CONTEMPORARY PRACTICE OF THE UNITED STATES RELATING TO INTERNATIONAL LAW

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GENERAL INTERNATIONAL AND U.S. FOREIGN RELATIONS LAW

U.S. Department of State Legal Adviser Surveys U.S. International Lawmaking Practice

In an October 2012 lecture at the Georgetown University Law Center, U.S. Department of State Legal Adviser Harold Hongju Koh[1] surveyed contemporary international lawmaking by the United States. Koh contended that the hornbook triad of Article II treaties, congressional-executive agreements, and pure executive agreements does not reflect contemporary U.S. practice in international law, which he saw as also including many other types of legally significant activities. Excerpts follow:

> [L]et me address how we in the Obama Administration have handled a broad set of activities that can be grouped loosely under the rubric of "21st Century International Lawmaking."
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> . . . You all know the hornbook law on this subject: the United States can make law through international cooperation via one of three domestic law devices: (1) an Article II Treaty, advised and consented to by 2/3 of the Senate; (2) a congressional-executive agreement, which involves passing a statute by a majority of both houses and signed by the President; and (3) under certain circumstances, by sole executive agreement, concluded within the scope of the President's independent constitutional authority. . . .
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> . . . [W]e are now moving to a whole host of less crystalline, more nuanced forms of international legal engagement and cooperation that do not fall neatly within any of these three pigeonholes. . . . We need a better way to describe the nuanced texture of the tapestry of modern international lawmaking and related activities that stays truer to reality. . . .
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> I. Our Varied International Legal Engagement Practices
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> A. Treaties and Agreements
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> . . . Even in this age of legislative near-deadlock, treaties—in the constitutional, Senate "advice and consent" sense—remain an integral part of our international lawmaking practice. . . .
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> But in modern times, Article II treaties have never been the only option. The long-dominant view in the Academy . . . has been that treaties and congressional-executive agreements are in fact interchangeable, legally available options for binding the United States in its international relations. At the same time, a governmental practice has arisen of doing certain types of agreements by treaty: for example, extradition, human rights, membership in international organizations, and arms control matters. Other forms of international lawmaking have traditionally been done by congressional-executive agreement. For example, free-trade agreements have traditionally been entered into with the ex post approval of Congress expressed through subsequent legislation.
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> . . . If it is so hard to get 67 votes for a treaty, why don't we just accede to it by statute? The short answer . . . is that a particular non-treaty route might be legally available to the Executive . . . but may not be *politically* advisable as a matter of comity . . . . [A] key part of

[1] Koh reportedly intends to return to teaching at the Yale Law School in January 2013. *See* http://yaledailynews.com/crosscampus/2012/12/07/former-law-dean-harold-koh-to-return-to-yale.

being an Executive Branch lawyer is accurately forecasting . . . when choosing a particular legal route—even if lawful—may foster bitter political conflict and invite unnecessary trouble.

. . . Securing a 67-vote Senate supermajority for a treaty is particularly hard work, and requires a very high degree of bipartisanship. In any given case, concluding a treaty with the requisite two-thirds support sends a powerful political message . . . . And so, for all their difficulties, Article II treaties remain a critically important focus of our international lawmaking practice.

[Koh here discussed the New START Treaty, approved by the Senate in 2010 by a vote of 71-26,[2] and administration efforts seeking Senate approval of the 1982 Law of the Sea Convention.[3]]

. . . .

[W]e also are urging the Senate to give its advice and consent to the Disabilities Convention, the Convention on the Rights of Persons with Disabilities. . . . This past July 26th, . . . the Senate Foreign Relations Committee sent the treaty to the Senate floor with bipartisan support. Again, we hope to see the full Senate give its advice and consent soon.[4]

. . . .

Now just a few generations ago, . . . [this rundown] would have been both the beginning and the end of a speech on international lawmaking: the Constitution specifies treaties as the constitutionally enumerated mechanism for entering international agreements, and that's that. Indeed, scholars such as . . . Larry Tribe made such an argument in the 1990s, when he called unconstitutional the mechanism by which the Clinton Administration joined NAFTA—by an Act of Congress, or as a congressional-executive agreement. But the overwhelming consensus in the legal academy rejected that view . . . .

The constitutionality of these congressional-executive agreements is now well-settled, particularly where Congress is exercising its foreign commerce power. Indeed, the United States used a congressional-executive agreement . . . to conclude the 1945 Bretton Woods Agreement, which did nothing short of establishing the post-war global economic order. . . .

What is also well-settled . . . is that there is a category of cases where the President can enter a binding international agreement based on his own independent, Article II authorities, without action from Congress. This was the holding of the famous *Belmont* and *Pink* cases where President Franklin Roosevelt, as part of his recognition of the Soviet Union, agreed to settle certain interstate claims. The Court recognized not only that the President had authority to enter into the Agreement on his own authority as President, but also found, under the Supremacy Clause, that that agreement prevailed over any contrary state law.

None of this is news . . . . But when you dig into the details, the clarity starts to fade. Academics . . . tend to treat this area of law as divided into three [boxes]. You have your treaty

[2] [Editor's note: *see* John R. Crook, Contemporary Practice of the United States, 105 AJIL 333, 358 (2011).]
[3] [Editor's note: *see* John R. Crook, Contemporary Practice of the United States, 106 AJIL 643, 659 (2012).]
[4] [Editor's note: *see* Brief Notes, *Disabilities Convention Fails to Win U.S. Senate Approval*, this issue.]

box. You have your congressional-executive agreement box . . . . Third, you have your "sole executive agreement" box . . . .

But in the real world, this tidy framework grossly over-simplifies reality. There are a wealth of international agreements that are consistent with, and can be implemented under, existing law, but that do not fall neatly into any of these boxes. [Koh here discussed the controversy regarding the Executive's authority to conclude the Anti-Counterfeiting Trade Agreement, or ACTA.]

But authority in this area sits not on isolated stools, but rather runs in a spectrum. Why was entering the agreement a legally available option? First, while Congress did not *expressly* pre-authorize this particular agreement, it *did* pass legislation calling on the Executive to "work[] with other countries to establish international standards and policies for the effective protection and enforcement of intellectual property rights." Further . . . the agreement negotiated fit within the fabric of existing law . . . and did not require any further legislation to implement. We also . . . found that Congress' call for executive action to protect intellectual property rights arose against the background of a long series of agreements on . . . intellectual property protection done in a similar fashion. What we saw in practice resembles a phenomenon I called . . . [a] "quasi-constitutional custom," a widespread and consistent practice of executive branch activity that Congress, by its conduct, has essentially accepted. In this respect, the ACTA resembled the Algiers Accords that ended the Iranian Hostages crisis, whose constitutionality was broadly upheld by the Supreme Court 31 years ago in *Dames & Moore v. Regan*. . . .

B. Ensuring Compliance

. . . *[B]efore* we undertake international commitments, we think very carefully about what they entail, precisely because we take so seriously those commitments we do make.

In my academic work, I have described a pervasive phenomenon in international affairs that I call "transnational legal process": that international law is primarily enforced not by coercion, but by a process of *internalized compliance*. Nations tend to *obey* international law, because their government bureaucracies adopt standard operating procedures and other internal mechanisms that foster default patterns of habitual compliance with international legal rules. When I became Legal Adviser, I found that this is even truer than I thought. [Koh here described the U.S. Department of State's Circular 175 process establishing a standardized procedure for concluding international agreements.]

My office also steps in on the other side of the equation, in the much rarer cases where we find ourselves falling short of compliance. . . . [Koh here described the ICJ's *Avena* judgment and efforts by the U.S. administration to bring the United States into compliance, leading to the U.S. Supreme Court's decision in *Medellin v. Texas*.]

. . . .

. . . Since *Medellin*, we have therefore worked hard to bring the United States into compliance with *Avena* (and our VCCR obligations more generally) through . . . (1) further litigation to fulfill *Avena*'s directive; (2) an ongoing effort to secure compliance through proposed federal legislation, the Consular Notification Compliance Act (CNCA); and (3)

continuing improvements in our consular practices to ensure that no future VCCR violations occur.

First, the United States has supported state and federal litigation to implement our international legal obligations under *Avena*. [Koh here described the administration's unsuccessful efforts in *Leal Garcia v. Texas*[5] and a recent Nevada Supreme Court decision[6] ordering an evidentiary hearing to determine if one of the sentenced defendants in *Avena* was prejudiced by lack of consular access.]

Second, this Administration has worked to develop a *federal legislative solution* to implement the *Avena* judgment. . . .

Third, . . . we have found that violations of consular assistance obligations typically result not from any malice, but simply lack of awareness of our international obligations by street-level officials. We have therefore worked on promoting awareness . . . through guidance, training, and model policies and practices to guarantee consular notification and access . . . [involving] intensive outreach and training efforts directed at federal, state, and local law enforcement officials, as well as counsel and judges. Since 1997, the State Department has published . . . a Consular Notification and Access (CNA) Manual and field trainings and briefings for federal, state, and local law enforcement, as well as for federal and state agencies, governors' and mayors' offices, bar associations, prison associations, and many other entities. . . .

C. Customary International Law

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The Executive Branch has famously recognized many provisions of the Vienna Convention on the Law of Treaties as customary international law. Since the late 1970s, it has done the same with respect to many aspects of the law of the sea. In March 1983, President Reagan's Ocean Policy Statement . . . announced that the United States would respect the claims of other States made in conformity with the 1982 Law of the Sea Convention, and abide by the Convention with respect to traditional uses of the ocean, such as navigation and overflight. Provisions in the Convention were thereafter *internalized* across the United States government, including in the U.S. Navy's standard operating procedures . . . . The U.S. Freedom of Navigation program . . . has implemented those procedures by opposing the maritime claims of States that go beyond that which is permitted by the Convention.

The Executive Branch also regularly asserts customary international law rules before our courts as principles to evaluate state claims of title to coastal waters, to guide statutory construction and to inform federal common lawmaking. In the area of the law of armed conflict, the U.S. Government has long recognized various rules of customary international law as binding, . . . such as the principles of distinction and proportionality. And the U.S. Government has also sought to promote the development of customary international law. For example, in 2011, the Obama Administration expressly declared that "The U.S. Government will . . . choose out of a sense of legal obligation to treat the [humane treatment] principles set forth in Article 75 [of the First Additional Protocol to the Geneva Conventions] as applicable to any individual it detains in an international armed conflict, and expects all other nations to adhere to these principles as well."[7]

[5] [Editor's note: *see* John R. Crook, Contemporary Practice of the United States, 105 AJIL 775, 784 (2011).]

[6] [Editor's note: *see Nevada Supreme Court Directs Hearing to Assess Possible Prejudice to Foreign National from Failure of Consular Notification in Capital Case*, this issue.]

[7] [Editor's note: *see* John R. Crook, Contemporary Practice of the United States, 105 AJIL 568, 594 (2011).]

D. Emerging Modes of "Non-Legal Understandings," "Layered Cooperation," and "Diplomatic Law Talk"

. . . Much of what my office does is to help policy clients advance their interests *outside* this familiar framework, oftentimes by fostering cooperation . . . in innovative ways. This can take the form of what I call "diplomatic law talk," involving fluid conversations on legal norms. It can also take the form of memorializing arrangements or understandings that we have on paper without creating binding legal agreements with all the consequences that entails. . . .

[Koh here discussed U.S. efforts to address global climate change through the Copenhagen Accord, a political document setting out nonbinding undertakings to address climate change by developed and developing countries.]

. . . .

These non-traditional efforts at legal diplomacy also include what I call "layered cooperation." In any given area of international cooperation, the choice between international agreements and non-legal alternatives is not binary. Instead, the legal and the non-legal understandings are layered, and operate on different levels. Take for example the Arctic Council, . . . which has emerged as an impressive example of a *non-legal* mechanism to facilitate sustainable development and international cooperation in the Arctic. The cooperation that takes place within the Arctic Council—generally through non-binding means—is layered on top of a legal backdrop of the Law of the Sea Convention, and the customary international law it reflects, which answer important questions about sovereign rights and jurisdiction in the Arctic.[8] . . .

Yet another example . . . can be found in outer space. . . . [T]o address contemporary problems presented by new capabilities and new actors, instead of new international agreements, space-faring states have favored legally non-binding principles and technical guidelines that are layered on top of those pre-existing treaties.[9]

We have also engaged in an innovative kind of "diplomatic law talk" on the ultimate 21st century legal issue: the law that applies to cyberspace. In this area, a few countries have sought to promote entirely new treaties and codes to regulate the internet. The U.S. Government has opposed these law-creation efforts—not because we don't think there should be *any* rules governing cyberspace, but to the contrary, because we believe there is already *established law* that applies. . . .

[Koh here discussed his speech at the U.S. Cyber Command addressing international law and cyberspace.[10]]

In political science terms, what we are doing is not "lawmaking" per se, so much as it is what international relations theorists call "regime-building"—in the sense of fostering discussion and building consensus about a set of norms, rules, principles, and decisionmaking procedures that converge and apply in a particular issue area. Some of the documents that emerge from these diplomatic discussions might be described as "soft law," inasmuch as they seek to define new norms, or speak to how established norms should apply to new circumstances. . . . In fact, a large part of my job as Legal Adviser has been to hold regular meetings with groups of legal adviser counterparts for the express purpose of discussing

[8] [Editor's note: *see* John R. Crook, Contemporary Practice of the United States, 105 AJIL 568, 580 (2011).]
[9] [Editor's note: *see* John R. Crook, Contemporary Practice of the United States, 106 AJIL 360, 372 (2012).]
[10] [Editor's note: *see State Department Legal Adviser Addresses International Law in Cyberspace*, this issue.]

emerging areas of consensus in these areas of law. Through this iterative process, where international lawyers from many countries talk about these issues bilaterally, plurilaterally, and multilaterally, we are building what international relations theorists call an epistemic community . . . .

E. Hybrid Private-Public Arrangements

Finally, the new 21st century international lawyering process recognizes that states are not the only actors. . . . [T]he proliferation and influence of non-state actors has "gone viral" in recent years. And so it is inevitable that the U.S. Government now finds itself developing relationships not just with states, but with civil society and industry groups too, among others. With this trend has come an explosion in so-called "public-private partnerships," or "hybrid arrangements."

One early and important landmark was the Voluntary Principles on Security and Human Rights. . . . The Voluntary Principles bring together governments, companies, and NGOs to promote guiding principles for oil, gas, and mining companies on providing security for their operations in a manner that respects human rights.[11] [Koh here described the operation and evolution of the Voluntary Principles.]

. . . [This] framework of cooperation exemplifies the modern "hybrid arrangement": to promote international norms and respect for human rights in the extractive industries, participants have set up a public-private partnership through which best practices can be shared and norms internalized. And we've helped set up an entity to provide the initiative necessary support—organizing that entity under the law of the Netherlands!

Another, more recent, example is the set of hybrid arrangements we have developed to create the International Code of Conduct for Private Security Service Providers.[12] . . . Instead of negotiating a traditional state-to-state agreement, we have helped develop an innovative public-private partnership, striving to bring government, industry, and civil society together to promote higher standards for private security companies (PSCs). You can think of it as shifting from an approach that focuses largely on static contracts to one that also emphasizes evolving and deepening public-private relationships.

As of today, in a remarkably short period of time, the Code has been signed by over 500 PSCs, including many that contract with the U.S. Government in places like Iraq and Afghanistan. . . .

II. Conclusion

. . . .

Make no mistake: this is not your grandfather's international law, a Westphalian top-down process of treatymaking where international legal rules are negotiated at formal treaty conferences, to be handed down for domestic implementation in a top-down way. Instead, it is a classic tale of what I have long called "transnational legal process," the dynamic interaction of private and public actors in a variety of national and international fora to generate norms and construct national and global interests. . . . Twenty-first century international lawmaking has become a swirling interactive process whereby norms get "uploaded" from

[11] [Editor's note: *see* John R. Crook, Contemporary Practice of the United States, 106 AJIL 138, 156 (2012).]
[12] [Editor's note: *see* John R. Crook, Contemporary Practice of the United States, 105 AJIL 122, 156 (2011).]

one country into the international system, and then "downloaded" elsewhere into another country's laws or even a private actor's internal rules.[13]

United States Comments on International Law Commission's Current Projects

In a November 2012 statement to the UN General Assembly's Sixth (Legal) Committee, Department of State Assistant Legal Adviser for UN Affairs Todd Buchwald expressed appreciation for the work of the International Law Commission's special rapporteurs and summarized U.S. views on the Commission's current projects.[1] Excerpts follow:

Immunity of State Officials from foreign criminal jurisdiction

. . . .

. . . The United States . . . remains committed to striking the right balance between immunity and accountability. We must keep in mind these twin goals in order that state officials performing their official duties overseas are adequately protected and those guilty of gross crimes do not go unpunished.

The Commission's report poses two questions to states regarding their national law and practice with respect to this topic: "(a) Does the distinction between immunity *ratione materiae* and immunity *ratione personae* result in different legal consequences and, if so, how are they treated differently? (b) What criteria are used in identifying the persons covered by immunity *ratione personae*?"

. . . .

As a general matter, the bulk of U.S. practice centers on civil suits and the issue arises rarely in the criminal context. To the extent U.S. practice in civil cases could be relevant to our handling of criminal cases, we offer the following.

The United States government analyzes cases that raise questions of immunity *ratione materiae* and those that raise questions of immunity *ratione personae* differently. Immunity *ratione materiae* is a conduct-based immunity such that an individual who has immunity *ratione materiae* enjoys immunity only for acts taken in an official capacity. For this reason, in cases that necessitate determining whether an official enjoys immunity *ratione materiae*, the United States analyzes whether the acts at issue were taken in his official capacity.

This can be contrasted with cases that raise questions of immunity *ratione personae*, a status-based immunity. Under United States practice, a foreign official who enjoys immunity *ratione personae* must occupy a particular governmental office. An individual's status as the current occupant of that office generally results in broad immunity but only while in office. Thus, cases that raise questions of immunity *ratione personae* do not necessitate an analysis of whether the acts at issue were taken in an official capacity and were official acts. Instead, the analysis required is only whether the official currently occupies an office to which immunity *ratione personae* generally attaches. If the official enjoys immunity *ratione personae*, the official is usually immune for all acts while he occupies the relevant office, *i.e.*, in general, he is immune for acts taken both before he took office as well as those taken

[13] U.S. Dep't of State Press Release, Legal Adviser Harold Hongju Koh, Remarks at Georgetown University Law Center on Twenty-First Century International Lawmaking (Oct. 17, 2012), *at* http://www.state.gov/s/l/releases/remarks/199319.htm.

[1] *See* Sean D. Murphy, *The Expulsion of Aliens and Other Topics: The Sixty-Fourth Session of the International Law Commission*, 107 AJIL 164 (2013).