

Mr. GOSSELIN: With respect to reasons for the United States to pursue an agreement, Canadian tariffs can be three times higher than U.S. tariffs. Also, the United States is interested in trade in services and intellectual property protection. An agreement with the largest trading partner of the United States would be beneficial in selling those concepts to other trading partners. In the telecommunications area, the United States opened up its market for its own reasons. That was not based on an agreement for reciprocal access to any other country. The Canadian telecommunication sector is open. A Canadian firm cannot own a telephone company in the United States, but a U.S. company can own one in Canada.

FRANK J SCHUCHAT*
Reporter

THE AUTHORITY OF THE UNITED STATES EXECUTIVE TO INTERPRET, ARTICULATE OR VIOLATE THE NORMS OF INTERNATIONAL LAW

The panel was convened at 11:00 a.m., April 11, 1986, by the Chairman, Anthony D'Amato.**

Professor D'AMATO: This is a panel discussion on the difficult question of whether the U.S. Executive has the authority to interpret, articulate, or violate norms of international law. These questions haven't been thought through in the literature, and thus we have an interesting opportunity to contribute at a very early stage to a debate that may become one of the major debates in American constitutional law. I want to proceed by asking questions of our distinguished panelists. They are hereby warned that their answers will be graded from A+ to D and entered on their official transcripts.

Starting with the government as a whole, and not dividing it into separate branches, does the U.S. Government have a right under the Constitution to violate international law?

MICHAEL GLENNON:*** I don't think there is a constitutional impediment to the two political branches of our government joining together to make a decision to place this nation in violation of international law. I want to emphasize that I refer to no constitutional impediment, because I think that when we get to federal common law the answer becomes somewhat different.

ABRAM CHAYES:† When I first heard about this panel on whether the U.S. Government can violate international law I was reminded of the story of a Georgia deacon who was asked if he believed in baptism by total immersion. He said: "Believe in it? Hell, I've seen it done!" At this level of abstraction, we sort of assume something is a violation and something else is international law, as though those were both very well-specified entities.

One of the problems we have to face most carefully is that the President never says he will violate international law. The Congress never explicitly authorizes the President to violate international law. Congress may authorize a specific action under a conclusive presumption that the action does not violate international law. Of course, there may be debate in the Senate or House as to whether there is a violation of

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international law, and Senators and Representatives may have one view, and we may have another. Then our question becomes whether we can tell if Congress is right or wrong in its judgment.

LOUIS HENKIN:* Are we predicting what a domestic court would decide as to the international legal question or what would be decided in an international forum? The answers can come out differently.

Professor D'AMATO: Can the Congress authorize an act that clearly violates international law?

Professor HENKIN: Yes. There is no doubt about that under our present interpretation of the Constitution.

Professor D'AMATO: How about the Executive?

Professor HENKIN: We have to look at specific cases. If Congress authorized the Executive's act, then it's unlikely that any court would find the act unconstitutional.

Professor D'AMATO: That raises the interesting question as to what happens if the Executive acts in violation of international law not pursuant to any congressional authorization. Maybe one way to start to chip away at this question would be to ask what deference, if any, a court should give to the Executive's determination that the action is, presumably, legal under international law.

HAROLD G. MAIER:** The "should" question is the one I think we should be talking about. I think Professor Henkin would say that it is perfectly constitutional for the Executive to say: Despite the fact that international law prohibits me from authorizing the Navy to carry out this specific military operation, I hereby authorize and command the Navy to do it anyway.

Professor HENKIN: The President can determine the U.S. position regarding a question of international law for international purposes. That doesn't mean that domestic courts will agree with him. The President does not decide what international law means for purposes of domestic law. Domestic courts may or may not give deference to the President; they may or may not defer to academic opinions.

The question that Professor D'Amato raised is more complicated, but I think that, if the President is acting within his constitutional authority, the fact that his act would be found to be in violation of international law does not mean that the courts will find that act to be in violation of the Constitution. The courts would not enjoin such an act.

Going back to the initial question, clearly the country as a whole can violate international law. Such an act might have international repercussions, but the violation would be legal for domestic purposes, under the Constitution.

Professor D'AMATO: In the absence of an act of Congress, what are the powers of the Executive to articulate, define, or violate a norm of international law?

Professor CHAYES: Professor Henkin did not quite answer your question. And I think the reason why he didn't illustrates the problem that we are wrestling with. Your question suggests a President getting on television and saying: "I am about to send the Navy into X in violation of international law—full speed ahead." But that's just never going to happen.

At the very least the President will get a thin memorandum of law, maybe very thin, advising him that his actions are in conformity with international law.

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I think that once you try to reduce this to a restatement you run into a lot of problems. That isn't the nature of the international legal system, or even the American constitutional system for that matter. If we ask whether Presidents from 1789 to 1986 have in any meaningful way asserted an authority to violate international law, the answer must be no.

Professor GLENNON: I'm not sure how much it really helps us to say that it is permissible for the President to disregard norms of customary international law when he is acting within his constitutional authority. It seems the question that we are asking concerns the scope of this constitutional authority. As to that question, I think it is reasonable to say that the President is constitutionally required to adhere to norms of customary international law that are part of federal common law and binding on everyone in this country including officials within the executive branch.

My analysis very briefly is this. There are certain norms of customary international law that are part of federal common law. Federal common law is binding on the President; it exists, however, only in the face of congressional silence. Congress always may occupy the field and displace court-made federal common law. Federal common law therefore exists only in the so-called zone of twilight. It does not exist where Congress either has acted affirmatively to approve the President's act or has disapproved the President's act explicitly or implicitly.

Professor D'AMATO: I want to try to sharpen one aspect of our discussion. Professor Chayes has talked about the "thin memorandum." I'm concerned that at some point the memorandum can be so thin that we're talking about a fig leaf. Suppose the United States wants to intervene militarily in Latin American country X, and a thin memorandum from the State Department says that this massive intervention is justified on the grounds of self-defense under the U.N. Charter. And suppose there has been absolutely no provocation from country X. But the President, in order to satisfy Professor Chayes' formula that Presidents never violate international law, says we'll just call this self-defense. Are you telling us that this is going to solve the problem?

Professor CHAYES: I didn't say that a thin memorandum would insulate the actions at hand. But I do want to take issue with your hypothetical. When you said there is absolutely no provocation, and the President is simply acting on a whimsical view that the people of country X are bad, and therefore we will send in the Marines, that is simply not a realistic situation that you posit. The President would be unable to mobilize the necessary domestic and congressional political support for action if literally nothing is happening to provoke us.

All I meant by the "thin memorandum" is that no President ever has claimed that he could act in direct defiance of international law. Now, I was in the State Department, and in my experience lawyers there always claim that the President can do anything he wants to do. But when the time comes to do it they back off. They analyze the situation.

I'm not saying that the President in fact has never acted in violation of international law. What I am saying is the fact that no President is ever willing to make the claim that he can act in direct defiance of international law tells us something about what the Constitution means.

Professor MAIER: I think what we are dealing with is something that Myres McDougal some years ago described as a situation in which the executive branch acts both as an advocate and a judge of the content of international legal norms. The executive branch acts as an advocate when it acts on the basis of a thin or thick memorandum. It decides whether a particular norm is the norm or ought to be the relevant norm of international law. But the problem is that the decision of what the

norm is will be arrived at only in the light of an advocate analysis, which may skew the resulting judgment.

Nevertheless, we are not talking about a group of lawyers in the government who are acting cynically as a means of merely setting up a verbal framework in order to fool the academic or any other community. That doesn't happen.

Professor HENKIN: I don't know whether Professor Maier is agreeing with Professor Chayes or not. Professor Chayes is right in saying that Presidents never say they are acting in violation of international law. It is not always true of Congress, because Congress has at times passed statutes inconsistent with treaties and asserted the right to pass such legislation. Professor Chayes is right in telling us that what Presidents have said and have not said tells us something about international law and constitutional law, but he does not reveal what it is that it tells us. It doesn't seem to tell me anything resembling what it tells him.

I don't believe that the executive branch has the constitutional right to violate international law in very many circumstances. But the question does not often come up in a domestic court.

Professor D'AMATO: I'd like to suggest that there are at least two variables at stake here. First is the degree to which Congress or federal common law has spoken in respect of a particular question. We've had discussion about that. But a second variable is the degree of the indeterminacy of the international norm itself. Perhaps Professor Henkin, who has illuminated so much of our understanding of the *Sabbatino* case, might indicate whether it is correct to say—given Justice Harlan's position in *Sabbatino* that a great deal depends on whether a given rule of international law has or has not crystallized—that the President has to be given a certain special leeway in articulating international law so as to allow him to be able to contribute to the formation of the norm. I don't know whether this is a fair statement of *Sabbatino* or a fair statement of Professor Henkin's position.

Professor MAIER: May I try to answer this? I think that what Professor D'Amato just said is a fair statement of the *Sabbatino* problem. As one writer said (I forgot who said it, but I loved the phrase), the Court in that case did not want to be put in the position of being either unpatriotic or disingenuous. It therefore stepped out of the case entirely. I think that should be taken together with the point Professor D'Amato just made about indeterminacy.

Professor D'AMATO: How do we match the content of international law with the content of federal common law? If I took Professor Glennon's position and pushed it to an extreme and contended that all international law is part of federal common law, and federal common law is binding on the President, wouldn't that have to be qualified somewhat to take account of indeterminate rules?

Professor GLENNON: My position is that widely accepted and clearly defined norms of customary international law are incorporated into federal common law and are binding on the President. But we first have to establish the predicate of that position, which is that norms of federal common law are binding on the President. The *Erie* case, correctly interpreted, does not do away with all federal common law. It simply says there is no general federal common law. But pockets of specific federal common law have survived *Erie*. One of those pockets consists of clearly defined norms of customary international law. If federal common law were not binding on the President, we would have an executive who was above the law. Courts have long rejected the notion that the king can do no wrong.

Professor MAIER: I'd like to ask Professor Glennon what he means by "federal common law." Does he have in mind a granite block of legal rules? Or is he thinking

of the process of deciding cases based on the application of general principles that might include international norms?

Professor GLENNON: I like Professor Henkin's suggestion that customary international law is a lot like federal common law. Tentative Draft Number 6 of the *Restatement of Foreign Relations Law* says that customary law is like federal common law but not exactly like it. I may be too much of a legal realist but it seems to me that the question is essentially this: Suppose I am a judge. There is no statute that tells me how to resolve the outcome of a particular case. I narrow down the list of sources that I am going to apply in resolving the dispute to these finalists: George Gallup's community consensus, Rawls' theory of justice, Richard Posner's economic analysis of law and Ian Brownlie's customary international law. Now I ruminate over this question, and I pick Brownlie. Does that mean that I'm finding law rather than making law? I don't think so. When a judge makes federal common law, he is engaging in legislating. He is creating public rights and obligations; he is engaged in a lawmaking function. And that is what we mean by federal common law.

Professor D'AMATO: I don't think that's a satisfactory jurisprudential position. If you are telling us anything at all, Professor Glennon, you should tell us what judges ought to be doing. To say simply: "This is what judges are doing, willy-nilly, arbitrarily or not, they're making law, they're choosing Brownlie against Rawls," is an unsatisfying theory; I don't really know that you believe it.

Professor GLENNON: I was asked what I mean by federal common law, not what should be federal common law. I wasn't asked what judges should do.

Professor D'AMATO: Is federal common law a black box into which you can put anything you like? Doesn't that put a hole in your own theory?

Professor GLENNON: Whether it does or doesn't isn't the question I was asked.

Professor HENKIN: I keep hearing my name. Also unfortunately I keep seeing it. A sentence I once wrote comes back to haunt me. Maybe I should admit my thinking has not changed but has evolved.

Professor D'AMATO: That's the federal common law approach.

Professor HENKIN: We're talking here about propositions as to which there is no authority, no judicial authority. Professor D'Amato was entirely right when we began this session: we are really addressing questions that have not been thoroughly thought through. When I made the statement that I did in my book, or in the *Restatement* for that matter, I was relying on that fact that we had one or two cases that have said so, and they didn't say it very clearly. I suggest we go back to basics.

International law is part of the law of the United States. That's *The Paquete Habana*. We ought to ask ourselves two questions: How did it get there? And what does that proposition mean?

Now how it gets there is quite interesting because we have to talk about customary law and treaty separately. We think we know how a treaty gets into U.S. law, because there happens to be a clause in the Constitution that specifically provides for it, though the purpose of the supremacy clause was not to put treaties into our law but to make sure the states could not act contrary to our treaty with Great Britain. Nevertheless, given the way the supremacy clause was drafted, we find a specific constitutional basis for saying that treaties are part of our law. And we, therefore, treat treaties as part of our law exactly like statutes.

On customary international law we have a different history. On the one hand, we received part of our common law from Great Britain, and since international law was part of the common law of Great Britain, it became part of our common law also. We never asked whether it was state or federal law. On the other hand, when the Colonies

became united as a nation, the United States as a whole became subject to international law like any other nation. The courts picked up this aspect of our history and held that international law is incorporated as part of our law, just as if it were common law. Now I'm not interested in debating, and I am not sure I disagree with Professor Glennon, but whether or not this is the common law, part of the common law or like common law does not seem to me to be a fruitful inquiry. I have stopped calling it federal common law; I just call it federal law. It's federal unwritten law, and it has two consequences.

One consequence is that the courts will apply customary law as U.S. law wherever relevant. And "relevant" usually means against the United States, as in *The Paquete Habana*. The other consequence, in which I agree with Professor Glennon, is that it is the President's duty to take care that the law be faithfully executed. That law includes customary international law, treaties, statutes, and anything else that comprises federal law.

Professor MAIER: Do I misread you if I conclude that you would carve out a whole area called "foreign affairs powers" that would not be subject to all of the checks that Professor Glennon talked about?

Professor HENKIN: I don't carve out any foreign affairs powers. If Professor Glennon and I part company, it may have to do with the fact that he is an alumnus of the Senate, whereas Professor Chayes and I are alumni of the executive branch. You have to discount our various prejudices. I've moved quite far away from the executive branch especially in recent years. I'm prepared to state my views as follows. The President and the executive branch have the duty to take care that the laws are faithfully executed—including international law. That comprises 99 percent of the cases that interest you.

But the President wears two hats. In addition to seeing that the law is faithfully executed, he acts for the United States in the international domain. Consider a treaty. I don't recognize the power of the President to disregard or fail to enforce a treaty. But suppose a President does these things. Suppose a President even denounces the treaty in violation of international law—that is, in a situation in which the United States would be internationally liable for the violation. Nevertheless, that treaty is dead as far as the United States is concerned. We may be obligated—and that goes back to a point Professor D'Amato has raised about what we mean when we say there is a right to violate a treaty. But if the President has terminated or breached a treaty, the treaty has lost its place in the domestic law of the United States.

But then, what about customary international law? Can the United States destroy for its own domestic purposes the applicability of a principle of international law by the President's denouncing it? My position is that the President has an obligation to enforce international law as long as it is international law for the United States.

Professor D'AMATO: Are you saying that there is a scintilla juris between the moment in which the President has to comply with international law and the next moment in which he denounces the law thus making it unnecessary for him to comply with it?

Professor HENKIN: If the President acts to "liberate" the country from an obligation, the way someone would breach a contract, then the United States has to pay the consequences internationally. But only the President is capable of acting internationally on behalf of the United States. If he acts that way in the international arena, it's the equivalent of a denunciation of a treaty.

Professor CHAYES: As you all know there has been a lot of discussion about whether the President may terminate a treaty unilaterally, including a case in the

Supreme Court in which the Court could not make up its mind why it would not decide the case. So I don't think one can say, as categorically as Professor Henkin just did, that the President has absolute power to terminate a treaty on behalf of the United States. Certainly whenever the power was asserted, the issue that was debated was whether it could be terminated in accordance with the terms of the treaty or in accordance with what were arguably general principles of the law of treaties.

I think it's pretty hard to find a case where either the President or the Congress or both have acted deliberately to breach or terminate a treaty when there was no occasion for its termination or no process for its termination. And that leads me to another comment. Professor Henkin's proposition, which is one that I too have clung to for most of my life and am now willing to think about a little bit, is that the President speaks for the United States in the international sphere on matters of international law. The President is the United States in the international sphere. I think the time has come to reexamine that proposition. We don't really believe it. Lots of people speak for the United States in the international sphere. Tip O'Neill goes down and talks to the Argentine Government. Now what is he saying? Does he say he is not speaking for anybody except Tip O'Neill? I don't believe that, I don't think the Argentine Government believes it. We have Congressmen junketing all over the world, talking about things for the United States, and you better believe that the people listening to those Congressmen think they are listening to part of the United States. And they listen to a lot of other people who go over and talk for the United States. That is not very satisfactory for us. Professor Henkin properly asks me, when I get off into these sort of misty realms, well what, who, what are they saying, how binding, how effective is all of that sort of stuff. I think as a jurisprudential matter, our sense of the nature and sources of law is in a very agitated state of change. It affects our sense of what international law is, how it develops and how it affects our own interests. It is not by any means accidental that at this stage of the world we have all of a sudden a whole set of scholarly articles and discussions at the American Society of International Law that challenge the premises that Professor Henkin and I imbibed with our mothers' milk in the Legal Adviser's Office. Those premises are under attack, and I think it's going to take more than just reiterating the opinions of the Legal Adviser to defend them.

Professor MAIER: I would like to avoid the misty realm of jurisprudence even though I do agree with Professor Chayes that jurisprudence is what this is all about. I want to ask a very practical question. How does a Legal Adviser to the State Department decide what international law is?

Professor CHAYES: Of course a lawyer looks up the answer to that question in the usual way, which is that you'd look at all the relevant materials. The problem for the Legal Adviser, which may be what you're getting at, is what you said earlier: the advocate-judge problem. We in the United States in particular come from a highly adversarial legal culture in which whatever can be said on behalf of our client in zealous representation, as long as it is not criminal, is what in fact is said. We can advocate on behalf of our client just about anything at all. That is our adversary tradition, and it is in the canons of ethics.

But the international legal system won't work with an adversary tradition of that kind. We can't read international law propositions on the assumption that out there is some neutral judge who is going to find out the truth no matter what we argue on behalf of our client. And that is the difficult problem for the Legal Adviser's Office, because the Legal Adviser has a very important client, and it is often very difficult to tell that client that he cannot or ought not do what he would like to do. It is especially

difficult to tell him not to do something if he knows that he will not be hauled into jail if he disregards your advice.

Professor MAIER: The practical problem is that the President wants a “yes or no” answer. Of course an argument can be made for either side. But if you adopt that position, then there are no constraints on the President at all. So what do you do if the President asks his Legal Adviser, “Is it legal under international law for me to do X?”

Professor CHAYES: What I’m saying is that advising the President cannot take place under the rubric of “whatever my client wants, I can make an argument why what he wants is legal.” That would be pernicious, because it means that there are no constraints on the President as a practical matter.

Professor HENKIN: I’m interested in Professor Chayes as The Legal Adviser, Professor Chayes as an ex-Legal Adviser, Professor Chayes as an advocate. He would not for a minute present a case in the International Court of Justice the way he has been talking today. That misty stuff wouldn’t get him anywhere.

The point is that it does no favor to international law to tell us how misty it is. I think we would do better to find some bonds in it.

We must recognize that Professor Chayes is not saying that you can say anything at all about the content of the international norm. And that is right and very important. But it is not enough. There are some black-letter rules in international law; article 2(4) of the Charter, for example.

Professor D’AMATO: Would you allow the President to depart from a black-letter rule?

Professor HENKIN: No, I would take the same position on the President’s power. You did not ask me the hard question, which is, what is the President’s power? And I want you to understand that when you get down to it the difference between Professors Chayes and Glennon on the one hand and me on the other is not as to the basic proposition about international law—because they would be the first to admit that if Congress and the President act together they can do all kinds of things—the difference is in our estimation of what the President acting alone can do. And that is a constitutional question on which I have some views, but it would take a book to tell you.

PROFESSOR GLENNON: Professors Henkin and Chayes were talking about the problem of unilateral executive termination of treaties. I think that Professor Henkin used “termination” as a term of art, that is, the termination of a treaty in accordance with its terms. On the other hand, I think Professor Chayes was talking about treaty abrogation, which is the termination of a treaty not in accordance with its terms. Now, I don’t think I’ve ever heard Professor Henkin say that treaty abrogation is within the President’s constitutional power, and I guess the question is, why? Now, I think the answer is that it is not within his power, and the reason is that the norm of *pacta sunt servanda* is a clearly defined and widely accepted norm of customary international law that is part of our domestic legal system—call it federal common law or anything you want. It is binding on the President unless he gets congressional consent to abrogate the treaty.

Professor HENKIN: Well, I want to be sure that we understand the issue. The first question Professor D’Amato asked today was whether the United States as a whole has a given power. If we ask here whether the United States as a whole can abrogate a treaty, the answer, I’m afraid, is clearly yes. The only question is, who in the United States can do it? And that question gets us into the constitutional distribution of powers. Congress has not tried to abrogate a treaty all by itself since 1800. And we have been spending 200 years trying to find a source in congressional authority for

doing that. Mr. Goldwater came up with a theory that it takes either the Senate or Congress as a whole, but I don't know any basis in the Constitution for that view.

I'm afraid that I'm committed to the proposition that a President should not have, but in fact has, constitutional authority to abrogate a treaty on behalf of the United States. I can't cite very much authority for that other than practice and the conception of the Presidential office.

Professor CHAYES: What practice? When has the President abrogated a treaty in a sense that we are talking about here? That is, when has a President declared a treaty to be at an end in a manner that is not in accordance with terms of the treaty or not purportedly in accordance with some general principles of the international law of treaties?

Professor HENKIN: There are such cases. Roosevelt denounced treaties. Other Presidents have denounced treaties. They may always try and come up with an excuse such as a change of circumstances. Abe, with all respect, that's beside the point. In international parlance we have abrogated the treaty, and the President did it. The Congress and the Senate often did not fuss about Presidential abrogation—until they got all excited about Taiwan, and suddenly all sorts of things began to happen.

Professor D'AMATO: If the President's authority extends to treaty abrogation, why does it not extend to violation of a customary norm such as the norm precluding prolonged arbitrary detention?

Professor HENKIN: Conceptually and constitutionally there is a difference between the President acting internationally to effect international obligations and the President failing in his duty to see that the law is faithfully executed. As long as that norm is part of our law, he has got to execute it. If he has authority to take an international act to abrogate the treaty then he can do it. Then the treaty dies, and he no longer has any duties in connection with it. And it's a fact that he has these two very different strange hats. And, notice, in my view I think it has to be an international act by the President.

Professor D'AMATO: Are you saying that if the President first were to say: "I hereby declare that the United States is no longer going to be bound by any international norm having to do with indefinite detention," then he can proceed to violate that norm and indefinitely detain a political prisoner?

Professor HENKIN: If he does that through a treaty I have no doubt about its legality. I have some difficulty as to how one abrogates principles of customary law. But suppose we decide for example that although at one time it was accepted that certain things were a violation of customary law, the United States no longer thinks they are and therefore acts in such-and-such a manner, I think that that is an international act which the President can take. The domestic consequences are severable and separate.

Professor D'AMATO: Professor Chayes, I know you're going to say the President would never do such a thing. Suppose the President were to say: "The United States is hereby no longer bound by the norms against the indefinite detention of aliens, and therefore we are going to do this or that." Is that all right?

Professor CHAYES: Well, you're right about what I was going to say.

I keep saying that it illustrates a great deal about the subject we are talking about. That is, Professor Henkin has now made the conditions for abrogation or denunciation of a conventional norm so onerous and so formal in character that it is simply inconceivable that a President would do that, because to do it that way means it would be "irrational." But what we're talking about here is an action of the President on the treaty side, that purports to be taken in defiance of the law of treaties and the termination clause or the absence thereof in the treaty. As for customary norms, just think of

the President's press release—Wow! “I hereby declare that the norm against torture no longer applies in the United States.” I mean, Larry Speakes can do a lot of things, but I don't think he is going to read that one from the White House podium.

Professor D'AMATO: What if 10 years from now the President is doing it all the time? What if it has become routine for him to say: “We are not bound by this, we are not bound by that, we are not bound by the norm against capital punishment, the norm that we can't execute juveniles.” All he has to do is make it more explicit. I don't see why you think that a future world like that is inconceivable.

Professor CHAYES: So much else would have had to happen in this society that there might really be dissidence by that time.

Professor HENKIN: I wish I were as confident as Professor Chayes. I'm not even sure about what Larry Speakes could do, or what the United States could do. We don't have to say explicitly that we're in favor of torture. It would not surprise me very much if some administration said: “We do not accept the notion that there are any human rights unless we have agreed to them by covenant.” The Senate will be the first to cheer it on, and Professor Glennon will be behind them leading the cheers. So I think we ought to be careful as to what we are talking about. It would not surprise me at all if the President said: “Article 2(4),” (which is the most important of all norms in international law in my view) “is outdated, is dead, and we are not going to pay any attention to it.” There are professors who say that. I want to know why you think this is out of the question. I suggest, as strongly as I know how, that we'd better stick to the rules we have and try to get people to live up to them.

DISCUSSION

JORDAN J. PAUST:* In *United States v. Nixon* it was recognized that the President might have the power to change regulations that the President indeed created, but during the time the regulations were extant as law, the President was bound by them. I would agree with Professor Henkin that the President be involved in the termination of international law, but he cannot lawfully violate such law.

JULES L. LOBEL:** I disagree with Professor Henkin's basic rule that the President and Congress acting together can always violate international law. True, the Supreme Court has said it a few times. Nevertheless, it seems to me that we have a fundamental principle in constitutional law that there are certain kinds of activities which are so outrageous that even if there are no explicit constitutional provisions on them they would be held to violate the Constitution despite ratification by Congress and the President. It seems to me that in the international world we have norms such as peremptory norms; I don't think anybody including the President or Congress would say that Congress has the right to authorize torture of civilians abroad. Or that Congress and the President acting jointly under our Constitution legally can authorize genocide.

Professor HENKIN: Well, my answer to a lot of those questions is that the Constitution applies abroad, and therefore Congress and the President are not authorized by the Constitution to authorize genocide or torture.

But we live in a dualist system, and I don't think any court in my lifetime or in yours would hold that Congress cannot supersede an international norm as far as internal U.S. law is concerned.

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Professor LOBEL: It's interesting, however, that the norm Professor Henkin likes the most—article 2(4)—can be superseded by Congress and the President under his analysis.

JOHN T. DALE:* Are the conclusions reached today applicable to all heads of state or only to U.S. Presidents?

Professor D'AMATO: There are certain questions of international law, as Professor Henkin pointed out, that are applicable to all heads of state. But today we are mainly talking about constitutional law. But we're talking about constitutional law in Professor Henkin's wonderfully fertile sense that it is so inextricably intertwined with foreign affairs and international law that we are trying to figure out where we stand in all of that.

Mr. DALE: But some nations like France and Germany specifically incorporate international law in their constitutions, giving that law a particular place in the hierarchy of law within those states. The United States doesn't do that specifically. That's what in fact we're debating here: what the place of international law is in our domestic law hierarchy.

Professor D'AMATO: I wonder if our next questioner will rise to the bait of the article 2(4) issue.

THOMAS M. FRANCK:** No, that trail has gone cold. It is not applicable to this meeting. But it was a splendid session, and I want to congratulate the Chairman and the panel members this morning for a really scintillating discussion. To some extent I think the conversation has gotten a little muddled because of the treaty issue, the question of abrogation having been somehow attached to the *Goldwater* case where it does not belong since that was a case of termination. We haven't really begun to think about how we distribute, within our system, the power to abrogate a treaty.

Let's forget about treaties for a moment, and let me ask Professor Henkin and perhaps Professor Glennon to comment on this: if one party violates a treaty the other party usually has the option to consider the treaty terminated and usually does, because otherwise you'd have a unilateral obligation. But that is not true of customary law, and thereby hangs a difference in how you get out of customary law. It is not to be assumed that the United States by unilateral action—by any combination of forces or by the President—can cease to be obliged under a customary law or norm.

Professor D'AMATO: Except for indeterminate norms?

Professor FRANCK: Yes, I'm just talking here about determinate norms that come under the heading of custom. Is there in fact any way in which the United States can escape the application of such norms? If you can't, then we're stuck with a lot of international law, at least under the kind of extended *Paquete Habana* doctrine that Professor Glennon was posing.

Professor HENKIN: I agree it's a difficult question, and there has been very little discussion in the literature so far about it. Maybe all we can say is that if any country can escape custom, the United States can as well.

We know there is a way of abrogating treaties. It has been done—as Professor Chayes indicated about the Baptist minister. But we don't know as well about terminating a principle of customary law. There must be some way to resolve Professor Franck's question, but I don't know how.

*Independent Commission on Respect for International Law.

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JONATHAN I. CHARNEY:* Was President Truman's proclamation in 1945 establishing sovereign rights over the continental shelf resources a violation of existing international law the sort of action that we want a President to be able to take?

Professor GLENNON: Wasn't it true that in 1945 a norm regarding the continental shelf hadn't yet developed?

Professor CHARNEY: I think the view was that there was a three-mile limit to jurisdiction offshore, and the U.S. proclamation on the continental shelf violated that rule at that time.

Professor D'AMATO: I think the question helps us focus the issue, but as far as history is concerned, state papers have revealed that the executive branch first asked many countries whether they would go along with such a proclamation and obtained a considerable number of affirmative responses.

Professor MAIER: I think clearly the President had to have the power to do what he did because the question of exploitation of the shelf had become technologically possible only at that point, and therefore what we really had was an existing international legal rule based on nonexistent premises.

Professor CHAYES: Some people have a notion of the discontinuous character of development of international norms or any legal norms. But that does not reflect our experience; we don't have a rule at one moment and a different rule at the next moment. Even the continental shelf example shows that norms are not discontinuous. So I think it's not fair to say that when President Truman made the proclamation, he was at that moment violating the existing rule, and then some moments later when everybody said: "Great. Let's extend our continental shelves equally," everything suddenly became O.K.

Let me say one more thing about continuous processes. While I was a member of the executive branch, I continuously gave advice and continuously taught that the President was immune—absolutely immune—from service of process in the U.S. courts. And *United States v. Nixon* showed that we were all wrong. So we should always be worried about how categorical we are.

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The time allotted for the panel having expired, Professor D'AMATO thanked the panelists and the audience and adjourned the session.

PERMISSIBLE MEASURES AND OBLIGATIONS FOR OUTSIDE STATES AND INTERNAL PEOPLES TOWARD MINORITY RULE IN SOUTH AFRICA

The panel was convened at 3:00 p.m., April 11, 1986, Henry J. Richardson III,** presiding.

REMARKS BY HENRY J. RICHARDSON III

The scope of the panel is the bounds of its title: what actions are outside states and the South African people permitted to take in response to past and present minority rule in South Africa? What obligations are imposed upon outside states under international law in response to minority rule in South Africa? The panelists will explore

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