

## **IN WHAT SENSE IS INTERNATIONAL LAW LAW?**

### **Excerpt of Panel Discussion Transcript ASIL Annual Meeting March 26, 2009**

The panel was convened as part of the American Society of International Law's 103<sup>rd</sup> Annual Meeting on Thursday, March 26, 2009. Andrew Guzman of the University of California-Berkeley School of Law moderated the session and introduced the panelists: José E. Alvarez of Columbia University School of Law; Antonia Chayes of Tufts University; Thomas Franck of New York University Law School; and Sean Murphy of George Washington University Law School.

This was the last occasion on which ASIL Past President and Honorary President Thomas Franck addressed his ASIL colleagues. The following is a transcript of Professor Franck's remarks. A summary of the complete session will be published in the Proceedings of the 103<sup>rd</sup> ASIL Annual Meeting.

#### **REMARKS BY THOMAS FRANCK**

Well, I am rather surprised that we have gathered here again at the beginning of a new political era to ask this tired old question, but the very fact that we have indicates that there must still be some unease about whether international law is law, and I'm going to try to approach that as a clinical subject: why do we keep worrying about it? Why do we keep asking this question—and, in fact, do we keep asking this question—or is it a small subset of our profession that keeps asking this question?

It is my impression that the existence of well-established international tribunals interpreting myriads of treaties that are carefully ratified and registered and fully understood by the parties to the treaties and habitually implemented by them in their conduct—that this kind of pattern of institutional behavior, behavior circumscribed by procedural rules and institutional practices, is not a mystery to anyone in this room or anyone in this profession. And if you follow the international treaty practice of states, you follow the decisions of international tribunals and compliance with those decisions by the states that are parties to the litigation, that you all must have some sense that there's obviously something out there that looks an awful lot like law, sounds a lot like law, has an awful lot of institutions that have names that seem to resonate in legal practice.

So then we come back again to the question: why are we so bothered by this issue, and who is the "we" that is so bothered by it? My response to that question, after not every extensive thought, I must say, is that this is a question primarily of interest to two subsets. The first subset is to Americans, and it is of particular interest to Americans because Americans have come of age in the post-cold war era believing in American exceptionalism, and law is always an encumbrance to the strong, much more than an encumbrance to the weak. And as long as America was of the strong, and so

demonstrably of the strong that it could always get its way on any subject it felt really strongly about, then law really got in the way of doing what you wanted to do and doing what you believed needed to be done.

And this kind of vertical Austinian imposition of law by the sole super power became an adequate substitute for international law and did not have to be particularly normative. It would occasionally be spelled out in a Bush doctrine about deterrence or about anticipatory self-defense, but, by and large, you did what you needed to do when you felt like doing it, and that was an adequate substitute for the rule of law, but it was an adequate substitute only on the assumption that we were, in fact, the world's only super power, and that we could pretty much extend our super power dominion to any field about which we felt very strongly.

It has turned out that that is utterly false, and being utterly false, one has to challenge those who use it as the starting point for asking the question, is "international law" law, in order to come to a negative answer to that question. The question, is "international law" law, is asked by the exceptionalists of the sole super power as an instrument for avoiding being shackled by the ties of law when you have the capacity to get what you want and getting done what needs to be done, without reference to a normative system, let alone one that is horizontally negotiated.

So that seems to me the first constituency for the question, is "international law" law: those who believe that America can do pretty much what it wants to do and what needs to be done and that we would have a better international regime if we just went ahead and did it. And, of course, in order to get to that, you have to surmount this little nuisance about this myth called "international law" and get it off the table. That is one reason to ask the question, is "international law" law?

It seems to me another reason to ask the question, is "international law" law, is because you don't want to comply with it. It is not a general theory about how to govern the world. It's that you've got a dispute, and you don't like what international law has to say about it. You've lost a case in the world court or what you're doing is clearly a violation of a treaty, and then you have the choice of saying, "Well, you know, what's this international law stuff anyway?" and thereby surmounting whatever a program may attach to having failed to carry out a stricture of the normative system.

If you look carefully, however, at who does that—that is, what is this constituency that uses specific non-compliance as the basis for asking is "international law" law—you are back with the same group of Americans again. It is not what Indians do when they don't want to obey the law. Indians lie about the law, or they lie about the facts. That's the way to avoid having to carry out international law. That's the lawyer's approach to unpleasant normative structures. You say, "Well, that may be the way you read it, but it's not the way I read it," or you may say, "These may be the facts as you see them, but they're not the real facts on the ground," but they don't say international law isn't law. They say, "Of course, international law is law. It just doesn't mean what you think it means."

And none of that kind of questioning, which comes primarily from ultramontane sources from other than Americans, none of that is a challenge to international law. On the contrary, it proceeds under the flag of support for international law.

Of course, we're for international law, but you have to understand what the international law is in this case, and you have to understand the facts to which international law responds, but none of that argues that international law isn't law. So you're really down to a very small constituency of people who are the exceptionalists, and we've had the exceptionalists now with us for, I would say, a good ten, eleven years, pretty much since the end of the cold war when exceptionalism became almost irresistibly tempting to American policy-makers.

And it has taken serious defeats, serious defeats on the economic side, serious defeats on the political side, to awaken us to the fact that this exceptionalism doesn't work—that we do not, in fact, have the power to have things our own way outside a normative structure, and that if we are prepared to work within a normative structure, we have to be prepared to lose some and win some.

That's the nature of a normative structure—that you can't win them all, and it's extraordinarily difficult, but I think maybe that the American public, and particularly the American foreign policy establishment, is beginning to learn the lesson that we cannot have it all our own way. And if we wish to have some of it our way, it can only be on the basis of a set of reciprocally obeyed normative processes and rules which are international law. And it's all there. I mean, it's operating away. It may not appear in Eric Posner's and Jack Goldsmith's studies, but it's all there, all operating all the time.

I would perhaps surprise you by the number of people who have called me since my recent article in the American Journal on proportionality to ask me whether it was safe for them to travel abroad. The very fact that people are calling and asking—that in one way or another indicates that there is some concern, that there's something out there, and that something out there is a system of norms, it's a system of reciprocal obligations that most countries obey, and that, yes, indeed, if you were responsible for certain kinds of counter-normative activities, you might not want to take your next vacation in Brussels. And that concern is the compliment that exceptionalism pays to international law—that they are beginning to worry that maybe there is something out there.

As for the rest of us, we always knew it was out there. It's just a very small group of people who have been insisting that it doesn't exist, and I would suggest that we may be emerging from that very dark period of our history, and perhaps the problem will look after itself, and maybe we will never have to have another panel like this.

[Applause.]