

the Attorney General's authority to deal with refugees stems from a foreign relations statute, the Immigration and Nationality Act.¹⁸ There is no indication of congressional intent in that Act to authorize a step that would violate international law.

If a decision of the executive branch is not made by the President himself, or by authority the President has clearly delegated to a high-ranking civilian Defense Department official (in the case of the commander-in-chief power) or to a high-ranking State Department official (in the case of diplomacy), the presumption should be that it is not within the powers of the commander-in-chief or of the chief diplomat. If the presumption is not convincingly rebutted, "self-executing custom" should prevail as a matter of federal common law. Even if the executive branch's act is by the President or his high-ranking civilian delegate, "self-executing custom" should prevail unless the act squarely comes within one of the two relevant Article II powers.¹⁹

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THE PRESIDENT AND INTERNATIONAL LAW: A MISSING DIMENSION

As the chairman of the panel at the 1985 ASIL Annual Meeting on the question "May the President Violate Customary International Law?" I must confess that the issue that originally troubled me when I suggested this topic for discussion remains securely hidden in the shadows of the debate. Yet I think it is of central importance. The reason it has remained obscure, despite its significance, is that it is an extraordinarily difficult intellectual puzzle. My brief purpose here is to bring it into the light, not to try to solve it.

We can begin by noting an organizing principle that appears to have been accepted either explicitly or implicitly by all of the persons who have contributed so far to the debate. The organizing principle is that there are two distinct questions involved here: (1) May the President, under the law of the United States, violate international law? and (2) May the United States, under international law, violate international law? The second question has been posed somewhat differently in the debate, such as: May Congress violate international law? or May the President, with explicit congressional approval, violate international law? But these are just variants on the question.

As I have put the second question, the answer would seem to be logically compelled. How could international law be legally violated by any country?

¹⁸ 8 U.S.C. §§1101 *et seq.* (1982).

¹⁹ This is a narrower point than some commentators have made. In an interesting article containing much historical analysis, Professor Lobel argues that explicit congressional approval is necessary for the President to override customary international law. See Lobel, *The Limits of Constitutional Power: Conflicts between Foreign Policy and International Law*, 71 VA. L. REV. 1071, 1120 (1985). See also Glennon, in *Agora*, *supra* note 1, at 924, 930; Glennon, *Raising The Paquete Habana*, *supra* note 1, at 331-39, 363.

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Surely, with reference to the international legal system, the United States may not violate international law.

But now the second question, as it has apparently been answered, seems to dictate the result of the first question—at least, if one takes literally the *Paquete Habana*¹ formulation that “[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination.”² For the same international law that on the international level forbids the United States (or any country) from violating it would, when translated into U.S. law, likewise forbid the Government of the United States from violating it. Or, if that position seems too strong, one might argue more modestly that international law, when it becomes part of U.S. law, at least forbids the Executive, acting alone, from violating it. Whether one takes the stronger or weaker position, one is simply involved in U.S. constitutional law. The international question has melted away.

But let us go back to the dark shadows. Is it really true that international law forbids nations from violating it? This question, which seems on its face to compel its own answer, in fact is not as clear as it appears. To be sure, it is perfectly clear with respect to *treaties*, and maybe a word about that would help set the stage. A treaty is a legal obligation that, under international law, simply cannot legally be violated. There are apparent exceptions to this rule, but they are only apparent. For example, if state *A* violates the treaty, then state *B* may act contrary to the terms of the treaty. Yet, importantly, we do not say that *B* has acted illegally; *B*'s actions do not violate the treaty because the treaty has already lost its legal bindingness on *B* because of the illegal act of *A*. Or take the example of a change of circumstances. In such a case, a party to a treaty may legally act contrary to the treaty. Again, it has not violated the treaty (although it has acted contrary to the treaty provisions) because we say that the treaty itself has changed in content as a result of the changed circumstances.

Where the answer is not clear is in the realm of *customary* international law. I invented the question that started off this debate by explicitly referring to custom; yet the debaters so far have made little use of the distinction between treaties and custom with respect to their positions regarding presidential power. It comes to this: Can customary law be said to tolerate a state's disobeying customary law, and if so, in what circumstances?

Consider how customary international law has evolved and changed through the centuries. Lacking a real legislature, the system appears to have tolerated changes in customary law as the result of *departures* from preexisting norms. Are these departures not also “violations”?

The process is a lot closer to Hegelian dialectic than to Aristotelian logic. Existing common law sets up a thesis; a state, acting in violation of it, manifests an antithesis. A new synthesis occurs; it can range from near congruity to the original thesis or to the antithesis or to a position at any point in between.

¹ 175 U.S. 677 (1900).

² *Id.* at 700.

The synthesis then becomes a new thesis, awaiting contradiction by a state acting antithetically to it.

Existing customary law, then, contains the seeds of its own violation; otherwise it could never change itself. Since it has changed over time, we know that a systemic dialectic process of change must be part of what we mean by the term "customary international law."

Now, if we ship that concept of customary international law aboard the *Paquete Habana*, we find that what disembarks in the United States is not the monolithic, unchanging norm that the participants in the present debate seem to have in mind, but rather a somewhat more fluid kind of law, one that tolerates, even if it does not technically permit, violations of itself, because it must. The possibility opens up, at least logically, that the United States could "disobey" this law, but that its doing so would not necessarily be a violation of the Executive's constitutional obligation to execute the law.

I have tried to couch these conclusions in terms such as "logically" and "necessarily," because there is a great danger here of being misunderstood. Hegelian logic is only a schematic diagram of a mental possibility; it contains no details. To apply it to customary international law tells us nothing about the content of the law itself; yet, in law, content is everything. Different rules of customary law, accordingly, differ according to their Hegelian force. Some may easily be overcome by antitheses; others may be more resilient. A newly emerging customary rule, such as the exact distance in nautical miles allowable for the proclamation of an exclusive economic zone, may be quite a weak thesis awaiting forceful distortion by maritime powers exercising their own normative antitheses. On the other hand, a thesis that a nation is entitled to a territorial sea of at least 3 nautical miles seems enormously powerful, having survived any threats of contradiction for centuries and currently enjoying a large margin of safety in the general acceptance of a customary rule allocating at least 12 miles for the territorial sea.

Depending on these different degrees of force, presidential "contradictions" may have different degrees of legality. In brief, we might not be able to answer the question whether the President may violate customary law in general. That may turn out to be a metaphysical question. The only questions we might be able to address are whether the President may violate this or that particular rule of customary law. And those questions, in turn, merge the jurisprudential character of the present debate with the expertise in ascertaining rules of customary law that only comes from extensive study of international law.

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THE PRESIDENT *IS* BOUND BY INTERNATIONAL LAW

In a recent issue of the *Journal*, one finds a largely theoretical discussion of a question that potentially implicates quite serious legal policies and con-

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