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The Internationalization of U.S. Law

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Some of you may draw one of three conclusions from the title of my remarks. (1) He'll be talking about the good old days when both Democrats and Republicans agreed on the need for international law and multilateral institutions – maybe the end of WWII or the end of the Cold War; or (2) he'll be taking the long-term view, about when Washington changes hands and the U.S. will re-emerge as good international citizen; or (3) if he talking about today, the President of the ASIL is on drugs. It would take mind-altering substances to consider the present day anything like the golden age when members of this Association and the ASIL were 'present at the creation' of the UN, the World Bank, and the IMF. Hasn't he heard that the U.S. Congress just passed legislation that appears to thumb its nose at the Geneva conventions? That the United States persists in staying away from

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some of the most far-reaching international regimes of our era, from landmines to climate change, and threatens, by statute, to make war on the ICC? That it has withdrawn from the optional protocol of the Vienna Convention on Consular Affairs lest more Mexicans on death row successfully sue us at the ICJ? That UN delegates are apparently so disgusted with our actions as a nation that they stand on their chairs and cheer in the General Assembly when Hugo Chavez likens our President to Lucifer?

At the risk of sounding like Bill Clinton, let me assure you that I have not inhaled but that, yes, I am talking about the present day. Consistent with the theme of this ILA Weekend, I want to suggest how the “evolving world of international law” is turning our law inside/out. I will suggest that as never before in our history, all three branches of our government, as well as our citizenry, media, and representatives of civil society – whether from the world of NGOs or from business-- are now perennially engaged with international and foreign law – despite bills in Congress that would seek to halt this phenomenon at least with

respect to federal judges. I will address only a few current realities to make my point and to suggest that legal internationalization is likely to accelerate, not decline. All of you here, inspired by this very conference, will be able to suggest others.

Point One: The internationalization of US law is occurring because of the mission creep of those international regimes that we are very much a part of and from which we are unlikely to withdraw because they are in our national interest: namely, the UN system, the international financial institutions, and the WTO. All of these institutions are, to greater and lesser extents, expanding their domain beyond what was originally intended by those who entered into the original treaties establishing them.

Today's UN General Assembly and Security Council have eroded the core non-interference norm of Art. 2(7) of the Charter. Nothing today is considered immune, on the basis of sacred "domestic jurisdiction," from consideration by either body and in the case of the Security Council, even legally binding Chapter VII enforcement action. Thanks in substantial part to our very own

revolution on behalf of human rights, it is impossible to suggest (as some still try) that the U.S. treaty power is confined by subject matter to “foreign affairs.” At a time when our government insists that international norms supplement our dormant commerce and takings clauses, that we have the right to examine how other nations treat their own nationals, and that there may be even be international limits on how others choose to rule themselves, it is impossible to contain the sphere of international law. Try as we might, the General Assembly is no longer constrained (if it ever was) from making recommendations even with respect to matters being examined by the Council —from the legality of the Israeli security wall to the due process rights of alleged terrorists. The human rights genie that we helped to breed is out of its bottle. It is being used by all, including by our own NGOs and our government -- as in criticizing the selectivity of the UN’s own human rights actions. Human rights now make a prominent appearance in the ICJ, at the World Bank, and even indirectly at the WTO – and in

street demonstrations protests against some of these institutions themselves.

A panoply of UN experts and assorted others – from human rights treaty bodies to the special rapporteur on torture – now routinely make ever more specific legal pronouncements—about such things as the propriety or consequences of “invalid” treaty reservations, specific interrogation techniques, or states’ reliance on diplomatic assurances when engaging in the foreign rendition of suspects. While our Executive contests many of these pronouncements, even the 100 plus lawyers of the U.S. State Department are no match for the sheer quantity and variety of this institutionalized output, which, as amplified by the voice of organizations like Human Rights Watch, may achieve a legitimacy greater than the views of any single nation, including our own.

It is impossible for even the United States to register its persistent objection – if that is what it is – to the sheer multitude of today’s international law-makers. And the United States’ soft power now has to regularly contend with those of activist NGOs

around the world who often serve as the “bad cop” to those international organizations too meek to serve as anything other than good cop. Inevitably, some of this legal output – whose content not even the United States can control -- whether incorporated in ATCA plaintiffs’ briefs or in amicus before our appellate courts, has begun to influence even our relatively nativist judges – who sometimes find themselves citing, as never before, “soft” law such as General Assembly resolutions, reports of human rights rapporteurs, judgments issued by international criminal courts, or guidelines for multinational corporations -- at least by way of interpreting U.S. law and even in some rare cases, the U.S. Constitution.

As the UN High Commissioner on Human Rights Louise Arbour has suggested, the global war on terror has also played a part in the internationalization of U.S. law. As our judges and law enforcers increasingly deal with legal issues involving others’ citizens and others’ territory, they find an increasing need to work with those others and to examine both international rules and

foreign law. Global and *common* justice concerns – and not merely those under U.S. law – are implicated by the detention and treatment pending trial of detainees in a war subject to no evident temporal or geographical boundaries or by, for example, the transnational privacy implications posed by the web and satellite communications and governments’ efforts to regulate these.

Of course, the same war on terror has facilitated the legislative turn of the UN’s Security Council, which has now adopted legally binding action directed at the world as a whole and not merely a single target rogue nation. Largely at our behest, the Security Council has become a global law-maker and not just a sporadic collective enforcer of the peace. Apart from repeated and now increasingly routinized collective sanctions efforts and the occasional authorization to use force, that body has settled a boundary dispute, created a standing dispute settlement mechanism to settle post-war interstate disputes, established two ad hoc war crimes tribunals and influenced prosecutions in a third, is embarking on the creation of another (hybrid) tribunal to deal with

a terrorist act, enhanced its own authority as well as powers of the IAEA over weapons inspections, expanded the range of peacekeepers' authority including as de facto administrators of territory, repeatedly authorized election assistance and supervision, criminalized for the world a range of terrorist activity (including financial transactions that facilitate terrorism, imposed smart sanctions on designated individuals and groups allegedly connected to the Taliban and Al Qaeda), developed "best practices" for the world's law enforcement agencies with respect to counter-terrorism and the non-proliferation of weapons of mass destruction, and supervised the military occupation of a state.

The Security Council's mission creep is having dramatic effects on the law – on the interpretation of UN Charter article 39, on the law of self defense, particularly with respect to states that "acquiesce" in terrorist activity within their borders, on the jurisdiction of states over a variety of activity and persons (including reviving notions of universal civil and criminal jurisdiction), on alleged norms such as the right to democratic

governance or an alleged “responsibility to protect,” on the law of occupation, on the legality of certain weapons, on the expanding scope of international criminal law. And though the United States has been a principal mover and participant in the Council’s normative activity, even P-1 has not been able to control the resulting legal implications and today faces, for example, the broader legal ripples brought about by the consequent revival of international criminal law, including enhanced interest in command responsibility and universal jurisdiction.

The mission creep of our international financial institutions – and the ever-expanding range of law affected by their activities – is ever more evident. The World Bank no longer sees itself as confined to financing infrastructure projects; its operational policies include such matters as the rights of those displaced by the damn projects that it funds. The IMF, freed from patrolling fixed exchange rates, imposes structural adjustment loans that incorporate normative values, such as respect for the rule of law and property rights, and even for an entitlement to “democratic

governance.” And a funny thing happens when such institutions are used to encourage “democracy” along Western lines: people begin to demand that those institutions themselves respect the rights of the governed – as by adapting techniques from national administrative law. All of these institutions, including UN specialized agencies and the WTO, find themselves under pressure, including by our government, to adopt mechanisms to encourage transparency, accountability, greater access to NGOs, and legal responsibility. There is even today an effort by the ILC to elaborate articles of responsibility for international organizations comparable to those it promulgated recently for state responsibility. We are encouraging these organizations to become more legalized even as they attempt to legalize others.

All of this suggests that international law is deepening both horizontally – as particular treaty regimes evolve with ever greater specificity – and vertically, as ever more intrusive forms for the national incorporation of its rules evolve, including within the United States itself.

To be sure the U.S. government tries to confine these developments to those regimes that it likes – such as trade and investment and their intrusive forms of dispute settlement -- but it is becoming ever clearer that those regimes, which at our behest have developed some space for autonomous action, are not self-contained. As many have noticed, the emerging law of the WTO now deals with, and in turn has influenced, such matters as the rules of treaty interpretation and the status of the precautionary principle in environmental law. The WTO also serves to harden “soft” standards elaborated by the International Organization for Standardization (ISO)(through the SPS Agreement) and the FAO-WHO’s Codex Alimentarius (through the TBT Agreement), thereby triggering the attention of both business and consumer groups. The result is that those treaty regimes are now part of our domestic politics. The sunk costs that the U.S. has incurred in establishing the WTO and constructing a web of investment agreements has not merely tied the hands of subsequent administrations, democrat and republican, but created domestic

audiences for supranational regulation and supervision; the genie of supranational scrutiny over U.S. law is now out of its bottle as well and will prove difficult to contain.

Our law is also being internationalized by our decisions, albeit in discrete areas, to permit supranational adjudicators to “complete” our treaty-contracts, as in the trade regime. Consider four techniques whereby WTO adjudicators blur the line between “trade” law and wider “public” international law, thereby preventing WTO law from being read in “clinical isolation” from general international law.

(1) The customary principles of compétence de la compétence and of effectiveness. The fact that WTO adjudicators, like all international judges and arbitrators, have the inherent authority to determine the scope of their own jurisdiction, and that they are under pressure to give effect to the rights that they are charged with protecting, has proven to be a tool that has broadened the scope of the trade regime. The customary principles of compétence de la compétence and effectiveness lie behind such

WTO decisions as those which give content to nullification and impairment complaints in the WTO where there is no explicit violation of the covered agreements (as in *Japan Film* (1998)). That WTO case also draws implicitly from broad notions of state responsibility since it found that even non-binding actions taken by a government, such as state incentives and disincentives or administrative guidance that structure the actions of private parties that in turn impair GATT rights, can trigger a judicial response. The principles of *compétence de la compétence* and of effectiveness hand WTO adjudicators a tool with which to expand the scope of their decisions and the law that they consider. This is also suggested by decisions that use preambular language in the GATT agreements to suggest that the regime embraces other goals apart from the liberalization of trade flows (see, e.g., *Shrimp/Turtle*).

(2) The alleged general principle that international adjudicators should avoid determinations of non-*liquet*, i.e., that no law applies to resolve a dispute. The general disinclination

to issue a finding of non-liquet fuels the reach for non-WTO principles to fill in the interpretative and other inevitable gaps in WTO law. It remains anathema for judges (or international law scholars) to proclaim that there is no law. A declaration of non-liquet would be in the views of most a defeat for the dispute settlement system as well as to the general hopes of constructing a rule-oriented regime not dependent on power.

(3) The self-perceived role of international judges and the procedural rules that they fashion. The need to produce a reasoned opinion, the pull of precedent, the need to feel a part of the ‘invisible college,’ and the need for self-legitimation help fuel the drive for WTO adjudicators to reach for general rules of international law. This underlies WTO adjudicators’ recourse to alleged principles of international judicial procedure such as waiver, the principle of *in dubio mitus* (to interpret international obligations in deference to state power whenever possible), conceptions of legal standing to file a complaint (cf. Bananas), notions of what constitutes a “redressable injury” and when such

complaints are either “moot” or “ripe,” or the application of other “passive virtues” such as the principle of judicial economy (that is, deciding only the narrowest set of questions necessary to issue a decision).

(4) The customary or Vienna rules of treaty interpretation. The open-texture of the traditional rules of treaty interpretation in the Vienna Convention on the Law of Treaties, articles 31-32 (e.g., the ambiguities of “plain meaning,” “in good faith,” “object and purpose,” and especially article 31(3)(c)’s license to consider “relevant rules of international law”) all provide opportunities for reaching to substantive international law not normally regarded as embraced by the WTO covered agreements.

While these four techniques or principles have not turned WTO panels into courts of general jurisdiction and the resort to non-trade law remains considerably limited, few now claim that

the trade regime exists in “clinical isolation” from the rest of international law.²

Similar things are happening in other international tribunals. Responsible arbitrators and judges are likely to reach to rules outside the regime directly at issue in part because of their own felt need to harmonize their decisions with others reached elsewhere. Like WTO and investor-state adjudicators, they too have common institutional needs to ensure certainty and predictability. Reliance on general international legal principles and other forms of “soft law” is one way to achieve this.

The fact that our trade and investment regimes are not self-contained has another consequence. To the extent WTO or ICSID adjudicators deploy general public international law, they necessarily affect it. The WTO’s Appellate Body’s *Shrimp Turtle* decision is a landmark not only because that Body showed an acute awareness of the interconnections between WTO *lex specialis* and

² For a more detailed account of how all of these principles serve both to expand and to limit the jurisdiction of WTO adjudication, see José E. Alvarez, “The Factors Driving and Constraining the Incorporation of International Law,” in Merit Janow, ed., The WTO at Ten: Governance, Dispute Settlement, and Developing Countries (forthcoming 2007).

the rest of international law. That body's extraordinary suggestion that the United States may have erred in not negotiating multilaterally prior to taking unilateral action has inspired considerable re-thinking by international lawyers far afield from trade. To many, it suggests that there is now an emerging duty to cooperate or even to negotiate multilaterally – whether with respect to landmines or the elimination of weapons of mass destruction. The idea that actions that a state takes that impinge on the rights of other states or of the international community needs to have a decent respect for those others and cannot be the product of unilateral dictat has considerable bite and much transformative potential. Whatever we may think of this aspect of *Shrimp Turtle* – and it has been criticized by some commentators as unjustified judicial activism -- that this suggestion was made in the course of a binding WTO decision and not by the ICJ matters less than the extraordinary fact that it was addressed to the world's "hyper-power." Even if we do not think that the WTO Appellate Body got the law right, we can scarcely deny that it, like many other

decisions being issued by our proliferating international judiciary, has a legal and political impact beyond the parties most immediately affected.

As the WTO example suggests, the U.S. executive branch finds itself increasingly subject to an interlocking set of multilateral processes from which it cannot – and does not wish to – extricate itself. To be sure, U.S. national law is not as dramatically affected by these regimes as are the laws of say, a poor African country, which has had to respond not only to the demands of the Security Council but is on the receiving end of IMF structural adjustment conditions and needs to respond to World Bank operational policies if it is to have access to Bank funds. In all of these regimes, the United States is more law-giver than law-taker.

But even such a law-giver -- a privileged nation with a Council veto, weighted voting rights in the World Bank and IMF, and substantial WTO trade leverage -- cannot totally control legal outcomes in any of these fora precisely because these venues

continued legitimacy depends on it. Compromises are always necessary to secure everything from a Chapter VII Council resolution to a favorable IMF decision with respect to a reliable U.S. ally. Nor can the U.S. government control the internal political reactions prompted by these institutions – including internal political alliances formed between proponents and opponents of these regimes. Of course, the United States cannot wholly control the institutions themselves, which enjoy a degree of autonomy resulting from the necessary delegation of powers or functions to “independent civil servants,” adjudicators, or technocrats.

Even the powerful United States cannot avoid the cumulative impact of WTO panel and Appellate Body decisions, even if these are neither self-executing nor the subject of claims in federal court. Over time, U.S. law, such as the residual application of section 301 of the U.S. Trade Act – like the law of all WTO members – is likely to reflect the WTO’s evolving views. Eventually, WTO law on discrimination against goods may become as sophisticated as

and even come to influence the interpretation of the U.S. commerce clause -- as much as, for example, U.S. takings jurisprudence may come to be affected by the emerging jurisprudence of NAFTA Chapter 11 investor-state arbitral decisions. In addition, the impact of these supranational regimes may come to be felt by changes in national law that do not occur -- because of the regulatory "chill" posed by the prospect that new laws will be challenged in the WTO or in investor-state arbitrations. Moreover, the fact that the USG has permitted a degree of supranational scrutiny over some domains (trade and investment) but not others (human rights and the environment), has not gone unnoticed and makes it increasingly untenable for our government to proclaim that such possibilities are "extra-constitutional."

There is yet another reason for the internationalization of U.S. law beyond the mission creep of our favored institutions: the re-emergence of customary law. Now at this point, I expect several of you to conclude that I really must be hallucinating.

Haven't I heard from well known U.S. revisionist scholars that customary international law is of no real relevance to the behavior of states; that it ought to have no status as federal common law; that it is subject to hopeless circularity in terms of definition; and that in game-theoretic terms it is a collective delusion routinely ignored when not consistent with the national interests of states? Well yes, actually I have heard these arguments by Curtis Bradley, Jack Goldsmith, and Eric Posner, among others. I just think they need to get out more and take a stroll, for example, in the real world of practicing lawyers where real cases are won or lost. They need to take a close look at, for example, USG or U.S. investor briefs in NAFTA arbitrations.

My foreign investment students have a difficult time understanding those who say that customary law does not exist or cannot bind. They certainly don't understand how such arguments can be made by those who simultaneously defend – in preference to supposedly “imprecise” “ineffectual” customary law -- the “hard” or more binding rules and institutions of international

economic law such as bilateral investment treaties, free trade agreements such as the NAFTA, or the WTO.

They have a tough time understanding such contentions because even a cursory examination of the emerging caselaw of BIT and NAFTA tribunals (before whom some over 200 investment disputes are now pending) reveal considerable reliance on rules of custom as well as general principles of law. The substantive guarantees provided in even relatively precise investment agreements anticipate, indeed require, reliance on these other sources of general international law outside the four corners of international trade or investment law narrowly construed. As the emerging arbitral caselaw suggests, provisions requiring investors to receive “fair and equitable treatment,” “full protection and security,” treatment that is not less than required “under international law,” or requiring states to respect investor-state contracts are recipes for dredging through hoary cases dealing with state responsibility to aliens (such as *Chatin* or *Neer*), more recent considerations of what constitutes fair or equitable procedures (as

in human rights tribunals that apply both treaty and customary standards), and comparative analyses of the general principles of law that can be drawn from national law (such as national law protecting the legitimate expectations of rights holders). The customary “denial of justice” standard is getting a work-out in many of these investment disputes, as are general principles of estoppel, unclean hands, and acquiescence. States trying to defend themselves from investors’ claims, such as Argentina, find themselves parsing the customary international law defenses of distress, necessity, or force majeure, as well as the rules concerning attribution. Despite recent Argentine threats not to abide by ICSID rulings, no one questions that such arbitral awards are among the most effectively enforceable in the international system, even when these decisions are contrary to what states originally contemplated or currently desire. The emerging “international common law” relating to the handling of evidentiary and procedural questions among our proliferating international judiciary is also a resurgent form of customary international law.

The reemergence of customary law in these contexts is in turn affecting the treaty obligations of the United States. Our government's latest model bilateral investment treaty now takes a more nuanced position on such matters as the meaning of "fair and equitable treatment" or the scope of permissible treaty exceptions because of these developments. And it is as yet unknown whether, for example, the customary law of permissible countermeasures, including traditional remedies canvassed in the rules of state responsibility such as reparations and the principle of proportionality, may yet play a role even with respect to the *lex specialis* remedial scheme contained in the WTO's Dispute Settlement Understanding.

While it may be generally true that customary norms are generally consistent with U.S. national interests, to conclude from that banal point that the United States is therefore unconstrained by the product of investor-state and WTO dispute settlement insofar as it incorporates custom is a non-sequitur. As is suggested by the huge efforts expended by the U.S. government to win NAFTA

(and WTO) cases, the customary and treaty law interpreted by such tribunals are of deep interest to us – because our federal and state laws or enforcement efforts could be undermined by the precedents established. That the United States has a national interest in say, having its investors be compensated for an expropriation, does not mean that NAFTA arbitrators will necessarily take the same view as a state of the United States in what either an “expropriation” or “compensation” means.

The revival of custom is occurring in more than the investment and trade regimes. As Ted Meron has recently pointed out, customary international law is undergoing a renaissance in part because all of our proliferating international dispute settlers face comparable needs to avoid a finding of non-liquet -- even when faced with questions over which no treaty rules apply or with respect to questions left open by vague or porous treaties. They too regularly turn to general principles and custom. Thus, the Iran-U.S. Claims Tribunal revived and gave more specific content to a range of customary rules – such as those governing the wrongful

expulsion of aliens. That Tribunal, which continues to operate today, along with other ad hoc bodies such as the UN Compensation Commission and the Eritrea-Ethiopia Claims Commission, have also applied and helped to refine the state responsibility rules recently issued by the ILC. Those rules, as well as customary human rights such as the ban on torture, continue to be getting a workout in our regional human rights courts – as in the Velasquez- Rodriguez decision by the Inter-American Court of Human Rights or numerous decisions issued by the European Court of Human Rights.

As Meron also points out, despite the strictures of *nullum crimen sine lege* the ad hoc war crimes tribunals have also applied and developed customary rules about command responsibility, what constitutes participation in a “joint criminal enterprise” and the requisites of the crime of complicity.³ They have developed the customary law concerning the applicability of international humanitarian law to internal conflicts, and resolved numerous

³ Theodor Meron, “Revival of Customary Humanitarian Law,” 99 AJIL 817 (2005).

issues concerning customary crimes against humanity such as whether a nexus is required with armed conflict, the distinction between concepts of “attack” and “armed conflict,” the meaning of discriminatory intent, or existence of a plan or policy, the relevance of personal motives, or the *actus reus* of persecution.⁴ With respect to the treaty based crime of genocide, these tribunals have turned to and in turn developed the customary law with respect to genocidal intent, or the meaning of aiding and abetting or complicity. The treaty based category of war crimes has also been subject to considerable customary law elaboration – as with respect to the crimes of torture and rape or the defense of duress. Like other international adjudicators discussed that have had to resolve evidentiary and procedural disputes, the ad hoc war crimes tribunals have addressed (and developed) customary rules regarding the issuance of subpoenas to state officials, the examination of documents raising national security concerns, and arrest, abduction, and international transfer. Most of this law is

⁴ Id.

relatively precise and none of it can be disparaged as unenforceable.

Note that much of the customary international law revival has occurred in the shadow of and spurred on by a considerable number of multilateral treaties across a range of topics from the regulation of trade and investment to rules governing combatants. Those who predicted that the proliferation of such treaties would bring about the demise of customary law overestimated the ability of treaty drafters to anticipate the needs of states – or their dispute settlers.

Now it is true that the United States has a greater ability to avoid the impact and to influence the formation of custom than most. Yet, the same state that helped to codify many of these customary rules through the Rome Statute of the ICC and the elements of crimes did not necessarily anticipate just how these developments could, in the wake of later torture scandals, for example, come back to haunt it -- indeed could come back to bite some of the same officials or lawyers. Nor is the “bite” of custom

explicable merely in terms of lack of foresight. Custom as a source of real world obligation, as well as its specific rules, are consistent with the interests of states. Since the United States has a clear interest in such matters as effective trade and investment dispute settlement, it, like all nations, has a strong interest in maintaining this inchoate source of obligation, as well as the reciprocal international law game that custom reflects.

To be sure, as the recently passed Military Commissions Act appears to suggest, the United States has greater power than most to immunize its officials from the reach of some of these customary developments. But, as General Pinochet and others can attest to if asked, national immunity forms of immunity are no longer the sure fire guarantees that they once were – not in a global market of buyers and sellers of customary norms and a variety of forums in which to test them or to direct political pressure against those who try to immunize themselves. International forum shopping is more alive than ever before. The international law game is no longer waged – if it ever was—exclusively within U.S.

federal courts and even when it is, there are fewer guarantees that our increasingly cosmopolitan judges, under pressure to speak with one voice with their international brethren, ignore law from elsewhere or the “decent respect for the opinions of mankind.”

Contrary to the critiques of some who have suggested that consensual treaties invariably have greater real world significance and legitimacy, there is an undeniable power and appeal that attaches to rules that legitimately can be said to apply to all nations precisely because none of them want to admit to violating them.

This is evident even with respect to fundamental questions of national security at the heart of sovereignty. Certainly those who wrote the infamous torture memos for the Bush Administration underestimated the power of the customary prohibition on torture – which appears to apply even beyond the territorial and jurisdictional limitations that are said to limit treaty instruments such as the Torture Convention. And the power of customary norms may also help to explain the views of those justices of our Supreme Court who, in *Hamdan*, choose to rely on common article

3 of the Geneva conventions but suggested in their reasoning and interpretation a strong reliance on customary law – as well as its singular global appeal. The recently passed Military Commission Act, to the extent it is interpreted or used in a way that is inconsistent with such universally appealing norms, may yet prove an ineffectual reed against the growing internationalization of our (and other nations’) laws – particularly as other nations react, including with respect to cooperating (or not) with our global war on terror.

The international law of today--both our treaty based institutions and our emerging and ever more specific rules of custom – is not quite as constrained as is suggested by books like Goldsmith and Posner’s The Limits of International Law. As Paul Berman and Peter Spiro have pointed out, such rational choice critiques focus too narrowly on the alleged short-term self interest and actions of states.⁵ International law today is not as state-centric as it once was and the actions of many others matter as

⁵ Paul Schiff Berman, “Seeing Beyond the Limits of International Law,” 84 Tex. L. Rev. 1265 (2006); Peter J. Spiro, “A Negative Proof of International Law,” 34 Ga. J. Int’l & Comp. L. 445 (2006).

well. Both the law-makers and the law-enforcers now include quasi-autonomous inter-governmental organizations, NGOs, multinational corporations (who are, for example, de facto complainants before the WTO and actual private attorney-general enforcers of the investment rights), and even individuals (who can bring disputes before a number of human rights bodies or can be criminal defendants).

All of this suggests that this is quite an odd time to suggest, as some do, that we ought to have a “unitary” executive with respect to foreign affairs. Quite apart from whether such a development would be desirable or historically consistent with our Constitution – and personally I think it is neither – the truth is that such a development is not likely to last long. The aggrandizement of U.S. presidential power has occurred in substantial part because of the expanding domain of “foreign relations.” The executive’s ability to enter into treaties, engage with international organizations, and participate in the making of custom has expanded his power vis-à-vis Congress and the states of the United

States. But this enhancement of power has come with a price. At no time in its history has our executive – or our legislature or our courts for that matter – been less “unitary” in the sense that any of them can afford to ignore legal developments at the international level or even by foreign courts and others around the world – developments no President, Democrat or Republican, can control. While some policy makers and academics yearn for an age when our President was free of the Gulliver-like constraints of international norms (or of the many non-state actors that deploy them), that time – that sovereignty – is long since past. Our own actions as a nation have helped to bring this about.

That U.S. law is increasingly internationalized helps to explain ever louder denunciations of the phenomenon. The fact that an increased number of law schools, most recently that bastion of curricular innovation, Harvard Law School, is now requiring international law as a course, that this course is now re-emerging even in undergraduate curriculums, that even our main line carry

articles on international law, and that the leaders of bar devote ever more resources to it – all of these prompt a predictable backlash.

I used to talk about the ‘four horsemen of the constitutional apocalypse’ – referring to Jack Goldsmith, Curtis Bradley, John Yoo, and Ernest Young and their constitutionally grounded critiques of international law. Today, I no longer use that term since the original four have metastasized into a horde. But the fact that so many talented lawyers –who once would have devoted their lives to undermining labor law or the law of antitrust – now devote themselves to trashing our subject fills me with joy. The fact that our best and brightest now think it is worth both praising and attacking international law is a sign that international lawyers have *arrived*. And, as economists have suggested, when you arrive at some destinations, despite the occasional missteps, it is hard to go back.

Thank you.