## 1AC

### Plan

The United States Federal Judiciary should restrict executive war powers authority to detain individuals that have won their habeas hearings on the grounds that human rights treaties ratified by the United States are self-executing.

### 1

Advantage one is human rights

Failure to judicially enforce treaties has undermined US human rights credibility

Gruber, 7

(Law Prof-Florida International, The Intersection of United States Constitutional Law with International and Foreign Law: Sending the Self-Execution Doctrine to the Executioner, 3 FIU L. Rev. 57, Fall, Lexis)

Consequently, it is fairly evident that the new anti-international self-execution rules were nearly exclusively a creation of lower courts. In the last several years, the topic of hostility to treaty law has filtered out of the courts and become more than merely a topic for academic rumination. As soon as the Guantanamo detentions came to light, the Geneva Conventions became the topic of popular discussion. n185 President Bush quickly set forth the conclusory legal claim that the Geneva Conventions are non-self-executing, n186 **and in the world opinion, the U**nited **S**tates **became synonymous with disrespect for treaty law**. n187 Eventually, two terrorism cases made their way through the lower courts challenging President Bush's program of military detention and trial for terrorism suspects. In Hamdi, an American citizen designated as an enemy combatant challenged his classification and continued military detention as, among other things, in violation of the Geneva Conventions. n188 In Hamdan, a foreign national and Guantanamo detainee sought to have the Supreme Court declare President's Bush's military tribunals illegal, asserting they violated domestic law and the Geneva Conventions. n189 The federal courts of appeals' analyses of the detainees' Geneva Convention claims reflect unequivocally a fervent embrace of the modern anti-internationalist approach to treaty self-execution. In Hamdi, the Fourth Circuit summarily dismissed Hamdi's Geneva claims on the ground that the Conventions neither contain an explicit private right of action, nor otherwise evidence intent to provide one. n190 Yet Hamdi had asserted the federal habeas corpus statute, which allows a litigant to challenge custody in violation of the laws and treaties of the United States, provided him a legal mechanism for suit. n191 To this, the Fourth Circuit responded categorically that the treaty could not be enforced through any domestic legal mechanism because it was intended to be vindicated only through international pro [\*88] cedures. n192 Here, the court assumed, without explanation, that the existence of some international procedure provisions within the Conventions necessarily precluded domestic enforcement. n193 In the end, the court's main legal stance was to mistake the question of self-execution with the question of justiciability, n194 and find the Geneva Conventions unenforceable merely for lack of an internal private right of action. The D.C. Circuit in Hamdan did much better on this issue, recognizing, "The availability of habeas may obviate a petitioner's need to rely on a private right of action." n195 In other respects, however, the decision of the D.C. Circuit in Hamdan elevates treaty law antipathy to new heights. The D.C. Circuit openly reversed the presumption that treaties are the supreme law of the land, through a patent misapplication, bordering on bad faith, of the holding in the Head Money Cases. n196 The court of appeals quoted Head Money for the proposition that "as a general matter, a 'treaty is primarily a compact between independent nations,' and 'depends for the enforcement of its provisions on the interest and honor of the governments which are parties to it.'" n197 Yet conspicuously absent from the D.C. Circuit's holding is the portion of Head Money that states that a treaty may "prescribe a rule by which the rights of the private citizen or subject may be determined," and a "court resorts to the treaty for a rule of decision for the case before it as it would to a statute." n198 The selective quotation of Head Money to create a presumption that treaties can only be enforced through international procedures is plainly unjustified. Relying on its created presumption that treaties do not affect individuals, the court of appeals did not bother to discuss the fact that the Geneva Conventions clearly obligate signatories to treat individual captures in a specific manner. n199 Rather, the Court [\*89] dismissed any domestic enforceability argument on the inapposite ground that Geneva contains provisions setting forth international procedures to resolve claims by signatories against fellow signatories. n200 However, this is clearly neither the principle set forth in Head Money, nor one from any other Supreme Court case. Head Money makes clear that so long as the Geneva Conventions create rights "of a nature to be enforced in a court of justice," they are so enforceable. n201 The existence of international procedures does not control the question. Lurking within the courts of appeals' analyses is the modern intent thesis. The courts interpret the existence of international procedures as an indication that treaty makers intended for the Geneva Conventions to be non-self-executing. The D.C Circuit in Hamdan asserts that it is constrained to this analysis by a footnote in the Supreme Court decision in the World War II case Johnson v. Eisentrager, which states, "It is . . . the obvious scheme of the [Geneva Conventions] that responsibility for observance and enforcement of these rights is upon political and military authorities." n202 The Eisentrager opinion, however, substantively resolved the treaty claims at issue, and the dicta on which the D.C. Circuit relies is unexplained and troubling. n203 The provisions for international procedures in the Geneva Conventions regard disputes between nations over treaty interpretation and inter-sovereign allegations of violations. n204 The Conventions simply do not say one way or another how individual claims should be processed. There is plainly no language in the treaty indicating that the rights set forth are not domestically enforceable. n205 Moreover, there is a good explanation for why the Conventions would remain silent about domestic enforcement mechanisms - the signatories had differing legal systems and varied approaches to domestic treaty enforcement. n206 This does not mean, however, that the Convention negotiators intended to preclude domestic enforcement in every signatory country. n207 Consequently, the existence of international [\*90] procedures does not demonstrate, as a matter of plain language or drafter intent, that domestic enforceability is precluded. Moreover, such a conclusion appears unequivocally at odds with the Supreme Court's holding in Cook. n208 In Hamdi and Hamdan, the Supreme Court had the opportunity to reaffirm the supreme status of treaty law, clarify the distinction between self-execution and justiciability, and send a message to the world that the United States does take international law seriously. n209 Unfortunately, the Court took pains to avoid these issues, finding by hook or crook, only domestic remedies for the detainees. International law played a small but interesting role in Hamdi. Writing for the plurality, Justice O'Connor held that President Bush's military detention of alleged enemy combatants, including citizens, had been authorized by Congress' Joint Resolution Authorizing the Use of Military Force (AUMF), which simply provides that "the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001." n210 Although the AUMF says absolutely nothing about military detention of citizens, the Court concluded that such action was part of using "necessary and appropriate" military force. n211 As support, the Court looked to law of war treatises, previous cases, and international instruments, including the Geneva Conventions. n212 Thus, the Geneva Conventions were used, not to limit the President's use of war power, but to help justify it. n213 Hamdi only limits Presidential discretion by requiring [\*91] that the procedure used to classify citizens as enemy combatants complies with constitutional due process. n214 The Court determined the process due to Hamdi by applying the test from Matthews v. Eldridge, a case involving social security benefits. n215 Having laid out the process due to Hamdi under the Matthews test, the Court summarily declared that it need not determine "whether any treaty guarantees him similar access to a tribunal for a determination of his status." n216 The Court, however, never entertained the notion that the Conventions might provide procedures different from those laid out by the Court. n217 In addition, conspicuously absent is any mention of the Geneva Conventions' prescribed conditions of detention, other than access to a tribunal. n218 It is quite clear that the President's treatment of Hamdi did not comply with the prisoner of war conditions required by the Geneva Conventions. n219 Because Hamdi had challenged the legality of his detention, the Court had an obligation to resolve whether or not the Geneva Conventions applied to him and rendered his detention illegal. n220 Moreover, the Court ignored the probability that the "law of nations," on which it relied in interpreting the AUMF, does not consider detention in violation of Geneva's dictates to be "necessary and appropriate." The Court likely ignored this point because it might have led to a finding that Congress had not authorized Hamdi's detention. n221 O'Connor's conclusion that Congress had authorized the President's detention program was what allowed her to steer clear of the thorny issue of executive unilateralism. Consequently, the Court managed to avoid the self-execution issue, and all substantive interna [\*92] tional law claims, even though a discussion of the Geneva Conventions' status and provisions was clearly warranted. By contrast, in Hamdan, the Supreme Court did undertake an extensive discussion of the Geneva Conventions, finding the military trial procedures unlawful as violative of Geneva Common Article 3, which requires military tribunals to be "regularly constituted courts, affording all the judicial guarantees which are recognized as indispensable by civilized peoples." n222 In doing so, the Court adopted an internationalist interpretation of Common Article 3, contrary to the one proffered by the President. n223 Amazingly, the Court was able to reach the conclusion that Common Article 3 rendered the tribunals unlawful without touching the issue of Geneva self-execution. In order to do so, the Court had to engage in an exercise of incredibly bold legislative interpretation, reading the Geneva Conventions into the Uniform Code of Military Justice (UCMJ). n224 The Court's basic argument was that the UCMJ requires the procedures used to try detainees like Hamdan to comply with the "law of war," including the Geneva Conventions, and the President's procedures did not so comply because of their failure to comport with Common Article 3. n225 The Court held that Article 21 of the UCMJ acted as implicit congressional authorization, with limitations, of the President's power to establish and employ military commissions to try enemy combatants. n226 Article 21 reads: The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute [\*93] or by the law of war may be tried by military commissions, provost courts, or other military tribunals. n227 The Court interprets this sentence as an authorization of the President to use military commissions with the qualification that such commissions comport with "the law of war." n228 This interpretation of Article 21 is quite problematic, and to be sure, it incurred the wrath of conservative members of the Court. n229 Experts are in fair agreement that Article 21 was not meant to authorize or limit the President's common law authority to establish military commissions during wartime. n230 Rather, Article 21 represents Congress' desire that the UCMJ's establishment of court martial procedures leave unchanged whatever common law power the President already had to try enemies for statutory violations or war crimes. n231 There are additional problems with the Court's interpretation of Article 21. Even if Article 21 does operate to limit the President's military commission authority, a plain reading reveals that it only limits the kind of offenses that may be tried -statutory or law of war offenses - not the procedures that may be used. n232 As much was recognized by the Court in the World War II case In re Yamashita, when it stated that Article 21 "left the control over the procedure . . . where it previously had been, with the military command." n233 Finally, the assumption that the UCMJ meant to incorporate Geneva procedural rights seems unsupported by the history of the Code. n234 Consequently, by bringing Geneva into the Hamdan case solely through the domestic UCMJ, the Court was able to scrupulously avoid [\*94] the self-execution issue. The questionable nature of the Court's legislative interpretation shows the length to which the Court was willing to go to avoid the self-execution question. Perhaps, the Court's methodology can be understood as mere judicial restraint. However, the Court clearly believed the Bush administration was violating international law. n235 Placing the fate of the Geneva Conventions in Congress's hands, especially when the Military Commissions Act (MCA), which approves the President's (illegal) interpretation of Geneva, n236 was about to be enacted, cannot be rationalized as mere judicial moderation. Jordan J. Paust criticizes the Court's approach: This roundabout use of the laws of war may seem appropriate in terms of normal judicial caution, but when a judge realizes that every violation of the laws of war is a war crime and war crime activity by the Executive against a habeas petitioner who is before the Court is apparent, such caution in the face of international crime is less than satisfying. The Court should have mandated that the Executive comply with particular laws of war when it was apparent that they were being violated. n237 Moreover, **declaring the Conventions self-executing would have bolstered** the **U**nited **S**tates' **credibility as a defender of human rights**. n238 Thus, the Supreme Court's avoidance of self-execution cannot be understood as mere accident or cautious temperance. The Court's jurisprudential choices reveal that it had internalized the view, created by isolationist lower court activism, that treaty self-execution is illegitimate. The Court's avoidance evidences that it believed declaring a humanitarian treaty like the Geneva Conventions self-executing would have been too ambitious, liberal, or difficult. CONCLUSION This Essay has sought to demonstrate that **the development of a new isolationist approach to self-execution is a barrier to true internationalism** [\*95] in American law. Over the past few decades, lower courts have actively expanded the self-execution barrier to treaty law, thereby rendering ineffective older treaties and providing the U.S. government a mechanism to avoid human rights and humanitarian obligations in new treaties. Meanwhile, the Court has largely sat by passively, allowing lower courts to chip away systematically at the letter and spirit of the Supremacy Clause. Today, however, the Court's avoidance and passivity on the self-execution issues is more than just grounds for academic dissatisfaction. In the midst of the "war on terror," **the status of human rights and humanitarian treaties is of dire import.** The United States has become **synonymous with international law violations**, and President Bush continues to flout the letter and spirit of the Geneva Conventions by his treatment of the Guantanamo detainees. Yet all is not lost. As the Guantanamo detainees' cases make their way up through the lower courts, now challenging detention under the newly-passed Military Commissions Act, the Supreme Court may yet have another chance to declare the Geneva Conventions self-executing and **affirm that treaties are the supreme law of the land.**

NSE declarations key—they make it impossible for the US to back norms

Friedman, 5

(JD-University of Florida Law, “The Uneasy US Relationship with Human Rights Treaties: The Constitutional Treaty System and Non-Self-Execution Declarations,” 17 Fla. J. Int'l L. 187, March, Lexis)

E. Policy Arguments Against Nonself-Execution Declarations: The International Implications

Regardless of whether the constitutional arguments against nonself-execution declarations pass muster, the practice of attaching them to human rights treaties **is an integral part of the blatantly protectionist U.S. foreign policy on human rights**. n418 Routinely using nonself-execution declarations communicates to other nations that the United States does not take its international human rights obligations seriously enough to allow them to take effect as domestic law. n419 It also undermines the foreign policy justifications for ratifying human rights treaties in the first place - most fundamentally, the motivation to serve as an example to other nations. n420 Nonself-execution declarations render the human rights treaties to which they are attached **empty promises,** because the terms of those treaties do not effect any change in U.S. domestic law. n421 The United States thus [\*251] is seen by other nations as seeking the benefits of human rights treaties - most importantly, membership in the organizations that oversee them - without assuming any of the burdens. n422 The practice of using nonself-execution declarations reflects an attitude that human rights treaties are only for other nations, not for the United States. n423 The U.S. foreign policy on human rights **promotes a double standard**, whereby the United States seeks to enforce international human rights law against other nations but is unwilling to have its own practices subjected to international regulation and scrutiny. n424 On one hand, the United States [\*252] played a leading role in establishing the United Nations and drafting the UDHR and other human rights treaties. n425 It also frequently expresses concern about human rights violations around the world and sometimes uses economic or military pressure to induce nations to improve their human rights practices. n426 Moreover, U.S. domestic law reflects a fundamental commitment to domestic human rights protection. n427 On the other hand, the United States has an uneasy relationship with human rights treaties and institutions. n428 The United States only occasionally ratifies human rights treaties, n429 and when it does, it attaches nonself-execution declarations without fail. n430 Furthermore, after declaring the treaties nonself-executing, it enacts the necessary implementing legislation erratically, if at all. n431 The root of this double standard lies in U.S. unilateralism, exceptionalism, and isolationism. n432 At the heart of those beliefs are two [\*253] related ideas: first, that human rights in the United States are "alive and well" and do not need scrutiny from other nations whose human rights protections are much less so; n433 and second, that the U.S. government, especially U.S. courts, would take human rights obligations much more seriously than would other governments. There are four basic foundations of this "pervasive sense of cultural relativism, ethnocentrism, and nationalism" n434 in the United States: the U.S. superpower status in world affairs, n435 the exceptional stability of democratic governance inside its borders, n436 the "general conservatism" of its politics, n437 and the decentralized and divided nature of its political institutions. n438 Nonself-execution declarations reflect this **nationalistic sense of superiority** and communicate a "refusal to consider the possibility that change may potentially bring improvement rather than deterioration" to domestic human rights protections. n439 To a somewhat lesser extent, the foundation of the human rights double standard also lies in the differences between U.S. constitutional rights and international human rights. n440 First, American constitutional rights focus [\*254] on the democratic form of government more specifically than do international rights. n441 Second, American constitutional rights are natural rights, and refer back to ideas that are European - rather than universal - in nature. n442 Other nations are becoming increasingly frustrated with U.S. foreign policy on human rights and with U.S. domestic human rights practices. n443 This widespread criticism **damages the U.S. credibility in foreign human rights policy**. n444 It also undercuts the U.S. foreign policy motivations for ratifying human rights treaties in the first place, especially the desire to serve as an example to other nations. n445

Collapse of human rights norms causes global WMD conflict

Burke-White 4 – William W., Lecturer in Public and International Affairs and Senior Special Assistant to the Dean at the Woodrow Wilson School of Public and International Affairs, Princeton University and Ph.D. at Cambridge, “Human Rights and National Security: The Strategic Correlation”, The Harvard Human Rights Journal, Spring, 17 Harv. Hum. Rts. J. 249, Lexis

This Article presents a strategic--as opposed to ideological or normative--argument that the promotion of human rights should be given a more prominent place in U.S. foreign policy. It does so by suggesting a correlation between the domestic human rights practices of states and their propensity to engage in aggressive international conduct. Among the chief threats to U.S. national security are acts of aggression by other states. Aggressive acts of war may directly endanger the United States, as did the Japanese bombing of Pearl Harbor in 1941, or they may require U.S. military action overseas, as in Kuwait fifty years later. Evidence from the post-Cold War period  [\*250]  indicates that states that systematically abuse their own citizens' human rights are also those most likely to engage in aggression. To the degree that improvements in various states' human rights records decrease the likelihood of aggressive war, a foreign policy informed by human rights can significantly enhance U.S. and global security. Since 1990, a state's domestic human rights policy appears to be a telling indicator of that state's propensity to engage in international aggression. A central element of U.S. foreign policy has long been the preservation of peace and the prevention of such acts of aggression. [2](http://www.lexis.com/research/retrieve?_m=62d5bddd50e555db7dfb40b14668cef6&csvc=bl&cform=searchForm&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLbVzW-zSkAW&_md5=a81b07a0a90d95be59f9b7bb9d939181#n2) If the correlation discussed herein is accurate, it provides U.S. policymakers with a powerful new tool to enhance national security through the promotion of human rights. A strategic linkage between national security and human rights would result in a number of important policy modifications. First, it changes the prioritization of those countries U.S. policymakers have identified as presenting the greatest concern. Second, it alters some of the policy prescriptions for such states. Third, it offers states a means of signaling benign international intent through the improvement of their domestic human rights records. Fourth, it provides a way for a current government to prevent future governments from aggressive international behavior through the institutionalization of human rights protections. Fifth, it addresses the particular threat of human rights abusing states obtaining weapons of mass destruction (WMD). Finally, it offers a mechanism for U.S.-U.N. cooperation on human rights issues.

### 2

Advantage two is treaties

The plan sends a key to signal that reinvigorates all human rights treaties

Gruber, 7

(Law Prof-Florida International, “Who’s Afraid of Geneva Law,” 39 Ariz. St. L.J. 1017, Winter, Lexis)

Internationalists and civil libertarians have widely praised Hamdi and Hamdan for creating a new era of rights, and at least one commentator has stated that the MCA, following Hamdan, "put the final nail in the coffin" of unbridled executive discretion. n447 Yet reports of the demise of executive overreaching and American isolationism are greatly exaggerated. To this day, the **Guantanamo detentions continue, and the U**nited **S**tates **remains a consistent subject of criticism from international actors, the press, and the public**. A finding that the Geneva Conventions are self-executing, in addition to possibly affording real and effective relief to detainees who continue to be treated in inhumane ways, would **truly set the U**nited **S**tates **on a path toward reversing the sad history of the last six years.** It would permit the United States to **step out of the** dark **era of** Bricker, racism, and **isolation into a new light of taking international law seriously**. **Holding the Geneva Conventions self-executing could demonstrate** that the United States is a country of laws that can proudly **occupy the position of a global defender of human rights**. Unfortunately, although the Supreme Court was well poised to take up the issue of treaty self-execution, it did not do so, evidencing an unfortunate [\*1085] internalization of treaty law fear created by lower court activism and conservative scholarship. This fear is neither justified by the Supreme Courts' own history nor compelled by the structure of the Constitution. Because the modern self-execution doctrine, particularly the intent analysis, is essentially isolationist, **the Court can only be truly internationalist when it finally puts an end to** recent **treaty law hostility**. Consequently, now is not the time for civil libertarians and internationalists to be complacent. They must be vigilant in their advocacy of the rule of law and judicial review. If the Supreme Court is willing to once again exercise jurisdiction over cases like Hamdan, it may well have the opportunity to assess whether the procedures set forth in the MCA violate the Geneva Conventions. This time, the Court will not be able to avoid the issue of self-execution by relying on congressional intent. Thus, internationalists and civil libertarians yet have a role to play in urging the **Supreme Court to be an international team player rather than a "lone ranger**."

Enforcement of the ICCPR crucial to marshal support for a rights-based approach to water issues

Varma, 13

(Director of Robert F. Kennedy Center for Justice and Human Rights, 9/9, “Wòch nan soley: The denial of the right to water in Haiti,” http://www.hhrjournal.org/2013/09/09/woch-nan-soley-the-denial-of-the-right-to-water-in-haiti/)

In addition to protections in domestic law, **the right to water is** also **recognized in international** **law**. International and regional human rights bodies and national and international courts have interpreted the right to water as being an implicit part of other human rights, such as the right to life, the right to health, the right to an adequate standard of living, the right to food, the right to housing, and the right to education.117 These rights have **been enshrined in** both UN and regional **human rights instruments**, several of which have been **ratified by** Haiti and the United States. Both Haiti and the United States have ratified the International Covenant on Civil and Political Rights (ICCPR), which protects, inter alia, the right to life. Both have signed the International Covenant on Economic, Social and Cultural Rights (ICESCR), which includes, inter alia, the right to housing, food, health, and an adequate standard of living.118 The right to water is also protected under other international instruments. These instruments are useful indicators of norms accepted by the international community and reflect evidence of political will to make access to water a priority. The provisions in some international instruments have obtained the status of customary international law and thus create legal obligations for states. Customary international law is derived from a clear consensus among states as to a legal rule, which is evidenced by widespread conduct by states accompanied by a sense of legal obligation to adhere to such rule, known as opinio juris.119 The UN Committee on Economic, Social and Cultural Rights (ESCR Committee) has found that the minimum core of the main economic, social, and cultural rights has become customary international law and is thus binding on all states, regardless of whether they have signed or ratified treaties protecting those rights. Many scholars support this position.120 The right to life is further protected by customary international law, and as a necessary component of the right to life, the right to water is thus implicitly protected by customary international law.121 International instruments that may reflect customary international law and that protect the right to water, either explicitly or implicitly, include the Universal Declaration of Human Rights, the Declaration on the Right to Development, and the Millennium Development Goals.122 States’ treaty-based obligations to secure Haitians’ right to water As the situation in Haiti makes clear, **legal rights provide no real protection for individuals without corresponding responsibilities, and the responsibility for fulfilling rights is an integral part of all legal rights**. Generally, the government of each state bears the primary responsibility to ensure the protection and achievement of human rights for those on its territory or otherwise under its jurisdiction. A state’s human rights obligations also apply when it acts as part of a multilateral or international organization, such as the UN or the World Bank.123 Thus, members of the international community bear a measure of legal responsibility. The case of water in Haiti is **directly relevant to the issue of international human rights law as codified in treaties** and under customary international law. When a state signs a treaty, the state is required to refrain from any action that would contradict the object and purpose of the treaty, and when a state ratifies a treaty, the state thereby accepts the duties contained within the treaty and is required to immediately take positive steps to realize the rights contained in the treaty.124 Even if a state has neither signed nor ratified a human rights treaty, it has certain obligations under customary international law, which protects fundamental human rights and in general applies to all states. Types of duties Human rights treaties generally specify three different kinds of duties relating to the rights set out in the treaty. The first is the obligation to respect, meaning that governments must refrain from interfering directly or indirectly with an individual’s enjoyment of rights. The second is the obligation to protect, meaning that governments must prevent the violation of human rights by other actors. States’ actions to protect include actions that prevent individuals, companies, or other entities from violating individuals’ human rights, and also actions to investigate and punish such violations if they occur. And the third duty is the obligation to fulfill, meaning that governments must adopt whatever measures are necessary to achieve the full realization of human rights for all. Thus, governments are required to provide subsidies, services, or other direct assistance to the most vulnerable and needy members of a society when they cannot otherwise access their rights. Obligations of the government of Haiti In accordance with these treaty-based obligations and customary international law, the Haitian government is responsible for guaranteeing and fulfilling the human rights of everyone in Haiti.125 Haiti is a party to the ICCPR, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Convention on the Rights of the Child, the Organization of American States (OAS) Charter, and the American Convention on Human Rights; it is thus responsible for all the obligations found within each of these treaties. The Haitian government has signed, but not yet ratified, the ICESCR and the Protocol of San Salvador, both of which enumerate many of the rights at issue in this article; thus, these treaties do not strictly bind the government of Haiti. However, as a signatory, Haiti has an obligation to refrain from actions that will frustrate the object and purpose of these treaties.126 Furthermore, given that the Haitian Constitution protects the rights to health and food, the Haitian government has an obligation to ensure the satisfaction of — at the very least — minimum essential levels of each of these rights, of which access to water is an integral component. All Haitians, as rights-holders, have a particular set of entitlements, and the Haitian state, as the primary duty-bearer, has a particular set of obligations. Haitians who cannot access even the most basic forms of these entitlements are being deprived of their constitutional economic and social rights and their rights under treaties guaranteeing basic civil and political rights, such as the right to life, personal liberty, and security.127 The Haitian Constitution requires the Haitian government to recognize and protect Haitians’ rights to health, decent housing, education, and food.128 Because the right to water is an important component of these rights, the Haitian government has a responsibility to ensure the full realization of the right to water through national legislation and policies. A national water strategy should elaborate how the right to water is to be realized and should include concrete goals, policies, and a time frame for implementation.129 Obligations of the international community While the government of Haiti is the primary guarantor of Haitians’ rights, the international community also has obligations.130 Human rights treaty obligations apply not only within the territory of the ratifying state, but also apply to states’ behavior outside of their borders, through the concept of jurisdiction, and to states’ actions as members of the international community.131 This means that states must protect the human rights of all individuals within their territory or under their jurisdiction and **ensure that their actions at the international level are in compliance with their human rights obligations**.132 With respect to the right to water, this means that states must “refrain from actions that interfere, directly or indirectly, with the enjoyment of the right to water in other countries.”133 The following brief summary of international obligations relevant to Haiti illustrates the importance of this factor in discussing Haitians’ right to water. Two types of state action are most pertinent to the denial of the right to water in Haiti: 1) when states act individually on the international level, and 2) when they act as members of international organizations, particularly international financial institutions (IFIs). The Maastricht Guidelines, developed to clarify which state actions constitute violations of economic, social, and cultural rights, assert that states’ duties to protect human rights extend to their “participation in international organizations, where they act collectively.”134 When authorized by member states, IFIs can take actions that may help fulfill human rights, such as financing the construction of the infrastructure needed to deliver and treat water. Alternatively, actions by IFIs may hinder the enjoyment of human rights, through, for example, requiring governments to minimize social programs or privatize core services as a precondition to receipt of grants or loans. IFI actions in such cases may interfere with the target state’s ability to fulfill human rights obligations.135 To effectively ensure the realization of the right to water, member states must be held accountable for the actions that they take, through IFIs, that have a direct impact on the human rights of individuals located outside their territory.136 At a minimum, member states must abide by their duty to respect human rights in their actions as members of IFIs.137 The ESCR Committee — responsible for interpreting and monitoring compliance with the ICESCR — has determined that states are bound by human rights obligations when acting as members of IFIs.138 With regard to the right to water, the Committee notes that “States parties that are members of international financial institutions, notably the International Monetary Fund (IMF), the World Bank, and regional development banks, should take steps to ensure that the right to water is taken into account in their lending policies, credit agreements and other international measures.”139 This statement further stipulates that “water should never be used as an instrument of political and economic pressure.”140 The majority of members of the World Bank Group and IMF (including the United States) are party to the ICCPR, which can be **seen as providing protections of the right to water as an element of the right to life, a right central to the ICCPR**.141 Also, since the ICESCR has been ratified by the majority of major IFI state members and all European Union countries, these states are obligated to comply with its provisions. The United States has not ratified the ICESCR, but it has signed the treaty, and thus must refrain from acting in a manner that would frustrate the object and purpose of the treaty.142 Many IDB member states are also members of the OAS, through which states may ratify regional treaties, including the American Convention and the Protocol of San Salvador, that protect economic and social rights. Moreover, the minimum core content of the key economic and social rights is regarded as customary international law, binding even non-ratifying states such as the United States. Thus, the action taken by the United States in blocking IDB development loans earmarked for water projects in Haiti is a **direct violation of** the **U**nited **S**tates’ **human rights obligations**.143 In this case, the United States actively impeded the Haitian state’s ability to fulfill Haitians’ human right to water through its actions, breaching its duty to respect. Such blatant frustration of the object and purpose of the human rights treaties to which the United States is a signatory or a state party is a clear violation of international law. Recommendation: Adopt a rights-based approach This article has documented the disastrous consequences of the IDB’s extended failure to disburse loans earmarked for water projects in Haiti. It has demonstrated how these actions directly impeded the Haitian government’s ability to respect, protect, and fulfill its citizens’ right to water. While the government of Haiti is primarily responsible for ensuring this right, other key actors, such as IFIs, foreign states, nongovernmental organizations, and private companies also have a role in solving Haiti’s water crisis. To ensure a sustainable solution, we recommend that all of these actors, in addition to the Haitian government, adopt a rights-based approach to the development and implementation of water projects. Such an approach would enhance the Haitian government’s ability to deliver these services and the Haitian population’s right to access safe and sufficient water. This section provides a brief explanation of a rights-based approach to development and its implications for water security in Haiti. A rights-based approach A rights-based approach to development is a conceptual framework that is based on international human rights law and methodology.144 It integrates the norms, standards, and principles of international human rights law into the plans, policies, and processes of development. A rights-based approach to development is based on five principles. First, a human rights-based approach shifts the language of development from charity to empowerment, viewing the beneficiary of development assistance as the owner of a right. The duty-bearer has a responsibility to develop access to the relevant rights to the rights-holder. Second, a rights-based approach considers the indivisibility and interdependence of interrelated rights (civil, cultural, economic, political, and social), recognizing that a policy affecting one right will necessarily have an impact on the others.145 Third, a rights-based approach requires non-discrimination and attention to vulnerable groups; that is, groups historically excluded from the political process and prohibited access to basic services must receive particular attention. Fourth, a rights-based approach to development ceases to be about charity and instead is about duty-bearers’ accountability to human rights obligations. In this case, accountability falls primarily on the government of Haiti, but also on the actions of donor states and private actors (for example, those providing public services) as they have obligations in particular situations. Transparency is crucial to increasing accountability.146 Finally, a rights-based approach requires duty-bearers to ensure a high degree of participation from communities, civil society, minorities, indigenous peoples, women, and other marginalized groups. Such participation must be active, free, and meaningful and must occur at each level of the development process.147 Measures to address and reduce structural participation inequalities or disadvantages may require appropriate preferential treatment to vulnerable and disadvantaged groups. Transparency is, again, essential. A rights-based approach to water projects in Haiti A rights-based approach to developing the water sector in Haiti requires all actors to incorporate each of these principles into their work. For example, effective participation requires that community members be involved in all efforts to improve the water situation. They should be consulted during the development of water projects, especially on issues such as water source, availability, sanitation precautions, time frames for implementation, water cost, and water quality. There must be regular consultations with the community during project development. Community members must have easy access to ongoing project information during implementation — for example, via posters, meetings, and radio programs. Such participation would help to ensure that water projects are empowering the Haitian people as rights-holders and that the projects are adequately and accurately meeting their needs. A rights-based approach also requires transparency of all efforts and actors involved in developing and implementing water projects in Haiti. There are several means to achieving this transparency. For example, since the government does not yet have the capacity to effectively regulate the private sector, groups responsible for water distribution or sale should also be responsible for regularly checking the safety of sources used for drinking water and publicizing test results. In addition, all water providers should report regularly on the status of projects, providing, at a minimum, information about available project funds, monies spent, specific timelines for implementation and completion, and any changes to original implementation plans. International entities might include mechanisms for transparency in their work in Haiti by providing readily-available public documentation of project status, including expenditures. Finally, a rights-based approach requires that each implementing entity has a clear and accessible accountability mechanism (or mechanisms) through which communities can report project problems. In Haiti’s case, this should include mechanisms for redress from all actors, including international organizations, states, IFIs, NGOs, and private entities. These mechanisms need to be locally focused and easily accessible, and they should have built-in transparency so that community members can follow the status of grievances or complaints and keep the public aware of their outcomes. Accountability also lies with the government, which should build internal accountability mechanisms into its national water strategy, with identifying benchmarks to measure the extent to which the right to water is being realized. The right to water has been compromised in Haiti for too long. **A rights-based approach is an essential strategy in the successful implementation and monitoring of** sustainable development projects, including **water projects**. While the government of Haiti is obligated to implement a rights-based approach, all entities involved in the development and implementation of water projects can contribute to fulfilling Haitians’ human rights by adopting this framework.

Right to water is protected under the ICCPR but the self-execution doctrine precludes recognition

WCU, 6

(World Conservation Union, 4/24, “Does international law recognise a human right to water?,” http://data.iucn.org/dbtw-wpd/html/EPLP-051-water-human-right/II.%20Does%20international%20law%20recognise%20a%20human%20right%20to%20water.html)

**The legally binding human rights covenants of** 1966, the International Covenant on Civil and Political Rights (**ICCPR)**14 and the International Covenant on Economic, Social and Cultural Rights (ICESCR)15 implicitly **recognise a right to water**, although perhaps more strongly so in the ICESCR. **The ICCPR affirms the “right to life**”,16 which has conventionally been interpreted to mean that no person shall be deprived of his or her life in a civil and political sense. According to the Human Rights Committee (HRC) in adopting a General Comment on this issue, this should now be interpreted expansively to include measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics. “[HRC] has noted that the right to life has been too often narrowly interpreted. The expression ‘inherent right to life’ cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures.”17 Disregarding this new development in the understanding of Art. 6 and assuming a narrow interpretation of such a right would nevertheless require the inclusion of the protection against arbitrary and intentional denial of access to sufficient water, because this is one of the most fundamental resources necessary to sustain life. In the ICESCR, it may be argued that the right to water is already apparent in Arts. 11–12. The newly adopted General Comment18 by the UN Committee on Economic, Social and Cultural Rights left little doubt as to its view of the correct legal position: “The human right to water is indispensable for leading a life in human dignity. It is prerequisite for the realization of other human rights.” There is no obligation on State parties to implement the Covenant's provisions immediately. Hence, even though there is an implied right to water, such a right does not necessarily have to be given immediate effect. Member States do have certain immediate obligations, which include the obligation to take steps – Art. 2(1) – towards the full realization of Arts. 11(1) and 12. Therefore, because the above-mentioned General Comment (which amounts to an interpretative instrument for Arts. 11 and 12) specifically recognises the human right to water, Member States “have a constant and continuing duty”19 to progressively take active steps (including the development of policy, strategy and action plans) in order to ensure that everyone has access to safe and secure drinking water and sanitation facilities. This should be undertaken equitably and without discrimination of any kind, as Art. 2(2) requires. 5. Declaration on the Right to Development Several international documents, among them the Vienna Declaration, state that the right to development is a “universal and inalienable right and an integral part of fundamental human rights”.20 Art. 8(1) of the Declaration on the Right to Development says that “[s]tates should undertake, at the national level, all necessary measures for the realization of the right to development and shall ensure, inter alia, equality of opportunity for all in their access to basic resources ...” In interpreting this article, the General Assembly clarified and reaffirmed in its Resolution 54/175 that “[t]he rights to food and clean water are fundamental human rights and their promotion constitutes a moral imperative both for national Governments and for the international community.”21 6. CEDAW and the Convention on the Rights of the Child To date, only two human rights treaties have referred directly to a right to water, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),22 and the Convention on the Rights of the Child.23 CEDAW obliges States Parties to eliminate discrimination against women, particularly in rural areas to ensure that women “enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications.”24 The express recognition of water may be viewed as a testament to the uneven burden traditionally placed on women in developing countries to collect water over long distances and represents an attempt to redress this burden.25 A different emphasis is made in the Convention on the Rights of the Child. It recognises a child's right to enjoy the highest attainable standard of health in order to “combat disease and malnutrition, including within the framework of primary health care, through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution…”26 In contrast to CEDAW, the pressing water issue for children is related more to health, and hence water quality rather than any other issue is emphasised. Global environmental instruments The right to water is more often expressed within non-legally binding resolutions and declarations. These instruments, both international and regional in scope, accept that fundamental human rights, such as life, health, and well being are dependent upon the premise that people are guaranteed access to sufficient quality and quantity of water. The following takes note of some of these instruments, which recognise a right to water to varying degrees.27 1. Stockholm Declaration The Declaration is one of the earliest environmental instruments that recognises the fundamental right to “an environment of a quality that permits a life of dignity and well being”28 and also that “[t]he natural resources of the earth including…water…must be safeguarded for the benefit of present and future generations…”29 2. Mar del Plata Action Plan Specific water instruments, such as the Action Plan from the United Nations Water Conference held in Mar del Plata in 1977, recognised water as a “right”, declaring that all people have the right to drinking water in quantities and of a quality equal to their basic needs.30 The primary outcome of this conference was the launching of the International Drinking Water Supply and Sanitation Decade (1980–1990) with the slogan ‘Water and Sanitation for All’. 3. Dublin Statement Principle 4 of the Dublin Conference on Water and Sustainable Development explicitly reaffirmed the human right to water: “… it is vital to recognize first the basic right of all human beings to have access to clean water and sanitation at an affordable price.” 4. Agenda 21 Agenda 21, the blueprint for sustainable development, is possibly the primary non-binding international environmental legal instrument. Chapter 18 on freshwater notes that a right to water entails three elements: access, quality and quantity, including not only a “general objective …to make certain that adequate supplies of water of good quality are maintained for the entire population of this planet”31, but also to provide that “all peoples, whatever their stage of development and their social and economic conditions, have the right to have access to drinking water in quantities and of a quality equal to their basic human needs.”32 Overall, an integrated approach is promoted throughout the chapter, which emphasises the three elements of sustainable development as equally important; water is to be viewed as “a natural resource and a social and economic good, whose quantity and quality determine the nature of its utilization.”33 5. Millennium Declaration and Political Declaration of Johannesburg Both the Millennium Declaration and the discourse adopted at the recent World Summit on Sustainable Development (WSSD) enhance the possibility of linking environmental health with human development goals in the global effort to eliminate poverty. However, WSSD –together with the World Water Forums (Hague, Bonn, and Kyoto) – failed to expressly recognise a fundamental human right to water. The indivisibility of human dignity and a right to water has been included in the Political Declaration of the World Summit on Sustainable Development through the commitment “to speedily increase access to such basic requirements as clean water, sanitation, adequate shelter, energy, health care, food security and the protection of biodiversity…”34 Regional arrangements Regionally too, there are numerous legal instruments which explicitly or implicitly recognise a right to water and again, the reader is referred to Appendix I for a more comprehensive list. 1. ECEL Resolution The European Council of Environmental Law (ECEL) Resolution on the right to water,35 forms yet another definitive link between human rights and water and “consider[s] that access to water is part of a sustainable development policy and cannot be regulated by market forces alone”, and “consider[s] that the right to water cannot be dissociated from the right to food and the right to housing which are recognized as human rights and that the right to water is also closely linked to the right to health.”36 Art. 1 of the Resolution states “[e]ach person has the right to water in sufficient quantity and quality for his life and health.” 2. ECE Protocol The European Commission of the United Nations for Europe (ECE) Protocol on Water and Health to the 1992 Convention on the Use of Transboundary Watercourses and International Lakes specifically states that “[p]arties shall, in particular, take all appropriate measures for the purpose of ensuring: (a) adequate supplies of wholesome drinking water …; (b) adequate sanitation …”.37 It mentions the three central aspects of a human right to water, stating that “…equitable access to water, adequate in terms of both quantity and of quality, should be provided for all members of the population, especially those who suffer a disadvantage or social exclusion.”38 Access to water and sanitation services are reinforced in Art. 6(1), which provides that “the Parties shall pursue the aims of: (a) access to drinking water for everyone; (b) provision of sanitation for everyone”. 3. African Charters There are a few instruments specific to the African region, such as the African Charter on Human and People's Rights, which notes broadly that “[a]ll peoples shall have the right to a general satisfactory environment favorable to their development”,39 and the African Charter on the Rights and Welfare of the Child, which states that “every child shall have the right to enjoy the best attainable state of physical, mental and spiritual health”40 and States Parties are required to take measures “to ensure the provision of adequate nutrition and safe drinking water...”41 4. Protocol of San Salvador Art. 11 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights provides that “[e]veryone shall have the right to live in a healthy environment and to have access to basic public services.” It is undoubtable that basic public services include water supply and sanitation: a report made by the Inter-American Commission on the human rights situation of Brazil clearly proves this by claiming that “there was inequality in the access to basic public services: 20.3% of the population have no access to potable water and 26.6% lack access to sanitary services…”42 B. Customary international law The development of environmental law as a recognised body of law has created an additional source of law for analysis of the existence of a right to water. This is because uniform State practice may provide evidence of opinio juris. It is appropriate to consider national constitutions as a source of an emerging right to water and court interpretations of fundamental rights contained in those constitutions. Whilst over 60 constitutions refer to environmental obligations, less than one-half expressly refer to the right of its citizens to a healthy environment. 43 Only the South African Bill of Rights enshrines an explicit right of access to sufficient water.44 In view of the aforegoing, a position that a uniform constitutional practice has emerged is rather doubtful, especially considering the fact that despite the increasing prevalence of constitutional environmental norms, most countries have yet to interpret or apply such norms.45 In many countries, particularly those with a civil law tradition, traditionally constitutional **rights were not regarded as being self-executing; legislation was required to implement a constitutional provision and to empower a person to invoke protections.** However, with the rise of constitutionalism globally, courts increasingly view the constitution as an independent source of rights, enforceable even in the absence of implementing legislation.46 Thus, courts could and do rely on the environmental provisions of their constitutions when protecting water from pollution or ensuring access to water to meet basic human needs. Where constitutions lack environmental provisions, reliance has been placed on the right to life, a provision contained in most constitutions worldwide. Constitutions many times incorporate ‘penumbral rights’, rights that are not explicitly mentioned in the constitution, but are consistent with its principles and existing rights.47 These rights could easily adopt emerging fundamental human rights. Both civil and common-law countries have incorporated the ‘Public Trust Doctrine’ in their constitutions.48 The doctrine dates back to the Institutes of Justinian (530 A.D.) and requires governments to protect certain resources, like water, that the government holds in trust for the public.49 Many of the US state constitutions have incorporated this doctrine, and courts in at least five states have used them to review state action.50 Similarly, Indian and Sri Lankan courts have relied on the doctrine to protect the environment. In the M.C. Mehta v. Kamal Nath Case 51 (1977), which concerned the diversion of a river's flow, the Supreme Court held that the government violated the public trust by leasing the environmentally sensitive riparian forest land to a company. In a landmark decision concerning the Eppawela Phosphate Mining Project, the Sri Lankan Supreme Court said that the ‘Public Trust Doctrine’ on which the petitioners depended was “comparatively restrictive in scope”. The court instead put forward a broader doctrine revolving around “Public Guardianship” to protect the site of an ancient kingdom and agricultural lands, and prevent the forced relocation of residents in Sri Lanka's North Central Province. The Court said that “[t]he organs of the State are guardians to whom the people have committed the care and preservation of the resources of the people.”52 In many cases, courts have applied the provisions of the right to life, environment, etc. where an environmentally destructive activity directly threatened people's health and life. The cases set out in Appendix II show that while there might not be a constitutional right to water, courts have been prepared to liberally interpret existing constitutional provisions. C. Judicial decisions Recent decisions show that recognition of a human right to water, though not recognised within the law of nations per se, is an emerging trend. In the Gabcikovo-Nagymaros Case53 (1997), Judge Weeramantry wrote that “[t]he protection of the environment is…a vital part of contemporary human rights doctrine, for it is a sine qua non for numerous human rights such as the right to health and the right to life itself…damage to the environment can impair and undermine all the human rights spoken of in the Universal Declaration and other human rights instruments.”54 While there is no express recognition, human rights courts have been prepared to be creative and liberally interpret existing provisions in their decisions. The following shows how water has been recognised as an integral part of several fundamental human rights.

ICCPR critical to recognition and enforcement of a global right to water

Huang, 8

(JD-University of Florida, “Not Just Another Drop in the Human Rights Bucket: The Legal Significance of a Codified Human Right to Water,” 20 Fla. J. Int'l L. 353, December, Lexis)

Currently amidst the United Nations proclaimed Decade of Water for Life, n1 a vast sector of the world's population still lacks daily access to sources of clean water for personal and domestic use. n2 Despite the universal necessity of water for basic survival and minimal living conditions, a codified right to water does not presently exist in the international legal sphere. Although the right may be derived from many human rights treaties or non-binding declarations, States have seldom recognized an explicit right to water. Yet as the dialogue on climate [\*354] change and other meteorological variations has increased, the movement toward codifying a right to water has simultaneously gained momentum. However, the question remains: why is it necessary to codify a human right to water? Left to the accretion of State practice n3 over time, development of customary international law may compensate for the silence on water rights-an unsatisfactory answer for the billions of people who face water deprivation and poverty as dual obstacles. Projected global populations will increasingly strain water resources, potentially leading to greater conflicts over this precious natural resource. Conflicts have already arisen in parts of the Middle East and sub-Saharan Africa and even include conflicts between humans and native fauna. n4 In addition to increased water consumption in the agricultural and industrial sectors, consumption will only rise further with the rapid industrialization of developing countries. n5 Other development issues include mismanagement of water and ecological resources, such as a lack of adequate water institutions, fragmented institutional structures, and short-sighted water policies. n6 The ecological consequences of water mismanagement are equally detrimental. Draining wetlands decreases water retention and recycling capacity; n7 and contaminated runoff and pollution of natural waterbodies foreclose human use. n8 The destruction of ecological habitats contributes [\*355] to the increase of greenhouse gases and further exacerbates projected temperature increases. n9 Projections indicate a disproportionate increase of volatile weather patterns across the globe. n10 Increased severity of floods, such as those in India, will cause greater contamination of water sources and speed the spread of disease, n11 while other areas will experience corresponding drought and desertification. n12 The legal motivations to codify a right to water are equally compelling. State obligations and duties would be clearly identifiable, as would subsequent violations. Under a right to water, a State could not condone policies that discriminate against individuals based on their economic level or housing status. Yet the current failure to recognize a human right to water also does not provide any legal recourse or access for individuals whose rights are being violated. As a codified right, domestic and international legal institutions provide relief for violations by a State. n13 Currently, violations of a right to water are linked to other rights in order to provide a remedy. Codifying a right to water would spare this rhetorical gymnastics and hold states accountable for specific violations. II. Defining a Human Right to Water That water is an undisputed necessity for life attests to the need to protect a right to water for all. However, the importance of water in the current global order extends beyond its biological and ecological importance. Access to safe drinking water has transformed into a political, economic, and social issue at all levels. Underlying many of the political tensions in the Middle East are conflicts over water and water use among neighboring countries, such as Jordan, Israel, Syria, and Lebanon that dispute the use of the Jordon River. n14 The health implications are also significant; investments in water quality and sanitation can yield net [\*356] economic benefits as a result of improved health conditions and reduced health-care costs. n15 Although the primary international human rights texts do not explicitly recognize a human right to water, n16 **this right is clearly implied in and derived from the provisions of the** International Covenant on Civil and Political Rights (**ICCPR)** and the International Covenant of Economic, Social, and Cultural Rights (ICESCR). n17 For example, Articles 6 and 7 of the ICCPR guarantee the "inherent right to life" and freedom from "torture or to cruel, inhuman, or degrading treatment," respectively. n18 Water is essential to the full realization of these Articles, for deprivation of water may amount to deprivation of life or inhumane treatment. Moreover, Articles 21 and 25 of the ICCPR guarantee the right of peaceful assembly and the right to participate in public life, both of which relate to the monitoring, surveillance, and advocacy aspects of water management and a human right to water. n19

Legal recognition of the right to water key to solve water shortages and de-escalate conflicts

Gleick, 7

(President- Pacific Institute for Studies in Development, Environment, and Security, “The Human Right to Water,” May, http://www.pacinst.org/reports/human\_right\_may\_07.pdf)

What is the point or advantage of explicitly acknowledging such a right? Even if the human right to water is formally accepted, what is the advantage of such an acknowledgment? After all, despite the declaration of a formal right to food, nearly a billion people remain undernourished. Let me offer five reasons for acknowledging a human right to water: 1. Acknowledging a right to water would **encourage the international community and individual governments to renew their efforts to meet basic water needs of their populations**. 2. By acknowledging a right to water, pressures to **translate that right into specific national and international legal obligations** and responsibilities are much more likely to occur. As Richard Jolly of the United Nations Development Programme noted: To emphasize the human right of access to drinking water does more than emphasize its importance. It grounds the priority on the bedrock of social and economic rights, it emphasizes the obligations of states parties to ensure access, and it identifies the obligations of states parties to provide support internationally as well as nationally. 3. Acknowledging a right to water maintains a spotlight of attention on the deplorable state of water management in many parts of the world. 4. Acknowledging a right to water helps **focus attention on the need to more widely address international watershed disputes and to resolve conflicts over the use of shared water** by identifying minimum water requirements and allocations for all basin parties. 5. Explicitly acknowledging a human right to water can help set specific priorities for water policy. In particular, meeting a basic water requirement for all humans to satisfy this right should take precedence over other water management and investment decisions. What are the implications of a human right to water? A right to water cannot imply a right to an unlimited amount of water, nor does it require that water be provided for free. Water availability is limited by resource constraints, the need to maintain natural ecosystems, and economic and political factors. Given such constraints on water availability, how much water is necessary to satisfy this right? Enough solely to sustain a life? Enough to grow all food sufficient to sustain a life? Enough to maintain a certain economic standard of living? Answers to these questions come from international discussions over development, analysis of the human rights literature, and an understanding of human needs and uses of water. These lead to the conclusion that a human right to water most logically applies only to basic needs for drinking, cooking, and fundamental domestic uses. Both the 1977 Mar del Plata statement and the 1986 UN Right to Development set a goal of meeting basic needs. The concept of meeting basic water needs was strongly reaffirmed during the 1992 Earth Summit in Rio de Janeiro. In developing and using water resources, priority has to be given to the satisfaction of basic needs … The Comprehensive Assessment of the Freshwater Resources of the World prepared for the Commission on Sustainable Development of the UN stated: All people require access to adequate amounts of clean water, for such basic needs as drinking, sanitation and hygiene. The UN Convention on the Law of the Non-Navigational Uses of International Watercourses, approved by the General Assembly on May 21, 1997, also explicitly addresses this question of water for basic human needs. Article 10 states that in the event of a conflict between uses of water in an international watercourse, special regard shall be given “to the requirements of vital human needs.” The states negotiating the Convention included in the Statement of Understanding accompanying it an explicit definition that: In determining ‘vital human needs’, special attention is to be paid to providing sufficient water to sustain human life… At what cost should this water be provided? Free? Full economic cost? Here the human rights literature is of little help, but the international water community is increasingly clear about the economics of water. I believe that water should be paid for, even basic water requirements, but that when a basic water requirement cannot be paid for by individuals – for reasons of poverty, emergency, or circumstance – it is still the responsibility of local communities, local governments, or national governments to provide that basic water requirement though subsidies or outright entitlement. Conclusion The failure to meet the most basic water requirements of billions of people has resulted in enormous human suffering and tragedy. It may be remembered as the 20th Century’s greatest failure. Reviewing evidence of international law, declarations of governments and international organizations, and state practices, **access to a basic water requirement must be considered a fundamental human right**. Let me offer a possible formulation appropriate to the existing human rights declarations: All human beings have an inherent right to have access to water in quantities and of a quality necessary to meet their basic needs. This right shall be protected by law. Will the recognition of the human right to water actually improve conditions worldwide? Perhaps not. The challenge of meeting human rights obligations in all areas is a difficult one that has been inadequately and incompletely addressed. But the imperatives to meet basic human water needs are more than just moral, they are rooted in justice and law and the responsibilities of individuals and governments. A first step toward meeting a human right to water would be for governments, water agencies, and international and local organizations to guarantee all humans the most fundamental of basic water needs and to work out the necessary institutional, economic, and management strategies necessary for meeting those basic needs, quickly and completely.

Water scarcity coming now - it's a threat multiplier that enflames hotspots globally. Specifically, Egypt and Central Asia - their defense isn't predictive

Dinar et al 10/18/12

SHLOMI DINAR is associate professor in the Department of Politics and International Relations and associate director of the School of International and Public Affairs at Florida International University. LUCIA DE STEFANO is associate professor at Complutense University of Madrid and researcher at the Water Observatory of the Botín Foundation. JAMES DUNCAN is consultant on natural resource governance and geography with the World Bank. KERSTIN STAHL is senior scientist at the Institute of Hydrology in the University of Freiburg. KENNETH M. STRZEPEK is research scientist with the Massachusetts Institute of Technology Joint Program on the Science and Policy of Global Change. AARON T. WOLF is a professor of geography in the College of Earth, Ocean, and Atmospheric Sciences at Oregon State University, Foreign Affairs, October 18, 2012, "No Wars for Water", http://www.foreignaffairs.com/articles/138208/shlomi-dinar-lucia-de-stefano-james-duncan-kerstin-stahl-kenneth/no-wars-for-water?page=show

In short, predictions of a Water World War are overwrought. However, tensions over water usage can still exacerbate other existing regional conflicts. Climate change is expected to intensify droughts, floods, and other extreme weather conditions that jeopardize freshwater quantity and quality and therefore act as a threat-multiplier, making shaky regions shakier. So what river basins constitute the biggest risks today? In a World Bank report we published in 2010 (as well as a subsequent article in a special issue of the Journal of Peace Research) we analyzed the physical effects of climate change on international rivers. We modeled the variability in river annual runoff in the past and for future climate scenarios. We also considered the existence and nature of the institutional capacity around river basins, in the form of international water treaties, to potentially deal with the effects of climate change. According to our research, 24 of the world's 276 international river basins are already experiencing increased water variability. These 24 basins, which collectively serve about 332 million people, are at high risk of water related political tensions. The majority of the basins are located in northern and sub-Saharan Africa. A few others are located in the Middle East, south-central Asia, and South America. They include the Tafna (Algeria and Morocco), the Dasht (Iran and Pakistan), the Congo (Central Africa), Lake Chad (Central Africa), the Niger (Western Africa), the Nile (Northeastern Africa), and the Chira (Ecuador and Peru). There are no strong treaties governing the use of these water reserves in tense territories. Should conflicts break out, there are no good mechanisms in place for dealing with them. By 2050, an additional 37 river basins, serving 83 million people, will be at high risk for feeding into political tensions. As is the case currently, a large portion of these are in Africa. But, unlike today, river basins within Central Asia, Eastern Europe, Central Europe, and Central America will also be at high risk within 40 years. Some of these include the Kura-Araks (Iran, Turkey, and the Caucasus), the Neman (Eastern Europe) Asi-Orontes (Lebanon, Syria, Turkey), and the Catatumbo Basins (Colombia and Venezuela). CROSSING THE NILE Among the larger African basins, the Nile has the greatest implications for regional and global security. Tensions over access to the river already pit Ethiopia and Egypt, two important Western allies, against one another. Egypt has been a major player in the Middle East Peace Process and Ethiopia is an important regional force in the Horn of Africa, currently aiding other African forces to battle Al-Shabbab in Somalia. Over the years, a number of international water treaties have made rules for the basin, but they are largely limited to small stretches of it. In particular, only Egypt and Sudan are party to the 1959 Nile River Agreement, the principal treaty regarding the river. Egypt, which is the furthest downstream yet is one of the most powerful countries in the region, has been able to heavily influence the water-sharing regime. Upstream countries, such as Ethiopia and Burundi, have been left out, hard-pressed to harness the Nile for their own needs. In 1999, with increasingly vitriolic rhetoric between Egypt and Ethiopia sidetracking regional development, the World Bank stepped up its involvement in the basin. It helped create a network of professional water managers as well as a set of investments in a number of sub-basins. Still, the drafting of a new agreement stalled: upstream countries would not compromise on their right to develop water infrastructure while downstream countries would not compromise on protecting their shares. In 2010, Ethiopia signed an agreement with a number of the other upstream countries hoping to balance against Egypt and Sudan. More recently, the country has also announced plans to construct a number of large upstream dams, which could affect the stability of the region. By 2050, the environmental state of the Nile Basin will be even worse. That is why it is important to create a robust and equitable water treaty now. Such a treaty would focus on ways to harness the river's hydropower potential to satiate the energy needs of all the riparian states while maintaining ecosystem health. The construction of dams and reservoirs further upstream could likewise help even out water flows and facilitate agricultural growth. Projects such as these, mitigating damage to ecosystem health and local populations, would benefit all parties concerned and thus facilitate further basin-wide cooperation. UP IN THE ARAL Another water basin of concern is the Aral Sea, which is shared by Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan, and Uzbekistan. The basin consists of two major rivers, the Syr Darya and Amu Darya. During the Soviet era, these two rivers were managed relatively effectively. The break-up of the Soviet Union, however, ended that. The major dispute now is between upstream Kyrgyzstan and downstream Uzbekistan over the Syr Darya. During the winter, Kyrgyzstan needs flowing water to produce hydroelectricity whereas Uzbekistan needs to store water to later irrigate cotton fields. The countries have made several attempts to resolve the dispute. In particular, downstream Uzbekistan, which is rich in fuel and gas, has provided energy to Kyrgyzstan to compensate for keeping water in its large reservoirs until the cotton-growing season. Such barter agreements, however, have had limited success because they are easily manipulated. Downstream states might deliver less fuel during a rainy year, claiming they need less water from upstream reservoirs, and upstream states might deliver less water in retaliation. Kyrgyzstan, frustrated and desperate for energy in winter months, plans to build mega hydro-electric plants in its territory. And another upstream state, Tajikistan, is likewise considering hydro-electricity to satiate its own energy needs. Meanwhile, Uzbekistan is building large reservoirs. Although these plans might make sense in the very near term, they are inefficient in the medium and long term because they don't solve the real needs of downstream states for large storage capacity to protect against water variability across time. In fact, both Kyrgyzstan and Uzbekistan, along with Kazakhstan, will see substantial increases in water variability between now and 2050. And so, the need to share the benefits of existing large-capacity upstream reservoirs and coordinate water uses through strong and more efficient inter-state agreements is unavoidable. A stabilized Aral Sea basin would also benefit the United States. With its withdrawal from Afghanistan, Washington has been courting Uzbekistan as a potential alternative ally and provider of stability in the region. The Uzbek government seems willing to host U.S. military bases and work as a counter-weight to Russia. Kyrgyzstan is also an important regional player. The Manas Air Base, the U.S. military installation near Bishkek, is an important transit point. The country is also working with the United States to battle drug trafficking and infiltration of criminal and insurgent groups. Regional instability could disrupt any of these strategic relationships. If the past is any indication, the world probably does not need to worry about impending water wars. But they must recognize how tensions over water can easily fuel larger conflicts and distract states from other important geopolitical and domestic priorities. Since formal inter-state institutions are key to alleviating tensions over shared resources, it would be wise, then, for the involved governments as well as the international community to negotiate sufficiently robust agreements to deal with impending environmental change. Otherwise, freshwater will only further frustrate stability efforts in the world's volatile regions.

Those wars go global

Reilly ‘2

(Kristie, Editor for In These Times, a nonprofit, independent, national magazine published in Chicago. We’ve been around since 1976, fighting for corporate accountability and progressive government. In other words, a better world, “NOT A DROP TO DRINK,” <http://www.inthesetimes.com/issue/26/25/culture1.shtml>)

\*Cites environmental thinker and activist Vandana Shiva Maude Barlow and Tony Clarke—probably North America’s foremost water experts

The two books provide a chilling, in-depth examination of a rapidly emerging global crisis. “Quite simply,” Barlow and Clarke write, “unless we dramatically change our ways, between one-half and two-thirds of humanity will be living with severe fresh water shortages within the next quarter-century. … The hard news is this: Humanity is depleting, diverting and polluting the planet’s fresh water resources so quickly and relentlessly that every species on earth—including our own—is in mortal danger.” The crisis is so great, the three authors agree, that the world’s next great wars will be over water. The Middle East, parts of Africa, China, Russia, parts of the United States and several other areas are already struggling to equitably share water resources. Many conflicts over water are not even recognized as such: Shiva blames the Israeli-Palestinian conflict in part on the severe scarcity of water in settlement areas. As available fresh water on the planet decreases, today’s low-level conflicts can only increase in intensity.

And nuclear

Weiner ‘90

(Jonathan, Visiting Professor of Molecular Biology at Princeton University. The Next One Hundred Years: Shaping the Fate of Our Living Earth, p. 214)

If we do not destroy ourselves with the A-bomb and the H-bomb, then we may destroy ourselves with the C-bomb, the Change Bomb. And in a world as interlinked as ours, one explosion may lead to the other. Already in the Middle East, from North Africa to the Persian Gulf and from the Nile to the Euphrates, tensions over dwindling water supplies and rising populations are reaching what many experts describe as a flashpoint. A climate shift in the single battle-scarred nexus might trigger international tensions that will unleash some of the 60,000 nuclear warheads the world has stockpiled since Trinity.

Water scarcity causes Nile wars

Rotberg 7/2/10

<http://www.boston.com/bostonglobe/editorial_opinion/oped/articles/2010/07/02/the_threat_of_a_water_war/>

 Robert I. Rotberg (Born: April 11, 1935) is an American who served as President emeritus of the World Peace Foundation (1993-2010). An American professor in governance and foreign affairs, he was director of the Program on Intrastate Conflict, Conflict Prevention, and Conflict Resolution at Harvard University's John F. Kennedy School of Government (1999-2010), and has served in administrative positions at Tufts University and Lafayette College. In 2003-2004, he served as a member of the Secretary of State's Advisory Panel on Africa, and was a Presidential appointee to the Council of the National Endowment for the Humanities. In 2007 at the Kennedy School, he directed the establishment of the Index for African Governance, to help evaluate leaders for the Mo Ibrahim Prize for Achievement in African Leadership, awarded annually by the Mo Ibrahim Foundation. A trustee of Oberlin College, Rotberg is a visiting professor at the College of Europe in Bruges, Belgium.

 NATIONS FIGHT over water, especially when access is curtailed or threatened, and there are the ingredients for a battle over the 4,100-mile long Nile River. Egypt and Sudan have counted on the abundance of the Nile’s life-giving flow. Now upstream nations want to keep more of the abundance for themselves. Ethiopia, Uganda, Kenya, Tanzania, Congo, Burundi, and Rwanda are asserting their rights to more of the river’s relentless flow. Washington needs to intervene to forestall hostilities between the countries. Britain conquered Uganda and Kenya in the 19th century in part to protect the precious Nile waters from being diverted away from their critical possession of Egypt, the Suez Canal, and the Red Sea route to India. Without the yearly sustaining floods of the Nile, agriculture and settlement in the valley of the river from Luxor to Cairo and Alexandria would have been impossible. When Britain in the 1920s controlled all of the waters of the Nile, bar those sluicing down the Blue Nile from Ethiopia, it signed a pact that gave Egypt and Sudan rights to nearly 75 percent of its annual flow. This 1929 agreement was confirmed in 1959, after Egypt and the Sudan had broken from Britain but while the East African countries were still colonies. A new 2010 Cooperative Framework Agreement, now signed by most of the key upstream abutters, would give all riparian states (including the Congo, where a stream that flows into Lake Tanganyika is the acknowledged Nile source) equal access to the resources of the river. That would give preference to large scale upstream energy and industrial, as well as long-time agricultural and irrigation uses. Egypt and Sudan have refused to sign the new agreement, despite years of discussions and many heated meetings. Given climate change, the drying up of water sources everywhere in Africa and the world, Egypt, which is guaranteed 56 billion of the annual flow of 84 billion cubic meters of Nile water each year, hardly wants to lose even a drop of its allocation. Nor does Sudan, guaranteed 15 billion cubic meters. About 300 million people depend on the waters of the Nile. The upstream countries, with still growing populations, believe that their socio-economic development has long been unfairly constrained by Egypt’s colonial-era lock on the river. Ethiopia and Uganda have not been able to support agricultural schemes. Nor have they been able fully to harness the river or its tributaries for industry and power. Both have suffered from major hydroelectric shortages in recent years. Egypt has declared the continued surge of the Nile waters a “red line’’ that affects its “national security.’’ There is discussion in Egypt about the use of air power to threaten upstream offenders, especially if Ethiopia becomes too demanding. In theory, Ethiopia could divert much of the Blue Nile to its own uses. Or Ethiopia and others could charge Egypt for water that has largely escaped modern pricing. Egypt is sufficiently disturbed by Ethiopia’s potentially aggressive water designs that it has recently made friends with Eritrea, Ethiopia’s arch enemy. In 1998, Ethiopia and Eritrea went to war over slices of insignificant mountainous territory. Although the shooting ended in 2000, a peace settlement handed down by the World Court in 2006 has still not been observed by both sides. If Egypt attacks Ethiopia, Eritrea might join in. Egyptian generals claim that Israel is on the other side, helping the upstream nations by encouraging their thirst for water and by financing the construction of four hydroelectric projects in Ethiopia. All these issues provide conditions for a war over water.

It’s the most likely global war

Coddrington 7/1/10

<http://www.tomorrowtoday.co.za/2010/07/01/a-looming-crisis-world-water-wars/>

 Graeme Codrington is an expert on the new world of work and multi-generational workplaces. He is a keynote presenter, author, futurist, facilitator and strategy consultant working across multiple industries and sectors. His unique style blends cutting-edge research, thought leading insights with humour and multimedia-driven presentations and workshops. He has a particular interest in trends affecting how people live, work, interact and connect with each other. He speaks on the TIDES of change – the five disruptive forces shaping the new world of work in the next decade: Technology, Institutional change, Demographics, the Environment and shifting Social values. Speaking internationally to over 100,000 people in about 20 different countries every year, he has shared the platform with the likes of Edward de Bono, Jonas Ridderstrale, Allan Pease, Sir Ken Robinson and Neil Armstrong. He has won numerous awards for his speaking and facilitation, including “Speaker of the Year” by the Academy for Chief Executives. His client list includes some of the world’s top companies, and CEOs invite him back time after time to share his latest insights and help them and their teams gain a clear understanding of how to successfully prepare for the future. Graeme is the co-founder and a senior partner of TomorrowToday, a global firm of futurists and business strategists. He is also a guest lecturer at four top business schools, including the London Business School, Duke Corporate Education and the Gordon Institute of Business Science. He is a professional member of a number of associations, including the World Future Society, The Institute of Directors, the International Association for the Study of Youth Ministry, the SA Market Research Association, the Global Federation of Professional Speakers and MENSA. He has a Doctorate in Business Administration (note: his DBA was awarded by the now non-accredited Rushmore University – Graeme is in the process of completing further doctoral studies), a Masters in Sociology, an Honours in Youth Work and two undergraduate degrees – in Arts (Theology/Philosophy) and Commerce. He has three best-selling books published by Penguin, including the award winning, “Mind the Gap” and “Future-Proof Your Child”. He is currently involved in a number of writing projects. Graeme’s breadth of knowledge and expertise makes him highly relevant in today’s rapidly evolving business world. Along with his formal qualifications and research credentials, he has a wide range of business experience. He did Chartered Accountancy articles at KPMG, was involved in an IT startup, has been a professional musician, a strategy consultant and is now a full-time speaker, facilitator and author.

 People go to war when their way of life is threatened. I have written before about the many issues we face in the coming years that threaten our way of life. These include global warming/climate change, pollution, pandemics, nuclear bombs, intelligent machines, genetics, and more. More and more I am becoming convinced that the next major regional/global conflict will be over water. We are much more likely to have water wars in the next decade than nuclear ones. And I were to guess, I’d say that it is most likely to happen in around North East Africa. This is a region with its own internal issues. But it also has the foreign involvement of America, China, the Middle Eastern Arab nations, and (increasingly) Israel. Quite a potent mix… Last week, Addis Ababa, Ethiopia hosted the 18th regular meeting of the Council of Ministers of Water Affairs of the Nile Basin countries. In the lead up to the conference, Ethiopia, Rwanda, Uganda, Tanzania and Kenya, the five countries that are all upstream of Egypt and Sudan concluded a water-sharing treaty – to the exclusion of Egypt and Sudan. This has obviously reignited the longstanding dispute over water distribution of the world’s longest river in the world’s driest continent. Egypt is currently the largest consumer of Nile water and is the main beneficiary of a 1929 treaty which allows it to take 55.5 billion cubic metres of water each year, or 87% of the White and Blue Nile’s flow. By contrast, Sudan is only allowed to draw 18.5 billion cubic metres. On attaining independence Sudan refused to acknowledge the validity of the Nile water treaty and negotiated a new bilateral treaty with Egypt in 1959. Kenya, Tanzania and Uganda also expressly refused to be bound by the treaty when they attained independence, but have not negotiated a new treaty since then. Under the 1929 treaty, Egypt has powers over upstream projects: The Nile Waters Agreement of 1929 states that no country in the Nile basin should undertake any works on the Nile, or its tributaries, without Egypt’s express permission. This gives Egypt a veto over anything, including the building of dams on numerous rivers in Kenya, Burundi, Rwanda, Tanzania, Ethiopia, and by implication Egypt has control over agriculture, industry and infrastructure and basic services such as drinking water and electricity in these countries. This is surely untenable. But if the other countries broke the treaty, would Egypt respond with force? Since the late 1990s, Nile Basin states have been trying unsuccessfully to develop a revised framework agreement for water sharing, dubbed the Nile Basin Initiative (NBI). In May 2009, talks held in Kinshasa broke down because Egypt and Sudan’s historical water quotas were not mentioned in the text of the proposed agreement. Water ministers met again in July 2009 in Alexandria, where Egypt and Sudan reiterated their rejection of any agreement that did not clearly establish their historical share of water. This is an untenable position. Upstream states accuse Egypt and Sudan of attempting to maintain an unfair, colonial-era monopoly on the river. Egyptian officials and analysts, however, defend their position, pointing out that Egypt is much more dependent on the river for its water needs than its upstream neighbours. Egypt claims that Nile water accounts for more than 95% of Egypt’s total water consumption, although they appear to be working hard to reduce both their water usage (they’re stopping growing rice, for example) and their dependence on the Nile.

### 3

Advantage three is modeling

The doctrine of non-self-execution of treaties combined with executive detention authority has obliterated the international credibility of the Supreme Court

Gruber, 11

(Law Prof-University of Colorado, “An Unintended Casualty of the War on Terror,” 27 Ga. St. U.L. Rev. 299)

As the dust of the Bush administration's war on terror settles, casualties are starting to appear on the legal battlefield. The United States' human rights reputation and the Supreme Court's international influence lay wounded in the wake of U.S. policies that flouted international law by advocating torture, suborning indefinite detention, and erecting irregular tribunals. Through declining citation, the courts of the world are telling the Supreme Court that if it does not respect international and foreign law, international and **foreign courts will not respect it.** Some might object that the Supreme Court should not be lumped with the Bush administration because in fact it handed down several opinions setting limitations on the administration's treatment of terror detainees. While these cases, notably Hamdan v. Rumsfeld, set forth domestic law limitations, their conspicuous effort to avoid giving the Geneva Conventions the force of law served to **confirm world opinion that the Supreme Court is "out of step**." This Essay demonstrates how the Court's avoidance of the treaty status issue in Hamdan not only contributed to the perception of American legal exceptionalism but also paved the way for the single most anti- international opinion in Supreme Court history, Medellin v. Texas. In Medellin, the Supreme Court adopted a legal stance that creates near impassable barriers to the domestic enforcement of treaties. Nonetheless, as President Obama ruminates on maintaining military tribunals and courts brace for another round of terrorism cases, the Supreme Court may yet have a chance to narrow the reach of Medellin, confirm the enforceability of the Geneva Conventions, and restore its international influence. The United States' war on terror has produced a lesser-discussed but **very important casualty: the international reputation of the Supreme Court.** Today, many scholars both within and outside the United States note the dwindling influence of the U.S. Supreme Court, as evidenced by declining worldwide citation. On September 17, 2008, the front page of the New York Times declared, "U.S. Court Is Now Guiding Fewer Nations." n1 The article observes that citations to the Canadian Supreme Court and European Court of Justice are on an upswing, especially in cases involving human rights, while, according to Professor Anne Marie Slaughter, "**We are losing one of the greatest bully pulpits we have ever had."** n2 The bottom line is that much of today's world views U.S. Supreme Court opinion as antiquated and out-of-step with modern constructions of global rights and obligations. n3 To be sure, several aspects of American legal practice garnered international disfavor even before the September 11 attacks, notably the nation's continued legal support for the death penalty. n4 Subsequently, the war on terror and its concurrent destruction of civil liberties, embrace of torture and indefinite detention, and contempt for international humanitarian law cemented the widespread view of America as the prototypical abuser of human rights rather than guarantor. n5 In short, the courts of the world are [\*301] saying that if the U.S. does not respect international and foreign law, international and foreign courts will not respect the U.S. n6 As President Obama recedes from his initial stance against ad hoc military justice n7 and federal courts prepare for another round of military tribunal challenges, n8 we should remain poignantly focused on the reputational damage caused by the Bush administration's "cowboy adventure into totalitarianism," n9 which was permitted to push forward even by "liberal" "obstructionist" Supreme Court decisions. n10 As we move into a new era of international relations and (hopefully) respect for human rights, the time is ripe to learn some lessons about what was and what was not decided in the Supreme Court terrorism cases. This Essay highlights how an unfortunate misstep in the seemingly internationalist Hamdan v. Rumsfeld n11 decision paved the way for a jurisprudence of hostility toward international law. In this way, **progressive Justices actually became complicit in the legal isolationist ideology so prevalent during the Bush era, which led the courts of the world to abandon the Supreme Court.** [\*302] I. A Globalist Court in an Age of Nationalism There can be little dispute that during the Bush administration years, especially those immediately following September 11, internationalism fell out of popular and political favor. Guantanamo, renditions, torture, and the unilateral invasion of Iraq served as stark examples of the United States' go-it-alone mentality regarding human rights and humanitarian law. This attitude was arguably a continuation of the administration's pre-September 11 "exceptionalist" n12 approach to human rights. n13 Foreign jurists and human rights supporters had already been shocked at President Bush's "unsigning" of the Rome Statute, thereby withdrawing support for the International Criminal Court, n14 and the United States' refusal to participate in international environmental regulation. n15 Of course, after September 11, as isolationist sentiment rose, America's acceptance of international law further decreased. Indeed, many Americans, including important legal actors, openly express contempt for international law and legal institutions. n16 In this view, international human rights law is a dirty phrase synonymous with loss of American sovereignty and radical liberal ideology. n17 Following September 11, isolationist sentiment intensified as society became increasingly averse to international law, foreign values, and [\*303] even foreigners. n18 Today, conservatives warn against the corrupting influence of foreign practices and characterize international law as a product of "elite" law professors who are not representative of the nation's views. n19 The body of international scholars has been described by even prominent law professors as either "feather boa-wearing" n20 liberal snobs intent on imposing patrician continental norms on ordinary American folk, n21 or worse, terrorism sympathizers. n22 One professor characterized the Supreme Court's citation of foreign and international sources as a product of "aristocratic" global "bonding" sessions at "Lake Como or the South of France." n23 However, if the executive's actions and public opinion confirmed to the world that the United States disdains international law, what about actions of the Supreme Court itself? In the early part of the decade it appeared that an emerging globalist Supreme Court attitude could provide a much-needed foil to the existence and perception of American legal exceptionalism. n24 Justices Breyer, Ginsburg, and former Justice O'Connor vocally extolled the importance of [\*304] international and comparative law in domestic constitutional jurisprudence. n25 In the 2003 decision Lawrence v. Texas, the Court cited international norms as part of its analysis striking down anti-sodomy laws. n26 In 2005, the Court took up the hotly-contested issue of the juvenile death penalty in Roper v. Simmons. n27 In a move that many conservatives saw, and continue to see, as an all-out assault on American values and sovereignty, the Court cited international sentiment as "confirmation" of its formal conclusion that putting juveniles to death is cruel and unusual. n28 Many, like Justice Ginsburg, believed that the Court's "'island' or 'lone ranger' mentality [was] beginning to change." n29 The Supreme Court was in the midst of a modest revolution, inching towards globalization despite great internal conflict n30 and external controversy. n31 At the same time, the Court was asked to [\*305] assess the parameters of the Bush administration's war on terror. Here, political sides had been quickly drawn regarding constitutional restraints on executive war- making power, n32 with conservatives generally arguing for unfettered or near limitless executive authority and liberals favoring significant congressional and judicial oversight. n33 Lurking in the substrata of the various civil liberties-versus-national security debates was a bubbling political polarization over the enforceability of international law. The Geneva Conventions n34 were arguably the greatest threat to the Bush administration's ability to wage the war on terror in any manner it saw fit, even greater than the Constitution. There is very little language in the Constitution regarding presidential war power, and the principle that during war the President can bypass other constitutional provisions is largely a creature of expert commentary and sparse case law. n35 Because the "law of war" is therefore extra-constitutional, it provided the Supreme Court a virtual tabula rasa [\*306] legal regime on which to scrawl its limitations (or non-limitations). n36 Thus, the Bush administration could reasonably hope to exploit the atmosphere of fear and hysteria surrounding September 11 in favor of an expansive judicial reading of constitutional war power. n37 By contrast, the Geneva Conventions lay out with clarity and great specificity how governments must treat prisoners of war, civilians, and others during times of armed conflict. n38 The treaty accordingly represented a significant potential restraint on how the Bush administration could treat detained Afghan and al Qaeda fighters. From the beginning, the Bush administration pursued a policy of "lawyering" the Conventions n39 and setting forth numerous textual arguments, from specious to plausible, as to why they do not apply to the Guantanamo detainees. n40 It was obviously important for public relations reasons that the administration find a way to convince the [\*307] public that it was in compliance with the Conventions, n41 but in the legal arena the administration advanced an argument for the wholesale jettisoning of the Geneva Conventions in domestic courts: "Non-self-execution." The administration claimed simply that as non-self-executing treaties, the Geneva Conventions could not be enforced by individuals in U.S. courts. n42 In turn, the formerly legalistic question of treaty execution became as highly politicized as the civil liberties-versus-national security debate. Of course, the question of treaty execution long predated the war on terror. The status of treaties is mentioned in the very text of the Constitution, in the Supremacy Clause, which declares that "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." n43 During the early years of our republic, the fact of treaty supremacy was relatively apolitical and apparently accepted. n44 The period immediately following World War II saw a flurry of international legal activity and thrust the question of treaty supremacy into the foreground. n45 Since that time, there has been steadily growing hostility in certain legal, academic, and political circles to the concept that treaties created in part or whole by "foreign entities" are binding [\*308] domestic law. n46 Although a topic of moderate activity in lower courts, until the last few years the Supreme Court had said very little on the issue and had not adopted the position that treaties are generally non-self- executing. n47 It was upon this historical, political, and legal background that the Supreme Court rendered its 2006 decision in Hamdan v. Rumsfeld, invalidating Bush's military tribunals because they violated the Uniform Code of Military Justice (UCMJ). n48 The decision caused a feeling that can be fairly characterized as jubilation among progressives and internationalists. n49 Yale Law School dean and international lawyer Harold Koh declared that the Hamdan case "finally beg[a]n the much-needed process of turning the legal world right-side up again." n50 International law scholar George Fletcher dubbed Hamdan a new beginning for international law in the United States. n51 Perhaps, however, internationalists were advancing a premature "mission accomplished" declaration. Upon further examination, the Hamdan majority opinion is remarkable in its [\*309] judicial restraint. Although it invalidated Bush's tribunals, it did so on the narrow ground that they violate the UCMJ, a domestic statute that was about to be superseded by the Military Commissions Act (MCA). n52 Hamdan did not pronounce any significant constitutional limitations on presidential war power, n53 nor did it reach the overriding foreign relations question of treaty execution. n54 Hamdan indeed would have been one of the greatest internationalist victories had the Supreme Court been willing, after nearly fifty years of silence, to recognize the force of international law in the face of decades of growing post-World War II isolationism that pinnacled after September 11. Unfortunately, the Court appeared to fear weighing in on the issue and went to great lengths to stay mute on whether the Geneva Conventions constitute valid domestic law. The Hamdan majority's refusal to comment on the status of the Conventions left open a dangerous door for a divided Court, now politically polarized over the treaty execution issue, to finally adopt an isolationist stance toward treaty execution. This is the precise door the Court walked through with its March 25, 2008 decision, Medellin v. Texas. n55 What started out as fear of international human rights law in Hamdan went to loathing in Medellin, as the Court for the first time formally sanctioned the United States' ability to double deal in international relations. n56 But before discussing Medellin, two [\*310] preliminary questions call for examination. First, what is the status of treaties in U.S. domestic law? Second, why was Hamdan's approach to the Geneva Conventions harmful to the Supreme Court's international reputation?

The plan restores the image and influence of the Supreme Court—detention ruling on treaty grounds key

Gruber, 11

(Law Prof-University of Colorado, “An Unintended Casualty of the War on Terror,” 27 Ga. St. U.L. Rev. 299)

V. A Second Chance for the Geneva Conventions

It appears likely that the Supreme Court will not rule on the domestic enforceability of the Geneva Conventions any time soon. Congress, through the MCA, has now set forth specific processes governing military trials of "alien unlawful combatants." These tribunals obviously comply with any constitutional mandate that military tribunals be established by both political branches of government. n178 The fact that Congress has approved the tribunals also [\*332] helps to satisfy Common Article 3's requirement of a "regularly constituted court." Indeed, the MCA proclaims itself to be in compliance with Common Article 3. n179 Experts, however, argue that in fact many of the procedures in the MCA are incompatible with Common Article 3's requirement that courts provide "all the judicial guarantees [which are] recognized as indispensable by civilized peoples." n180 Conceivably, then, a detainee subject to military trial under the MCA could assert that his Geneva rights are being violated. If such a case were to arrive at the Supreme Court, the Court would not be able to "backdoor" the Geneva Conventions through UCMJ Article 21, as it did in Hamdan, because the MCA expressly replaces the UCMJ where inconsistent. n181 Thus, **in order to enforce such a detainee's Geneva rights, the Court would have to decide the self- execution question.** Of course, the Supreme Court might simply find that the MCA complies with Common Article 3, rendering a decision on self-execution unnecessary, or strike down the tribunals on domestic grounds. Moreover, it could possibly bypass the self-execution question all together by holding that the MCA replaced contrary Geneva provisions as a "last-in-time" statute. n182 However, courts generally look for clear language before finding that a treaty has been superseded by statute. n183 Although the MCA does seek to stop [\*333] individual invocations of the Geneva Conventions in military trials, elsewhere it confirms that the Geneva Conventions retain the force of international law. n184 If the MCA is insufficiently clear to constitute an express repeal of Geneva, the novel question becomes whether Congress, without repealing a treaty, can "unexecute" it, that is, force it to become non-self- executing. n185 This is, however, a question the Court will not likely address, given that military tribunals are being phased out and the number of detainees is decreasing. Since the June 2008 decision in Boumediene v. Bush permitting detainees to bring habeas corpus petitions despite the MCA's habeas-stripping provisions, n186 district courts have demonstrated a willingness to release detainees. For example, the district court for the District of Columbia ordered the release of Boumediene and several others on the ground that the government failed to prove by a preponderance of the evidence that they were "enemy combatants." n187 Hundreds of other detainees have been released discretionarily and, as of the writing of this Essay in January 2010, only 196 remain. n188 On January 22, 2009, President Obama signed an Executive Order to shut down the Guantanamo facility [\*334] within a year and harmonize U.S. interrogation tactics with the Geneva Conventions. n189 The one terrorism detention case pending at the time before the Supreme Court that might have brought the Geneva Conventions back into play, Al-Marri v. Pucciarelli, n190 was rendered moot in February 2009 when President Obama transferred Al-Marri's case to the criminal system. n191 Still, recent events have served to revive the debate over military tribunals. The one-year deadline for closing Guantanamo has come and gone. n192 Moreover, President Obama, apparently under pressure from Congress, has retreated from his commitment to permanently close the Bush terrorism play- book. n193 He now endorses military trials, albeit under an apparently more civil-rights oriented version of Bush's commissions, n194 and supports indefinite detention of certain [\*335] terror suspects. n195 Meanwhile, trials under MCA procedures are on- going. n196 As a consequence, the possibility that the Supreme Court will have another opportunity to rule on Geneva's applicability to the war on terror still exists. If the occasion arises, the Supreme Court will have another chance to turn "the legal world right-side up again" n197 and to show that it is not a "lone ranger" n198 by affirming the domestic enforceability of the Geneva Conventions. Although Medellin may have created yet another legalistic barrier between the "war" detainees n199 and their human rights, the case leaves some room for a future decision giving effect to the Geneva Conventions. Conclusion As President Obama inches ever closer to embracing the "twilight zone" model of terrorism law, it would be wise to keep in mind the reputational harm the Bush administration's war on terror caused the United States. One human rights advocate warned the Obama administration, "The results of the cases [tried in military commissions] will be suspect around the world. It is a tragic mistake to continue them." n200 More than just a source of embarrassment, there are real consequences to America's sullied international reputation. Our experiments with "alternative" military justice not only affect [\*336] **our high court's world influence, they operatively prevent the U**nited **S**tates **from assuming a leadership role in defining and defending international human rights.** For example, in 2007, the Chinese government responded to the U.S. State Department's annual human rights report by stating that America had no standing to comment on others' human rights violations given its conduct of the war on terror. Specifically, the Chinese characterized the United States as "pointing the finger" at other nations while ignoring its "flagrant record of violating the Geneva Convention." n201 **Supreme Court validation of treaty law would no doubt help repair the international reputation of the United States**. n202 The lesson here is about fear and missed opportunity. Guantanamo stands as a stark reminder of the great importance of international humanitarian law during times of crisis. The Geneva Conventions were the very barrier between terrorism detainees and a government regime singularly committed to national security through any means possible. Unfortunately, when international law mattered most, even the liberal Supreme Court justices avoided cementing its legal status. By contrast, Medellin, a convicted murderer, was apparently afforded the full panoply of constitutional protections, and in all likelihood, his inability to confer with consular officials did not prejudice his case. Much less was at stake, and those on the Supreme Court critical of humanitarian law impediments to waging the war on terror could fashion anti-internationalist rules with little public fanfare or liberal resistance. Consequently, although Hamdan will likely go down in history as evidence of the Court's willingness to protect individual rights in the face of massive public fear and executive pressure, it also represents a failure to truly support the comprehensive [\*337] international regime governing war-time detention, a regime in which the United States long ago vowed to participate. But all may not be lost. The Supreme Court might have another chance to rule on the status of the Geneva Conventions, and Medellin leaves some wiggle room on self-execution. **If the Supreme Court is once again to be a beacon of judicial light, it must move beyond the xenophobic exceptionalism** of the Bricker past **and embrace the straightforward and fair principle that signed and ratified treaties are the law of the land.**

Other countries model our judiciary on detention policy

PILPG 8, the Public International Law & Policy Group (PILPG), is a global pro bono law firm that provides legal assistance to foreign governments and international organizations on the negotiation and implementation of peace agreements, the drafting and implementation of post-conflict constitutions, and the creation and operation of war crimes tribunals. PILPG also assists states with the training of judges and the drafting of legislation, “brief of the public international law & policy group as amicus curiae in support of petitioners”, <http://www.americanbar.org/content/dam/aba/publishing/preview/publiced_preview_briefs_pdfs_09_10_08_1234_PetitionerAmCuPILPG.authcheckdam.pdf>

iii. transnational judicial dialogue confirms this court’s leadership in promoting adherence to rule of law in times of conflict.

PILPG’s on-the-ground experience demonstrating the leadership of this Court is confirmed by a study of transnational judicial dialogue. Over the past halfcentury, the world’s constitutional courts have been engaged in a rich and growing transnational judicial dialogue on a wide range of constitutional law issues. See, e.g., Melissa A. Waters, Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law, 93 Geo. L.J. 487 (2005); Anne-Marie Slaughter, Judicial Globalization, 40 Va. J. Int’l L. 1103 (2000). Courts around the world consider, discuss, and cite foreign judicial decisions not out of a sense of legal obligation, but out of a developing sense that foreign decisions are valuable resources in elucidating complex legal issues and suggesting new approaches to common problems. See Waters, supra, at 493-94.

In this transnational judicial dialogue, the decisions of this Court have exercised a profound — and profoundly positive — influence on the work of foreign and international courts. See generally Constitutionalism and Rights: The Influence of the United States Constitution Abroad (Louis Henkin & Albert J. Rosenthal eds., 1990); Anthony Lester, The Overseas Trade in the American Bill of Rights, 88 Colum. L. Rev. 537 (1988). As Anthony Lester of the British House of Lords has noted,

“there is a vigorous overseas trade in the Bill of Rights, in international and constitutional litigation involving norms derived from American constitutional law. When life or liberty is at stake, the landmark judgments of the Supreme Court of the United States, giving fresh meaning to the principles of the Bill of Rights, are studied with as much attention in New Delhi or Strasbourg as they are in Washington, D.C.” Id. at 541.

This Court’s overseas influence is not limited to the Bill of Rights. From Australia to India to Israel to the United Kingdom, **foreign courts have looked to the seminal decisions of this Court as support for their own rulings upholding judicial review, enforcing separation of powers, and providing a judicial check on the political branches**.

Indeed, for foreign courts, this Court’s rulings in seminal cases such as Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803),4 Brown v. Board of Education, 347 U.S. 436 (1954),5 United States v. Nixon, 418 U.S. 683 (1974),6 and Roper v. Simmons, 543 U.S. 551 (2005)7 take on a special significance. **Reliance on the moral authority of this Court can provide invaluable support for those foreign courts struggling to establish their own legitimacy, to shore up judicial authority against overreaching by powerful executives, and to develop a strong rule of law within their own national legal systems**.

This Court’s potential to positively influence the international rule of law is particularly important in the nascent transnational judicial dialogue surrounding the war on terrorism and the primacy of rule of law in times of conflict. As the world’s courts begin to grapple with the novel, complex, and delicate legal issues surrounding the modern-day war on terrorism, and as states seek to develop judicial mechanisms to address domestic conflicts, foreign governments and judiciaries are confronting similar challenges. In particular, foreign governments and judiciaries must consider how to accommodate the legitimate needs of the executive branch in times of war within the framework of the law.

Although foreign courts are just beginning to address these issues, it is already clear that they are looking to the experience of the U.S., and to the precedent of this Court, for guidance on upholding the rule of law in times of conflict. In recent years, **courts in Israel, the United Kingdom, Canada, and Australia have relied on the precedent of this Court in decisions addressing the rights of detainees**.8 In short, as a result of this Court’s robust influence on transnational judicial dialogue, its decisions have proved extraordinarily important to the development of the rule of law around the world.

International courts have similarly relied on the precedent of this Court in influential decisions. For example, in the important and developing area of international criminal law, the international war crimes tribunals for Yugoslavia and Rwanda both relied heavily on the precedent of this Court in their early opinions. In the first five years of the Yugoslav Tribunal, the first in the modern iteration of the war crimes tribunals, the justices cited this Court at least seventeen times in decisions establishing the fundamental legal principles under which the Tribunal would function.9 The International Criminal Tribunal for Rwanda similarly relied on this Court’s precedent, citing this Court at least twelve times in its first five years.10 The precedent of this Court has provided a crucial foundation for international criminal law. The reliance on the precedent of this Court speaks to the Court’s international leadership on the promotion of respect for the rule of law in times of conflict.

By ruling in favor of the Petitioners, **this Court will reaffirm the precedent established in its prior decisions granting habeas rights to Guantanamo detainees and**, in doing so, **demonstrate to these foreign courts, and to other courts who will be addressing these issues in the future, that all branches of government must be bound by the rule of law, even in the most challenging of times**.

Africa models Kiyemba

PILPG 8, the Public International Law & Policy Group (PILPG), is a global pro bono law firm that provides legal assistance to foreign governments and international organizations on the negotiation and implementation of peace agreements, the drafting and implementation of post-conflict constitutions, and the creation and operation of war crimes tribunals. PILPG also assists states with the training of judges and the drafting of legislation, “brief of the public international law & policy group as amicus curiae in support of petitioners”, <http://www.americanbar.org/content/dam/aba/publishing/preview/publiced_preview_briefs_pdfs_09_10_08_1234_PetitionerAmCuPILPG.authcheckdam.pdf>

The precedent of this Court has a significant impact on rule of law in foreign states. Foreign governments, in particular foreign judiciaries, notice and follow the example set by the U.S. in upholding the rule of law. As foreign governments and judiciaries grapple with new and challenging issues associated with upholding the rule of law during times of conflict, U.S. leadership on the primacy of law during the war on terror is particularly important.

Recent decisions of this Court have reaffirmed the primacy of rule of law in the U.S. during the war on terror. As relates to the present case, a number of this Court’s decisions, most notably Boumediene v. Bush, 128 S.Ct. 2229 (2008), have established clear precedent that Guantanamo detainees have a right to petition for habeas corpus relief. Despite a clear holding from this Court in Boumediene, the Court of Appeals sought in Kiyemba v. Obama to narrow Boumediene to such a degree as to render this Court’s ruling hollow. 555 F.3d 1022 (D.C. Cir. 2009). The present case is thus a test of both the substance of the right granted in Boumediene and the role of this Court in ensuring faithful implementation of its prior decisions.

Although this Court’s rulings only have the force of law in the U.S., foreign governments will take note of the decision in the present case and use the precedent set by this Court to guide their actions in times of conflict. PILPG has advised over two dozen foreign states on peace negotiations and post-conflict constitution drafting, as well as all of the international war crimes tribunals. Through providing pro bono legal assistance to foreign governments and judiciaries, PILPG has observed the important role this Court and U.S. precedent serve in promoting rule of law in foreign states.

In Uganda, for example, the precedent established by this Court in Hamdan v. Rumsfeld, 548 U.S. 557 (2006), and Boumediene, influenced judges and legislators to incorporate the principles of judicial review and enforceability in their domestic war crimes bill. In Nepal, this Court has served as a model for the nascent judiciary. In Somaliland, the government relied heavily on U.S. terrorism legislation when drafting terrorism legislation for the region. And in the South Sudan peace process, the Sudan People’s Liberation Movement/Army (SPLM/A), the leading political party in the Government of Southern Sudan, relied on U.S. precedent to argue for the primacy of law and the importance of enforceability of previous adjudicative decisions in the Abyei Arbitration, one of the most important and contentious issues in the ongoing implementation of the peace agreement.

Foreign judges also follow the work of this Court closely. In a number of the judicial training programs PILPG has conducted, foreign judges have asked PILPG detailed questions about the role of this Court in upholding rule of law during the war on terror.

A review of foreign precedent confirms how closely foreign judges follow this Court. In numerous foreign states, and in the international war crimes tribunals, judges regularly cite the precedent of this Court to establish their own legitimacy, to shore up judicial authority against overreaching by powerful executives, and to develop a strong rule of law within their own legal systems.

Given the significant influence of this Court on foreign governments and judiciaries, a decision in Kiyemba implementing Boumediene will reaffirm this Court’s leadership in upholding the rule of law and promote respect for rule of law in foreign states during times of conflict.

Judicial independence key to sustainable democracy in Africa

Abuya, 10

(Law Prof-University of Nairobi, “Can African States Conduct Free and Fair Presidential Elections?” 8 Nw. U. J. Int'l Hum. Rts. 122, Spring)

**An independent judiciary is an essential ingredient in free and fair elections**. Julius Nyerere, a former president of Tanzania, argued that **unless judges perform their work "properly, none of the objectives of [a] democratic society" can be met**. n234 Accordingly, **any initiative that seeks to reform the electoral process in Africa must** also **focus on the judicial system, due to the central role** n235 that **courts play in the resolution of electoral disputes in particular and the promotion and protection of democracy in general**. Any person who is dissatisfied with the result of a presidential election can challenge it in domestic courts. Special courts are established in most African countries to handle such claims. n236 This section first discusses the process of challenging the results of a presidential election. It then evaluates some of the factors that cast doubt on the ability of courts to handle electoral disputes in accordance with due process considerations. A. Process Multiple procedures dictate the process of challenging the election of a president. Once the EMB declares the results of the vote, any unsatisfied person can challenge this outcome in court within a specified period of time. n237 Essentially, election petitions involve determining the "validity" n238 of a poll. The burden of proof is on the person who lodges the application to demonstrate that there was an irregularity in the electoral process. n239 The burden a petitioner must meet is a balance of probability, not beyond a reasonable doubt. n240 Those election petitions that fail to meet this burden are dismissed with costs. n241 Any aggrieved person can appeal the decision of the electoral court to an appellate court. n242 Only questions of law can be raised on appeal in Zimbabwe. n243 In Kenya, by contrast, because the law is silent on the scope of issues that an appellant can advance, administrative law principles apply. n244 Therefore, an aggrieved party could appeal the [\*151] decision of an electoral court on grounds that the decision maker erred either in law or in fact. Where it allows the appeal, the appellate court refers the petition back to the electoral court if it made an error of law. Under such circumstances the electoral court must re-adjudicate the challenge based on the guidance the appellate court provided. For those cases where an appellate court finds that the electoral court made an error of fact, it refers the matter to the EMB directly, with an order, for instance, to recount votes. n245 The mandate of an electoral court is limited to determining whether the law was complied with. Therefore, if the court determines that a person was unduly elected, judges can only order the EMB to re-tally votes. Judges cannot declare that a particular presidential candidate won the election. n246 This authority rests solely with the EMB. B. Challenges Although the process appears straightforward in theory, several problems have arisen in practice. This subsection evaluates issues surrounding the independence and impartiality of courts and their ability to deliver justice promptly in election petitions. 1. Independence and Impartiality As guardians of their countries' constitutions n247 and the rights of individuals, judges must uphold the law at all times. This rule stems from the principle of separation of powers. Under this doctrine, the three arms of government--legislative, executive, and judicial--are required to be autonomous in their work. This requires each arm to guard itself from undue influence by the others. n248 The separation of powers is crucial in any constitutional state. n249 Judicial independence is particularly important, as without it, it would be difficult for an individual to ensure the protection of his or her human rights from infringement by the state. n250 Indeed, **judicial independence is the "lifeblood of constitutionalism**." n251 [\*152] P 63 Furthermore, the independence of the judiciary from the other arms of government plays a central role in preserving and promoting the integrity of courts. n252 Independence also ensures that disputes are adjudicated based on their factual and legal merits, not on political considerations. In other words, judges should be free to act on their "own convictions, without any apprehension of personal consequences" to themselves. n253 Charles Montesquieu claims that in comparison to the power of the other arms of government, the power of the judiciary is "next to nothing." n254 However, this claim underestimates the pivotal role that judges play in the protection and promotion of voting rights. In particular, they are charged with the responsibility of adjudicating the "validity" n255 of a presidential election. An objective decision maker must ensure not only that justice is done, but also that it is seen to be done. He or she must grant effective remedy to a person whose rights and freedoms have been violated. n256 Moreover, confidence in the legal process is critical if such a person is to seek redress in the judicial system. People, especially those who are aggrieved, must have a sense that electoral courts will act independently and determine petitions based on well-established domestic and international legal principles. As the Australian High Court once stated, "the appearance of independence preserves public confidence in the judicial branch" n257 as well as in the law. In other words, public perception of bias by the judiciary should be minimized, if not eliminated altogether. The parties to a petition and members of the public should be confident that justice prevailed. The opposition parties in Kenya and Zimbabwe employed two distinct approaches in the wake of the flawed presidential election. Whereas the opposition party in Kenya refused to seek relief in court, its counterpart in Zimbabwe chose to pursue a judicial remedy. An evaluation of these approaches ultimately reinforces the argument that an independent judiciary is an essential tool for democracy. a) Writing Off the Judiciary: The "We Will Not Go to Court" Route As one would have expected, the main opposition party in Kenya, the Orange Democratic Movement ("ODM"), challenged the outcome of the 2007 presidential election. n258 Although one also would have expected the ODM to seek relief within the local legal framework, n259 the party refused to ventilate its grievance in "Kibaki's courts," thus expressing a total lack of confidence in Kenya's judiciary to resolve any challenge to [\*153] the election results independently and impartially. The ODM viewed the courts as an instrument of the state that could not objectively adjudicate any petition that involved the sitting president. n260 Thus, the ODM believed that the solution to the flawed presidential poll lay in engaging the government through peaceful protests rather than through litigation. Their supporters took their dissatisfaction with the election results to the streets. In response, the government declared that it would deal decisively with any unauthorized or unlawful demonstration. It also argued that any aggrieved person should seek relief in court: "Elections are over and our Constitution does say that once the Electoral Commission has declared the results those are the results that we accept. If we have any disputes, the normal way of resolving them is ... by petitioning the High Court." n261 Interestingly, the Vice President of Kenya, Kalonzo Musyoka, who was a contender for the presidency in the 2007 election, echoed this viewpoint: "I am a lawyer. I can even take instructions. And I can argue for [the ODM]." n262 Some commentators expressed similar sentiments. Peter Kagwanja, President of the Africa Policy Institute, claimed that the domestic legal framework was the proper forum for resolving electoral disputes. n263 Kagwanja asserted that "giant strides" had been made since Kenya's independence in 1963 to set up "a functioning modern" judicial system. n264 Thus, people must respect court decisions, "however sleazy" they may be. n265 To support this assertion, Kagwanja cited the U.S. Supreme Court decision in Bush v. Gore, n266 where the central issue was the tallying of votes in the state of Florida. Bush has been the subject of wide discussion, n267 and courts in Kenya could have drawn from the rich jurisprudence that decision has generated. However, the assertion by Kagwanja is narrow in the sense that he ignores the vital role that confidence in the judiciary and court system plays in the litigation process. Indeed, courts worldwide have underscored the value of public confidence on the judiciary. In their dissent in Bush, Justices Breyer and Stevens describe belief in the judiciary as the foundation of the rule of law. n268 Canadian n269 and Australian n270 courts have also acknowledged that public perception is a core component of the justice system. In the words of Justice Katju of the Indian Supreme Court: [\*154] It is of upmost importance for the public to have confidence in the judiciary. The role of the judiciary is to resolve disputes amicably. Without it, people may use violence to resolve differences. To avoid this, the judiciary must be independent. This is an inherent trait. If a judge is independent and knows the law, the losing party is likely to be pacified. He or she will be content, notwithstanding the fact that he or she has lost the action. n271 **Data from Africa** n272 and elsewhere n273 **demonstrate the importance of public trust in the judiciary**. People engage the judiciary because they have faith in the court system, n274 and they believe their disputes will be resolved based on legal principles. In addition, they trust that judges will be independent and not favor any party. n275 Absent this trust, it is doubtful that presidential candidates would ever seek relief in domestic courts. Kenya's judiciary has undergone a number of developments, including a transformation from an all-white bench at the time of independence to a bench comprised of native-born judges today. However, courts in Kenya and Zimbabwe do not have a reputation of fairness and independence. Survey data suggest that many citizens do not trust that courts and judges in Africa are autonomous in their work. In a survey conducted in 2006 and 2007 among thirty-two African countries, including Kenya and Zimbabwe, the Gallup Organization found that just over half of those polled (fifty-three percent) expressed confidence in the judiciary in their country. n276 Moreover, a number of studies have established that courts in Kenya and Zimbabwe cannot discharge their mandates impartially and independently. For instance, in its 2008 report, the Fund for Peace, a nonprofit research and education organization, described the judiciary in Kenya and Zimbabwe as "weak" n277 and "poor," n278 respectively. The 2008 report of the Waki [\*155] Commission observed that Kenya's judiciary had "acquired the notoriety of losing the confidence and trust of [its clientele] because of the perception that it is not independent." n279 Legal practitioners argue that public confidence in the Kenyan judiciary has "virtually collapsed." n280 Simply put, the judiciary in Kenya and Zimbabwe is facing a crisis of confidence.

Loose interpretations of stare decisis that challenge deference are key

Prempeh, 1

(Law Prof--Seton Hall Law School, former Director of Legal Policy and Governance at the Ghana Center for Democratic Development, . In The Global Divergence Of Democracies, ed Larry Diamond, P. 260-264)

Africa's judiciaries are emerging at last from decades of powerlessness and marginalization at the hands of omnipotent executives and strongmen. Constitutional reforms that have accompanied democratic transitions in countries like Benin, Ghana, Malawi, Namibia, South Africa, Tanzania, Zambia, and Zimbabwe are helping to redefine the role and enhance the stature of the judiciary in the contemporary African state. While past judiciaries served primarily as passive instruments of legitimation for authoritarian regimes, today's African courts, like their counterparts in emerging democracies elsewhere, must enforce constitutional limitations on the exercise of governmental power, as well as protect the rights of citizens, the media, and civil society. The idea of judicial review is now enthusiastically embraced in a growing number of African countries. Establishing judicial review is, of course, the easy part; a clause or two in the national constitution is generally all that is required to bestow such awesome power on the courts. **The challenge is to ensure that judges in newly democratizing states exercise their new power** so as **to advance and deepen the transition** to constitutional democracy. This is indeed a matter of genuine concern, because judicial review, though widely celebrated by democrats and constitutional architects in transitional democracies, is not quite the unmitigated virtue it is frequently made out to be. As Alexander Bickel has reminded us, "judicial review means not only that the Court may strike down a legislative [End Page 135] [or executive] action as unconstitutional but also that it may validate it as within constitutionally granted powers and as not violating constitutional limitations."1 Because judicial review "performs not only a checking function but also a legitimating function,"2 it is a double-edged sword. If exercised courageously (but prudently) to defend rights or hold the line against abuses of power, it could enhance constitutionalism in transitional democracies. In the hands of weak, insecure, or illiberal judges, however, judicial review could easily become an even more formidable instrument for legitimating authoritarianism. Thus Africa's newly democratizing states must seek to minimize the risk that judicial review will become a curse rather than the blessing it was meant to be. Because it has generally been assumed that the African judiciary's primary problem to date has been the lack of institutional autonomy and career security for judges, Africa's contemporary constitutional architects have adopted the standard Hamiltonian solution: judicial independence. Thus Africa's new constitutions all carry the standard provisions designed to secure judges in their jobs, salaries, jurisdiction, and judgments. Judges no longer hold their offices at the sufferance of the executive; judicial salaries and other benefits may not be varied to the judges' detriment; the jurisdiction of the courts may not be diminished at the pleasure of the executive or legislature; and, in general, at least two independent institutions must cooperate in making judicial appointments. In some cases, as in Ghana, the new constitution goes even further by giving the judiciary autonomy in the preparation, administration, and control of its own budget. Except in South Africa and Benin, where newly created "constitutional courts" have been laid over the preexisting judiciary, Africa's newly refurbished judiciaries have generally consisted entirely of holdovers from the ancien régime "grandfathered" into the new constitutional arrangement in the name of institutional continuity. The assumption seems to have been that, given a new constitution with a host of rights-friendly provisions, limitations on governmental power, and guarantees of judicial independence, judicial review will lead to a liberal-democratic jurisprudence almost as a matter of course. Yet the evidence that is emerging, especially from the common-law jurisdictions, suggests that there is a significant risk that an asymmetrical jurisprudence will take hold, with the constitutional text contemplating a rights-friendly, liberal-democratic jurisprudence while the actual decisions and reasoning of the courts take a different course. Ghana's experience under its new constitution is a case in point. Liberal Constitution, Illiberal Jurisprudence On 7 January 1993, Ghana's fourth republican constitution went into effect. The constitution, adopted by referendum in April 1992 [End Page 136] (hence the "1992 Constitution"), promises a new beginning in the life of the country. In contrast to the political and legal order that immediately preceded it, the new constitution proclaims the people of Ghana collectively as "sovereign" and guards against a resurgence of absolutist rule by providing for a set of "fundamental human rights and freedoms"; a system of checks and balances involving the sharing of power among three separate but coordinate branches of government; an independent commissioner with power to investigate and remedy citizen complaints of human rights violations and abuse of administrative power; a prohibition against a de jure one-party system; a two-term limitation on the tenure of the president; and an independent judiciary headed by a Supreme Court that has exclusive power to determine the constitutionality of disputed legislative and executive acts. Although Ghana has experimented with similar liberal-democratic constitutions in the past (notably, the 1969 and 1979 constitutions), there is exceptional optimism that the 1992 Constitution is here to stay. Significantly, Ghana has already achieved an unprecedented feat under the new constitution. General elections held in December 1996 marked the first time in the country's postcolonial history that an elected government had successfully served out its constitutional term of office (and, in this case, been reelected to a second term) without the intervention of a coup d'état. This breaking of the jinx, coupled with discernible public antipathy toward military rule and with the "conditioned" investment made by the international donor and investor community in Ghana's ongoing transition, has given Ghanaians renewed hope and confidence that their country's latest attempt at constitutional democracy, though fraught with challenges, is irreversible.3 Much of the burden of this expectation has come to rest on the shoulders of the Ghanaian judiciary, in its new role as the final arbiter of interinstitutional disputes and guardian of the Bill of Rights. Already, however, public faith in the courts has been dampened by a string of rulings that bespeak a lack of judicial solicitude for freedom of expression and of the press. The Supreme Court of Ghana has ruled, for instance, that a seditious libel statute, first enacted during the colonial period and later reenacted without much modification during the one-party era of the 1960s, does not violate the media-friendly provisions of the 1992 Constitution. This ruling, together with another upholding a related criminal libel law, has paved the way for the criminal prosecution of journalists for alleged defamation of the government and of certain influential public figures. In addition, despite language in Article 162 of the Constitution stating that "editors and publishers shall not . . . be penalized or harassed for their editorial opinions and views, or the [End Page 137] content of their publications," a number of courts have imposed "perpetual" injunctions and financially crippling damages on certain publishers and editors in a barrage of civil libel lawsuits brought by leading members of the government and their allies. As justification for these rulings, a justice of the Supreme Court has asserted that the laws criminalizing defamation of public officials are "necessary to protect the dignity of public office," while another has defended such laws, despite their English common-law and colonial antecedents, as reflecting "the customs and traditions" of Ghanaian society. To date, no fewer than three newspaper editors have been summarily imprisoned and fined for criminal contempt of court for violating court-imposed "prior restraints." In another case, a columnist for an independent newspaper was sentenced by the Supreme Court to a 30-day term of imprisonment and a fine for committing a nonstatutory crime called "scandalizing the court." The writer's offense was accusing a justice (now Chief Justice) of the Supreme Court of "judicial chicanery" for committing, and then surreptitiously retracting after the fact (that is, after he had delivered his written judgment in the case), an error of attribution in a politically charged case. In sentencing the defendant, the Supreme Court refused to accept "truth" as a defense or mitigating factor, reaffirming instead an old common-law maxim ("Truth is no defense") that harkens back to the days of the infamous English Court of the Star Chamber. These rulings, directed at Ghana's popular private media, have caused considerable alarm among significant sections of the Ghanaian public. In reaction to the latest "anti-press" rulings, various groups and individuals have joined hands under the banner of "Friends of Freedom of Expression" to protest what they perceive as an unwarranted judicial assault on a right that is, for Ghanaians, as hard-earned as the right to vote. What is important for our purposes is not the politically interesting question of who the losers and winners have been in the cases ruled upon by the Ghanaian courts. In fact, were that the primary concern, one would have to acknowledge that the Supreme Court has ruled against the government in some high-profile constitutional cases, especially during the very early years of the transition. Even so, except for one highly controversial ruling in which the Court enjoined the government from celebrating with public funds the anniversary of the coup d'état of 31 December 1981, most of the rulings that have been adverse to the government have involved provisions of the constitution that did not leave much room in the text for ambiguity or fudging. What is problematic about the decisions of the Ghanaian courts is the dominant jurisprudence--or set of values, beliefs, and assumptions--that seems to be informing the reasoning and the result in the "hard" cases. Do the Ghanaian courts continue to draw largely upon [End Page 138] the assumptions, practices, and precedents of the past, or do they project a transformative vision? Do they resolve textual ambiguity in favor of constitutionalism or in favor of the status quo ante? Do the courts appear willing to consult the liberal-democratic spirit of the constitution in expounding upon its letter, or are they given, instead, to literalism? Do they, when they deem it necessary to lean on precedents from other jurisdictions, select those persuasive authorities that tend to advance liberal-democratic values, or do they selectively avoid such precedents? The picture that emerges from a close study of appellate court opinions and rulings since the new constitution went into effect suggests that the Ghanaian judiciary remains attached to a jurisprudence that is far more authoritarian than liberal. The case of Ghana indicates that reliance on judicial review and formal guarantees of judicial independence as the exclusive mechanisms for liberating African courts from their authoritarian past may be futile, unless such reforms are considered as incidental to the more fundamental question of how to produce a paradigm shift in the jurisprudence of the judges. If the constitutions of Africa's transitional democracies can be said to compel a new jurisprudence of constitutionalism, it also appears that recourse to tradition and long-standing common-law doctrine, **an ingrained deference to executive diktat, and the force of stare decisis all propel Africa's judges back toward a jurisprudence of executive supremacy**. The trajectory of Africa's democratic transitions will be **adversely altered if Africa's judiciaries fail to make a contemporaneous transition from the jurisprudence of executive supremacy to the jurisprudence of constitutionalism**. A jurisprudence of executive supremacy regards the "state" (personified in an omnipotent chief executive), not a supervening constitution, as the source, juridically speaking, of all "rights" and "freedoms." The state is thus subject to only such restraint as it chooses to place upon itself, while the citizen has only such rights as the state may allow. Consequently, judges operating on the basis of a jurisprudence of executive supremacy lean heavily on those "claw-back" or derogation clauses that typically appear in the nominal constitution and allow the state essentially to take back whatever "rights" it may have granted previously, leaving citizens with only such protection as might remain after the state has had its "due." In short, under a jurisprudence of executive supremacy, the state walks into the courthouse with an almost irrefutable presumption of lawfulness as to its conduct. A judiciary habituated by custom, training, or experience to this way of thinking learns, quite naturally, to be excessively deferential to the state and all manner of public authority. Such a judiciary reckons its institutional role primarily as one of maintaining "law and order," and not as protecting freedom or restraining government. For the better part of its life, the African state--and for that matter, the African judiciary--has paid homage to a jurisprudence of executive supremacy, with regrettable consequences for civil liberties and personal freedom across the continent. It has been observed, for example, that the Kenyan courts' longstanding fidelity to this brand of jurisprudence is partly to blame for how Kenya's once potentially promising Bill of Rights ended up as a "Bill of Exceptions."4The Kenyan courts consistently allowed the limited exceptions tagged on to the Bill of Rights to trump the rights themselves. If current efforts at reconstituting the social compact in Africa along liberal-democratic lines are to stand a chance of succeeding, the jurisprudence of executive supremacy must give way to what we might call a jurisprudence of constitutionalism. A jurisprudence of constitutionalism differs in fundamental respects from a jurisprudence of executive supremacy. In general, judges who follow the latter disclaim any exercise of discretion on their part in matters of interpretation. In practice, too, they tend to follow strictly the dictates of past precedents and usually give literal effect to the plain meaning of legal texts. As a result, their methods of interpretation tend to be narrow, rule-driven, and text-bound. A jurisprudence of constitutionalism, on the other hand, invites more active judicial intermediation and interpretation. In particular, it demands that judges interpreting a constitutional text not only consult the spirit of the law but also endeavor to harmonize the letter with the spirit. To do so, judges must bring to their reasoning and decisions a clear understanding of the overarching values and philosophical foundations of a liberal democracy; of the social, economic, and political evolution of their country; and of the historical antecedents and contemporary purposes of the particular provision in dispute. A jurisprudence of constitutionalism is also less doctrinaire in its insistence on stare decisis and does not regard the "common law" as either cast in stone or beyond judicial review. Instead, it invites judges to weigh the value of keeping the law certain and settled against the imperative to do right in the particular case at hand. The rationale is that, in a legal dispute concerning human rights, civil liberties or the scope of governmental power, as opposed to, say, a dispute over the meaning of a clause in a commercial contract, it is deemed far more important that the result be right than that it follow some precedent from a bygone era.

African rule of law solves multiple zoonotic diseases

Aluwong, lecturer in department of veterinary public health and preventive medicine at Ahmadu Bello University, 2010

(“Emerging diseases and implications for Millennium Development Goals in Africa by 2015 – an overview,” *Veterinaria Italiana*, 46 (2), http://www.te.izs.it/vet\_italiana/2010/46\_2/137.pdf)

Emerging diseases can occur anywhere in the world and the consequences can be severe. Based on experience to date, it is difficult to predict the origin or the nature of future emerging diseases. Recently, new emerging diseases have in some instances demonstrated that they originate primarily where there are high concentrations of different animal species, often in close contact with people (2). As human lifestyles change due to advancing technologies, increasing populations and changing social behaviour, new diseases emerge, while those that have been controlled in the past sometimes tend to re-emerge. Emerging diseases can be defined as infections that are new occurrences in a susceptible population or are rapidly increasing in incidence or geographic range (16). About 75% of the emerging diseases that have affected humans in the past 10 years are caused by pathogens originating from animals and/or their products (29). Approximately 60% of these diseases are zoonoses, including recent examples, such as H1N1 (commonly referred to as ‘swine flu’), avian influenza, severe acute respiratory syndrome (SARS), Ebola haemorrhagic fever and probably human immunodeficiency virus/acquired immune deficiency syndrome (HIV/AIDS). Some of the most important factors that have contributed to an increase in emerging diseases are as follows:

▪ expansion of the human population

▪ climate change

▪ globalisation of trade

▪ increasing movement of animal species, civil unrest/wars, microbial evolution and ecological disruption (16).

These and other current issues suggest that emerging diseases may not only continue to occur, but have the potential of increasing the rate of their emergence. These observations call for closer integration of veterinary, medical and environmental communities, along with relentless education of the general public and policy-makers on the African continent.

Complexity of factors underlying infectious disease emergence

Microbial evolution

The emergence of some disease is due to the natural evolution of micro-organisms. For example, a new serotype of Vibrio cholerae, designated 0139, appears to be nearly identical to the strain that most commonly causes cholera epidemics, Vibrio cholerae 01, except that it has gained the ability to produce a capsule (8). The consequence of the new serotype is that even people who have immunity against the earlier strain are susceptible to the new one. Resistance to the effects of antimicrobial drugs is contributing to the re-emergence of many diseases, including malaria.

*[CONTINUES… full article available… typing out the entire PDF is a nightmare…]*

The principal Millennium Development Goal that interfaces with emerging diseases is Millennium Development Goal No. 6, which is combating HIV/AIDS, malaria, and other diseases. These other diseases mentioned in the sixth goal of the Millennium Development Goals include emerging diseases. Ensuring environmental sustainability is another goal of the Millennium Development Goals that also interfaced with emerging diseases. This includes livestock and environmental issues, such as land, water, air, biodiversity and ecosystems. Therefore, the mitigation of emerging disease outbreaks in Africa could largely contribute to achieving the Millennium Development Goals in Africa by 2015. For, as the saying goes, 'a healthy population is a productive population'. When there is complete eradication of microbial infectious agents in Africa, other Millennium Development Goals such as the eradication of extreme poverty and hunger, the reduction of child mortality, achieving universal primary education etc., will be reached. However, good governance and rule of law on the continent of Africa must be a pre-requisite for the attainment of the Millenium Development Goals by 2015.

New and strategic areas for partnerships within the global ‘One Health’ movement should be scientifically explored in Africa. The lessons of the recent past have taught us to expect the reoccurrence of emerging infections at any time and/or any place. Therefore, there is an urgent need to strengthen research, investigation and disease control partnerships among animal health and public health experts.

Emerging infectious diseases do not have boundaries, that is, they occur and can spread to other continents of the world. It is therefore pertinent to adopt a global collaborative agenda that focuses on the surveillance, prevention and control of emerging and re-emerging infectious diseases of animal origin. This should include the following components: the areas of wildlife biology, ecology, virology, ▪ integrated research agenda food safety, food and animal production, ▪ interdisciplinary zoonotic disease research centres ▪ infrastructural development; work force

development ▪ improved international coordination/cooper- ation and focus oriented.

*[CONTINUES… full article available… typing out the entire PDF is a nightmare…]*

The responses of OIE member countries to a questionnaire on emerging zoonoses overwhelmingly acknowledged the impact of emerging zoonoses and their likely continued resurgence (18). A large number of member countries reported that they had experienced incidents of emerging and re-emerging diseases, along with the emergence of antimicrobial-resistant pathogens, and noted the importance of strengthening and improving surveillance, research and training to ensure or to build the capacity to address these persistent threats.

The mitigation of emerging diseases on the continent of Africa will help to attain the Millennium Development Goals but the entrenchment of good democracy and rule of law must be a ’sine qua non’ of the various governments of African countries. Another key point is the need for stronger partnerships with national and international animal and public health organisations, academic institutions, private practitioners in animal and public health and non-governmental organisations to meet the ensuing challenges. The OIE and the FAO must continue to be involved in their response to the needs of member countries and the changing demands and opportunities associated with emerging infections. Of paramount importance to this transformation will be the formation and strengthening of partnerships, mobilisation of resources and the development of a global intersectoral approach in tackling zoonotic threats.

New zoonotic diseases cause extinction – different from past diseases

Quammen, award-winning science writer, long-time columnist for *Outside* magazine, writer for National Geographic, Harper's, Rolling Stone, the New York Times Book Review and others, 9/29/2012

(David, “Could the next big animal-to-human disease wipe us out?,” The Guardian, pg. 29, Lexis)

Infectious disease is all around us. It's one of the basic processes that ecologists study, along with predation and competition. Predators are big beasts that eat their prey from outside. Pathogens (disease-causing agents, such as viruses) are small beasts that eat their prey from within. Although infectious disease can seem grisly and dreadful, under ordinary conditions, it's every bit as natural as what lions do to wildebeests and zebras. **But conditions aren't always ordinary**.

Just as predators have their accustomed prey, so do pathogens. And just as a lion might occasionally depart from its normal behaviour - to kill a cow instead of a wildebeest, or a human instead of a zebra - so a pathogen can shift to a new target. **Aberrations occur**. When a pathogen leaps from an animal into a person, and succeeds in establishing itself as an infectious presence, sometimes causing illness or death, the result is a zoonosis.

It's a mildly technical term, zoonosis, unfamiliar to most people, but it helps clarify the biological complexities behind the ominous headlines about swine flu, bird flu, Sars, emerging diseases in general, and the threat of a global pandemic. It's a word of the future, destined for heavy use in the 21st century.

Ebola and Marburg are zoonoses. So is bubonic plague. So was the so-called Spanish influenza of 1918-1919, which had its source in a wild aquatic bird and emerged to kill as many as 50 million people. All of the human influenzas are zoonoses. As are monkeypox, bovine tuberculosis, Lyme disease, West Nile fever, rabies and a strange new affliction called Nipah encephalitis, which has killed pigs and pig farmers in Malaysia. Each of these zoonoses reflects the action of a pathogen that can "spillover", crossing into people from other animals.

Aids is a disease of zoonotic origin caused by a virus that, having reached humans through a few accidental events in western and central Africa, now passes human-to-human. This form of interspecies leap is not rare; about 60% of all human infectious diseases currently known either cross routinely or have recently crossed between other animals and us. Some of those - notably rabies - are familiar, widespread and still horrendously lethal, killing humans by the thousands despite centuries of efforts at coping with their effects. Others are new and inexplicably sporadic, claiming a few victims or a few hundred, and then disappearing for years.

**Zoonotic pathogens can hide**. The least conspicuous strategy is to lurk within what's called a reservoir host: a living organism that carries the pathogen while suffering little or no illness. When a disease seems to disappear between outbreaks, it's often still lingering nearby, within some reservoir host. A rodent? A bird? A butterfly? A bat? To reside undetected is probably easiest wherever biological diversity is high and the ecosystem is relatively undisturbed. The converse is also true: ecological disturbance causes diseases to emerge. Shake a tree and things fall out.

Michelle Barnes is an energetic, late 40s-ish woman, an avid rock climber and cyclist. Her auburn hair, she told me cheerily, came from a bottle. It approximates the original colour, but the original is gone. In 2008, her hair started falling out; the rest went grey "pretty much overnight". This was among the lesser effects of a mystery illness that had nearly killed her during January that year, just after she'd returned from Uganda.

Her story paralleled the one Jaap Taal had told me about Astrid, with several key differences - the main one being that Michelle Barnes was still alive. Michelle and her husband, Rick Taylor, had wanted to see mountain gorillas, too. Their guide had taken them through Maramagambo Forest and into Python Cave. They, too, had to clamber across those slippery boulders. As a rock climber, Barnes said, she tends to be very conscious of where she places her hands. No, she didn't touch any guano. No, she was not bumped by a bat. By late afternoon they were back, watching the sunset. It was Christmas evening 2007.

They arrived home on New Year's Day. On 4 January, Barnes woke up feeling as if someone had driven a needle into her skull. She was achy all over, feverish. "And then, as the day went on, I started developing a rash across my stomach." The rash spread. "Over the next 48 hours, I just went down really fast."

By the time Barnes turned up at a hospital in suburban Denver, she was dehydrated; her white blood count was imperceptible; her kidneys and liver had begun shutting down. An infectious disease specialist, Dr Norman K Fujita, arranged for her to be tested for a range of infections that might be contracted in Africa. All came back negative, including the test for Marburg.

Gradually her body regained strength and her organs began to recover. After 12 days, she left hospital, still weak and anaemic, still undiagnosed. In March she saw Fujita on a follow-up visit and he had her serum tested again for Marburg. Again, negative. Three more months passed, and Barnes, now grey-haired, lacking her old energy, suffering abdominal pain, unable to focus, got an email from a journalist she and Taylor had met on the Uganda trip, who had just seen a news article. In the Netherlands, a woman had died of Marburg after a Ugandan holiday during which she had visited a cave full of bats.

Barnes spent the next 24 hours Googling every article on the case she could find. Early the following Monday morning, she was back at Dr Fujita's door. He agreed to test her a third time for Marburg. This time a lab technician crosschecked the third sample, and then the first sample.

The new results went to Fujita, who called Barnes: "You're now an honorary infectious disease doctor. You've self-diagnosed, and the Marburg test came back positive."

The Marburg virus had reappeared in Uganda in 2007. It was a small outbreak, affecting four miners, one of whom died, working at a site called Kitaka Cave. But Joosten's death, and Barnes's diagnosis, implied a change in the potential scope of the situation. That local Ugandans were dying of Marburg was a severe concern - sufficient to bring a response team of scientists in haste. But if tourists, too, were involved, tripping in and out of some python-infested Marburg repository, unprotected, and then boarding their return flights to other continents, the place was not just a peril for Ugandan miners and their families. It was also an international threat.

The first team of scientists had collected about 800 bats from Kitaka Cave for dissecting and sampling, and marked and released more than 1,000, using beaded collars coded with a number. That team, including scientist Brian Amman, had found live Marburg virus in five bats.

Entering Python Cave after Joosten's death, another team of scientists, again including Amman, came across one of the beaded collars they had placed on captured bats three months earlier and 30 miles away.

"It confirmed my suspicions that these bats are moving," Amman said - and moving not only through the forest but from one roosting site to another. Travel of individual bats between far-flung roosts implied circumstances whereby Marburg virus might ultimately be transmitted all across Africa, from one bat encampment to another. It voided the comforting assumption that this virus is strictly localised. And it highlighted the complementary question: why don't outbreaks of Marburg virus disease happen more often? Marburg is only one instance to which that question applies. Why not more Ebola? Why not more Sars?

In the case of Sars, the scenario could have been very much worse. Apart from the 2003 outbreak and the aftershock cases in early 2004, it hasn't recurred. . . so far. Eight thousand cases are relatively few for such an explosive infection; 774 people died, not 7 million. Several factors contributed to limiting the scope and impact of the outbreak, of which humanity's good luck was only one. Another was the speed and excellence of the laboratory diagnostics - finding the virus and identifying it. Still another was the brisk efficiency with which cases were isolated, contacts were traced and quarantine measures were instituted, first in southern China, then in Hong Kong, Singapore, Hanoi and Toronto. If the virus had arrived in a different sort of big city - more loosely governed, full of poor people, lacking first-rate medical institutions - **it might have burned through a much larger segment of humanity**.

One further factor, possibly the most crucial, was inherent in the way Sars affects the human body: symptoms tend to appear in a person before, rather than after, that person becomes highly infectious. That allowed many Sars cases to be recognised, hospitalised and placed in isolation before they hit their peak of infectivity. With influenza and many other diseases, the order is reversed. That probably helped account for the scale of worldwide misery and death during the 1918-1919 influenza. And that infamous global pandemic occurred in the era before globalisation. Everything nowadays moves around the planet faster, including viruses. **When the Next Big One comes**, **it will** likely **conform to the** same perverse pattern as the **1918 influenza**: high infectivity preceding notable symptoms. That will help it move through cities and airports like an angel of death.

The Next Big One is a subject that disease scientists around the world often address. The most recent big one is Aids, of which the eventual total bigness cannot even be predicted - about 30 million deaths, 34 million living people infected, and with no end in sight. Fortunately, not every virus goes **airborne** from one host to another. If HIV-1 could, you and I might already be dead. If the **rabies** virus could, it **would be the most horrific pathogen on the planet**. The influenzas are well adapted for airborne transmission, which is why a new strain can circle the world within days. The Sars virus travels this route, too, or anyway by the respiratory droplets of sneezes and coughs - hanging in the air of a hotel corridor, moving through the cabin of an aeroplane - and that capacity, combined with its case fatality rate of almost 10%, is what made it so scary in 2003 to the people who understood it best.

Human-to-human transmission is the crux. That capacity is what separates a bizarre, awful, localised, intermittent and mysterious disease (such as Ebola) from a global pandemic. Have you noticed the persistent, low-level buzz about avian influenza, the strain known as H5N1, among disease experts over the past 15 years? That's because avian flu worries them deeply, though it hasn't caused many human fatalities. Swine flu comes and goes periodically in the human population (as it came and went during 2009), sometimes causing a bad pandemic and sometimes (as in 2009) not so bad as expected; but avian flu resides in a different category of menacing possibility. It worries the flu scientists because they know that H5N1 influenza is extremely virulent in people, with a high lethality. As yet, there have been a relatively low number of cases, and it is poorly transmissible, so far, from human to human. It'll kill you if you catch it, very likely, but you're unlikely to catch it except by butchering an infected chicken. But if H5N1 mutates or reassembles itself in just the right way, if it adapts for human-to-human transmission, it could become the biggest and fastest killer disease since 1918.

It got to Egypt in 2006 and has been especially problematic for that country. As of August 2011, there were 151 confirmed cases, of which 52 were fatal. That represents more than a quarter of all the world's known human cases of bird flu since H5N1 emerged in 1997. But here's a critical fact: those unfortunate Egyptian patients all seem to have acquired the virus directly from birds. This indicates that the virus hasn't yet found an efficient way to pass from one person to another.

Two aspects of the situation are dangerous, according to biologist Robert Webster. The first is that Egypt, given its recent political upheavals, may be unable to staunch an outbreak of transmissible avian flu, if one occurs. His second concern is shared by influenza researchers and public health officials around the globe: with all that mutating, with all that contact between people and their infected birds, the virus could hit upon a genetic configuration making it highly transmissible among people.

"As long as H5N1 is out there in the world," Webster told me, "**there is the possibility of disaster**. . . There is the theoretical possibility that it can acquire the ability to transmit human-to-human." He paused. "And then God help us."

We're unique in the history of mammals. No other primate has ever weighed upon the planet to anything like the degree we do. In ecological terms, we are almost paradoxical: large-bodied and long-lived but grotesquely abundant. **We are an outbreak**.

**And here's the thing about outbreaks**: **they end**. In some cases they end after many years, in others they end rather soon. In some cases they end gradually, in others they end with a crash. In certain cases, they end and recur and end again. Populations of tent caterpillars, for example, seem to rise steeply and fall sharply on a cycle of anywhere from five to 11 years. The crash endings are dramatic, and for a long while they seemed mysterious. What could account for such sudden and recurrent collapses? One possible factor is infectious disease, and viruses in particular.

Tolerant, responsive government is the key variable in preventing and containing zoonotic disease – reverse causal

Prescott, professor of security studies at Georgetown University, former AAAS Congressional Fellow and Research Fellow at the International Institute for Strategic Studies, 2007

(Elizabeth, Global Health Governance, “The Politics of Disease: Governance and Emerging Infections,” http://blogs.shu.edu/ghg/files/2013/02/Prescott\_The-Politics-of-Disease-Governance-and-Emerging-Infections\_Spring-2007.pdf)

Infectious disease outbreaks demand a timely and proportional response. The responsibility for this action falls to those with the power to harness the processes and systems by which a society operates in order to effect the changes necessary to limit transmission of an illness. Controlling emerging and reemerging infectious diseases can require extreme actions and coordination between many national and international actors making the ability to respond a reflection of the capacity of a governing system. In the absence of good governance, opportunities are created for disease to emerge, while at the same time, an aggressive response is often hindered. Failures in governance in the face of infectious disease outbreaks can result in challenges to social cohesion, economic performance and political legitimacy. Overall, the need for coordination of actions despite a high degree of uncertainty and high costs makes curtailing infectious disease a challenge in the absence of good governance.

INTRODUCTION

According to the World Bank, “a country’s governance system comprises the full array of state institutions and the arrangements that shape the relations between the state and society. […] Public sector governance refers to the way the state acquires and exercises the authority to provide and manage public goods and services—including both public capacities and public accountabilities.”1

Many societal problems must be addressed through coordinated efforts. Populations look to those with political authority to confront these challenges and harness institutional resources in a manner proportionate to the societal burden. The nature of the efforts needed to contain and control a communicable pathogen put emerging and reemerging infectious disease (ERID) into the category that requires concerted action. Therefore, characteristics of ERIDs create unique political challenges requiring effective governance to coordinate and mount the appropriate response.

ERIDs are highly variable in their pathogenic characteristics. These difference help define the impact the disease will have on society. By looking at specific characteristics of ERIDs and taking examples from past outbreaks, this paper will examine the impact of emerging infectious disease on social cohesion, economic performance and political legitimacy. This analysis demonstrates significant implications of ERIDs beyond short-term health impacts as the spread of ERIDs expose preexisting failures of governance at the national and international level. Focusing on this link demonstrates the need for good governance by national and international authorities to best prepare for combating emerging diseases.

EMERGING AND REEMERGING INFECTIOUS DISEASES AND GOVERNANCE

An infectious disease is an illness caused by an organism that enters the body then grows and multiplies in cell, tissue or cavities of the body.2 Infectious diseases are the leading cause of death worldwide and novel pathogens continue to emerge and reemerge as the ecosystems in which they interact with human hosts evolve.3 The necessary public health response to contain an infectious pathogen depends on the nature of the agent and characteristics of disease progression. Infections can be acute – such as influenza – with the disease occurring in a short duration and being contagious for a short period of time.4 Alternatively, infectious diseases can be chronic – such as Hepatitis B and C – with a longer duration of communicability due to continual reproduction of the pathogen.5 Identification of the causative agent of an infectious illness is critical to determining how to counter the health challenge. Novel or emerging pathogens – such as SARS in China in 2003 – are often difficult to quickly identify. As many illnesses have overlapping symptoms, close examination by trained public health professionals is critical to diagnosis of re-emerging or novel pathogens. Provision of This level of public health expertise requires time and resources making ERID a difficult challenge to maintaining the health of any population.

When functioning properly, an effective public health infrastructure requires close and timely coordination between knowledgeable professionals who are able to craft and implement what is deemed an appropriate response to the identified challenge. Rarely is there perfect information about the nature of an emerging disease. Tolerance for uncertainty and trust in the aptitude of public health professionals by political authorities is critical to implementation of the recommended response. Additionally, in most cases, the actions deemed necessary to counter a growing disease epidemic can be costly and require implementation with minimal deliberation without consensus6 . These characteristics demand political dexterity that is difficult to achieve.

The response to an outbreak of infectious disease is primarily a domestic government function. Maintaining the capacity to respond to a plethora of pathogens is a costly goal for governments. Recognizing that pathogens do not respect political borders, international resources are made available to help combat infectious diseases with the aim of minimizing negative health impacts in a specific country as well as preventing further geographic spread.7 However, international organizations such as the World Health Organization (WHO) have limited ability to respond to outbreaks of infectious disease without explicit invitation by the local government where an outbreak occurs.8 As such, a government is responsible for addressing domestic public health challenges but is forced to recognize and publicly admit when capacity is insufficient and international assistance is necessary. Achieving this balance of domestic sovereignty over health issues and international responsibility to prevent further transmission is challenging and requires effective domestic governance.

For this reason, an outbreak of an ERID can be indicative of and exacerbated by ineffective governance at the national and international levels. Domestic ability to respond to an emerging pathogen requires effective information gathering and dissemination to appropriately trained individuals who are able to assess the data. Pathogens that are not commonly encountered often require broad consultation with the international health community to effectively identify. In the case of SARS, China delayed disclosure of atypical illness to the international community until the disease attracted international attention as a global problem.9 Soon after international disclosure, the global scientific community sought to understand the pathogen, engaging experts in the field of coronaviruses – mostly from animal health – critical to elucidating characteristics of the human disease.10 The absence of transparency by the Chinese government early in the SARS epidemic is attributed with fueling the global spread of disease, demonstrating the role poor transparency can play in exacerbating an infectious disease challenge.11

Dissemination of information within governments can also hinder disease response. Many ERIDs are zoonotic in origin meaning that they are passed from animals to humans, inducing disease.12 As such the appropriate response to an epidemic can require actions to control the pathogen in animals concurrent with interventions in the human population. This is demonstrated in the ongoing battle against avian influenza and has complicated the response to the human health challenge. The expansion of the virus to the bird populations forced countries to find mechanisms for collaboration between ministries of health and agriculture. The varied mandates of these ministries can make an uncomfortable fit for information sharing and concerted action. The ability to function collaboratively within governments can determine the success in responding to an ERID making effective intra-governmental interaction critical.

## 2AC

### t – restrict

The plan is a judicial restriction

Random House Dictionary 2013

(http://dictionary.reference.com/browse/judicial)

ju·di·cial [joo-dish-uhl] Show IPA

adjective

1.

pertaining to judgment in courts of justice or to the administration of justice: judicial proceedings; the judicial system.

2.

pertaining to courts of law or to judges; judiciary: judicial functions.

3.

of or pertaining to a judge; proper to the character of a judge; judgelike: judicial gravity.

4.

inclined to make or give judgments; critical; discriminating: a judicial mind.

5.

decreed, sanctioned, or enforced by a court: a judicial decision.

Restrict is

American Heritage Dictionary 2000

(http://www.thefreedictionary.com/restrict)

re·strict (r-strkt)

tr.v. re·strict·ed, re·strict·ing, re·stricts

To keep or confine within limits. See Synonyms at limit.

It’s in the plan!

Judicial interpretation of treaty authority is the same as interpreting statutory authority

Morrison, professor of law at Minnesota, 2010

(Fred L., The Protection of Foreign Investment In The United States of America+, 58 Am. J. Comp. L. 437, Lexis)

**Treaties**, **like federal law**, **are** also **part of the supreme law of the land**. A formal treaty must be ratified with the advice and consent of two-thirds of the members of the Senate. n14 A treaty has the same status as a federal law, so a subsequently enacted federal law can supersede a treaty for domestic purposes, even though the treaty may still be binding as a matter of international law. n15 A properly ratified treaty can alter previous federal law and override state law, if it is self-executing. n16 The United States also enters into other international obligations called executive agreements. These instruments are either authorized by statute, n17 by the customary practice of the Congress, n18 or are based upon specific authorities expressly granted to the President by the Constitution. n19 They have essentially the same authority in domestic law as formal treaties. n20

Some treaties and executive agreements are, however, non-self-executing and do not become part of the domestic law of the United [\*440] States. Then a federal law must be adopted to implement them. n21 Whether a treaty is self-executing depends primarily on the language of the instrument and whether it can be implemented without providing further detail. n22 Thus a treaty that provided that "each High Contracting Party will pay the full market value of property taken" would be self-executing, while one that provided that "each High Contracting Party will enact legislation that will ensure the payment of full market value of property taken" would not be. n23 Similarly, a treatythat would require implementation by a court or agency would not be self-executing **until that court or agency was identified by statute**. In recent years the U.S. Supreme Court has found several international treaties not to be self-executing.

[NOTE: RELEVANT FOOTNOTES—]

n14. U.S. Const. art 2, § 2, cl. 2.

n15. See, Restatement of the Foreign Relations Law of the United States (third) § 115 (1987) (An act of Congress supersedes an earlier rule of international law or a provision of an international agreement as law of the United States if the purpose of the act is to supersede the earlier rule or provision is clear or if the act and the earlier rule or provision cannot be fairly reconciled.).

n16. According to the Supreme Court, **a** "**self executing treaty**" **needs** "**no domestic legislation**" **to** "**give it force of law in the U**nited **S**tates." Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243, 252 (1984). Chief Justice Marshall asserted that a self-executing **treaty** "**operates of itself**, **as** : **a rule for the Court**," "**equivalent to an act of the legislature**." Foster v. Neilson, 27 U.S. 253, 314 (1829).

n17. 1. U.S.C.A. § 112b (West 2009).

n18. Dames & Moore v. Regan, 453 U.S. 654 (1981).

n19. U.S. Const. art 2, § 2.

n20. See, e.g., Dames & Moore v. Regan, 453 US 654 (1981); U.S. v. Pink, 313 U.S. 203 (1942).

n21. Restatement of the Foreign Relations Law of the United States (third) § 111 ("Courts in the United States are bound to give effect to international law and to international agreements of the United States, except that a "non-self-executing" agreement will not be given effect as law in the absence of necessary implementation.").

n22. Medellin v. Texas, 128 S.Ct. 1346 (2008) ("**The interpretation of a treaty**, **like the interpretation of a statue**, begins with its text."); (**a treaty** is "equivalent to an act of the legislature," and hence self-executing, when it "**operates of itself without the aid of any legislative provision**.") (Citing Foster v. Neilson, 27 U.S. 253, 254 (1829).).

n23. Restatement (Third) of the Foreign Relations Law of the United States § 141 ("The United States and state A make a treaty providing that each of the parties shall take all necessary action to give full faith and credit to the final judgments rendered by courts in the other. On the basis of the 'necessary and proper' clause, the Congress has the power to enact legislation requiring federal and state courts to give full faith and credit to judgments of A.").

All court affs interpret statutes or treaties or the Constitution – the neg eliminates all of them – they’re educational and explicitly guaranteed in the resolution – most predictable

It’s a restrict authority topic, not restrict detention – the core controversy is legal effects, not operational ones

Authority is an officeholder’s power to act

Merriam-Webster’s Dictionary of Law 1996

(“Authority,” Credo Reference, Georgetown University Library)

au•thor•i•ty

n, pl -ties

1

: an official decision of a court used esp. as a precedent

2

a

: **a power to act** esp. over others **that derives from status**, **position**, **or office** 〈the ~ of the president〉; also : jurisdiction

b

: **the power to act that is officially or formally granted** (**as by statute**, corporate **bylaw**, **or court order**) 〈within the scope of the treasurer's ~〉 〈police officers executing a warrant…are not required to “knock and announce” their ~ and purposes before entering — National Law Journal〉

c

: power and **capacity to act granted by someone in a position of control**; specif : **the power to act granted by a principal to his or her agent**

Tagging us with results on the ground mixes burdens – enforcement should be a solvency question – circumvention already destroys aff ground without being a voting issue

Oxford Dictionary of Politics, 3rd Edition, 2009

(“Authority,” Oxford University Press via Oxford Reference, Georgetown University Library)

authority

The right or the capacity, or both, to have proposals or prescriptions or instructions accepted without recourse to persuasion, bargaining, or force. Systems of rules, including legal systems, typically entitle particular office-bearers to make decisions or issue instructions: **such office‐bearers have authority conferred on them** by the rules and the practices which constitute the relevant activity. Umpires and referees, for example, have authority under the rules and practices constitutive of most sporting contests. Law enforcement officers are authorized to issue instructions, but they also receive the right to behave in ways which would not be acceptable in the absence of authorization: for example, to search persons or premises. **To have authority** in these ways **is to be the bearer of an office and to** be able to **point to the relation between that office and a set of rules**. **In itself**, **this says nothing about the capacity in fact of such an office‐holder to have proposals and so forth accepted without introducing persuasion**, **bargaining**, **or force**. **A referee**, for example, **may possess authority under the rules of the game**, **but in fact be challenged or ignored by the players**. A distinction is therefore drawn between de jure authority—in which a right to behave in particular ways may be appealed to—and de facto authority—in which there is practical success. A different distinction is drawn between a person who is in authority as an office‐bearer and a person who is an authority on a subject. The latter typically has special knowledge or special access to information not available to those who accept the person's status as an authority. Sometimes the two forms are found together: for example, the Speaker of the Commons possesses authority (to regulate the business of the House, under its rules of procedure), and is also an authority (on its rules of procedure). Attempts have been made to find common features between these two usages. These focus primarily on the ‘internal’ relationship between the authority‐holder and the authority‐subject, the process of recognition of the status involved, and on the willingness of the authority‐subject to adopt the judgement of the authority‐holder (instead of his or her own, or in the absence of the ability to formulate one).

Reasonability – XXXX

### security

**No impact to threat con**

Eric A. **Posner and** Adrian **Vermeule 3**, law profs at Chicago and Harvard, Accommodating Emergencies, September, <http://www.law.uchicago.edu/files/files/48.eap-av.emergency.pdf>

Against the view that panicked government officials overreact to an emergency, and unnecessarily curtail civil liberties, we suggest a more constructive theory of the role of fear. Before the emergency, government officials are complacent. They do not think clearly or vigorously about the potential threats faced by the nation. After the terrorist attack or military intervention, their complacency is replaced by fear. Fear stimulates them to action. Action may be based on good decisions or bad: fear might cause officials to exaggerate future threats, but it also might arouse them to threats that they would otherwise not perceive. **It is impossible to say in the abstract whether decisions and actions provoked by fear are likely to be better than decisions and actions made in a state of calm**. But our limited point is that there is no reason to think that the fear-inspired decisions are likely to be worse. For that reason, the existence of fear during emergencies does not support the antiaccommodation theory that the Constitution should be enforced as strictly during emergencies as during non-emergencies.

C. The Influence of Fear during Emergencies

Suppose now that the simple view of fear is correct, and that it is an unambiguously negative influence on government decisionmaking. Critics of accommodation argue that this negative influence of fear justifies skepticism about emergency policies and strict enforcement of the Constitution. However, this argument is implausible. It is doubtful that fear, so understood, has more influence on decisionmaking during emergencies than decisionmaking during non-emergencies.

The panic thesis, implicit in much scholarship though rarely discussed in detail, holds that citizens and officials respond to terrorism and war in the same way that an individual in the jungle responds to a tiger or snake. The national response to emergency, because it is a standard fear response, is characterized by the same circumvention of ordinary deliberative processes: thus, (i) the response is instinctive rather than reasoned, and thus subject to error; and (ii) the error will be biased in the direction of overreaction. While the flight reaction was a good evolutionary strategy on the savannah, in a complex modern society the flight response is not suitable and can only interfere with judgment. Its advantage—speed—has minimal value for social decisionmaking. No national emergency requires an immediate reaction—except by trained professionals who execute policies established earlier—but instead over days, months, or years people make complex judgments about the appropriate institutional response. And the asymmetrical nature of fear guarantees that people will, during a national emergency, overweight the threat and underweight other things that people value, such as civil liberties.

But if decisionmakers rarely act immediately, then the tiger story cannot bear the metaphoric weight that is placed on it. Indeed, the flight response has nothing to do with the political response to the bombing of Pearl Harbor or the attack on September 11. The people who were there—the citizens and soldiers beneath the bombs, the office workers in the World Trade Center—no doubt felt fear, and most of them probably responded in the classic way. They experienced the standard physiological effects, and (with the exception of trained soldiers and security officials) fled without stopping to think. It is also true that in the days and weeks after the attacks, many people felt fear, although not the sort that produces a irresistible urge to flee. **But this kind of fear is not the kind in which cognition shuts down**. (Some people did have more severe mental reactions and, for example, shut themselves in their houses, but these reactions were rare.) The fear is probably better described as a general anxiety or jumpiness, an anxiety that was probably shared by government officials as well as ordinary citizens.53

While, as we have noted, there is psychological research suggesting that normal cognition partly shuts down in response to an immediate threat, we are aware of no research suggesting that people who feel anxious about a non-immediate threat are incapable of thinking, or thinking properly, or systematically overweight the threat relative to other values. Indeed, it would be surprising to find research that clearly distinguished “anxious thinking” and “calm thinking,” given that anxiety is a pervasive aspect of life. People are anxious about their children; about their health; about their job prospects; about their vacation arrangements; about walking home at night. No one argues that people’s anxiety about their health causes them to take too many precautions—to get too much exercise, to diet too aggressively, to go to the doctor too frequently—and to undervalue other things like leisure. So it is hard to see why anxiety about more remote threats, from terrorists or unfriendly countries with nuclear weapons, should cause the public, or elected officials, to place more emphasis on security than is justified, and to sacrifice civil liberties.

Fear generated by immediate threats, then, causes instinctive responses that are not rational in the cognitive sense, not always desirable, and not a good basis for public policy, but it is not this kind of fear that leads to restrictions of civil liberties during wartime. The internment of Japanese Americans during World War II may have been due to racial animus, or to a mistaken assessment of the risks; it was not the direct result of panic; indeed there was a delay of weeks before the policy was seriously considered.54 Post-9/11 curtailments of civil liberties, aside from immediate detentions, came after a significant delay and much deliberation. The civil libertarians’ argument that fear produces bad policy trades on the ambiguity of the word “panic,” which refers both to real fear that undermines rationality, and to collectively harmful outcomes that are driven by rational decisions, such as a bank run, where it is rational for all depositors to withdraw funds if they believe that enough other depositors are withdrawing funds. Once we eliminate the false concern about fear, it becomes clear that the panic thesis is indistinguishable from the argument that during an emergency people are likely to make mistakes. But if the only concern is that during emergencies people make mistakes, there would be no reason for demanding that the constitution be enforced normally during emergencies. Political errors occur during emergencies and nonemergencies, but the stakes are higher during emergencies, and that is the conventional reason why constitutional constraints should be relaxed.

Even if security and risk calculation are flawed, engaging in them creates discourse of social welfare and promotes a democratic civic culture that checks political exclusion and loss of value to life

Loader – Criminology Prof at Oxford – 7

(Civilizing Security, Pg. 5)

Faced with such inhospitable conditions, one can easily lapse into fatalistic despair, letting events simply come as they will, or else seek refuge in the consolations offered by the total critique of securitization practices – a path that some critical scholars in criminology and security studies have found all too seductive (e.g. Bigo 2002, 2006; Walters 2003). Or one can, as we have done, supplement social criticism with the hard, uphill, necessarily painstaking work of seeking to specify what it may mean for citizens to live together securely with risk; to think about the social and political arrangements capable of making this possibility more rather than less likely, and to do what one can to nurture practices of collective security shaped not by fugitive market power or by the unfettered actors of (un)civil society, but by an inclusive, democratic politics. Social analysts of crime and security have become highly attuned to, and warned repeatedly of, the illiberal, exclusionary effects of the association between security and political community (Dillon 1996; Hughes 2007). They have not, it should be said, done so without cause, for reasons we set out at some length as the book unfolds. But this sharp sensitivity to the risks of thinking about security through a communitarian lens has itself come at a price, namely, that of failing to address and theorize fully the virtues and social benefits that can flow from members of a political community being able to put and pursue security in common. This, it seems to us, is a failure to heed the implications of the stake that all citizens have in security; to appreciate the closer alignment of self-interest and altruism that can attend the acknowledgement that we are forced to live, as Kant put it, inescapably side-by-side and that individuals simultaneously constitute and threaten one another’s security; and to register the security-enhancing significance and value of the affective bonds of trust and abstract solidarity that political communities depend upon, express and sustain. All this, we think, offers reasons to believe that security offers a conduit, perhaps the best conduit there is, for giving practical meaning to the idea of the public good, for reinventing social democratic politics, even for renewing the activity of politics at all.

### congress cp

Only self-execution solves – the CP is unenforceable under current doctrine

Friedman, 5

(JD-University of Florida Law, “The Uneasy US Relationship with Human Rights Treaties: The Constitutional Treaty System and Non-Self-Execution Declarations,” 17 Fla. J. Int'l L. 187, March, Lexis)

VI. Conclusion and Suggestions for the Future The U.S. policy on human rights treaties **threatens to undermine over fifty years of effort to establish international human rights standards as international law**. n446 It is essential that the United States **regain and maintain its position as a leader in international human rights and an example for other nations**. But that cannot happen until the United States **starts taking seriously its international obligations under human rights treaties.** Demonstrating respect for international human rights law - and the instruments and organizations that create it - requires that the United States stop using nonself-execution declarations, n447 **mitigate the effects of** [\*256] **nonself-execution declarations already made**, n448 ratify more of the major human rights treaties, n449 **and start complying with its treaty obligations**. But **ratification alone does nothing to advance the nation's standing in the global arena unless the U**nited **S**tates **is prepared to take on real obligations** under those treaties. n450 Ratification of multilateral human rights treaties is important for many reasons. n451 But if and when the treaty-makers ratify future human rights treaties, "they should either agree on implementing legislation to fulfill the requirements of the treaty or agree that the treaty will be self- executing." n452 If neither of those options is feasible, it would be wiser to **refrain entirely from ratification than to ratify the treaties with nonself- execution declarations.** n453 Not only are there significant constitutional arguments against the declarations, n454 but their use shows more disrespect than does non-ratification for international human rights efforts and for other nations. The United States must **stop perpetuating the double standard of international human rights**. n455 The United States seeks to gain access to the [\*258] institutions of international human rights law and to influence other nations and to impose obligations on them, but refuses to accept any obligations to effect changes in its own law. n456 The United States should either commit to the terms of human rights treaties or refrain from ratifying them at all. The treaty-makers should not ratify any more human rights treaties until they are prepared to make real, **concrete, and unqualified commitments to the terms** of those treaties.

Non-ratification better than ratifying without judicial enforcement

Friedman, 5

(JD-University of Florida Law, “The Uneasy US Relationship with Human Rights Treaties: The Constitutional Treaty System and Non-Self-Execution Declarations,” 17 Fla. J. Int'l L. 187, March, Lexis)

The body of international law that governs the rights of individuals, rather than states, began its development at the end of the Second World War. n1 Until that time, international law dealt exclusively with relationships between nations and left each nation's treatment of its citizens to that nation's government. However, at the end of the Second World War, the punishment of war criminals at Nuremberg and Tokyo and the desire to prevent the recurrence of such crimes against humanity drastically changed the status of individuals under international law. n2 For the first time, individuals gained important rights under international law and, to some extent, the means for vindication of those rights on the international plane. n3 Beginning in 1945 with the U.N. Charter, n4 nations themselves began to develop international human rights law by concluding multilateral treaties. The Universal Declaration of Human Rights, a U.N. General Assembly resolution, came shortly thereafter. n5 To date, there are seven major [\*190] multilateral human rights treaties: the International Covenant on Civil and Political Rights; n6 the International Covenant on Economic, Social, and Cultural Rights; n7 the Convention on the Prevention and Punishment of the Crime of Genocide; n8 the International Convention on the Elimination of All Forms of Racial Discrimination; n9 the Convention on the Elimination of All Forms of Discrimination Against Women; n10 the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment; n11 and the Convention on the Rights of the Child. n12 The United States played a major role in developing the international human rights system and the treaties that comprise it. n13 However, the United States has ratified only four of the major human rights treaties, and [\*191] only did so after considerable delay. n14 Moreover, the United States has declared the treaties it has ratified to have no legal effect as domestic law. n15 Other nations have widely criticized the United States for its failure to ratify international human rights treaties and for its ineffective enforcement of the few treaties it has ratified. n16 This Note recognizes that there are important foreign policy reasons for ratifying human rights treaties, and argues that the practice of declaring those treaties to have no domestic legal effect dramatically undercuts the reasons for their ratification. Part II discusses the important constitutional principles that underlie U.S. treaty law and policy. n17 Part III explores the history of multilateral human rights treaties in the United States, including the constitutional, political, and policy considerations that influence the U.S. attitudes toward human rights treaties. n18 Part III also examines the proposed Bricker Amendment, a 1953 attempt to curtail U.S. participation in international human rights agreements. n19 Finally, Part III details the current U.S. practice of occasionally ratifying human rights treaties but attaching reservations, understandings, and declarations that rob these treaties of any real domestic effect. n20 Part IV discusses the substance of the major multilateral human rights treaties and their status in the United States. n21 Part V critically analyzes the practice of declaring human rights treaties to have no domestic legal effect, and explores arguments for and against the practice. n22 Part V also examines the international implications of that practice, most fundamentally, the promotion of an international human rights double standard. n23 In Part VI, the Note concludes with the assertion that U.S. ratification practices do more harm than good to the international human rights regime, and suggests that the United States should not ratify any more human rights treaties until it is prepared to make real commitments to the terms of those treaties. n24

Only link is Medellin – that’s not us

Gruber, 11

(Law Prof-University of Colorado, “An Unintended Casualty of the War on Terror,” 27 Ga. St. U.L. Rev. 299)

IV. Walking through the Door in Medellin v. Texas

Medellin is the Supreme Court's "first case ever to deny relief solely on the ground that the treaty relied upon was non-self-executing." n135 Medellin is the ultimate in a series of cases involving the United States' violation of foreign nationals' rights under the Vienna Convention on Consular Relations (Vienna Convention). n136 The Vienna Convention, to which the United States is a party, guarantees foreign nationals arrested in signatory countries the right to meet with consular officials. n137 The petitioner Medellin, a Mexican national, was arrested for murder in Texas. State officials did not afford Medellin the opportunity to confer with Mexican consular officials, and a Texas jury eventually convicted and sentenced him to death. n138 Medellin raised the issue of Texas's violation of the Vienna Convention in his state habeas corpus appeal. The state court dismissed the habeas appeal on procedural default grounds because Medellin had not raised the Vienna Convention issue in a timely manner during trial or direct appeal. n139 The United States Supreme Court had first ruled on the procedural default question in the 1998 case Breard v. Greene, holding that habeas petitioners' Vienna Convention claims are subject to the Antiterrorism and Effective Death Penalty Act's (AEDPA) procedural rules, just like all other habeas claims. The per curiam opinion contains language tending to indicate that the authors considered the Vienna Convention to confer enforceable rights. It states: [\*325] [A]lthough treaties are recognized by our Constitution as the supreme law of the land, that status is no less true of provisions of the Constitution itself, to which rules of procedural default apply . . . . The Vienna Convention-which arguably confers on an individual the right to consular assistance following arrest-has continuously been in effect since 1969. But in 1996, before Breard filed his habeas petition raising claims under the Vienna Convention, Congress enacted the Antiterrorism and Effective Death Penalty Act . . . . Breard's ability to obtain relief based on violations of the Vienna Convention is subject to this subsequently enacted rule, just as any claim arising under the United States Constitution would be. n140 After Breard, the International Court of Justice ("ICJ") ruled in two separate cases, the 2001 LaGrand Case (involving a German national) n141 and 2004 Case Concerning Avena and Other Mexican Nationals (Avena), n142 that subjecting the Vienna Convention's requirements to AEDPA's procedural default rules violates the terms of the Convention. In Avena, the ICJ ordered the United States to conduct special hearings to determine whether the named Mexican nationals had been prejudiced by the Vienna Convention violation. n143 After Avena, President Bush issued a memorandum that the United States "[would] discharge its international obligations" under Avena "by having State courts give effect to the decision." n144 In 2006, the Court in Sanchez-Llamas v. Oregon re-affirmed Breard's procedural default holding in the face of the contrary ICJ decisions. n145 The Court asserted that it would give the ICJ opinions no more deference than "respectful consideration," which did not [\*326] compel a reversal of Breard. n146 The political landscape and composition of the Court, which was now in the midst of sorting through the war on terror debate, n147 had changed considerably since 1998. Chief Justice Roberts's opinion for the Court evidences much more caution on the issue of treaty enforceability. The opinion notes that the government "strongly dispute[s]" that the Vienna Convention is self-executing and emphasizes the government's position that treaties are presumptively non-self executing. n148 Tellingly, the Court repeats the government's selective quotation of an 1884 Supreme Court decision, Head Money Cases, for the proposition that a treaty "is primarily a compact between independent nations" and "depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it." n149 The Court does not mention other language from the case, often ignored by treaty exceptionalists, which states that a treaty may "prescribe a rule by which the rights of the private citizen or subject may be determined," and a "court resorts to the treaty for a rule of decision for the case before it as it would to a statute." n150 Medellin's case was not rendered moot by the holding in Sanchez-Llamas, because unlike the defendants in that case, he was one of the individuals named in Avena. As a consequence, his argument was not about Supreme Court deference to ICJ interpretation of the Vienna Convention, but was about whether state officials were obligated to give effect to the ICJ judgment and grant the named individuals hearings. n151 Medellin advanced two arguments in favor of enforcement: (1) Texas had an obligation to comply with treaties that require the United States to implement ICJ judgments; and (2) Texas [\*327] had an obligation to comply with the President's memorandum. n152 Of concern here is the Court's analysis of Medellin's first claim. Chief Justice Roberts once again wrote the opinion of the Court, and noted as a threshold matter that Texas would have to comply with the judgment if Avena constituted "binding federal law" that could be invoked as a source of substantive rights. n153 The United States is a signatory to two conventions that bear on the question of the force of the Avena ruling. The Optional Protocol to the Vienna Convention (Optional Protocol) provides that disputes regarding Convention interpretation fall under the "compulsory jurisdiction" of the ICJ. n154 The United Nations Charter requires signatory nations to "undertake[] to comply" with ICJ rulings. n155 The Court found that neither of these agreements required Texas to comply with Avena. n156 The Court's analysis begins with the division between domestically enforceable self-executing treaties and unenforceable non-self-executing treaties. n157 Again, such a division is acceptable to internationalists so long as non-self-executing treaties are confined to those that do not create individual rights or expressly forbid private lawsuits. Justice Roberts's version of the division, however, seems to be an exceptionalist one, for he quickly forays into the land of presumptions against enforceability. As was foreshadowed by Sanchez- Llamas, he begins with the selected quote from the Head Money Cases, adding "of course" a treaty is "primarily a compact between independent nations." n158 Roberts, however, does include the language from Head Money Cases that self-executing treaties "have the force and effect of a legislative enactment." n159 It is, therefore, not entirely clear from this language whether the Court endorses the view [\*328] that treaties are presumptively non-self-executing and what the formula is for overcoming such a presumption. In a footnote, the Court makes this curious statement: "Even when treaties are self-executing in the sense that they create federal law, the background presumption is that '[i]nternational agreements, even those directly benefiting private persons, generally do not create private rights or provide for a private cause of action in domestic courts.'" n160 The Court thus indicates that, in order to be enforced, treaties must pass two separate hurdles: n161 (1) they must meet a self-execution test (whatever that may be); and (2) they must contain "express language" that private individuals can sue to remedy violations. n162 However, the Court does not apply the express private right of action requirement it apparently endorses. The Court could have disposed of Medellin's claim simply by saying that neither of the treaties involved specified that individuals have a right to sue in national courts to force compliance with ICJ decisions. Instead, the Court's limited discussions of standing invoke the statutory structure of the ICJ and U.N. Charter language, rather than the absence of express right-to-sue provisions. One argument asserts the ICJ statute expressly prohibits non-parties (the technical parties to Avena were the U.S. and Mexico) from seeking to enforce judgments. n163 The other posits that the U.N. Charter's "sole remedy" for a breach is U.N. Security Council action. n164 Of course, there are strong objections to the contention that whenever a treaty specifies an international remedy it means to forbid domestic enforcement. n165 [\*329] Nevertheless, the Court stops far short of applying the express private right of action rule it appears to support. Turning back to self-execution, the Court indicates that the self-execution inquiry is separate from the private right of action query. The question thus becomes exactly what constitutes Medellin's test for self-execution. The major ambiguity in Medellin, and thus its saving grace for internationalists, is its failure to distinguish between two concepts of unenforceability: (1) the idea that a treaty is non-self-executing if, by it terms, it does not create any justiciable rights or obligations; and (2) the concept that a treaty is non-self-executing even if it does create concrete rights or obligations but does not contain language indicating that the drafters intended "domestic effect." n166 The majority opinion contains some language tending to endorse the second view. It states, "[W]e have held treaties to be self-executing when the textual provisions indicate that the President and Senate intended for the agreement to have domestic effect." n167 Similar to its standing analysis, however, the Court does not apply the intent test it seems to support and instead focuses on demonstrating that the Optional Protocol and U.N. Charter substantively do not require the U.S. to implement the Avena ruling. The case would have been much worse for internationalists had the Court found that the Optional Protocol and U.N. Charter provisions clearly obligated the U.S. (and Texas) to comply immediately with the ICJ judgment, but Medellin could not sue to enforce the obligation because U.S. treaty makers had not intended the provisions to be domestically enforceable. n168 Instead, what the Medellin majority [\*330] did was interpret the scope of the substantive obligations contained within the Optional Protocol and U.N. Charter. The Court held that the Optional Protocol's directive that parties "submit" to the "compulsory" authority of the ICJ only requires signatories to send cases to the ICJ and appear for hearings, but it does not require actual compliance with ICJ judgments. n169 Regarding the U.N. Charter, the Court opined that "undertake[] to comply" only signifies that parties like the United States "pledged" their "faith" to one day create legal structures to enforce ICJ judgments. n170 In essence, Justice Roberts makes the same questionable interpretive move as the Foster Court did when interpreting the Spanish treaty. The Medellin majority's analysis renders the U.N. Charter language on ICJ judgments basically meaningless because it does not actually bind the signatories to comply with ICJ judgments. n171 Questionable as the interpretive analysis may be, it does not simply discard the treaty provisions because there is no language on self-execution. However, at the tail end of the opinion, the Court again shifts into exceptionalist mode and concludes that "while the ICJ's judgment in Avena creates an international law obligation on the part of the United States, it does not of its own force constitute binding federal law." n172 Yet given its interpretive analysis, it is hard to understand exactly what international obligation the United States has, since "undertak[ing] to comply" does not mean compliance. n173 The bottom line is that, despite catch phrases to the contrary, the Court resolves Medellin's claims for relief on the ground that the Optional Protocol and U.N. Charter simply do not create the substantive duties Medellin claimed. Thus, despite any disagreement with Roberts's [\*331] interpretation of treaty text, n174 an internationalist might see an optimistic aspect of the Court's self-execution analysis. n175 Medellin leaves some room to argue that what the Court meant by non-self-executing is simply that the treaty at issue does not create rights and obligations. n176 Perhaps, the argument can still be made that a treaty that clearly grants individuals rights, like the Geneva Conventions, is by its very nature self-executing. n177

### inform cp

Articles 3 and 75 of Geneva are already enforced via citation – should’ve trigger the NB

Tony Ginsburg et al\* 9, law prof at Chicago, “brief of international law experts as amici curiae in support of petitioners”, <http://www.americanbar.org/content/dam/aba/publishing/preview/publiced_preview_briefs_pdfs_09_10_08_1234_PetitionerAmCuIntlLawExperts.authcheckdam.pdf>

\*Ryan Goodman is Anne and Joel Ehrenkranz Professor of Law Professor of Politics and Sociology and Co-Chair of the Center for Human Rights and Global Justice at NYU School of Law. Oona Hathaway is Gerard C. and Bernice Latrobe Smith Professor of International Law at Yale Law School. Jennifer Martinez is Professor of Law and Justin M. Roach, Jr. Faculty Scholar at Stanford Law School. Steven R. Ratner is Bruno Simma Collegiate Professor of Law at the University of Michigan Law School. Kal Raustiala is Professor at UCLA School of Law and UCLA International Institute and Director of the UCLA Ronald W. Burkle Center for International Relations. Beth Van Schaack is Associate Professor of Law at Santa Clara University School of Law and a Visiting Scholar with the Center on Democracy, Development & The Rule of Law at Stanford University. David Scheffer is Mayer Brown/Robert A. Helman Professor of Law at Northwestern University School of Law and Director of the Center for International Human Rights. James Silk is Clinical Professor of Law at Yale Law School, where he directs the Allard K. Lowenstein International Human Rights Clinic. He is also executive director of the Law School’s Orville H. Schell, Jr. Center for International Human Rights. David Sloss is Professor of Law and Director of the Center for Global Law and Policy at Santa Clara University School of Law.

The law of war creates an independent legal obligation that the District Court be permitted to order Petitioners’ release. The law of war does not displace the obligations under the Covenant outlined above, but creates an additional international legal obligation on the United States to permit the District Court to order Petitioners’ release.10 **Common Article 3 of the Geneva Conventions, which the United States has ratified, requires that detainees be treated humanely**. **This principle** is appropriately interpreted in light of recognized customary international law that **requires the release of detainees when the reason for their detention has ceased**. In the case at hand, the District Court must have the authority to order the release of Petitioners, whose detention is unlawful and who pose no threat to the United States.

Article 3 of the Geneva Conventions – often called Common Article 3 because it appears in all four of the Geneva Conventions – requires that all persons taking no active part in the hostilities, including detainees, be “treated humanely.” Common Article 3, supra. In Hamdan v. Rumsfeld, 548 U.S. 557, 630 (2006), the Supreme Court held that Common Article 3 is legally binding on the United States and enforceable in U.S. courts.11 Common Article 3 provides that in a “conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum,” certain provisions. Common Article 3, supra. Among these provisions is the requirement that “[p]ersons taking no active part in the hostilities, including . . . those placed hors de combat by . . . detention . . . shall in all circumstances be treated humanely.” Id. (second emphasis added).

The obligation that detained civilians be “treated humanely” must be read in light of Article 75 of Protocol I to the Geneva Conventions, see Article 75, supra. Article 75, which is “indisputably part of the customary international law,” 548 U.S. at 634 (plurality opinion),12 provides that all detainees held in connection with armed conflict “shall be released with the minimum delay possible and in any event as soon as the circumstances justifying the arrest, detention or internment have ceased to exist.” Article 75, supra, § 3 (emphasis added).13

Although the United States has not ratified Protocol I, the Protocol’s status as customary international law renders it an appropriate interpretive tool for the Court. See Hamdan, 548 U.S. at 633 (plurality opinion) (noting that Common Article 3 “must be understood to incorporate at least the barest of those trial protections that have been recognized by customary international law,” many of which are “described in Article 75 of Protocol I”). Under Article 75, civilians initially detained because they were thought to pose a security risk must be released as soon as it is clear that they pose no such risk. This reading of Common Article 3 in light of Article 75 is consistent with the conclusions of a 2005 study on Customary International Humanitarian Law by the International Committee of the Red Cross, which concludes that as a matter of treaty law, “arbitrary deprivation of liberty is not compatible” with humane treatment under Common Article 3. See Int’l Comm. Red Cross, I Customary International Humanitarian Law 344 (Jean-Marie Henckaerts & Louise DoswaldBeck eds., 2007).

State Department Legal Advisers have repeatedly stated that the fundamental guarantees expressed in Article 75 are part of the law of war.14

While serving as Legal Adviser to President George W. Bush, William H. Taft, IV wrote that the “customary law notion of fundamental guarantees found more expansive expression in Article 75 of Additional Protocol I to the Geneva Conventions” and that the United States “does regard the provisions of Article 75 as an articulation of safeguards to which all persons in the hands of an enemy are entitled.” William H. Taft, IV, The Law of Armed Conflict After 9/11: Some Salient Features, 28 Yale J. Int’l L. 319, 321-22 (2003). His successor, John Bellinger, argued for a public statement recognizing Article 75 as customary international law binding on the United States, noting in the process that U.S. practice conforms to Article 75. See Letter from John B. Bellinger, III, Legal Adviser, Dep’t of State, to William J. Haynes, II, Gen. Counsel, Dep’t of Def. (Jan. 16, 2008) (on file with the Yale Law School Library). These Legal Advisers were reaffirming a position declared more than two decades ago under then-Deputy Legal Adviser Michael Matheson. See Michael J. Matheson, The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions, 2 Am. U. J. Int’l L. & Pol’y 419, 427 (1987) (“We support in particular the fundamental guarantees contained in article 75. . . .”). It is therefore appropriate to interpret the binding legal obligations on the United States under Common Article 3 in light of Article 75’s obligation to release detainees as soon as the reason for their detention has ceased.

The United States’ obligation under Common Article 3 to ensure the courts have the authority to order release of detainees when there is no lawful basis for detention **can be enforced by this Court through the habeas statute**. Section 2241 expressly provides that habeas relief is available where detention is contrary to U.S. treaty obligations. 28 U.S.C. § 2241(c)(3) (2006) (noting that writ extends to prisoners held “in custody in violation of the Constitution or laws or treaties of the United States”); see Mali v. Keeper of the Common Jail, 120 U.S. 1, 17 (1887) (holding that because a “treaty is part of the supreme law of the United States,” the power to issue writs of habeas corpus applies to prisoners held in violation of treaties). **At a minimum, Common Article 3 should be used to interpret the domestic habeas corpus statute**. See Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804).

And, the plan doesn’t actually result in a substantive alteration of war on terror detention – lower courts will distinguish

Joanna Wasik 12, J.D. from Georgetown, When, and To Where? Leaving Guantanamo after Habeas, Release, or Transfer, May 1, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2167718>

The principles embodied in the Geneva Conventions are an incomplete tool for creating a framework for detainees cleared for release, approved for transfer, and granted habeas. The Conventions are largely silent on the provisions for repatriation in NIAC. Additionally, as John Bellinger points out. the traditional assumptions about return of POWs in IAC or NIAC break down when issues of release arise during hostilities on the basis of an ongoing periodic review process as well as ongoing habeas litigation. The fact that the U.S. detains individuals from countries with which it is not at war also poses a challenge for traditional assumptions under the Conventions. As Bellinger explained.

One of the most difficult challenges that we faced in the State Department was determining where to transfer detainees whom the Defense Department had decided to release in the conflict with Al Qaeda. These sorts of issues arise rarely in international armed conflict, in which it is assumed lawful combatants will be returned to their country of nationality, in whose armed forces they had been serving. It is also not a problem in internal conflicts, in which those detained by the state are nationals of that same state. By contrast, at Guantanamo alone, the United States detained individuals from more than forty countries.105

A thorny legal issue also arises regarding civilian-combatant status: **are the detainees at Guantanamo "civilians" or "POWs**"106 **once they have been cleared for release, granted habeas, or approved for transfer**? Applying the Conventions to detainees that have been granted habeas by a federal court seems the most straightforward. By granting habeas, federal courts conclude that detention is unlawful wider the AUMF as informed by IHL.107 Under IHL. these detainees ¥ seem akin to citizens, not POWs. Because they are being held due to diplomatic friction and not for security imperatives, their detention is illegal. **Despite this conclusion**, however, **the Conventions spell out no process for the detainees to challenge their ongoing detention**.

For the detainees that have been approved for transfer, **application of the Conventions is** more **difficult**. Some detainees have been cleared for transfer because, although the U.S. has enough evidence to justify their continued detention wider the laws of war. it has otherwise decided to transfer them if appropriate security assurances are obtained.108 If the transfer provisions applicable to POWs in IAC were followed, the U.S. would only have to ensure that the receiving country abide by the Conventions, and take back the detainees if they did not. If the IAC release provisions were followed, the detainees may have a "right of free choice" to decide their destination of repatriation under Article 118. But has such a right truly crystallized? And how should it be procedurally enforced?

Moreover, because U.S. federal courts do not have the power to hear habeas petitions of detainees that have been administratively cleared for transfer.109 it is at least possible that some of these detainees would be granted habeas if given a chance to bring then case in court, thus calling into question their status as proper POWs. hi addition, at least one detainee was cleared for release by the Bush administration due to lack of sufficient evidence to continue his detention.110 However, the Obama administration asserts that all detainees at Guantanamo are being held pursuant to the laws of war.111 even though this one detainee remains at Guantanamo. What classification should be accorded to this detainee and possible others, whose change in status between administrations calls into question the basis for their detention?

Lastly, though Common Article 3 speaks to humane treatment and a prohibition on torture and degrading treatment in LAC and XIAC. it does not spell out the process that should be used to assess detainees' fears of irreparable harm. In short, the legal framework of the laws of war is ill suited to addressing the difficulties faced by detainees that are approved for transfer. cleared for release, or granted habeas. Its applicable principles are an imperfect fit with regards to the detainees at issue, and lack specificity and guidance regarding procedure.

### word pic

Legally wrong—not prisoners---means the CP doesn’t solve and is more confusing

Sullivan, 13

(NYT Ombuds, 4/12, ‘Targeted Killing,’ ‘Detainee’ and ‘Torture’: Why Language Choice Matters, http://publiceditor.blogs.nytimes.com/2013/04/12/targeted-killing-detainee-and-torture-why-language-choice-matters/)

And Gene Krzyzynski, a veteran copy editor at The Buffalo News and a longtime New York Times reader, objected to the continued use of the term “detainee” to describe suspected terrorists who are being held indefinitely at the United States naval base at Guantánamo Bay, calling it “accepting political spin at face value.” Mr. Krzyzynski wrote: To “detain” connotes brevity, as in, say, a traveler detained at a border or an airport for further Immigration, Customs, T.S.A. or similar questioning-searching-processing. I’d go as far as to call it language abuse in the context of Gitmo, especially for anyone who has a healthy respect for plain, clear English or who remembers “detention” in high school. “Prisoner” and its variants would be accurate, of course, given the unusually long time behind bars or in cages (historically unprecedented, actually, for any P.O.W.’s, if one accepts that we’re in a “war,” albeit undeclared by Congress). Seven years ago, the Pulitzer Prize-winning cartoonist Steve Breen of The San Diego Union-Tribune came up with what’s probably the most precise term of all: “infinitee.” I asked Mr. Shane, a national security reporter in the Washington bureau, and Philip B. Corbett, the associate managing editor for standards, to respond to some of these issues. Mr. Shane addressed Mr. Gort’s question on “targeted killings,” noting that editors and reporters have discussed it repeatedly. He wrote: “Assassination” is banned by executive order, but for decades that has been interpreted by successive administrations as prohibiting the killing of political figures, not suspected terrorists. Certainly most of those killed are not political figures, though arguably some might be. Were we to use “assassination” routinely about drone shots, it would suggest that the administration is deliberately violating the executive order, which is not the case. This administration, like others, just doesn’t think the executive order applies. (The same issue arose when Ronald Reagan bombed Libya, and Bill Clinton fired cruise missiles at Sudan and Afghanistan.) “Murder,” of course, is a specific crime described in United States law with a bunch of elements, including illegality, so it would certainly not be straight news reporting to say President Obama was “murdering” people. This leaves “targeted killing,” which I think is far from a euphemism. It denotes exactly what’s happening: American drone operators aim at people on the ground and fire missiles at them. I think it’s a pretty good term for what’s happening, if a bit clinical. Mr. Shane added that he had only one serious qualm about the term. That, he said, was expressed by an administration official: “It’s not the targeted killings I object to — it’s the untargeted killings.” The official “was talking about so-called ‘signature strikes’ that target suspected militants based on their appearance, location, weapons and so on, not their identities, which are unknown; and also about mistaken strikes that kill civilians.” On the matter of “detainee,” Mr. Corbett called it “a legitimate concern” and agreed that the term might not be ideal. **He said that it, not prisoner, was used because those being held “are in such an unusual situation – they are not serving a prison term, they are in an unusual status of limbo.”**

#### Its legally distinct in ILaw—key to ruling clarity

Hakimi, 9

(JD-University of Michgian, http://repository.law.umich.edu/cgi/viewcontent.cgi?article=1123&context=articles)

In the parlance of the Geneva Conventions, the term "detention" has penal connotations. The Conventions use the term "internment" to refer to non-penal deprivations of liberty. See, e.g., Horst Fischer, Protection of Prisoners of War, in THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS 321, 326 (Dieter Fleck ed., 1995).

### treaty da

Can’t ratify human rights treaties in current climate

Economist, 10/6

“Why won't America ratify the UN convention on children's rights?”

<http://www.economist.com/blogs/economist-explains/2013/10/economist-explains-2>

The treaty was adopted by the UN General Assembly in 1989 and became one of the most rapidly and widely adopted human-rights pacts. It sets standards for education, health care, social services and penal laws, and establishes the right of children to have a say in decisions that affect them. America signed it in 1995 but never ratified it. (By signing a treaty a country endorses its principles; ratification means committing to be legally bound by it.) **The bar for treaty ratification is set high in America: the president must send treaties to the Senate, where they require approval by a two-thirds majority, the same standard required to amend the Constitution. The child-rights convention has never made it to a vote.** Although Presidents Clinton and Obama have supported ratification, opposition by Republicans in the Senate has made it clear that the treaty would not pass. Opponents of the treaty say it would usurp American sovereignty, a long-standing fear about the UN among some conservative Republicans.

Distinguishing human rights treaties solves US credibility while avoiding the DA’s

Goldman, 5

(JD & LLM-Duke Law, “Of Treaties and Torture: How the Supreme Court Can Restrain the Executive,” 55 Duke L.J. 609, December, Lexis)

Part II begins with a discussion of the function and interpretation of treaties under U.S. law and argues that human rights treaties should be categorically distinguished from those dealing with other subjects. It then argues that equating human rights with constitutional rights is both appropriate and **necessary if human rights treaties are to achieve their full potential**. Part III suggests a limit for the executive's treaty interpretation power and specifically demonstrates that executive power to terminate treaties unilaterally does not extend to human rights treaties. Part III then argues that **recognizing human rights treaties as a distinct category** offers the judiciary a way to restrain the executive **without running afoul of the political question doctrine**. I. International Law, Peremptory Norms, and Torture This Part examines the relationship between international law, peremptory norms, and torture. Section A describes the history of U.S. courts' recognition of international law and the Supreme Court's understanding of the relationship between domestic and international law. Section B defines jus cogens (peremptory) norms and their place in the international law hierarchy and establishes torture as a jus cogens norm. A. Recognition of International Law by U.S. Courts International law "consists of rules and principles of general application dealing with the conduct of states and of international organizations and with their relations ... [including] some of their relations with persons." n11 These rules are derived from treaties, customs, and principles common to major world legal systems. n12 This definition, however, does not explain how U.S. courts have traditionally treated international law in general, and customary international law and jus cogens specifically. This Section briefly describes U.S. jurisprudence regarding international law. [\*613] The Framers assumed that the American government would be based on a common law legal system similar to England's. n13 According to Professor Michael Glennon, because the English law embraced principles of both natural and international law, the Framers intended that the U.S. legal system would embrace these same principles. n14 Courts have generally reached a similar conclusion. An early case supporting this contention is The Paquete Habana, n15 which dealt with whether fishing boats caught during the Spanish-American War should be exempt from capture as a prize of war. n16 Speaking for a six-Justice majority of the Supreme Court, Justice Gray first noted that "by an ancient usage among civilized nations, beginning centuries ago, and gradually ripening into a rule of international law," boats captured in the course of fishing were exempt from capture. n17 After a comprehensive review of the rule's history, including a review of English and French law, Justice Gray declared that this rule "has been familiar to the United States from the time of the War of Independence." n18 Recounting adherence to the rule in the "modern" era n19 (including by Japan, described as "the last State admitted into the rank of civilized nations"), Justice Gray wrote: International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction ... . For this purpose, where 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 ... not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is. n20 [\*614] Concluding that a court n21 "administering the law of nations" must, in the absence of a treaty on the same subject, judicially discern and apply international law, the court found in favor of the ship owners. n22 Interestingly, the dissent in The Paquete Habana did not deny the existence of the international rule cited by the majority. Instead, it disputed the force of the rule, downgrading it from a law to a mere matter of comity between nations, "an act of grace, and not a matter of right." n23 The dissent, however, misconstrued the Court's earlier opinion in Brown v. United States, n24 on which it relied. n25 Contrary to the dissent's reading, in Brown, which dealt with confiscation of enemy property during the War of 1812, Chief Justice Marshall questioned only the legitimacy and implications of a specific rule of international law, but did not deny the persuasive authority of international law in general. n26 In fact, the Chief Justice did not abandon the notion of international law's persuasive authority on U.S. courts at all. Earlier in the Brown opinion, he cited international law for the proposition that "tangible property belonging to an enemy and found in the country at the commencement of war, ought not to be immediately confiscated." n27 Marshall also warned the Court against interpreting the Constitution to permit what would be generally prohibited under international law. n28 More than one hundred years later, U.S. courts are still citing The Paquete Habana. For example, a federal district court recently cited the case when holding that the court could "not ignore the [\*615] precepts of customary international law." n29 Indeed, even the conservative Rehnquist Court acknowledged that "the domestic law of the United States recognizes the law of nations." n30 The next Section of this Note turns to the concept of jus cogens norms - norms considered to be uniformly binding under international law - and demonstrates that torture has achieved jus cogens status. B. Jus Cogens Norms and Torture Certain norms under international law are deemed to be jus cogens, or "compelling law which is binding on parties regardless of their will and [that does] not yield to other laws." n31 As such, jus cogens norms should be, and usually are, accorded greater protection than other rights. A norm cannot be jus cogens unless both the principle and its universal, binding character are accepted by the international community. n32 Although there is some disagreement at the margins, prohibitions on genocide, slavery, and apartheid are generally conceded to be examples of jus cogens norms. n33 Torture is recognized as such a jus cogens norm under both international and U.S. domestic law. n34 Torture is prohibited in all major legal systems and by almost all international human rights instruments. n35 [\*616] Domestically, the U.S. Senate acknowledged that torture is prohibited under international law when it gave its advice and consent to ratifying the Convention Against Torture. n36 The Senate Committee on Foreign Relations described the Convention as a codification of international law and indicated that "ratification ... [would] demonstrate clearly and unequivocally U.S. opposition to torture." n37 The Committee believed ratification was "consistent with long-standing U.S. efforts to promote and protect basic human rights and fundamental freedoms throughout the world." n38 The Committee's comments also suggested that regardless of torture's peremptory-norm status at the time of the hearing, most of the obligations the United States assumed when acceding to the Convention were "already covered by existing law." n39 At the Senate hearing, substantial evidence was presented that the Convention Against Torture recognized, rather than created, international law. For example, Judge Abraham D. Sofaer indicated that "international law already condemns torture[, and i]n that sense, the Convention breaks little new ground." n40 Testimony before the Committee also acknowledged that the United States was the only permanent member of the U.N. Security Council not to have ratified the Convention. n41 Furthermore, U.S. courts have also recognized torture as a peremptory norm and not just as a domestically legislated prohibition. In the seminal case of Filartiga v. Pena-Irala, n42 the United States Court of Appeals for the Second Circuit held that "deliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human [\*617] rights." n43 Recognizing that "courts must interpret international law not as it was in 1789, but as it has evolved and exists ... today," the court acknowledged that there were "few, if any, issues in international law ... on which opinion seems to be so united as the limitations on a state's power to torture." n44 And, in discussing whether the United Nations Charter conveyed individual rights to citizens of member countries, the court added that "the guaranties include, at a bare minimum, the right to be free from torture." n45 Interestingly, Filartiga was decided almost fifteen years prior to the United States' accession to the Convention Against Torture, supporting the contention that torture had already achieved the status of a peremptory, binding norm prior to the Convention. n46 As a jus cogens norm, torture deserves greater protection than other rights - perhaps even greater protection than other constitutional rights. As discussed in Part II, this heightened protection suggests a way to distinguish treaties by subject matter. II. Distinguishing Human Rights Treaties The previous Part established that the U.S. is bound by international law and that torture is widely recognized as a jus cogens norm under international law. This Part discusses the relationship between international and domestic law, focusing on treaties, which bridge the two legal planes. Section A examines the concept of treaties and seeks to distinguish between those treaties that are contractual in nature and those that reflect international law, focusing on differentiating treaties dealing with international human rights [\*618] law. Section A also reviews U.S. courts' traditional understanding of treaties and the relationship between treaties, international law, and domestic law. Section B equates the substantive rights delineated in human rights treaties, especially jus cogens norms, with constitutional rights. At the outset, the looming presence of Goldwater v. Carter n47 should be acknowledged. In Goldwater, a plurality of the Court held that a challenge to President Carter's unilateral termination of a commercial treaty with Taiwan was a nonjusticiable political question. n48 Although Goldwater has precedential value, its reasoning should apply only to certain types of treaties. Specifically, this Note argues that Goldwater's nonjusticiability rule should apply only to commercial treaties and should not apply to human rights treaties. As this Note explains in Section A and further develops in Part III.A, commercial and human rights treaties can be distinguished on the basis of purpose (contractual vs. codification) and subject matter (commercial vs. human rights). These distinctions are crucial in determining whether nonjusticiability should apply. A. Methods for Distinguishing Treaties A treaty is "an agreement formally signed, ratified, or adhered to between two nations or sovereigns; an international agreement concluded between two or more states in written form and governed by international law." n49 A treaty is, essentially, a "contract between nations" and is usually treated like a contract rather than a legislative act. n50 Madison commented that "the object of treaties is the regulation of intercourse with foreign nations and is external." n51 [\*619] However, although treaties often resemble contracts in form, they can sometimes perform statutory or legislative functions. n52 Such is the case in the United States, where treaties are considered to be the law of the land. n53 Both contractual and lawmaking treaties are, in general, considered sources of international law; neither international nor U.S. domestic law, however, accords all laws equal standing. n54 For example, the consequence of breaching a contract (damages) is quite different from the consequence for breaking a law (often, incarceration). In the second half of the twentieth century, U.S. international agreements typically focused on economic, transportation-communication, cultural-technical, diplomatic, and military issues. n55 Historically, U.S. courts have interpreted treaties "in the manner and to the extent [to] which the parties have declared, and not otherwise." n56 The Supreme Court has no power "to alter, amend, or add to any treaty, by inserting any clause" because that "would be to make, and not to construe a treaty." n57 Treaties generally are deemed to have the same weight as federal law but are not superior to the Constitution. n58 The remainder of this Section describes the traditional classification scheme for treaties and suggests an alternate methodology. The Section concludes by asserting that human rights treaties can be clearly distinguished from other treaties based on their subject matter and applies the proposed methodology to prove the argument. Some treaties that seek to achieve multiple objectives or that take a comprehensive approach to problem-solving might be difficult to classify, but this Note is not concerned with such borderline cases. The classification scheme described in this Note will [\*620] distinguish the majority of treaties - and can be applied easily to the Convention Against Torture and most other human rights treaties. 1. Self-Executing vs. Non-Self-Executing Treaties. Article II treaties - those negotiated by the president and ratified by the Senate - are sometimes said to have the force of law only once they are executed. A treaty can be either self-executing - meaning it has the force of law once ratified - or non-self-executing - meaning separate "implementing legislation" must be passed before the treaty has force. n59 Chief Justice Marshall elegantly explained that a treaty "is ... to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision." n60 At times, distinguishing a self-executing treaty from one that is not self-executing can be difficult. A four-part test is often used to distinguish the two, focusing on: (1) the purpose and objectives of the treaty; (2) the existence of domestic procedures for direct implementation; (3) the availability of alternative enforcement mechanisms; and (4) the social consequences flowing from a court's decision whether the treaty is self-executing. n61 When no implementing legislation has been passed, non-self-executing treaties do not create a private right of action under which a plaintiff can state a claim. n62 To avoid infringing on the political branches' authority to define crimes and to conduct foreign relations, courts have invoked non-self-execution to deny claims under international human rights treaties ratified by the United States. n63 Ostensibly, courts' construction and delineation of treaties in this fashion serves the purpose of deferring as much as possible to the express will of the legislative branch and to the executive's interpretations of statutes and international commitments. Yet, it is not at all clear that the self-executing and non-self-executing dichotomy was intended to apply to international [\*621] agreements dealing with subjects like human rights. Although Chief Justice Marshall's comments in Foster v. Neilson n64 are the source of this dichotomy, those comments may have been intended to apply only to "contractual" treaties. n65 Marshall stated that "when either of the parties engages to perform a particular act, the treaty addresses itself to the political ... department; and the legislature must execute the contract before it can become a rule for the Court." n66 Although Marshall emphasized that an international agreement remains inchoate until enacted by Congress, he prefaced that statement with the phrase "when the terms of the stipulation import a contract." n67 Foster involved two claimants to the same tract of land: one traced ownership to a grant when the land was under Spanish possession; the other to a grant once the land came under U.S. control. n68 The former claimed that the United States was bound by treaty to honor Spain's grant to the title holder. n69 Marshall parsed the treaty's language, holding that it did not automatically confer property rights on those who received grants when the land was under Spanish control; rather, such grants were only valid once confirmed by Congress. n70 Chief Justice Marshall, ever the savvy diplomat, primarily sought to avoid a dispute with the political branches that might have been caused by the Court's support for a foreign nation. n71 Adopting a treaty [\*622] construction that would invalidate actions the federal government had taken in reliance on a claim of sovereignty over the territory in question would have been "an anomaly in the history and practice of nations." n72 Marshall's decision strengthened the early republic by consolidating control over what would eventually become a significant portion of the United States n73 - and possibly anticipated and enabled the Manifest Destiny movement which would flourish in the 1840s. n74 Marshall's distinction between self-executing and non-self-executing treaties, then, might not reflect an overarching judicial philosophy so much as a convenient fix for exigent circumstances. n75 Indeed, the Court itself has on occasion rejected Marshall's dichotomy. For example, in the Head Money Cases, n76 the Court distinguished between contractual treaties, which conferred no individual rights, and statutory treaties, which did. n77 The Head Money Cases dealt with the validity of an excise tax on immigrants - a tax [\*623] that the plaintiffs claimed conflicted with various bilateral treaties. n78 The Court distinguished between treaties that are merely "compacts between independent nations," under which courts can provide no remedy to an injured party, and those that "confer certain rights upon the citizens" of one party living in the territory of another, which are "capable of enforcement as between private parties in the courts." n79 Thus, the distinction between self-executing and non-self-executing treaties, although long-standing, is not compelled in all instances; other treaty classification schemes are possible and, indeed, have been relied on by courts. 2. Subject Matter. If the structure of a treaty - its nature as a self-executing or non-self-executing instrument - is an inappropriate basis for determining when a treaty functions as a law and not as a contract (a distinction critical to knowing how a court should interpret its breach), what might be a better way to distinguish the two? The treaty's subject matter may offer a more useful basis for distinction. n80 Chief Justice Marshall's dichotomy may be useful for determining when treaties incidentally or derivatively confer individual rights, such as "treaties of peace, commerce, [and] alliance," n81 but only because the essential nature of such treaties is already obvious (they are contractual). Individual rights are not necessarily essential to the achievement of these treaties' aims, and thus whether such rights are conferred by these treaties is not of primary importance. The situation, however, is very different with human rights treaties, which primarily and specifically seek to acknowledge or imbue individual rights. Analyzing such a treaty as self-executing (or not) might be academically interesting, but this approach misses the forest for the trees. An approach that first considers subject matter would, this Note proposes, be both more efficient and more effective. Chief Justice Marshall, however, was not alone in his conception of the treaty power's scope and nature. Alexander Hamilton, for example, believed that treaties had, as their object, contracts with [\*624] foreign nations, and that they did not encompass "rules prescribed by the sovereign to the subject, but agreements between sovereign and sovereign." n82 A jurist who was a contemporary of the Framers commented, "The power "to make treaties' ... embraces all sorts of treaties, for peace or war; for commerce or territory; for alliances or succors ... and for any other purposes which the policy or interests of independent sovereigns may dictate in their intercourse with each other." n83 Another jurist opined that "ordinarily, treaties are not rules prescribed by sovereigns for the conduct of their subjects, but contracts, by which [the sovereigns] agree to regulate their own conduct." n84 He applied this rationale to hold that congressional legislation superseded a commercial treaty when a conflict arose between the two, despite the fact that individual merchants were inconvenienced by the change. n85 However, he qualified this rule of construction with the caveat that it might be inapplicable when a treaty is distinguishable from other laws - perhaps alluding to situations that do in fact prescribe conduct for sovereigns' subjects. n86 Theoretical reinterpretations of history are one thing, but actual precedent is far more compelling. The Supreme Court itself has, in fact, distinguished a treaty based on subject matter. n87 In United States v. Rauscher, n88 the Court interpreted the Ashburton Treaty to hold that British defendants extradited to the United States could only be tried for crimes enumerated in the demand for extradition. n89 Of course, an extradition treaty might not be classified as a human rights treaty by modern standards. Rauscher, however, is notable for [\*625] acknowledging that a treaty's subject matter, and not its self-executing nature, granted individual rights. n90 Rauscher is not the only example of the Supreme Court distinguishing treaties based on subject-matter classification. For example, in considering whether certain provisions of the Jay Treaty of 1794 between the United States and the United Kingdom survived the War of 1812, the Court unanimously held: "The doctrine ... that war ipso facto annuls treaties of every kind ... is repudiated by the great weight of modern authority; and the view now commonly accepted is that "whether the stipulations of a treaty are annulled by war depends upon their intrinsic character.'" n91 Specifically, the Court distinguished treaties "having a political character" from those dealing with substantive issues, such as possession of property by nationals, boundary decisions, and "provisions which represent completed acts." n92 The Court ultimately distinguished treaty articles vesting rights "permanent in character" which were "by their very nature ... fixed and continuing" from those rights which were "wholly promissory and prospective." n93 3. Human Rights Treaties and the Subject-Matter Distinction. Applying the distinction between treaties vesting personal and permanent rights (human rights treaties) and promissory rights (contractual agreements) to the Goldwater holding, a commercial treaty (like that in Goldwater) might confer derivative individual rights, but a human rights treaty clearly implicates rights "permanent in character." n94 Whereas nations might contract for certain privileges in a commercial treaty, such that the parties merit the benefits of their [\*626] bargains, to speak of treaties as creating bargained-for privileges of human beings seems offensive. n95 Unfortunately, in modern times, courts have generally relied on Chief Justice Marshall's dichotomy rather than the substance of treaties to determine whether treaties create individual rights. Sadly for both human rights activists and potential torture victims, Marshall's dichotomy quite often has been applied to human rights treaties. For example, a district court held that the United Nations Charter was non-self-executing and therefore did "not vest any of the plaintiffs with individual legal rights." n96 Similarly, the International Covenant on Civil and Political Rights (ICCPR) n97 has been found to be non-self-executing. n98 Specifically because of their non-self-executing nature, neither the ICCPR nor the Convention Against Torture were deemed to have created "a private right of action under which the plaintiff[s could] successfully state a claim." n99 In applying Marshall's dichotomy to human rights treaties, courts have created a quagmire of case law that is replete with exceptions. For example, in evaluating the applicability of the Geneva Conventions to General Manuel Noriega, a court noted that although most international treaties have been found to be non-self-executing, this determination must be made for each treaty individually. n100 Finding the Geneva Convention Relative to the Treatment of [\*627] Prisoners of War (Geneva III) n101 to be self-executing, the court stated that "it is inconsistent with both the language and spirit of the treaty ... to find that the rights established therein cannot be enforced by the individual POW in a court of law." n102 Relying on the purpose of the Geneva Conventions to justify its conclusion, the court held that it was not designed "to create some amorphous, unenforceable code of honor among the signatory nations." n103 Thus, the court held, "if a treaty expressly or impliedly provides a private right of action, it is self-executing and can be invoked by the individual." n104 Such a torturous route to discerning individual rights from a treaty is helpful neither to individuals seeking protection under U.S. law nor to those burdened with the laws' enforcement. Rather than relying on a structural analysis of whether a treaty is self-executing, courts should use the content, substance, and purpose of the treaty to determine whether treaties confer private, individual rights. Human rights treaties are prime contenders for conferring private rights based on their content and purpose because "human rights conventions address the rights of individuals" by their very nature. n105 This proposal is not unprecedented: as the Noriega court noted, "it must not be forgotten that the [Geneva] Conventions have been drawn up first and foremost to protect individuals." n106 Categorically distinguishing human rights conventions and other international agreements is not too great a task for the judiciary. Traditionally, of course, the subjects of international law have been states - and only states. n107 But treaties and other international instruments have moved beyond the limited subject matter that the Framers envisioned, such as trade agreements, military or strategic [\*628] alliances, and navigation privileges. n108 "Human rights law ... [differs] in that it focuses on the rights of individuals ... . Because of this focus on individuals, human rights law necessarily must peer into the domestic laws of nations and into the private spheres of life." n109 A functional argument also supports distinguishing human rights instruments from other kinds of international agreements. The Convention Against Torture, for example, is neither legislative nor contractual in nature. Instead, it "codifies international law as it has evolved." n110 In fact, the Senate Committee on Foreign Relations believed that "the majority of the obligations to be undertaken by the United States pursuant to the Convention [were] already covered by existing law." n111 Therefore, the Convention Against Torture must have been ratified for reasons other than to create either contractual obligations or new legislation, such as to support public policy. For example, failure to comply with either human rights treaties or international law norms would **weaken the ability** of the United States to **impose such norms on other nations**. n112 Ratifying a treaty like the Convention Against Torture also bolstered the credibility of the United States in the human rights arena. In hearings related to the ratification, one witness told Congress that "the United States has played a leading role in the development of the major human rights treaties, but has declined to ratify many of them." n113 Ratifying the Convention Against Torture signaled that the United States [\*629] would "practice what it preached." The signal communicated by completion of the formal ratification process was especially strong given the many issues and causes that compete for congressional attention. A purely symbolic gesture, a court might reason, would not have been undertaken by either the president or members of Congress, given the demands on their time. Therefore, the signaling function might also serve to notify the judiciary that the political branches intended that the government be held accountable for violations of the torture prohibition, as embodied in the treaty.

This is dumb – the House has no treaty powers to begin with but can still refuse to implement via domestic legislation after the plan

Gruber, 7

(Law Prof-Florida International, “Who’s Afraid of Geneva Law,” 39 Ariz. St. L.J. 1017, Winter, Lexis)

In addition, like Bricker, modern critics of self-execution argue that the ability of treaty makers to create domestic law offsets the delicate balance of power in our constitutional structure. n407 One of the most vocal proponents of this argument is professor and former high level Bush appointee John Yoo. n408 He fervently asserts that allowing the President to create domestic law through treaties with only the consent of the Senate undermines the power of our democratically-elected House of Representatives and gives too much power to the President. n409 To be sure, this argument is not simply one against self-execution, it is an argument against treaty law all together. If treaties are by their very nature antidemocratic, they are so whether they establish domestic law or only bind the government to foreign obligations. n410 Yoo and other conservatives' concerns over balance of power, however, boil down to merely picking the value that leads to one's conclusion. In other words, Yoo assumes that the process by which treaties are made and ratified is "bad" and proposes a system that is "better." The only difference one can readily ascertain from the systems, however, is that in Yoo's proposed system it is harder to create treaty law. Yoo's primary critique of the treaty-making process is that it does not involve bicameralism, his apparent touchstone for democracy. n411 He seems to presume that the default structure must be congressional action and executive veto, such that any deviation from this structure is presumptively [\*1079] invalid. n412 It is quite clear, however, that our constitutional system is an imperfect democracy, with various methods, both bicameral and unilateral, for making law. n413 The specific balance of power in the treaty context, as set forth by the Constitution, is that the President may create treaty law, but only with the approval of a supermajority of the Senate. n414 As treaty scholar Louis Henkin explains, "Whatever might be said for amending the Constitution to require consent to a treaty by both Houses of Congress, that is not what the Constitution (unamended) provides." n415 Indeed if the bicameral "default" system is so unquestionably preferable to the existing treaty ratification system, one would think that Congress would have amended the Constitution to so reflect when given the chance. n416 Moreover, conservative scholars like Yoo tend to rely solely on the characterization of treaty making as "undemocratic" to convince their audiences to favor non-self-execution, without explaining why this particular deviation from the bicameral "default" is so bad. n417 Instead, they often establish this point through dramatics, that is, predicting that treaty law will take over the nation. n418 Yoo, for example, warns ominously, "If the United States forges multilateral agreements addressing problems that were once domestic in scope, treaties could replace legislation as a vehicle for domestic regulation." n419 Not only is the idea of treaty law subsuming every [\*1080] area of domestic law unlikely as a matter of politics, it is practically impossible given the last-in-time rule. n420 If a treaty so gravely diverges from the law Congress would have made, one could expect Congress to respond quickly by passing legislation overriding the treaty. n421 Professor Jed Rubenfeld, however, ups the stakes by asserting that, according to some internationalists, treaty law should be on the level of nearly immutable Constitutional law, a principle at which even treaty defenders might balk. n422 Yet all debate is a matter of degree. Of course, there will always be a tension between guaranteed rights and incompatible "democratic" legislation. n423 Constitutional provisions cannot be overturned by legislation precisely because they are a check on majoritarianism. n424 We are comfortable with that check on majority rule because constitutional law is in other ways limited. n425 This is the "balance" at which we have arrived, although it is not purely democratic or majoritarian. n426 The question, when it comes to treaties, is not whether they are products of fully "democratic" processes, but whether the slight deviation from bicameral structure is warranted or defensible. This question can only be answered by balancing the value of majoritarianism against the value of international law. n427 Of [\*1081] course, that balance is affected by how much one values majoritarianism and international law, and how much majoritarianism or treaty power stands to be sacrificed. n428 The problem is that because many conservative scholars employ structural arguments as a mask for an aversion to international law, rather than balancing relative values, they rely on the mere fact that treaties are not the product of "democracy" as the primary reason for their rejection. n429 As a result, the separation of powers argument reduces to little more than a tricky way of defining treaty law as a priori illegitimate, without having to admit that one does not value international law. One expert notes that the "underlying notion" of such arguments "seems to be that the United States is better off to the extent that the Constitution can be made to limit and frustrate full United States' participation in the burgeoning institutions and regimes of international society." n430 Moreover, extending the relevant temporal span reveals that non-self-execution tends to enlarge rather than contract executive power. A treaty becomes law after negotiation among several parties and consent of the President and a supermajority of the Senate. n431 Thereafter, the government is bound by the treaty. The treaty, however, outlasts administrations, and a future President may desire to violate the terms of the treaty. Non-self-execution permits the President to unilaterally abrogate the treaty without the check of judicial review. This is poignantly illustrated by the Bush administration's position on the Geneva Conventions. n432 In 1949, the President negotiated and ratified the Geneva Conventions, with the assent of two-thirds of the Senate. Now, over fifty years later, the President has [\*1082] decided alone that he is not bound by the Geneva Conventions' dictates. n433 Were the Geneva Conventions presumptively self-executing, the President would have to either negotiate a new treaty and get Senate approval or convince Congress to pass rescinding legislation. n434 Instead, the President acted unilaterally in violation of Geneva and relied on the self-execution doctrine to make his actions immune from judicial scrutiny. n435 Consequently, in the war on terror, the self-execution doctrine has enhanced executive power and minimized Congress's role. The above analysis may explain why the most fervent supporters of non-self-execution are elsewhere the greatest advocates of unfettered executive discretion in foreign affairs. It is extremely difficult to accept that conservative critics of self-execution are really concerned about executive power or bicameral procedure in the abstract. n436 Yoo, who elsewhere argues that the President possesses the sole discretion to interpret treaties, n437 may act in the prosecution of the war on terror without "democratic" congressional approval, n438 and may engage in torture in violation of international law, n439 appears patently hypocritical when he states in the treaty context, "As a matter of accountability, when the government imposes rules of conduct on individuals, those rules ought to be made by members of the legislature who directly represent the people." n440 To be sure, these formalist conservative scholars take offense at any attempt to deconstruct their structural arguments. Yoo, for example, decries such criticism as nonacademic personal attack: [\*1083] The foreign relations law community seems to have a tendency to accept certain conclusions of law with the slightest of scrutiny. Sometimes utter unanimity surrounds certain conclusions, such as ... whether treaties should be self-executing, with a minimum of debate. When those propositions are later challenged by sincere intellectual criticism, the international law community often responds by claiming that these conclusions are motivated either by "isolationism" or by an almost senseless desire to roil what are peaceful waters, rather than by engaging the arguments on the merits. n441 There is, however, a trick to Yoo's arguments. Addressing his claims "on the merits" means playing with a stacked deck where bicameralism is a default and treaty law will always lose. n442 Engaging the liberal legal forms, what Yoo characterizes as the only legitimate way to debate, is to forfeit the debate. The deeper issues involve, not how to play the game, but why the deck should be stacked in such a manner. It is difficult to ignore the isolationist beliefs of non-self-execution proponents when they lie so close to the surface. Yoo, for example, has not made his distaste for foreign law and international actors a secret. n443 He decries the influence of international law as heralding "the emergence of what can be called a deterritorialized, "cosmopolitan' moral sensibility, generally shared by governing elites of the advanced nations." n444 Moreover, Yoo criticizes the increasing awareness of contemporary European law by stating: Europe has been given to fluctuations of ideological extremes... . In the Twentieth Century, monarchy was followed by fascism, socialism, and communism. As history has demonstrated, the performance of these regimes has been less than exemplary. In particular, fascism and communism, which were once viewed by [\*1084] some as advanced, modern ideologies, were adopted by regimes that murdered millions. n445 Consequently, the appeal to formalist "neutral" values does not succeed in divesting the modern self-execution doctrine of its isolationist character. Therefore, the Supreme Court's choice to avoid the self-execution issue because of a belief in the validity of this doctrine is, at its core, an isolationist choice inconsistent with the Court's self-proclaimed new internationalism. n446

#### Trade doesn’t solve war

Martin et. al. 8(Phillipe, University of Paris 1 Pantheon—Sorbonne, Paris School of Economics, and Centre for Economic Policy Research; Thierry MAYER, University of Paris 1 Pantheon—Sorbonne, Paris School of Economics, CEPII, and Centre for Economic Policy Research, Mathias THOENIG, University of Geneva and Paris School of Economics, The Review of Economic Studies 75)

Does globalization pacify international relations? The “liberal” view in political science argues that increasing trade flows and the spread of free markets and democracy should limit the incentive to use military force in interstate relations. This vision, which can partly be traced back to Kant’s Essay on Perpetual Peace (1795), has been very influential: The main objective of the European trade integration process was to prevent the killing and destruction of the two World Wars from ever happening again.1 Figure 1 suggests2 however, that during the 1870–2001 period, the correlation between trade openness and military conflicts is not a clear cut one. The first era of globalization, at the end of the 19th century, was a period of rising trade openness and multiple military conflicts, culminating with World War I. Then, the interwar period was characterized by a simultaneous collapse of world trade and conflicts. After World War II, world trade increased rapidly, while the number of conflicts decreased (although the risk of a global conflict was obviously high). There is no clear evidence that the 1990s, during which trade flows increased dramatically, was a period of lower prevalence of military conflicts, even taking into account the increase in the number of sovereign states.

#### No impact – every actor has incentives to overstate consequences

**Farley 11**, assistant professor at the Patterson School of Diplomacy and International Commerce at the University of Kentucky, (Robert, "Over the Horizon: Iran and the Nuclear Paradox," 11-16, [www.worldpoliticsreview.com/articles/10679/over-the-horizon-iran-and-the-nuclear-paradox](http://www.worldpoliticsreview.com/articles/10679/over-the-horizon-iran-and-the-nuclear-paradox))

But states and policymakers habitually overestimate the impact of nuclear weapons. This happens among both proliferators and anti-proliferators. Would-be proliferators seem to expect that possessing a nuclear weapon will confer “a seat at the table” as well as solve a host of minor and major foreign policy problems. Existing nuclear powers fear that new entrants will act unpredictably, destabilize regions and throw existing diplomatic arrangements into flux. These predictions almost invariably turn out wrong; nuclear weapons consistently fail to undo the existing power relationships of the international system.

The North Korean example is instructive. In spite of the dire warnings about the dangers of a North Korean nuclear weapon, the region has weathered Pyongyang’s nuclear proliferation in altogether sound fashion. Though some might argue that nukes have “enabled” North Korea to engage in a variety of bad behaviors, that was already the case prior to its nuclear test. The crucial deterrent to U.S. or South Korean action continues to be North Korea’s conventional capabilities, as well as the incalculable costs of governing North Korea after a war. Moreover, despite the usual dire predictions of nonproliferation professionals, the North Korean nuclear program has yet to inspire Tokyo or Seoul to follow suit. The DPRK’s program represents a tremendous waste of resources and human capital for a poor state, and it may prove a problem if North Korea endures a messy collapse. Thus far, however, the effects of the arsenal have been minimal.

Israel represents another case in which the benefits of nuclear weapons remain unclear. Although Israel adopted a policy of ambiguity about its nuclear program, most in the region understood that Israel possessed nuclear weapons by the late-1960s. These weapons did not deter Syria or Egypt from launching a large-scale conventional assault in 1973, however. Nor did they help the Israeli Defense Force compel acquiescence in Lebanon in 1982 or 2006. Nuclear weapons have not resolved the Palestinian question, and when it came to removing the Saddam Hussein regime in Iraq, Israel relied not on its nuclear arsenal but on the United States to do so -- through conventional means -- in 2003. Israeli nukes have thus far failed to intimidate the Iranians into freezing their nuclear program. Moreover, Israel has pursued a defense policy designed around the goal of maintaining superiority at every level of military escalation, from asymmetrical anti-terror efforts to high-intensity conventional combat. Thus, it is unclear whether the nuclear program has even saved Israel any money.

The problem with nukes is that there are strong material and normative pressures against their use, not least because states that use nukes risk incurring nuclear retaliation. Part of the appeal of nuclear weapons is their bluntness, but for foreign policy objectives requiring a scalpel rather than a sledgehammer, they are useless. As a result, states with nuclear neighbors quickly find that they can engage in all manner of harassment and escalation without risking nuclear retaliation. The weapons themselves are often more expensive than the foreign policy objectives that they would be used to attain. Moreover, normative pressures do matter. Even “outlaw” nations recognize that the world views the use of nuclear -- not to mention chemical or biological -- weapons differently than other expressions of force. And almost without exception, even outlaw nations require the goodwill of at least some segments of the international community.

Given all this, it is not at all surprising that many countries eschew nuclear programs, even when they could easily attain nuclear status. Setting aside the legal problems, nuclear programs tend to be expensive, and they provide relatively little in terms of foreign policy return on investment. Brazil, for example, does not need nuclear weapons to exercise influence in Latin America or deter its rivals. Turkey, like Germany, Japan and South Korea, decided a long time ago that the nuclear “problem” could be solved most efficiently through alignment with an existing nuclear power.

Why do policymakers, analysts and journalists so consistently overrate the importance of nuclear weapons? The answer is that everyone has a strong incentive to lie about their importance. The Iranians will lie to the world about the extent of their program and to their people about the fruits of going nuclear. The various U.S. client states in the region will lie to Washington about how terrified they are of a nuclear Iran, warning of the need for “strategic re-evaluation,” while also using the Iranian menace as an excuse for brutality against their own populations. Nonproliferation advocates will lie about the terrors of unrestrained proliferation because they do not want anyone to shift focus to the manageability of a post-nuclear Iran. The United States will lie to everyone in order to reassure its clients and maintain the cohesion of the anti-Iran block.

None of these lies are particularly dishonorable; they represent the normal course of diplomacy. But they are lies nevertheless, and serious analysts of foreign policy and international relations need to be wary of them.

Nonproliferation is a good idea, if only because states should not waste tremendous resources on weapons of limited utility. Nuclear weapons also represent a genuine risk of accidents, especially for states that have not yet developed appropriately robust security precautions. Instability and collapse in nuclear states has been harrowing in the past and will undoubtedly be harrowing in the future. All of these threats should be taken seriously by policymakers. Unfortunately, as long as deception remains the rule in the practice of nuclear diplomacy, exaggerated alarmism will substitute for a realistic appraisal of the policy landscape.

####

### at: deference

Deference is a myth—Zivotofsky was the death knell

Gwynne Skinner, Professor of Law at Willamette, 8/23/13, Misunderstood, Misconstrued, and Now Clearly Dead: The 'Political Question Doctrine' in Cases Arising in the Context of Foreign Affairs, papers.ssrn.com/sol3/papers.cfm?abstract\_id=2315237

Lower federal courts often erroneously cite the “political question doctrine” to dismiss as nonjusticiable individual rights claims arising in foreign or military affairs contexts, a trend that has increased since the 1962 case of Baker v. Carr. Similarly, lower courts have begun citing “special factors counselling hesitation” when dismissing constitutional claims (“Bivens claims”) in similar contexts, inappropriately treating “special factors” as a nonjusticiability doctrine. Lower federal courts should not cite either doctrine as a reason to avoid adjudicating individual rights claims arising in the context of foreign or military affairs. Rather, lower federal courts should adjudicate these claims on their merits by deciding whether the political branch at issue had the power under the Constitution to act as it did. Doing so is consistent with the manner in which the Supreme Court has approached these types of cases for over 200 years. The Court affirmed this approach in the 2012 case of Zivotofsky v. Clinton, a case in which the Court once and for all rung the death knell for the application of the “political question doctrine” as a nonjusticiability doctrine in cases involving individual rights – even those arising in a foreign policy context. In fact, a historical review of Supreme Court cases demonstrates that the Supreme Court has never applied the so-called “political question doctrine” as a true nonjusticiable doctrine to dismiss individual rights claims (and arguably, not to any claims at all), even those arising in the context of foreign or military affairs. This includes the seminal “political question” case of Marbury v. Madison. Rather, the Supreme Court has almost always rejected the “political question doctrine” as a basis to preclude adjudication of individual rights claims, even in the context of foreign or military affairs. Moreover, the Supreme Court has consistently admonished lower courts regarding the importance of the judiciary branch’s adjudication of individual rights claims, even in such contexts.13 That is not to say that from time to time the Court has not cited a “political question doctrine” in certain of its cases. However, a close review of those cases demonstrates that rather than dismissing such claims in those cases as “nonjusticiable,” the Court in fact adjudicated the claims by finding that either the executive or Congress acted constitutionally within their power or discretion. Moreover, the post-9/11 Supreme Court cases of Hamdi v. Rumsfeld, Rasul v. Bush, and Bush v. Boumediene, in which the Supreme Court consistently found that the political branches overstepped their constitutional authority, clarified that the doctrine should not be used to dismiss individual rights claims as nonjusticiable, even those arising in a foreign or military affairs context. In case there remained any doubt, the Supreme Court in Zivotofsky rejected the “political question doctrine” as a nonjusticiability doctrine, at least in the area individual rights, if not altogether. The Court found the case, involving whether the parents of a boy born in Jerusalem had the right to list Israel as his place of birth pursuant to a Congressional statute, was justiciable.17 The Court addressed the real issue, which was whether Congress had the authority to trump the President over whether Israel could be listed as the country of birth on passports where a person was born in Jerusalem, notwithstanding the President’s sole authority to recognize other governments. 18 In ruling as it did, the Court stayed true to many of its earlier cases involving “political questions” by adjudicating the claim through deciding whether one of the political branches took action that was within its constitutional authority. In the case, the Court showed its willingness to limit the power of the President in the area of foreign affairs rather than finding the claim nonjusticiable.

The President has zero authority over treaty-interpretation

Goldman, 5

(JD & LLM-Duke Law, “Of Treaties and Torture: How the Supreme Court Can Restrain the Executive,” 55 Duke L.J. 609, December, Lexis)

A. Limitations on the Executive's Foreign Affairs Powers This Section contends that the president is not solely responsible for international affairs, suggests some limitations on the president's ability to interpret and execute treaties, and shows that the president lacks the power to abrogate human rights treaties codifying jus cogens norms. 1. The President Is Not Solely Responsible for International Affairs. Although the Constitution can be read as vesting the president with "primary constitutional authority over the conduct of foreign affairs," n137 the president is not the "sole organ" of foreign affairs and does not wield a "blank check in the area." n138 True, the president might be viewed as the center of power for actions touching on "relations and intercourse with other countries," n139 but human rights treaties, because they confer individual rights, do not implicate "intercourse" with other nations. United States v. Curtiss-Wright Export Corp. n140 is commonly cited as supporting the theory of presidential dominance in foreign [\*634] affairs. n141 The Court commented there that "the President alone has the power to speak or listen as a representative of the nation" and referred to the president's "exclusive power ... as the sole organ of the federal government in the field of international relations." n142 Yet, Curtiss-Wright dealt with whether Congress could delegate authority to the president to prohibit munitions sales to certain countries, not with treaty modification or abrogation. n143 Of the several categories into which foreign affairs powers can be divided, Curtiss-Wright most obviously implicates the recognition and international advocacy powers. n144 Conceptually, the arms sales policy was either related to recognition of governments involved in the Paraguayan-Bolivian war or was part of the United States' overall foreign policy objectives. n145 2. Limitations on the President's Ability to Interpret and Execute Treaties. Still, the president's foreign relations powers surely include those of negotiating and executing treaties, which necessarily involve some interpretation. n146 Nevertheless, the treaty power has never been understood to be unlimited. Hamilton believed that both the Constitution and "natural principles" limited the treaty power - as they did for every other delegated power. n147 Indeed, regardless of the executive's views on the subject, a congressional act that modifies, contravenes, or repeals a treaty following its entry into force is controlling. n148 In Whitney v. Robertson, n149 for example, the Supreme Court held that a commercial treaty is equivalent to any other statute [\*635] and applied the maxim of lex posterior derogat priori - a later statute repeals an earlier one. n150 Although the executive's interpretation of a treaty carries great weight, it certainly is not controlling n151 because Congress can check the executive branch's interpretation through legislative action. Likewise, the judicial branch should be able to gainsay the executive's interpretation of a treaty, especially if constitutional-level rights, such as human rights, are infringed. n152 Put another way, if the executive "cannot make a treaty contrary to the constitution," neither should it be able to interpret a treaty in a way that opposes the Constitution or that "takes away essential liberties." n153 3. Checking the Power to Abrogate Treaties. If the executive cannot "interpret away" individual rights, could it simply abrogate or terminate a human rights treaty? The issue of unilateral treaty termination by the president has never been satisfactorily resolved, but it has occupied the attention of many legal scholars. n154 Unilateral termination has sometimes been justified under the theory that it does not create any obligations for the United States but merely brings obligations to an end. n155 Yet estoppel might be raised as an argument against unilateral termination with regard to those treaties that implicate contractual rights. n156 Similarly, human rights treaties, [\*636] which create expectations of individual liberties or freedoms, might also be subject to an estoppel-style argument. Even the executive branch has, on at least one occasion, adhered to the belief that once rights are created and vest, a president does not have the authority to revoke them. In an opinion on the subject of whether an act "within the jurisdiction of the President" could be revised by a successor, Attorney General Caleb Cushing concluded that President Franklin Pierce did not have "lawful authority to revoke the act of ... President Polk." n157 Cushing based his decision on the principle that if the opposite were true, "there would be no stability or security for any rights." n158 The "rights" in question related to a property grant that the government sought to revoke and reassign to a different party. If property rights acquired under color of law cannot be revoked, then recognized human rights, which arguably are more fundamental for "stability," should be accorded similar, if not greater, protection. n159 Although Goldwater v. Carter n160 can be read as tacitly approving unilateral termination, its application is limited. The Court relied on the political question doctrine to avoid reaching the case's merits, n161 but under the approach outlined in this Note, the Court could have concluded that termination of only certain types of treaties presented a nonjusticiable question. Instead, members of the Court declared that no "judicially manageable" standards existed because "different termination procedures may be appropriate for different treaties." n162 The one Justice who would have reached the merits implied that the president did have unilateral abrogation power - but hinted that such [\*637] power might have been limited (or limitable, if the Court had dared to act) to certain categories of treaties. n163 To date, no alleged or actual unilateral terminations have dealt with a human rights treaty. Of the nine examples of unilateral presidential terminations cited by one scholar, all but one dealt with commerce-related issues; the other related to national defense. n164 Thus, **neither judicial nor executive branch precedent, construed even on the most generous terms, supports unilateral termination of human rights treaties**.

## 1AR

### Cp

Congressional mandate fails – gets overturned and doesn’t guide interpretation

Chapman, 98

[Patricia, Ms. Chapman has practiced law since 1983, focusing on complex litigation cases. She is currently the principal owner of the Law Offices of Patricia G. Chapman, Houston, Texas, where her practice involves toxic tort litigation, business litigation, natural resources, and Superfund litigation cases. Ms. Chapman received her L.L.M. degree in Environmental Law and Natural Resources from Lewis and Clark College, Portland, Oregon, in 1997. She has been an adjunct law professor at the University of Houston and is a member of the American Bar Association, the Texas Bar Association, the College of the State Bar of Texas, the Oregon Bar Association, Who's Who in the Practice of Law, and numerous sections devoted to litigation and environmental law, “ Has the Chevron Doctrine Run Out of Gas? Senza Ripieni \* Use of Chevron Deference or the Rule of Lenity,” Fall 1998, 19 Miss. C. L. Rev. 115 ]

 If desired, Congress could dictate the judicial standard of review to be utilized during the evaluation of agency interpretations of a statute. This mandate could become a part of any congressional attempt to re-authorize statutes which are interpreted by administrative agencies. n287 A legislative mandate which prescribes [\*160] the degree of deference to be used by courts when evaluating agency interpretations of statutory provisions n288 or which instructs the judiciary to disregard a particular canon of construction is not a new concept, but past similar efforts have not met with much success. n289 Even if Congress was able to legislatively restrict the scope of judicial review for an administrative agency's actions, its efforts would face constitutional challenges. n290

Another problem with a legislatively mandated, unitary approach is the lack of uniformity of the administrative agency scheme. There are too many different types of agencies and agency structures for one blanket judicial review standard, even if Congress were to mandate a unitary rule. In order to attempt to meet the needs of each of the agencies whose function it is to define broad statutory language, the language delineating the standard would itself have to be extremely broad, thus raising the same arguments enumerated in this Article against broadly worded statutory language. n291 Because such a solution would not significantly assist the judiciary in engaging in the art of statutory construction, it is not a solution that will likely appear.

### Treaty power—yoo xt

House can still assert power on treaties after the plan

Cinotti, 3

(JD-Georgetown Law, “The New Isolationism: Non-Self-Execution Declarations and Treaties as the Supreme Law of the Land,” 91 Geo. L.J. 1277, August, Lexis)

C. THE ROLE OF THE HOUSE OF REPRESENTATIVES

One common objection to automatic self-execution is that it circumvents the democratic process of lawmaking by leaving out the House of Representatives. n98 Although the House is not directly a part of the treatymaking process, it retains significant power to check the President's and the Senate's use of treatymaking authority. First, the House may exercise its power of the purse and refuse to appropriate funds necessary to implement the treaty. n99 Second, the House, with the concurrence of a majority of the Senate, can pass legislation after a treaty has been ratified that is inconsistent with the treaty's provisions or that declares a treaty non-self-executing. n100 The Supreme Court has held that as between a treaty and congressional legislation, the later in time prevails. n101 Congressional legislation providing that a treaty is not directly effective under U.S. law would be different than a non-self-execution declaration because the Constitution grants such legislation the force of law. n102 Third, treaties that call for actions that the Constitution places within the sole authority of the legislative branch require congressional implementation in any case, although this may be limited to bills raising revenue. n103 Finally, Congress retains the power under [\*1291] Article III to remove questions arising under federal law from the original jurisdiction of the lower federal courts or from the Supreme Court's appellate jurisdiction. n104 Therefore, the House, with Senate concurrence, could pass a jurisdictional statute that prevents federal district courts from hearing cases relating to or arising under treaty provisions. n105 Congress could also enact a statute excepting such cases from the Supreme Court's review. n106 Thus, the Constitution does provide the House with ammunition to check treatymaking power; however, that ammunition is external to the treatymaking process itself.

### No ratify

#### Err aff---hugely cumbersome to ratify treaties

Oona **Hathaway**, Associate Professor of Law, Yale Law School, May 200**8**, ARTICLE: Treaties' End: The Past, Present, and Future of International Lawmaking in the United States, 117 Yale L.J. 1236

Of the two methods for making international law in the United States, the Treaty Clause - which requires a two-thirds vote in the Senate and bypasses the House of Representatives - is the better known of the two; it is principally used to conclude agreements on extradition, taxation, and investment and commercial matters. But an increasingly common path is the congressional-executive agreement, now **used in virtually every area of international law**. Each year, hundreds of congressional-executive agreements on a wide range of international legal topics are enacted by simple majorities in the House and Senate and signed into law by the President, outside the traditional Treaty Clause process. (Executive agreements entered into by the President alone - often called sole executive agreements - are also on the rise and involve no formal congressional involvement at all. n6) It is puzzling that **two distinct methods of lawmaking** operate side-by-side within a single nation - all the more so because virtually no other country deals with international law as we do. Most other countries make international law in the same way they make domestic law - a norm followed by one of our two methods (congressional-executive agreements) but not the other (the Treaty Clause). Because the Treaty Clause requires that all but thirty-three members of the Senate assent to a treaty and includes no provision for participation by members of the House, it surely **makes a substantial difference** which of these two methods is used. For this reason alone, it would be natural to expect that there are compelling, consistent reasons why each method is used in particular areas or instances. Yet that is not the case. Although there are patterns to the current practice of using one type of agreement or another, those patterns have no identifiable [\*1240] rational basis. For example, most free trade agreements are concluded through congressional-executive agreements. By contrast, agreements on investment and commercial matters - issues no less critical to the smooth operation of the global economy - are concluded through both treaties and congressional-executive agreements. The Law of the Sea Convention mentioned at the outset was brought to the Senate under the Treaty Clause. But most other fisheries and maritime agreements are concluded through congressional-executive agreements. Human rights agreements are concluded as treaties. Meanwhile, the vast majority of education, health, and debt-restructuring agreements with developing countries - issues that can be just as important to human dignity - are concluded as congressional-executive agreements. Compared with agreements authorized as congressional-executive agreements, a higher share of agreements considered under the Treaty Clause are multilateral. Nonetheless, the vast majority of multilateral agreements are concluded through congressional-executive agreements. There is, I argue, no persuasive explanation for these differences based on the subject matter, form, topic, or any other substantive basis. The explanation for these differences lies not in reason, but in history - a history that it is now time to leave behind. Rooted in now-irrelevant (and discredited) concerns of slaveholding states, overtaken by actual political practice almost from the Constitution's beginning, the Treaty Clause was the product of circumstances that have little continuing relevance. The current bifurcated system took its shape over the course of the twentieth century. The United States gradually abandoned the mercantilist, protectionist trade policy that it had pursued since the Civil War in favor of a policy built on reciprocal trade agreements with foreign states. The legal innovation that enabled this transformation subsequently expanded to include almost every area of international law - an expansion fueled by the perceived cumbersomeness of the Treaty Clause alongside the desire and need for the country to engage more fully in the international sphere. Meanwhile, **opposition to human rights agreements motivated significant opposition to treaties in the second half of the century**. In the 1950s, a series of proposed amendments to the Constitution (generally referred to collectively as "the Bricker Amendment" after the chief sponsor in the Senate) aimed to prevent the United States from entering international human rights agreements that some feared would be used to challenge segregation and Jim Crow. The controversy ended in a "compromise" in which the amendment was defeated at the cost of future human rights agreements, which would henceforth be concluded only as treaties that had been rendered almost entirely [\*1241] unenforceable through reservations, understandings, and declarations. n7 All of the rest of international law was haphazardly carved up between these two tracks - with some areas assigned to the Treaty Clause route, others to the congressional-executive agreement, and many uncomfortably straddling the two. Paying fealty to this history by requiring that treaties continue to be used in certain historically contingent areas of international law comes at a substantial continuing cost: compared to congressional-executive agreements, **treaties have weaker democratic legitimacy, are more cumbersome and politically vulnerable**, and **create less reliable legal commitments**. The final failure is particularly worrisome, since the central purpose of international lawmaking is to create reliable commitments between states. This Article makes the case for a new direction: nearly **everything that is done through the Treaty Clause can and should be done through congressional-executive agreements** approved by both houses of Congress. The congressional-executive agreement includes the House of Representatives in the lawmaking process, is less subject than is a treaty to **stonewalling by an extreme minority**, and rarely requires the passage of separate implementing legislation to enter into effect. Moreover, the agreement is often easier to enforce and can be subject to more stringent rules regarding unilateral withdrawal, thus allowing the United States to make stronger and more consistent international commitments. A congressional-executive agreement might seem to lack the ""dignity' of a treaty." n8 But in fact a congressional-executive agreement that is expressly approved by Congress is more legitimate and more reliable than a treaty, and it can and should be used for even the most important international commitments. n9

### link

There’s also no impact because any court enforcement comes years later

Katyal, 7

(Former Solicitor General & Law Prof-Georgetown, with Derek Jenks, Law Prof-UT, “Disregarding Foreign Relations Law,” 116 Yale L.J. 1230, April, Lexis)

III. THE CASE AGAINST POSNER AND SUNSTEIN'S PROPOSAL TO PROVIDE DEFERENCE IN THE EXECUTIVE-CONSTRAINING ZONE

A. Evaluating the Affirmative Case for Deference In essence, we disagree with the premise that a change in existing law that requires awarding additional deference to the President in foreign affairs is warranted. Posner and Sunstein build their case for change not on legal precedent (with which they disagree), or on the text of the Constitution (which they concede is ambiguous), n77 but rather on policy reasons: [\*1250] Courts say that the nation must speak in "one voice" in its foreign policy; the executive can do this, while Congress and the courts cannot. They say that the executive has expertise and flexibility, can keep secrets, can efficiently monitor developments, and can act quickly and decisively; the other branches cannot. As emphasized in Chevron, the executive, unlike the judiciary, is politically accountable as well as uniquely knowledgeable ... . n78 This line of reasoning misses the mark in several important respects and, in our view, offers no good reason to augment the deference already accorded executive interpretations of international law. First, there is no reason to conclude that the current scope of judicial deference unacceptably impedes the ability of the President to respond to a crisis. Second, wholly adequate checking mechanisms limit the power of the courts to foist unwelcome interpretations of international law on the political branches. Consider a few examples. The political branches, in the course of negotiating, ratifying, performing, and otherwise implementing U.S. treaty obligations, undertake a series of actions that signal, and at times establish, the U.S. interpretation of specific treaty terms. When the United States has authoritatively and discernibly embraced an interpretation of its treaty obligations, courts give effect to this interpretation. n79 The President might also issue formal interpretations of U.S. treaty obligations through the proper exercise of his substantial lawmaking (or delegated rulemaking) n80 authority. n81 In addition, the President has the constitutional [\*1251] authority to execute the laws - this power almost certainly includes the authority to terminate, suspend, or withdraw from treaties in accordance with international law. Congress has the constitutional authority to abrogate, in whole or in part, U.S. treaty obligations via an ordinary statute - a lawmaking process that, of course, includes the President. Augmenting the law-interpreting (and lawbreaking) power of the President drastically diminishes the role of courts - thereby effectively depriving international law in the executive-constraining zone of its capacity to constrain meaningfully and, [\*1252] consequently, its status as enforceable "law." Such an expansion of the President's authority also subverts the institutional capacity (and hence, the political will) of Congress to regulate the executive in these domains. These themes merit some elaboration. Exigency does not compel a rejection of the status quo. Indeed, Posner and Sunstein's article is not concerned with whether the President can put boots on the ground without a statute; rather, it is addressed to litigation and what courts should do, typically years after the fact. Speed is often irrelevant. n82 So, too, is accountability. The legislature is just as accountable as the executive. And textually, of course, Congress has a strong role to play in the incorporation of international law into the domestic sphere, from its Article I, Section 8 powers to "declare War," to "make Rules concerning Captures on Land and Water," and to "punish ... Offences against the Law of Nations," to the Senate's Article II, Section 2 power to ratify treaties. n83 In one sense, then, our disagreement centers around default rules. Posner and Sunstein acknowledge that Congress can specify an antidelegation/ antideference principle. n84 Yet oddly, their whole article frames the relevant issue as the competence of the executive branch versus that of the judiciary. But given the fact that this tussle between the executive and the judiciary will always play out within a matrix set by the legislature, it is not quite appropriate to compare the foreign policy expertise of the executive branch with that of the courts. n85 After all, Congress could specify a prodelegation/prodeference policy [\*1253] most of the time as well. (In fact, it has repeatedly done so. n86) The more precise question is which entity is better suited to interpret a legislative act of some ambiguity, when international law principles would yield an answer that restrains the executive branch. Once the question is properly framed, much of Posner and Sunstein's challenge to the status quo falls out. Most crucially, they fail to account for a dynamic statutory process - through which mistakes (if any) made by courts in the area can be corrected by the legislature. Such legislative corrections can take place in both the statutory and the treaty realm. If a court reads a statute in light of international law principles and Congress disagrees with those principles, it can rewrite the statute. And if a court reads a treaty to constrain the executive in a way Congress does not like, it can trump the treaty, in whole or in part, with a statute under the "last-in-time" rule. n87 More fundamentally, the Senate can define the role of courts up front - during the ratification process - by attaching to the instrument of ratification specific reservations, declarations, or understandings concerning the judicial enforceability of the treaty. n88 With a stylized account that criticizes the relative competence of the judiciary, Posner and Sunstein make it appear that a judicial decision in foreign affairs is the last word. But that set of events would rarely, if ever, unfold in this three-player game. If the courts err in a way that fails to give the executive enough power, Congress will correct them. Surely national security is not an area rife with process failures. In that sense, current law works better than the Posner and Sunstein proposal because it forces democratic deliberation before international law is violated. For this reason, it obscures more than it illuminates to say that "the courts, and not the executive, might turn out to be the fox." n89 Such language assumes [\*1254] a stagnant legislative process, so that the choice is "court" versus "executive," when the real choice is really "court + Congress." That is to say, if the courts grab power in a way that undermines the executive, Congress can correct them. The relevant calculus turns on which type of judicial error is more likely to be resolved, one in which the court wrongly sides with the President (in which case Congress would have to surmount the veto) or one in which the court wrongly sides against the President (in which case the veto would be unlikely to be a barrier to corrective legislation). Recall that Posner and Sunstein are not addressing their argument to constitutional holdings by courts, but statutory ones that are the subject of Chevron deference. There is much to criticize when courts declare government practices unconstitutional in the realm of foreign affairs, as those practices cannot then be resuscitated by the legislature absent a constitutional amendment. But when a court's holding centers on a statutory interpretation, the dynamic legislative process ensures that the judiciary will not have the last word. Indeed, in this statutory area, the risks of judicial error are asymmetric - that is, judicial decisions that side with the President are far less likely to be the subject of legislative correction than those that side against him. While contemporary case law and theory have not taken the point into account, we believe that they provide a powerful reason to reject Posner and Sunstein's proposal. Our claim centers on the President's veto power and how the structure of the Constitution imposes serious hurdles when Congress tries to modify existing statutes to restrict presidential power. Suppose that, for example, the President asserts that the Detainee Treatment Act, n90 sponsored by Senator John McCain and others to prohibit the torture of detainees, does not forbid a particular practice, such as waterboarding. A group of plaintiffs, in contrast, argue that standard principles of international law and treaties ratified by the Senate forbid waterboarding, and that these principles require reading the statute to forbid the practice. Now imagine that the matter goes to the Supreme Court. The risks from judicial error are not equivalent. If the Court sides with the plaintiffs, the legislature can - presumably with presidential encouragement - modify the statute to permit waterboarding, provided that a bare majority of Congress agrees. The [\*1255] prospect of legislative revision explains why many of the criticisms of the Supreme Court's involvement in the war on terror thus far are entirely overblown. n91 Now take the other possibility - that the Court sides with the President. In such a case, it is virtually impossible to alter the decision. That would be so even if everyone knew that the legislative intent at the time of the Act was to forbid waterboarding. Even if, after that Court decision, Senator McCain persuaded every one of his colleagues in the Senate to reverse the Court's interpretation of the Detainee Treatment Act and to modify the Act to prohibit waterboarding, the Senator would also have to persuade a supermajority in the House of Representatives. After all, the President would be able to veto the legislation, thus upping the requisite number of votes necessary from a bare majority to two-thirds. And his veto power functions ex ante as a disincentive even to begin the legislative reform process, as Senators are likely to spend their resources and time on projects that are likely to pass. n92 So what Posner and Sunstein seek is not a simple default rule, but one with a built-in ratchet in favor of presidential power. The President can take, under the guise of an ambiguous legislative act, an interpretation that gives him striking new powers, have that interpretation receive deference from the courts, and then lock the interpretation into place for the long term by brandishing his veto power. For authors who assert structural principles as [\*1256] their touchstone, Posner and Sunstein's omission of the veto is striking and provides a lopsided view of what would happen under their proposal. One common objection to our line of thinking is that the President must enjoy substantial discretion to respond to the sort of crises that might arise in the foreign relations realm. n93 This is certainly an important point, but it should not be overstated. No serious person contends that the President's powers in an emergency are the same as in a nonemergency. The question Posner and Sunstein are addressing, we take it, is simply how courts should view presidential decisions (typically, years later). For example, if a court received a temporary restraining order request in the midst of a true emergency when Congress could not plausibly respond, of course deference to the President would be appropriate unless the claims being made by the executive were thoroughly outlandish. The rest of the time - the more than 99.9% - the President's ability to respond in an emergency is beside the point. As long as courts are not enjoining executive action (an exceptionally rare event), the President should be able to take the action he deems necessary in a crisis and face the consequences in the courts later. That approach permits the President to act quickly but does not bestow on him a blank check to disregard law in the executive-constraining zone. After all, much of the law in question is expressly designed to condition the exercise of executive power in times of national crisis. For example, international humanitarian law regulates the treatment of captured enemy fighters and civilians in times of war. n94 The Uniform Code of Military Justice regulates the administration of military courts - a matter that routinely, if not always, implicates national security - and it does so even during wartime. n95 The War Crimes Act of 1996 criminalizes violations of various treaty provisions that are only applicable in times of war. n96 When the object of the law in question is to regulate the government's response to national security challenges, the bare fact of a crisis does not provide a convincing rationale for greater deference. The rationale instead has to center on the raw ability of Congress to act. When Congress can act, and can respond to erroneous court decisions that restrict the President's power, the case for deference is not significantly enhanced by pointing to a "crisis." [\*1257] Finally, Posner and Sunstein buttress their case for deference by pointing out that "Congress has not objected to the traditional doctrines of executive deference, and until it does so, the constitutional problems seem more theoretical than real." n97 There are two problems with this assertion. First, Posner and Sunstein themselves are criticizing the case law for incorporating these foreign relations canons, so it is not clear what Congress would be objecting to at present. Second, it is a mistake to view congressional silence as tacit approval, particularly in the modern context. Legislative silence in the past few years may be a reflection of party loyalty, not true policy preference. That is particularly so when the President wields the veto power, which means that any legislative rebuke to the President would require a two-thirds supermajority - a virtual impossibility in today's political climate.

### Trade

#### Interdependence doesn’t prevent war – crises, differential prosperity, limited costs and WWI

Mearsheimer, 1

John, American professor of Political Science at the University of Chicago, Tragedy of Great Power Politics, 370-371

There are problems with this perspective, too." In particular, there is always the possibility that a serious economic crisis in some important region, or in the world at large, will undermine the prosperity that this theory needs to work. For example, it is widely believed that Asia's "economic miracle" worked to dampen security competition in that region before 1997, but that the 1997-98 financial crisis in Asia helped foster a "new geopolitics."24 It is also worth noting that although the United States led a successful effort to contain that financial crisis, it was a close call, and there is no guarantee that the next crisis will not spread across the globe. But even in the absence of a major economic crisis, one or more states might not prosper; such a state would have little to lose economically, and maybe even something to gain, by starting a war. A key reason that Iraqi dictator Saddam Hussein invaded Kuwait in August 1990 was that Kuwait was exceeding its oil production quotas (set by the Organization of Petroleum Exporting Countries, or OPEC) and driving down Iraq's oil profits, which the Iraqi economy could ill-afford.25

There are two other reasons to doubt the claim that economic interdependence makes great-power war unlikely. States usually go to war against a single rival, and they aim to win a quick and decisive victory. Also, they invariably seek to discourage other states from joining with the other side in the fight. But a war against one or even two opponents is unlikely to do much damage to a state's economy, because typically only a tiny percentage of a state's wealth is tied up in economic intercourse with any other state. It is even possible, as discussed in Chapter 5, that conquest will produce significant economic benefits.

Finally, an important historical case contradicts this perspective. As noted above, there was probably about as much economic interdependence in Europe between 1900 and 1914 as there is today. Those were also prosperous years for the European great powers. Yet World War I broke out in 1914. Thus a highly interdependent world economy does not make great-power war more or less likely. Great powers must be forever vigilant and never subordinate survival to any other goal, including prosperity.

#### Trade will never collapse

Ikenson, 9

[Daniel, associate director of the Center for Trade Policy Studies at the Cato Institute, “ A Protectionism Fling: Why Tariff Hikes and Other Trade Barriers Will Be Short-Lived,” March 12, 2009, http://www.cato.org/pub\_display.php?pub\_id=10651]

Although some governments will dabble in some degree of protectionism, the combination of a sturdy rules-based system of trade and the economic self interest in being open to participation in the global economy will limit the risk of a protectionist pandemic. According to recent estimates from the International Food Policy Research Institute, if all WTO members were to raise all of their applied tariffs to the maximum bound rates, the average global rate of duty would double and the value of global trade would decline by 7.7 percent over five years.8 That would be a substantial decline relative to the 5.5 percent annual rate of trade growth experienced this decade.9

But, to put that 7.7 percent decline in historical perspective, the value of global trade declined by 66 percent between 1929 and 1934, a period mostly in the wake of Smoot Hawley's passage in 1930.10 So the potential downside today from what Bergsten calls "legal protectionism" is actually not that "massive," even if all WTO members raised all of their tariffs to the highest permissible rates.

If most developing countries raised their tariffs to their bound rates, there would be an adverse impact on the countries that raise barriers and on their most important trade partners. But most developing countries that have room to backslide (i.e., not China) are not major importers, and thus the impact on global trade flows would not be that significant. OECD countries and China account for the top twothirds of global import value.11 Backsliding from India, Indonesia, and Argentina (who collectively account for 2.4 percent of global imports) is not going to be the spark that ignites a global trade war. Nevertheless, governments are keenly aware of the events that transpired in the 1930s, and have made various pledges to avoid protectionist measures in combating the current economic situation.

In the United States, after President Obama publicly registered his concern that the "Buy American" provision in the American Recovery and Reinvestment Act might be perceived as protectionist or could incite a trade war, Congress agreed to revise the legislation to stipulate that the Buy American provision "be applied in a manner consistent with United States obligations under international agreements." In early February, China's vice commerce minister, Jiang Zengwei, announced that China would not include "Buy China" provisions in its own $586 billion stimulus bill.12

But even more promising than pledges to avoid trade provocations are actions taken to reduce existing trade barriers. In an effort to "reduce business operating costs, attract and retain foreign investment, raise business productivity, and provide consumers a greater variety and better quality of goods and services at competitive prices," the Mexican government initiated a plan in January to unilaterally reduce tariffs on about 70 percent of the items on its tariff schedule. Those 8,000 items, comprising 20 different industrial sectors, accounted for about half of all Mexican import value in 2007. When the final phase of the plan is implemented on January 1, 2013, the average industrial tariff rate in Mexico will have fallen from 10.4 percent to 4.3 percent.13

And Mexico is not alone. In February, the Brazilian government suspended tariffs entirely on some capital goods imports and reduced to 2 percent duties on a wide variety of machinery and other capital equipment, and on communications and information technology products.14 That decision came on the heels of late-January decision in Brazil to scrap plans for an import licensing program that would have affected 60 percent of the county's imports.15

Meanwhile, on February 27, a new free trade agreement was signed between Australia, New Zealand, and the 10 member countries of the Association of Southeast Asian Nations to reduce and ultimately eliminate tariffs on 96 percent of all goods by 2020.

While the media and members of the trade policy community fixate on how various protectionist measures around the world might foreshadow a plunge into the abyss, there is plenty of evidence that governments remain interested in removing barriers to trade. Despite the occasional temptation to indulge discredited policies, there is a growing body of institutional knowledge that when people are free to engage in commerce with one another as they choose, regardless of the nationality or location of the other parties, they can leverage that freedom to accomplish economic outcomes far more impressive than when governments attempt to limit choices through policy constraints.

### Prolif

#### No domino effect

**Bergenas, 10** [Johan, Research Associate at the Henry L. Stimson Center, “The Nuclear Domino Myth,” Foreign Affairs, 8/31/2010, [http://www.foreignaffairs.com/articles/66738/johan-bergenas/the-nuclear-domino-myth?page=2#](http://www.foreignaffairs.com/articles/66738/johan-bergenas/the-nuclear-domino-myth?page=2)]

 When considering the dangers of an Iranian nuclear weapons program, those who differ on political ideology find rare common ground. According to nearly everyone, if Iran develops nuclear weapons, its neighbors will inevitably do so, too. Former U.S. Senator Sam Nunn (D-Ga.), for example, said earlier this year, "The governments of the world must understand what a threat it is if the Iranians get nuclear weapons, because there are probably 10 other countries in the Middle East over the next 10 to 20 years that would follow down that road." U.S. policymakers from John Bolton, the conservative former U.S. ambassador to the UN, to Vice President Joe Biden all seem to agree with this dark prediction.

But there's one problem with this "nuclear domino" scenario: the historical record does not support it. Since the dawn of the nuclear age, many have feared rapid and widespread nuclear proliferation; 65 years later, only nine countries have developed nuclear weapons. Nearly 20 years elapsed between the emergence of the first nuclear state, the United States, in 1945, and the fifth, China, in 1964.

The next 40 years gave birth to only five additional nuclear countries: India, Israel, South Africa, Pakistan, and North Korea. South Africa voluntarily disarmed in the 1990s, as did Belarus, Kazakhstan, and Ukraine following the dissolution of the Soviet Union. After Israel developed a nuclear weapons capability in the late 1960s, no regional nuclear chain reaction followed, even though the country is surrounded by rivals. Nor was there even a two-country nuclear arms race in the region.

Similarly, it has now been four years since North Korea became a nuclear weapons state, yet South Korea and Japan have not followed suit, despite the fact that they have a latent nuclear weapons capability -- access to the fissile material necessary for nuclear weapons. These countries' decisions to not go nuclear are largely thanks to extensive U.S. efforts to dissuade them. Both South Korea and Japan enjoy firm and long-standing security assurances from Washington, including protection under the U.S. strategic nuclear umbrella, obviating the need for their own deterrents. Following North Korea's 2006 nuclear test, U.S. President George W. Bush immediately assured South Korea and Japan that the United States was unequivocally committed to protecting them.

The fruit of these efforts to prevent rapid and widespread nuclear proliferation, then, is the very reason a nuclear domino effect remains a myth. In the Middle East, there are no signs that the nuclear dominos will fall anytime soon. Although many governments believe that Iran could be one to three years away from developing a nuclear bomb, all other Middle Eastern countries (besides Israel) are at least 10 to 15 years away from reaching such a capability.

#### No Impact – Prolif will be slow

**Waltz 3,** adjunct professor of political science at Columbia University

 (Kenneth, The Spread of Nuclear Weapons: A debate renewed, p 3-4)

What will the spread of nuclear weapons do to the world? I say “spread” rather than “proliferation” because so far nuclear weapons have proliferated only vertically as the major nuclear powers have added to their arsenals. Horizontally, they have spread slowly across the world, and the pace is not likely to change much. Short-term candidates for admission to the nuclear club are not numerous, and they are not likely to rush into the nuclear business. One reason is that the United States works with some effect to keep countries from doing that. Nuclear weapons will nevertheless spread, with a new member occasionally joining the club. Membership grew to twelve in the first fifty years of the nuclear age, and that number included three countries that suddenly found themselves in the nuclear military business as successor states to the Soviet Union. Membership in the club then dropped to eight as South Africa, Kazakhstan, Belarus, and Ukraine liquidated their weapons. A fifty percent growth of membership in the next decade would be surprising. Since rapid changes in international relations can be unsettling, the slowness of the spread of nuclear weapons is fortunate. Someday the world will be populated by fifteen or eighteen nuclear-weapon states (hereafter referred to as nuclear states). What the further spread of nuclear weapons will do to the world is therefore a compelling question.

#### Prolif inevitable – getting nukes is rational and can’t be dissuaded

Roth, 7

[Ariel Ilan, Associate Director of National Security Studies at the Johns Hopkins University’s Krieger School of Arts and Sciences. "The Inevitability of a Nuclear Tomorrow: Iran, North Korea and the Rational Desire for Nuclear Weapons" Paper presented at the annual meeting of the International Studies Association 48th Annual Convention, Hilton Chicago, CHICAGO, IL, USA, Feb 28, 2007 <http://www.allacademic.com/meta/p178708_index.html>]

The case of Israel is particularly instructive. More than most other nations, Israel is dependent on its alliance with the United States. The US is Israel’s largest provider of arms and provides economic support of 1.5 billion dollars annually. The United States also provides diplomatic protection for Israel in the UN Security Council. The fact that Israel refuses to sign the NPT and denuclearize even at the cost of risking confrontation with the US as it did in the late 1960’s is strong proof of how states prioritize security risks over other issues. Pakistan too has been and continues to be willing to endure moral and financial sanction rather than part with weapons which they believe give them a maximal degree of security over their potential enemies.

 Policy Implications

The fact is that Iran and North Korea are likely to become nuclear nations despite whatever pressures the international community places upon them. Because these nations believe themselves to be facing existential threats and because they believe that nuclear weapons can change the strategic calculus of their enemies in such a way as to make attacking them incalculably expensive, they are not likely to desist.

What does that suggest in terms of policy for the United States and the international community more broadly? The first implication is that the US should desist from trying to engage either nation in talks which are premised on the idea that their nuclear ambitions may be related to a civilian purpose. While Iran and North Korea may genuinely wish to harness the power of the atom for generating electricity, that is not their sole or even primary motive. Searching for a formula which will allow them to use the atom for power without allowing them to use atoms for war will not succeed.

Since North Korea and Iran cannot be convinced to to desist from producing nuclear arms the international community must focus on two other goals: First, the international community must clarify to the North Koreans and the Iranians expectations about how nuclear nations behave. The risks of nuclear crisis compelled certain adaptations to the very real and sometime virulent conflict between the United States and the Soviet Union including the installation of hotlines and some level of communication between capitals. A similar policy should be developed vis-à-vis North Korea and Iran

Secondly, while during the Cold War questions of who launched what were fairly easily managed because of the dearth of nuclear nations, the sad fact of proliferation compels a new investment in technologies that will allow the sources of nuclear attacks to be definitively traced. Nuclear weapons must, in all circumstances, have an address. Being location detectable will deter all nations from passing their weapons on to terrorists for use against another nation. When the source of all weapons is known, the principle that President Bush applied to terrorism- that it is both to the organizations and those that shelter them upon whom retribution will be visited- will apply here as well.

Finally, the international community must encourage new and innovative scholarship that will address the reality of nuclear existence in a non-bipolar world. The condition of bipolarity which shaped the Cold War no longer obtains. With its demise, much of the thinking on nuclear diplomacy will have to change to.

Conclusion

In a sense, the world was granted a gift. Contrary to what many expected in the late 1960’s a massive wave of nuclear proliferation has never occurred. However, that long interval without nuclear proliferation has lulled many into a false sense of security that the specter of proliferation would never resurface. Here is the sad truth: Awful as nuclear weapons are, there are some states for which their acquisition is a rational policy choice § Marked 21:30 § as suggested in conditions 2-4 above. While we can deplore Israel’s and Pakistan’s reliance of nuclear deterrence, we cannot be surprised, given their security environment that they have chosen as they have. Their choice, like NATO’s refusal to endorse a “no first use” policy regarding nuclear weapons during the Cold War, reflects the reality that nuclear weapons are not, as we wish they were, unthinkable. The key to the future is not to pretend that proliferation will not happen, but to develop techniques to manage the fact that it has already happened. Resources squandered in the fool’s errand of convincing Iran and North Korea to give up what other nuclear powers never will cannot be recovered and could be better used in planning for our more uncertain and more scary future.