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Deference and Its Dangers: Congress' Power to "Define ... Offenses Against the Law of Nations"

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I. INTRODUCTION

Customary international law—how to define and determine it—is one of the great mysteries in the law.[1] The experts do not agree on a definition.[2] The rules cannot become law unless they are followed, but they may not become law—even if followed—until anointed as such.[3] In the

1. Akehurst, *Custom as a Source of International Law*, 47 BRIT.Y.B. INT'L L. 1 (1974-1975). *See also* L. HENKIN, R. PUGH, O. SCHACTER & H. SMIT, INTERNATIONAL LAW: CASES AND MATERIALS 37-40 (2d ed. 1987) [hereinafter HENKIN & PUGH].

2. *Compare* Akehurst, *supra* note 1, at 1-3, *with* A. D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW 88 (1971) [hereinafter A. D'AMATO, CONCEPT OF CUSTOM].

3. "International law, or the law that governs between states, has at times, like the common law within states, a twilight existence during which it is hardly distinguishable from morality or justice, till at length the *imprimatur* of a court attests its jural quality." New Jersey v. Delaware, 291 U.S. 361, 383-84 (1934) (Cardozo, J.).

United States, this mystery has constitutional dimension, because the offenses clause of the Constitution grants Congress the power "to define and punish . . . Offenses against the Law of Nations,"[4] permitting Congress to define violations of customary international law as domestic crimes.[5]

On the surface, the offenses clause appears to be the framers' resolution of a conflict between two legal regimes. It recognizes a body of law distilled from the practice of nations that forbids individuals, including people within the jurisdiction of the United States, to commit certain acts. Those acts may become international "offenses" without the participation of the political departments of the United States and would be triable in United States courts,[6] thereby diminishing this nation's freedom of action by allowing other states to dictate domestic crimes.[7] The offenses clause avoids this problem and asserts the independence of the United States by permitting the imposition of criminal penalties for those offenses only when Congress authorizes the penalties. Although the framers generally accepted the notion that customary international law

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4. U.S. CONST. art. I, § 8, cl. 10. Henkin has observed that this power "has been little used and its purport is not wholly clear." L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 72 (1972). *See generally* Comment, *The Offenses Clause: Congress' International Penal Power*, 8 COLUM. J. TRANSNAT'L L. 279 (1969). This Article will not consider another complex of constitutional disputes regarding custom—when, if ever, custom is incorporated into United States law in the absence of a statute and the effect of such incorporation. *Compare* Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1566 (1984) (customary international law, to which the United States has not objected, equal in authority to an act of Congress) and Lobel, *The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law: An Historical Perspective*, 71 VA. L. REV. 1071, 1141 (1985) (peremptory norms of customary international law binding on President) *with* Trimble, *A Revisionist View of Customary International Law*, 33 UCLA L. REV. 665, 704 (1986) ("Customary international law is not an appropriate doctrinal vehicle for general restraint of considered political branch action"). *See generally* Morgan, *Internalization of Customary International Law: An Historical Perspective*, 12 YALE J. INT'L L. 63 (1987); Agora, *May the President Violate Customary International Law?*, 80 AM. J. INT'L L. 913 (1986), 81 AM. J. INT'L L. 371 (1987) (collection of essays by various authors).

Issues of customary law also arise outside of international law. *See, e.g.*, D'Amato, *Professor Nagel's Reflections on Cardozo (Distinction between Custom and Law)*, 2 CARDOZO L. REV. 589 (1981); Nagel, *Professor D'Amato on Law and Custom: A Rejoinder*, 2 CARDOZO L. REV. 593 (1981); Watson, *An Approach to Customary Law*, 1984 U. ILL. L. REV. 561.

5. *See infra* text accompanying notes 34-59.

6. Henfield's Case, 11 F. Cas. 1099, 1100-01 (C.C.D. Pa. 1793) (No. 6,360). *But see* United States v. Hudson, 11 U.S. (7 Cranch) 32 (1812).

7. Morgan, *supra* note 4, at 70. Rather than "freedom of action," one might use "sovereignty," but that term carries other, perhaps unnecessary, connotations.

was a part of the common law of the United States,[8] this nice symmetry was not on their minds. International law in 1787 had little direct impact on individuals.[9] The framers' real concern was to prevent the thirteen refractory states from disrupting foreign relations.[10]

The participants in the debates over the ratification of the Constitution did not overlook the possibility that Congress, acting under the offenses clause, might infringe individual rights.[11] But there is no evidence that this alarmed them generally. Aside from the limited intrusion of international law into ordinary affairs, the framers viewed custom as, in part, natural law, which was consistent with the constitutional theory they were writing.[12] To the extent that custom was positive law,[13] it depended on the accumulation of international practice.[14] The requirement that there be widespread and uniform practice was and is a cautionary mechanism that prevents the formation of customary international law either precipitously or without the agreement of most nations. Such a mechanism exists precisely to protect states' independence,[15] an

8. *See, e.g.*, 1 Op. Att'y Gen. 26, 26 (1791) (Edmund Randolph) ("The law of nations, although not specially adopted by the constitution or any municipal act, is essentially a part of the law of the land. Its obligation commences and runs with the existence of a nation, subject to modifications on some points of indifference. Indeed a people may regulate it so as to be binding upon the departments of their own government. . . ."); *id.* at 26-27 (discussing entry into a foreign minister's house and arresting one of his servants; arrest covered by specific federal statute, *see infra* note 74, but entry covered, "if at all," by law of nations; assumes prosecution possible under latter); Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853, 865-68 (1987); Lobel, *supra* note 4, at 1084-90. *See also* 1 Op. Att'y Gen. 567, 570 (1822).

9. HENKIN & PUGH, *supra* note 1, at 981-83 (quoting Henkin, *The Internationalization of Human Rights*, 6 PROC. GEN. EDUC. SEMINAR 7-9 (1977)); R. LILLICH & F. NEWMAN, INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW AND POLICY 1 (1969) (quoting Humphrey, *The International Law of Human Rights in the Middle Twentieth Century*, in THE PRESENT STATE OF INTERNATIONAL LAW AND OTHER ESSAYS 75 (1973)).

10. *See infra* text accompanying notes 62-65.

11. *See infra* text accompanying notes 67-68.

12. *See* 1 THE WORKS OF JAMES WILSON 148-67 (R. McCloskey ed. 1967), *reprinted in* 3 P. KURLAND & R. LERNER, THE FOUNDERS' CONSTITUTION 70-78 (1987). Indeed, the basis of much eighteenth century American constitutional theory rested on the natural law concepts of such international law writers as Pufendorf, Burlamaqui, Vattel, and Rutherforth. Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843, 860-64 (1978).

13. *See* 1 J. KENT, COMMENTARIES ON AMERICAN LAW 2-3 (1826).

14. *See infra* text accompanying notes 125-26, 134-39.

15. *See* Stein, *The Approach of the Different Drummer: The Principle of the Persis-*

independence that encompasses the power to select fundamental values.

The limited evidence available suggests that the framers knew that the list of international law offenses would expand with time. It is doubtful, however, that they anticipated several developments which would undermine the balance implicit in the offenses clause. First, United States courts have become willing to accept much less in the way of practice in order to prove the existence of an international legal norm, which was not the case in this country's first century. Rather, as will be discussed, the trend has been to rely on instruments such as treaties and declarations not only as a distinct source of law between signatory states, but also as evidence of custom that binds nonsignatory states or that transmutes nonlegal instruments into law. Second, the courts tend to defer to congressional legislative judgments, especially in the area of foreign affairs. This is particularly true in offenses clause cases: of the very few cases decided under the offenses clause, in only a handful have the parties raised the question of the existence of an international law offense, and in none has a court found that there was no offense. This may be attributed to (1) traditional judicial deference to the legislature, (2) an unwillingness to look carefully at international practice, and (3) the fact that congressional powers in addition to the offenses clause often support the statute at issue. The upshot of these trends is that, with relative ease, a non-norm can become the basis of a United States criminal statute and the courts will give it only minimal scrutiny, even though it may infringe rights guaranteed by the Constitution.

A recent case, *Boos v. Barry*,[16] provides a useful probe for examining the foregoing problems. *Boos* involved a statute enacted pursuant to the offenses clause. The statute at issue, section 22-1115 of the District of Columbia Code,[17] essentially prohibits the "display [of] any flag, banner,

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tent Objector in International Law, 26 HARV. INT'L L.J. 457, 469-70 (1985).

16. 108 S. Ct. 1157 (1988), *aff'g in part, rev'g in part* Finzer v. Barry, 798 F.2d 1450 (D.C. Cir. 1986). *See* Note, *The Law of Nations' Effect Upon Free Speech: Finzer v. Barry*, 2 CONN. J. INT'L L. 509 (1987); Note, *Regulating Embassy Picketing in the Public Forum*, 55 GEO. WASH. L. REV. 908 (1987).

17. D.C. CODE ANN. § 22-1115 (1981). The statute was repealed in 1986, contingent upon Congress' extending 18 U.S.C. § 112 (1982), a similar federal statute that operates outside the District of Columbia, to cover the District of Columbia. Protection for Foreign Officials, Official Guests and Internationally Protected Persons Amendment Act of 1987, § 3, 35 D.C. Reg. 728-29 (1988). Congress has not yet done that. Nevertheless, the repeal of section 22-1115 would not moot the issues discussed here. Although the government has apparently adopted a restrictive interpretation of section 112, *see* CISPES v. FBI, 770 F.2d 468, 474 (5th Cir. 1985) (peaceful picketing not prohibited), that provision still presents first amendment problems on its face. *See infra* note 105.

placard, or device designed or adapted to . . . bring into public odium any foreign government" within 500 feet of the embassy of that government without a permit from the chief of police of the District of Columbia.[18]

The Court of Appeals for the District of Columbia Circuit, in a lengthy opinion by Judge Bork, held that the government had a compelling state interest in its international law obligations to protect ambassadors.[19] Given the "trifling"[20] restriction on first amendment rights and the deference due by the courts to the political branches in determinations concerning "the conduct of American foreign policy,"[21] the court of appeals upheld the display clause of section 22-1115 as a permissible regulation of speech.[22] Had the court of appeals' decision stood, the

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18. The full statute provides as follows:

> It shall be unlawful to display any flag, banner, placard, or device designed or adapted to intimidate, coerce, or bring into public odium any foreign government, party, or organization, or any officer or officers thereof, or to bring into public disrepute political, social, or economic acts, views, or purposes of any foreign government, party, or organization, or to intimidate, coerce, harass, or bring into public disrepute any officer or officers or diplomatic or consular representatives of any foreign government, or to interfere with the free and safe pursuit of the duties of any diplomatic or consular representatives of any foreign government, within 500 feet of any building or premises within the District of Columbia used or occupied by any foreign government or its representatives as an embassy, legation, consulate, or for other official purposes, except by, and in accordance with, a permit issued by the Chief of Police of the said District; or to congregate within 500 feet of any such building or premises, and refuse to disperse after having been ordered so to do by the police authorities of the said District.

D.C. CODE ANN. § 22-1115 (1981). The section preceding the semicolon is known as the "display clause"; the remaining language is known as the "congregation clause."

19. *Finzer*, 798 F.2d at 1455-58.

20. *Id.* at 1463.

21. *Id.* at 1458-59.

22. *Id.* at 1477. Adopting a narrowing construction of the congregation clause, the court upheld that clause of section 22-1115 as well, permitting dispersal only when police reasonably believe there is a threat to the security of the embassy. *Id.* at 1471-72.

Fifty years previously, the same court had upheld the same statute in Frend v. United States, 100 F.2d 691 (D.C. Cir. 1938), *cert. denied*, 306 U.S. 640 (1939). *See also* Zaimi v. United States, 476 F.2d 511 (D.C. Cir. 1973) (reversing conviction under section 22-1115 for speaking); Jewish Defense League, Inc. v. Washington, 347 F. Supp. 1300 (D.D.C. 1972) (three-judge court) (same); CISPES v. FBI, 770 F.2d 468 (5th Cir. 1985) (affirming similar, but slightly more limited, restriction in 18 U.S.C. § 112); Concerned Jewish Youth v. McGuire, 621 F.2d 471, 474-76 (2d Cir. 1980), *cert. denied*, 450 U.S. 913 (1981) (upholding "bullpen" restriction on protests directed at consulates).

Judge Wald filed a detailed dissent in which she contended that the government had failed to demonstrate a compelling interest in enacting the particular speech restraints at issue. *Finzer*, 798 F.2d at 1481-84. Judge Wald therefore subjected section 22-1115 to a

United States would have been in opposition not only to the trend in international practice, but also to the first amendment.

The Supreme Court, in an opinion by Justice O'Connor, disagreed.[23] The Court found "our national interest in protecting diplomatic personnel powerful indeed,"[24] but declined to conclude that the interest was "automatically . . . 'compelling' for purposes of First Amendment analysis."[25] Assuming, without deciding, that international law recognizes a sufficiently compelling "dignity interest" to support a content-based restraint on speech, the majority found that section 22-1115 was not "narrowly tailored" to serve that interest.[26] The Court reasoned that the analogous federal statute limits only picketing "intended to harass" diplomats within 100 feet of an embassy,[27] showing that section 22-1115's

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standard first amendment analysis and, largely because it restricted speech based upon the speaker's viewpoint, found that the statute did not comport with the first amendment. *Id.* at 1493-96, 1499, 1500.

23. Boos v. Barry, 108 S. Ct. 1157, 1168 (1988). Justices Brennan and Marshall concurred. The Chief Justice, joined by Justices White and Blackmun, dissented, stating that he would have affirmed the opinion below. *Id.* at 1173 (Rehnquist, C.J., dissenting).

24. *Id.* at 1165.

25. *Id.*

26. *Id.* at 1168.

27. The statute reads, in relevant part:

(a) Whoever assaults, strikes, wounds, imprisons, or offers violence to a foreign official, official guest, or internationally protected person or makes any other violent attack upon the person or liberty of such person, or, if likely to endanger his person or liberty, makes a violent attack upon his official premises, private accommodation, or means of transport or attempts to commit any of the foregoing shall be fined not more than $5,000 or imprisoned not more than three years, or both. Whoever in the commission of any such act uses a deadly or dangerous weapon shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

(b) Whoever willfully—

(1) intimidates, coerces, threatens, or harasses a foreign official or an official guest or obstructs a foreign official in the performance of his duties;

(2) attempts to intimidate, coerce, threaten, or harass a foreign official or an official guest or obstruct a foreign official in the performance of his duties; or

(3) within the United States but outside the District of Columbia and within one hundred feet of any building or premises in whole or in part owned, used, or occupied for official business or for diplomatic, consular, or residential purposes by—

(A) a foreign government, including such use as a mission to an international organization;

(B) an international organization;

(C) a foreign official; or

(D) an official guest; congregates with two or more other persons with intent to violate any other provision of this section;

500 foot limit was literally and legally too broad.[28]

Boos raises a series of questions about both customary international law and the interaction between that body of law and the first amendment. The preliminary question is: What did the framers intend when they drafted the offenses clause? The language of the offenses clause accepts the fact that offenses might not be well defined. Thus, arguably, Congress has some flexibility in defining "offenses against the law of nations," both as a way of recognizing existing custom and as a way of participating in the development of custom. Part II of this Article considers the history of the offenses clause and the framers' intent in giving Congress the power to define offenses against the law of nations. This section also examines the few Supreme Court cases dealing with the offenses clause. It concludes that, while Congress was to take account of developing international law, it could not define such an offense where none existed. However, this section also concludes that the courts have been extremely generous in letting Congress decide what an offense is and that, especially since World War II, the focus in determining the "law of nations" has shifted from practice to treaties.

The next question is whether customary international law restricts nonviolent picketing outside an embassy to protect a foreign state's dignity interest. Part III of this Article examines whether customary international law restrains speech in the form of picketing, as embodied in section 22-1115. That inquiry begins with a brief examination of what one means by custom. This section then surveys the existing state practice, as well as the effect of the Vienna Convention on Diplomatic Relations.[29] Part III concludes that under any acceptable definition of custom, the court of appeals erred in *Boos* by failing to examine carefully international practice to verify the contours of custom. There appears to be no international offense in picketing peacefully. The court of appeals went astray by following some commentators who have asserted a broad

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shall be fined not more than $500 or imprisoned not more than six months, or both.

* * *

(d) Nothing contained in this section shall be construed or applied so as to abridge the exercise of rights guaranteed under the first amendment to the Constitution of the United States.

18 U.S.C. § 112(a), (b), (d) (1982).

28. The Court nonetheless affirmed the court of appeals holding as to the congregation clause. *Boos*, 108 S. Ct. at 1168-70.

29. April 18, 1961, 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95 (entered into force April 24, 1964; entered into force for United States, December 13, 1972) [hereinafter Vienna Convention].

duty to hold diplomatic agents and a diplomatic mission "inviolable"[30] and to protect their "dignity,"[31] without looking at actual international practice, which does not unambiguously prevent peaceful picketing.

Finally, although Congress might be mistaken in defining an offense, that does not mean the courts can interfere. The Constitution gives Congress the power to define offenses; if Congress misreads international law, the remedy may lie in the political process. Part IV, therefore, considers issues of judicial review. This section first examines whether the courts have any role to play; that is, whether the issue is nonjusticiable under the political question doctrine. Part IV then examines whether, at least in situations involving a statute that does not violate other constitutional prohibitions, the courts' deference to the political branches should tip the scales in favor of the congressional definition.

Part IV next considers the impact of the first amendment on the deference due the political branches' assertion that some peaceful picketing constitutes an offense against the law of nations. It shows that the standard justifications for judicial deference in the foreign relations area are inapposite. When the Legislature simply believes that there is an offense against the law of nations, first amendment considerations argue against any substantial judicial deference to the political branches.

II. CONGRESSIONAL DISCRETION TO DEFINE OFFENSES AGAINST THE LAW OF NATIONS

The President can articulate developing international law.[32] Although one does not typically think of Congress as speaking for the United States on what custom is, Congress and the President clearly have overlapping areas of authority in international affairs.[33] The offenses clause may explicitly provide Congress and the President with power to define international law. This section will examine the history of the offenses clause and judicial decisions interpreting it to determine the scope, if any, of Congress' discretion under that clause. The conclusion reached in this section is that Congress possesses some discretion in establishing the

30. *See, e.g.*, E. DE VATTEL, THE LAW OF NATIONS 463-64 (J. Chitty ed. 1844).

31. *See, e.g.*, Harvard Law School, Research in International Law, Codification of International Law, *reprinted in* 26 AM. J. INT'L L. 1, 19 (Supp. 1932) [hereinafter Harvard Research].

32. *See, e.g.*, Proclamation No. 2667, 10 Fed. Reg. 12,303 (1945) (proclamation of President Harry S. Truman entitled "Policy of the United States with respect to the Natural Resources of the Subsoil and the Sea Bed of the Continental Shelf").

33. A. SOFAER, WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER 58-60 (1976).

boundaries of offenses that are unclear, but Congress may not create offenses where none exist. Nonetheless, it will be evident that the courts have largely ignored the framers' rather limited conception of the offenses clause in favor of a more expansive view of congressional power.

A. *History of the Offenses Clause*

When they drafted the offenses clause, the framers had two concerns. First, probably with the De Longchamps affair[34] in mind, they wished to stop the states from defining and punishing offenses against the law of nations. Second, the framers wanted to put Congress in a position to deal with uncertainties as to what the offenses were. There is some evidence, however, that the framers believed the clause was not restricted to the "offenses against the law of nations" recognized in 1789.

The Articles of Confederation failed to give the Continental Congress the power to define and punish offenses against the law of nations.[35] To deal with that vacuum, in 1781, a committee of the Continental Congress recommended that the states enact laws "punishing infractions of the laws of nations."[36] The entire Continental Congress then passed a resolution recommending, among other things, that the states "provide expeditious, exemplary and adequate punishment . . . for the infractions of the immunities of ambassadors and other public ministers authorized and received as such by the United States in Congress assembled."[37] Few states responded and, in August 1785, the Continental Congress again passed a similar resolution.[38]

Most states still did not respond to those repeated recommendations.[39]

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34. Respublica v. De Longchamps, 1 U.S. (1 Dall.) 111 (Phila. O. & T. 1784) (a celebrated Pennsylvania case involving an insult to a French diplomat in Philadelphia). *See* G. ROWE, THOMAS MCKEAN: THE SHAPING OF AN AMERICAN REPUBLICANISM 209-17 (1978).

35. *See* Articles of Confederation, art. 9, *reprinted in* 1 J. ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 81 (2d ed. 1888) [hereinafter ELLIOT]. Congress only had appellate power over state decisions regarding captures on the high seas. *See id.*; 14 JOURNALS OF THE CONTINENTAL CONGRESS 635-36 (1779) (letter to the Minister Plenipotentiary of France); Letter from Edmund Randolph to the Speaker of the Virginia House of Delegates (Oct. 10, 1787), *reprinted in* 2 H. STORING, THE COMPLETE ANTI-FEDERALIST 86, 88 (1981).

36. The Committee was composed of Randolph, Duane and Witherspoon. 21 JOURNALS OF THE CONTINENTAL CONGRESS 1136 (1781).

37. *Id.* at 1136-37.

38. 29 JOURNALS OF THE CONTINENTAL CONGRESS 654-55 (1785).

39. Letter from Edmund Randolph, *supra* note 35, at 88.

When the Federal Convention gathered in 1787, one of the reasons for proposing a new constitution was precisely that failure of the states. For example, in proposing the Virginia Resolutions, which eventually formed the basis of the Constitution, Edmund Randolph "proceeded to enumerate the defects [of the Confederation]. . . . Of this he cited many examples; most of whi[ch] tended to shew, that they could not cause infractions of treaties or of the law of nations, to be punished: that particular states might by their conduct provoke war without controul. . . ."[40] Indeed, James McHenry's notes quote Randolph's criticism of the Confederation: "If the rights of an ambassador be invaded by any citizen it is only in a few States that any laws exist to punish the offender."[41]

The phrase "offenses against the law of nations" did not spring forth from the framers' quills. Many of them would have recalled it from Blackstone, "a book which," Madison noted, "is in every man's hands."[42] In a chapter entitled "Offenses Against the Law of Nations,"[43] Blackstone included violations of safe conducts, violations of the rights of ambassadors, and piracy. Other than piracy,[44] however, the prohibited acts were indefinite. "Offenses against the law of nations" were not completely ascertained.[45] Likewise, the common law did not adequately define "felonies on the high seas."[46]

The provision that became the offenses clause first appears in a draft of the Committee on Detail, probably from July 23, 1787.[47] It refers to "Punishment of . . . Offenses against the Law of Nations."[48] The clause, somewhat changed, was first debated on August 17, 1787; its initial formulation was "To declare the law and punishment of piracies and felonies &c."[49] Most of the rather limited discussion of the provision dealt with whether punishment of counterfeiting should be included in the provision and whether "define &" should be inserted before "punish,"

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40. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 19 (Farrand ed. 1937) [hereinafter FARRAND] (Madison's notes).

41. *Id.* at 25.

42. 3 ELLIOT, *supra* note 35, 501 (Madison's notes).

43. 4 W. BLACKSTONE, COMMENTARIES 66 (1st ed. 1765).

44. *See* United States v. Smith, 18 U.S. (5 Wheat.) 153, 155 (1820).

45. 2 J. STORY, COMMENTARIES ON THE CONSTITUTION § 1158 (2d ed. 1851).

46. *See* THE FEDERALIST No. 42, at 303-04 (J. Madison) (B. Wright ed. 1961); 2 J. STORY, *supra* note 45, § 1158.

47. 2 FARRAND, *supra* note 40, at 129 n.1

48. *See id.* at 168. The Report of the Committee on Detail, delivered on August 6, 1787, listed the following as a legislative power: "To declare the law and punishment of piracies and felonies committed on the high seas, and the punishment of counterfeiting the coin of the United States, and of offenses against the law of nations. . . ." *Id.* at 182.

49. *Id.* at 312 (Journal), 315 (Madison's notes).

although Madison did point out that "no foreign law should be a standard other than is expressly adopted."[50] Gouverneur Morris preferred "designate" to "define" since the latter was "limited to [its] preexisting meaning."[51] The convention rejected his suggestion. At the end of the discussion, Oliver Ellsworth "enlarged the motion so as to read 'to define and punish piracies and felonies committed on the high seas, counterfeiting the securities and current coin of the U. States, and offenses agst. the law of Nations' which was agreed to, nem con."[52] The measure came up again on September 14, 1787, in the voting on the report of the Committee of Style in the following form: "To define & punish piracies and felonies on the high seas, and punish offenses agst. the law of nations."[53] The entire reported debate was as follows:

> Mr. Govr. Morris moved to strike out "punish" before the words "offenses agst. the law of nations" so as to let these be *definable* as well as punishable, by virtue of the preceding member of the sentence.
>
> Mr. Wilson hoped the alteration would by no means be made. To pretend to *define* the law of nations which depended on the authority of all the Civilized Nations of the World, would have a look of arrogance. that would make us ridiculous.
>
> Mr. Govr The word *define* is proper when applied to *offenses* in this case; the law of (nations) being often too vague and deficient to be a rule.[54]

The motion to strike out the word "punish" passed by a narrow six to five margin.[55]

The debates and their conclusion indicate that the framers did not intend to limit offenses only to those in existence in 1789. Congress could, apparently, define new offenses if they arose in customary law.[56]

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50. *Id.* at 315-16. Madison reiterated this point in Federalist No. 42. He wrote that piracies might "without inconveniency" be defined by the law of nations; felonies, however, were only loosely defined in English law: "But neither the common, nor the statute law of that, or of any other nation, ought to be a standard for the proceedings of this, unless previously made its own by legislative adoption." THE FEDERALIST No. 42 (J. Madison), *supra* note 46, at 303-04.

51. 2 FARRAND, *supra* note 40, at 316.

52. *Id.*

53. *Id.* at 614. *See id.* at 570 (a Committee of Style draft that includes counterfeiting), 595 (a Committee of Style draft that does not include counterfeiting).

54. *Id.* at 614-15.

55. *Id.* at 615.

56. Even during the Confederacy, it was understood that, while "offenses against the law of nations" included the violation of passports and safe conducts, "infractions of the immunities of ambassadors" and infractions of treaties and conventions to which the United States was a party, those were "only . . . the most obvious." E. Randolph, J.

The notion of "define," however, was not that Congress could invent new offenses, but rather that it could clarify existing offenses.[57] Moreover, both Madison's fears about the imposition of foreign law, that is, the law of an individual foreign state, and Wilson's recognition that "all the civilized Nations of the World" participate in the development of custom indicate that the framers did not intend custom to be binding on this country unless the established custom was substantially uniform in the international community.

The Convention ended in September 1787 and the process of ratification began. Several themes ran through the ratifying process and debates. Among these themes were the need for a bill of rights,[58] potential abuses of the treaty power, and the taxing power.[59] By and large the offenses

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Duane, & J. Witherspoon, Report to Congress (Nov. 1781), *reprinted in* 3 P. KURLAND & R. LERNER, THE FOUNDERS' CONSTITUTION 66 (1987). This conception, and the subsequent history described in this section, appear to cut against Judge Bork's "admittedly speculative" notion that torts against the law of nations were intended to be limited to the three categories set out. *See* Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 815 (D.C. Cir. 1984) (Bork, J., concurring) (discussing 28 U.S.C. § 1350); *see also* W. RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 109 (2d ed. 1829) ("Such acts [offenses against the law of nations] may be of various kinds. . . .").

57. In July 1865, Attorney General James Speed opined to President Johnson: "To *define* is to give the limits or precise meaning of a word or thing in being; to make is to call into being. Congress has power to *define*, not to make, the laws of nations . . . . " 11 Op. Att'y Gen. 297, 299 (1865). Professor D'Amato apparently considered the point so obvious that it did not require discussion. Comment, *The Alien Tort Statute and the Founding of the Constitution*, 82 AM. J. INT'L L. 62, 63 n.6 (1988) (offenses clause uses "define" in sense of "articulate" or "recognize," not "invent").

58. George Mason, one of five delegates to vote against the Constitution, first noted the issue in his draft of the Constitution on September 12, 1787. 2 FARRAND, *supra* note 40, at 636-40. The Convention implicitly rejected it. *See id.* at 632; *see also id.* at 340-42 (Pinckney proposal) ("The liberty of the Press shall be inviolably preserved"); *id.* at 617-18 (Pinckney-Gerry motion) ("the Liberty of the Press should be inviolably preserved") (defeated). It appears that Richard Henry Lee and Melancthon Smith also argued for a bill of rights. Letter from James Madison to George Washington (Sept. 30, 1787), *reprinted in* 5 THE WRITINGS OF JAMES MADISON 4-8 (Hunt ed. 1904), *and in* 1 B. SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 440-42 (1971) [hereinafter BILL OF RIGHTS]. Mason circulated his objections to the proposed Constitution, one of which was the absence of a declaration of rights. MASON, OBJECTIONS TO THE PROPOSED FEDERAL CONSTITUTION (n.p. 1787), *reprinted in* P. FORD, PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES, 327-32 (1888 & reprint 1968) [hereinafter PAMPHLETS], *and in* 1 BILL OF RIGHTS, *supra*, at 444-47. *See also* Letter from The Federal Farmer (Richard Henry Lee) (Oct. 15, 1787), *reprinted in* 1 BILL OF RIGHTS, *supra*, at 471 (expressing concern that no constitutional bounds limited treaties).

59. Madison commented to Jefferson that "[t]he articles relating to Treaties, to pa-

clause was lost in the struggles over those larger issues. Reflecting the lack of conflict over the offenses clause, the Federalist Papers simply echoed the framers' reasons for adopting it. In Federalist No. 3, John Jay observed that under a national government the laws of nations should be "expounded in one sense," as opposed to being interpreted inconsistently by thirteen states.[60] The national government could also minimize the possibility of war by having the power, unencumbered by local pride, to punish violations of the laws of nations.[61] In Federalist No. 42, Madison argued that the powers in the offenses clause properly belong to the "federal government."[62] The Articles of Confederation had left "it in the power of any indiscreet member to embroil the confederacy with foreign nations."[63]

There was little controversy, if any, about the offenses clause in the debates of the thirteen states. Elliot's *Debates* contain nothing on the clause, although at one point they do mention a notorious offense against the law of nations—the arrest of the Russian ambassador by an English sheriff.[64] There must have been some dispute about the offenses clause, however. In a letter of November 1, 1787, "Cincinnatus"[65] responded to a speech in Philadelphia by James Wilson, complaining that the power to "define" offenses would include the "power to declare . . . all publications from the press against the conduct of government, in making treaties, or in any other foreign transactions, an offense against the law of nations."[66]

In addition, the issue arose obliquely in the federalists' response to George Mason's *Objections*.[67] James Iredell, who later became a Su-

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per money and to contracts, created more enemies than all the errors in the System positive & negative put together." Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), *reprinted in* 5 THE WRITINGS OF JAMES MADISON, *supra* note 58, at 269, 271, *and in* 1 BILL OF RIGHTS, *supra* note 58, at 614-15.

60. THE FEDERALIST No. 3 (J. Jay), *supra* note 46, at 98.

61. *Id.* at 99.

62. THE FEDERALIST No. 42 (J. Madison), *supra* note 46, at 303. *See* 3 ELLIOT, *supra* note 35, at 532 (Madison's argument at Virginia Convention). *See also* W. RAWLE, *supra* note 56, at 108.

63. THE FEDERALIST No. 42 (J. Madison), *supra* note 46, at 303.

64. 3 ELLIOT, *supra* note 35, at 507. The incident in question led to the British adoption of 7 Anne, ch. 12 (1708), *repealed by* Diplomatic Privileges Act, 1964, ch. 81, § 8(4), sched. 2.

65. "Cincinnatus" was thought to be Richard Henry Lee or Arthur Lee. *See* 6 H. STORING, *supra* note 35, at 6 n.2.

66. *Id.* at 8.

67. *See supra* note 58.

preme Court Justice, gave a point-by-point rebuttal.[68] Iredell argued at several points that there was no need for a bill of rights. He also dealt specifically with the fear that Congress would "constitut[e] . . . new crimes, and inflict unusual and severe punishment,"[69] stating:

> [C]ertainly the cases enumerated wherein the Congress are empowered either to define offences, or prescribe punishments, are such as are proper for the exercise of such authority in the general Legislature of the Union. They only relate to "counterfeiting the securities and current coin of the United States," to "piracies and felonies committed on the high seas, and offences against the law of nations," and to "treason against the United States." These are offences immediately affecting the security, the honor or the interest of the United States at large, and of course must come within the sphere of the Legislative authority which is intrusted with their protection.[70]

Iredell said nothing about the intent of the framers regarding the scope of the offenses clause. He side-stepped the scope of the clause and dealt only with the need for uniformity.

It would be a mistake to infer too much about the framers' and ratifiers' conception of the offenses clause from these historic excerpts. The framers understood that certain acts violated the law of nations; they were aware that the states had failed to deal adequately with those acts as crimes under their common law and that the law of nations was imprecise[71]—the new nation needed both a way to treat such offenses and uniformity. The federalists' arguments—especially those of Madison and Iredell—rested solely on the need for national, rather than state, laws and on the law of nations' lack of clarity. Neither the debates at the Convention nor the limited discussion during the ratification process evince any intent to give Congress a general warrant to create offenses. Moreover, neither Madison nor the antifederalist "Cincinnatus" missed the point that international law could infringe United States citizens' rights. It would thus extend the clause too far to permit Congress to use it to define offenses without a clear international law basis.

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68. MARCUS, ANSWERS TO MR. MASON'S OBJECTIONS TO THE NEW CONSTITUTION (Newbern 1788), *reprinted in* PAMPHLETS, *supra* note 58, at 333, *and in* 1 BILL OF RIGHTS, *supra* note 58, at 449.

69. 1 BILL OF RIGHTS, *supra* note 58, at 452.

70. *Id.*

71. Story later wrote in his COMMENTARIES: "Offences against the law of nations . . . cannot with any accuracy be said to be completely ascertained, and defined in any public code, recognized by the common consent of nations." 2 J. STORY, *supra* note 45, at § 1163.

B. *Judicially Permitted Scope of the Offenses Clause*

The First Congress passed the Act of April 30, 1790,[72] which defines certain acts as piracies[73] and others as crimes against ambassadors.[74] Since then only a few cases have considered issues under the offenses clause, and only a few of those have expressly or implicitly considered whether a suitably well-defined international law offense is needed to support congressional action under the clause.

It would have been anomalous for the framers to have viewed "offenses against the law of nations" as a static grouping. They understood the law of nations to be, at least in part, positive law derived from the customs of nations.[75] As common law lawyers, the framers knew that the law evolved as customs changed. They inserted the congressional power to define offenses against the law of nations into a document that they certainly understood would be not for the moment, but for the ages. It was only thirty years after the Convention that John Marshall, who participated in the Virginia Convention,[76] wrote that "it is a constitution we are expounding."[77]

Courts have permitted Congress to adapt offenses to changing times. Indeed, no court has ever invalidated a statute enacted pursuant to the offenses clause on the ground that no offense against the law of nations existed. The cases, albeit equivocally, seem to give Congress a somewhat freer hand in defining crimes under the offenses clause than they generally give courts in integrating customary international law into United States law, in the sense that in some cases less evidence of custom is needed to establish an offense than is needed to establish custom generally.[78] In some cases, such as *United States v. Arjona*,[79] the Court took

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72. 1 Stat. 112.

73. *Id.* at 113-14. *See* United States v. Klintock, 18 U.S. (5 Wheat.) 144 (1820).

74. 1 Stat. at 112, 117-18. Subsequently, certain of those crimes, largely based on 7 Anne, ch. 12 (1708), *supra* note 64, were codified at R.S. §§ 4063-66, and then at 22 U.S.C. § 252-54, which were repealed in 1978. Act of Sept. 30, 1978, Pub. L. No. 95-393, § 3(a)(1), 92 Stat. 808.

75. 1 J. WILSON, *supra* note 12, *reprinted in* 3 P. KURLAND & R. LERNER, *supra* note 12, at 70-71. Wilson was a delegate to the Federal Convention, one of the leading federalists, a justice of the Supreme Court, and a law professor. *See generally* G. SEED, JAMES WILSON (1978); C. SMITH, JAMES WILSON (1956).

76. L. BAKER, JOHN MARSHALL: A LIFE IN LAW 118-19 (1974).

77. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819).

78. *Compare* The Paquete Habana, 175 U.S. 677 (1900) (non-offenses clause case; substantial evidence of international practice) *with* United States v. Arjona, 120 U.S. 479 (1887) (offenses clause case; only Vattel used as evidence).

79. 120 U.S. 479 (1887) (affirming conviction under act prohibiting the counterfeit-

into account Congress' authority under the necessary and proper clause[80] as well as its authority under the offenses clause.[81] In *Frend v. United States*,[82] the court relied on Congress' exclusive power of legislation in the District of Columbia,[83] in addition to the offenses clause.[84] Whatever the rationale, when Congress has passed laws recognizing new offenses against the law of nations, the courts have consistently upheld Congress' authority.[85]

An example of the Court's relaxed view of customary international law occurs in *United States v. Arjona*,[86] decided in 1886. The issue in *Arjona* was whether Congress could punish the counterfeiting of foreign bank notes under the offenses clause. Chief Justice Waite, writing for the Court, cited only Vattel to establish (a) that if a nation allows and protects counterfeiters, it injures the nation whose money is counterfeited, and (b) that nations have a duty to protect "exchange," the traffic between bankers.[87] Extrapolating from these rules, the Court found that the United States could call upon other nations to protect United States bank notes, that such an obligation was reciprocal, and that the United States was bound to protect it.[88] The Court did not inquire into the practice of other nations.

Fifty-five years later, in a case that arose during World War II, the Supreme Court wrote an opinion that throws light on congressional power to define offenses. In *Ex parte Quirin*,[89] the issue was whether a spy could be tried by a military commission, rather than by standard criminal procedures.[90] Congress enacted the regulations at issue pursuant to its power to "make Rules for the Government and Regulation of the land and naval Forces."[91] Those regulations gave military tribunals

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ing of foreign notes, bonds, and securities). *See also* United States v. White, 27 F. 200 (C.C.E.D. Mo. 1886).

80. U.S. CONST. art. I, § 8, cl. 18.

81. *Arjona*, 120 U.S. at 483.

82. 100 F.2d 691 (D.C. Cir. 1938).

83. U.S. CONST. art. I, § 8, cl. 17.

84. *Frend*, 100 F.2d at 692.

85. In one recent case the court even suggested that Congress define an offense, narcotic trafficking. United States v. Marino-Garcia, 679 F.2d 1373, 1382 n.16 (11th Cir. 1982). The court cited no evidence of practice.

86. 120 U.S. 479 (1887).

87. *Id.* at 484-85 (citing 1 E. DE VATTEL, THE LAW OF NATIONS 46-47 (J. Chittey ed. 1876)).

88. *Id.* at 486-87.

89. 317 U.S. 1 (1942).

90. *Id.* at 18-19.

91. U.S. CONST. art. I, § 8, cl. 14.

jurisdiction over "offenders or offenses that . . . by the law of war may be triable by such military commissions."[92] The Court noted that under the offenses clause, Congress might properly incorporate the law of nations by reference, without explicit definition.[93] The Court stated that Congress could use a similar technique for incorporating the law of war. In defining the relevant law of war, the Court cited, among other things, the Hague Convention No. IV,[94] British, German and Italian military manuals,[95] and pre-Constitutional United States practice.[96] The Court also cited numerous authors, including Moore, Hyde, Oppenheim, Bluntschli, Calvo and Halleck.[97] *Quirin* seemed to imply that if the evidence of states' practice had been less conclusive, Congress might not have been able to incorporate it as a "law of war." Such an implication may, however, read too much into *Quirin.*

Writing the majority opinion in *In re Yamashita,*[98] Chief Justice Stone gave a more expansive interpretation to international precedent. Yamashita had been commander of Japanese troops in the Philippines. After his army's defeat, he was tried as a war criminal before a military commission for failing to take steps to prevent troops under his command from committing atrocities. The commission, established under the offenses clause,[99] was a proper forum only if Yamashita was charged with violating the laws of war, part of the law of nations.[100] Seeking habeas corpus relief, Yamashita argued that the United States had not charged him with violating the laws of war. The issue in *Yamashita* was whether a military commander violates the laws of war by refusing "to take such appropriate measures . . . to control the troops under his command for the prevention of" acts which themselves violate the laws of war.[101] The Court held that provisions in three international conventions to which Japan was a party imposed a duty on Yamashita to take affirmative

92. *Quirin,* 317 U.S. at 30 (quoting Articles of War, ch. 418, art. 15, 39 Stat. 619, 653 (1916), *repealed by* Uniform Code of Military Justice, ch. 169, art. 21, 64 Stat. 108, 115 (1950) (current version at 10 U.S.C. § 821 (1982)).

93. *Id.* at 29-30 (citing United States v. Smith, 18 U.S. (5 Wheat.) 153 (1820)).

94. *Id.* at 30 n.7 (citing Convention Respecting the Laws and Customs of War on Land (Hague Convention No. IV), Oct. 18, 1907, ann. 1, 36 Stat. 2277, 2295, T.S. No. 539, at 643, 205 Parry's T.S. 277, 289).

95. *Id.* at 30-31 nn.7-8.

96. *Id.* at 31 n.9.

97. *Id.* at 30-31 nn.7-8; *see also id.* at 35 n.12 (referring to the "unanimous" view of all authorities).

98. 327 U.S. 1 (1946).

99. *Id.* at 7.

100. *Id.* at 7, 13.

101. *Id.* at 14-15.

steps to protect civilians and prisoners of war within his jurisdiction.[102] Those provisions, however, dealt only tangentially with the issue; no provision dealt specifically with a commander's obligation to control his troops. The Court also cited two arbitrations, again tangential, and the orders of the United States Army.[103] Justice Murphy wrote in dissent:

> [T]here was no serious attempt to charge or to prove that [Yamashita] committed a recognized violation of the laws of war. . . . The recorded annals of warfare and the established principles of international law afford not the slightest precedent for such a charge.[104]

Yamashita may be explained mainly by the fact that victors were judging a vanquished foe whose troops had committed clear atrocities. The Court played somewhat fast and loose with precedent, although it purportedly made an attempt to ground its international law holding in actual state practice.[105] In doing so, however, it relied principally on a treaty—not what the framers had in mind as the "law of nations"—and foreshadowed courts' now frequent reliance on multilateral conventions both as sources of the law of nations and as evidence of customary international law.[106]

As Part III of this Article demonstrates, United States courts in the nineteenth century were relatively careful when they determined customary international law, apart from the offenses clause. An early example illustrates the different approaches to Congress' attempt to create international law and domestic law.

In 1825, in *The Antelope*,[107] Chief Justice Marshall held that al-

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102. *Id.* at 15-16.

103. *Id.* at 16 & n.3.

104. *Id.* at 28 (Murphy, J., dissenting). Justice Rutledge also dissented.

105. *But see* United States v. Rodriguez, 182 F. Supp. 479, 494 (S.D. Cal. 1960), *aff'd sub nom.* Rocha v. United States, 288 F.2d 545 (9th Cir. 1961) (holding that false statements abroad to obtain entry document into United States constitutes an offense against the law of nations; no discussion of practice or *opinio juris*); CISPES v. FBI, 770 F.2d 468, 474-75 (5th Cir. 1985) (upholding statute under international law; no evidence of practice or *opinio juris*); Concerned Jewish Youth v. McGuire, 621 F.2d 471 (2d Cir. 1980), *cert. denied*, 450 U.S. 913 (1981).

106. *See, e.g.*, United States v. Yunis, 681 F. Supp. 896, 900-01 (D.D.C. 1988) (establishing offenses of air piracy and hostage taking pursuant to Convention on Offenses and Certain Other Acts Committed onboard Aircraft, Sept. 14, 1963, 20 U.S.T. 2941, T.I.A.S. No. 6768, 704 U.N.T.S. 219; Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, T.I.A.S. No. 7192, 860 U.N.T.S. 105; and Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 564, T.I.A.S. No. 7570, 974 U.N.T.S. 177). *See also infra* note 163 (cases using treaties as evidence of custom).

107. 23 U.S. (10 Wheat.) 66 (1825).

though the United States had enacted a statute defining the slave trade as piracy, the slave trade was not therefore a violation of the law of nations. Consequently, the capture of a vessel on the high seas was illegal under that statute. In this case, a privateer, the *Arraganta*, captured two vessels, one Spanish—the *Antelope*—and one Portugese, off the coast of Africa.[108] It took slaves from both vessels and put them aboard the *Antelope*, with a prize-master and prize-crew. As the *Antelope* and the *Arraganta* proceeded toward Brazil, the *Arraganta* was lost at sea. After further adventures at sea, including a name change, the *Antelope* proceeded to Florida, where Captain Johnson of the United States revenue cutter *Dallas*, thinking her a pirate, captured her on the high seas[109] and "brought her in for adjudication."[110] The Vice Consuls of Spain and Portugal libelled the *Antelope*, claiming different proportions of the slaves aboard.[111]

As is relevant here, the principal question for the Court was whether the slave trade violated the law of nations.[112] If the law of nations did not render the trade illegal, the visitation and search of the *Antelope*, a foreign ship, on the high seas and in peacetime was illegal and the slaves had to be restored to their owners.[113] The United States argued that two statutes legitimized the capture.[114] One, an 1820 enactment, made the slave trade piracy when carried on by a United States citizen;[115] the other, an 1807 statute, forfeited any ship or vessel "hovering on the coast of the United States," with "negro[es], mulatto[es] or person[s] of colour" aboard, intending to sell them as slaves or to land them in the United States.[116] Counsel for the Vice Consuls argued that "[t]hough the law of the United States has made this traffic piracy, it has not, therefore, made it an offense against the law of nations."[117]

After surveying the law,[118] which showed that many states still did not forbid slavery, Marshall concluded that international law did not render the slave trade illegal, that is, the law of the United States did not make slave trade an offense against the law of nations. He wrote:

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108. *Id.* at 123.
109. *Id.* at 123-24.
110. *Id.* at 124.
111. *Id.*
112. *Id.* at 115.
113. *Id.* at 123.
114. *Id.* at 106-07 (argument of the Attorney General).
115. Act of May 15, 1820, ch. 113, § 5, 3 Stat. 600, 601.
116. Act of March 2, 1807, § 7, 2 Stat. 426, 428.
117. *The Antelope*, 23 U.S. (10 Wheat.) at 99 (argument of Mr. Berrien).
118. *See infra* text accompanying note 149.

> No principle of general law is more universally acknowledged than the perfect equality of nations. Russia and Geneva have equal rights. It results from this equality, that no one can rightfully impose a rule on another. . . . As no nation can prescribe a rule for others, none can make a law of nations, and this traffic remains lawful to those whose governments have not forbidden it.
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> If it is consistent with the law of nations, it cannot in itself be piracy. It can be made so only by statute, and the obligation of the statute cannot transcend the legislative power of the state which may enact it.[119]

Since the legislative power of the United States did not reach out to the high seas, the capture was improper. Marshall did not have to consider whether Congress had properly created a domestic offense. Still, the principal conclusion that follows from Marshall's opinion is that Congress cannot, by legislative fiat, transmute an act that is not against the law of nations into one that is.

Apart from its particular and outmoded holding,[120] the Court in *The Antelope* employed a passive view of the United States' adoption of international law; that is, a nation only recognizes when custom has coalesced into law. In Marshall's view, even if the United States had enacted a statute making slave trading a domestic crime, it would have been derived, at best, from an emerging norm of international law, so such a statute would not create international law. That formulation would preclude the United States from participating in the development of international law by enacting criminal measures under the offenses clause, in which international law had not fully matured. *Arjona* and *Yamashita* implicitly give Congress a somewhat wider scope in developing customary law, since they found violations of the law of nations without any specific precedent.[121] Thus, Congress might more actively

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119. *The Antelope*, 23 U.S. (10 Wheat.) at 122. *See also* 1 J. KENT, *supra* note 13, at 200.

120. Justice Story, sitting as a circuit judge, had earlier reached the opposite result in United States v. The La Jeune Eugenie, 26 F. Cases 832 (C.C.D. Mass. 1822) (No. 15,551). Justice Story believed his earlier decision was proper. Letter from Joseph Story to Hon. Ezekiel Bacon (Nov. 19, 1848), *quoted in* B. ZIEGLER, THE INTERNATIONAL LAW OF JOHN MARSHALL 309 n.44 (1939). Today, slavery and slave trading are recognized as violative of a peremptory norm of international law. *See infra* note 471. *See also* 1 J. KENT, *supra* note 13, at 181 (three offenses against law of nations: violation of passports, violation of ambassadors, piracy; slave trade not "absolutely unlawful by the law of nations, but . . . a trade condemned by the general principles of justice and humanity").

121. The Nuremberg Tribunals used much the same technique. D'Amato, Gould, and Woods demonstrate that virtually all of those Nazis convicted under the "innovative crimes" of waging or conspiracy to wage wars of aggression were also convicted of

participate in the development of customary law. But even the *Yamashita* Court does not, at least explicitly, give Congress broad enough discretion to characterize an emerging norm as an existing norm. That is, the Supreme Court has not said that Congress has authority to *create* the law of nations; Congress only has authority to *define* the law of nations.[122]

The limitation on Congress' international *law-making* power embodied in *The Antelope* holding may not be so anomalous. The offenses clause is hardly the most important way the United States Government contributes to the development of international law. Executive branch acts and, presently, treaties are probably the principal contributors. Moreover, a nation helps develop international law by its own practice. By outlawing slavery under different heads of legislative authority, the United States joined other nations in establishing the antislavery norm. Similarly, *Arjona's* result could have been achieved under the commerce clause.[123] Finally, an interpretation of the offenses clause that requires some congruence with international practice appears consistent with the intent of the framers, who took the power to define offenses against the law of nations away from the states in order to prevent "indiscretions." Granting free rein to Congress to do the same thing was probably not their idea.

At any rate, *The Antelope* reminds us that while progressiveness and flexibility are built into the offenses clause, there are limits beyond which Congress may not go. Those limits consist of two types. There must be an international law offense, with some reasonable degree of substance, and the definition of that offense must not transgress other constitutional restraints.

III. THE PUTATIVE OBLIGATION UNDER CUSTOMARY INTERNATIONAL LAW TO RESTRICT PEACEFUL PICKETING

The Constitution contains no formula for defining offenses against the law of nations. That presumably posed no problem to the framers. They understood both the limited scope of that body of law and the type of evidence used to ascertain it. In particular, the framers relied on actual state practice to demonstrate custom. Things have changed, however, in the intervening two centuries. Scholars have argued that a wider variety

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"traditional" war crimes. D'Amato, Gould & Woods, *War Crimes and Vietnam: The "Nuremberg Defense" and the Military Service Resister*, 57 CALIF. L. REV. 1055, 1061-63 (1969).

122. *See supra* note 57.

123. U.S. CONST. art. I, § 8, cl. 3. *See* L. HENKIN, *supra* note 4, at 323 n.26.

of evidence of practice, such as unilateral declarations, is acceptable as evidence of custom. In addition, especially since World War II, the dominant mode of international law formation has been the multilateral treaty, rather than custom. Although treaties are only binding on parties, they can have a broader effect. As will be described below, such treaties can affect custom in two ways. They may codify and be evidence of existing custom, and they may create new rules that crystallize into customary norms. In either case the norms they evidence may be or may become binding on non-parties.

To determine whether there is a customary norm that forbids peaceful picketing that brings "public odium" or "disrepute" on a state, this section examines traditional sources of custom relied on by United States courts. It then considers the one relevant treaty, the Vienna Convention on Diplomatic Relations (Vienna Convention),[124] to determine if that instrument indicates that peaceful picketing can constitute an offense. This section concludes that the traditional sources reveal very little actual practice to support such a notion. In addition, an analysis of the drafting and interpretation of the Vienna Convention does not suggest that its drafters believed it embodies a customary norm forbidding peaceful picketing.

A. *Customary International Law Apart From the Vienna Convention on Diplomatic Relations*

Custom has two components. First, there must be state practice,[125]

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124. *See supra* note 29.

125. The leading guide to sources of international law, article 38 of the Statute of the International Court of Justice, reads as follows:

> Article 38(1) The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
> (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting States;
> (b) international custom, as evidence of a general practice accepted as law;
> (c) the general principles of law recognized by civilised nations;
> (d) subject to the provisions of Article 59, 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.

Stat. I.C.J., art. 38, *reprinted in* BASIC DOCUMENTS OF INTERNATIONAL LAW 397 (I. Brownlie 3d ed. 1983) [hereinafter BASIC DOCUMENTS]. Article 59 states that decisions of the International Court of Justice are binding only between the parties and in respect of a particular case. *Id.* art. 59, *reprinted in* BASIC DOCUMENTS, *supra,* at 401. Akehurst points out that paragraph (b) is backward. M. AKEHURST, A MODERN INTRODUCTION TO INTERNATIONAL LAW 32 (5th ed. 1984). Although the term "source of

which, while not necessarily universal, must be nearly uniform.[126] The core factual question is when does nonbinding practice ripen into binding custom.[127] The subsidiary questions include the following: What constitutes "practice"; how much practice is necessary;[128] what must the duration of the practice be or need there be any duration at all; how consistent must it be? Second, in addition to those quantitative factors, there is a qualitative, psychological factor: Western writers generally[129] assert that states must believe themselves legally bound to adhere to the practice, *opinio juris sive necessitatis* (*opinio juris*).[130] As Brierly stated,

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international law" is confusing, *see* H. KELSEN, PRINCIPLES OF INTERNATIONAL LAW 437-38 (R. Tucker 2d ed. 1966), it should not be confused with evidence.

126. Most writers believe that the practice need not be "universal," but beyond that the rule is unclear. *See* Sohn, *"Generally Accepted" International Rules*, 61 WASH. L. REV. 1073, 1074 (1986); Akehurst, *supra* note 1, at 20 ("practice must be virtually uniform, not absolutely uniform") (citation omitted).

127. *See generally* M. AKEHURST, *supra* note 125, at 25-29; I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 4-10 (3d ed. 1979); A. D'AMATO, CONCEPT OF CUSTOM, *supra* note 2, at 47-72; W. FRIEDMANN, THE CHANGING STRUCTURE OF INTERNATIONAL LAW 121-23 (1964); G. TUNKIN, THEORY OF INTERNATIONAL LAW 123 (W. Butler trans. 1974); Kunz, *The Nature of Customary International Law*, 47 AM. J. INT'L L. 662 (1953); Sohn, *supra* note 126, at 1074. One could distinguish between "usage," which is not binding, and "custom," which is. I. BROWNLIE, *supra*, at 5. Soviet jurists abjure the term "usage"; they distinguish between "custom" (nonbinding) and "customary norm of international law" (binding). Tunkin, *Remarks on the Juridical Nature of Customary Norms of International Law*, 49 CALIF. L. REV. 419, 422 (1961).

128. *See* Baxter, *Treaties and Custom*, 129 RECUEIL DE COURS pt. 1, at 25, 67, 73 (1970).

129. *But see* H. KELSEN, *supra* note 125, at 444-45; Guggenheim, *Les Deux Elements de la Coutume en Droit International*, in 1 ETUDES EN L'HONNEUR DE G. SCELLE 275-80 (1950). *Cf.* H. KELSEN, *supra* note 125, at 440 (states must believe acts are "obligatory or right," although not necessarily in response to "legal norm").

130. Akehurst, *supra* note 1, at 31. The American Law Institute has taken that position: "Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1986) [hereinafter RESTATEMENT (THIRD)]. *See* Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 97-98; North Sea Continental Shelf (W. Ger. v. Den.; W. Ger. v. Neth.), 1969 I.C.J. 4, 44; Asylum (Colo. v. Peru), 1950 I.C.J. 266, 276-77; S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A.) No. 10, at 18 (Sept. 7). In contrast, Tunkin argues that *opinio juris* means acceptance or recognition by states as a juridically binding norm of law. Tunkin, *supra* note 127, at 422-23. D'Amato rejects the standard theories of *opinio juris*, substituting the "requirement that an objective claim of international legality be *articulated* in advance of, or concurrently with, the act which will constitute the quantitative elements [sic] of custom." A. D'AMATO, CONCEPT OF CUSTOM, *supra* note 2, at 74. D'Amato intends to reduce the arbitrariness—and perhaps the impossibility—of determining a psychological factor from collective acts. Yet many

"[W]hat is sought for is a general recognition among states of a certain practice as obligatory."[131]

In the present case, one must demand high levels of proof of both state practice and *opinio juris*. Here, and perhaps more generally, the quantitative factors are interrelated. Where the phenomenon is unique and nonrepetitive, a limited amount of practice may indicate a trend toward development of a legal norm, and may, if many states express adherence to the norm, have a jural quality. If the phenomenon at issue is one that recurs frequently, however, such as picketing, one would expect to see a large number of cases, decided over a substantial period of time, reaching the same conclusion, if there were really a norm. Thus, one should not be satisfied with isolated judicial decisions or declarations; one should also require a substantial amount of consistent evidence. As will be seen, that is precisely what United States courts did historically.

Likewise, there must be evidence of *opinio juris*. There is a substantial body of practice regarding diplomatic relations. Much of that practice, however, is a matter of comity, not obligation.[132] Given the need for diplomatic relations, states often extend courtesies to other states' envoys. Absent *opinio juris*, however, these courtesies are not legally required.[133]

Most writers agree that contemporary international practice permits consideration of a wide variety of evidence of custom to help demonstrate the existence of a practice.[134] This evidence ranges from diplomatic cor-

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acts are responsive to perceived legal obligations, even when the actor does not articulate the obligation. On the other hand, if the actor need not pronounce the obligatory nature of the act, it is hard to see how D'Amato's formulation helps.

131. J. BRIERLY, THE LAW OF NATIONS 61 (H. Waldock 6th ed. 1963). *See* W. FRIEDMANN, *supra* note 127, at 121; 1 G. SCHWARZENBERGER, INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 17 (2d ed. 1949). On the difficulty of determining when usage matures into customary international law such that states believe the usage is obligatory, see generally A. D'AMATO, CONCEPT OF CUSTOM, *supra* note 2.

132. *See infra* notes 141-78. *See also* Tunkin, *supra* note 127, at 421 (article predating the Vienna Convention).

133. One writer has argued that a norm may exist although there is "no usage at all in the sense of repeated practice" as long as one can "clearly establish[]" the *opinio juris*. Cheng, *United Nations Resolutions on Outer Space: "Instant" International Customary Law?*, 5 INDIAN J. INT'L L. 23, 36 (1965). Lambert has taken a marginally less extreme position in arguing that a single act suffices. LAMBERT, ETUDES DE DROIT COMMUN LEGISLATIF OU DE DROIT CIVIL COMPARE 140-42 (1903). Here, much of the practice indicates no *opinio juris*.

134. *See, e.g.*, I. BROWNLIE, *supra* note 127, at 5. Brownlie states:

> The material sources of custom are very numerous and include the following: diplomatic correspondence, policy statements, press releases, the opinions of official legal advisors, official manuals on legal questions, e.g. manuals of military law,

respondence to national and international judicial decisions to treaties and declarations. Professor Anthony D'Amato takes a somewhat more restricted view of the evidence of practice, including actual acts and commitments to act (for example, treaties), but excluding claims and unilateral declarations that are not disguised treaties.[135] As will be demonstrated, the "norm" asserted by the government in *Boos v. Barry*[136] is not supported by the broad definition; a fortiori it does not fulfill Professor D'Amato's criterion.[137]

Courts may consider the works of commentators as a source of international law, although such works play only a subsidiary role.[138] On the

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executive decisions and practices, orders to naval forces etc., comments by governments on drafts produced by the International Law Commission, state legislation, international and national judicial decisions, recitals in treaties and other international instruments, a pattern of treaties in the same form, the practice of international organs, and resolutions relating to legal questions in the United Nations General Assembly.

Id. (footnotes omitted). Brownlie uses "material source" as synonymous with "evidence." For examples of various types of evidence, see The Scotia, 81 U.S. (14 Wall.) 170, 186-87 (1871) (considering domestic legislation of other nations to determine rule of maritime law); North Sea Continental Shelf (W. Ger. v. Den.; W. Ger. v. Neth.), 1969 I.C.J. 4, 32-33, 47, 53 (Truman Proclamation treated as evidence of custom in international case); Nottebohm (Liech. v. Guat.), 1955 I.C.J. 2, 22 (national laws relied upon for principle that naturalization exists only when there is a genuine link to that nation); Rights of United States Nationals in Morocco (Fr. v. U.S.), 1952 I.C.J. 175, 200, 209 (diplomatic correspondence and conference records); Genocide Case, 1951 I.C.J. 15, 25, 34-36 (advisory opinion; practice of United Nations Secretary-General). The evidence may show the duration, uniformity, consistency and generality of the practice, as well as *opinio juris*. I. BROWNLIE, *supra* note 127, at 6-7. The International Court of Justice considered, among other things, support for a conference resolution, ratification of a convention, and acceptance of the principles of the Helsinki Conference on Security and Co-operation in Europe as evidence of *opinio juris*. Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 100.

135. A. D'AMATO, CONCEPT OF CUSTOM, *supra* note 2, at 88-91.

136. 108 S. Ct. 1157 (1988), *aff'g in part, rev'g in part*, Finzer v. Barry, 798 F.2d 1450 (D.C. Cir. 1986).

137. It is often difficult to locate examples of practice, especially when they reside in the archives of foreign offices. Akehurst, *supra* note 1, at 13; A. D'AMATO, CONCEPT OF CUSTOM, *supra* note 2, at 16; *see also* Stein, *supra* note 15, at 459 & n.6. But the point is not purely methodological: if states are not aware or cannot readily become aware of a practice or of its obligatory character, the "rule" does not meet one of the basic criteria of legality. L. FULLER, THE MORALITY OF LAW 39, 49-51 (rev. ed. 1969).

Much of the practice supporting the existence of the suggested norm dates from the late eighteenth and early nineteenth centuries. Even uniform practice that is generally 150 years old, however, could hardly constitute a present day rule if current practice is nonexistent or contrary.

138. *See* Stat. I.C.J., *supra* note 125, art. 38(1)(d), *reprinted in* BASIC DOCUMENTS,

other hand, in the absence of state practice that meets reasonable tests of duration, uniformity and generality, it is difficult to see that even "uniform commentary" could create law or be conclusive evidence of customary international law.[139]

1. Custom in United States Courts

To the framers, who were immersed in the writings of the seventeenth and eighteenth centuries' international legal scholars, the idea of custom was a standard part of their intellectual equipment.[140] International law was part of domestic law; the structure of custom was the same in both systems: Usage that "has obtained in any civil society from time immemorial . . . is presumed to have been obtained with consent."[141] The "customary law of nations,"[142] or customary international law, was a body of law separate from treaties. The distinction was well known to the framers[143] and the Constitution reflects it. For example, the Consti-

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supra note 125, at 397. M. AKEHURST, *supra* note 125, at 37. Brownlie observes, "National courts are unfamiliar with state practice and are ready to lean on secondary sources." I. BROWNLIE, *supra* note 127, at 26.

139. *See* Asylum (Colom. v. Peru), 1950 I.C.J. 266, 276 ("The Party which relies on a custom . . . must prove that this custom is established in such a manner that it has become binding on the other Party . . . that the rule invoked . . . is in accordance with a constant and uniform usage practised by the States in question, and that this usage is the expression of a right appertaining to the State granting asylum and a duty incumbent on the territorial State.").

140. *See* Grey, *supra* note 12, at 852-54.

141. T. RUTHERFORTH, INSTITUTES OF NATURAL LAW 396 (2d American ed. 1832). The law of nations, as understood by the framers, encompassed a relatively small number of subjects, including the international law of the rights and duties of ambassadors. Dickinson, *The Law of Nations as Part of the National Law of the United States* (pt. I), 101 U. PA. L. REV. 26, 30 (1952); *see also* Trimble, *supra* note 4, at 690-91, 723-24. The international law of ambassadors was, at least until recently, based upon international practice. I. BROWNLIE, *supra* note 127, at 345; 1 W. BLACKSTONE, *supra* note 43, at 247 ("[T]he general practice of Europe seems now to have adopted the sentiments of the learned Grotius, that the security of embassadors is of more importance than the punishment of a particular crime.") (citation omitted). With the entry into force of the Vienna Convention, much of the prior custom is embodied in a treaty. Higgins, *The Abuse of Diplomatic Privileges and Immunities: Recent United Kingdom Experience*, 79 AM. J. INT'L L. 641, 642 (1985). *But see* [1958] 2 Y.B. INT'L L. COMM'N 100, U.N. Doc. A/CN.4/SER.A/1958/Add. 1 (although exemption from customs duties for personal items is not a customary legal norm, it is of such general practice that the International Law Commission proposed its inclusion in the Vienna Convention).

142. The phrase is Alexander Hamilton's. Letters of Camillus, No. 20 *reprinted in* 7 THE WORKS OF ALEXANDER HAMILTON (H. Lodge ed. 1904).

143. In 1793, Chief Justice John Jay, one of the framers, charged the jury in the trial of Gideon Henfield: "[T]he laws of the United States admit of being classed under

tution refers specifically both to treaties[144] and the law of nations.[145]

Curiously, neither the Supreme Court nor the court of appeals in *Boos* acknowledged the complexity of the inquiry into custom or made any systematic effort to determine either state practice or *opinio juris*. Rather, their "custom" comprised an incoherent mixture of United States constitutional history, United States practice, the writing of Vattel and, in an undefined way, the Vienna Convention.[146]

Earlier American judges were both more cognizant of and more attentive to the quantative issues involved in determining custom.[147] In 1815, for example, in *The Nereide*[148] the Supreme Court considered whether a neutral could ship goods in a belligerent vessel without the good's being subject to capture and confiscation as a prize. On the issue of whether a treaty that said "neutral bottoms make neutral goods" implied "hostile bottoms make hostile goods," Chief Justice Marshall for the Court appeared to rely on the actions of other nations, and particularly a declaration by the King of Prussia.[149] More important, Justice Story, in dissent,

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three heads of descriptions. 1st. All treaties made under the authority of the United States. 2d. The laws of nations. 3dly. The constitution, and statutes of the United States." Henfield's Case, 11 F. Cas. 1099, 1100-01 (C.C.D. Pa. 1793) (No. 6,360).

144. U.S. CONST. art. II, § 2; art. VI.

145. *Id.* art. I., § 8, cl. 10. *See also* THE FEDERALIST No. 3 (J. Jay), *supra* note 46, *at* 98.

146. Boos v. Barry, 108 S. Ct. 1157, 1164-68 (1988) *aff'g in part, rev'g in part*, Finzer v. Barry, 798 F.2d 1450, 1455-58 (D.C. Cir. 1986). In its defense, the Supreme Court did not purport to consider the issue in depth.

147. United States cases have not carefully examined *opinio juris*. A LEXIS search of all federal cases in that service reveals the term "*opinio juris*" only once. *See* Lareau v. Manson, 507 F. Supp. 1177, 1193 n.18 (D. Conn. 1980). The notion has been expressed, however, in other decisions. *See* The Paquete Habana, 175 U.S. 677, 694 (1900) (custom becomes law with the "general assent of civilized nations"); United States v. Arjona, 120 U.S. 479, 484, 487 (1887) (law of nations requires states to use due diligence to prevent wrongs to states with whom they are at peace; United States "bound" to protect a right secured by the law of nations to another nation); Filartiga v. Pena-Irala, 630 F.2d 876, 880-81 (2d Cir. 1980) (citing The Paquete Habana, 175 U.S. 677 (1900)); Stat. I.C.J., *supra* note 125, art. 38, *reprinted in* BASIC DOCUMENTS, *supra* note 125, at 397 ("general practice accepted as law"). For an early scholarly view of the evidence of custom, see 1 J. KENT, *supra* note 13, at 18-19.

148. 13 U.S. (9 Cranch) 388 (1815).

149. *Id.* at 420. Earlier, Jay had said:

> I do hereby make known, that whosoever of the citizens of the United States, shall render himself liable to punishment or forfeiture, under the law of nations, by committing, aiding, or abetting hostilities against any of the said powers, or by carrying to them those articles which are deemed contraband, by the modern usage of nations, will not receive the protection of the United States against such punishment or forfeiture. . . .

discussed whether the fact that the *Nereide* had resisted capture—unsuccessfully—overcame the rule "asserted in the most broad and unqualified manner in publicists,"[150] that neutral goods could lawfully be shipped aboard enemy vessels without being prize. Justice Story, more of a scholar than Chief Justice Marshall,[151] found it "utterly inadmissible" to argue that the absence of treaties dealing with the issue indicated that it was not the law that resistance transformed a neutral into a belligerent.[152] He cited English prize decisions and the statement of a Danish minister.[153]

In 1820, in *United States v. Smith*,[154] Justice Story demonstrated even more graphically how an erudite judge determines custom. Pursuant to the offenses clause, Congress had made a "crime of piracy, as defined by the law of nations." Justice Story found that piracy was sufficiently defined by the law of nations so that Congress could incorporate that body of law by reference.[155] He cited jurists, "general usage and practice," and judicial decisions.[156] Justice Story's opinion contains a nineteen-page footnote—enough to warm the heart of any law review editor—setting out commentaries by United States, British, French, Spanish, Swiss and German writers, French and British statutes, and British trials.[157]

In a subsequent case, *The Antelope*,[158] Chief Justice Marshall had to consider the legality under international law of the slave trade. In the course of his review of international law, he considered English opinions, the acts of France, and the practice of nations in Africa.[159]

Seventy-five years later, in *The Paquete Habana*,[160] the Supreme

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Henfield's Case, 11 F. Cas. 1099, 1102 (C.C.D. Pa. 1793) (No. 6,360).

150. *The Nereide*, 13 U.S. (9 Cranch) at 437 (Story, J., dissenting).

151. *See* B. ZIEGLER, *supra* note 120, at 13-15.

152. *The Nereide*, 13 U.S. (9 Cranch) at 437-41 (Story, J., dissenting).

153. *Id.* at 442-43 (Story, J., dissenting).

154. 18 U.S. (5 Wheat.) 153 (1820).

155. *Id.* at 160-62.

156. *Id.* at 160-61.

157. *Id.* at 163-81 n.(a).

158. 23 U.S. (10 Wheat.) 66 (1825). The opinion leaves little doubt of Marshall's moral abhorrence of the practice. *See, e.g., id.* at 114-16, 121.

159. *Id.* at 116-21. Marshall wrote:

> Whatever might be the answer of a moralist to this question, a jurist must search for its legal solution, in those principles of action which are sanctioned by the usages, the national acts, and the general assent, of that portion of the world of which he considers himself as a part, and to whose appeal the law is made.

Id. at 121.

160. 175 U.S. 677 (1900). *See also* The Venus, 12 U.S. (8 Cranch) 253, 278-80 (1814) (considering English decisions in deciding question of international law).

Court dealt with the question whether certain Cuban fishing smacks were subject to capture by United States armed vessels during the Spanish American War. The Court began by referring to "an ancient usage among civilized nations, beginning centuries ago, and gradually ripening into a rule of international law."[161] The Court considered an extensive variety of sources, including orders issued in 1403 and 1406 by Henry IV of England, a treaty of October 2, 1521, between the Emperor Charles V and Francis I of France, French and Dutch edicts of 1536, a letter of June 5, 1779, from Louis XVI to his admiral, standing orders of a judge of the English high court of admiralty, decisions of a French prize tribunal, and records of the United States Navy Department.[162]

Thus, for the first 100 years after the Constitution, in deciding the existence of customary international law, justices of the Supreme Court looked to the actual practice of states. That method, in theory at least, retains its vitality in non-offenses clause cases.[163] The Court relied upon

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161. *The Paquete Habana*, 175 U.S. at 686.

162. *Id.* at 687-97. *See also* Hilton v. Guyot, 159 U.S. 113, 207-27 (1895) (in deciding an issue of the international law of effect of judgments, Court considered judicial decisions from England, France, Belgium, Holland, Denmark, Germany, various Swiss cantons, Russia, Poland, Romania, Bulgaria, Austria, Italy, Monaco, Spain, Portugal, Greece, Egypt, Cuba, Puerto Rico, Haiti, Mexico, Peru, Chile and Brazil).

163. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 421-22 n.21 (1962) (judicial decisions of United Kingdom, France, Germany, the Netherlands, Greece, Italy, Switzerland and Japan relating to act of state doctrine); *id.* at 429-30 (discussing international judicial and arbitral decisions and commentators from various countries regarding the international law of compensation after expropriation). *See also* New Jersey v. Delaware, 291 U.S. 361, 381-84 (1934).

In this century, the use of international instruments, such as treaties and declarations of international organizations, especially the United Nations, both to codify existing custom and to generate new custom is far more widespread than it was previously. *See, e.g.*, W. FRIEDMANN, *supra* note 127, at 123-24; R. HIGGINS, THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS 4-7 (1963); G. TUNKIN, *supra* note 127, at 133-37; Akehurst, *supra* note 1, at 5-7; D'Amato, *Treaties as a Source of General Rules of International Law*, 3 HARV. INT'L L.J. 1 (1981); Stein, *supra* note 15, at 464-66. *But see* Baxter, *supra* note 128, at 99 ("Rules found in treaties can never be conclusive evidence of customary international law."). *See generally* M. VILLIGER, CUSTOMARY INTERNATIONAL LAW AND TREATIES xxv, 3-61, 183-205 (1985). *See also* Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 530 (Jennings, J., dissenting); Western Sahara, 1975 I.C.J. 12, 31-33 (advisory opinion) (General Assembly Resolution 1514 (XV) (1960) conforms application of right of self-determination).

These developments have been reflected in many cases. For example, in Filartiga v. Pena-Irala, 630 F.2d 876, 881-84 (2d Cir. 1980), the Second Circuit based its decision that official torture violates the law of nations on, among other things, the United Nations Charter; the Universal Declaration of Human Rights, G.A. Res. 217 (IIIA)

the writings of publicists as secondary evidence.[164] United States judges also understood that state practice had to have an obligatory quality to

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(1948); the Declaration on the Protection of All Persons from being Subjected to Torture, G.A. Res. 3452, 30 U.N. GAOR Supp. (No. 34) at 91, U.N. Doc. A/1034 (1975); the International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966); the American Convention on Human Rights, Nov. 22, 1969, O.A.S. T.S. No. 36 at 1, O.A.S. Off. Rec. OEA/Ser. 4/16; and the cases decided under the European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221. On the other hand, in Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 795-96 (D.C. Cir. 1984) (Edwards, J., concurring), Judge Edwards of the District of Columbia Circuit held that terrorism does not violate the law of nations, relying on several General Assembly resolutions. Both *Filartiga* and *Tel-Oren* involve claims under the Alien Tort Claims Act, 28 U.S.C. § 1350 (1982).

Cases involving Cuban and Haitan refugees have also raised issues of when treaties and international declarations create customary norms. *See, e.g.*, Fernandez-Rogue v. Smith, 622 F. Supp. 887, 901-04 (N.D. Ga. 1985), *aff'd sub. nom.* Garcia-Mir v. Meese, 88 F.2d 1446 (11th Cir. 1986) (even if customary international law violated by prolonged arbitrary detention, "controlling" act of executive branch overcomes force of international legal norm); Haitian Refugee Center, Inc. v. Gracey, 600 F. Supp. 1396, 1406 (D.D.C. 1985) (Universal Declaration of Human Rights merely a nonbinding resolution); Fernandez v. Wilkinson, 505 F. Supp. 787, 796-98 (D. Kan. 1980), *aff'd on other grounds*, 654 F.2d 1382 (10th Cir. 1981) (prolonged arbitrary detention violates customary international law as expressed in Universal Declaration of Human Rights, *supra*; European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra*; and International Convention on Civil and Political Rights, *supra*). *See also In re* Alien Children Education Litig., 501 F. Supp. 544, 594, 595-96 (S.D. Tex. 1980) (various international instruments did not establish existence of customary international law right to education).

United States courts have also dealt with custom as codified in treaties. *See, e.g.*, United States v. Pena-Jessie, 763 F.2d 618, 620-21 (4th Cir. 1985) (Convention on the High Seas, Apr. 12, 1961, 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82, codifies custom); United States v. Williams, 617 F.2d 1063, 1090 (5th Cir. 1980) (en banc) (same).

In the criminal area, courts have had to consider assertions that customary norms give extra protection to defendants. *See, e.g.*, People v. Ghent, 43 Cal. 3d 739, 779, 239 Cal. Rptr. 82, 108-09 (1987) (Lucas, C.J.); *id.* at 780-81, 239 Cal. Rptr. at 109-10 (Mosk, J., concurring).

164. *See, e.g., The Paquete Habana*, 175 U.S. at 700. In *The Paquete Habana*, the Court stated:

> [W]here there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat.

Id.

be law.[165] In contrast, the court of appeals in *Boos* made no attempt to canvas international practice. The court did not even mention the concept of *opinio juris*. The latter is particularly disturbing because much of the practice relating to diplomats has long been considered a matter of international comity, rather than of international obligation.[166]

2. Evidence of International Custom: Punishment for Insults to an Ambassador's Dignity

The protection foreign diplomats receive or should receive is encompassed in the term "inviolability."[167] The notion of diplomatic inviolability goes back, at least, to the time of King David of Israel.[168] There have been several competing theories of a state's duty to protect foreign ambassadors. One such theory was based upon the notion that the ambassador was the representative of the sovereign.[169] Another was based upon

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165. *See supra* note 90.

166. *See supra* note 137; *infra* note 178.

167. 1 R. GENET, TRAITE DE DIPLOMATIE ET DE DROIT DIPLOMATIQUE, § I (1931); Harvard Research, *supra* note 31, at 90-91 (1932); 1 H. LAUTERPACHT, OPPENHEIM'S INTERNATIONAL LAW § 385 (8th ed. 1955); F. PRZETACZNIK, PROTECTION OF OFFICIALS OF FOREIGN STATES ACCORDING TO INTERNATIONAL LAW 3 (1983); E. DE VATTEL, *supra* note 30, at 464 ("Embassies then, being of such great importance in the universal society of nations, and so necessary to their common well-being, the persons of ministers charged with those embassies are to be held *sacred* and *inviolable* among all nations . . . .") (emphasis in original). Lauterpacht, on the other hand, indicates that inviolability itself is an attribute of the inherent "dignity of states." 1 H. LAUTERPACHT, *supra*, § 120.

168. 2 C. HYDE, INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES § 433 (2d ed. 1945). The Greek city-states recognized the idea, 1 R. GENET, *supra* note 167, at 494-95; R. NUMELIN, THE BEGINNING OF DIPLOMACY 299 (1950), as did the Romans. P. CORBETT, LAW AND SOCIETY IN THE RELATION OF STATES 191 & n.7 (1951). Nor is the notion limited to Western law. *See* E. DENZA, DIPLOMATIC LAW 135 & n.3 (1976) (Indian Law); Bassiouni, *Protection of Diplomats Under Islamic Law*, 74 AM. J. INT'L L. 609 (1980); *see also* Deák, *Classifications, Immunities and Privileges of Diplomatic Agents*, 1 S. CAL. L. REV. 209, 210-15 (1928). Indeed, Grotius, noting the sacred character of the rights of ambassadors and the fact that they were under the protection of the gods, stated that a violation of those rights was "not only unjust, but impious." 2 H. GROTIUS, DE JURE BELLI ET PACIS ch. 18, § 1 (W. Whewell trans. lst ed. 1853).

169. *See Report of the Tenth Session of the International Law Commission, Diplomatic Privileges and Immunities*, 13 U.N. GAOR Supp. (No. 9), at 11, U.N. Doc. A/3859 (1959), *reprinted in* 53 AM. J. INT'L L. 253, 266 (1959); C. HURST, INTERNATIONAL LAW: THE COLLECTED PAPERS OF SIR CECIL HURST 176-77 (1950); C. WILSON, DIPLOMATIC PRIVILEGES AND IMMUNITIES 1-5 (1967); E. DE VATTEL, *supra* note 30, at 464. Curiously for this theory, recognition of the rights of ambassadors preceded recognition of the rights of sovereigns. *See, e.g.*, J. BRIERLY, *supra* note 131, at

the "extraterritoriality" of the embassy.[170] At present, however, states have accepted a functional, rather than a verbal, rationale for inviolability:[171] inviolability is necessary to promote the ambassadorial function. As one commentator has noted with regard to ambassadors,

> [I]t is obvious that, were they liable to ordinary legal and political interference like other individuals, and thus more or less dependent on the good will of the Government, they might be influenced by personal considerations of safety and comfort to a degree which would materially hamper them in the exercise of their functions.[172]

The point is that, whether or not one uses the term inviolability, it has often been stated that nations must provide some level of protection for diplomatic agents that is greater than that which they provide either their own citizens or other foreigners, in order that the diplomat can properly perform his or her mission.[173]

Diplomatic protection covers a wide range of possible immunities. It includes freedom from the criminal and civil jurisdiction of the receiving state[174] and generally freedom from customs duties and taxes.[175] Some authors have gone farther and written that inviolability is "the protection against any aggression, illegal attack, injury or either physical or moral offense."[176] One way to give effect to the international obligation to protect the inviolability of diplomats is to provide increased penalties for offenses against them, including offenses against their dignity or reputa-

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254; P. CORBETT, *supra* note 168, at 189.

170. C. WILSON, *supra* note 169, at 5-16; *see* 1 W. BLACKSTONE, *supra* note 43, at 246-48.

171. C. WILSON, *supra* note 169, at 17-25; Note, *Diplomatic Immunity: A Proposal for Amending the Vienna Convention to Deter Violent Criminal Acts*, 5 B.U. INT'L L.J. 177, 200-02 (1987) (Vienna Convention adopts functional view). By 1932, the Harvard Researchers had rejected both extraterritoriality and "inviolability" as useful terms and had adopted the functional approach. Harvard Research, *supra* note 31, at 51-57.

172. 1 H. LAUTERPACHT, *supra* note 167, at 788.

173. C. HURST, *supra* note 169, at 176; Przetacznik, *The Protection of Foreign Officials Under International Law*, 9 ANGLO-AM. L. REV. 177, 185 (1980). *But see* F. PRZETACZNIK, *supra* note 167, at 6 (discussing writers who view inviolability as only immunity from "measures of constraint").

174. *See, e.g.*, 2 C. HYDE, *supra* note 168, at § 435; 1 P. CORBETT, CASES ON INTERNATIONAL LAW 340 (1947); P. CORBETT, *supra* note 168, at 190-99. For other examples of immunity, see 2 C. HYDE, *supra* note 168, at §§ 436-37, 440-42.

175. *See, e.g.*, J. BRIERLY, *supra* note 131, at 258-59.

176. F. PRZETACZNIK, *supra* note 167, at 7 (citing 1 C. BEVILAGUA, DIREITO PUBLICO INTERNACIONAL 425 (1911); C. CISNEROS, DERECHO INTERNACIONAL PUBLICO 86 (1966); M. Giuliano, *Les Relations et Immunités Diplomatiques*, 100 HAGUE RECUEIL 125 (1960-II)).

tions. Alternatively, a state might establish separate offenses for violations of diplomatic inviolability.[177] The protection can be custom or it can rise to the level of a legal norm. The issue here is whether the protection against "moral offenses," if given at all, exists simply as nonbinding custom[178] or as a binding international legal norm.

Initially, it is necessary to define the inquiry. If one looks for evidence of an obligatory international practice that states punish or, at least, discourage peaceful picketers who are within certain number of feet of an embassy and who are carrying signs likely to bring odium or disrepute upon a foreign state, the search will prove relatively fruitless. There are no examples of international practice or even of domestic legislation, other than section 22-1115, that purport to authorize such a result. Accordingly, one must broaden the inquiry to cases in which a foreign state or an ambassador, as the representative of a foreign state, has been insulted but not physically harmed, and the sending state demands redress or the receiving state punishes the act.[179] Except for a few cases distinguished almost as much by their antiquity as by their ambiguity, it is virtually impossible to find any cases or other examples of state practice involving insults only.[180] On the other hand, commentators going back to Grotius have regularly asserted that international law prohibits insults to ambassadors.[181]

a. Judicial Decisions

The conceit that insulting a diplomat is sufficiently serious to provoke a war goes back to biblical times. The Old Testament reports that King David of Israel waged and won a war against King Hanum of the Ammonites after the latter treated an Israelite ambassador with contempt.[182] Nonetheless, it is difficult to find examples of judicial decisions or claims in the United States or in other jurisdictions recognizing mere insults as violations of the law of nations.[183]

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177. *See, e.g.*, 2 D. O'CONNELL, INTERNATIONAL LAW 899-90 (2d ed. 1970); *see also* F. PRZETACZNIK, *supra* note 167, at 7.

178. For example, O'Connell pointed out in the first edition of his treatise that the "universal practice" of exemption of diplomats from local taxation is "more a matter of comity than of law." 2 D. O'CONNELL, INTERNATIONAL LAW 977 (1st ed. 1965).

179. Cases of actual violence differ, of course, from insults. Violence, or even a realistic threat of violence, unquestionably interferes with the diplomatic function. Moreover, free speech concerns are absent when the protestors' aim is physical harm.

180. *See infra* text accompanying notes 185-205.

181. *See supra* note 168; *see infra* text accompanying notes 261-63.

182. 1 *Chronicles* 19; 2 *Samuel* 10:18-19.

183. *But see* F. PRZETACZNIK, *supra* note 167, at 221, text accompanying nn.58-59.

Cases from foreign jurisdictions are too rare and too ambiguous to establish a practice of protecting diplomats from insults. Genet reports a 1728 case in which an individual was condemned to death in Sweden for publically insulting Louis XV's ambassador.[184] In *State v. Acuna Araya*,[185] a well-known Costa Rican case, the Peruvian *chargé d'affairs* had instigated a quarrel by calling the defendant a drunkard and making a gesture with his umbrella as though to strike the defendant.[186] Although the report is slightly unclear, it appears the defendant returned the insult and physically assaulted the *chargé*. In the course of holding that the *chargé's* conduct excused the defendant,[187] the court assumed that "offenses by word" would constitute a violation.[188] This is, however, merely dicta since the real issue in the case was whether the assault/insult was excused.

Five British cases deal with criminal libels on foreign monarchs or ambassadors, but none evidences that there is an international obligation to impose criminal liability or *opinio juris*.[189] Sir James Stephen, in his *History of the Criminal Law of England*, classifies them with seditious libel.[190] In the 1764 case of *R. v. D'Eon*,[191] the defendant Chevalier D'Eon charged the French ambassador, Count Guereley, with forging D'Eon's letters of recall. He was convicted and Lord Mansfield observed to the other ambassadors present at the sentencing that "the law of England . . . would equally protect [foreign ambassadors] from all insults, as well on their reputation as their persons or property, as the laws of any

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Neither incident discussed by Przetacznik indicates that the expressions of regret sent by the country whose citizens offended the foreign dignitary—in neither case an ambassador, but in each case the head of state—reflected a legal responsibility.

184. 1 R. GENET, *supra* note 167, at 496. Vattel also reports an incident, of uncertain date, in which "a company of young rakes" insulted the house of the British minister in a Swiss town, not knowing that it was his home. The local magistrate asked the minister what satisfaction he desired, but the latter responded that nothing was required because he was not affronted as the young men had not known who he was. E. DE VATTEL, *supra* note 30, at 465-66.

185. 4 Ann. Dig. 359 (Costa Rica Ct. Cass. 1927).

186. *Id.* at 359.

187. *Id.* at 360-61.

188. *Id.* at 359-61.

189. The lack of express references to international obligations in the earlier cases may reflect the Blackstonian view that customary international law was part of English law. 4 W. BLACKSTONE, *supra* note 43, at 67. *See also* Triquet v. Bath, 3 Burr. 1478, 97 Eng. Rep. 936 (K.B. 1764)) (Mansfield, L.J.) (law of nations part of common law of England).

190. 2 J. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 375 & n.1 (1883).

191. 1 BLACK. 510, 96 Eng. Rep. 295 (K.B. 1764).

other country."[192] This is not a statement that international law provided the protection. In 1787, Lord George Gordon was tried for libelling Marie Antoinette and the French *chargé d'affaires*, M. Barthelemy, by calling the latter a spy and a participant in a kidnap attempt.[193] However, in prosecuting, the Attorney General stated that "[t]he laws of England protect every man's character from reproach."[194] International law did not serve to impose any extra obligation. Subsequent cases involve not only insults but allegations of encouraging assassination.[195] The editor of Russell on Crimes gives the reason for those prosecutions; the reason was not an international legal obligation, but rather that "malicious and scurrilous reflections upon foreign sovereigns or their representatives may tend to involve this country in disputes, animosities and warfare . . . ."[196] Even so, more than 100 years ago, Stephen commented regarding these decisions that "highly important judicial decisions . . . give a right to every one to criticise fairly, that is honestly, even if mistakenly the public conduct of public men," a group which he evidently believed included ambassadors.[197]

Putting aside a 1708 incident involving the British ambassador to Venice, it does not appear that Britain has complained about any cases of mere insults to her envoys in modern times. Parry lists a number of incidents under the heading of "injuries and insults," in the 1965 edition of the *British Digest of International Law*, but all involve violence, including shooting, sabre-cuts or physical invasions of diplomatic premises.[198]

A diplomatic exchange regarding the incidents that led up to the outbreak of World War I is also instructive regarding the possibility of legal

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192. *Id.* at 517, 96 Eng. Rep. at 298.

193. R. v. Gordon, 22 Howell's St. Tr. 213 (1787).

194. *Id.* at 225.

195. K. v. Vint, 27 Howell's St. Tr. 627 (1799); R. v. Peltier, 28 Howell's St. Tr. 529 (1803); R. v. Most, 7 Q.B.D. 244 (1881). Lauterpacht calls *Vint* and *Peltier* "exceptional." 1 H. LAUTERPACHT, *supra* note 167, § 121, at 283 n.1.

196. 2 RUSSELL ON CRIME 1549 (12th ed. 1964).

197. 2 J. STEPHEN, *supra* note 190, at 376. It is not at all clear that Sir James approved of that; in the next paragraph he noted the "state of moral and intellectual anomaly in which we live at present." *Id.*

198. 7 BRITISH DIGEST OF INTERNATIONAL LAW 714-16 (C. Parry ed. 1965). *See also* Public Prosecutor v. Hjelmeland, *summarized in* 87 JOURNAL DU DROIT INT'L 512 (1960)(1956 decision of Norwegian Supreme Court under that country's statute that punishes, among other things, anyone who "publicly insults the flag or coat of arms of a foreign State or threatens or attacks a diplomatic representative or does damage to any building used by a foreign embassy"; actual act involved throwing a bomb at the Soviet Union's embassy).

redress for insults. Austria-Hungary had protested, among other things, articles appearing in Serbian newspapers.[199] It requested that Serbia crack down on newspaper articles that printed pieces hostile to Austria-Hungary. Serbia responded with a diplomatic note indicating that in "almost all countries" such articles were "quite ordinary" and "not generally under state control."[200] Austria-Hungary responded by stating that the "practice of modern states, even under the freest interpretation of rights of the press" rendered the press "of public character" and "subject to state supervision."[201] Serbia offered to amend its law to punish hostile publications against Austria-Hungary, but the latter rejected the offer, in part because of the well-known difficulty in obtaining punishment in such cases.[202]

Among United States courts there is only one decision that even intimates that, in the absence of physical injury, insulting a foreign diplomat would violate international law. *Respublica v. De Longchamps*,[203] was a decision by Chief Justice McKean of Pennsylvania, sitting at Oyer and Terminer. In this case, de Longchamps had gone to the residence of the French minister and violently threatened Francis Barke de Marbois, secretary to the French legation. Chief Justice McKean held that the threat was a violation of the law of nations and that the law of nations was part of Pennsylvania's law.[204] This was not, however, a case of a mere insult, but of a violent threat.

Still, this appears to be as far as United States courts were willing to go. Although a number of early cases consider threats and insults in-

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199. 8 AM. J. INT'L L. Supp. 381 (1914).

200. *Id.* at 387.

201. *Id.*

202. *Id.* at 388-89.

203. 1 U.S. (1 Dall.) 111 (Phila. O. & T. 1784). This case, which began when a French emigre in Philadelphia married a young Quaker woman against the wishes of her guardians, had political as well as legal and romantic ramifications. The emigre, Charles Julien de Longchamps, claimed a noble lineage. He asked the French consul general to help him prove his claims and, when the latter refused, threatened him. Later the same day, more heated words were exchanged and de Longchamps struck the consul general with his cane. The Philadelphia diplomatic corps was outraged; both the French and United Netherlands ministers threatened to leave the city. The latter urged the Continental Congress to proclaim the law of nations to be a part of the law of each state. *See* G. ROWE, *supra* note 34, at 209-14.

204. *De Longchamps*, 1 U.S. (1 Dall.) at 117. Justice McKean was a member of the Continental Congress, a leading federalist, Pennsylvania's chief justice for 22 years, and its governor. G. ROWE, *supra* note 34, at xii, 57, 304-06. Justice McKean was also involved in another celebrated case involving an alleged libel on the Spanish minister, Don Carlos Martinez D'Yrujo. G. ROWE, *supra* note 34, at 295-99.

flicted on diplomatic personnel,[205] none finds that a mere insult violates international law.

In contrast to these rather antiquated incidents, it is a commonplace event to see demonstrations in front of diplomatic missions.[206]Indeed, the problem is far more serious than mere verbal insults;[207] the State Department has had to "stress[] defense against mob attacks."[208] When the demonstrations turn violent, the news media comment.[209] Otherwise, they go largely unnoticed.

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205. United States v. Ravana, 2 U.S. (2 Dall.) 297 (Wilson, Circuit Justice 1793) (consul can be charged with a misdemeanor for sending "anonymous and threatening letters" to British minister, citizens of Philadelphia, and other persons); United States v. Liddle, 26 F. Cas. 936 (C.C.D. Pa. 1808) (No. 15,598) (assault and battery of public minister); United States v. Hand, 26 F. Cas. 103 (C.C.D. Pa. 1810) (No. 15,297) (shooting at Russian *charge d'affaires*); United States v. Ortega, 27 F. Cas. 359 (C.C.E.D. Pa. 1825) (No. 15,971), *aff'd*, 24 U.S. (11 Wheat.) 467 (1826) (assault on a foreign minister); United States v. Benner, 24 F. Cas. 1084 (C.C.E.D. Pa. 1830) (No. 14,568) (assaulting and imprisoning Danish minister); United States v. Jeffers, 26 F. Cas. 596 (C.C.D.C. Cir. 1836) (No. 15,471) (constable intruded upon house of secretary of British legation to take a "colored lad," serving there, back to his "master" in Alabama).

While the court in *Hand* indicated that insulting an ambassador, or someone in his train, would violate the law of nations, the language is dictum. Moreover, given the violent context of the case (a shot through a window), it is not clear if a simple verbal insult would constitute an offense against the law of nations.

Nor do arbitrations involving the United States support the notion that insults or violations of "dignity" would constitute a violation of international law. *See, e.g.*, William E. Chapman Claim, 1930 Op. of the Comm'rs 121 (U.S.-Mex. General Claims Comm'n), *reprinted in* 25 AM. J. INT'L L. 544 (1931) (violation of international law not to provide protection to consul against threats of physical harm); Francisco Mallén Claim, 1927 Op. of the Comm'rs 254 (U.S.-Mex. General Claims Comm'n), *reprinted in* 21 AM. J. INT'L L. 803 (1927) (same).

206. *See* Brief for Petitioners at 32-33, Boos v. Barry, 108 S. Ct. 1157 (1988).

207. *See* Friedlander, *The Crime of Kidnapping of Diplomatic Personnel*, in 1 M. BASSIOUNI, INTERNATIONAL CRIMINAL LAW 485 (1986) (in 17 years preceding 1985, United States lost more diplomats to terrorism than in prior 150 years); Perez, *The Impact of International Terrorism*, 82 DEP'T ST. BULL. 55 (1982).

208. Perez, *supra* note 207, at 56.

209. *See, e.g.*, 8 AM. J. INT'L L. Supp. 385-86; C. WILSON, *supra* note 169, at 57-58. *See also* Dehaussey, *The Inviolability of Diplomatic Residences*, 83 JOURNAL DU DROIT INT'L 597 (1956) (citing various violent attacks on embassies in 1955 and 1956, but no examples of mere insults; author argues in favor of international law obligation to give special protection to the persons of diplomats, while conceding there is no such obligation with respect to embassy buildings).

b. Opinions of Legal Advisers

Custom can be realized in domestic legal systems through the opinions of governmental legal advisers. A review of the available United States and English opinions reveals parallel trends: in the late eighteenth and early nineteenth centuries, advisers believed that insulting an ambassador violated international law, but by the middle of the nineteenth century, those advisers either opined that there was no special penalty attached to insulting an envoy or discouraged offended parties from bringing actions.

Early attorneys general of the United States several times voiced their view that insulting or defamatory statements made about ambassadors were punishable under international law. In 1794, Attorney General William Bradford wrote to the Secretary of State, regarding the publication in the New York Journal of an article allegedly libeling the British Minister, Mr. Hammond. Noting that a malicious publication, tending to render a citizen "ridiculous, or to expose him to public contempt and hatred, or to injure him in his profession, is deemed a libel," Bradford stated that "in the case of a foreign public minister, the municipal law is strengthened by the law of nations, which secures the minister a peculiar protection, not only from violence, but also from insult."[210]

Only three years later, Attorney General Charles Lee considered whether the United States could bring a libel prosecution against the editor of Porcupine's Gazette for carrying certain allegedly defamatory letters regarding the King of Spain and the Spanish Minister Plenipotentiary.[211] Relying on Blackstone, he opined that each of the letters

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210. 1 Op. Att'y Gen. 52 (1794). Prosecutions for criminal libel are "almost obsolete." Note, *Constitutionality of the Law of Criminal Libel*, 52 COLUM. L. REV. 521, 533 (1952). Often, criminal libel laws are either unconstitutionally vague, *see, e.g.*, Ashton v. Kentucky, 384 U.S. 195, 198 (1966); Gottschalk v. State, 575 P.2d 289, 292-95 (Alaska 1978), or run afoul of New York Times v. Sullivan, 376 U.S. 254 (1964). *See, e.g.*, Garrison v. Louisiana, 379 U.S. 64 (1964); Eberle v. Municipal Court, 55 Cal. App. 3d 423, 431-33, 127 Cal. Rptr. 594, 599-600 (1976). Moreover, it is not clear whether Bradford correctly assumed that the criminal libel would be punishable in federal courts. In 1812, the Supreme Court held in a libel case that United States courts had no common law jurisdiction. United States v. Hudson and Goodwin, 11 U.S. (7 Cranch) 32 (1812). *But see* Dickinson, *The Law of Nations as Part of the National Law of the United States* (pt. II), 101 U. PA. L. REV. 792, 793-95 (1952).

211. 1 Op. Att'y Gen. 71 (1797). *See supra* note 204. Citing Lord Mansfield, Lee stated that "the liberty of the press consists in printing without any previous license, subject to the consequence of law." *Id.* at 72. Until at least the early twentieth century, many assumed that the entire content of the first amendment was the freedom from prior administrative restraint. *See, e.g.*, L. LEVY, EMERGENCE OF A FREE PRESS 204 (1985) (" 'what is meant by liberty of the press is that there should be no antecedent legal restraint upon it' "). *See, e.g.*, Patterson v. Colorado, 205 U.S. 454, 462 (1907) (Holmes,

could be deemed libelous. Lee then made some observations that anticipated free speech concerns with regard to this type of prosecution:

> As yet, in the United States, the line between the freedom and licentiousness of the press has not been distinctly drawn by judicial decision. With respect to national concerns among ourselves, as well as with respect to foreign nations, our presses have been unlimited and unrestrained. If on those subjects the liberty of the press can be excessive, or carried to licentiousness, it must be admitted that, in many instances, licentiousness of the press has prevailed in our country.[212]

Although he cited no specific examples, Lee observed that ambassadors and other representatives of foreign nations are "entitled to be treated with respect . . . and especially ought not to be libeled by any of the citizens."[213]

> An affront to an ambassador is just cause for national displeasure, and, if offered by an individual citizen, satisfaction is demandable of his nation. It is not usual for nations to take serious notice of publications in one nation containing injurious and defamatory observations upon the other; but it is usual to complain of insults to their ambassadors, and to require the parties to be brought to punishment.[214]

Lee also stated that the Supreme Court would have jurisdiction over actions involving libels of ambassadors, but since no law establishing such an action existed, no action could be brought.[215] This statement was an accurate prediction of what the Supreme Court would hold in its 1812 decision in *United States v. Hudson & Goodwin* that there is no federal common law of crimes.[216] Nevertheless, Lee's conclusion is somewhat

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J.). *But see* Near v. Minnesota *ex rel.* Olsen, 283 U.S. 697 (1931).

212. 1 Op. Att'y Gen., at 72. Consider also John Marshall's letter of October 16, 1793, published in the Virginia Gazette and General Advertiser. In arguing that a letter in a recent newspaper supporting Jefferson's neutrality proclamation should not "discontent" France, Marshall noted:

> Are we so sunk, so degraded even in our own eyes, that we become accountable as a nation for the false reasoning of any individual, who may chuse to publish his opinions? The papers of America teem with publications testifying our ardent attachment to France; while the press remains free (and Heaven forbid its freedom should be violated) every individual may reason on every subject, according to his own judgment.

2 THE PAPERS OF JOHN MARSHALL 228 (C. Cullen & H. Johnson eds. 1974).

213. 1 Op. Att'y Gen., at 72-73.

214. *Id.* at 73.

215. *Id.* at 73-74.

216. 11 U.S. (7 Cranch) 32 (1812).

curious. At the time when he made his observation, both state[217] and federal[218] courts recognized that the law of nations is part of the United States law. There was also authority that international law offenses could be punished in United States courts.[219] Thus, one might naively conclude that if international law required punishment of an insult against a minister, no statute would be necessary. Because there is no federal common law of crimes, including offenses against the law of nations,[220] the result is understandable.[221]

By the mid-nineteenth century,[222] however, it was clear that the federal government would take no action regarding even libelous letters addressed to foreign ministers.[223] The reasons reflected a concern for free

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217. Respublica v. De Longchamps, 1 U.S. (1 Dall.) 111 (Pa. O. & T. 1784).

218. Ware v. Hylton, 3 U.S. (3 Dall.) 199, 281 (1796) (Wilson, J.); *see also* 1 Op. Att'y Gen. 26, 27 (1792) (Randolph) ("The law of nations, although not specially adopted by the constitution or any municipal act, is essentially a part of the law of the land.").

219. Henfield's Case, 11 F. Cas. 1099, 1100-01 (C.C.D. Pa. 1793) (No. 6,360).

220. *See* United States v. Coolidge, 14 U.S. (1 Wheat.) 415, 416-17 (1816).

221. The development of the statutory law of piracy supports this conclusion. Congress made piracy criminal by the Act of March 3, 1819, ch. 77, § 5, 3 Stat. 510-13, (current version at 18 U.S.C. § 1651 (1982)). However, that act refers to piracy "as defined by the law of nations." In United States v. Smith, 18 U.S. (5 Wheat.) 153, 162 (1820), the Supreme Court upheld Congress' power to define piracy as a domestic crime by reference to the law of nations. The opinion also makes it clear that piracy as so defined had long been a violation of the law of nations. *Smith*, 18 U.S. (5 Wheat.) at 162. That being the case, if there were a federal common law of crimes, and if that law included the international law crimes of piracy, no statute was necessary. Because Congress apparently believed such a statute was necessary, there would seem to be no room for a federal common law of crimes, including, any crimes—should they exist—for insulting ambassadors.

222. The next statement on point by a United States government official, other than a judge, is President Fillmore's cryptic remark in his annual message of December 2, 1851. H. EXEC. DOC. 2, 32d Cong., 1st Sess. 7 (1851). The President noted that "ambassadors [sic], public ministers, and consuls, charged with friendly national intercourse, are objects of especial respect and protection, each according to the rights belonging to his rank and station." The precise import of that statement is dubious. It is not sufficient to say that an ambassador is entitled to "especial respect," without defining what the nature of that respect might be.

223. *See* 1 F. WHARTON, A DIGEST OF INTERNATIONAL LAW OF THE UNITED STATES § 56 (1887). Wharton cites, among other things, an 1852 letter from the acting Secretary of State; an 1860 letter from Secretary of State Cass; an 1869 letter from Secretary of State Seward; and another 1869 letter from Secretary of State Fish. Seward's letter is particularly interesting:

> Free discussion, by speech and in the press, in public assemblies, and in private conversation, of the Cretin insurrection, and of all other political transactions and movements occurring either abroad or at home, is among the rights and liberties

speech, especially in the discussions of foreign affairs, a public issue.

In 1906, whether for reasons of policy or reasons of principle, the United States Government stressed first amendment considerations in declining to proceed against publishers of possibly insulting information. At that time, the Government of Mexico asked the United States Government to prevent further circulation of a St. Louis, Missouri, newspaper that had insulted Mexico. The solicitor of the Department of State stated that if the editors had committed an offense, it was a political one.[224] Similarly, in 1929, the Assistant Secretary of State wrote to the Mexican *chargé d'affaires*:

> It is always a cause for regret when private publications print articles which may be offensive to the Government or people of a friendly nation, but the publication of articles containing allegations or expressions of opinion, however unwarranted they may be is not, under our Constitution, subject to executive control. This applies to articles reflecting on the Government of the United States or its officials as well as to those which refer to foreign governments or officials.
>
> However, if any such article should be regarded as libelous resort may be had to the courts by any one alleging to have suffered injury by its publication.[225]

Obviously, an insulting newspaper article about an envoy or about the envoy's country may be different from an insulting placard held in the ambassador's face.[226] Both of the foregoing examples are consistent with the remarks of Attorney General Lee quoted above; however, until the ambassador's safety or ability to function is endangered, the difference is one of degree, not of kind.

In sum, by 1937, when section 22-1115 was introduced, the international legal requirements of punishing insulting statements were at best

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> guaranteed by the Constitution of the United States to every citizen and even to every stranger who sojourns among us, and is altogether exempt from any censure or injury on the part of the Government of the United States. . . . The maxim was long since adopted in the United States that even error of opinion may be safely tolerated where reason is left free to combat it.

Id. But see 3 *id.* § 121 (quoting 1861 instruction from Secretary of State Seward to Mr. Harvey, stating that "[i]nsults by a foreign Government to a consul . . . will justify a demand that in addition to other redress, 'the flag of the United States shall be honored with a salute.' ").

224. 2 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW § 129 (1940).

225. Letter from the Assistant Secretary of State to the Mexican *chargé d'affaires* (Dec. 27, 1929), *reprinted in* 2 G. HACKWORTH, *supra* note 224, at § 129.

226. Senator Pittman, the sponsor of § 22-1115, used this example when arguing for the legislation. *See* 81 CONG. REC. 8587-88 (1937).

old and equivocal. In that context, Secretary of State Cordell Hull sent Senator Pittman, section 22-1115's sponsor, a brief letter endorsing the bill.[227] It is difficult, however, to read a great deal into the letter. Secretary Hull referred to "certain immunities under international law to enable [diplomats] to transact" official business, but he did not spell out the details and concluded by saying the "comity of nations," not international law, entitled diplomats to be free from "attempted intimidation or coercion," not insult or odium.[228]

British practice seems to have followed a pattern similar to that of the United States.[229] In 1762 Attorney General Charles Yorke noted that "scandalous and injurious reflections published in derrogation of the Honour and Dignity of Foreign States and Princes in Amity" with England might be punished as libel.[230] The stated reason, however, was that such writings impaired the relations between Great Britain and its allies, not that there was an international obligation.[231]

In 1816, the King and the Prince Royal of Sweden complained about allegedly libelous newspaper articles. The law officers acknowledged that if the articles tended to degrade the king and prince and to render their people discontented the articles might be libelous, but in view of the "almost unbounded latitude" tolerated in Great Britain in the discussion of their own and foreign governments, a conviction was "very doubtful."[232] Obviously, this did not imply that an indictment would not lie, but it hardly encouraged the bringing of one.

By 1857, the law officers indicated that an alleged libel against a foreign sovereign or foreign chief of state would not be treated differently from any other libel.[233] In 1896, however, the law officers reported, in reference to an attack on the Turkish Sultan, that a libel upon a foreign sovereign could be the subject of a criminal action. Still, the law officers

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227. The letter was printed with the deliberations on the bill. *Id.* at 8486.

228. *Id.*

229. Hurst does note an incident in 1856 in which the Government of Peru dismissed the editor of a newspaper that had attacked the diplomatic corps. However, Hurst assumes that the paper either belonged to or was under the control of the government. C. HURST, *supra* note 169, at 185.

230. McNair, *Aspects of State Sovereignty*, 26 BRIT. Y.B. INT'L L. 627 (1949). The incident involved the King of Denmark.

231. *Id.; see also id.* at 27-28 (quoting Letter of December 4, 1779, to Lord Grenville).

232. 1 A. MCNAIR, INTERNATIONAL LAW OPINIONS 12 (1956) (quoting Letter to Viscount Castlereagh dated February 6, 1816).

233. *Id.* at 12-13 (quoting Letter of March 21, 1857, to the Earl of Clarendon). The response was to a Prussian inquiry, which shows that Prussian officials had a much less speech-protective attitude and, indeed, appeared to see no barrier to prosecution. *Id.*

argued against bringing the case because the article in question concerned "public conduct in connection with the Armenians,"[234] so a conviction appeared unlikely. Notably, the opinion does not indicate that there was any special punishment for libel of a foreign sovereign.[235] In fact, in 1898, the Foreign Office wrote to the French Ambassador, M. Chambon, saying that with respect to libels, foreign diplomatic agents have the "same legal remedies as British subjects" but that "as an act of courtesy" if a matter was brought to the attention of the government, the opinion of the law officers would be sought and, if "advisable" a prosecution would follow.[236] The Foreign Office noted that it was a misdemeanor to publish a libel regarding a foreign prince, potentate, ambassador or other dignitary "with intent to disturb peace and friendship between the United Kingdom and the country to which any such person belongs."[237]

Currently, one assumes diplomatic officials would be delighted if they could limit their concerns to oral or written insults, even if printed in national magazines or broadcast by the television networks.[238] While it is true that two hundred years ago United States officials stated that insults violated international legal norms, the fact is that those concerns have been submerged beneath both concerns about more violent demonstrations and the need to affirm free speech rights. It is very difficult to find in the official writings of United States attorneys general, State Department officials, or their counterparts in England, any recognition of either a broad international law prohibition against defamatory or insulting remarks leveled at an ambassador or, any legal argument in support of a prohibition on peaceful, but insulting, picketing.

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234. *Id.*

235. *Id.* (quoting memorandum of June 6, 1896).

236. 7 BRITISH DIGEST OF INTERNATIONAL LAW, *supra* note 198, at 702-03 (quoting Letter from Foreign Office to M. Chambon (Dec. 27, 1898)).

237. *Id.* at 710.

238. *See* 7 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW § 36 (1967); 52 DEP'T ST. BULL. 289 (1965) (note protesting failure of Russian Government to provide adequate police protection for demonstration in front of United States Embassy). *See generally* Friedlander, *supra* note 207; DIPLOMATS IN A DANGEROUS WORLD: PROTECTION FOR DIPLOMATS UNDER INTERNATIONAL LAW (N. Hevener ed. 1986). In 1971, Professor Wilson did not even bother to catalogue such insults among assaults on diplomats. C. WILSON, *supra* note 169, at 55. This is not to say that an insult to a diplomat's dignity may not, in certain circumstances, violate international norms. For example, racially discriminatory treatment of diplomats may breach such a duty. *See id.* at 73-77. However, while not denigrating the resulting affront to an individual's dignity from such treatment, it would also impair the diplomat's ability to function in his or her role.

c. Municipal Statutes

Municipal legislation presents something of a puzzle as potential evidence of custom. In the absence of legislative history showing that the legislation was enacted to fulfill an international obligation, it may not demonstrate any *opinio juris*.[239] Such legislation may indicate state practice; however, if it is not enforced, this indication could be nullified.

Although picketing is a relatively new mode of expression, one might expect to find municipal statutes limiting picketing or, more broadly, limiting insults, if international law actually imposed upon states a duty to restrict picketing or, even more broadly, insults leveled at a diplomatic mission. Putting aside section 22-1115, which would render the argument tautological, one would find little support for laws against picketing and mixed support for laws dealing with insults. For example, until 1964 the only British legislation on diplomatic protection, the 1708 Statute of 7 Anne ch. 12, was limited to writs or process against the person of the ambassador or of his or her servants.[240] As to picketing itself, other than the United States legislation, there appears to be little national legislation.[241] This may be due to the fact that the legislation does not exist, that police often have broad discretion to prohibit picketing, or that national legislation is, in effect, embodied in local legislation. In 1968, for example, the Ottawa City Council passed an ordinance giving police greater power to control demonstrations, partly in response to vandalism at the Soviet Embassy the prior year.[242]

Until the passage of section 22-1115, United States law contained no

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239. In 1934, Preuss listed seventeen states that had laws punishing "acts which are of a nature to provoke a foreign state to war or reprisals, or which, being directed against a foreign state, would constitute treason if committed against themselves." Preuss, *International Responsibility for Hostile Propaganda Against Foreign States*, 28 AM. J. INT'L L. 649, 650-51 nn. 9-10 (1934). He argued, however, that the statutes did not demonstrate *opinio necessitatus*. *Id.* at 651. They protected the legislating state from hostile reactions or secured the benefits of reciprocal protection abroad. *Cf.* 2 A. GRAHL-MADSEN, THE STATUS OF REFUGEES IN INTERNATIONAL LAW § 182 (1972) (although many states' municipal law gives right to be granted asylum, laws often result from humanitarian, rather than legal, grounds and are thus not evidence of customary international law).

240. *Amended by* Criminal Justice Act, 1948, 11 & 12 Geo. 6, ch. 58. It does not appear that there has ever been a prosecution under the statute. 2 RUSSELL ON CRIME, *supra* note 196, at 1551. That statute was repealed in 1964, with the enactment of the Diplomatic Privileges Act 1964, 12 & 13 Eliz. II, ch. 81, which incorporated relevant provisions of the Vienna Convention, *supra* note 29, into English law.

241. *See* Higgins, *supra* note 141, at 650.

242. 7 M. WHITEMAN, *supra* note 238, at 385 (citing Airgram No. A-1149 (April 9, 1968)).

provision criminalizing simple insults, and certainly none dealing with picketing. Since the earliest days of the republic, however, there has been a statute dealing with violent behavior directed at diplomatic agents which states that:

> [A]ny person . . . [who] shall assault, strike, wound, imprison, or in any other manner infract the law of nations, by offering violence to the person of an ambassador or other public minister . . . shall be imprisoned not exceeding three years, and fined at the discretion of the court.[243]

Arguably, the absence of any statutory prohibition on insulting ambassadors or public ministers implied the absence of an obligation to make that sort of behavior criminal.

The legal systems of other countries present a more complex picture. States generally have chosen to protect diplomatic dignity interests neither with additional punishments nor with separate crimes, and many that did so in the past have abandoned the practice. The Dutch apparently had the first statute dealing with the subject. This statute, enacted in 1651, authorized corporal punishment against one who offends an ambassador or injures the ambassador by word.[244] Some states have statutes that punish insults, but only on the basis of reciprocity, which indicates the absence of a legal obligation, and at least one state has a statute, but admits that it is not enforced.

In 1932, the Harvard Researchers found that a "survey of national legislation fail[ed] to reveal evidence of the general recognition of a legal obligation to establish specially severe penalties for offenses against diplomatic officers. . . ."[245] Przetacznik has catalogued the laws relating to injuries—physical and emotional—to diplomats.[246] His catalogue relies on Feller and Hudson's 1933 compilation[247] and the United Nations 1958 survey.[248] In addition, the present author has reviewed more recent penal codes.

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243. Act of April 30, 1790, ch. 9, § 28, 1 Stat. 112, 118, *repealed by* Act of June 25, 1948, ch. 645, § 21, 62 Stat. 683, 862. The material in § 28 of the Act of April 30, 1790, is now covered by 18 U.S.C. § 112 (1982).

244. Harvard Research, *supra* note 31, at 94 (citing 1 FÉRAUD-GIRAUD, ETATS ET SOUVERAINS 333 (1895)).

245. *Id.* (citations omitted). *See also* Deák, *supra* note 168, at 229 ("There are . . . many countries where municipal law does not contain any stipulation whatsoever concerning diplomatic immunities.").

246. F. PRZETACZNIK, *supra* note 167, at 68-73.

247. A. FELLER & M. HUDSON, A COLLECTION OF THE DIPLOMATIC AND CONSULAR LAWS AND REGULATIONS OF VARIOUS COUNTRIES (1933).

248. *Laws and Regulations Regarding Diplomatic and Consular Privileges and Immunities*, U.N. Doc. ST/LEG/SER.B/7 (1958) [hereinafter U.N. Survey].

Although a substantial number of states presently provide penalties for violation of diplomatic or personal immunities,[249] only twenty-three states have specifically provided either separate or enhanced penalties for insults without demanding reciprocity.[250] Six of the twenty-three countries that once had such statutes, however, did not indicate that they still had them in 1958 when they responded to the United Nations questionnaire. One of the countries that had such a statute, Israel, stated that it was "rarely invoked."[251]

Five countries out of the twenty-three have or have had laws relating to the freedom of the press that also punish inappropriate statements against diplomats.[252] In 1958, however, it appears that France did not

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249. *See, e.g.*, PENAL CODE OF THE REPUBLIC OF COLUMBIA art. 133 (violation of immunity), *reprinted in* THE COLUMBIAN PENAL CODE 49 (P. Eder trans. 1967).

250. *See*, Law of March 12, 1858 arts. 6-7 (Belg.) (punishing insults by words); PENAL CODE art. 162 (Bol.) (enhanced sentence for "insult or injury" to foreign ministers, with knowledge of status); PENAL CODE art. 429 (Chile) ("calumny or insult"); CODE OF SOCIAL DEFENCE art. 258 (Cuba) (maligning, insulting, defaming diplomatic agent); PENAL CODE art. 110 (Den.) ("honor"), *reprinted in* K. WAABEN, THE DANISH CRIMINAL CODE 64 (1958); PENAL CODE arts. 126, 127 (Ecuador) (acts offending dignity of representative of a foreign state); CODE PENAL art. 192 (Egypt) ("outrages"); PENAL CODE § 104 (W. Ger.) ("insult"); PENAL CODE art. 154 (Greece) (attack on "honor" of diplomat), *reprinted in* THE GREEK PENAL CODE 98 (N. Lolis trans. 1973); CRIMINAL CODE ORDINANCE § 77 (Isr.) (publication intended to degrade, revile, or expose ambassador to hatred); PENAL CODE art. 108 (Korea) (dishonors or defames); PENAL CODE § 118-19 (Neth.) (intentional insult to representative of foreign power; distributing insulting writing); PENAL CODE § 96 (Nor.) (increase in penalty if crime is against envoy, including crimes which cause injuries to honor); PENAL CODE art. 283(3) (Pol.) ("insults"), *reprinted in* THE PENAL CODE OF THE POLISH 111-12 (W. Kenney & T. Sadowski trans. 1973); PENAL CODE art. 261 (U.S.S.R.) (continued by a decree of June 30, 1921) (insults by words) ; FEDERAL PENAL CODE art. 43 (Switz.) ("insult"); CRIMINAL CODE art. 166 (Turk.) (defamation of an ambassador punished with same penalty as defamation of Turkish official), *reprinted in* THE TURKISH CRIMINAL CODE 67 (O. Sepici & M. Ovacik trans.; T. Ansay, M. Yücel & M. Friedman eds. 1965); PENAL CODE art. 176(2) (Yugo.) (damages to honor or reputation of diplomatic agent). The cited Bolivian, Chilean, German, Norwegian and Swiss statutes are printed in A. FELLER & M. HUDSON, *supra* note 247, at 118, 271, 929, 1178. Cuban, Egyptian, Ecuadorian, Israeli, Korean, Netherlands and Yugoslavian provisions are in U.N. Survey *supra* note 248, at 71, 107, 109, 179-80, 189, 201, 407. The Belgian and Russian statutes are cited in 1 R. GENET, *supra* note 167, at 503.

251. U.N. Survey, *supra* note 248, at 180.

252. Law of July 29, 1881, art. 37 (Fr.) (punishing "outrages"); PENAL CODE art. 141 (Para.) (doubles penalty for ordinary press offense); Law of May 28, 1881, art. 20 (San Marino) (same); Ordinance of July 16, 1812 (Swed.) (punishing "insulting judgments or utterances" made against nations with which Sweden was at peace); Decree of October 14, 1884 (Tunisia) (Tunisia, then a French protectorate, enacted the French law of July 29, 1881). The foregoing provisions can be found in A. FELLER & M. HUDSON,

inform the United Nations of its 1881 law. In all likelihood, this indicates a lack of enforcement.[253]

Austria and Italy punish insults to a state or an ambassador respectively only on the basis of reciprocity.[254] Romania does not heighten the punishment, but permits the public prosecutor to initiate the prosecution;[255] Sweden also permits the public prosecutor to prosecute certain assaults as insults against foreign states.[256]

As indicated, there are relatively few municipal enactments that require punishment for defamation of ambassadors. Likewise, there are virtually no statutes that limit picketing directed toward embassies or ambassadors. Consequently, it is difficult to argue that municipal legislation supports the existence of a perceived international legal obligation to prevent either picketing or insults, defamatory or otherwise, of foreign diplomatic agents or nations. This is so even if one takes into account the more general provisions of law that would criminalize action which might promote unfriendly relations between governments.[257]

d. Commentators

Thus far, the evidence of state practice—judicial decisions, claims, legal opinions, municipal statutes—shows no consistent pattern supporting the existence of a contemporary international legal norm requiring punishment of insults. If there was a uniform practice, it did not extend far into the nineteenth century. Moreover, fairly explicit free speech concerns seemed to gain force to compete with concerns of diplomatic inviolability, so that absent actual violence or the threat of violence there would be no legal prohibition of insults in most countries. Although the works of publicists are "subsidiary," both international[258] and United

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supra note 247, at 537, 954, 1099, 1156 n.1, 545.

253. *See* 1 R. GENET, *supra* note 167, at 515 (indicating that juries tended not to convict under the law, so jurisdiction was taken from them by a law of March 16, 1893).

254. CRIMINAL CODE § 66 (Aus.) (attempting to incite contempt or hatred), *reprinted in* THE AUSTRIAN PENAL ACT 43-44 (N. West & S. Shuman trans. 1966); PENAL CODE arts. 298, 300 (Italy) ("affronts" to ambassador), *reprinted in* THE ITALIAN PENAL CODE 107, 108 (E. Wise & A. Maitlin trans. 1978).

255. PENAL CODE art. 171 (Rom.) (offenses against "dignity"), *reprinted in* THE PENAL CODE OF THE ROMANIAN SOCIALIST REPUBLIC 86 (S. Kleckner trans. 1976).

256. PENAL CODE, 5, § 5 (Swed.) (assaults which insult foreign states), *reprinted in* THE PENAL CODE OF SWEDEN 22 (T. Sellin & J. Getz trans. 1972).

257. *See, e.g.*, Ordinance of the Government of India of April 5, 1931, 134 BRIT. & FOREIGN ST. PAPERS 207. *See also* F. PRZETACZNIK, *supra* note 167, at 68-69.

258. *See, e.g.*, Military and Paramilitary Activities in and Against Nicaragua, 1986 I.C.J. 14, 530 (Jennings, J., dissenting); I. BROWNLIE, *supra* note 127, at 26 & n.5

States[259] courts routinely cite them. The same trends noted exist in their writings as in the other evidence.

The suggestion that an ambassador's inviolability extends to protection against moral offenses or insults has an ancient lineage among publicists. Vattel states that "[w]hoever offends and insults a public minister commits a crime more deserving of severe punishment, as he might thereby involve his country and his sovereign in very serious difficulties and trouble."[260] As seen above, both judges and other officials in the United States utilized Vattel's comment. Commentators likewise relied on this comment. In a statement made by Hyde in 1945, for example, he relied solely on statements by United States attorneys general who had themselves relied on Vattel. In this statement, written approximately 200 years after Vattel wrote, Hyde noted that a

> foreign minister is entitled to the same degree of protection for his reputation as for his person, and for like reasons. Hence it behooves the State to which he is accredited to shield him from insult as well as personal violence, and to prosecute with vigor him who attempts to defame him.[261]

In 1932, the Harvard Researchers had concluded that the special duty to protect diplomatic premises would include "protection against crowds or mobs collected in the vicinity of the premises for the purpose of expressing abuse, contempt or even disapprobation of the sending state or of its mission, or of the members of a mission."[262] This duty also "would seem to exist" to protect against picketing;[263] however, the researchers did not cite any authority for those propositions.

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259. *See, e.g.*, The Paquete Habana, 175 U.S. 677, 700-01 (1900). Notably, Justice Gray felt it necessary to justify his reliance on text-writers and cited Wheaton and Chancellor Kent in support of their use. *Id.*

260. E. DE VATTEL, *supra* note 30, at 464. Vattel relies only on two events, both involving violence (Genghis Khan extracted revenge in one, the Turkish Emperor Selim I did likewise in the other), the events that lead to the statute of 7 Anne ch. 12, which do not involve an insult, and the incident of the Swiss rakes, *supra* note 30, at 464-65, to support his point.

261. 2 C. HYDE, *supra* note 168, at 1250 & n.8. *See also* 1 R. GENET, *supra* note 167, at 513 ("*L'inviolabilite dans le personne physique et morale suppose egalement l'intangibilite dans la reputation*"); Gregory, *The Privileges of Ambassadors and Foreign Ministers*, 3 MICH. L. REV. 173, 184 (1905) (citing only "Wharton's Dig. Inter. L., Vol. I, p. 649"); F. PRZETACZNIK, *supra* note 167, at 9 (advocating a definition of inviolability to include prevention of "*any attack on [diplomats'] persons, freedom and dignity*"). However, Przetacznik's position is based upon article 29 of the Vienna Convention. The scope of the protection of the Vienna Convention will be discussed *infra*, Section B.

262. Harvard Research, *supra* note 31, at 57.

263. *Id.*

On the other hand, either by express statement or by omission, other commentators have called into doubt the existence of any norm of international law protecting ambassadors from insults, *vel non.* Discussing the idea of a state's "dignity," including the inviolability of its envoys, Sir Hersch Lauterpacht noted:

> [while] a Government of a State, its organs, and its servants are bound in this matter by rigid duties of respect and restraint, it is doubtful whether a State is bound to prevent its subjects from committing acts which violate the dignity of foreign States, and to punish them for acts of that kind which it was unable to prevent.[264]

Lauterpacht plainly stated his conclusion:

> In any case a State must prevent and punish such acts only as really violate the dignity of a foreign State. Mere criticism of policy, judgment concerning the past attitude of States and their rulers, utterances of moral indignation condemning immoral acts of foreign Governments and their monarchs, need neither be suppressed nor punished.[265]

Along this line, Sir Cecil Hurst stated that in normal times in democratic countries the press is now free and can make what statements it wishes as long the statements made do not surpass the limits of what is legal.[266] Arguably, his statement is limited to the press, and does not address even peaceful picketing. Moreover, it may beg the question: What are the legal limits? Nonetheless, the thrust of the remark is that foreign sovereigns should not expect their dignity interests, if any, to override press freedoms. This opinion, rendered in 1926 by a person in England, a country without an express right to freedom of the press, evinces perhaps a greater appreciation of the rights of a free press and a greater sophistication of other nations' understanding of those rights than Americans writing only a few years later demonstrated.

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264. 1 H. LAUTERPACHT, *supra* note 167, at 282-83. Regarding inviolability of diplomats, Lauterpacht refers only to their personal safety and exemption from criminal jurisdiction. *Id.* at 789. *See also* Lyons, *Personal Immunities of Diplomatic Agents*, 31 BRIT. Y.B. INT'L L. 299 (1954) (arguing that diplomats are entitled to no special protection).

265. 1 H. LAUTERPACHT, *supra* note 167, at 284. There is, however, an important distinction: Lauterpacht is writing here of the obligations of a state to prevent a citizen from insulting another nation or the ambassador of another nation; more stringent rules apply to the behavior of the state itself. *Id.* at 283.

266. C. HURST, *supra* note 169, at 185. Hurst continued by noting: "Representatives of foreign governments now generally accept the position that a government is bound to respect the freedom of the press and, therefore, cannot be held in any way to blame for newspaper criticisms of foreign governments or their ministers." *Id.*

Professor O'Connell takes a somewhat ambivalent position. He begins with the "idea that the receiving State is obliged to take legal action against any person who insults or scorns a diplomat."[267] He then points out that, as a practical matter, the protection "is only meaningful when a special penalty attends the commission of an act derogatory of diplomatic dignity."[268] He nevertheless concedes that English law bases no crimes on international law, including any separate crime for assaulting an ambassador. Therefore, he states, "*a fortiori* in the case of mere insult . . . there is no offense under the ordinary criminal law."[269] O'Connell observes that states have a duty to preserve embassies "from insult or invasion," but his only authority is *Frend v. United States*,[270] which makes his position circular in the present context.

Other commentators fail to mention any duties to protect the "dignity" of a foreign state from attacks by citizens of a receiving state. For example, in 1912, Professor Hershey did not mention any such rights.[271] More recently, Denza, discussing the notion of personal inviolability under article 29 of the Vienna Convention, does not refer to any duty to prevent private defamatory attacks on a foreign state or the diplomatic agents of a foreign state.[272]

Of course, the preceding authorities considered only a general situation—state responsibility for private defamatory or insulting remarks about a foreign state or a foreign ambassador. In the late 1920s and the 1930s, however, there was some discussion in the American academic community about issues directly related to insults leveled at foreign governments. In 1928, Professor Dickinson argued in favor of a criminal libel action against the Hearst newspapers for a series of apparently

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267. 2 D. O'CONNELL, *supra* note 177, at 964. O'Connell cites United States v. Ortega, 24 U.S. (11 Wheat.) 467 (1826) for this proposition. *Ortega*, however, does not support his view. First, the report of the trial court shows that physical violence, not verbal violence, was involved. *See* United States v. Ortega, 27 F. Cas. 359 (C.C.E.D. Pa. 1825) (No. 15,971). Second, the Supreme Court's opinion, cited by O'Connell, deals only with the question of consular immunity, since the defendant, Ortega, was a consul.

268. 2 D. O'CONNELL, *supra* note 177, at 965.

269. *Id.*

270. 100 F.2d 691 (1938), *cited in* 2 D. O'CONNELL, *supra* note 177, at 965.

271. A. HERSHEY, THE ESSENTIALS OF INTERNATIONAL PUBLIC LAW AND ORGANIZATION §§ 266-91 (rev. ed. 1929). *See also* J. BRIERLY, *supra* note 131, at 256-61; E. DENZA, *supra* note 168, at 78-82.

272. 9 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 94, 97 (1986) (Denza article entitled *Diplomatic Agents and Missions, Privileges, and Immunities*). Indeed, Denza affirmatively asserts that states have no duty to impose special penalties for attacks on diplomats, including attacks on their dignity. E. DENZA, *supra* note 168, at 138.

fraudulent articles about Mexico.[273] Dickinson believed that the publications would support a prosecution for criminal libel at common law.[274] He suggested that Congress should enact appropriate legislation under the offenses clause to render statements such as those made by the Hearst newspapers criminal under federal law. Without citation, he wrote that such legislation would fulfill an international obligation.[275] However, while noting that the United States had already enacted a substantial amount of legislation to fulfill its "international obligations to safeguard the interests of foreign states," he conceded that "it is not always easy to say just how far such legislation is dictated by international obligation, on the one hand, and how much of it is merely national policy expressed in law for reasons of municipal convenience, on the other. . . ."[276] Thus, even a strong proponent of legislation to protect the dignity of foreign sovereigns doubted whether international obligation, as opposed to international policy, required the statute.[277]

A few years later, another commentator, Professor Preuss, discussed legislation that eventually became section 22-1115.[278] Preuss be-

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273. Dickinson, *The Defamation of Foreign Governments*, 22 AM. J. INT'L L. 840, 843-44 (1928).

274. *Id.* For this latter proposition, Dickinson relied upon several English cases and authorities. *See id.* at 842 n.8 (citing R. v. D'Eon, 1 Black. 510, 96 Eng. Rep. 295 (K.B. 1764); R. v. Gordon, 22 Howell's St. Tr. 213 (1787); R. v. Vint, 27 Howell's St. Tr. 627 (1799); R. v. Peltier, 28 St. Tr. 529 (1803)).

275. Dickinson, *supra* note 273, at 843.

276. *Id.* at 843-44. Indeed, one might argue that domestic interests were paramount even in prosecutions for insults of ambassadors, "the laws and peace of this country [England] having, in truth, been attempted to be violated, and such probable violation being the real ground of prosecution." *Id.* at 843 n.13.

277. Some of Professor Dickinson's contemporaries noted that states bore no responsibility for hostile or revolutionary propaganda issued by their citizens. *See* Lauterpacht, *Revolutionary Propaganda by Governments*, in 13 TRANSACTIONS OF THE GROTIUS SOCIETY 143, 144-45 (1928); Preuss, *International Responsibility for Hostile Propaganda Against Foreign States*, *supra* note 239, at 649. *See also* 2 G. HACKWORTH, *supra* note 224, at § 129 (quoting Letter from Secretary of State Knox to Mexican Ambassador de la Barra (Dec. 1, 1910) ("[S]ince under the American Constitution liberty of speech and of the press is guaranteed, mere propaganda in and of itself would probably not fall within these statutes [neutrality statutes] and would not therefore be punishable thereunder."). It appears that Secretary Knox reiterated the point later that year to another Mexican ambassador, Señor de Zamacona: "[T]he carrying on of a mere propaganda either by writing or speaking does not constitute an offense against the law of nations, nor does it constitute an offense against the local law since freedom of speech and of the press is, under the Constitution of the United States, absolutely assured to those dwelling within its jurisdiction." 2 G. HACKWORTH, *supra* note 224, at § 129 (quoting Letter from the Secretary of State to the Mexican Ambassador (June 7, 1911)).

278. *See* Preuss, *Protection of Foreign Diplomatic and Consular Premises Against*

gan by noting several contemporary incidents of picketing.[279] A resolution substantially similar to section 22-1115 had been introduced in the Senate in August 1937 but had died in the House at the end of the legislative session. Preuss argued that it should be reintroduced, yet he equivocated as to whether international law imposed an obligation upon states to prevent picketing.[280] Consequently, even Preuss, an advocate of the legislation that eventually became section 22-1115, could not argue unequivocally that international law required the legislation.[281]

Picketing, 31 AM. J. INT'L L. 705 (1937).

279. *Id.* at 706-07 & n.8. *See also* Stowell, *The Joint Resolution Prohibiting the Picketing of Diplomatic and Consular Premises in the District of Columbia*, 31 AM. J. INT'L L. 344 (1937).

280. "Since the picketing of foreign official premises is of recent origin, it may be questioned whether there has developed a rule of international law which would impose upon the receiving state a clear and immediate obligation to prevent this practice as such." Preuss, *supra* note 278, at 708. He noted in a footnote that the "subject is not discussed in such standard works as those of Sir Ernest Satow, A GUIDE TO DIPLOMATIC PRACTICE (3d ed, 1932), and Raoul Genet, *Traitê de diplomatie et de droit diplomatique*, Vol. I (1931)." *Id.* at 708 n.10. After discussing the possible origins of such an obligation, Preuss wrote: "Whether or not the toleration of such picketing constitutes an international deliquency [sic] in itself, it would undoubtedly lay the foundation for claims against the United States should the demonstrations of hostile feeling lead to actual violence against foreign representatives or their official premises." *Id.* at 709. In the course of his article, Preuss rejected the theory that there is an

> international obligation to erect the defamation of foreign sovereigns or states into a *delictum sui generis*, nor to afford them greater protection than is provided under the general law, adequately enforced. Early English and American decisions have been cited as evidence of such obligation, but these decisions must, in the light of later developments, be regarded as discredited and overruled.

Id. at 712 (citing Preuss, *La rêpression des crimes et dêlits contre la sûretê des êtats êtrangers* 40 REVUE GENERALE DE DROIT INTERNATIONAL PUBLIC 639 (1933)) (footnote omitted).

281. More important, Preuss' view of the first amendment implications of the legislation was at best arguably accurate even in 1937. After 136 years of not-so-benign neglect of the first amendment, in 1927 the Supreme Court first used the amendment to reverse a criminal conviction in Fiske v. Kansas, 274 U.S. 380 (1927). In 1931, it held that an injunction against a newspaper violated the first amendment in Near v. Minnesota, 283 U.S. 697 (1931), and in 1937, it recognized a right of peaceful assembly as cognate to free speech in De Jonge v. Oregon, 299 U.S. 353 (1937). Soon after section 22-1115 became law, the Court decided Hague v. C.I.O., 307 U.S. 496 (1939), which laid the foundations of the public forum doctrine that forms the backbone of Justice O'Connor's opinion in *Boos v. Barry*.

At the time that Preuss wrote, his views were being overtaken by the development of first amendment law. *See generally* L. LEVY, *supra* note 211; L. LEVY, LEGACY OF SUPPRESSION (1960); Kairys, *Freedom of Speech*, in THE POLITICS OF LAW 160 (Kairys ed. 1982); Rabban, *The First Amendment in its Forgotten Years*, 90 YALE L.J. 514

To summarize, commentators were and are far from uniform in asserting the existence of an international legal obligation to prevent even the defamation of foreign embassies or ambassadors, much less simple insult. Moreover, at the time section 22-1115 was enacted, there was no scholarly support for the proposition that international law imposed an obligation to prevent nonviolent picketing. Even the commentators who argued for a broad obligation to prevent defamation represented an era that preceded the development of contemporary free speech law.

B. *Applicability of the Vienna Convention*

As noted above, multilateral conventions are not decoupled from custom.[282] Conventions can both declare existing custom and serve as nuclei about which customary norms crystallize.[283] One might argue that the Vienna Convention,[284] which entered into force in 1964 and to which the

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(1981) (describing the development of first amendment law leading up to the First World War). For example, Preuss believed that a section of the District of Columbia Code punishing insulting, profane, or obscene language directed at bystanders would be constitutional but that it did not go far enough. Preuss, *supra* note 278, at 710-11. However, there is no doubt that today the section would not survive first amendment scrutiny. *See, e.g.*, Houston v. Hill, 107 S. Ct. 2502, 2505 (1987); Lewis v. New Orleans, 415 U.S. 130, 131 n.1 (1974); Gooding v. Wilson, 405 U.S. 518, 519 n.1 (1972).

282. *See supra* note 163 and accompanying text.

283. In the North Sea Continental Shelf Cases, the International Court of Justice (ICJ) considered the contention of Denmark and the Netherlands that the Federal Republic of Germany was bound by the boundary delimitation provisions of article 6 of the Geneva Convention on the Continental Shelf, Apr. 29, 1958, 15 U.S.T. 471, T.I.A.S. No. 5578, 499 U.N.T.S. 311, even though the Federal Republic of Germany was not a party to the Convention. They argued, among other things, that the "equidistance-special circumstance" rule of article 6 had contributed to the formation of a customary norm. The court held:

> In so far as this contention is based on the view that Article 6 of the Convention has had the influence, and has produced the effect, described, it clearly involves treating that Article as a norm-creating provision which has constituted the foundation of, or has generated a rule which, while only conventional or contractual in its origin, has since passed into the general *corpus* of international law, and is now accepted as such by the *opinio juris*, so as to have become binding even for countries which have never, and do not, become parties to the Convention. There is no doubt that this process is a perfectly possible one and from time to time does occur: it constitutes indeed one of the recognized methods by which new rules of customary international law may be formed.

1969 I.C.J. 1, 14. The ICJ held that on the facts of that case, article 6 did not contribute to the creation of a customary norm.

284. Vienna Convention, *supra* note 29, is largely declaratory of existing law. *See* Higgins, *supra* note 141, at 642. *See generally* E. DENZA, *supra* note 168; Brown, *Diplomatic Immunity: State Practice Under the Vienna Convention on Diplomatic Rela-*

United States is a party, contains provisions that explicitly or implicitly support section 22-1115.[285] Its two applicable articles are article 22(2) and article 29, which read, in relevant part, as follows:

> Article 22:
>
> . . .
>
> 2. The receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity.
>
> . . .
>
> Article 29:
> The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity.[286]

Neither the specific language of the Vienna Convention nor its drafting history supports a conclusion that either existing or evolving custom requires section 22-1115. Other states that have adopted the Vienna Convention seem not to have taken such a position. Moreover, the absence of implementing legislation, in the United States or elsewhere, that protects diplomats or their states from odium or disrepute casts doubt on whether that was ever a goal of the Vienna Convention.

The language of articles 22 and 29, requiring states to protect the "dignity" of diplomats and diplomatic missions, might be read to imply a duty under customary international law to prevent peaceful picketing that would bring odium or disrepute on another state. There are several difficulties in such an interpretation. First, the Vienna Convention does not say what steps, if any,[287] states must take to protect that dignity. If such a duty is a customary norm, one would expect the treaty that codifies custom to express it.[288] Second, the preamble of the Convention spe-

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tions, 37 INT'L & COMP. L.Q. 53 (1988).

285. Judge Bork made a somewhat similar argument in his opinion in Finzer v. Barry, 798 F.2d 1450, 1457-58 (D.C. Cir. 1986). He did not specify whether the Vienna Convention simply declared existing custom or generated new custom. Indeed, Judge Bork seemed to believe that section 22-1115, a 1938 statute, fulfilled obligations under the Vienna Convention, a 1961 treaty. *Id.* at 1457-58.

286. Vienna Convention, *supra* note 29, arts. 22(2), 29.

287. *See* E. DENZA, *supra* note 168, at 138 & n.21.

288. Sir Francis Vallat, leader of the United Kingdom's delegation to the drafting committee of the Conference that drafted the Vienna Convention, testified before the House of Commons Foreign Affairs Committee that, rather than setting down legislative rules, it would be better to let courts decide cases under article 22 as they arose. H.C.

cifically provides that "the rules of customary international law should continue to govern questions not expressly regulated by the provisions of the present Convention."[289] To the extent that the Convention does not spell out the measures necessary to protect dignity, one should consult custom to determine the contours of those measures. As discussed above, custom offers little guidance in the present situation.[290] Third, nothing in the preparatory works of the Vienna Convention suggests such a broad reading of the document.[291] Finally, the drafters of the Vienna Convention must have been aware of section 22-1115,[292] but they did not insert a similar provision into the Convention, leaving specific protections a matter of individual state practice. This is not to say that Congress could not choose to implement the Vienna Convention by enacting legislation like section 22-1115. If it did so—and if other nations followed—a custom might develop. Rather, the point is that nothing in the Vienna Convention implies that custom compels legislation like section 22-1115.

Obviously, giving a broad reading to the notion of protecting dignity would permit a state not only to limit offensive demonstrations, but also to limit media commentary, picketing of any kind, or even letters to diplomatic agents. On the other hand, adopting a contrary position forces one to find a meaning for "dignity" to avoid its being surplusage. The

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FOREIGN AFF. COMM., FIRST REPORT, 1984 THE ABUSE OF DIPLOMATIC PRIVILEGES AND IMMUNITIES No. 127, at 37 [hereinafter FOREIGN AFF. COMM. REP.].

289. Vienna Convention, *supra* note 29, at preamble. *See* Kerley, *Some Aspects of the Vienna Conference on Diplomatic Intercourse and Immunities*, 56 AM. J. INT'L L. 88, 93 (1962). Ambassador Kerley notes ironically that "[a] major factor in the adoption of this preamble was the need to avert a less acceptable one." *Id.* at 91.

290. *See supra* Part III, A. The commentary to the draft that became the Vienna Convention is also unhelpful. *See Report of the International Law Commission on Covering Its Tenth Session, 1958*, 13 U.N. GAOR Supp. (No. 9), at 11-27, U.N. Doc. A/3859 (1958), *reprinted in* 53 AM. J. INT'L L. 230, 268 (1959) [hereinafter *International Law Commission Report*].

291. The Vienna Convention was based upon the International Law Commission's Draft Articles. *International Law Commission Report, supra* note 290, at 254. The 1958 draft followed a 1957 draft. *Report of the International Law Commission on Its Ninth Session, 1957*, 12 U.N. GAOR Supp. (No. 9), at 1, U.N. Doc. A/3623 (1957). Comments to the 1957 draft were attached as an annex to the 1958 draft. 13 U.N. GAOR Supp. (No. 9), at 33, U.N. Doc. A/3859 (1958). None of the comments indicates that states have an international legal obligation to protect against insults. None of the amendments proposed to draft article 20, which became article 22, or draft article 27, which became article 29, shed any further light on states' duty to protect the dignity of the diplomatic mission or of the diplomatic agents. Kerley, *supra* note 289, at 101-07.

292. In the 1948 edition of Oppenheim's treatise, for example, Lauterpacht cites Frend v. United States, 100 F.2d 691 (D.C. Cir. 1938), which upheld section 22-1115. 1 H. LAUTERPACHT, *supra* note 167, at 789 n.2.

most realistic interpretation is that protection of dignity means protection from such things as civil process.[293] Although service of process would not disturb the peace of, intrude on, or damage the embassy, it might impair its dignity. While the Vienna Convention contains provisions granting immunity,[294] it does not expressly forbid service of process. That is historically a central meaning of the protection of diplomats.[295] The absence of any other explicit reference to such protection in the Vienna Convention indicates that it falls within the dignity protection. Protection of dignity undoubtedly may extend beyond forbidding service of process;[296] the absence of specific references to anything else, however, makes it very difficult to extract a rule from the vague word, dignity. Even if custom contained some prohibitions of insulting language, the tension between those prohibitions and the protection of political speech renders the vagueness problem particularly acute. In view of that tension, the Vienna Convention's silence suggests that no norm exists.

The United States signed the Vienna Convention on June 29, 1961; the Senate consented to it on September 14, 1965; and the United States ratified it on the November 8, 1972.[297] The United States did not pass legislation, public law 95-393, "consistent" with the Convention until 1978.[298] Public law 95-393 had nothing to do with protecting the dignity of diplomatic agents or diplomatic missions. Rather, it repealed broad personal immunity provisions enacted in 1790,[299] which were inconsis-

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293. *See International Law Commission Report*, *supra* note 290, art. 20, commentary, para. 5, at 17, *reprinted in* 53 AM. J. INT'L L., at 268 (service of process special application of protection of inviolability).

294. Vienna Convention, *supra* note 29, art. 31.

295. *See supra* note 240 and accompanying text.

296. *See* FOREIGN AFF. COMM. REP., *supra* note 288, at 36 (Sir Francis Vallat: "stop[ping] demonstrations which really do contain a threat to the dignity of the embassy" within article 22(2); not necessary to show danger or the threat of damage).

297. June 29, 1961, 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95.

298. *See* H.R. REP. No. 526, 95th Cong., 1st Sess. 2 (1977). The legislation did not purport to implement the Vienna Convention, since that Convention is self-executing. *Id.* Under article VI of the Constitution, treaties are the "supreme law of the land." However, that does not automatically render them enforceable in domestic courts. Whitney v. Robertson, 124 U.S. 190, 194 (1888); Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829); Frovlova v. Union of Soviet Socialist Republic, 761 F.2d 370, 373 (7th Cir. 1985); United States v. Postal, 589 F.2d 862, 875-76 (5th Cir. 1979); Sei Fujii v. State, 38 Cal. 2d 718, 721, 242 P.2d 617, 619-20 (1952). *See generally* RESTATEMENT (THIRD), *supra* note 130, at §§ 111(3), (4), comment h. Self-executing treaties are enforceable without implementing legislation; non-self-executing treaties require implementing legislation.

299. Act of April 30, 1790, ch. 9, 1 Stat. 112, 117-18 (formerly codified at 22 U.S.C. §§ 252-54; repealed in 1978). The 1790 act was taken from the Statute of Anne, *supra*

tent with the Vienna Convention and set forth insurance obligations of foreign diplomats.[300] If the United States had intended to use the Vienna Convention as a vehicle for adopting laws to protect diplomatic dignity or to limit peaceful picketing, it missed its best opportunity in 1978.

The implementing legislation of other nations is no more illuminating. For example, Canada, England, Australia, and New Zealand have all enacted the Vienna Convention as part of their domestic law.[301] While none of these statutes specifically defines what is meant by protecting dignity, there is some useful commentary.

In 1969, the legal division of the Canadian Ministry of Foreign Affairs was asked to interpret article 22(3) of the Vienna Convention. In responding, it found it "difficult to assess precisely the degree of protection that the Receiving State is obliged to provide due to the somewhat undefined obligation it has (i.e. its 'special duty to take all the appropriate steps')."[302] However, the Legal Division did not find any obligation to take special steps to prevent affronts to the dignity of the diplomatic agent's mission.[303] Instead, it concluded that a receiving state's obligation

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note 238. S. REP. No. 1108, 95th Cong., 2d Sess. 2 (1978).

300. The law required diplomats to carry liability insurance against certain defined risks, created a direct right of action against an insurer when an insured diplomat had immunity from civil suits, and made certain conforming amendments in the Judiciary Code. S. REP. No. 1108, *supra* note 294, at 1. *See also* 14 WEEKLY COMP. PRES. DOC. 1694 (Oct. 2, 1978); 123 CONG. REC. H25,204 (daily ed. July 27, 1977) (remarks of Rep. Fascell). *See generally* Valdez, *Privileges and Immunities under the Vienna Convention on Diplomatic Relations and the Diplomatic Relations Act of 1978*, 15 INT'L LAW. 411 (1981); Comment, *A New Regime of Diplomatic Immunity: The Diplomatic Relations Act of 1978*, 54 TUL. L. REV. 661 (1980); Note, *The Effect of the Diplomatic Relations Act*, 11 CAL. W. INT'L L.J. 354 (1981).

301. In England treaties are generally not self-executing. S. DE SMITH, CONSTITUTIONAL AND ADMINISTRATIVE LAW 130 (2d ed. 1973). In Canada, treaties affecting private rights are generally not self-executing. J. CASTEL, INTERNATIONAL LAW, CHIEFLY AS INTERPRETED AND APPLIED IN CANADA 851-60 (1st ed. 1965). The specific implementing statutes are Diplomatic Privileges Act, 1964, ch. 81 (United Kingdom); Diplomatic Privileges and Immunities Act, 1967-1973, S. Austl. Acts, § 6 ; Can. Stat., ch. 31 (1977); Diplomatic Privileges and Immunities Act, 1968 no. 36 (N.Z.). *See* Merger, *Diplomatic Privileges and Immunities Act 1968*, 3 N.Z. UNIV. L. REV. 346 (1969) (discussing New Zealand statute); O'Keefe, *International Privileges and Immunities in Australia—The Legislative Framework*, 8 FED. L. REV. 265 (1977) (discussing Australian statute); Przetacznik, *The History of the Jurisdictional Immunity of the Diplomatic Agents in English Law*, 7 ANGLO-AM. L. REV. 348 (1978) (discussing English act); Samuels, *Dipomatic Privileges Act*, 1964, 27 MOD. L. REV. 689 (1964) (same).

302. 8 CAN. Y.B. INT'L L. 355, 355-56 (1970) (citing Memorandum dated September 23, 1969). Professor Castel refers to no special duties to protect against insult. *See* J. CASTEL, *supra* note 301, at 717-19.

303. 8 CAN. Y.B. INT'L L., *supra* note 302, at 356.

to protect diplomatic missions is greater than its normal obligation to protect the property of the public. It noted that the obligation to protect diplomatic premises is based upon the following principles:

> (1) the receiving State's responsibility is not incurred by the mere fact that damage was inflicted upon diplomatic premises;
> (2) the receiving State's obligation to protect diplomatic missions is somewhat greater than its obligation to exercise due diligence in preventing injuries to aliens;
> (3) this obligation is in direct proportion of the predictability of the commission of an aggression, or in other words, to the circumstances.[304]

It would seem difficult to argue that the Canadian Foreign Ministry believes that there is an obligation to protect the dignity of an embassy that extends beyond protecting against violence or damage to the embassy.

A matter nearly directly on point arose in Great Britain in 1984.[305] London police arrested apparently peaceful demonstrators outside the South African High Commission's offices on the belief of the police commander involved that the demonstrators violated Britain's statute implementing the Vienna Convention, the Diplomatic Privileges Act.[306] The Magistrates Court found in favor of the demonstrators, holding that "impairment of dignity required abusing or insulting behavior, and that political demonstrations per se do not amount to such."[307] That, of course, leaves open the question what "insulting" means. Interestingly, Great Britain does not have an act setting a statutory distance as does section 22-1115; it has no legislation specifically protecting embassies.[308] Indeed, following the foregoing incident, and in the context of a general review of the Vienna Convention, the House of Commons Foreign Affairs Committee did not recommend passage of such an act.[309]

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304. *Id.* at 356, *quoted in* L. BLOOMFIELD & G. FITZGERALD, CRIMES AGAINST INTERNATIONALLY PROTECTED PERSONS: PREVENTION AND PUNISHMENT 45 n.19 (1975).

305. Regina v. Roques (Bow Street Mag. Ct. June 1984), *noted in* FOREIGN AFF. COMM. REP., *supra* note 288, at xvii; Higgins, *supra* note 141, at 651.

306. FOREIGN AFF. COMM. REP., *supra* note 288, at xvii.

307. Higgins, *supra* note 141, at 651.

308. FOREIGN AFF. COMM. REP., *supra* note 288, at xvi.

309. Higgins, *supra* note 141, at 651. The Committee wrote:

> [T]he receiving state's duty to protect the peace of the mission cannot be given so wide an interpretation as to require the mission to be insulated from expressions of public opinion within the receiving state. Provided always that work at the mission can continue normally, that there is untrammelled access and egress, and that those within the mission are never in fear that the mission might be damaged or its

An Australian appellate judge also commented about a prosecution under Australia's statute implementing the Vienna Convention:

> If there were in the last analysis no more in this case than a quite peaceful gathering on the lawn of persons shouting slogans and carrying placards of the kind in question here, with no risk of intrusion or damage to the premises, I would have some doubt whether there was any basis for believing that such action in such a place could reasonably amount to impairing the dignity of the mission, which is, after all, a political body. As such it must presumably accommodate itself to the existence of strong disagreement with some of the policies of its government and to the direct and forceful verbal expression of such disapproval. I appreciate that something may turn on the closeness of those concerned to the premises and on the extravagance or insulting nature of the language used, but, for myself, I would like to keep this whole subject open until, if ever, it arises for decision.[310]

Other states do not require implementing legislation, since international treaties to which they are parties automatically have the force of law.[311] There appear to be no judicial decisions in these countries interpreting articles 22(2) and 29 of the Vienna Convention.

If Congress believed that the Vienna Convention required a statute to protect diplomatic dignity, it could have passed one. The legislation implementing the United Nations Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents (U.N. Convention)[312] and the Organization of American States Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion That Are of International Significance (O.A.S. Convention)[313] deals pre-

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staff injured, the requirements of Article 22 [of the Vienna Convention] are met. FOREIGN AFF. COMM. REP., *supra* note 288, at xvii. *But see id.* at 68, 74 (memorandum by Colonel Professor G.I.A.D. Draper arguing that United Kingdom's failure to enact legislation to protect against impairment of embassies' dignity "could expose [the United Kingdom] to international protest if not claims for reparation").

310. Wright v. McQualter, 17 F.L.R. 305, 321-22 (1970). This Vietnam War era case involved a prosecution for obstructing a police officer in his duty to protect the United States Embassy in Canberra. The obstruction occurred when a group of demonstrators pushed through three lines of police to reach the Embassy. *Id.* at 317.

311. *See, e.g.*, Sasse, *The Common Market: Between International Law and Municipal Law*, 75 YALE L.J. 695, 712-13 (1966).

312. Dec. 14, 1973, 28 U.S.T. 1975, T.I.A.S. No. 8532, 1035 U.N.T.S. 167 (entered into force Feb. 20, 1977) [hereinafter U.N. Convention]. *See generally* L. BLOOMFIELD & G. FITZGERALD, *supra* note 304.

313. Feb. 2, 1971, 27 U.S.T. 3949, T.I.A.S. No. 8413 (entered into force for U.S. Oct. 20, 1976) [hereinafter O.A.S. Convention].

cisely with that problem. Both conventions seek to protect diplomats from crimes such as murder, kidnapping and assault, threats or attempts to commit murder, and extortion in connection with those crimes.[314] In 1972, the United States amended 18 U.S.C. § 112, a statute that protects diplomats outside the District of Columbia.[315] In 1976, Congress enacted and the President signed H.R. 15552, which again amended section 112 and specifically implemented the U.N. and O.A.S. Conventions.[316] In

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314. U.N. Convention, *supra* note 312, art. 2; O.A.S. Convention, *supra* note 313, arts. 1, 2.

315. The amended section 112 is analogous to, but slightly different than, section 22-1115. The legislation began as H.R. 10502 and S. 2436 in the second session of the 92nd Congress, *see* H.R. REP. NO. 1202, 92nd Cong., 2d Sess. 1 (1972), and was eventually enacted as H.R. 15883. *See* S. REP. NO. 1105, 92nd Cong., 2d Sess. 8 (1972), *reprinted in* 1972 U.S. CODE CONG. & ADMIN. NEWS 92 Stat. 4316. The law added sections 1116 and 1117 to Title 18 of the United States Code and amended, *inter alia*, section 112 of Title 18. *Id.* at 4325-27.

H.R. 15883 purportedly fulfilled a United States "obligation under international law as a host country to provide protection for diplomatic, consular, and other foreign government and international organization personnel and their families . . . ." H.R. REP. NO. 1202, *supra*, at 8. The report recognized a "generally accepted rule of international law" regarding a host country's "special duty to protect" diplomatic and consular premises and personnel. *Id.* at 9. *See also* 118 CONG. REC. S31,028, S31,032 (1972) (remarks of Senator McClellan regarding H.R. 15883). It mentions nothing more about the source of that duty.

H.R. 10502 initially contained an extremely broad antipicketing provision, making it a crime for anyone to congregate with two or more persons within 100 feet of any diplomatic premises and to refuse to leave when ordered to so by federal, state, or local authorities. H.R. REP. 1202, *supra*, at 3. That provision was later stricken in favor of one prohibiting parading, picketing, and the like, "for the purpose of intimidating, coercing, threatening, or harassing any foreign official or obstructing him in the performance of his duties" or "congregat[ing] with two or more other persons with the intent to perform the aforesaid acts." 118 CONG. REC. H27,111, H27,112, H27,116 (1972). As amended, the provision passed the House, 380 to 2. *Id.* at H27,118. Despite wide support in the Senate, Senator Ervin raised first amendment objections to the amended H.R. 15883. 118 CONG. REC. at S31,034-35 (comments of Senator Ervin). The bill's proponents stressed both Frend v. United States, 100 F.2d 691 (D.C.Cir. 1938), which held section 22-1115 constitutional and, perhaps more important, the purpose of the statute to "protect foreign officials from danger and allow such officials to work in peace." *Id.* at S31,035-36 (remarks of Senator McClellan). Nonetheless, the final bill was amended to provide that "nothing in these provisions shall be construed or applied to abridge first amendment rights." *See* 18 U.S.C. § 112(d) (1982); *see also* 118 CONG. REC. H33,210 (1972); H.R. REP. NO. 1485, 92 Cong. 2d Sess. 1 (1972) (conference report). The bill was signed on October 28, 1972. 8 WEEKLY COMP. PRES. DOC. 1582, 1584 (1972). *See generally* Przetacznik, *The Protection of Foreign Officials in the United States Code*, 9 INT'L LAW. 121 (1975).

316. *See generally* H.R. REP. NO. 1614, 94th Cong., 2d Sess. 1 (1976), *reprinted in*

amending section 112 in 1972 and 1976, the Senate purported to act in accordance both with customary international law and with a specific treaty.[317] Absent similar legislation purporting to implement the Vienna Convention within the District of Columbia, section 22-1115 does not accomplish that implementation.

Finally, it would seem odd that nations implicitly agreed by treaty to limit speech and assembly rights, shortly after many of the same nations were concluding other treaties that established such rights.[318] The European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention),[319] which was signed in 1950 and which entered into force in 1953, specifically guarantees "freedom of expression . . . . includ[ing] . . . to receive and impart information and ideas without interference by public authority."[320] It also guarantees the right of "peaceful assembly and . . . freedom of association."[321] All sixteen signatories of that convention are also parties to the Vienna Convention. Conceivably, if the European Convention limited peaceful picketing, those signatories believed that the Vienna Convention either (1) did not affect what they viewed as legitimate speech or assembly rights, or (2) drew the proper balance between those rights and other states' dignity interests. Still, one would have expected some discussion of the issue if the Vienna Convention actually restricted speech or assembly rights, only ten years after many of its parties had entered the European Convention.[322]

1976 U.S. CODE CONG. & ADMIN. NEWS 4480; 12 WEEKLY COMP. PRES. DOC. 1486 (1976) (statement by President Gerald R. Ford on signing H.R. 15552 into law). Interestingly, despite changes in the 1972 legislation described in note 315, *supra*, the House Committee on the Judiciary reported that the language still "raises serious Constitutional questions because it appears to include within its purview conduct and speech protected by the First Amendment." H.R. REP. NO. 1614, *supra*, at 6 n.9. The Committee, however, believed that the language was not constitutionally objectionable and that the speech-protective language added in 1972 made it clear that "this legislation is not intended in any way to inhibit the exercise of first amendment rights . . . ." *Id.*

317. *See supra* note 313.

318. In addition, various countries recognize such rights in their domestic constitutions. *See, e.g.*, Federal Republic of Germany, Basic Law, arts. 5(1), B.

319. Nov. 4, 1950, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953).

320. *Id.* art. 10(1), 213 U.N.T.S. at 230.

321. *Id.* art. 11(1), 213 U.N.T.S. at 232.

322. A similar point also applies to parties to the American Convention on Human Rights, signed in 1969. O.A.S. Official Records OEA/ser. K./XVI/I.I., doc. 65 rev. I, Corr. 2 (1970). That treaty also protects freedom of expression and the right of peaceful assembly. *Id.* arts. 13(1), 15.

C. *Conclusion*

It is not easy to determine international practice: one cannot simply consult the *Modern Federal Practice Digest* and *Shepard's Citations*. The task requires examination of a variety of sources, over a wide time period, and in different languages. One cannot limit oneself to a few texts, especially if they are old; the meaning of words can change over the years. "Dignity" may be a particularly apt example of that. The difficulty in determining custom should render one particularly cautious in saying that a customary norm exists.

Professor Akehurst has argued that under the right circumstances "a very small number of acts, involving very few States and of very limited duration, is sufficient to create a rule of customary law."[323] He holds that the quantum of evidence needed to establish the existence of a customary norm is relative: if the proponent has only a little evidence, but the opponent has none, the former wins, at least provisionally.[324] Yet this assertion unnecessarily confuses the burden of proof with the substantive elements to be proved. All, or all interesting, proof questions are relative. The real point is that the proponent of the norm must prove both a nearly uniform practice and the existence of *opinio juris*. In areas involving a large number of events, a small number of decisions or paid claims cannot establish a practice, much less a uniform one. In fact, sporadic practice suggests the contrary. Moreover, the quality of the evidence is very important; where the majority of the evidence used to establish the norm is ancient and there is little or no contemporary practice, it renders more uncertain the existence of a norm.

Consequently, tested against the standards of "nearly uniform" practice and *opinio juris*, one cannot discern a customary norm prohibiting or limiting peaceful picketing. There is little doubt that states have various kinds of international legal duties to protect the dignity interests of other states and their diplomatic agents. There is equally little doubt that no international consensus regarding an legal duty requires states to prevent peaceful picketing—even "odious" peaceful picketing—near an embassy.

States have no uniform practice regarding verbal affronts to dignity. Only a few cases, all quite archaic, deal with the issue. For the better part of a century, United States and British officials have discouraged

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323. Akehurst, *supra* note 1, at 18.

324. *Id.* at 13-14. *See also* Weisburd, *A Reply to Professor D'Amato*, 21 VAND. J. TRANSNAT'L L. 473, 478-79 (1988); *but see* D'Amato, *A Brief Rejoinder*, 21 VAND. J. TRANSNAT'L L. 489, 489-90 (1988).

offended states from bringing lawsuits, or have taken a hands-off attitude, often explicitly because of free speech or free press concerns. While some states have enacted legislation that punishes insults to diplomatic agents, by far the greater number of states has not. Moreover, those that have such laws rarely invoke it. Other legislation prohibits only violent displays or does not distinguish between insults generally and insults to ambassadors. Even the commentators are split, with the more recent acknowledging either the absence of any general duty or the absence of any municipal measures to enforce such a duty. Finally, although given the opportunity to codify such a norm in the Vienna Convention, states passed, essentially leaving regulation of peaceful picketing to local options.

The *opinio juris*, such as it is, cuts against finding an obligation. Under the traditional theory that states must recognize that they are acting under a legal obligation, there seems to be no consensus. Although early United States cases assumed such an obligation, more recent British cases[325] made it quite clear that the Crown prosecuted those who defamed ambassadors because they might disrupt relations with other nations. Likewise, those statutes that punish demonstrations appear to protect local interests in peace, rather than the dignity of foreign governments. The fact that several statutes are reciprocal further indicates a lack of legal obligation. Finally, the Vienna Convention itself does not imply the existence of specific customary obligations. If nations truly believed that they had an international legal duty to prevent or limit peaceful picketing or other insults, one would expect to see it clearly stated in the Vienna Convention.[326]

The absence of a customary international law restriction on peaceful picketing comports both with a functional view of diplomatic protection and with developing protections for free expression and assembly. As to the former, if restrictions on picketing prevent only actual interference with the operation of embassies or ambassadors, laws against disorderly

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325. *See supra* note 196 and accompanying text.

326. Nor does D'Amato's articulation theory provide a basis for finding a norm. *See* A. D'AMATO, CONCEPT OF CUSTOM, *supra* note 2, at 74; *see also supra* note 130. There are no compelling examples of states' articulating their understanding of the norm while applying it. Indeed, there is no uniform articulation as to what the norm is, either by national bodies or by international bodies. Only in cases such as Respublica v. De Longchamps, 1 U.S. (1 Dall.) 111 (Phila. O. & T. 1784), *see supra* notes 203-05 and accompanying text, have domestic courts articulated the rule they applied. The English cases expressly relied on no international obligation. Nor have foreign ministries or commentators expressed a rule with the kind of uniformity that states, if they complied could say that they were doing so.

conduct are adequate; no additional legislation is necessary. As to the free speech and assembly issues, the situation may be more complicated. While the treaty and constitutional provisions cited above[327] generally protect expression and assembly, their precise outlines may differ from nation to nation.[328] Usually, however, when states choose to limit expressive rights to achieve another goal, that other goal has a fundamental quality, whether it be public peace or another person's right to dignity. States typically have not placed the dignity of another state at that fundamental level. Until they do, international custom cannot be said to have established that ranking.

IV. First Amendment Constraints on the Exercise of Congressional Discretion Under the Offenses Clause

We have seen that, despite the framers' limited conception of the offenses clause, the courts have given Congress broad discretion to define offenses against the law of nations. The "mysterious" or inchoate nature of some asserted customary norms emphasizes the thin line between definition and creation. There may well be times when the existence of an international legal norm is far from clear. The question then concerns the scope of congressional creativity; that is, what amount of evidence must Congress have before deciding that a particular act constitutes an offense against the law of nations? That in turn leads to a series of questions.

First, one must determine which branch of government, Congress or the courts, ultimately decides whether certain acts constitute an offense

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327. *See supra* notes 317-20 and accompanying text.

328. *See* Kommers, *The Jurisprudence of Free Speech in the United States and the Federal Republic of Germany*, 53 S. Cal. L. Rev. 657, 673-92 (1980) (discussing different balances applied by Germany and United States law in deciding speech cases). *Compare* Shuttlesworth v. Birmingham, 394 U.S. 147 (1969) (invalidating permit requirement on overbreadth grounds); Kunz v. New York, 340 U.S. 290 (1951) (invalidating requirement of permit for outside religious meeting); *and* Saumur v. Quebec, [1953] S.C.R. 299 (same) *with* Tokyo Ordinance Case, 14 Keishū 1243 (criminal) (No. 9 1960), *reprinted in part in* W. Murphy & J. Tanenhaus, Comparative Constitutional Law: Cases and Commentaries 513 (1977) (permit requirement for parades constitutional). *Compare* New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (defamation of public official not actionable absent showing of actual malice) *and* Defamation Case, Keishū 2,472 (No. A 1969) (no crime of defamation without proof of *mens rea*), *reprinted in part in* W. Murphy & J. Tanenhaus, *supra*, at 537, *with* Mephisto Case, 30 BVerfGE 173 (1971), *reprinted in part in* W. Murphy & J. Tanenhaus, *supra*, at 539 (publication of novel based on life of Nazi actor enjoined as violative of right of personal honor). *See also* M. McDougal, H. Lasswell & L. Chen, Human Rights and World Public Order 698-701 (1980).

against the law of nations. The language of the offenses clause appears to make it a prime candidate for the political question doctrine.

Second, if the Constitution allows a judicial role, one might then ask how much deference must be given to the political branches'[329] determination that certain conduct violates customary international law, absent an asserted constitutional violation. Generally, Congress must have only a rational basis for its actions, since courts are loathe to interfere with Congress' political decisions. The issue here, however, is peculiar: the existence of an international legal norm is not solely a political judgment. Arguably, then, courts may have a greater role. On the other hand, courts rarely interfere with the political branches' foreign affairs decisions, so despite the essentially legal nature of the decision, the courts' role may still be circumscribed.

Third, when a congressionally-defined offense conflicts with a constitutional prohibition, in particular, the first amendment, the question becomes how to determine whether the congressional definition or the first amendment controls. If, as here, strict scrutiny[330] applies, the court must determine whether the regulation is narrowly drawn and advances a compelling state interest.[331] As discussed above, in *Boos* the Court found that even if the interest was compelling, the statute was not sufficiently narrowly drawn.[332] It left open the question whether a foreign nation's dignity interest can ever constitute a compelling governmental interest.[333] Determining whether the government's interest is compelling again requires examination of a series of questions. On the one hand, the international norm itself may have an impact on the result. Some norms, such as the rule against genocide, are "peremptory," and the need to enforce

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329. Obviously, both Congress and the President are involved in enacting legislation.

330. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 602-04 (1978).

331. *See* Boos v. Barry, 108 S. Ct. 1157, 1164 (1988) (quoting Perry Educ. Ass'n v. Perry Local Educators Ass'n, 460 U.S. 37, 45 (1983)).

332. *See supra* notes 16-28 and accompanying text.

333. In Haig v. Agee, 453 U.S. 280 (1981), Justice Stevens wrote: "It is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation. Protection of the foreign policy of the United States is a governmental interest of great importance, since foreign policy and national security considerations cannot neatly be compartmentalized." *Id.* at 307 (citation omitted). If Justice Stevens meant that foreign policy considerations are per se compelling, his dictum is not the law in view of Justice O'Connor's remarks in *Boos*. *See Boos*, 108 S. Ct. at 1165. On the other hand, if Justice Stevens expressly meant what he said, that "foreign policy . . . is a governmental interest of great importance," he left open the precise question considered here: Of how great importance? Other cases have linked foreign policy and national security. *See, e.g.*, Zemel v. Rusk, 381 U.S. 1, 16-17 (1954) (restriction "supported by the weightiest considerations of national security").

such a norm may affect the strength of the governmental interest. On the other hand, there may be a generalized "foreign affairs" interest that is ipso facto compelling.

This section will examine each of the above issues. It argues that the political question doctrine does not foreclose judicial examination of the issue and that the usual reasons for deferring to foreign affairs decisions should not restrain the courts from looking into the existence of an international offense. This section concludes that neither the nature of the proposed norm itself nor foreign affairs reasons renders the governmental interest compelling, unless there is a strong national security component or another domestic interest that would be compelling, such as preventing racism.

A. *The Political Question Doctrine*

The threshold inquiry is whether the political question doctrine[334] wholly forecloses judicial examination of a congressional definition of an offense against the law of nations because the Constitution expressly gives Congress the power to define offenses.[335] The political question doctrine permits courts under limited circumstances to find certain questions nonjusticiable.[336] Justice Powell stated the doctrine's broad con-

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334. This Article will not attempt to examine the political question doctrine in depth. For two classic and opposing views, see A. BICKEL, THE LEAST DANGEROUS BRANCH 46-65 (1962) (doctrine an avoidance technique used to permit courts to maintain own legitimacy by limiting reviewing power) and Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 1-10 (1959) (doctrine applies when Constitution has committed autonomous decision-making power to another branch).

335. The fact that in the last century several cases specifically dealt with questions of the existence of an offense does not necessarily end the inquiry. Those cases, such as United States v. Arjona, 120 U.S. 479 (1887), *see supra* notes 86-88 and accompanying text, were decided long before the current flowering of the political question doctrine.

336. The modern fountainhead of the doctrine is Justice Brennan's opinion in Baker v. Carr, 369 U.S. 186 (1962), an electoral apportionment case:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. at 217.

Professor Scharpf set forth the categories of cases in which courts had applied the doctrine as of 1961. Scharpf, *Judicial Review and the Political Question: As Functional*

tours in *Goldwater v. Carter*,[337] a dispute between the President and some members of Congress over the power to terminate treaties:

> (i) Does the issue involve resolution of questions committed by the text of the Constitution to a coordinate branch of Government?
> (ii) Would resolution of the question demand that a court move beyond areas of judicial expertise?
> (iii) Do prudential considerations counsel against judicial intervention?[338]

The doctrine represents a curtailment, if not a total abdication, of the judicial function and is only appropriate in limited circumstances. One of the most frequent, and some would say the only legitimate,[339] use of the doctrine is in foreign relations cases.[340] Often such cases raise the issue whether one branch of government has unreviewable discretion to take certain action, for example, to commit United States forces to combat[341] or to terminate treaties.[342] Yet, as Professor Scharpf has pointed out, even in the foreign relations area, courts have often decided constitutional questions on their merits.[343] In the context of foreign affairs, the

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Analysis, 75 YALE L.J. 517, 537 n.69 (1966). Unfortunately for any generalized analysis, those categories remind one of the state of chemistry before Mendeleev. *See also* Tigar, *Judicial Power, the "Political Question Doctrine," and Foreign Relations*, 17 UCLA L. REV. 1135, 1166 (1970) (political question doctrine not "a coherent, single principle which permits or requires non-decision of an identifiable class of cases").

337. 444 U.S. 996 (1979).

338. *Id.* at 998 (Powell, J., concurring).

339. Champlin & Schwartz, *Political Question Doctrine and Allocation of Foreign Affairs Power*, 13 HOFSTRA L. REV. 215, 239 (1985). Those authors state that the last domestic use of the doctrine occurred in Colegrove v. Green, 328 U.S. 549 (1946). Champlin & Schwarz, *supra*, at 239 n.99.

340. Chicago & Southern Air Lines v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948) ("very nature of executive decisions as to foreign policy is political, not judicial. . . . [Such decisions] are delicate, complex, and involve large elements of prophecy."). *But see* Baker v. Carr, 369 U.S. 186, 211 (1962) ("Yet it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.").

341. *See, e.g.*, Atlee v. Laird, 347 F. Supp. 689 (E.D. Pa. 1972), *aff'd sub nom.* Atlee v. Richardson, 411 U.S. 911 (1973).

342. *See, e.g.*, Goldwater v. Carter, 444 U.S. 996 (1979).

343. Scharpf, *supra* note 336, at 543-48; *see also* Tigar, *supra* note 336, at 1168-70. Professor Henkin has argued that if the "political question [doctrine] is one in which the courts forego their unique and paramount function of judicial review of constitutionality," then no such doctrine exists. Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597, 599 (1976). Henkin contends that the leading cases in which courts have declined to review "political questions" are cases in which the political branches were simply exercising their legitimate constitutional responsibilities and courts declined to intervene. *Id.* at 599-601. *See* Luther v. Borden, 48 U.S. (7 How.) 1 (1849) (Court bound by congressional determination that a state government was "Republican"). Pro-

political question doctrine often involves the allocation of decisional competence between the political branches.[344] The offenses clause presents an interesting variation on the allocation theme; it raises the question of allocation between the political branches and the judiciary, not the legislative and the executive.

Perhaps the most important reason that the doctrine has not been applied in *Boos* and other offenses clause cases is that those cases involve criminal convictions. In effect, the existence of an offense against the law of nations is an element of the crime. As a matter of due process, the criminal defendant is entitled to a judicial determination that Congress has not exceeded its authority.[345]

Aside from the criminal nature of the proceeding, a careful examination of the standard criteria suggests that the doctrine does not apply. As an initial approximation, the first, and probably most important, prong of the *Baker v. Carr* test[346] seems to be met: the fact that the Constitution vests Congress with the power to "define" offenses seems as demonstrable a commitment as there can be. Concluding on that basis alone that judicial inquiry is foreclosed, however, seems unduly scholastic. Under article III of the Constitution and *Marbury v. Madison*,[347] federal courts decide constitutional issues properly before them and "say what the law is."[348] The issue here is precisely "what the law is."

While Congress can define offenses, it does not follow that it has the function of saying finally what the law of nations is. Traditionally, the courts play a role in saying what the law is. In the absence of a clear indication in the history of the offenses clause that the framers intended to preclude a judicial role, one should be wary of excluding the courts.

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fessor Henkin further argues that even in the foreign relations cases, the Court did not "refuse to consider whether the President had exceeded his constitutional authority; rather, it concluded that the President's decision was within his authority and therefore law for the courts." Henkin, *supra,* at 612. *See* Williams v. Suffolk Ins. Co., 38 U.S. (13 Pet.) 414 (1839) (Court bound by executive determination that a regime was the government of a foreign state).

344. *See* Champlin & Schwartz, *supra* note 339, at 243-44.

345. *See* United States v. Decker, 600 F.2d 733, 738 (9th Cir. 1979) (courts reluctant to use political question doctrine in criminal cases); *see also* Eain v. Wilkes, 641 F.2d 504, 513-16 (7th Cir. 1981) (rejecting Government argument that political question doctrine renders nonjusticiable issue whether "political offense" exception applies to extradition); *In re* Mackin, No. 80 Cr. Misc. 1, slip op. at 21-22 (S.D.N.Y. Aug. 13, 1981) (LEXIS, Genfed Library, Dist. file) (declining to use political question doctrine to limit inquiry into political offense issue). *See generally* Tigar, *supra* note 336, at 1175-78.

346. *See supra* note 336 and accompanying text.

347. 5 U.S. (1 Cranch) 137 (1803).

348. *Id.* at 177.

The history of the offenses clause, read in the light of the framers' understanding of international law, does not suggest an exclusive role for Congress. The debates over the offenses clause, outlined above, imply a limited grant of authority to define offenses whose elements are unclear, not to create offenses out of whole cloth.[349] International law was "part of our law."[350] If it required some definition, Congress could do that, but nothing in the debates over the clause suggests that the courts should not play their historic role in saying what the law is. In those days, international law, unlike the law of a particular foreign jurisdiction, was a question for the court, not the trier of fact.[351] Determining the law did not demand a political decision, but rather required an examination of "the usages, the national acts, and the general assent, of that portion of the [jurist's] world of which he considers himself a part. . . ."[352]

Nor does the courts' treatment of the offenses clause suggest an understanding that Congress has the ultimate decisional authority. From the earliest days of the nation, the courts have considered the scope of congressional authority to define piracies,[353] felonies[354] and offenses against the law of nations.[355] *Powell v. McCormack*[356] presents an analogous case in which the Court refused to invoke the doctrine. The House of Representatives claimed unreviewable discretion to judge the qualifications of its own members under article I, section 5 of the Constitution. The Court rebuffed the argument, holding that the House's discretion to exclude members was limited by article I, section 2, which sets forth the

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349. As shown from the discussion of the history of the offenses clause, *see supra* notes 58, 59 and accompanying text, the framers apparently did not intend to give Congress unbounded authority to define offenses against the law of nations. They likely assumed that Congress would specify the elements of crimes more generally understood by the international community.

350. The Paquete Habana, 175 U.S. 677, 700 (1900). *See also* Lobel, *supra* note 4, at 1084-90; 1 F. WHARTON, *supra* note 223, at § 8.

351. Thomas Jefferson apparently did not consider trial by jury necessary in "matters of fact triable by the laws of the land and not by the law of Nations." Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), *reprinted in* 12 THE PAPERS OF THOMAS JEFFERSON 438, 440 (J. Boyd ed. 1958), *and in* 1 BILL OF RIGHTS, *supra* note 60, at 605, 606. Alexander Hamilton agreed with this conclusion. THE FEDERALIST No. 83, *supra* note 46, at 468-69.

352. The Antelope, 23 U.S. (10 Wheat.) 66, 121 (1825).

353. United States v. Smith, 18 U.S. (5 Wheat.) 153 (1820).

354. Oliver v. United States, 230 F. 971 (9th Cir. 1916) (statute covered attempt to commit rape; rape occurred on American vessel on high seas).

355. United States v. Arjona, 120 U.S. 479 (1887); United States v. White, 27 F. 200 (C.C.E.D. Mo. 1886).

356. 395 U.S. 486 (1969).

three qualifications for House membership.[357] Likewise, under the offenses clause, Congress is restrained by international law.

In the general case, there is no reason to believe that the other *Baker v. Carr* criteria[358] apply. The offenses clause presents questions uniquely suitable for judicial resolution, with standards readily at hand. Indeed, unlike some other provisions of article I, section 8, the standards are built into the text: Is there an offense against the law of nations? This differs completely from such open-ended grants of power as article I, section 8, clause 3, which gives Congress power "to regulate" interstate and foreign commerce, and article I, section 8, clause 14, which gives Congress unlimited authority to make rules to govern the land and naval forces.[359] Although the bases for finding practice to be a norm of customary international law are not always clear, no commentators suggest that the decision is open-ended or merely political. To the contrary, the effort is generally to objectify the decision by demanding evidence of uniform practice and *opinio juris*. Unlike situations involving hidden or secret evidence in the possession of the executive branch,[360] if custom exists, it must be public. That it may be esoteric, as it often is, is a matter of inadvertence—and annoyance—rather than design.

Similar reasons undercut the prudential concerns, which Justice Brennan outlined more explicitly in *Baker v. Carr*.[361] They include the possibility of lack of respect for the other branches of government, the need for unquestioning adherence to the political branches' determinations, or the possibility of conflicting prouncements from different branches of government.[362] In one way or another each of these flows from the judicary's reluctance to become enmeshed in policy decisions where other branches of the government have taken a different (or various different) position. That overlooks, however, the type of question the courts will decide—whether a congressional enactment properly embodies an offense against law of nations. There is no greater policy content here than in any determination of the state of the law.

It is also somewhat difficult to imagine realistic scenarios in which the

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357. *Id.* at 522.

358. *See supra* note 336 and accompanying text.

359. *See, e.g.*, Gilligan v. Morgan, 413 U.S. 1, 6-8, 10 (1973) (court erred in evaluating training of Ohio National Guard as a predicate to granting injunctive relief; U.S. CONST., art. I, § 8, cl. 16, gave Congress authority over state militias and courts lacked competence to make the required "complex, subtle and professional decisions on such matters").

360. Scharpf, *supra* note 336, at 567-68.

361. 369 U.S. 186 (1962).

362. *Id.* at 217. *See supra* note 336 and accompanying text.

current problem would arise. The political question issue might arise if the President committed that a person would be punished for allegedly criminal behavior, obviously an incredibly unlikely event, or if the President made a public commitment that certain behavior would be criminalized as violating customary international law, without clear evidence to support the law.[363]

In the first situation, embarrassment would occur only if the other states involved did not understand that in this country a trial must precede criminal sanctions. It need hardly be said that no court would bow to that embarrassment argument. The second hypothetical is more problematic. Other states might not understand why a United States commitment to enact such a statute is not conclusive. There are several responses. First, the issue is only likely to arise in the context of a criminal prosecution. There, the dictates of due process should defeat the President's commitment: on one side of the scale there is a criminal penalty; on the other, a political, discretionary statement by the President. Second, if the existence of an international norm is in doubt, other states should not complain if a United States court, after a proper inquiry, refuses to proclaim it law. Third, if the political branches wished to avoid the pitfalls of the offense clause, they could use other heads of authority, such as entering into a treaty and then enacting implementing legislation. Finally, this is not strictly a foreign affairs matter. If another nation claimed reparations, rather than demanding punishment, its claim would be handled through standard foreign relations channels. What is at stake here is a domestic criminal prosecution.

The *Baker v. Carr* (or *Goldwater v. Carter*) criteria[364] are merely the projection on the practical plane of the theoretical rationale for the political question doctrine. Thus, it may be worthwhile to see if any of the more generalized rationales supports judicial abstinence. If the doctrine flows from the constitutional text and applies only where the text allocates power solely to one branch, it is highly improbable that the text precludes judicial participation in decisions concerning the existence of customary international law. The framers did believe that our law incorporates custom; they must have envisioned judges as saying what that customary law was, just as they did other law. Many of the cases discussed above required judges to do exactly that, even when the question involved the offenses clause.

On the other hand, if one views the doctrine as a prudential avoidance

363. A treaty that criminalized the behavior would present a wholly different situation.

364. *See supra* notes 336-38 and accompanying text.

device to permit the judiciary to maintain its legitimacy, it is not easy to see how abstaining from offenses clause cases is useful. Again, if there is anything judges should do, it is to "say what the law is." Those decisions implicate basic legal questions, not political ones, so adjudicating them should not detract from the vision of the court as above political skirmishing.

B. *Deference to Congressional Definitions of Offenses Against the Law of Nations Absent a First Amendment Claim*

Having concluded that courts may review statutes passed pursuant to the offenses clause, one must determine the proper standard of review. In general, if a regulatory statute does not contravene a fundamental right, courts require Congress only to have a rational basis for its belief that the law advances permissible legislative ends. The argument for deference is usually considered more compelling when the issues involved implicate foreign affairs. This view, however, raises several complications.

The argument for deference might be more persuasive if this were strictly an executive branch rule. Part of the accepted mystique of the Presidency is the great freedom to act in the area of foreign affairs. Congressional delegations of authority may be much broader in foreign affairs than in domestic affairs.[365] The President may enter into executive agreements that have the effect of overriding state laws when the President recognizes foreign countries[366] or resolves international claims generally.[367] Courts grant "great weight" to executive branch interpretations of treaty language.[368] The Supreme Court in *United States v. Curtiss-Wright Export Corp.*[369] suggested two reasons (that apparently sur-

365. United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936).

366. United States v. Pink, 315 U.S. 203, 230 (1942); United States v. Belmont, 301 U.S. 324, 330 (1937).

367. Dames & Moore v. Regan, 453 U.S. 654, 673 (1981).

368. Sumitomo Shoji America, Inc. v. Avagliano, 457 U.S. 176, 185 (1982); Kolovrat v. Oregon, 366 U.S. 187, 194 (1961). This rule may, however, simply be an extension of the administrative law precept that interpretations of a statute by the agency charged with the statute's enforcement are entitled to great weight. *See, e.g.*, Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367, 381 (1969); *see also* Damrosch, *Application of Customary International Law by U.S. Domestic Tribunals*, 76 AM. SOC'Y INT'L L. PROC. 251, 252 (1982) (arguing that United States courts defer less to State Department views on treaties than on customary international law).

369. 299 U.S. 304 (1936). In *Curtiss-Wright*, Justice Sutherland also articulated a theory that the foreign affairs power is extra-constitutional:

> It results that the investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution. The powers to declare and wage war, to conclude peace, to make treaties, to main-

vive today) for the level of deference paid to executive branch decisions in foreign affairs. Not surprisingly, those reasons largely overlap the political question doctrine. First, there is the "embarassment" argument: Courts wish to avoid interfering with and possibly undermining United States foreign policy initiatives.[370] Second, there is the "competence" argument: The President has access to confidential information, not available to Congress, upon which executive judgments might be based.[371] Generalizing, courts take into account the executive's "superior ability to make factual determinations involving foreign situations"[372] — its peculiar ability to deal with an entire problem—as opposed to the piecemeal ways in which courts confront problems and the courts' own perception of their inability to predict the reactions of foreign governments.[373] Commentators[374] and courts[375] have extended this rationale to the political branches generally vis a vis the courts.[376]

The cases and writers talk casually of deference to the "political branches." But the generally understood grounds for deferring to congressional action differ substantially from those advanced for deferring to the executive. In the former case, we assume that Congress does—or at

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tain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the federal government as necessary concomitants of nationality.

Id. at 318. Justice Jackson, in his concurrence in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952), referred to Sutherland's view as dictum. *Id.* at 635-36 n.2 (Jackson, J., concurring). Commentators have also criticized the historical basis of Justice Sutherland's analysis. *See, e.g.*, L. Henkin, *supra* note 4, at 22-26.

370. *Curtiss-Wright*, 299 U.S. at 320.

371. *Id.* at 320-22. This concern for secrecy in the handling of foreign policy, especially treaties, has deep constitutional roots. *See, e.g.*, THE FEDERALIST No. 75 (A. Hamilton), *supra* note 46, at 455; 4 ELLIOT, *supra* note 35, at 263 (Pierce Butler); *id.* at 204 (Charles Cotesworth Pinckney).

372. Trimble, *Foreign Policy Frustrated—Dames & Moore, Claims Court Jurisdiction and a New Raid on the Treasury*, 84 COLUM. L. REV. 317, 365 (1984) (citing Scharpf, *supra* note 336, at 567-68, 571-83).

373. *Id.*

374. *See, e.g., id.*

375. Finzer v. Barry, 798 F.2d 1450, 1458-59 (D.C. Cir. 1986).

376. In one recent case, the court noted that it is particularly inappropriate for courts to examine congressional power to enact legislation in the foreign affairs area when Congress and the President act in unison. Mendelsohn v. Meese, 695 F. Supp. 1474, 1480 (S.D.N.Y. 1988). That court found that the present situation did not involve a case of Presidential action by itself. Accordingly, the tripartite analysis of Justice Jackson's concurrence in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635-38 (1952), as adopted in Dames & Moore v. Regan, 453 U.S. 654, 668-69 (1981), was not warranted. *Mendelsohn*, 695 F. Supp. at 1480.

least is more likely to—represent a majority view, and that no similar majoritarian ground supports the authority of the courts.[377] The usually articulated grounds for deferring to the executive in foreign affairs are quite different. Whether they derive explicitly from *Curtiss-Wright's* extra-constitutional theoretical base or from the pragmatic considerations stated by Justice Sutherland in that case (and repeated by subsequent courts and commentators),[378] they are anti-majoritarian, indeed almost monarchical.[379]

Even the accepted arguments for deference to the executive are not very cogent here. Without cataloging all the examples of potential executive embarrassment, typical examples include situations in which the President takes a position in foreign policy and the courts take an opposite position,[380] or in which courts might force the United States Government to take a position when it does not wish to do so.[381] Even in these circumstances, however, it is difficult to see how such embarrassment would occur. If courts take a position contrary to that assumed by Congress or the President as to the content of customary international law, only pathological naivete on the part of other nations could lead to embarrassment. They would have to believe that the political branches have the final word regarding both what constitutes the law in a constitutional sense and whether United States law violates the first amendment. That seems most unlikely. Moreover, most nations should be expected to understand that, except in the clearest cases, there may be some question

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377. *See* A. BICKEL, *supra* note 334, at 16-20; Choper, *The Supreme Court and the Political Branches: Democratic Theory and Practice*, 122 U. PA. L. REV. 810, 830-32 (1974). This is not to deny that anti-majoritarian factors play a major role in the legislative process. *See* S. KRISLOV, THE SUPREME COURT AND POLITICAL FREEDOM 20 (1968).

378. *See supra* note 369 and accompanying text.

379. The majority's view may work its way into the process as a constraint every four years by changing those who select the judges, but that does not distinguish the executive very much from the judiciary. Wright, *The Role of the Supreme Court in a Democratic Society—Judicial Activism or Restraint?*, 54 CORNELL L. REV. 1, 21 (1968); Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 284-86 (1957).

380. For example, Professor Trimble posits a situation in which the United States Court of Claims awards additional relief to a claimant who had received some relief from the United States-Iran Claims Tribunal, finding there had been a taking without just compensation. This would imply that the Tribunal had somehow behaved unfairly, contrary to the executive branch position on the Tribunal. Trimble, *supra* note 372, at 366-67.

381. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d at 801 (Bork, J., concurring); Trimble, *supra* note 372, at 367-68.

about whether international practice has reached the level of custom. It follows that they should be aware that, except in those very clear cases, executive or congressional policy relating to custom may not be legally authoritative.

To some extent, international law recognizes that states should be aware of the internal gears and wheels of other states' legal systems. Article 46 of the Vienna Convention on the Law of Treaties[382] states that a treaty does not become binding between states if it is manifestly apparent—to one acting in good faith—that it was adopted in violation of the constitutional processes of the other state. Judicial review of statutes is a hallmark of the United States system. Given the substantial number of countries that now employ some form of judicial review, one would further expect states to understand that executive and legislative pronouncements that something is "law" are not final.[383]

The competence argument—the second argument in favor of judicial deference—is even weaker than the embarrassment argument. To the extent that it rests upon the existence of secret facts, it does not apply to the existence of a customary norm of international law. To the contrary, the facts at issue must be well known to support the existence of a norm. Nor does it apply to Congress as opposed to the President; the desire to keep things secret also means secret from Congress. More to the point, deciding whether a practice has reached the level of "law" is precisely what judges do.[384] The argument also rests on the need for speed, again, absent here.

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382. U.N. Doc. No. A/Conf. 39/27, *reprinted in* BASIC DOCUMENTS *supra* note 125 and at 368-69, 63 AM. J. INT'L L. 875, 890 (1969).

383. Judicial review of statutes virtually originated in the United States with Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), and has spread throughout much of the world. *See* W. MURPHY & J. TANENHAUS, *supra* note 328, at 32, 44-45, 91 (judicial review in the Federal Republic of Germany, Japan, and Ireland); *see generally* M. CAPPELLETI, JUDICIAL REVIEW IN THE CONTEMPORARY WORLD (1971); Cappelletti, *Judicial Review in Comparative Perspective*, 58 CALIF. L. REV. 1017 (1970). The European Community has a court that exercises judicial review of national statutes. *See, e.g.*, Marckx Case, 1979 Y.B. EUR. CONV. ON HUM. RTS. 410; *see generally* F. CASTBERG, THE EUROPEAN CONVENTION ON HUMAN RIGHTS (1974).

384. Arguably, the judicial determination of customary international law, like the law of other nations, is a matter of law. While the drafters of Rule 44.1 of the Federal Rules of Civil Procedure do not use the term judicial notice, the procedure set out by the rule is very much like judicial notice. *See* 1 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶200[02], at 200-6—200-7 (1986); Fed. R. Civ. P. 44.1. Moreover, appellate courts should and do exercise de novo review of facts when those facts determine results that affect first amendment rights. *See* Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 499 (1984).

Applied to congressional action, the argument for deference is even weaker. The majoritarian argument does not fully justify deference to congressional definitions of the law of nations. To first order, declaring the existence of those rules is not a policy determination at all; either there are rules or there are not. But the first order is not the whole story. In some cases there is room for judgment in saying what the law is.

The judgment as to the existence of international legal rules is, however, quite different from other judgments involving legislation. *Lyng v. International Union*,[385] is a typical example of judicial review of a congressional economic judgment. At issue in *Lyng* was a federal statute that forbade states from issuing food stamps to households in which one of the household members was on strike.[386] The Court rejected first amendment challenges and, as relevant here, an equal protection attack. It held that the statute was justified because it was rationally related to Congress' desire not to favor one side of a labor dispute.[387] In this respect, Congress is making a policy choice that has no logic other than a congressional desire to achieve a certain purported end—neutrality in labor disputes. Judicial interference in the result would simply substitute the Court's preference for Congress' in an area lacking standards for guidance.

In contrast, judicial consideration of the congressional definition of an offense is based on the principle implicit in the offenses clause itself, that an international norm exists. The offenses clause differs from many other constitutional provisions in that it contains not only its own standard against which to measure congressional action, but a specifically legal standard at that. Similarly, there is an obvious distinction between Congress' decision to impose criminal sanctions on the violation of an established norm, such as slavery, and its decision that there is a norm. Finally, the congressional determination that a certain act constitutes an offense against the law of nations contains nothing of the political character of the executive determinations that supported the discretion given to the President in *Zemel v. Rusk*,[388] *Haig v. Agee*[389] and *Regan v. Wald*.[390] Accordingly, a deferential standard of review will almost never

385. 108 S. Ct. 1184 (1988). *See also* Bankers Life & Cas. Co. v. Crenshaw, 108 S. Ct. 1645, 1652 (1988) (similar standard applied to state statute).

386. Omnibus Budget Reconciliation Act of 1981, § 109, Pub. L. No. 97-35, 95 Stat. 357.

387. *Lyng*, 108 S. Ct. at 1192-93.

388. 381 U.S. 1 (1965).

389. 453 U.S. 280 (1981).

390. 468 U.S. 222 (1984). In *Zemel* and *Wald*, the issues were related to a determination that travel to Cuba was not in the best interests of the United States. In *Agee*, the

be appropriate.

One might object that the decision to formulate a new "norm" of international law or to recognize an emerging norm is intensely political, and may not be legal at all in any traditional, domestic sense. While that is true, it does not vitiate this argument. The United States does not need the offenses clause to participate in the progressive development of international law. Decisions as to international obligations, whether made by the President alone or by the President and the Senate, will not necessarily have a domestic effect. Problems arise only when international agreements or statutes executing them constrain domestic behavior.

C. *Deference to Congressional Definitions of Offenses Against the Law of Nations when the "Offense" Violates the First Amendment*

The foregoing argument may seem to run contrary to accepted notions of the judicial role in reviewing statutes. Yet, even if that analysis is incorrect, the question remains whether the interests embodied in the statute are "compelling" for a first amendment analysis. "Compelling" both is and is not a term of art. On the one hand, it is among several words that the Supreme Court uses interchangeably to connote an important governmental interest.[391] On the other hand, some cases imply a distinction between "important" and "compelling."[392] The question is not one of semantics; rather, it is how one identifies a governmental interest of sufficient stature that it permits even a narrowly-drawn speech restriction. If the statute restricts first amendment rights, is an interest inherent simply in the fact that Congress reasonably believes there is an international offense—or that there is in fact such an offense—sufficient to save the statute?

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question was whether Agee harmed the national security interests of the United States by revealing the names of C.I.A. agents. Both of those questions are quintessentially political. By contrast, and almost tautologically, the determination that something is an offense against the law of nations is a legal decision, appropriate for courts to review. Perhaps most important is the fact that a statute enacted pursuant to the offenses clause will almost certainly involve criminal penalties and will therefore affect a fundamental liberty interest. The author is indebted to Jules Lobel for this point.

391. Arcara v. Cloud Books, Inc., 478 U.S. 697, 703 (1986) ("compelling; substantial; subordinating; paramount; cogent; strong") (quoting United States v. O'Brien, 391 U.S. 367, 376-77 (1968)).

392. In Craig v. Boren, 429 U.S. 190 (1976), a gender-discrimination case, the Court articulated an intermediate equal protection test that fell between strict scrutiny (which requires a compelling interest) and the deferential test applied to economic regulation (which requires only a legitimate interest). The *Craig* test requires an "important governmental interest." *Id.* at 199.

But "compelling"—or its surrogates—are meaningful only in context, and that context is a challenge to federal or state action that infringes either a fundamental right[393] or equal protection.[394] The counterweight to the allegedly compelling governmental interest flows either directly or by implication from the Constitution. Thus, compelling must mean something beyond "important"; it must express a value or values that have roots in the community's broader interest. In general, interests that have been found sufficient to justify restraints on speech have that element.[395] Without something more, it would not appear that an international interest alone had that element, since it does not necessarily express values of the people the Constitution protects. Of course, the fact that the interest is that of another nation does not preclude its having a compelling status: the interest of United States citizens in the lives of Ethiopians suffering from famine may be compelling. Moreover, the fact that the interest finds its way into domestic legislation indicates that it has some value to the domestic community. The question thus becomes what characteristics such an interest must have to be "compelling"; more specifically, is a "foreign affairs" interest sufficient?

1. Judicial Background

The cases provide some implicit guidance as to the weight of foreign policy interests. Courts often couple those interests with "national security." In certain circumstances courts have indicated that a national security or military interest will justify an infringement of first amendment speech or press rights.[396] The Court's cases appear to place those defense interests ahead of other interests, including foreign relations.[397] In no

393. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618, 634 (1969) (right to interstate travel); Roe v. Wade, 410 U.S. 113, 152-56 (1973) (right to privacy).

394. *See, e.g.*, Fullilove v. Klutznick, 448 U.S. 448, 477-78, 491-92 (1980) (requirement that recipients of certain federal grants give 10% to "minority business enterprises" affirmed as a legitimate method of remedying prior discrimination in awarding of federal grants).

395. *See, e.g.*, City of Renton v. Playtime Theatres, Inc., 106 S. Ct. 925, 930 (1986) (governmental interest in preserving quality of urban neighborhoods justified restriction on location of "adult" theaters); Grayned v. City of Rockford, 408 U.S. 104, 119 (1972) (interest in preventing disruption at public schools justified total ban on picketing on sidewalk adjacent to schools).

396. *See* Communist Party v. Subversive Activities Control Bd., 367 U.S. 1, 94-97 (1961) (where national security is involved and congressional decision not "unfounded or irrational" and congressional appraisal not unentertainable, Court will not substitute its judgment for congressional accommodation of "exigencies of self-preservation and the values of [first amendment] liberty").

397. Rostker v. Goldberg, 453 U.S. 57, 64-65 (1981) (upholding all-male draft regis-

case has the Court held that foreign affairs or foreign relations interests are inherently "compelling."

When political branch actions in the foreign relations or related areas directly infringe explicit constitutional rights, courts have not always deferred to them.[398] Perhaps the clearest example of that position is *Reid v. Covert*.[399] In *Reid*, the Supreme Court considered whether dependents of United States military personnel could be tried in foreign countries by military regulations and procedures.[400] Writing for the Court, Justice Black held that, contrary to Uniform Code of Military Justice (UCMJ) regulations permitting such a trial, article III, section 2 and the fifth and sixth amendments to the Constitution governed; therefore, trials pursuant to the UCMJ were unconstitutional.[401] The fact that the application of the UCMJ was predicated upon the existence of an executive agree-

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tration against equal protection challenge) ("The case arises in the context of Congress' authority over national defense and military affairs, and perhaps in no other area has the Court accorded Congress greater deference.").

398. Ironically, perhaps the most egregious examples of judicial deference, albeit under the war power, occurred in cases involving individual rights. *See* Korematsu v. United States, 323 U.S. 214 (1944); Hirabayashi v. United States, 320 U.S. 81 (1943); *but see* Korematsu v. United States, 584 F. Supp. 1406, 1419, 1420 (N.D. Cal. 1984) (carefully reviewing evidence and granting writ of *coram nobis*). Although Justice Jackson, a former United States Attorney General, must have known something about executive decision-making, he dissented in *Korematsu*. *See* 323 U.S. at 242 (Jackson, J., dissenting).

399. 354 U.S. 1 (1956).

400. *Id.* at 3.

401. Justice Black clearly stated the premise of his argument in *Reid*: "The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution." *Id.* at 5-6 (footnotes omitted). *See* United States v. Tiede, Crim. Case No. 78-001A (U.S. Ct. for Berlin Mar. 14, 1979), *reprinted in* 19 I.L.M. 179, 188, 192 (1980) (everything United States officials do must be authorized by the Constitution; any matter concerning the Government's operation of an occupied territory is not necessarily a political question). *Tiede* is discussed in Gordon, *American Courts, International Law and "Political Questions" Which Touch Foreign Relations*, 14 INT'L LAW. 297 (1980); Paust, *Is the President Bound by the Supreme Law of the Land?—Foreign Affairs and National Security Reexamined*, 9 HASTINGS CONST. L.Q. 719, 723, 724 (1982).

The premise of *Reid* is directly contrary to Justice Sutherland's rationale in United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936). *Curtiss-Wright* and *Reid* cannot coexist very peacefully. If all of the political branches' power comes from the Constitution, Justice Sutherland's somewhat mystical view of the flow of foreign affairs power is unacceptable. It does not follow, however, that Justice Sutherland's practical reasons in *Curtiss-Wright* for according discretion to the political branches thereby lose their force. Indeed, one could argue that they are wholly distinct from the supposed rationale.

ment between the United States and Great Britain did not alter Justice Black's conclusion.[402] The Court did not distinguish between treaties and executive agreements.[403] The Court also rejected the Government's argument that article 1, section 8, clause 14, which empowers Congress to "make Rules for the Government and Regulation of the land and naval Forces," gave Congress the power to enact the regulation at issue.[404]

In two other cases in which governmental authority rested on either the foreign affairs power or the closely related war power, the conflict between governmental authority and the first amendment was more direct, and the Court upheld first amendment challenges. In *United States v. Robel*,[405] the Court found unconstitutional section 5(a)(1)(D) of the Subversive Activities Control Act, which effectively made it a crime for a member of the Communist Party to work in a "defense facility."[406] The Government argued that the statute was passed pursuant to Congress' war power and was thus entitled to substantial deference.[407] Nevertheless, Chief Justice Warren, writing for the Court, rejected the notion that the war power was a "talismanic incantation" that would support "any exercise of congressional power."[408] Recognizing that Congress has the authority to regulate in the area, the Court found the regulation at issue overbroad.[409]

In 1971, the Supreme Court decided *New York Times Co. v. United States*,[410] better known as the *Pentagon Papers Case*. In that case, the Court refused to enjoin the *New York Times* and the *Washington Post* from publishing a classified study entitled "History of U.S. Decision-Making Process on Viet Nam Policy."[411] The Government argued,

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402. *See Reid*, 354 U.S. at 15 & n.29. Justice Black stated that "no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution." *Id.* at 16.

403. *Id.* at 17. In discussing the treaty power, the Court cited Geofroy v. Riggs, 133 U.S. 258, 267 (1890), for the proposition that it "would not be contended that [the treaty power] extends so far as to authorize what the Constitution forbids . . . ." *Reid*, 354 U.S. at 17.

404. *Reid*, 354 U.S. at 19-41. *See also* Afroyim v. Rusk, 387 U.S. 253 (1967) (Congress has no inherent foreign affairs power and may not use such power to strip a person of citizenship).

405. 389 U.S. 258 (1967).

406. Subversive Activities Control Act of 1950, § 5, 64 Stat. 992 (1950), *as amended by* Act of Aug. 24, 1954, 68 Stat. 777 (codified at 50 U.S.C. § 784(a)(1)(D) (1982)).

407. *Robel*, 389 U.S. at 263.

408. *Id.* at 263.

409. *Id.* at 264-68.

410. 403 U.S. 713 (1971).

411. *Id.* at 714.

among other things, that the President's authority to protect against publication stemmed from the President's constitutional power over the conduct of foreign affairs and his power as commander-in-chief.[412] Justice Black, writing for himself and Justice Douglas, rejected that argument. Noting the breadth and vagueness of the word "security," he wrote:

> The guarding of military and diplomatic secrets at the expense of informed representative government provides no real security for our Republic. The Framers of the First Amendment, fully aware of both the need to defend a new nation and the abuses of the English and Colonial governments, sought to give this new society strength and security by providing that freedom of speech, press, religion, and assembly should not be abridged.[413]

In the *Pentagon Papers Case*, of course, the Government believed that publication of the report would prove embarrassing. In his concurrence, Justice Douglas emphasized the congruence of that concern with the concerns of seditious libel law, pointing out that one of the core functions of the first amendment was to preclude precisely such statutes.[414]

This does not mean that the first amendment always prevails when security issues are at stake. In *Greer v. Spock*,[415] the Court affirmed Army regulations forbidding political speeches—in this case by minor-party presidential candidates—and the dissemination of literature, including newspapers and handbills, without prior approval on a military base. The Court held that the base was not a public forum.[416] It then found that the prohibition on political speeches, which was enforced without discriminating among viewpoints, was justified by the military's asserted desire to remain independent of partisan politics.[417] The prior-

412. *Id.* at 718 (Black, J., concurring).

413. *Id.* at 719 (Black, J., concurring).

414. *Id.* at 723-24 (Douglas, J., concurring). Indeed, only a few years previously, the court had decided New York Times Co. v. Sullivan, 376 U.S. 254 (1964), which initiated the constitutionalization of libel law by relying upon the analogy between that body of law and seditious libel. Yet, in United States v. Progressive, Inc., 467 F. Supp. 990 (W.D. Wis. 1979), the district court enjoined publication of an article entitled "The H-Bomb Secret: How We Got It, Why We're Telling It." Notably, in *Progressive*, section 2274(b) of the Atomic Energy Act of 1954, 42 U.S.C. § 2274(b), granted courts authority to issue injunctions preventing the disclosure of some of the information at issue in the article. In the *Pentagon Papers Case*, there was no such legislative authorization. Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191.

415. 424 U.S. 828 (1976).

416. *Id.* at 832-33, 838.

417. *Id.* at 838-39.

approval regulation passed constitutional muster because the base commander could only disapprove publications that constituted "a clear danger to [military] loyalty, discipline or morale."[418] In effect, the Court deferred to the executive branch's primacy in military affairs to determine whether the speech would undermine discipline. The majority opinion did not have to consider precisely how much deference the executive branch was entitled to, since the government may restrict speech as it desires in nonpublic forums. In his concurrence, Justice Powell discussed the substantiality of the governmental interest and the breadth of the restraint.[419] He found the interest in political neutrality sufficiently strong to justify the speech ban, especially in view of the fact that soldiers could leave the base to obtain unrestricted access to information.[420] Similarly, the military's interest in morale and a discipline justified the "more limited" prior-approval regulations.[421] Justice Powell relied on the "unique need of the military to 'insist upon a respect for duty and discipline without counterpart in civilian life.' "[422]

Foreign affairs interests alone have not justified a speech-restriction under a strict scrutiny test. However, danger exists in the facile linkage between foreign affairs and national security that could lead to treating them equivalently. Perhaps the best example of this is a series of cases involving the right to travel internationally.[423] In those cases the Court has recently deferred to very general notions of "foreign affairs" and "national security."

The sequence of cases actually began very well for free speech. In the first case, *Kent v. Dulles*,[424] the Court held that the Secretary of State did not have "unbridled" discretion to grant or withhold passports, in view of the conceded liberty interest in foreign travel.[425] In *Aptheker v.*

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418. *Id.* at 840 (quoting from a Department of the Army letter, dated June 23, 1969). *See also* Brown v. Glines, 444 U.S. 348 (1980) (upholding regulations imposing a prior restraint on the right to petition military personnel).

419. *Greer*, 424 U.S. at 847-49 (Powell, J., concurring).

420. *Id.* at 847 (Powell, J., concurring).

421. *Id.* at 848-49 (Powell, J., concurring).

422. *Id.* at 848 (Powell, J., concurring) (quoting Schlesinger v. Councilman, 420 U.S. 738, 757 (1975)).

423. Kent v. Dulles, 357 U.S. 116 (1958); Aptheker v. Secretary of State, 378 U.S. 500 (1964); Zemel v. Rusk, 381 U.S. 1 (1965); Haig v. Agee, 453 U.S. 280 (1981); and Regan v. Wald, 468 U.S. 222 (1984). The due process liberty interest in international travel must be distinguished from the "virtually unqualified" constitutional right of interstate travel. *See* Califano v. Aznavorian, 439 U.S. 170, 176 (1978) (quoting United States v. Guest, 383 U.S. 745, 757-58 (1966)).

424. 357 U.S. 116 (1958).

425. *Id.* at 129. Justice Douglas also noted that no condition of war existed. *Id.* at

Secretary of State,[426] the Court explicitly linked the first amendment and the fifth amendment liberty to travel.[427] The dispute in that case arose when the State Department revoked the passports of two prominent Communist Party officials under the Subversive Activities Control Act,[428] which made it a crime for members of the Communist Party to apply for passports after a final order requiring the party to register. In his opinion for the majority, Justice Goldberg wrote that the "freedom of travel is a constitutional liberty closely related to rights of free speech and association."[429] The Court accordingly reversed the revocations as overbroad.[430]

Since *Aptheker*, the Court has systematically drained any first amendment content from the right to foreign travel. In *Zemel v. Rusk*,[431] the plaintiff challenged restrictions on travel to Cuba. Acknowledging the impact on the flow of information from the passport restriction, the Court held that the restriction did not infringe a first amendment right, but only a fifth amendment due process right.[432] The Court perceived only "an inhibition of action. There are few restrictions on action which could not be clothed by ingenious argument in the garb of decreased data flow. . . . The right to speak and publish does not carry with it the unrestrained right to gather information."[433] Relying on *Curtiss-Wright*,[434] the Court held that the act had sufficiently definite standards for the Secretary of State to formulate the travel controls at issue.[435] The Court thus accepted the view of the State Department, the agency

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426. 378 U.S. 500 (1964).

427. *Id.* The Court had earlier recognized that interests in foreign travel have first amendment overtones, such as the right of an American "to shape his own life as he thinks best" and rights to obtain information. *Kent*, 357 U.S. at 126-27 (quoting Z. CHAFFEE, THREE HUMAN RIGHTS AND THE CONSTITUTION OF 1787, at 197, 195-96 (1956)).

428. Subversive Activities Control Act of 1950, § 6, 64 Stat. 993, as amended, 68 Stat. 778 (1954) (codified at 50 U.S.C. § 785 (1982)).

429. *Aptheker*, 378 U.S. at 517. Professor Kalven writes that Justice Goldberg put the argument less than persuasively: "The vice is not the interference with travel; it is the interference with freedom of political association, ... The interference with travel is relevant only insofar as limiting travel imposes partial sanctions *on association*." H. KALVEN, JR., A WORTHY TRADITION 381 (J. Kalven ed. 1988) (emphasis in original).

430. *Aptheker*, 378 U.S. at 514.

431. 381 U.S. 1 (1965).

432. *Id.* at 16.

433. *Id.* at 16-17.

434. 299 U.S. 304 (1936). *See supra* notes 369-71 and accompanying text.

435. *Zemel*, 381 U.S. at 17.

charged with the interpretation of the statute, that such restrictions were permitted.[436]

Sixteen years after *Zemel*, the Court decided *Haig v. Agee*,[437] which extended *Zemel's* holding on the scope of executive discretion. Philip Agee was a former C.I.A. agent who began to expose other C.I.A. employees and sources in 1974.[438] In an opinion by Chief Justice Burger, the Court noted that evidence in the record showed that Agee's activities had "prejudiced the ability of the United States to obtain intelligence, and [had] been followed by episodes of violence against the persons and organizations identified."[439]

In 1979, relying upon regulations issued pursuant to 22 U.S.C. § 211a, the same statute at issue in *Zemel*, the Secretary of State revoked Agee's passport. Agee challenged the revocation. After setting forth the statutory basis of the revocation, the Chief Justice wrote that the need for deference to the administrator was "especially so in the areas of foreign policy and national security . . . ."[440] He then cited the "sole organ" language from *Curtiss-Wright* and noted that "[m]atters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention."[441] The Court went on to find congressional acquiescence in the administrator's "policy"[442] and distinguished *Kent* because the instant case involved conduct, as opposed to mere beliefs.[443]

The Court picked up the speech-conduct distinction again when it dealt with and rejected Agee's free speech claims. Citing old and probably incorrect dictum from *Near v. Minnesota ex rel. Olsen*,[444] the Chief Justice noted that Agee's disclosures had in fact obstructed intelligence operations and hindered recruiting of intelligence personnel. They were thus not subject to first amendment protection.[445] Again distinguishing *Zemel* on the speech-conduct ground, the Court wrote: "[W]hen there is

436. *Id.* at 7-12.

437. 453 U.S. 280 (1981).

438. *Id.* at 283-84.

439. *Id.* at 284-85 (footnotes omitted).

440. *Id.* at 291.

441. *Id.* at 292-93.

442. *Id.* at 300.

443. *Id.* at 304-05.

444. 283 U.S. 697, 716 (1931). Justice Linde has shown rather convincingly that the *Near* dictum is a distorted reading of first amendment law. Linde, *Courts and Censorship*, 66 MINN. L. REV. 171, 190-91 (1981).

445. Haig v. Agee, 453 U.S. 280, 308-09 (1981). The Court had earlier rejected Agee's right to travel claim, again relying on *Curtiss-Wright*, this time to establish the importance of the President's confidential sources of information. *Id.* at 306-08.

a substantial likelihood of 'serious damage' to national security or foreign policy as a result of a passport holder's activities in foreign countries, the Government may take action to ensure that the holder may not exploit the sponsorship of his travels by the United States."[446]

Under the umbrella of a broad "national security" or "foreign policy" power, the Court grants the President (through the Secretary of State) authority to interpret statutes in a way that impinges upon constitutional rights, based solely on congressional acquiescence. Particularly in *Agee*, the State Department was unable to demonstrate acquiescence in specific acts; it could only demonstrate that acquiescence in a generalized "policy."[447] The Court's analysis bleeds security concerns into foreign policy concerns. However, it still does so in the context of a due process test rather than a first amendment test.[448]

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446. *Id.* at 309.

447. *See Agee*, 453 U.S. at 314 (Brennan, J., dissenting). Professor Farber has provided a detailed critique of the acquiescence argument. Farber, *National Security, the Right to Travel, and the Court*, 1981 SUP. CT. REV. 263, 277-82.

The Court's first amendment test is troubling. It can be read to impose much less of a burden on the Government than the usual test for penalties imposed upon the advocacy of illegal action. In Brandenburg v. Ohio, 395 U.S. 444 (1969), the Court held Ohio's Criminal Syndicalism Act unconstitutional. The act punished "advocat[ing] . . . the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform." *Id.* at 444-45 (citing OHIO REV. CODE ANN. § 2923.13). The Court held that such advocacy cannot be punished unless it is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Id.* at 447. Conceivably, the Court did not intend to cut back on *Brandenburg* when it set forth the above test in *Agee*. The Court may have believed that in view of the known past consequences of Agee's actions, further harm to United States interests could safely be predicted. On the other hand, the Court may have felt that, in view of the "national security or foreign policy" interests implicated by Agee's behavior, less of a showing was necessary. If so, the case indicates far more than simply that the Court is willing to extend broad discretion to Presidential interpretations of statutes in the foreign affairs and national security context, but that the usual test for avoiding the chilling effect of governmental action on speech is inapplicable if national security or foreign affairs is involved. Justice Brennan dissented on delegation grounds and therefore did not reach the first amendment issues. However, he indicated in a lengthy footnote that he believed that those issues were substantial. *Agee*, 453 U.S. at 320-21 n.10.

448. In *Agee*, the Court relied on Snepp v. United States, 595 F.2d 926 (4th Cir. 1979), *rev'd in part*, 444 U.S. 507 (1980). Snepp was a former C.I.A. employee who signed a secrecy agreement that required him to submit any proposed publication to the C.I.A. for its approval. Snepp later published a book, *Decent Interval*, without giving advance notice to the C.I.A. Although the C.I.A. conceded that the book contained neither classified information nor any other information not already made public, it nevertheless sued, seeking (1) a declaration that Snepp had violated contractual and fiduciary duties; (2) an injunction against future breaches; (3) damages; and (4) the imposition

Finally, in *Regan v. Wald*,[449] United States citizens were prevented from travelling to Cuba by Treasury Department regulations prohibiting transactions involving property in which Cuba, or a Cuban national, had any interest.[450] In rejecting a due process argument, the Court accepted *Zemel's* rationale that the restrictions on travel at issue did not implicate first amendment rights.[451] Comparing *Zemel* and *Wald*, the Court noted that both regulations at issue were "justified by weighty concerns of foreign policy."[452] Therefore, the case represented "merely an example of this classical deference to the political branches in matters of foreign policy."[453] Unlike the earlier cases, no security concern was implicated.

As a realistic matter, *Agee* involves punishment for speech; with *Zemel* and *Wald*, it reveals that the Court is willing to give short shrift to claims that might be thought to have first amendment implications in the name of "foreign policy." It might push inference too far to conclude

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of a constructive trust over all revenues Snepp received from the book. The Supreme Court held for the Government. Relegating first amendment issues to a footnote, *Snepp*, 444 U.S. at 509 n.3, the Court declared that the Government had a compelling interest in its need to protect the secrecy of "information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service." *Id.* While the case does not address questions of legislative or executive discretion, it does indicate that the Supreme Court will view some national security interests as compelling, even though one of the supposed interests—protecting confidential information—was clearly bogus in view of the Government's concession. *See* Cheh, *Judicial Supervision of Executive Secrecy: Rethinking Freedom of Expression for Government Employees and the Public Right of Access to Government Information*, 69 CORNELL L. REV. 690 (1984); *see generally* Medow, *The First Amendment and the Secrecy State: Snepp v. United States*, 130 U. PA. L. REV. 775 (1982). On the relationship among *Snepp*, *Agee* and United States v. Progressive, 467 F. Supp. 990 (W.D. Wis. 1979), see Koffler & Gershman, *The New Seditious Libel*, 69 CORNELL L. REV. 816 (1984). *See also* Knoll, *National Security: The Ultimate Threat to the First Amendment*, 66 MINN. L. REV. 161 (1981). On considerations relating to the need for and limitation of secrecy, see Futterman, *Controlling Secrecy in Foreign Affairs* in THE CONSTITUTION AND THE CONDUCT OF FOREIGN POLICY 6 (F. Wilcox & R. Frank eds. 1976).

Snepp also relies on an idiosyncratic theory of fiduciary duty: under its analysis any employment contract creates a duty to protect nonconfidential information. *See* Moss, Adams & Co. v. Shilling, 179 Cal. App. 3d 124, 224 Cal. Rptr. 456 (1986) (only in limited circumstances does law prohibit employee's use of employer's information). Moreover, as Koffler and Gershman point out, the Court neglected the adhesive nature of the contractual provisions. Koffler & Gershman, *supra*, at 847 n.134.

449. 468 U.S. 222 (1984).

450. 31 C.F.R. § 515.201(b) (1983).

451. *Wald*, 468 U.S. at 241-42.

452. *Id.* at 242.

453. *Id.* The court relied on United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936), and Harisiadas v. Shaughnessy, 342 U.S. 580, 589 (1952).

that the Court's repeated elections to consider those cases under due process analyses indicate that the governmental interests in them would not justify restrictions on speech as such. But these cases do emphasize that no case expressly has given that weight to foreign policy alone.[454] Moreover, unlike offenses clause cases, the travel cases involve executive, rather than congressional, action. Even if those decisions correctly subordinate speech concerns to foreign policy concerns, they provide at best tangential support for the proposition that congressional action such as a statute enacted pursuant to the offenses clause is "compelling."

It is important to highlight precisely the distinction that the courts have blurred. "National security" is not synonymous with "foreign policy" or "foreign affairs." In the past, courts understood this difference. Both Justices White and Stewart, concurring in the *Pentagon Papers Case*, held that a sufficient showing of immediate harm to national security interests might justify an injunction.[455] Not all foreign relations involve national security; the term encompasses everything from nuclear arms control to commodities agreements. While sufficiently immediate, irreparable national security interests may in extremely exigent circumstances justify restrictions on free speech or press;[456] absent those sorts of concerns, it is hard to see that generalized foreign policy interests are sufficiently compelling to justify speech restraints. Cases like *Snepp*, *Zemel* and *Agee* implicitly make that point because in each the Court attempted to base its holding on specific interests that purported to be security interests, not simply foreign relations interests.

In addition, the argument that United States courts should eschew redressing violations of constitutional rights to avoid entangling themselves in international problems proves too much to be a general proposition. The Bill of Rights exists precisely to protect certain highly valued individual freedoms.[457] Implicit in this idea is the judgment that those freedoms outweigh other, presumably socially-useful, goals. While the habeas corpus clause[458] permits derogation in times of rebellion or invasion when the public safety requires it, the first amendment contains no

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454. *See, e.g.*, Ozonoff v. Berzak, 744 F.2d 224, 233 (1st Cir. 1984).

455. New York Times Co. v. United States, 403 U.S. 713, 727, 730 (1971) (Stewart, J., concurring); *id.* at 730, 731 (White, J. concurring).

456. F. SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 197-99 (1982); *but see* Knoll, *supra* note 448. Even Professor Schauer foresees a detailed evaluation of the national security interest to ensure that "the dangers to national security are highly probable, likely to be immediate and of great magnitude . . . ." F. SCHAUER, *supra*, at 199.

457. *See supra* note 58 and accompanying text; *infra* note 481 and accompanying text.

458. U.S. CONST., art. I, § 9, cl. 2.

such language. It is difficult to see that United States courts' discharging their constitutional responsibility is a sufficient threat to the actual security interests of the country, rather than simply to nonspecific "foreign relations" interests.

This is not to deny that some embarrassment or complication would likely occur if Congress passed a law that was later nullified because it violated the first amendment. However, that is precisely the kind of embarrassment the first amendment not only permits, but to some extent encourages. If the *Pentagon Papers Case* means anything, it means that, even where sensitive matters are involved, mere embarrassment is not a sufficient reason to defer to the executive, or by inference the congressional branch.[459] Only an immediate danger of substantial harm to the country will support interference with first amendment rights.[460]

The close relationship between criticism of other governments and seditious libel provides a related reason to be wary of the embarrassment argument in this particular case. In England, for example, the old misdemeanor of libelling other sovereigns was part of seditious libel law;[461] that criticism might sour relations between the English Crown and other states. The notion persists. In *Curtiss-Wright*, Justice Sutherland worried about the "delicate" relations between states.[462] Diplomatic negotiations are, of course, conducted among elite groups in all societies. The language of diplomacy is measured and nuanced; it does not contain epi-

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459. *See* New York Times Co. v. United States, 403 U.S. 713 (1971); *see also supra* notes 410-14. Superficially, the holding in Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1962), is contrary to this logic. Indeed, writing in *Sabbatino*, Justice Harlan observed: "It should be apparent that the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it . . . ." *Id.* at 428. Here, of course, the whole issue arises when international law is unclear, at least in the eyes of a court. However, there are important distinctions between *Sabbatino* and this situation. First, *Sabbatino* involved the application of international law to acts in another country; obviously, any error regarding the application of international law to such acts contains more seeds of embarrassment and interference in foreign policy than does the present situation, which deals with application of international law within the United States. Second, in the event that other states perceive some act to be a violation of international law by United States citizens within the United States, there is nothing to prevent the political branches from paying reparations for those acts. The pertinent issue is whether United States citizens should be punished by the United States Government for their acts. That is a matter between the United States and its citizens, once proper redress has been made to the offended sovereign.

460. *New York Times Co. v. United States*, 403 U.S. at 724-26 (Brennan, J., concurring).

461. *See* 2 J. STEPHEN, *supra* note 190.

462. 299 U.S. at 319.

thets like "baby-killers."[463] It is understandable and probably useful that the members of these elites would prefer to minimize invective and acrimony; it is also understandable and inevitable that diplomats from one country might work to shield their colleagues from another country's verbal attacks because they identify with them. But it is precisely those reasons that should cause courts to be suspicious of laws that inhibit free speech. To the extent[464] that attacks on "dignity" interests are really perceived as interfering with the stature and discretion of elite domestic groups to control the conduct of foreign affairs, they are as suspect as seditious libel laws.

Assuming that the Government asserts a national security interest, the judicial inquiry is twofold: (1) whether there is an international law offense; and (2) if so, whether the national security interest justifies the speech restraint. Since we are dealing with legislative, not executive, action, neither issue should be treated any differently than it would be for any other statute: each is subject to searching scrutiny. In fact, that conclusion follows a fortiori because even the traditional justifications for deference to the executive are largely inapplicable.

Labelling something an offense against the law of nations, however, may not implicate traditional national security or even foreign affairs concerns: it does not necessarily involve secret information, and it is extremely unlikely to be exigent. Indeed, even if the congressional process moves quickly, any prosecution—which is likely to be the real goal of the exercise—will not. Most important, perhaps, the principal actor is Congress, not the President. The question, then, is whether any heightened judicial deference is appropriate when Congress defines an offense against the law of nations.

2. Determining the Strength of the Governmental Interest

One may generally state that Congress has some scope creatively to define offenses, but acts prohibited by those definitions must not be permitted by other constitutional provisions, such as the first amendment. We saw previously that Congress breaches the Constitution if it defines an "offense" that is not an offense, and that its decision in that regard is entitled to no great deference.[465] The last section also shows that Con-

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463. *See* 81 CONG. REC. 8486 (1937) (picketers carried signs reading "Mussolini murders babies").

464. Realistically, in the present case, to a very minor extent.

465. *See supra* Part IV, B. It is no answer to say that the United States could enter a treaty by which it committed to criminalize the behavior at issue, after which Congress could pass executing legislation. If the legislation violated the first amendment, it would

gress is given no more deference simply because the statute touches a matter of foreign affairs. Nevertheless, external reasons may permit a sufficiently narrow speech-infringing statute to stand. It is difficult to suggest generally what such reasons might be, but several candidates are: (1) the extent to which the norm reiterates a fundamental United States interest; (2) the nature of the international legal norm itself; (3) the extent to which the norm protects national security; and (4) whether the statute vindicates an interest of another state.

a. Congruence of International Norm and Domestic Interest as Justification for a Speech Restraint

If an international norm is congruent to or largely overlaps with a domestic statute that justifies a restraint on speech, it might have sufficient weight to justify such a restraint. Certain international norms bear close relationships to United States governmental interests considered to be compelling. International norms, for example, prohibit slavery and racial discrimination. To the extent that a domestic statute embodying such a norm were not redundant, the fact that the international norm is congruent with the analogous domestic interest would add to the government's interest in enacting the law. Consider a domestic statute criminalizing certain behavior: the existence of an international offense might justify a statute criminalizing the behavior beyond usual domestic jurisdiction, such as on the high seas or in outer space.

Admittedly, it is difficult to conjure up norms that affect speech. One possible set of statutes could prohibit advertising that would lead to a violation of the norm. For example, Congress might properly penalize advertising for racially or sexually discriminatory jobs.[466] On the other hand, although there is a norm against aggressive warfare, that notion is probably not firmly enough embedded in our national consciousness to justify laws against adverstising military aircraft.

b. Nature of the Norm

Courts are perhaps more likely to defer when Congress singles out one sort of international norm than when it singles out another. Consequently, violations of the international legal duty to inform other states

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be void under the reasoning of Reid v. Covert, 354 U.S. 1 (1956). *See supra* notes 400-04.

466. *Cf.* Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 (1973) (upholding injunction against publication of gender-designated "help-wanted" ads).

of potentially dangerous situations[467] may require different treatment than violations of the norm against aggressive warfare.[468] It is now generally accepted that a hierarchy of international law norms exists. Thus, there are ordinary, run-of-the-mill norms and there are certain norms considered "peremptory" or *jus cogens*.[469] Peremptory norms include a number of rules that protect human rights[470] as well as other rules that protect the international system, such as a prohibition against aggressive warfare.[471] Peremptory norms differ from non-peremptory norms in that they demand, in addition to uniform practice and *opinio juris* of their existence, uniform acceptance of their fundamental character.[472]

The notion of peremptory norms first achieved prominence in the Vienna Convention on the Law of Treaties, which states that treaties in

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467. Corfu Channel Case (U. K. v. Alb.) 1949 I.C.J. 4.

468. *See, e.g.,* Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.) 1984 I.C.J. 169 (provisional measures), 392 (jurisdiction).

469. *See generally* Meron, *On a Hierarchy of International Human Rights*, 80 AM. J. INT'L L. 1, 14 n.56 (1986).

470. RESTATEMENT (THIRD), *supra* note 130, § 702. However, the Reporters' Notes point out that not all human rights norms are peremptory. *Id.* Reporters' note 11.

471. Peremptory norms are, in fact, few in number. They recognize "certain principles which safeguard values of vital importance for humanity and correspond to fundamental moral principles . . . ." De Arechaga, *International Law in the Last Third of the Century*, 159 RECUEIL DES COURS 9, 64 (1978-I). Most scholars believe that they include the prohibition or the use or threat of force, aggressive warfare, genocide, piracy, the slave trade, racial discrimination and the taking of hostages. *Id.* De Arechaga also lists terrorism as a peremptory norm, although many doubt this assertion. *See, e.g.*, Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 795-96 (1984) (Edwards, J.). Nevertheless, some writers go farther and state that *jus cogens* includes sovereignty over natural resources, I. BROWNLIE, *supra* note 127, at 513, and inviolability of diplomatic archives. Ago, [1976] 1 Y.B. INT'L L. COMM'N 74. Another category consists of "fundamental human rights." Barcelona Traction, Light & Power Co., Ltd. (New Application) (Bel. v. Sp.) 1970 I.C.J. 4, 32. Typically, the rights in this category are set forth in international human rights instruments, such as the Universal Declaration of Human Rights. United States Diplomatic and Consular Staff in Tehran (U. S. v. Iran), 1980 I.C.J. 3, 42. However, neither all human rights nor even all fundamental human rights norms are peremptory. *See* Meron, *supra* note 469, at 14-15 n.58, 18-19.

472. RESTATEMENT (THIRD), *supra* note 130, at § 331, comment e. With respect to nonperemptory norms, probably the strongest position one could take is that such norms have the force of law, under the supremacy clause, such that they overcome prior statutes. *See* Henkin, *supra* note 4, at 1566. The cases do not appear to support Professor Henkin's proposition but even if they did, such norms of customary international law do not thereby overcome constitutional prohibitions. Reid v. Covert, 354 U.S. 1 (1956), held that the treaties, also the supreme law of the land under the supremacy clause, cannot violate the provisions of the Bill of Rights. *Id.* at 16. There is no reason to give nonperemptory customary norms higher authority.

violation of such norms are void.[473] Most important for present purposes, the violation of any peremptory norms may lead to international criminal responsibility, since all international criminal offenses are violations of peremptory norms.[474] The final important effect of a human rights norm's peremptory character is its *erga omnes* effect: any state may enforce it.[475]

The elevation of some customary norms to the peremptory plane is not free of dispute. Proving practice and *opinio juris* are difficult enough; proving that states accept a given norm as peremptory is even harder. For example, Professor Weil points out that the international community apparently accepts the "decolonization" norm as *jus cogens*, while France does not even accept it as an ordinary norm.[476] Similarly, although many developing states may view sovereignty over natural resources as a peremptory norm, developed states might not see it as even an ordinary rule. Limiting the group of peremptory norms to "fundamental human rights" is no solution because the concept of fundamentality is inevitably subjective. Moreover, what is fundamental in one age may not be fundamental in another: while the antislavery norm is now particularly strong, it was not always so. Finally, what is fundamental to one polity may not be fundamental to another. Thus, even beyond a mere difficulty of proof, a question arises whether specific norms are fundamental for all nations. The fact that a particular right is expressed in a document such as the Universal Declaration is also not conclusive; many such instruments are of dubious law-making force. For all of those reasons, there have been and remain dissenters from the generally broad

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473. Vienna Convention on the Law of Treaties, art. 53, U.N. Doc. A/CONF. 39/27, *reprinted in* BASIC DOCUMENTS, *supra* note 125, at 349, 370 and at 63 AM. J. INT'L L. 875, 891 (1969). *See generally* C. ROZAKIS, THE CONCEPT OF JUS COGENS IN THE LAW OF TREATIES (1976); J. SZTUCKI, JUS COGENS AND THE VIENNA CONVENTION ON THE LAW OF TREATIES (1974). Although it is by no means conclusively established, it may also be true that peremptory norms are nonderogable, generally. Lobel, *supra* note 4, at 1136; Meron, *supra* note 469, at 19-20. The argument runs that it would make little sense to forbid nations from entering treaties that violate peremptory norms, which they are most unlikely to do anyway, but not to forbid them from violating the norms unilaterally.

474. Weil, *Towards Relative Normativity in International Law?*, 77 AM. J. INT'L L. 413, 423-24 (1983). Judge Ago has pointed out that not all violations of peremptory norms lead to international criminal liability. Ago, *supra* note 471, at 74.

475. Barcelona Traction, Light & Power Co., Ltd. (new Application) (Bel. v. Spain) 1970 I.C.J. at 32; RESTATEMENT (THIRD), *supra* note 130, § 701, Reporters' note 3; Demjanjuk v. Petrovsky, 776 F.2d 571, 583 (6th Cir. 1985) (genocide punishable by Israel, even though it was not in existence at time of crime).

476. Weil, *supra* note 474, at 430 n.68.

agreement on the existence of *jus cogens*.[477]

For present purposes, one may assume that some norms are peremptory. Should the interest in criminalizing behavior that violates those norms be "compelling" for the purpose of first amendment analysis? Even in the absence of an international consensus, a court is likely to find human rights norms, such as the right to be free from torture, as "substantial," "important" or "compelling." Preventing genocide, racial discrimination, and hostage taking[478] would likewise implicate substantial governmental interests under any circumstance. Again, the important issue is not that the norm is called peremptory, but how congruent it is with compelling domestic United States interests. Given our stated national commitment to racial equality, a peremptory norm designed to accomplish the same ends would be compelling. Similarly, were there not already laws against slavery, a statute based on the international anti-slavery norm would be compelling, given the thirteenth amendment. In contrast, norms of an economic character have less claim to additional weight because domestic statues dealing with such interests are entitled to no such weight.[479] The difficult issue—whether their status as peremptory norms add anything—arises with less morally-weighted norms, for example, the asserted peremptory norm of sovereignty over natural resources.

Peremptory status adds some weight to the argument that the governmental interest is an important one. The proponent of a statute can point to the general agreement among other nations as an additional basis for treating the norm as compelling.[480] That goes to the weight of the Con-

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477. Charney, *The Power of the Executive Branch of the United States Government to Violate Customary International Law*, 80 AM. J. INT'L L. 913, 916 n.9 (1986); Schwarzenberger, *International Jus Cogens*, 43 TEX. L. REV. 455 (1965); Weil, *supra* note 471. The American Law Institute has adopted a rather tentative position in its *Restatement (Third) of the Foreign Relations Law of the United States*, noting that due to the "uncertain scope of the doctrine, . . . [a] domestic court should not on its own authority refuse to give effect to an agreement on the ground that it violates a peremptory norm." RESTATEMENT (THIRD), *supra* note 130, § 331, comment e.

478. *See supra* note 471.

479. In San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973), the Supreme Court held that the right to education was not "fundamental." Yet that right is recognized in the European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 2, March 20, 1952, E.T.S. 9, 213 U.N.T.S. 282, and the International Covenant on Economic, Social and Cultural Rights, *opened for signature* December 16, 1966, art. 13, 993 U.N.T.S. 3, 8, 6 I.L.M. 360 (1967). The international recognition of that right could persuade a United States court to elevate it to "fundamental" status.

480. It is conceivable that a statute is necessary to permit the offense to be tried in

gressional interest in enacting the legislation. Given other factors demonstrating the weight of the legislation, this may lead to a finding that the interest is compelling.

A number of weighty considerations suggest that peremptory status alone will not render a governmental interest compelling. First, the history of the offenses clause implies that neither the framers nor the First Congress intended that even international law interests recognized to be strong in their day would muzzle speech.[481] Second, peremptory norms

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federal courts. This is important for peremptory norms that create individual criminal responsibility. Arguably, federal law preempts state law in the area of offenses against the law of nations. The purpose of the offenses clause was, after all, to exclude states from that function. The preemption doctrine prevents states from enacting legislation contrary to federal regulation. *See* L. TRIBE, *supra* note 330, at 376-77. Because the offenses clause precludes states from defining an offense against the law of nations, the states may not do so, even if no federal law addresses the issue. Yet, in the area considered by this Article, state courts have acted. *See, e.g.*, Respublica v. De Longchamps, 1 U.S. (1 Dall.) 111 (Pa. O. & T. 1784); Concerned Jewish Youth v. McGuire, 621 F.2d 471 (2d Cir. 1980), *cert. denied*, 450 U.S. 913 (1981). If, however, states are excluded and Congress does not enact legislation criminalizing specified behavior, then there could be no prosecution in the United States. One might contend that the United States then violates an international legal obligation to provide a forum to prosecute those who violate peremptory norms.

481. Madison had not advocated a bill of rights at the Convention. *Id. See* Letter from James Madison to George Eve (Jan. 2, 1789), *reprinted in* 5 THE WRITINGS OF JAMES MADISON, *supra* note 58, at 319, *and in* 2 BILL OF RIGHTS, *supra* note 58, at 996, 997. With Jefferson's encouragement, he eventually became the guiding force behind the Bill of Rights. Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), *reprinted in* 12 THE PAPERS OF THOMAS JEFFERSON 438-42 (Boyd ed. 1958), *and in* 1 BILL OF RIGHTS, *supra* note 58, at 605-08. *See also* Letter from Thomas Jefferson to James Madison (Feb. 6, 1788), 12 THE PAPERS OF THOMAS JEFFERSON, *supra*, at 568-69, *and in* 1 BILL OF RIGHTS, *supra* note 58, at 610, 611 (lack of declaration of rights Constitution's "principal defect"). Madison introduced it in the First Congress. *See* 2 BILL OF RIGHTS, *supra* note 58, at 1023. In one form or another, various state ratifying conventions had recommended that the Constitution be amended to include a bill of rights. The delegates repeatedly mentioned the need to protect freedom of speech and press. For example, an important minority report of the Pennslyvania Convention offered several propositions, including one that looks much like the first amendment's speech and press clause. PENNSLYVANIA AND THE FEDERAL CONSTITUTION 454-83 (1970), *reprinted in* 2 BILL OF RIGHTS, *supra* note 58, at 662, 665. The Virginia Convention's majority proposed a bill of rights, including speech and press protection. 2 BILL OF RIGHTS, *supra*, at 842. An important Maryland Convention committee made a similar proposal. *Id.* at 734-35. New York debated, but did not pass, a similar recommendation. *Id.* at 872, 911-18. North Carolina did not even ratify the Constitution. *Id.* at 977. Instead, it submitted, verbatim, Virginia's proposed declaration of rights, plus several additional ones. *Id.* at 966-71. The first order of business of the First Congress was, of course, to pass the Bill of Rights.

of international law are not necessarily fundamental in our system. The United States has chosen, through its Constitution, to erect certain norms as fundamental; for example, freedom of speech, freedom of religion, the right to a jury trial, and freedom from racial discrimination. Nothing in the Constitution indicates that customary international law outweighs constitutional restrictions on governmental actions; indeed that is precisely why constitutional restrictions exist. Obviously, the offenses clause is as subject as any other congressional power to the command that "Congress shall make no law . . . abridging freedom of speech." Values expressed by the international community may or may not be consistent with values established by the Constitution. Indeed, there is no assurance that this country had any role in the formulation of the international norms.[482] In the absence of congruence with fundamental norms of our system, there is no logical reason to treat external norms as compelling governmental interests that can restrict constitutional freedoms. Third, at least for the time being, the problematic status of the concept of *jus cogens*, the fluid and expanding list of suggested fundamental norms,[483] and the possibility that ordinary norms, and even non-norms, will percolate up to peremptory status urge caution in using peremptory norms as compelling governmental interests.

We might consider the following situation. Recall, the question is

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482. Even peremptory norms may achieve their status without participation by all members of the legal community. *See* Weil, *supra* note 471, at 430. One might respond that international law, including peremptory norms, "is part of our law." The Paquete Habana, 175 U.S. 677 (1900). Professor Lobel has written persusasively that the natural law roots of the Constitution imply the incorporation of peremptory norms into our law, at least to the extent of circumscribing contrary executive branch citation. *See generally* Lobel, *supra* note 4. If that were the case, peremptory norms would arguably have a fundamental status domestically and would be compelling. There appear to be several difficulties with that position. First, it is difficult to accept the notion that because that they believed in natural law, the framers intended to smuggle by implication a body of law they would never know into a positivist document such as the Constitution, in a way that would undermine other express provisions. Second, even if the framers believed some international norms were so much a part of natural law that they migrated into the Constitution, it is hard to say which ones. It may be that only those international norms that we have expressly recognized as fundamental are so much a part of natural law as to be compelling; that is, the framers probably did not think of sovereignty over natural resources as a part of natural law. Third, it would again seem that the best test for the compelling status of an international norm is whether it is understood domestically as compelling. Finally, even assuming a temporal inflation of the number of peremptory norms that are part of natural law, why should we be bound when we have no input into the norm?

483. *See* Alston, *Conjuring Up New Human Rights: A Proposal for Quality Control*, 79 AM. J. INT'L L. 607 (1984).

whether a governmental interest is compelling, so that a narrowly drawn statute may restrain speech. Assume a peremptory norm against advocating racial discrimination and a statute forbidding such advocacy. While no case has raised this issue under international law,[484] it seems reasonably clear that courts would hold that the first amendment protects advocacy of racial discrimination against such a challenge.[485] Despite the importance of the interest, the political nature of the speech would protect it from infringement. Whether the decision to prevent that sort of advocacy is good or bad is not the issue; other nations have decided differently.[486] If the violation were likely, speech intended to incite imminent violation of the norm might be beyond first amendment protection. That prohibition, however, would be consistent with current first amendment doctrine.[487]

In short, where the international norm represents a fundamental value in the United States, the governmental interest in it is likely to be compelling. Where the norm establishes economic and social rights, the interest is unlikely to be compelling even though it is peremptory. Of course, if trends in this country move toward recognition of those rights, as they have in Western Europe, there is no reason the interests might not be given substantial weight in the first amendment context.

c. National Security

As discussed above, courts have given national security interests great deference.[488] Some international norms, such as the norm against aggressive warfare and that against hostage taking, reflect security concerns. It would seem that if Congress enacted a statute criminalizing behavior

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484. United States law will, of course, be interpreted not to conflict with international law. The Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804); Commodities Futures Trading Comm'n v. Nahas, 738 F.2d 487, 495 (D.C. Cir. 1984).

485. *See, e.g.*, Collin v. Smith, 578 F.2d 1197 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978) (striking down ordinance making it a misdemeanor to disseminate any material promoting and inciting racial or religious hatred). *See* L. BOLLINGER, THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA (1986); A. NEIER, DEFENDING MY ENEMY: AMERICAN NAZIS, THE SKOKIE CASE, AND THE RISKS OF FREEDOM (1979); Bollinger, Book Review, 80 MICH. L. REV. 617 (1982); Village of Skokie v. Nationalist Socialist Party, 69 Ill. 2d 605, 373 N.E.2d 21 (1978); *see also* American Booksellers Ass'n v. Hudnut, 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986) (striking down Indianapolis ordinance that treated pornography as sex discrimination).

486. *See* Kommers, *supra* note 328, at 668-69, 686-92.

487. *See* Brandenberg v. Ohio, 395 U.S. 444 (1969).

488. *See supra* Part II.

that violates these norms, they would be found to be compelling because of their close association with security and defense matters. In view of Congress' existing authority over military affairs, its determination that certain closely-related behavior should be forbidden would probably receive a high level of deference.

d. Foreign Nations' Interests

In *Boos v. Barry*, Justice O'Conner raised the issue of when a foreign nation's dignity interest can be compelling for first amendment purposes.[489] Without being too facetious, the answer may be "Never." Domestically, it seems clear that the first amendment protects oral or written indignities, except for a few very narrowly drawn categories, such as obscenities. One must add something to the analysis for foreign dignity interests to make them compelling. We saw above that international law does not now, if it ever did, add that ingredient.[490] On the other hand, there may be specific cases, for example, hostage situations, in which the damage to human life is so explicit and immediate that it might justify a speech restraint. That is not, however, an interest of the other nation, but is more akin to a domestic security interest or a humanitarian interest.

In general, a foreign nation's interest is unlikely to be compelling when measured against the first amendment, unless that interest involves something like the domestic interests given great weight, such as loss of life or threat to the national security of an ally. More amorphous interests, unless they simultaneously involve a cogent domestic interest, would not seem to be compelling.

V. CONCLUSION

This Article has not sought to argue that we are today bound to the framers' limited conception of the law of nations. The way that law develops has changed dramatically in 200 years; there is no reason to believe that the framers would not have supported an evolving definition of offenses against the law of nations. And, even if they did not, an originalist interpretation of the offenses clause is still not warranted. Nor has this Article argued that Congress has no leeway in defining offenses; its points are less strict.

When Congress determines that a certain set of actions constitutes an offense against the law of nations, it is doing more than establishing a

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489. *See* Boos v. Barry, 108 S. Ct. 1157 (1988).

490. *See supra* Part III.

domestic crime. It is putting its imprimatur on certain international practice and saying that that practice has reached a level at which it is binding upon nations. Congress has every reason to be especially careful before reaching such a conclusion. Obviously, if Congress bestows legal status on rules that lack the requisites of a norm—practice and *opinio juris*—international law suffers. It is hard enough to convince people of the reality of international law without debasing it by giving a false status to some "rules." Moreover, where the proposed norm undermines a fundamental right granted by the Constitution, Congress should be wary of codifying its transient views of international practice or the domestic practice of nations with different fundamental values. One of the ironies of *Boos* is that, now that many nations have begun to march to the beat of the United States' drummer,[491] the United States in one—albeit quite small—way is arguing that it must turn around. Why Congress should deviate from a fundamental domestic norm to achieve at best a minimal foreign policy objective is totally unclear.

Determining the norms of customary international law is a complex and often indeterminate enterprise. Congress must exercise its best judgment in making that determination. But there is no reason in theory or practice for the courts to defer to Congress' determination, especially when the resulting laws conflict with the first amendment.

491. *See* Keller, *Freed to Criticize, Some Criticize Freedom*, N.Y. Times, Apr. 10, 1988, sec. 4, at 1, col. 1 (discussing opposition to the Soviet policy of *glasnost*).