EDITORIAL COMMENTS

TAKING TREATIES LESS SERIOUSLY

A decade ago, my predecessor as Editor in Chief wrote a trenchant critique of what he saw as a tendency of the United States not to give its treaty obligations the weight they deserved.[1] I return to the subject to report that the last ten years have seen an alarming exacerbation of that situation. The mood in the United States about treaty commitments has turned distinctly negative.[2] This has gone so far as to dismay both actual and potential treaty partners of the United States and, in general, all who are concerned about the performance of the country in the realm of international law. Some of the manifestations of this mood can be dismissed as eccentric, at the level of Christian militias' expressions of anxiety about the prospects of black-painted helicopters dropping United Nations forces into Montana and Idaho. The more worrisome part of it is the prevalence of distaste for treaty commitments in Congress and other influential circles, including the media.

The causes of these reactions are obscure, though some elements are rather obvious, such as the termination of the Cold War and the attendant need to maintain a coalition against a deadly enemy. More generally, there seems to be a sense that too much power over matters properly handled by the institutions of this country or even of its states is gravitating toward international organizations and international agreements. In this there is a parallel with the European reactions that led to the development of the idea of "subsidiarity" and its enshrinement in the Treaty of Maastricht. It is the principle that authority should be vested at the lowest level capable of exercising it.[3] To a European, the American concern seems hard to understand since the amount of control over domestic affairs that has been transferred to international institutions seems minor in comparison with that relinquished by members of the European Union. The North American Free Trade Agreement vests almost no legislative power in any supranational institution remotely comparable to that bestowed on the bureaucrats in Brussels. Citizens of countries such as South Korea that have been subjected by the International Monetary Fund to stringent and intrusive fiscal controls may also find it difficult to appreciate American sensitivities in that regard.

The American reaction is most striking with respect to a willingness to disregard existing treaty obligations, and in that connection is most salient with regard to the arrears in United Nations dues. Veterans of the international organization field will recall that in 1962 we led the charge to obtain an advisory opinion from the International Court of Justice to the effect that dues owed by France and the Soviet Union were really debts and that nonpayment could and should lead to deprivation of voting privileges in the General Assembly.[4] Whatever the merits of the complaints about UN personnel and budgetary practices alleged by the supporters of nonpayment, it is apparent that they do not justify this method of responding to the perceived problems. Defaulting is simply not in accordance with the obligations we undertook. The sum in question, now about

[1] Thomas M. Franck, *Taking Treaties Seriously*, 82 AJIL 67 (1988).

[2] This Comment uses the term "treaty" in the same sense as the Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, Art. 2(1)(*a*), 1155 UNTS 331, without distinguishing between treaties in the sense of Article II of the U.S. Constitution and executive agreements.

[3] *See* PAUL CRAIG & GRÁINNE DE BÚRCA, EC LAW: TEXT, CASES AND MATERIALS 112–18 (1995).

[4] Certain expenses of the United Nations (Article 17, paragraph 2, of the Charter), 1962 ICJ REP. 151 (Advisory Opinion of July 20).

$1.5 billion, is duly owed and would be duly enforced in any comparable national legal system—unless Mr. Ted Turner were to ride to the rescue of the national honor at the last moment.

In less spectacular cases, invocations of the rule in the *Head Money Cases*,[5] the subsequent-in-time rule, are multiplying. Under this hallowed principle of American foreign relations law, treaties and statutes are of equal status and the later in time prevails, even though the treaty involves a pledge of American good faith, which is not an element of a statute, whose application is strictly national. One of the most striking invocations of this rule, by Congress itself, was the shift from provisions in tax legislation specifying that new legislation would not overrule prior tax treaty commitments to sections of the laws of 1986 and 1988 specifying that new rules *would* override prior commitments.[6] Resort to this move, instead of renegotiation, was sharply criticized by members of the European Community as tending to evoke distrust of this country as a treaty partner. A sprinkling of recent cases from other fields have reiterated the U.S. position. These include *Dole v. South African Airways*,[7] holding that the Comprehensive Anti-Apartheid Act trumped the bilateral civil air agreement with South Africa, and *Havana Club Holding, S.A. v. Galleon S.A.*,[8] putting the Cuban Assets Control Regulations above provisions of an older Organization of American States treaty relating to transfers of intellectual property. Only heroic efforts to interpret the Anti-Terrorism Act of 1987 so as not to evince an intent to overrule a prior international agreement, the UN Headquarters Agreement, prevented a statute aimed at the Palestine Liberation Organization from putting us in violation of our treaty commitments.[9] Most recently, the Supreme Court, in *Breard v. Greene*, announced without any attempt at reconciling the two rules that the Antiterrorism and Effective Death Penalty Act of 1996 had overruled Article 36 of the Vienna Convention on Consular Relations of 1963.[10]

Another domestic rule that would authorize U.S. courts to set aside existing treaty obligations is the doctrine ascribed to *Reid v. Covert*,[11] that treaties are not valid if they violate a constitutional norm. For many years after the doctrine was enunciated in 1957, there were almost no cases applying it to international agreements. Then, in 1988, the Supreme Court applied the rule to strike down a provision of a District of Columbia statute intended to carry out the U.S. obligation under the Vienna Convention on Diplomatic Relations to protect embassies from demonstrations.[12] More recently, a district court struck down provisions of an agreement with Switzerland that permitted seizure of assets without prior notification to the possessor,[13] and in 1997 a court of appeals struck down extradition arrest practices that failed to live up to guarantees regarding "probable cause" and "speedy trials."[14] These cases leave the United States in the position of being unable to fulfill obligations that remain valid internationally because the constitutional infirmity would not rise to the level of being "manifest," as called for by Article 46 of the Vienna Convention on the Law of Treaties. The scope of the problem might be dramatically enhanced if the courts adopt Professor Laurence Tribe's conclusion that at least some international agreements made as executive agree-

[5] 112 U.S. 580 (1884).

[6] *See* Richard L. Doernberg, *Legislative Override of Income Tax Treaties: The Branch Profits Tax and Congressional Arrogation of Authority*, 42 TAX LAW. 173 (1989). *See also* Lindsey v. Commissioner, 98 T.C. 672 (1992).

[7] South African Airways v. Dole, 817 F.2d 119 (D.C. Cir.), *cert. denied*, 484 U.S. 896 (1987).

[8] 974 F.Supp. 302 (S.D.N.Y. 1997).

[9] United States v. Palestine Liberation Org., 695 F.Supp. 1456 (S.D.N.Y. 1988).

[10] 118 S.Ct. 1352 (1998).

[11] 354 U.S. 1 (1957).

[12] Boos v. Barry, 485 U.S. 312 (1988).

[13] Colello v. SEC, 908 F.Supp. 738 (C.D. Cal. 1995).

[14] Parretti v. United States, 112 F.3d 1363 (9th Cir. 1997), *summarized in* 92 AJIL 91 (1998).

ments should have been concluded as treaties in the sense of Article II and are not valid.[15] The rationale for insisting on a two-thirds vote of the Senate is basically a sense that this would better protect the sovereign rights of the fifty states against foreign entanglements.

The somewhat paradoxical result of giving special status to the treaty in the Article II sense is to liberate the United States from commitments made through other means. Two recent cases, by stressing the idea that extradition can be authorized only by a treaty, have frustrated Congress's attempts to create obligations to extradite by statute.[16]

If terminating a treaty is too drastic, the desired result of minimizing U.S. obligations under it can often be achieved by interpretation. A series of opinions by the Supreme Court have struck observers abroad and in the United States as extremely restrictive in that sense. Clearly, no international tribunal would be likely to have construed the Extradition Treaty with Mexico as did the Court in *United States v. Alvarez-Machain.*[17] Such a tribunal would have found, by interpreting the treaty in "good faith," that the United States had an obligation not to bypass the treaty by kidnapping the defendant from Mexican soil, an acknowledged violation of customary international law. The following year, in *Sale v. Haitian Centers Council, Inc.*,[18] the Supreme Court's reading of the United Nations Protocol on the Status of Refugees and the associated portions of our immigration legislation strained the text to free the United States to intercept Haitian refugees on the high seas. The Court found support for that conclusion very largely in negotiating history consisting of statements by the Swiss delegation that, one infers, were trying both to justify Switzerland's exclusion of Jews fleeing the Holocaust in 1942 and to allow future exclusions of "mass migrations." The earlier *Aérospatiale* case[19] freed U.S. courts to continue to require foreign litigants in U.S. courts to provide discovery under the Federal Rules of Civil Procedure rather than make parties seeking that information resort to international cooperative measures set forth in the Hague Convention. The result in all three cases was to prevent treaty commitments from altering the way we are used to doing things.

Seemingly on the opposite track were the cases involving the UN Convention on Arbitral Awards.[20] They interpreted the Convention as calling for the withdrawal from U.S. courts of jurisdiction over cases implicating the antitrust and securities laws where the parties had agreed to arbitrate them. But the apparent cause of this self-denying outcome appears to have been an urge to shed a caseload that was not desired. The likelihood that our system will come up with interpretations that do not restrict U.S. discretion is enhanced by the practice of deferring to executive indications. Such deference has recently been extended from the White House and the Department of State to other government agencies with no particular expertise in international law or relations under an extension of the *Chevron* doctrine.[21] When one compares this record with the way European national courts have collaborated in the construction of European Community law, one is struck by the nationalism of our courts.

[15] Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221 (1995).

[16] *In re* Surrender of Ntakirutimana, No. L–96–5, 1997 U.S. Dist. LEXIS 20,714 (S.D. Tex. Dec. 17, 1997); Gouveia v. Vokes, 800 F.Supp. 241 (E.D. Pa. 1992). *But see* Hilario v. United States, 854 F.Supp. 165 (E.D.N.Y. 1994) (contrary to *Gouveia*).

[17] 504 U.S. 655 (1992).

[18] 509 U.S. 155 (1993).

[19] Société Nationale Industrielle Aérospatiale v. United States District Court, 482 U.S. 522 (1987).

[20] Vimar Seguros y Reaseguros, S.A. v. The M/V Sky Reefer, 515 U.S. 528 (1995); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985); Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974).

[21] More v. Intelcom Support Servs., 960 F.2d 466 (5th Cir. 1992). *See also* Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

The work of minimizing treaty commitments on the part of the United States is incomplete so long as an impartial international tribunal might be vested with the power to interpret the documents in question. Some of us had hoped that with the end of the Cold War the U.S. defiance of the World Court's reading of our treaty with Nicaragua had been put behind us. But now we have more recent ominous developments. First, the United States has carefully kept the dispute resolution system of the World Trade Organization from getting its hands on our dispute with Europe about the compatibility of our actions against Cuba and Iran with the General Agreement on Tariffs and Trade.[22] Second, powerful figures have made known their opposition to the establishment of an international criminal court. Having managed to respond in a minimal way to the My Lai massacre, the United States may want to retain the power to repeat the performance the next time our troops commit major atrocities. Third, the U.S. actions in *Breard v. Greene*[23] return to the tradition of disregard by the United States of the World Court. That tradition began in the *Tehran* case when, in defiance of the Court's indication of a standstill pending its disposition of the case, we tried—and failed—to rescue the hostages by brute force.[24] It was carried forward in the *Nicaragua* case, where we purported to withdraw from the Court's jurisdiction while ignoring its indication of provisional relief—as well as, ultimately, its final Order.[25] The Supreme Court seems not to have recognized that what the International Court of Justice had done in *Breard* was more than issue a "request" for a stay. To be sure, the binding character and enforceability of provisional measures are subject to some doubt.[26] It is possible, however, that Breard's execution may have put the United States in violation of the United Nations Charter and the Statute of the International Court of Justice. It may thus have been contrary to the supreme law of the land. It would have been at least courteous and prudent to spare Breard a few days so that the issues could be fairly debated. The dissenters deserve credit for having sought some breathing space to consider the matter.

At the state level, there are also signs of rebellion at international limitations. Most ominous is the refusal or neglect to notify foreign nationals arrested in the United States of their right to communicate with their consul. A recent case denied an appeal by a Mexican national on death row in Virginia on the grounds that this provision in the Vienna Convention on Consular Relations was designed to benefit states rather than individuals.[27] The district court, despite denying the plaintiff's claims, at the same time had expressed concern about "what appears to be Virginia's defiant and continuing disregard for the Vienna Convention."[28] A commentator notes evidence that roughly a hundred foreign nationals are on death row in various states and have not received such notification.[29] Moreover, various states have been sallying forth into the field of foreign economic policy by enacting or threatening to enact rules imposing economic disadvantages on foreign countries or entities that displease them. The targets include Myanmar,

[22] By agreement with the European Union, we assented to deferring enforcement of the rules if Europe would refrain from taking us to the WTO. *See* 36 ILM 529 (1997).

[23] 118 S.Ct. 1352 (1998).

[24] United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 ICJ REP. 3 (May 24). See commentary in Ted L. Stein, *Contempt, Crisis and the Court: The World Court and the Hostage Rescue Attempt*, 76 AJIL 499 (1982).

[25] Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Provisional Measures, 1984 ICJ REP. 169, 186–87 (Order of May 10).

[26] *See* Peter J. Goldsworthy, *Interim Measures of Protection in the International Court of Justice*, 68 AJIL 258 (1974); and Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn.-Herz. v. Yugo.), Provisional Measures, 1993 ICJ REP. 325, 374, 396 (Order of Sept. 13) (Weeramantry, J., sep. op., & Ajibola, J., sep. op.).

[27] Murphy v. Netherland, 116 F.3d 97 (4th Cir. 1997); *see* William J. Aceves, Case note, 92 AJIL 87 (1998).

[28] Aceves, *supra* note 27, at 87–88 (quoting Murphy v. Netherland, No. 3:95–CV–856, slip op. at 7 (E.D. Va. July 26, 1996)).

[29] *Id.* at 90.

Nigeria and Switzerland.[30] These rules are likely to be challenged through the GATT/WTO dispute resolution mechanism. Meanwhile, aid and comfort is given to advocates of these activities by academic writing that denies the claim that federal common law precludes such state activity.[31]

Finally, one comes to an aspect of U.S. practice as to treaties that is more symbolic than substantive, the gross neglect of the obligation to publish them. At this point in time, publication of *Treaties and Other International Acts* is five years behind schedule and *United States Treaties and Other International Agreements* is about ten years behind.[32] Although private sources have picked up the slack and publish electronic and microfiche versions, the neglect, for budgetary reasons, of the obligations of the Department of State is disturbing.[33] It suggests that the Government regards international agreements as second-rate legal sources.

Readers of the *Journal* have a special obligation to try to limit the damage resulting from this disdain of treaties. They need to point out to students and the public that the later-in-time rule is not the end of the matter, since an obligation to other countries continues to exist independently of the treaty's status in American law. They need to make clear to the public how much our policies abroad depend on our being able to negotiate treaties and to obtain compliance with them from our foreign counterparts. Some of these agreements require other countries to make drastic changes in their domestic legal systems. A striking example is the promise to provide effective relief for violations of intellectual property rights that is contained in the new Trade-Related Aspects of Intellectual Property Agreement. A reputation for playing fast and loose with treaty commitments can only do harm to our capacity to be a leader in the post–Cold War world.

DETLEV F. VAGTS

WAR CRIMES LAW COMES OF AGE

The rapid and fundamental developments in the last few years on the establishment of individual criminal responsibility for serious violations of international humanitarian law have been such that it is now an appropriate time to assess their principal features.[1]

On the institutional plane, the establishment by the United Nations Security Council of the ad hoc tribunals for the former Yugoslavia and Rwanda under Chapter VII of the UN Charter was of cardinal importance. The International Tribunal for Former Yugoslavia is no longer in danger of running out of defendants. Under international pressure, Croatia arranged for the surrender of a number of indicted Croatian nationals and

[30] For examples, see Jack L. Goldsmith, *Federal Courts, Foreign Affairs and Federalism*, 83 VA. L. REV. 1617, 1637–39 (1997).

[31] *Id.*

[32] CLAIRE M. GERMAIN, GERMAIN'S TRANSNATIONAL LAW RESEARCH: A GUIDE FOR ATTORNEYS §2.01.2 (1991). *See also* 84 ASIL PROC. 451 (1990).

[33] Publication is called for by 1 U.S.C. §112a (1994).

[1] I have written the following articles demonstrating these developments: Theodor Meron, *The Case for War Crimes Trials in Yugoslavia*, FOREIGN AFF., Summer 1993, at 122; *From Nuremberg to The Hague*, MIL. L. REV., Summer 1995, at 107; *Rape as a Crime under International Humanitarian Law*, 87 AJIL 424 (1993); *The Normative Impact of the International Tribunal for Former Yugoslavia*, 1994 ISR. Y.B. HUM. RTS. 163; *International Criminalization of Internal Atrocities*, 89 AJIL 554 (1995); *The Continuing Role of Custom in the Formation of International Humanitarian Law*, 90 AJIL 238 (1996); *Answering for War Crimes: Lessons from the Balkans*, FOREIGN AFF., Jan.–Feb. 1997, at 2.