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Presidential Pronouncements of Customary International Law as an Alternative to the Senate's Advice and Consent

*Eric Talbot Jensen**

Abstract: The Restatement (Fourth) of Foreign Relations Law of the United States has thus far focused on the status of treaties in United States law, and has not specifically considered the topic of customary international law. While the American Law Institute undoubtedly has good reasons for its approach, there is an emerging presidential practice that should catch the attention of the drafters and encourage them to make at least a small foray into customary international law's impact on the domestic law of the United States. This practice consists of presidents proclaiming to the international community that certain provisions of treaties that are currently before the Senate for its advice and consent have already achieved the status of customary international law and, therefore, are binding on the United States, regardless of Senate action. While it appears that the president has the constitutional authority to determine what is customary international law as part of his foreign relations power, it is less clear that he determines the domestic effect of customary international law, particularly in instances where Congress has intentionally not taken action on a specific treaty. The Restatement (Fourth) has the opportunity to clarify the domestic effect of such presidential actions.

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INTRODUCTION

Article II, Section 2 of the United States Constitution tells the president that “He shall have power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur.”¹ Article VI then states that “all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land.”² These two constitutional provisions establish the recognized and authoritative method for the federal government to incorporate the content of international agreements to which the United States is a signatory into domestic law. As constitutional practice has evolved, the originally strict understanding of these provisions has grown to include some controversy on the self-execution or non-self-execution of treaties,³ and to allow for the use of executive agreements,⁴ congressional-executive agreements,⁵ and even sole executive agreements.⁶

In addition to these well-documented and thoroughly discussed evolutions in constitutional practice, there is a recent development in U.S. practice that has not previously been analyzed but that

1. U.S. CONST. art. II, § 2, cl. 2.

2. *Id.* art. VI, cl. 2.

3. MICHAEL JOHN GARCIA, CONG. RESEARCH SERV., RL32528, INTERNATIONAL LAW AND AGREEMENTS: THEIR EFFECT UPON U.S. LAW 7–9 (2014) [hereinafter CONG. RESEARCH SERV., RL32528]; *see generally* David Sloss, *Taming Madison’s Monster: How to Fix Self-Execution Doctrine*, 2015 BYU L. REV. 1691 (2016).

4. CONG. RESEARCH SERV., RL32528, *supra* note 3, at 4–7. It would appear that over 18,500 executive agreements have been concluded by the United States since 1789 (more than 17,300 of which were concluded since 1939), compared to roughly 1100 treaties that have been ratified by the United States. However, this estimate seems likely to undercount the number of executive agreements entered by the United States. As Garcia states, “While the precise number of unreported executive agreements is unknown, there are likely many thousands of agreements (mainly dealing with ‘minor or trivial undertakings’) that are not included in these figures.” *Id.* at 5.

5. *Id.* at 5; Oona A. Hathaway, *Treaties’ End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE L.J. 1236 (2008) (discussing the constitutional and legislative significance of both treaties and congressional-executive agreements and arguing for greater use of congressional-executive agreements).

6. CONG. RESEARCH SERV., RL32528, *supra* note 3, at 6. Though there are fewer of these in quantity, they often cause quite a bit of concern when they are made. However, the United States Supreme Court has upheld such agreements on several occasions. *See, e.g.*, *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396 (2003); *Dames & Moore v. Regan*, 453 U.S. 654 (1981); *United States v. Belmont*, 301 U.S. 324 (1937).

potentially has a significant impact on the larger question of the treaty process under the Constitution and the concurrent application of customary international law (CIL) as part of the “supreme Law of the Land.”⁷ This emerging practice is a declaration by the president that portions of a treaty are CIL and binding on the United States, even while that treaty is at the Senate for its advice and consent.

Three primary examples are sufficient to demonstrate this emerging trend in congressional-executive branch interaction: The 1982 United Nations Convention on the Law of the Sea (UNCLOS III),⁸ the Additional Protocol II to the Geneva Conventions of 1949 (APII),⁹ and Article 75 of the Additional Protocol I to the Geneva Conventions of 1949 (API).¹⁰ In all three cases, the president sent the treaty for advice and consent to the Senate, which took no action. Despite this congressional inaction, or perhaps in response to it, subsequent presidents have made statements or taken actions that, to greater or lesser degrees, proclaim that certain provisions or all of the presented treaties have become part of CIL and are binding on the United States and its agencies. The effect of such presidential action is to bind the United States, as a matter of international law, to apply those treaty provisions. Presidents have then further directed various executive agencies to follow these provisions of newly minted CIL and provided domestic legal ramifications for failure to do so.

This particular “lawmaking” exercise by the president is unique and has not garnered much attention from either Congress or academics. Despite recent claims about presidential authority with respect to the foreign affairs power,¹¹ no one has claimed for the president this application of authority under the Constitution.

7. U.S. CONST. art. VI, cl. 2.

8. United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397 (entered into force Nov. 16, 1994).

9. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), *opened for signature* Dec. 12, 1977, 1125 U.N.T.S. 609 [hereinafter Additional Protocol II].

10. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 75, *opened for signature* Dec. 12, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I].

11. See Michael D. Ramsey, *The Textual Basis of the President's Foreign Affairs Power*, 30 HARV. J.L. & PUB. POL'Y 141 (2006) (arguing that the foreign affairs power was understood to be part of the executive power at the time the Constitution was ratified); David Gartner,

The *Restatement (Fourth)* has the opportunity to clarify the domestic effect of such a presidential statement. This clarification is especially significant with respect to presidential statements that subsequently become binding on the actions of executive agencies and carry legal repercussions for non-compliance.

Part I of this Article will provide a very basic overview of the formation of CIL and its application in U.S. domestic law as the “supreme Law of the Land.”¹² Though this is a contested area of foreign relations law, Part I will make some assumptions in order to avoid reengaging in this debate and instead try to distill principles that are important to the specific question presented in this Article. With Part I as background, Part II will then analyze the three previously referenced examples where the president has submitted a treaty to the Senate for its advice and consent and subsequently, in the face of Senate inaction, proclaimed provisions of those treaties or those treaties as a whole to be accepted CIL and binding on the United States. Part III will further illustrate how subsequent presidential actions have had the effect of making those provisions binding on executive agencies as a matter of domestic law. Part IV will then discuss the relevance of this phenomenon to the *Restatement (Fourth)* and argue that the Restatement has the opportunity to address this issue and clarify the domestic effect of such presidential actions. The Article will conclude in Part V.

I. INTERNATIONAL LAW

International law, at its most basic level, is the law that governs the interaction of nations,¹³ though its competence is gradually growing to include many non-state entities, including individuals.¹⁴

Foreign Relations, Strategic Doctrine, and Presidential Power, 63 ALA. L. REV. 499 (2012) (examining the rise of the president’s foreign affairs power).

12. U.S. CONST. art. VI, cl. 2.

13. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 101 (AM. LAW INST. 1987) (describing international law as the “rules and principles of general application dealing with the conduct of states and of international organizations and with their relations *inter se*, as well as with some of their relations with persons, whether natural or juridical”); CONG. RESEARCH SERV., RL32528, *supra* note 3, at 1.

14. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 1 cmt. a (AM. LAW INST. 1987).

Modern international law can generally be divided into two broad categories: treaty law and custom (or CIL).¹⁵

The next section will focus on CIL. It will be followed by a section that discusses the role of CIL in U.S. domestic law.

A. Customary International Law

As opposed to treaties which are “international agreement[s] concluded between States [meaning nations] in written form and governed by international law,”¹⁶ CIL is often unwritten law governing the actions of nations.¹⁷ It comes from the experience of history and has often grown and developed over extensive periods of time.¹⁸ For example, many concepts of modern CIL were first espoused by Grotius,¹⁹ Gentili,²⁰ Vattel,²¹ and Pufendorf.²² As these

15. Statute of the International Court of Justice art. 38(1), June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 933 [hereinafter I.C.J. Statute]; RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (AM. LAW INST. 1987); *see also id.* ch. 1, intro. note (“International law is made in two principal ways—by the practice of states (“customary law”) and by purposeful agreement among states (sometimes called “conventional law,” *i.e.*, law by convention, by agreement). Until recently, international law was essentially customary law: agreements made particular arrangements between particular parties, but were not ordinarily used for general law-making for states. In our day, treaties have become the principal vehicle for making law for the international system; more and more established customary law is being codified by general agreements. To this day, however, many rules about status, property, and international delicts are still customary law, not yet codified.”). Customary international law can also be ascertained by an appeal to “the general principles of law recognized by civilized nations; . . . [and] judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.” I.C.J. Statute, *supra* note 15, art. 38(1); *see also* CONG. RESEARCH SERV., RL32528, *supra* note 3, at 1; RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (AM. LAW INST. 1987) (stating that in addition to treaties and custom, international law may also be derived from “[g]eneral principles common to the major legal systems” of the world).

16. Vienna Convention on the Law of Treaties art. 2, ¶ 1(a), May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980).

17. *See generally* Joel P. Trachtman, The Obsolescence of Customary International Law (Oct. 21, 2014) (unpublished manuscript), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2512757 (arguing that CIL is obsolete and should be replaced with international agreements and soft law).

18. John W. Foster, *The Evolution of International Law*, 18 YALE L.J. 149 (1909).

19. HUGO GROTIUS, *THE LAW OF WAR AND PEACE* (1625).

20. ALBERICO GENTILI, *DE JURE IURE BELLI LIBRI TRES* (John C. Rolfe tran., Clarendon Press 1933) (1589).

21. EMER DE VATTEL, *THE LAW OF NATIONS* (Béla Kapossy & Richard Whatmore eds., Liberty Fund, Inc. 2008).

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historical norms are accepted as governing principles in the interaction of nations, they enter the realm of CIL. The *Restatement (Third)* acknowledges this reliance on the historical actions of nations and proclaims that CIL “results from a general and consistent practice of states [known as ‘state practice’] followed by them from a sense of legal obligation.”²³

Establishing this state practice does not require universal compliance,²⁴ but does involve widespread and representative adherence, particularly among those nations that are specially affected by the norm.²⁵ Practice may be demonstrated in many different ways, including “diplomatic acts and instructions as well as public measures and other governmental acts and official statements of policy, whether they are unilateral or undertaken in cooperation with other states”²⁶ This practice must also be accompanied by a sense of legal obligation, otherwise known as *opinio juris*.²⁷ In other words, the fact that nations consistently take some specific action is insufficient to create a principle of CIL. Those actions also have to be acknowledged by those nations as being legally required.

The importance of establishing what is and what is not CIL is highlighted by the fact that once a norm is accepted as CIL, it is binding on all nations who do not persistently object to it.²⁸ This means that a nation may become bound by a practice that it does not accept as legally required and that it specifically does not adhere to,

22. SAMUEL PUFENDORF, DE JURE NATURAE ET GENTIUM LIBRI OCTO (1672).

23. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (AM. LAW INST. 1987).

24. *Id.* § 102 cmt. b.

25. *Id.*; *see also* North Sea Continental Shelf (Ger. v. Den./Ger. v. Neth.), Judgment, 1969 I.C.J. Rep. 3, ¶ 73 (Feb. 20).

26. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 cmt. b (AM. LAW INST. 1987).

27. *See id.* § 102 cmt. c (“For a practice of states to become a rule of customary international law it must appear that the states follow the practice from a sense of legal obligation (*opinio juris sive necessitatis*); a practice that is generally followed but which states feel legally free to disregard does not contribute to customary law. A practice initially followed by states as a matter of courtesy or habit may become law when states generally come to believe that they are under a legal obligation to comply with it. It is often difficult to determine when that transformation into law has taken place. Explicit evidence of a sense of legal obligation (e.g., by official statements) is not necessary; *opinio juris* may be inferred from acts or omissions.”); *see also* North Sea Continental Shelf, 1969 I.C.J. Rep. at ¶ 77.

28. Trachtman, *supra* note 17, at 18.

unless it has vigorously opposed that notion with respect to its legal obligations. And even then, if the principle is found to be a peremptory norm, such objection will not spare the nation of the legal obligation.²⁹

B. CIL and U.S. Domestic Law

The application of CIL to the United States is “ambiguous and sometimes controversial.”³⁰ This is true for many reasons, including the method of CIL formulation. Scholars and government officials have raised the objection that because CIL is an undemocratic method of law formulation,³¹ it should be considered skeptically with respect to its binding nature in U.S. domestic law.³² As a counter to that skepticism, proponents of CIL point to numerous references to international law in both the Declaration of Independence³³ and the Constitution,³⁴ as well as in *The Federalist* papers.³⁵ Indeed, the 1900 Supreme Court Case of *The Paquete Habana* is famously quoted for the proposition that “[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of

29. Dinah Shelton, *Normative Hierarchy in International Law*, 100 AM. J. INT’L L. 291, 313–14 (2006). A peremptory norm is a “rule[] of international law that admit[s] of no derogation and that can be amended only by a new general norm of international law of the same value.” *Id.* at 297.

30. CONG. RESEARCH SERV., RL32528, *supra* note 3, at 2; Saikrishna Prakash, *The Constitutional Status of Customary International Law*, 30 HARV. J. L. & PUB. POL’Y 65 (2006).

31. Trachtman, *supra* note 17, at 18–20.

32. Nicole Roughan, *Democratic Custom v International Customary Law*, 38 VICTORIA U. WELLINGTON L. REV. 403 (2007); Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 871 (1997).

33. THE DECLARATION OF INDEPENDENCE para. 5 (U.S. 1776) (“That these United Colonies . . . as Free and Independent States . . . have full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do.”).

34. U.S. CONST. art. I, § 8, cl. 10–11 (discussing Congress’s power concerning the “law of nations” and to “grant Letters of Marque and Reprisal”); *id.* at art. II, § 2, cl. 2 (discussing the president’s power to make treaties—with the advice and consent of the Senate—and to appoint ambassadors).

35. *See e.g.* THE FEDERALIST NO. 3 (John Jay) (“It is of high importance to the peace of America that she observe the laws of nations”); THE FEDERALIST NO. 42 (James Madison) (“[I]f we are to be one nation in any respect, it clearly ought to be in respect to other nations.”).

appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination.”³⁶

However, just stating that international law is part of our law does not answer the question of *how* it is part of our law and how it is to be applied domestically, particularly in the face of other competing national interests and constitutional principles. This topic has been hotly debated³⁷ and will likely continue to be, even if the *Restatement (Fourth)* decides to directly address the issue. Specific judicial tools have been created to help apply CIL in domestic courts. For example, it is generally accepted that where a controlling statute or executive action exists, CIL is not applicable,³⁸ as demonstrated by the “Later in Time” rule³⁹ and the *Charming Betsy* Canon.⁴⁰ The *Restatement (Third)* concludes only that

The President’s authority and duty to take care that a principle of customary law be faithfully executed, and the doctrine that a new customary law becomes United States law automatically and supersedes at least State law, depend on an authoritative

36. 175 U.S. 677, 700 (1900).

37. Bradley & Goldsmith, *supra* note 32; William S. Dodge, *Customary International Law and the Question of Legitimacy*, 120 HARV. L. REV. F. 19 (2007).

38. CONG. RESEARCH SERV., RL32528, *supra* note 3, at 2 (citing *The Paquete Habana*, 175 U.S. at 677, 700); *see also, e.g.*, *United States v. Yousef*, 327 F.3d 56 (2d Cir. 2003); *Galo-Garcia v. I.N.S.*, 86 F.3d 916 (9th Cir. 1996) (“where a controlling executive or legislative act . . . exist[s], customary international law is inapplicable”); *Comm. of U.S. Citizens Living in Nicar. v. Reagan*, 859 F.2d 929, 939 (D.C. Cir. 1988); *Garcia-Mir v. Meese*, 788 F.2d 1446, 1453 (11th Cir. 1986). *But see Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (holding that the Alien Tort Statute, 28 U.S.C. § 1350, recognized an individual cause of action for certain egregious violations of the law of nations).

39. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 115 cmt. d (AM. LAW INST. 1987) (“It has . . . not been authoritatively determined whether a rule of customary international law that developed after, and is inconsistent with, an earlier statute or international agreement of the United States should be given effect as the law of the United States.”). However, the *Restatement (Third)* acknowledges that “[a] new rule of customary law will supersede inconsistent obligations created by earlier agreement if the parties so intend and the intention is clearly manifested.” *Id.* § 102 cmt. j.

40. The *Charming Betsy* canon comes from the case of *Murray v. Schooner Charming Betsy* and holds that statutes enacted by Congress “ought never to be construed to violate the law of nations if any other possible construction remains.” 6 U.S. (2 Cranch) 64, 118 (1804).

determination that the particular principle has in fact become part of customary law.⁴¹

Despite the lack of clarity concerning the application of CIL as U.S. domestic law and without trying to resolve those concerns here, the important point for this Article is that there is at least some application of CIL in U.S. domestic law and that the president's proclamation of an international norm or principle as CIL and binding on the United States likely carries with it some measure of legal importance. Given that assumption, the next part will take three examples of such presidential proclamations and provide a platform for the analysis of their impact in Part III.

II. THREE CASES OF PRESIDENTIAL PROCLAMATION

Over the past roughly three decades, beginning with Ronald Reagan, presidents have made statements about the CIL status of specific treaties or parts of those treaties in order to bind the United States to those provisions, despite the Senate not providing its advice and consent. The following sections outline three specific instances where this has occurred.

A. *United Nations Convention on the Law of the Sea*

On March 10, 1983, only three months after the completion of the United Nations Convention on the Law of the Sea (UNCLOS III),⁴² President Ronald Reagan issued his *Statement on United States Oceans Policy*.⁴³ Despite confirming that he would not seek ratification, the president proclaimed that “the convention also contains provisions with respect to traditional uses of the oceans which generally confirm existing maritime law and practice and fairly balance the interests of all states.”⁴⁴ In the *Statement*, the president made several pronouncements that effectively adopted the majority

41. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS OF THE UNITED STATES § 111 reporters' note 1 (AM. LAW INST. 1987) (internal citations omitted).

42. See United Nations Convention on the Law of the Sea, *supra* note 8.

43. Ronald Reagan, Statement on United States Oceans Policy (Mar. 10, 1983), <http://www.reagan.utexas.edu/archives/speeches/1983/31083c.htm>.

44. *Id.*; see generally George D. Haimbaugh, Jr., *Impact of the Reagan Administration on the Law of the Sea*, 46 WASH. & LEE L. REV. 151 (1989) (discussing the actions taken by the Reagan Administration with respect to different maritime claims as a result of UNCLOS III).

of the provisions of UNCLOS III, pointedly excluding the provisions contained in Chapter XI⁴⁵ dealing with the deep seabed and its minerals. The *Statement* contains three important decisions concerning the application of provisions of the UNCLOS III:

First, the United States is prepared to accept and act in accordance with the balance of interests relating to traditional uses of the oceans—such as navigation and overflight. In this respect, *the United States will recognize the rights of other states in the waters off their coasts*, as reflected in the Convention, so long as the rights and freedoms of the United States and others under international law are recognized by such coastal states.

Second, *the United States will exercise and assert its navigation and overflight rights and freedoms on a worldwide basis in a manner that is consistent with the balance of interests reflected in the convention*. The United States will not, however, acquiesce in unilateral acts of other states designed to restrict the rights and freedoms of the international community in navigation and overflight and other related high seas uses.

Third, I am proclaiming today an Exclusive Economic Zone in which the United States will exercise sovereign rights in living and nonliving resources within 200 nautical miles of its coast. This will provide United States jurisdiction for mineral resources out to 200 nautical miles that are not on the continental shelf. Recently discovered deposits there could be an important future source of strategic minerals.⁴⁶

While the *Statement* contains the proviso “The policy decisions I am announcing today will not affect the application of existing United States law concerning the high seas or existing authorities of any United States Government agency,” the executive branch—and particularly the military—has been conducting its operations under the assumption that they were required as a matter of presidential directive to apply the provisions of UNCLOS III. In other words,

45. The Convention is now being implemented together with the subsequent Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982. G.A. Res. 48/263, U.N. Doc. A/RES/48/263 (July 28, 1994).

46. Reagan, *supra* note 43 (emphasis added).

the practice of the United States since has been to apply these accepted provisions as CIL and binding domestic regulation.⁴⁷

In subsequent actions, succeeding presidents have become even more convinced of the value of UNCLOS III. UNCLOS III was on the Treaty Priority Lists of both President Bush⁴⁸ and President Obama.⁴⁹ On May 15, 2007, President Bush officially urged the Senate to ratify UNCLOS III,⁵⁰ arguing that “[j]oining will serve the national security interests of the United States, including the maritime mobility of our armed forces worldwide.”⁵¹ In response to the president’s call, “[t]he Senate Foreign Relations Committee voted 17–4 to” forward UNCLOS III to the full Senate for a vote,⁵² though the Senate never provided its advice and consent.

In June 2012, President Obama made another attempt to get the Senate’s advice and consent when six four-star generals and admirals (including the vice chairman of the joint chiefs of staff; the chief of naval operations; the commandant of the U.S. Coast Guard; and the commanders of U.S. Transportation Command, U.S. Northern Command, and U.S. Pacific Command) testified before the Senate Committee on Foreign Relations.⁵³ Each of these commanders urged Congress to provide advice and consent because ratification was in the best interests of the United States.⁵⁴

This ongoing tension between Congress and the executive branch with respect to UNCLOS III might be portrayed as a

47. *See infra*, Section III.A.

48. *Contemporary Practice of the United States Relating to International Law*, 101 AM. J. INT’L L. 866, 869–71 (John R. Cook ed., 2007).

49. Letter from Richard R. Verma, Assistant Sec’y of Legislative Affairs, U.S. Dep’t of State, to John F. Kerry, Chairman, Comm. on Foreign Relations, U.S. Senate Treaty Priority List (May 11, 2009), http://www.gc.noaa.gov/documents/gcil_bd_2009TreatyPriorityList.pdf.

50. George W. Bush, President’s Statement on Advancing U.S. Interests in the World’s Oceans (May 15, 2007), <http://georgewbush-whitehouse.archives.gov/news/releases/2007/05/20070515-2.html>.

51. *Id.*

52. Kevin Drawbaugh, *U.S. Senate Panel Backs Law of the Sea Treaty*, REUTERS, Oct. 31, 2007, <http://www.reuters.com/article/2007/10/31/idUSN31335584>.

53. Press Release, U.S. Senate Comm. on Foreign Relations, “24 Star” Military Witnesses Voice Strong Support for Law of the Sea Treaty (June 14, 2012), <http://www.foreign.senate.gov/press/chair/release/24-star-military-witnesses-voice-strong-support-for-law-of-the-sea-treaty>.

54. *Id.*

prototypical example of the Constitution's structural separation of powers. The ongoing discussions and negotiations must occur because both political branches are required for a treaty to bind the United States to provisions of international law. Instead it highlights how the president has used his "executive power"⁵⁵ to overcome the hesitation of Congress and bind the United States through a declaration of CIL to the provisions of the very treaty to which Congress will not provide its advice and consent.

As discussed previously, CIL is formed by state practice that is followed from a sense of a legal obligation, or *opinio juris*.⁵⁶ The International Court of Justice has held that to reach the level of supporting the development of a customary norm, the practice must be "widespread and representative" and include any states that are "specially affected."⁵⁷ As evidenced by President Reagan's statement on UNCLOS III discussed previously, the United States not only asserts its right to exercise the elements of UNCLOS III, but it also expects others to honor that assertion as a matter of law, thus demonstrating *opinio juris*. To emphasize this, subsequent presidents have issued directives to executive branch agencies and the military to comply with the provisions of UNCLOS III, and to do so relying on the fact that their compliance is based on international law and that they can expect other nations to recognize the United States' right, as a matter of international law, to make such assertions. This action by the United States amounts to a demonstration of state practice that is followed through a sense of legal obligation and that relies on a belief of reciprocal obligations and authorities by other nations, thus confirming the existence of CIL.

In fact, the Introductory Note to the *Restatement (Third)*'s Part V on the Law of the Sea refers to President Reagan's March 1983 statement quoted previously⁵⁸ and then concludes: "Thus, by express or tacit agreement accompanied by consistent practice, the United States, and states generally, have accepted the substantive provisions of the Convention, other than those addressing deep sea-bed

55. U.S. CONST. art. II, § 1.

56. See *supra* Section I.A.

57. North Sea Continental Shelf (Ger. v. Den./Ger. v. Neth), Judgment, 1969 I.C.J. Rep. 3, ¶ 73 (Feb. 20).

58. See *supra* notes 44–48 and accompanying text.

mining, as statements of customary law binding upon them apart from the Convention.”⁵⁹

The legal result of this is that the president has committed the United States to the provisions of a treaty to which the Senate has explicitly refused to provide its advice and consent because it thinks the legal obligations that would result are ill-advised.⁶⁰ Although presidents have persisted in seeking Senate approval for UNCLOS III, at this point, it would be a mere formality that carries little legal weight. As the treaty is undoubtedly non-self-executing,⁶¹ the provisions of UNCLOS III would not normally carry domestic effects until further implemented by Congress. Therefore, the advice and consent of the Senate would serve the purpose of binding the United States as a matter of international law. But, in this case, the president has already done that, making Senate action unnecessary (except with respect to those provisions that the president has not specifically declared to be CIL).

UNCLOS III is not the only example of presidential action resulting in an end-run around congressional inaction that leads to binding international legal norms for the United States. President Obama has recently done something very similar with Article 75 of Additional Protocol I to the Geneva Conventions of 1949 (API),⁶² and with Additional Protocol II to the Geneva Conventions of 1949 (APII).⁶³

B. Additional Protocol II to the 1949 Geneva Conventions

With respect to APII, President Reagan submitted that treaty to the Senate for ratification in 1987 and “recommend[ed] . . . that the Senate grant advice and consent”⁶⁴ President Reagan argued that:

59. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, Part V, introductory note (AM. LAW INST. 1987).

60. See Kristina Wong & Sean Lengell, *DeMint: Law of the Sea Treaty Now Dead*, WASHINGTON TIMES (July 16, 2012), <http://www.washingtontimes.com/news/2012/jul/16/demint-says-law-sea-treaty-now-dead/?page=al>.

61. See generally Sloss, *supra* note 3.

62. Additional Protocol I, *supra* note 10.

63. Additional Protocol II, *supra* note 9.

64. S. TREATY DOC. NO. 100-2, at III (1987).

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The United States has traditionally been in the forefront of efforts to codify and improve the international rules of humanitarian law in armed conflict, with the objective of giving the greatest possible protection to victims of such conflicts, consistent with legitimate military requirements. The agreement that I am transmitting today is, with certain exceptions, a positive step toward this goal. Its ratification by the United States will assist us in continuing to exercise leadership in the international community in these matters.⁶⁵

Despite President Reagan's strong statement of support, the Senate has taken no action since.

In March of 2011, President Obama issued a fact sheet, which stated:

Additional Protocol II, which contains detailed humane treatment standards and fair trial guarantees that apply in the context of non-international armed conflicts, was originally submitted to the Senate for approval by President Reagan in 1987. The Administration urges the Senate to act as soon as practicable on this Protocol, to which 165 States are a party. An extensive interagency review concluded that *United States military practice is already consistent with the Protocol's provisions*. Joining the treaty would not only assist us in continuing to exercise leadership in the international community in developing the law of armed conflict, but would also allow us to *reaffirm our commitment to humane treatment in, and compliance with legal standards for, the conduct of armed conflict*.⁶⁶

This statement by the president that U.S. practice is already consistent with the APII's provisions, combined with the president urging the Senate to ratify "to reaffirm our . . . compliance with legal standards," provides pretty clear evidence that the United States is applying the provisions of APII as state practice and clearly imply that the United States is doing so out of legal obligation. In other words, President Obama is declaring APII to be CIL and applying its provisions as binding on the United States, regardless of the Senate's advice and consent.

65. *Id.*

66. Press Release, White House, Fact Sheet: New Actions on Guantánamo and Detainee Policy, (Mar. 7, 2011), <http://www.whitehouse.gov/the-press-office/2011/03/07/fact-sheet-new-actions-guant-namo-and-detainee-policy> (emphasis added).

C. Article 75 of Additional Protocol I to the 1949 Geneva Conventions

Article 75 of API provides an even clearer example. President Reagan also transmitted API to the Senate but stated that it was “fundamentally and irreconcilably flawed.”⁶⁷ API was also the subject of an intense Department of Defense review that was declassified and disseminated to the public only a few months ago.⁶⁸ That review, done in 1985, recommended against ratification.⁶⁹ And so, API is also languishing in the Senate with no prospect of action in the near future. However, in the same March 2011 fact sheet previously quoted, President Obama stated:

Article 75 of Additional Protocol I, which sets forth fundamental guarantees for persons in the hands of opposing forces in an international armed conflict, is similarly important to the international legal framework. Although the Administration continues to have significant concerns with Additional Protocol I, Article 75 is a provision of the treaty that is consistent with our current policies and practice and is one that the United States has historically supported.

Our adherence to these principles is also an important safeguard against the mistreatment of captured U.S. military personnel. *The U.S. Government will therefore choose out of a sense of legal obligation to treat the principles set forth in Article 75 as applicable to any individual it detains in an international armed conflict*, and expects all other nations to adhere to these principles as well.⁷⁰

This statement by President Obama directly asserting the legal obligation almost certainly has the force of a binding “unilateral act”⁷¹ and has the effect of committing the United States to apply Article 75 as a matter of law in all applicable circumstances, despite the fact that the Senate has not provided its constitutionally mandated advice and consent.

67. S. TREATY DOC. NO. 100-2, at III.

68. THE JOINT CHIEFS OF STAFF, REVIEW OF THE 1977 FIRST ADDITIONAL PROTOCOL TO THE GENEVA CONVENTIONS OF 1949 (1985).

69. *Id.*

70. See Press Release, White House, Fact Sheet: New Actions on Guantánamo and Detainee Policy, *supra* note 66 (emphasis added).

71. Nuclear Tests (N.Z. v. Fr.), Judgment, 1974 I.C.J. Rep. 253, ¶ 43 (Dec. 20).

D. Conclusion

These three examples illustrate an apparently developing pattern of presidents turning to CIL as a method of binding the United States to treaty obligations when they are unable to get the advice and consent of the Senate. If the Senate will not respond favorably to the executive's desire to become party to a treaty, the president can direct the executive branch to comply with the treaty's provisions anyway. Then, the president can either imply the legal obligation, as with UNCLOS III and APII, or directly state the legal obligation, as with Article 75 of API, and unilaterally create just as binding of an international obligation as if the Senate had taken its constitutionally mandated role.

III. BINDING EXECUTIVE AGENCIES

As established in Part II, the president has committed the United States to apply specific provisions of treaties to which Congress has not provided advice and consent, at least as a matter of international law, by effectively declaring all or part of them to be CIL. However, as discussed in Part I, the mere declaration may or may not carry the weight of domestic law, therefore binding the United States, especially for particular executive agencies.⁷² In order for this to occur, the president has to engage in some further action that makes his decision binding on the executive branch and punishable upon non-compliance.⁷³ Presidents have effectively done this with all three of the treaties mentioned above. The next three sections will detail how the president has done this.

A. United Nations Convention on the Law of the Sea

As previously mentioned, the Senate has never provided its advice and consent to UNCLOS III. As a result, under the Constitution, the United States is not bound by its provisions, beyond the obligations that come with being a signatory to a

72. See *supra* notes 26–29 and accompanying text.

73. See *id.*

treaty.⁷⁴ However, presidential action has had the effect of making many of the provisions of UNCLOS III not only binding as a matter of CIL but also binding on the members of executive agencies.

One example of this is the promulgation and enforcement of law of the sea provisions as described in *The Commander's Handbook on the Law of Naval Operations*, or NWP 1-14M.⁷⁵ The NWP 1-14M “sets out those fundamental principles of international and domestic law that govern U.S. naval operations at sea,”⁷⁶ and is “designed to provide officers in command and their staffs with an overview of the rules of law governing naval operations in peacetime and during armed conflict.”⁷⁷ It is promulgated by the Navy, Marines, and Coast Guard,⁷⁸ and restates the requirement that “[a]t all times, a commander shall observe, and require their commands to observe, the principles of international law.”⁷⁹ Presumably, without any further implementing actions by the president, his statement that a provision of UNCLOS III was CIL would now make it an international law principle. As such, members of the Navy, Marine Corps, and Coast Guard would be bound to observe this principle.

The legal obligation becomes even clearer throughout the NWP 1-14M. The NWP 1-14M begins with an explanation of the current status of UNCLOS III with respect to the Senate’s lack of advice and consent⁸⁰ but then goes on to assert that “[a]lthough the United States is not a party to [UNCLOS III], it considers the navigation and overflight provisions therein reflective of customary international law and thus acts in accordance with [UNCLOS III], except for the deep seabed mining provisions.”⁸¹ The subsequent sections then rehearse in detail the provisions of UNCLOS III as being the current

74. See Vienna Convention on the Law of Treaties, *supra* note 16, at art. 18 (describing the obligation of signatories not to defeat the object and purpose of a treaty prior to its entry into force).

75. U.S. NAVY, U.S. MARINE CORPS, & U.S. COAST GUARD, *THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS* (2007).

76. *Id.* at 19.

77. *Id.*

78. *Id.* at 1.

79. *Id.* at 20.

80. *Id.* at 11.

81. *Id.*

law and practice of the United States,⁸² even when those provisions are not in compliance with the United States' actual legal obligations under the 1958 Law of the Sea Conventions⁸³ (the last Law of the Sea Convention to which the United States was a party)⁸⁴ and, therefore, legally bound. To add clarity to the NWP 1-14M, the Naval War College issued an "Annotated Supplement" which provides footnotes with explanations to the provisions of the NWP 1-14M.⁸⁵ One example from this annotated version of the NWP 1-14M will suffice. As an explanation for the drawing of baselines in order to determine maritime zones, the Annotated Supplement states: "The current rules for delimiting baselines are contained in Articles 5 through 14 of [UNCLOS III]."⁸⁶ This reference to UNCLOS III as the legal regime that governs the Navy's recognition of baselines is a clear indication of the incorporation, as a matter of governing executive agencies, of UNCLOS III as a binding legal norm.

Not only has the president's acceptance and declaration of UNCLOS III as CIL become binding on executive agencies but also failure to follow these rules carries the potential of punishment, including incarceration. While not technically binding on the Navy, Coast Guard, and Marine Corps as a statute,⁸⁷ failure to abide by the

82. For example, see the discussion of maritime regimes such as territorial seas and the Exclusive Economic Zone. *Id.* at 1-2.

83. Convention on the Territorial Sea and the Contiguous Zone, Apr. 29, 1958, 516 U.N.T.S. 205.

84. See List of Participants in the Convention on the Territorial Sea and the Contiguous Zone, UNITED NATIONS TREATY COLLECTION, <https://treaties.un.org/Pages/showDetails.aspx?objid=0800000280033c69> (last visited Sept. 14, 2015).

85. NAVAL WAR COLLEGE, ANNOTATED SUPPLEMENT TO THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS (1997), http://www.ficlh.org/uploads/media/US_Navy_Commander_s_Handbook_Annotated_Supplement_1997.pdf.

Note that the Annotated Supplement is based on the 1995 edition of the NWP 1-14M, not the more recent 2007 version of the NWP 1-14M. The Annotated Supplement is in the process of being updated.

86. *Id.* at 1-3, n.11.

87. The supplement contains the following caveats as to its legal weight:

Although prepared with the assistance of cognizant offices of the General Counsel of the Department of Defense, the Judge Advocate General of the Navy, The Judge Advocate General of the Army, The Judge Advocate General of the Air Force, the Staff Judge Advocate to the Commandant of the Marine Corps, the Chief Counsel of the Coast Guard, the Chairman, Joint Chiefs of Staff and the Unified Combatant Commands, the annotations in this Annotated Supplement are not to be construed

requirements of the NWP 1-14M could certainly be prosecuted as a dereliction of duty in violation of Article 92 of the Uniform Code of Military Justice,⁸⁸ punishable by up to six months in confinement and being evicted from the military. In this way, the president has an easy enforcement mechanism to ensure compliance with his declaration of CIL, despite the Senate's refusal to provide its advice and consent.

B. Additional Protocol II to the 1949 Geneva Conventions

APII, by definition, applies only to non-international armed conflicts (NIAC).⁸⁹ These are conflicts that do not involve two nations fighting each other, but generally involve one nation fighting against an insurgency. NIACs could also involve two or more nations working together to fight against an insurgent group,⁹⁰ even if that

as representing official policy or positions of the Department of the Navy or the U.S. Government.

Id. at Introductory Note.

Although *The Commander's Handbook on the Law of Naval Operations* is a publication of the Department of the Navy, neither *The Handbook* nor its annotated supplement can be considered as a legislative enactment binding upon courts and tribunals applying the rules of war. However, their contents may possess evidentiary value in matters relating to U.S. custom and practice. See *The Hostages Trial (Wilhelm List et al)*, 11 TWC 1237-38, 8 LRTWC 51-52 (U.S. Military Tribunal, Nuremberg, 8 July 1947-19 Feb. 1948); *The Peleus Trial*, 1 LRTWC 19 (British Military Ct., Hamburg, 1945); *The Belsen Trial*, 2 LRTWC 48-49 (British Military Ct., Luneburg, 1945); *The Abbage Ardennes Case (Trial of Brigadefurher Kurt Meyer)*, 4 LRTWC 110 (Canadian Military Ct., Aurich, Germany, 1945).

In the course of these cases, the question of the status of such official publications and the British and U.S. military manuals arose on various occasions. Although the courts recognized these publications as "persuasive statements of the law" and noted that, insofar as the provisions of military manuals are acted upon, they mold State practice, itself a source of international law, it was nevertheless stated that since these publications were not legislative instruments they possessed no formal binding power. Hence, the provisions of military manuals which clearly attempted to interpret the existing law were accepted or rejected by the courts in accordance with their opinion of the accuracy with which the law was set forth.

Id. at 1 n.1.

88. DEPT. OF DEFENSE, MANUAL FOR COURTS-MARTIAL IV-23 (2012).

89. In fact, APII applies to an even narrower subset of NIACs where the non-governmental fighting force is "under responsible command, [and can] exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol." Additional Protocol II, *supra* note 10, art. 1.

90. The International Committee of the Red Cross defines NIAC as "protracted armed confrontations occurring between governmental armed forces and the forces of one or more

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insurgent group is a transnational entity, such as al-Qaeda. The U.S. conflict alongside the government of Afghanistan from 2002 until the present is a good example of a NIAC. In determining what law would apply to detainees in that conflict, the Supreme Court, in *Hamdan v. Rumsfeld*,⁹¹ disagreed with the government's assertion to the contrary and confirmed that the conflict in Afghanistan was a NIAC. In so doing, the Court recognized that the applicable Law of Armed Conflict (LOAC) governed the treatment and prosecution of individuals involved in that NIAC who were suspected of violating that law.⁹²

In accord with the Supreme Court's decision, the Military Commissions Act of 2009 authorizes the president to "try alien unprivileged enemy belligerents for violations of the law of war and other offenses triable by military commission."⁹³ This authority has been exercised by the executive branch, and a number of individuals are currently on trial.⁹⁴ In contrast, despite the Supreme Court's determination with respect to the LOAC applicable to the prosecution of detainees in a NIAC, the United States has a policy of trying its own service members for substantive crimes such as murder,⁹⁵ rather than a similar LOAC violation that would be applicable to a NIAC.⁹⁶ This policy could be seen as undermining the CIL nature of APII's provisions on prosecution and trial rights in a NIAC.

armed groups, or between such groups arising on the territory of a State [party to the Geneva Conventions]. The armed confrontation must reach a minimum level of intensity and the parties involved in the conflict must show a minimum of organization." *How is the term "Armed Conflict" Defined in International Humanitarian Law*, INT'L COMM. OF THE RED CROSS 5 (Mar. 2008), <https://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf>.

91. *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

92. Geoffrey S. Corn & Eric Talbot Jensen, *Transnational Armed Conflict: A "Principled" Approach to the Regulation of Counter-Terror Combat Operations*, 42 ISR. L. REV. 46, 51 (2009).

93. 10 U.S.C. § 948b(a).

94. *See Cases*, OFFICE OF MILITARY COMM'NS, <http://www.mc.mil/CASES.aspx>. (last visited Nov. 4, 2015).

95. Rules for Courts-Martial 307(c)(2) states that "[a] charge states the article of the code, law of war, or local penal law of an occupied territory which the accused is alleged to have violated." However, the discussion to the same Rule adds: "Ordinarily persons subject to the code should be charged with a specific violation of the code rather than a violation of the law of war." MANUAL FOR COURTS-MARTIAL, *supra* note 88, at II-27.

96. The Rome Stat. for the Int'l Crim. Court, art. 8(2)(c)(i), U.N. Doc. A/Conf.183/9.

However, even though U.S. service members have not been tried for violations of the laws of war in a NIAC, the authority to do so is clearly established by statute. Article 18 of the Uniform Code of Military Justice (UCMJ) has a long history⁹⁷ and states: “General courts-martial also have jurisdiction to try any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war.”⁹⁸ Thus, insofar as the provisions of APII are CIL, U.S. service members could be tried for their violation. And presidential actions from President Reagan to President Obama all confirm that, for members of the executive branch, APII is considered CIL and Article 18 of the UCMJ makes prosecution possible for any violators of those provisions.⁹⁹

C. Article 75 of Additional Protocol I to the 1949 Geneva Conventions

Finally, a very similar argument can be made for Article 75 of API. API applies to international armed conflicts¹⁰⁰ and neither President Reagan¹⁰¹ nor any successive president has urged the ratification of API. While the statement above from President Obama shows that he recognizes the flawed nature of API, he goes on to argue that “[t]he U.S. Government will therefore choose out of a sense of legal obligation to treat the principles set forth in

97. Jan E. Aldykiewicz & Geoffrey S. Corn, *Authority to Court-Martial Non-U.S. Military Personnel for Serious Violations of International Humanitarian Law Committed During Internal Armed Conflicts*, 167 MIL. L. REV. 74, 90–101 (2001).

98. MANUAL FOR COURTS-MARTIAL, *supra* note 88, at § 818, art. 18, A2–6.

99. 10 U.S.C. § 818; *see also* Aldykiewicz & Corn, *supra* note 97, at 108–44.

100. Additional Protocol I, *supra* note 9, art. 1. The International Committee of the Red Cross states that IACS “exist whenever there is resort to armed force between two or more States.” *How is the Term “Armed Conflict” Defined in International Humanitarian Law?*, INT’L COMM. OF THE RED CROSS 5 (Mar. 2008), <https://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf>.

101. In his Letter of Transmittal of APII, President Reagan stated with respect to API:

I have at the same time concluded that the United States cannot ratify a second agreement on the law of armed conflict negotiated during the same period. I am referring to Protocol I additional to the 1949 Geneva Conventions, which would revise the rules applicable to international armed conflicts. Like all other efforts associated with the International Committee of the Red Cross, this agreement has certain meritorious elements. But Protocol I is fundamentally and irreconcilably flawed. It contains provisions that would undermine humanitarian law and endanger civilians in war.

S. TREATY DOC. NO. 100-2, at III–IV (1987).

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Article 75 as applicable to any individual it detains in an international armed conflict, and expects all other nations to adhere to these principles as well.”¹⁰²

As argued above, this statement incorporates Article 75 into CIL.¹⁰³ Additionally, the application of Article 18 of the UCMJ to violations of CIL, as argued above with respect to APII, makes it clear that U.S. service members are not only bound to apply Article 75 as a matter of law, but can be punished if they do not. And, of course, all of this is so, despite the fact that the Senate has the treaty before it and is not considering granting its advice and consent.

D. Conclusion

These three examples clearly illustrate the impact of presidential action with respect to treaties that are before the Senate for advice and consent, but for which consent has not been granted. Despite the lack of Senate action, presidents have not only effectively declared the treaties, or provisions thereof, to be CIL and binding on the United States as a matter of international law, but have also demanded compliance with their provisions as a matter of domestic law with respect to executive agencies and have enforced that demand with the possibility of severe punishment, including incarceration.

IV. *RESTATEMENT (FOURTH) AND CLARIFICATION*

Perhaps little of this situation is alarming to those who are strong advocates of the president being the “one voice” in foreign relations.¹⁰⁴ While the implications of the recently decided *Zivotofsky v. Kerry*¹⁰⁵ are still unclear, the Supreme Court’s embrace of the president as the “one voice” in foreign relations supports the authoritative nature of the president’s declarations as to the United

102. Press Release, White House, Fact Sheet: New Actions on Guantánamo and Detainee Policy, *supra* note 66.

103. *See supra* Section II.C.

104. *See* David H. Moore, *Beyond One Voice*, 98 MINN. L. REV. 953, 955–56 (2014) (analyzing the “one voice” doctrine and then arguing that because it has serious flaws, it should be abandoned).

105. 135 S. Ct. 2076 (2015).

States' perspective on the content of CIL.¹⁰⁶ Therefore, the statements made in Part II should, perhaps, not be troubling. However, even for those who advocate the president's role in pronouncing CIL, his role in enforcing those pronouncements domestically through punitive means, particularly when the Senate is already engaged in the ratification process, may cause pause with respect to separation of powers.

There is some evidence that Congress is starting to get alarmed by this presidential pattern. In anticipation of President Obama having Secretary of State John Kerry sign the Arms Trade Treaty sponsored by the United Nations,¹⁰⁷ Senator Bob Corker, who was the ranking member of the Foreign Relations Committee at the time, sent a letter to President Obama stating, that “[a]ny act to implement this treaty, provisionally or otherwise, before the Congress provides its advice and consent would be inconsistent with the United States Constitution, law, and practice.”¹⁰⁸

Similar statements could have, but have not, been made by Congress with respect to the three treaties analyzed above. However, Senator Corker's comments raise the specter of the appropriateness of executive action. Because this is a potentially emerging practice by presidents, the *Restatement (Fourth)* has an opportunity to play a role in shaping what the interaction between the political branches should be.

Three possible options seem to present themselves, though all three (and potentially others) deserve a much more thorough analysis than it is possible to provide here. First, the *Restatement (Fourth)* could remain silent and allow practice to develop between the executive and the legislature. Second, the *Restatement (Fourth)* could reconfirm the obligation of the United States to not defeat the

106. *Id.* at 2086.

107. Michelle Nichols, *Kerry Signs U.N. Arms Trade Treaty, Says Won't Harm U.S. Rights*, REUTERS, (Sept. 25, 2013), <http://www.reuters.com/article/2013/09/25/us-un-assembly-kerry-treaty-idUSBRE980WV20130925>; Arms Trade Treaty, *opened for signature* June 3, 2013. (As this Article goes to press, there is no available U.N.T.S. citation information for this treaty. A copy of the treaty can be found at https://treaties.un.org/doc/Treaties/2013/04/20130410%2012-01%20PM/Ch_XXVI_08.pdf.)

108. Press Release, U.S. Senate Comm. on Foreign Relations, Corker Warns Obama Admin. Against Any Action to Implement U.N. Arms Trade Treaty Without Senate Advice and Consent (Sept. 24, 2013), <http://www.foreign.senate.gov/press/ranking/release/corker-warns-obama-administration-against-any-action-to-implement-un-arms-trade-treaty-without-senate-advice-and-consent>.

“object and purpose” of a signed treaty, even while awaiting advice and consent from the Senate. In doing so, the *Restatement (Fourth)* could endorse the president’s role in declaring certain treaty provisions to be CIL and implementing those CIL provisions while awaiting Senate action. Third, the *Restatement (Fourth)* could confirm the lack of domestic effect of unratified treaties and urge presidential caution and congressional vigilance with respect to implementing treaty provisions absent congressional action.

A. No Action

Because this is an emerging interaction between the president and the Senate, the most cautious, and probably most appropriate course of action for the *Restatement (Fourth)* to take is to remain silent and await further developments. This is especially prudent given Senator Corker’s recent acknowledgement of this evolving presidential practice and his warning thereto. As the Restatement is meant to be a statement on what the law is, as opposed to what it should be or might become, this would appear to be the approach most in line with current Restatement practice. Some attention could be drawn to the emerging practice in the commentary, while not proposing solutions. Such a course of action would identify the issue, while not getting ahead of the practice as it develops.

The drawback of such an approach would be, of course, to draw attention to the recent presidential action without making a statement about it. This could be interpreted as tacit approval for presidential action, even if that was not the intent of the Restatement.

B. Provisional Application

As previously noted, signatories to international agreements, though not bound to apply the provisions of the treaty or convention until the domestic ratification process has been completed, are still “obliged to refrain from acts which would defeat the object and purpose” of the agreement.¹⁰⁹ Though the actual

109. See Vienna Convention on the Law of Treaties, *supra* note 16, art. 18. The United States is not a party to the Vienna Convention, but generally accepts Article 18 as CIL. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES pt. 3, intro. note (AM. LAW INST. 1987) (“This Restatement accepts the Vienna

meaning of “object and purpose” is unclear,¹¹⁰ if it has any meaning, it likely precludes any actions that would undermine the actual treaty itself. Neither the Restatement¹¹¹ nor any official U.S. statement has taken the position that Article 18 requires or even allows certain actions by the president. In fact, Professor David H. Moore has argued that this international law obligation forces the president into an unconstitutional act when signing a treaty prior to receiving the advice and consent of the Senate.¹¹²

The current version of the *Restatement (Fourth)* contains a proposed Section 104 which is titled “Entry into Force of International Agreements” which comments on the application of the “object and purpose” obligation. The article states:

(2) A state may also be subject to international obligations arising from an international agreement (a) if it has expressed its consent to be bound by some or all of the terms of the agreement, by means consistent with the agreement, on a provisional basis pending the agreement’s entry into force, or (b) if it is subject to interim obligations under the agreement arising from its signature, exchange of instruments, or ratification, provided that such provisional application or interim obligations have not been terminated by it or otherwise ceased to be binding.

(3) While the United States may assume international obligations in accordance with (1) or (2), the status of these

Convention as, in general, constituting a codification of the customary international law governing international agreements. . . .”).

110. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 312 cmt. i (AM. LAW. INST. 1987); see generally David H. Moore, *The President’s Unconstitutional Treaty-making*, 59 UCLA L. REV. 598 (2011); David S. Jonas and Thomas N. Saunders, *The Object and Purpose of a Treaty: Three Interpretive Methods*, 43 VAND. J. TRANSNAT’L L. 565 (2010).

111. The *Restatement (Third)* argues that “[f]ailing to dismantle a weapons scheduled to be dismantled under the treaty might not defeat its object, since the dismantling could be effected later.” RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 312 cmt. i (AM. LAW. INST. 1987).

112. See Moore, *supra* note 110; see also Jean Galbraith, *Prospective Advice and Consent*, 37 YALE J. INT’L L. 247 (2012) (arguing that the president should seek “prospective advice and consent” from the Senate, prior to negotiating and signing an international agreement, as a method of improving the chances of ratification and the timeliness of such ratification).

obligations under U.S. domestic law remains subject to the Constitution and laws of the United States.¹¹³

Paragraph (2)(b) allows that a state can be bound to certain obligations internationally by a signature on a treaty, paragraph (3) leaves the domestic effect of that signing unstated.

Comment *f* to draft Section 104 makes clear that this provision is intended to deal with Article 18 of the Vienna Convention (which it says the United States accepts as CIL).¹¹⁴ The comment states that “[t]he scope of such interim obligations, however, has remained unclear, in particular as to the nature of the acts prohibited.”¹¹⁵ The comment then goes on to state: “Potential issues relating to the compatibility of the interim obligation with U.S. law, including whether adherence to the interim obligation requires legislative authorization or may be based on the President’s constitutional authority, have not been resolved.”¹¹⁶ In other words, it is unclear if the obligations under Article 18 would provide the president with sufficient authority to begin enforcing them as previous presidents have done with UNCLOS III, API, and APII.

Additionally, Section 104(2)(a) contemplates that a state may become subject to an international agreement’s obligations on a “provisional basis.” In essence, this is what the various presidents have done with the treaty provisions analyzed above, though not through “means consistent with the agreement.” Instead, the president has, through the means of declaring those treaties or treaty provisions as CIL and then making them enforceable domestically against executive agencies, accomplished the same effect as a provisional acceptance.

Assuming it is not *per se* unconstitutional for the president to make provisional declarations that bind the United States as a matter of international law,¹¹⁷ it would be easy for the *Restatement (Fourth)* to add a similar comment that recognizes the president’s authority to

113. RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: TREATIES § 104 (AM. LAW INST., Preliminary Draft No. 4, 2015).

114. *Id.* § 104 cmt. f.

115. *Id.*

116. *Id.*

117. *Id.* § 104 cmt. e.

also bind executive agencies as a matter of domestic law. Such language might be something like the following:

If consent of the Senate or approval by Congress is required for the entry into force of an international agreement but has not yet been obtained, an undertaking that it shall have provisional effect for the United States, *both as a matter of international and domestic law*, must normally rest on the President's own constitutional authority.

If the *Restatement (Fourth)* took this approach, it would be, in effect, making a legal determination as to the constitutional correctness of the president's course of action. This would be a bold statement in an area of executive-legislative interaction that is relatively new and unsettled, and the writers of the *Restatement (Fourth)* may not be ready to make that leap.

C. Senate Vigilance

Comment *j* to Section 312 of *Restatement (Third)* states: "An international agreement made by the United States in the form of a treaty enters into force for the United States when the President, with the advice and consent of the Senate, has ratified it or otherwise given official notification of assent to it" ¹¹⁸ This reinforces the constitutional requirement that treaties become the "supreme Law of the Land" ¹¹⁹ only after "the Advice and Consent of the Senate," ¹²⁰ or other accepted congressional involvement, such as in congressional-executive agreements discussed previously.

The *Restatement (Fourth)* could make the clear distinction between provisional application of unratified treaty provisions in international and domestic law and draw attention to the recent presidential actions, noting that such action may, in fact, be violative of the Constitution's separation of powers paradigm. This could be accomplished in any number of ways, including by adding language such as the following:

If consent of the Senate or approval by Congress is required for the entry into force of an international agreement but has not yet been

118. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 312 cmt. j (AM. LAW. INST. 1987).

119. U.S. CONST., art. VI.

120. *Id.* art. II, § 2.

obtained, an undertaking that it shall have provisional effect for the United States, *as a matter of international law*, must normally rest on the President's own constitutional authority. *Provisional application of non-self-executing agreements as a matter of domestic law would require Congressional action.*

As with the previous suggestion, it seems bold for the Restatement to step into this discussion in such a decisive way since the resolution of the constitutionality of the president's actions is still unclear.

D. Conclusion

Because this is an emerging trend in presidential-congressional interaction, taking no action is most likely the best approach for the *Restatement (Fourth)*. However, the action by successive presidents to bind executive agencies, including punishments for non-compliance, deserves at least some consideration by the drafting committee and the American Law Institute (ALI) more generally. If no action is warranted at this time, the ALI should at least take note of the developing practice in preparation for the *Restatement (Fifth)*.

V. CONCLUSION

This Article has documented recent presidential action to bind executive agencies to treaty provisions that have not been ratified but are currently before the Senate for its advice and consent. Three specific examples highlight this emerging practice. It seems clear that the president has the authority to direct provisional application of these provisions as a matter of international law, but his authority to do so as a matter of domestic law appears unresolved. Congress has, at least on one occasion, warned the president to take no such action until the Senate has completed its constitutional responsibility.

The *Restatement (Fourth)* has several options with regard to this emerging practice, including taking no action, supporting the president's approach through the "object and purpose" obligations of signatory nations, and clarifying that provisional application of non-self-executing agreements as a matter of domestic law requires congressional action. The first approach—to take no action and see how the practice develops between the

two political branches—seems the most prudent at this time. However, the ALI should at least take note of the developing practice and, perhaps, promote greater discussion on the issue in preparation for the *Restatement (Fifth)*.