

Address: Twenty-First-Century International Lawmaking

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INTRODUCTION

The last time I spoke at Georgetown University Law Center was on the occasion of the eightieth anniversary of the Legal Adviser’s Office, known affectionately at the State Department as “L.”¹ I have now been the Legal Adviser at the State Department for more than three and a half years. During that time, at nearly every public event I attend, I find myself being asked questions about one issue: armed conflict. Nearly every question I am asked involves

* Legal Adviser, U.S. Department of State; Martin R. Flug ’55 Professor of International Law (on leave), Yale Law School. © 2012 Harold Hongju Koh. This is a lightly edited and footnoted version of the 33rd Thomas F. Ryan Lecture, which was delivered at the Georgetown University Law Center, Washington, D.C., on October 17, 2012. I am grateful to Deans Bill Treanor and Greg Klass and the Ryan Lecture Committee for including me in Georgetown’s great tradition in international law and human rights, particularly the legacy of the late, great Father Bob Drinan, in whose honor I had the joy of giving the inaugural lecture for the Drinan Chair in Human Rights just a few years ago. See Harold Hongju Koh, *Father Drinan’s Revolution*, 95 GEO. L.J. 1709 (2007). I was especially touched to meet Christine Coffey Ryan, the wife of the late Thomas F. Ryan, and her daughter, White House Fellow Missy Ryan, and to learn of the many illustrious lawyers who preceded me as Ryan Lecturer, especially my late boss, Associate Justice Harry A. Blackmun. Finally, I am grateful to my many wonderful colleagues at the Legal Adviser’s Office who gave me ideas and support for this lecture, including my Deputy Sue Biniatz; my Counselors of International Law, Geoff Klineberg, Sarah Cleveland, and Bill Dodge; Assistant Legal Advisers Evelyn Aswad, Paul Dean, and Alexandra Perina; and my friends and colleagues Kevin Baumert, Gilda Brancato, Steve Fabry, Virginia Frasure, Julie Herr, Brian Israel, Ian McKay, and Kathleen Milton. My greatest thanks go to my fabulous Special Assistants Kimberly Gahan, Emily Kimball, and, for his particular contributions to this work, David Zions, who has been a particular joy to work with, during the early days of what will doubtless be a brilliant scholarly career in international law.

¹ Harold Hongju Koh, Remarks, *The State Department’s Legal Adviser’s Office: Eight Decades in Peace and War*, 100 GEO. L.J. 1747 (2012).

Guantanamo, Afghanistan, cyber war, detention, and targeting practices. While these key areas raise tremendously important legal questions, in fact, they do not occupy even half of my time. More than half of my time is spent on a completely different set of issues, which I almost never get a chance to talk about publicly.

So today, let me talk not about international conflict, but about the other side of what I do: the legal aspects of international cooperation and engagement. Specifically, let me address how we in the Obama Administration have handled a broad set of activities that can be grouped loosely under the rubric of “twenty-first century international lawmaking.”

Now I would expect that many, if not most, of you have already studied, or even taught, this topic, whether in a constitutional law, international law, national security law, or foreign relations law class. 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 two-thirds of the Senate;² (2) a congressional–executive agreement, which involves passage of a statute by a majority of both houses and signature by the President;³ and (3) under certain circumstances, by sole executive agreement, concluded within the scope of the President’s independent constitutional authority.⁴ Indeed, sketching this tripartite framework of Article II treaty, congressional–executive agreement, and sole executive agreement is Lesson I of Foreign Relations Law 101. Over my academic career, those core lessons constitute a law school course that I have often taught and law review articles that I have published.⁵

But it turns out that in the real world—I have found during my time at L—it is just not that simple. In this lecture, I hope to challenge your preconceived notions of how today’s practice of international legal engagement really works. In the twenty-first century, I would argue, we 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. My message is that in the twenty-first century, our international legal engagement has become about far more than just treaties and executive agreements. We need a better way to describe the texture of the tapestry of modern international lawmaking and related activities that stays truer to reality than this procrustean construct that academics try to impose on a messy reality. To give you a fuller sense of that texture, let me describe our current international lawmaking practice with regard to entering and complying with treaties; executive agreements and customary international law; and emerging modes of international legal engagement, such as what I will call “diplomatic law-talk,” layered cooperation, and hybrid public–private arrangements.

I. OUR VARIED INTERNATIONAL LEGAL ENGAGEMENT PRACTICES

A. TREATIES AND INTERNATIONAL AGREEMENTS

Let me start with treaties. Even in this age of legislative near-deadlock,⁶ treaties—in the

² See LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 176 (2d ed. 1996) (quoting U.S. CONST. art. II, § 2, cl. 2).

³ See *id.* at 215–18.

⁴ See *id.* at 219–24.

⁵ See, e.g., Harold Hongju Koh, *The Fast Track and United States Trade Policy*, 18 BROOK. J. INT’L L. 143, 145–47 (1992) (summarizing these options in the trade-agreement context).

⁶ See, e.g., Jonathan Weisman, *Congress Heads for Home with Rancor Still Evident*, N.Y. TIMES, Sept. 21, 2012, <http://www.nytimes.com/2012/09/22/us/politics/lawmakers-going-home-with-rancor-still-evident.html>.

constitutional, Senate “advice and consent” sense—remain an integral part of our international lawmaking practice. Article II of the Constitution gives the President the power to “make treaties,” subject to the advice and consent of two-thirds of the Senate,⁷ and the Supremacy Clause—Article VI—makes those treaties “the supreme law of the land.”⁸

But in modern times, Article II treaties have never been the only option. The long-dominant view in the academy⁹—articulated by my late Yale colleague Myres McDougal and Asher Lans in *The Yale Law Journal* as far back as 1945—has been that treaties and congressional–executive agreements are in fact interchangeable, legally available options for binding the United States in its international relations.¹⁰ At the same time, a governmental *practice* has arisen of doing certain types of agreements by treaty: for example, extradition,¹¹ human rights,¹² membership in international organizations,¹³ and arms control matters.¹⁴ 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.¹⁵

I am sometimes asked, why don’t we just ratify a particular convention by congressional–executive agreement, rather than Article II treaty? If it is so hard to get sixty-seven votes for a treaty, why don’t we just accede to it by statute? The short answer, which you will understand sitting here less than a mile from the Capitol, is that a particular nontreaty route might be legally available to the Executive for entering into certain kinds of international agreements but may not be *politically* advisable as a matter of comity to Congress. Congress has its own strong views on how certain types of agreements should be entered into and will fight for those outcomes as a matter of institutional and political prerogative. That does not mean that the Executive’s hands are tied in any given case. But what it does mean is that a key part of being an Executive Branch lawyer is accurately forecasting to your clients when choosing a particular legal route—even if lawful—may foster bitter political conflict and invite unnecessary trouble.

Every time we enter into an Article II treaty, we also send the *world* a message. Securing a sixty-seven-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

⁷ U.S. CONST. art. II, § 2, cl. 2.

⁸ *Id.* art. VI (“[A]ll 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.”).

⁹ See, HENKIN, *supra* note 2, at 217 (“[I]t is now widely accepted that the Congressional–Executive agreement is available for wide use, even general use, and is a complete alternative to a treaty.” (footnote omitted)).

¹⁰ Myres S. McDougal & Asher Lans, *Treaties and Congressional–Executive or Presidential Agreements: Interchangeable Instruments of National Policy: I*, 54 YALE L.J. 181 (1945).

¹¹ See 18 U.S.C. § 3181 note (2006) (listing U.S. extradition treaties).

¹² See GLEN S. KRUTZ & JEFFREY S. PEAKE, TREATY POLITICS AND THE RISE OF EXECUTIVE AGREEMENTS: INTERNATIONAL COMMITMENTS IN A SYSTEM OF SHARED POWERS 48 (2009) (noting that “human rights agreements have always been submitted to the Senate as treaties”).

¹³ See, e.g., U.N. Charter, June 26, 1945, 59 Stat. 1031, 1 U.N.T.S. XVI (consented to by the Senate on July 28, 1945); North Atlantic Treaty, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243 (creating the North Atlantic Treaty Organization and consented to by the Senate on July 21, 1949).

¹⁴ See, e.g., Treaty on the Non-Proliferation of Nuclear Weapons, July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161 (consented to by the Senate on March 13, 1969).

¹⁵ See JEANNE J. GRIMMETT, CONG. RESEARCH SERV., 97-896, WHY CERTAIN TRADE AGREEMENTS ARE APPROVED AS CONGRESSIONAL–EXECUTIVE AGREEMENTS RATHER THAN AS TREATIES (2012) (surveying free-trade agreements approved by Congress).

support sends a powerful political message about how united our nation is behind a particular international obligation. And so, for all their difficulties, Article II treaties remain a critically important focus of our international lawmaking practice.

Take the New START treaty, which passed the Senate in 2010 by a hard-won vote of 71–26.¹⁶ Under New START, the United States and Russia agreed to limits on the number of deployed warheads and nuclear-weapon-delivery vehicles, as well as complicated verification procedures.¹⁷ Lawyers in my office played a key role in this massive effort—advising policymakers, working on language at the negotiating table, and working with the Senate every step of the way to ensure ratification. Why was New START so important? Because that treaty allowed us to resume on-site inspections of Russian facilities, a right that had expired along with the previous START treaty.¹⁸ Restoring this “trust but verify” regime was critical to a genuine system of arms control, which is why President Obama called ratifying the New START treaty a “national security imperative.”¹⁹

Currently before the Senate, as you probably know, are two more treaties that the Obama Administration is strongly supporting. The first is the 1982 Law of the Sea Convention,²⁰ which Secretary Clinton testified in support of in May of this year.²¹ Although that treaty has long enjoyed substantial bipartisan support and was also pushed by our predecessors in the Bush Administration,²² some critics have alleged that joining it would sacrifice our national sovereignty.²³ But nothing could be further from the truth. In fact, the opposite is true: joining

¹⁶ See Peter Baker, *Senate Passes Arms Control Treaty with Russia, 71–26*, N.Y. TIMES, Dec. 22, 2010, <http://www.nytimes.com/2010/12/23/world/europe/23treaty.html>.

¹⁷ See Remarks on Signing the Strategic Arms Reduction Treaty with President Dmitry A. Medvedev of Russia and an Exchange with Reporters in Prague, Czech Republic, 2010 DAILY COMP. PRES. DOC. 241 (Apr. 8, 2010).

¹⁸ See Baker, *supra* note 16 (explaining that the treaty “provides for a resumption of on-site inspections, which halted when the original Start treaty expired last year”).

¹⁹ See Remarks Prior to a Meeting on the Strategic Arms Reduction Treaty and an Exchange with Reporters, 2010 DAILY COMP. PRES. DOC. 995 (Nov. 18, 2010). Despite the Senate having completed the advice-and-consent phase of treaty accession in 2008, this Administration is still seeking congressional action to allow our ratification of two other treaties designed to strengthen our legal basis for securing nuclear materials and preventing nuclear terrorism: the 2005 amendment to the Convention on the Physical Protection of Nuclear Material and the International Convention for the Suppression of Acts of Nuclear Terrorism. These treaties require updates to the United States criminal code, for which the Administration presented draft legislation in 2010 and again last year. The House passed a version of this bill this summer, and we await Senate action that would permit us finally to deposit our instruments of ratification. See Nuclear Terrorism Conventions Implementation and Safety of Maritime Navigation Act of 2012, H.R. 5889, 112th Cong. (as passed by House, June 28, 2012); *Implementation of Certain International Nuclear and Maritime Terrorism Agreements: Hearing Before the Subcomm. on Crime, Terrorism, & Homeland Security of the H. Comm. on the Judiciary*, 112th Cong. 24–27 (2011) (testimony of Thomas M. Countryman, Assistant Secretary of State for International Security & Nonproliferation).

²⁰ U.N. Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397 (entered into force Nov. 16, 1994).

²¹ See *Accession to the 1982 Law of the Sea Convention and Ratification of the 1994 Agreement Amending Part XI of the Law of the Sea Convention: Hearing Before the S. Comm. on Foreign Relations*, 112th Cong. (2012) (written testimony of Hillary Rodham Clinton, Secretary of State) [hereinafter *Law of Sea Testimony*], available at http://www.foreign.senate.gov/imo/media/doc/REVISED_Secretary_Clinton_Testimony.pdf.

²² See, e.g., Henry Kissinger, George Shultz, James Baker III, Colin Powell & Condoleezza Rice, Op-Ed, *Time To Join the Law of the Sea Treaty*, WALL ST. J., May 30, 2012, <http://online.wsj.com/article/SB10001424052702303674004577434770851478912.html>.

²³ See Donna Cassata, *Sea Treaty All but Dead, 34 GOP Senators Oppose*, ASSOCIATED PRESS, July 16, 2012, available at http://www.boston.com/news/nation/washington/articles/2012/07/16/sea_treaty_all_but_dead_34_gop_senators_oppose/.

the Convention would *enhance* our sovereignty. It would secure for the United States sovereign rights over vast new areas and resources, including continental-shelf areas extending off our coasts and into the Arctic, at least six hundred miles off Alaska. It would give U.S. companies the legal certainty they need to make expensive investments and create American jobs.²⁴ It would enhance our national security by guaranteeing our military the freedom-of-navigation principles enshrined in the Convention.²⁵ And it would amplify our voice when we use the Law of the Sea platform to speak about the numerous maritime issues that implicate our national interests, such as the ongoing tensions in the South China Sea.²⁶ For these reasons, we continue to be hopeful that the Senate will act on these interests and soon give advice and consent to the Law of the Sea Convention.

Second, we also are urging the Senate to give its advice and consent to the Disabilities Convention—the Convention on the Rights of Persons with Disabilities.²⁷ Here in the United States, we have a long history of bipartisan leadership on domestic disability legislation, including the Americans with Disabilities Act (ADA)²⁸—legislation that is not only the gold standard worldwide but served as the model for this very Convention.²⁹ At its heart, the Convention promotes a core principle of our Constitution: nondiscrimination. It seeks to ensure that all persons with disabilities would be able to enjoy the same rights as nondisabled persons, on an equal basis with them. My office, with substantial input from the Department of Justice and other key agencies, prepared the article-by-article analysis and proposed reservations, understandings, and declarations in the transmittal package for this treaty,³⁰ and it has actively assisted the ratification efforts.³¹ This past July 26, the twenty-second anniversary of the Americans with Disabilities Act, the Senate Foreign Relations Committee sent the treaty to the Senate floor with bipartisan support.³² Again, we hope to see the full Senate give its advice and consent to this and other human rights treaties soon.³³

²⁴ See Kissinger et al., *supra* note 22.

²⁵ See *The Law of the Sea Convention (Treaty Doc. 103-39): The U.S. National Security and Strategic Imperatives For Ratification: Hearing Before the S. Comm. on Foreign Relations, 112th Cong.* (2012) (testimony of Gen. Martin E. Dempsey, Chairman, Joint Chiefs of Staff), available at [http://www.foreign.senate.gov/imo/media/doc/General_Dempsey_Testimony%20\(2012-05-23\)%20\(Final\).pdf](http://www.foreign.senate.gov/imo/media/doc/General_Dempsey_Testimony%20(2012-05-23)%20(Final).pdf).

²⁶ See, e.g., *Law of Sea Testimony*, *supra* note 21, at 8.

²⁷ Convention on the Rights of Persons with Disabilities, *opened for signature* Dec. 13, 2006, 2515 U.N.T.S. 3 (entered into force May 3, 2008).

²⁸ 42 U.S.C §§ 12101–12213 (2006 & Supp. V 2011).

²⁹ Press Statement, Hillary Rodham Clinton, Secretary of State, Celebrating 20 Years of the Americans with Disabilities Act (July 26, 2010), available at <http://www.state.gov/secretary/rm/2010/07/145144.htm>.

³⁰ See S. TREATY DOC. NO. 112-7 (2012).

³¹ See, e.g., S. EXEC. REP. NO. 112-6, at 7 (2012) (describing Senate committee hearings).

³² See *id.* (recommending Senate approval by a 13–6 vote).

³³ While it is not expected to be taken up in 2012, also before the Senate is the long-delayed advice and consent to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), or the Women’s Treaty, *adopted* Dec. 18, 1979, 1249 U.N.T.S. 13. See Office of the Legal Advisor, U.S. Dep’t of State, *Treaties Pending in the Senate*, <http://www.state.gov/s/l/treaty/pending/index.htm> (last updated May 18, 2012). The Administration strongly supports U.S. ratification of the CEDAW, a landmark convention that seeks to eradicate discrimination against women in a wide variety of settings, including in the workplace, education, and the provision of health care. U.S. ratification of CEDAW is long overdue, because it would give the United States a powerful tool to combat discrimination against women around the world. Press Statement, U.S. Dep’t of State, Thirtieth Anniversary of the United Nations’ Adoption of CEDAW (Dec. 18, 2009), available at <http://www.state.gov/r/pa/prs/ps/2009/dec/133893.htm>.

Now just a few generations ago, what you just heard me say 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 my friend and former Obama Administration colleague 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.³⁴ But the overwhelming consensus in the legal academy rejected that view and approved of the way our constitutional practice has developed to permit binding agreements entered into by the Executive and approved by majorities of both houses of Congress.³⁵

The constitutionality of these congressional–executive agreements is now well settled, particularly where Congress is exercising its foreign commerce power.³⁶ Indeed, the United States used a congressional–executive agreement as the procedure to conclude the 1945 Bretton Woods Agreement,³⁷ which “did nothing less than create the foundations of a new world economic order.”³⁸ Since that time, the same type of legislative instrument has been used to join NAFTA³⁹ and approve the Agreement Establishing the World Trade Organization.⁴⁰ And during this Administration, Congress has now approved three new free-trade agreements—with the Republic of Korea,⁴¹ Colombia,⁴² and Panama.⁴³ Because the process for domestic approval of such agreements not only eliminates the need for a sixty-seven-vote supermajority, but also includes the House, it allows implementing legislation to become part of the international lawmaking process.

What is also well settled, with Supreme Court case law to prove it, 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*⁴⁴ and *Pink*⁴⁵ cases where President Franklin Roosevelt, as part of his recognition

I have expressed my deep personal commitment to securing ratification of this treaty in testimony supporting it as Assistant Secretary of State for Democracy, Human Rights and Labor during the Clinton Administration, as well as in my private capacity. See Harold Hongju Koh, *Why America Should Ratify the Women's Rights Treaty (CEDAW)*, 34 CASE W. RES. J. INT'L L. 263 (2002); *Country Reports on Human Rights Practices for 1999: Hearing Before the Subcomm. on Int'l Operations and Human Rights of the H. Comm. on Int'l Relations*, 106th Cong. 9, 13 (2000) (testimony of Harold Hongju Koh, Assistant Secretary of State for Democracy, Human Rights and Labor), available at <http://www.gpo.gov/fdsys/pkg/CHRG-106hhrg65719/pdf/CHRG-106hhrg65719.pdf>.

³⁴ Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221 (1995).

³⁵ See, e.g., Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799 (1995).

³⁶ See *supra* note 15 and accompanying text.

³⁷ Bretton Woods Agreements Act, ch. 339, 59 Stat. 512 (1945) (codified at 22 U.S.C. § 286 (2006)).

³⁸ Ackerman & Golove, *supra* note 35, at 891.

³⁹ North American Free Trade Agreement Implementation Act, Pub. L. No. 103-182, 107 Stat. 2057 (1993) (codified as amended at 19 U.S.C. §§ 3301–3473 (2006 & Supp. V 2011)).

⁴⁰ Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 (1994) (codified as amended at 19 U.S.C. §§ 3501–3624 (2006)).

⁴¹ United States–Korea Free Trade Agreement Implementation Act, Pub. L. No. 112-41, 125 Stat. 428 (2011) (codified at 19 U.S.C. § 3805 note (2006)).

⁴² United States–Colombia Trade Promotion Agreement Implementation Act, Pub. L. No. 112-42, 125 Stat. 462 (2011) (codified at 19 U.S.C. § 3805 note (2006)).

⁴³ United States–Panama Trade Promotion Agreement Implementation Act, Pub. L. No. 112-43, 125 Stat. 497 (2011) (codified at 19 U.S.C. § 3805 note (2006)).

⁴⁴ *United States v. Belmont*, 301 U.S. 324 (1937).

⁴⁵ *United States v. Pink*, 315 U.S. 203 (1942).

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 the agreement prevailed over any contrary state law.⁴⁶

None of this is news—you can learn it all from reading Lou Henkin’s *Foreign Affairs and the Constitution*⁴⁷ or the ALI’s *Restatement (Third) of Foreign Relations Law*.⁴⁸ But when you dig into the details, the clarity starts to fade. Academics like to put things in boxes, and they tend to treat this area of law as divided into three. First, you have your treaty box. Second, you have your congressional–executive-agreement box, which is subdivided into ex ante agreements, where Congress first authorizes the agreement by statute, and the Executive then negotiates and concludes it; and ex post agreements, where the Executive first negotiates an agreement and then brings it to Congress for subsequent approval.⁴⁹ Third, you have your sole-executive-agreement box, covering those areas where the President makes international law based on his independent constitutional authority.⁵⁰

But in the real world, this tidy framework grossly oversimplifies 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. Many of these agreements may not even be intended to affect legal interests at the domestic level (e.g., by being judicially enforceable like in the *Pink* and *Belmont* cases⁵¹). For example, recently, we in the Legal Adviser’s Office were surprised to find controversy surrounding the Executive’s authority to enter into the Anti-Counterfeiting Trade Agreement (ACTA), a multilateral agreement on enforcing intellectual property rights.⁵² Certainly, some of that controversy may have derived from policy disagreements with the goals of the ACTA, but a surprisingly large number of law professors questioned the Executive’s legal authority even to enter the agreement.⁵³ They said, in effect, “I don’t see an express ex ante congressional authorization, so it can’t fit into the congressional–executive agreement box, nor does this look like a traditional topic for a sole executive agreement. Since it falls between the stools, that must mean the U.S. lacks any authority to enter the agreement!”

What this misses is that legislative authority in the foreign affairs area sits not on isolated stools, but rather runs along a spectrum of congressional approval, as Justice Jackson suggested in his landmark concurrence in the *Steel Seizure* case.⁵⁴ Why was entering the agreement a

⁴⁶ *Pink*, 315 U.S. at 229–34; *Belmont*, 301 U.S. at 330–32.

⁴⁷ HENKIN, *supra* note 2, at 217–29.

⁴⁸ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 303, 311 (1987).

⁴⁹ HENKIN, *supra* note 2, at 215–16.

⁵⁰ See generally RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 303 (1987) (“[T]he President, on his own authority, may make an international agreement dealing with any matter that falls within his independent powers under the Constitution.”); HENKIN, *supra* note 2, at 219–24 (describing international agreements entered into solely by the Executive).

⁵¹ *Pink*, 315 U.S. 203; *Belmont*, 301 U.S. 324.

⁵² Anti-Counterfeiting Trade Agreement, Dec. 3, 2010, 50 I.L.M. 243.

⁵³ See, e.g., Jack Goldsmith & Lawrence Lessig, Op-Ed, *Anti-Counterfeiting Agreement Raises Constitutional Concerns*, WASH. POST, Mar. 26, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/03/25/AR2010032502403.html> (“Binding the United States to international obligations of this sort without congressional approval would raise serious constitutional questions”); Letter from Law Professors to Barack Obama, U.S. President 2–3 (Oct. 28, 2010), <http://www.wcl.american.edu/pijip/download.cfm?downloadfile=83CE3453-EFC7-45B0-7CBA50D842A84563> (“The use of a sole executive agreement for ACTA appears unconstitutional.”).

⁵⁴ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring).

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.”⁵⁵ Further, we and the United States Trade Representative (USTR) determined that the agreement negotiated fit within the fabric of existing law; it was fully consistent with existing law and did not require any further legislation to implement. We also surveyed how the political branches have dealt with similar agreements in the past and found that Congress’s call for executive action to protect intellectual property rights arose against the background of a long series of agreements on the specific question of intellectual property protection done in a similar fashion.⁵⁶ What we saw in practice resembles a phenomenon I called in my book *The National Security Constitution* “quasi-constitutional custom,” a widespread and consistent practice of Executive Branch activity that Congress, by its conduct, has essentially accepted.⁵⁷ In this respect, the ACTA resembled the Algiers Accords⁵⁸ that ended the Iranian Hostage Crisis, whose constitutionality was broadly upheld by the Supreme Court thirty-one years ago in *Dames & Moore v. Regan*.⁵⁹ There, the Supreme Court upheld the Algiers Accords by relying not on any particular express *ex ante* congressional authorization, but rather on “closely related” legislation enacted in the same area and a long history of Executive Branch practice of concluding claims-settlement agreements.⁶⁰ Although the Algiers Accords, like ACTA, did not fall neatly into any of these three “boxes,” the Supreme Court in *Dames & Moore* easily upheld the constitutionality of the Algiers Accords and found a “legislative intent to accord the President broad discretion” and, citing the *Steel Seizure* case, noted that such legislation “may be considered to ‘invite’ ‘measures on independent presidential responsibility.’”⁶¹

B. ENSURING COMPLIANCE

I’ve talked about a host of ways to undertake an obligation, but that’s only the beginning. You then face what international relations people call “the compliance question”: if the United States can lawfully enter into an international agreement, how do you ensure that we’ll comply? My office’s lawmaking practice is not limited to *joining* treaties and other agreements; we spend just as much time ensuring the U.S. is in a position to *comply* with its international obligations. I sometimes am asked by my European counterparts why the United States seems slow to join international agreements, suggesting that this shows that the United States doesn’t really care about international law. In fact, it reveals the opposite: *before* we undertake international commitments, we think very carefully about what they entail, precisely because we take so seriously those commitments we do make.

⁵⁵ Prioritizing Resources and Organization for Intellectual Property Act of 2008, Pub. L. No. 110-403, § 303(a)(6), 122 Stat. 4256, 4267 (codified at 15 U.S.C. § 8113(a)(6) (2006)).

⁵⁶ See Letter from Ambassador Ron Kirk, U.S. Trade Representative, to Ron Wyden, U.S. Senator (Dec. 7, 2011), in 2011 DIGEST § 4.A.2, at 109–10, available at <http://www.state.gov/documents/organization/194008.pdf>.

⁵⁷ HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN–CONTRA AFFAIR 70–71 (1990).

⁵⁸ Declaration of the Government of the Democratic and Popular Republic of Algeria, Jan. 19, 1981, 20 I.L.M. 224.

⁵⁹ 453 U.S. 654 (1981).

⁶⁰ *Id.* at 678; *id.* at 680–82 (describing as “[c]rucial” to the decision “that Congress has implicitly approved the practice of claim settlement by executive agreement” and citing examples).

⁶¹ *Id.* at 678 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring)).

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*.⁶² 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.⁶³ When I became Legal Adviser, I found that this is even more true than I thought. For example, most people are unaware of the so-called “C-175” process, named after a 1955 State Department Circular setting out a standardized procedure for concluding international agreements.⁶⁴ The few academics who have ever noticed that process often assume it is nothing more than a rubber stamp.⁶⁵ But having now seen it from the inside, I can tell you that the process is exhaustive and designed to ensure that all proposed U.S. international agreements—even if concluded by a different agency—are subject to a rigorous legal and policy review by the State Department before being negotiated and concluded. Through this process, the State Department plays the same kind of clearinghouse role with respect to international agreements that the Office of Management and Budget (OMB) plays with regard to federal regulations.⁶⁶ The C-175 process ensures not only that we have the legal authority to conclude the agreement in question, but also that every agency’s lawyers fully understand the nature of the domestic and international legal obligations we will undertake, so that we can accurately evaluate whether the United States will be able to comply with its new international legal obligations.

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. One widely underappreciated story is our continuing effort to comply with the International Court of Justice’s (ICJ) 2004 judgment in the *Avena* case.⁶⁷ In *Avena*, the ICJ famously held that the United States had violated Article 36 of the Vienna Convention on Consular Relations (VCCR)⁶⁸—whereby states must inform detained foreign nationals of their right to contact their country’s consular officials to seek assistance—with respect to fifty-one Mexican nationals on state death rows.⁶⁹ To remedy this violation, the Court ruled that the United States had to provide for review and reconsideration of each of the fifty-one convictions, notwithstanding any procedural default rules (which in our system normally apply to postconviction review of state convictions).⁷⁰ Once the ICJ gave judgment, we had an international obligation to comply not just under the Vienna Convention but also under Article 94 of the UN Charter, which requires states to comply with ICJ judgments in cases to

⁶² See Harold Hongju Koh, Lecture, *Transnational Legal Process*, 75 NEB. L. REV. 181 (1996).

⁶³ See *id.* at 199–205.

⁶⁴ See *Circular 175 Procedure*, OFFICE OF THE LEGAL ADVISOR, U.S. DEP’T OF STATE, <http://www.state.gov/s/l/treaty/c175> (last visited Oct. 31, 2012). The process has been codified at 22 C.F.R. § 181.4 (2012) and 11 U.S. DEP’T OF STATE, FOREIGN AFFAIRS MANUAL §§ 721–27 (2006).

⁶⁵ See, e.g., Oona A. Hathaway, *Treaties’ End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE L.J. 1236, 1250–51 (2008) (arguing that the C-175 process “give[s] relatively little guidance regarding the choice between a treaty and a congressionally authorized executive agreement”); see *id.* at 1251 n.36 (collecting similar scholarly opinions).

⁶⁶ See Exec. Order No. 12,866, 3 C.F.R. 638 (1994).

⁶⁷ Case Concerning *Avena & Other Mexican Nationals* (Mex. v. U.S.), 2004 I.C.J. 12 (Mar. 31).

⁶⁸ Vienna Convention on Consular Relations, art. 36, Apr. 24, 1963, 21 U.S.T. 77, 100–01 596 U.N.T.S. 261, 292–94.

⁶⁹ *Avena*, 2004 I.C.J. 12, ¶ 106.

⁷⁰ *Id.* ¶¶ 152, 153(4) & (11).

which they are a party.⁷¹

The *Avena* judgment inaugurated an eight-year-long effort over two Administrations to bring ourselves into compliance with the ICJ judgment. Although the first unsuccessful phase was well publicized, our ongoing efforts at compliance are far less well-known.

In 2005, then-President George W. Bush sought to implement the *Avena* judgment by issuing a memorandum to the Attorney General directing state courts to “give effect to the decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision.”⁷² Texas refused to comply with the memorandum and, in the 2008 Supreme Court case of *Medellin v. Texas*, convinced the Court that the President acting alone lacks the authority to enforce the *Avena* judgment in U.S. courts.⁷³ Although the Supreme Court held that our Article 94 obligation is not self-executing or enforceable in domestic court,⁷⁴ Chief Justice Roberts expressly recognized that the *Avena* judgment “constitutes an *international* law obligation on the part of the United States.”⁷⁵ Since *Medellin*, we have therefore worked hard to bring the United States into compliance with *Avena* (and our VCCR obligations more generally) through three other avenues: (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*. In the case of Humberto Leal Garcia, the United States supported a stay of execution for a Mexican national subject to the *Avena* judgment who—in violation of our Vienna Convention obligations—was convicted and sentenced to death following the failure of Texas authorities to notify Mr. Garcia upon his detention of his right under the VCCR to seek the assistance of the Mexican consulate.⁷⁶ Along with Solicitor General Don Verrilli, I signed our amicus brief in that case, making clear the importance of the foreign policy consequences at issue,⁷⁷ but a 5–4 majority of the Court nonetheless denied the stay.⁷⁸ Still, litigation in this area continues. Just last month, the Nevada Supreme Court *did* remand the case of one of the *Avena* defendants for an evidentiary hearing to determine whether he was actually prejudiced by the lack of consular access.⁷⁹ Notably, the court described the reverse

⁷¹ U.N. Charter art. 94, para. 1 (“Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party.”).

⁷² Memorandum from the President for the Attorney General (Feb. 28, 2005), <http://georgewbush-whitehouse.archives.gov/news/releases/2005/02/20050228-18.html>.

⁷³ 552 U.S. 491 (2008).

⁷⁴ *Id.* at 506 (“[W]e conclude that the *Avena* judgment is not automatically binding domestic law.”).

⁷⁵ *Id.* at 504.

⁷⁶ Brief for the United States as Amicus Curiae in Support of Applications for a Stay at *5–6, *Garcia v. Texas*, 131 S. Ct. 2866 (2011) (No. 11-5001), 2011 WL 2630156.

⁷⁷ *Id.* at *26–30.

⁷⁸ *Garcia*, 131 S. Ct. 2866 (2011). Justice Breyer, joined by Justices Ginsburg, Sotomayor, and Kagan, dissented. *Id.* at 2868–71.

⁷⁹ *Gutierrez v. State*, No. 53506, 2012 WL 4355518 (Nev. Sept. 19, 2012). Even though Nevada did not *have to* remand under *Medellin*, the Nevada court properly recognized that it *could*. This illustrates the “cooperative federalism” principle that Justice Stevens discussed in his separate opinion in *Medellin*—where he stated that “[o]ne consequence of our form of government is that sometimes States must shoulder the primary responsibility for protecting the honor and integrity of the Nation.” 552 U.S. 491, 536 (Stevens, J., concurring in judgment). Even if the integrity of the nation rests in a certain circumstance in the hands of an individual state, with that power comes an independent state responsibility to comply with international legal obligations.

hypothetical of a U.S. citizen detained in Mexico, pointing out that “we would expect Mexico, on order of the ICJ, to review the reliability of the proceedings”⁸⁰

Second, this Administration has worked to develop a federal legislative solution to implement the *Avena* judgment. After extensive consultations with this Administration, in June 2011, Senator Patrick Leahy introduced the CNCA, a bill which, if enacted, would bring the United States into compliance with our *Avena* obligations by providing federal court review of the Vienna Convention claims of foreign nationals on death row to determine whether they were prejudiced by a consular-notification-and-access violation.⁸¹ Secretary of State Hillary Clinton, Secretary of Defense Leon Panetta, and Attorney General Eric Holder have all written to Senate committees expressing the Administration’s strong support for this legislation, citing its implications for the U.S. government’s ability to protect U.S. citizens overseas and to promote cross-border law-enforcement cooperation, and legislative efforts to secure the CNCA’s passage continue even as I speak.⁸²

Third, looking at our VCCR obligation more generally: we have found that violations of consular-assistance obligations typically result not from any malice, but simply from lack of awareness of our international obligations by street-level officials. We have therefore worked on promoting awareness among those who are responsible for living up to our nation’s obligations. Applying transnational-legal-process techniques of norm internalization, we have sought to achieve full compliance with the VCCR through guidance, training, and model policies and practices to guarantee consular notification and access. These ongoing, persistent efforts at treaty compliance are almost unknown, but they are a critical part of abiding by our legal obligations. For nearly a decade, the Departments of State and Justice have engaged in 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 and provided free of charge a Consular Notification and Access 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.⁸³ The State Department also now disseminates information about consular notification and access requirements on our website,⁸⁴

⁸⁰ *Gutierrez*, 2012 WL 4355518, at *3.

⁸¹ Consular Notification Compliance Act of 2011, S. 1194, 112th Cong. To obtain relief, such defendants face a high bar: they must establish not only a violation of their consular-notification rights but also that the violation resulted in actual prejudice. *Id.* § 4(a)(3).

⁸² See *Fulfilling Our Treaty Obligations and Protecting Americans Abroad: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. 120 (2011) (letter from Hillary Rodham Clinton, Secretary of State, to Sen. Lindsey Graham (July 27, 2011)); *id.* at 127 (letter from Eric H. Holder, Jr., Att’y Gen. of the United States & Hillary Rodham Clinton, Secretary of State, to Sen. Patrick J. Leahy (June 28, 2011)); *id.* at 149 (letter from Leon Panetta, Secretary of Defense, to Sen. Patrick J. Leahy (Aug. 31, 2011)).

⁸³ See *Outreach by the State Department*, U.S. DEP’T OF STATE, http://travel.state.gov/law/consular/consular_2244.html (last visited Oct. 31, 2012); see also William J. Aceves, *The Vienna Convention on Consular Relations: A Study of Rights, Wrongs, and Remedies*, 31 VAND. J. TRANSNAT’L L. 257, 323–24 (1998) (“The State Department has begun to conduct briefings on consular notification and access for law enforcement officials throughout the country. It has developed a more comprehensive guide on [those] issues for law enforcement agencies.”).

⁸⁴ The current edition of the *Consular Notification and Access Manual* (3d ed. 2010) is available at http://www.travel.state.gov/pdf/cna/CNA_Manual_3d_Edition.pdf.

as well as on such social media websites as Facebook and Twitter.⁸⁵

C. CUSTOMARY INTERNATIONAL LAW

Another traditional way for the Executive Branch to engage in international lawmaking for the U.S.—even in the absence of an express agreement—is by recognizing and helping develop certain rules as customary international law, which result from a general and consistent practice of states followed out of a sense of legal obligation. For example, related to what I just discussed, the State Department takes the view that customary international law imposes on us an obligation to provide consular notification and access upon request to nationals even of foreign countries that are *not* parties to the VCCR or other applicable bilateral treaties.

The Executive Branch has famously recognized many provisions of the Vienna Convention on the Law of Treaties as customary international law.⁸⁶ 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—noting the U.S. leadership role in developing customary law of the sea—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.⁸⁷ Provisions in the Convention were thereafter *internalized* across the United States government, including in the U.S. Navy’s standard operating procedures.⁸⁸ The United States has not only recognized much of the Convention as customary law, it has actively sought—through diplomacy and peaceful military activities—to promote this recognition across all states. The U.S. Freedom of Navigation program, starting in the 1970s and continuing to this day, has implemented those procedures by opposing the maritime claims of states that go beyond that which is permitted by the Convention.⁸⁹

The Executive Branch also regularly asserts customary-international-law rules before our courts as principles to evaluate state claims of title to coastal waters,⁹⁰ to guide statutory

⁸⁵ See, e.g., U.S. Dep’t of State, *Consular Notification and Access*, <https://www.facebook.com/ConsularNotify> (last visited Oct. 31, 2012); U.S. Dep’t of State, *@ConsularNotify*, <https://twitter.com/ConsularNotify> (last visited Oct. 31, 2012).

⁸⁶ See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES pt. III intro (1987) (“The Department of State has on various occasions stated that it regards particular articles of the Convention as codifying existing international law; United States courts have also treated particular provisions of the Vienna Convention as authoritative.”).

⁸⁷ See Statement on United States Oceans Policy, 1 PUB. PAPERS 378 (Mar. 10, 1983) (stating that the Convention contained “provisions with respect to the traditional uses of the oceans which generally confirm existing maritime law and practice and fairly balance the interests of all states”).

⁸⁸ See, e.g., JUDGE ADVOCATE GENERAL’S LEGAL CENTER & SCHOOL, OPERATIONAL LAW HANDBOOK ch. 10 (2011), *available at* http://www.loc.gov/r/frd/Military_Law/pdf/operational-law-handbook_2011.pdf (relying extensively on various Convention provisions). For a fuller discussion of internalizing the Convention and other customary international law, see Harold Hongju Koh, Address, *The 1998 Frankel Lecture: Bringing International Law Home*, 35 HOUS. L. REV. 623, 639–41 (1998).

⁸⁹ See BUREAU OF OCEANS & INT’L ENVTL. & SCIENTIFIC AFFAIRS, U.S. DEP’T OF STATE, LIMITS IN THE SEAS NO. 112: UNITED STATES RESPONSES TO EXCESSIVE NATIONAL MARITIME CLAIMS 6 (1992) (describing the Freedom of Navigation program, started in 1979), *available at* <http://www.state.gov/documents/organization/58381.pdf>; see also Koh, *supra* note 88, at 638–41.

⁹⁰ See *United States v. Louisiana (Louisiana Boundary Case)*, 394 U.S. 11, 22 (1969) (applying “generally accepted principles of international law” to deny Louisiana’s claim of historic title to certain coastal waters).

construction,⁹¹ and to inform federal common lawmaking.⁹² In the area of the law of armed conflict, the U.S. government has long recognized various rules of customary international law as binding, including the central principles of *jus in bello*, such as the principles of distinction and proportionality.⁹³ 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 “[t]he 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.”⁹⁴

D. EMERGING MODES OF “NONLEGAL UNDERSTANDINGS,” “LAYERED COOPERATION,” AND
“DIPLOMATIC LAW TALK”

But twenty-first-century international legal engagement is hardly limited to these traditional tools of treaties and executive agreements and customary international law. Much of what my office does is to help policy clients advance their interests *outside* this familiar framework, oftentimes by fostering cooperation with various partners 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. To take just one example, Secretary Clinton recently signed a Memorandum of Understanding on enhancing our cooperation with the Arab League.⁹⁵ Again, its legal status is neither treaty nor agreement, but rather an expression of mutual intent that embodies our common effort to react to the new Middle East brought on by the “Arab Awakening.”

⁹¹ The Executive Branch and the courts often look to customary international law as informing the construction of statutory authorities. *See* *United States v. Alaska*, 503 U.S. 569, 588 & n.10 (1992) (considering arguments based on the baseline provisions of the Convention on the Law of the Sea, which the United States asserted as customary international law, to determine an executive official’s statutory authority to condition a permit); *United States v. Louisiana (Alabama and Mississippi Boundary Case)*, 470 U.S. 93, 106–07 (1985) (applying customary international law to define the term “historic bay” in the 1958 Territorial Sea Convention); *Finzer v. Barry*, 798 F.2d 1450, 1459 (D.C. Cir. 1986) (“[W]e are asked to review a statute which both Congress and successive Presidents have declared to be necessary to fulfill our obligations under . . . customary international law . . .”), *aff’d in part, rev’d in part sub nom.* *Boos v. Barry*, 485 U.S. 312 (1988).

⁹² In *First National City Bank v. Banco Para el Comercio Exterior de Cuba (Bancec)*, for example, Justice O’Connor found “the principles governing this case are common to both international law and federal common law” and derived a federal rule regarding the piercing of the corporate veil of foreign government entities from federal common law rules, as “necessarily informed both by international law principles and by articulated congressional policies.” 462 U.S. 611, 623 (1983).

⁹³ *See generally* Michael J. Matheson, The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions, Remarks at the Sixth Annual American Red Cross–Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions (Jan. 22, 1987), *in* 2 AM. U. J. INT’L L. & POL’Y 419 (1987).

⁹⁴ Office of the Press Secretary, The White House, Fact Sheet: New Actions on Guantánamo and Detainee Policy (Mar. 7, 2011), *available at* <http://www.whitehouse.gov/the-press-office/2011/03/07/fact-sheet-new-actions-guantanamo-and-detainee-policy>.

⁹⁵ *See* Hillary Rodham Clinton, Secretary of State, Remarks at the United Nations Security Council Session on Peace and Security in the Middle East (Sept. 26, 2012), *available at* <http://www.state.gov/secretary/rm/2012/09/198276.htm>.

Or take the Obama Administration's efforts to renew the United States' engagement in international diplomacy to address the threat of global climate change. In 2009, many hoped that the climate change conference in Copenhagen would yield a new climate-change treaty. When it became clear that would not be achievable, the international community, led by President Obama and Secretary Clinton, was able to agree on the Copenhagen Accord: a political, not legally binding document, that moved away from the Kyoto Protocol paradigm by securing commitments to address climate change from developed and developing countries alike.⁹⁶ At a crucial moment in climate diplomacy, the Copenhagen countries for the first time agreed on a global aspirational temperature goal; all key countries listed the emissions actions that they would implement;⁹⁷ everyone agreed to transparency procedures; and a new global climate fund was spawned.⁹⁸ While not legally binding, the Copenhagen outcome paved the way for last year's Durban Conference, where the world again decided to pursue a climate agreement of a more legal character—a protocol, legal instrument, or agreed outcome with legal force.⁹⁹

Another recent example is the 2010 Washington Communiqué of the Washington Nuclear Security Summit, hosted here by President Obama.¹⁰⁰ Again, the text is not legally binding, but it includes significant undertakings, and states have already made significant progress in fulfilling their pledges and improving nuclear security.¹⁰¹

These nontraditional efforts at legal diplomacy also include what I call “layered cooperation.” In any given area of international cooperation, the choice between international agreements and nonlegal alternatives is not binary. Instead, the legal and the nonlegal understandings are layered and operate on different levels. Take for example the Arctic Council, a group of eight Arctic States—Canada, Denmark, Finland, Iceland, Norway, Russia, Sweden, and the United States—which has emerged as an impressive example of a *nonlegal* mechanism to facilitate sustainable development and international cooperation in the Arctic.¹⁰² The cooperation that takes place within the Arctic Council—generally through nonbinding 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. Now notice that the Council is not a formal international organization; it was not set up by an international agreement, and the majority of its work is not legally binding. But this has not detracted from—and has probably even enhanced—its success in facilitating robust international cooperation among the Arctic States at all levels, ranging from foreign ministers to bench scientists.

⁹⁶ Copenhagen Accord, Dec. 18, 2009, in United Nations Framework Convention on Climate Change, Report of Conference of the Parties on its 15th Sess., Dec. 7–19, U.N. Doc. FCCC/CP/2009/11/Add.1 at 4 (Mar. 30, 2010).

⁹⁷ See United Nations Framework Convention on Climate Change, Copenhagen Accord Appendix I—Quantified Economy-Wide Emissions Targets for 2020, http://unfccc.int/meetings/copenhagen_dec_2009/items/5264.php (last visited Nov. 1, 2012).

⁹⁸ See Copenhagen Accord, *supra* note 96, at 7.

⁹⁹ For an account of the role the Legal Adviser's Office played in Durban, see John M. Broder, *U.S. Envoy Relieved by Climate Talks' Outcome*, N.Y. TIMES GREEN BLOG (Dec. 14, 2011), <http://green.blogs.nytimes.com/2011/12/14/u-s-envoy-relieved-by-climate-talks-outcome/>.

¹⁰⁰ Communiqué of the Washington Nuclear Security Summit (Apr. 13, 2010), *available at* <http://photos.state.gov/libraries/libya/19452/public/NSS%20-%20Communique%20With%20Logo%20040710.pdf>.

¹⁰¹ See Laura Holgate, Senior Director, Nat'l Security Staff, Exec. Office of the President, Remarks: The Outcomes of the 2010 Washington Summit (Oct. 7, 2011), *available at* <http://www.state.gov/t/isn/rls/rm/184951.htm>.

¹⁰² See *About the Arctic Council*, ARCTIC COUNCIL, <http://www.arctic-council.org/index.php/en/about> (last visited Nov. 7, 2012).

Yet another example of this kind of layered cooperation can be found in outer space. The exploration and use of outer space is conducted pursuant to important multilateral treaties as old as space exploration itself. But to address contemporary problems presented by new capabilities and new actors, instead of new international agreements, space-faring states have favored legally nonbinding principles and technical guidelines that are layered on top of those preexisting treaties.¹⁰³

We have also engaged in an innovative kind of “diplomatic law talk” on the ultimate twenty-first-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.¹⁰⁴ 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. At the same time, we acknowledge that when it comes to new technologies, it will not always be clear exactly *how* existing law applies.¹⁰⁵ So rather than start writing entirely new rules from scratch, we’ve taken the approach of engaging in a series of legal conversations—diplomatic law talk—with our international partners to promote consensus around international norms in various areas of cyber law.

For example, I recently gave a speech at U.S. Cyber Command presenting the U.S. views on ten questions regarding international law and cyberspace, focusing on the context of use of force and armed conflict. The answers to these questions state important principles, including the recognition that a cyberattack can, under certain circumstances, constitute an illegal use of force; that under certain conditions, such an attack can give rise to a right of self-defense (*jus ad bellum*); and that in the context of hostilities, cyber operations must abide by the law of armed conflict, including the *jus in bello* principles of “distinction” and “proportionality.”¹⁰⁶ Beyond cyber *conflict*, Secretary Clinton has been vocal in supporting cyber *freedom*: the proposition that the human right of freedom of expression, enshrined in the Universal Declaration of Human Rights¹⁰⁷ and codified in the International Covenant on Civil and Political Rights,¹⁰⁸ applies online, just as it does offline.¹⁰⁹

In political science terms, what we are doing is not “lawmaking” per se, so much as it is what

¹⁰³ See, e.g., Gérardine Meishan Goh, *Softly, Softly Catchee Monkey: Informalism and the Quiet Development of International Space Law*, 87 NEB. L. REV. 725, 736 (2009) (“Practically speaking, informalism is well and thriving in various aspects of the development of international space law. From the overarching framework proposed for space traffic management and situational awareness, to the charter developed for disaster management and emergency response, the movement to informalism is gaining ground.”).

¹⁰⁴ See, e.g., Letter Dated 12 September 2011 from the Permanent Representatives of China, the Russian Federation, Tajikistan and Uzbekistan to the United Nations Addressed to the Secretary-General, U.N. Doc. A/66/359 (Sept. 14, 2011).

¹⁰⁵ Harold Hongju Koh, Legal Advisor, U.S. Dep’t of State, Remarks at USCYBERCOM Inter-Agency Legal Conference: International Law in Cyberspace (Sept. 18, 2012), *available at* <http://www.state.gov/s/l/releases/remarks/197924.htm> (explaining that “the difficulty of reaching a definitive legal conclusion or consensus among States on when and under what circumstances a hostile cyber action would constitute an armed attack does not automatically suggest that we need an entirely new legal framework specific to cyberspace”).

¹⁰⁶ *Id.*

¹⁰⁷ Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

¹⁰⁸ International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171, S. EXEC. DOC. E, 95-2.

¹⁰⁹ See, e.g., Hillary Rodham Clinton, Secretary of State, Remarks on Internet Freedom (Jan. 21, 2010), *available at* <http://www.state.gov/secretary/rm/2010/01/135519.htm>.

international-relations theorists call “regime-building”—in the sense of fostering discussion and building consensus about a set of norms, rules, principles, and decision-making procedures that converge and apply in a particular issue area.¹¹⁰ 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. This kind of law talk always precedes and sometimes takes the place of formal lawmaking, in the cyber area, for example, in meetings with counterparts from other countries at the U.N. Group of Government Experts on information technology issues. 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 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”¹¹¹ or what my late Yale colleague Bob Cover called a “community of interpretation”—international lawyers speaking the same language to describe the same transnational phenomenon as it plays out in their country and in their foreign relations.¹¹²

E. HYBRID PRIVATE–PUBLIC ARRANGEMENTS

Finally, the new twenty-first-century international lawyering process recognizes that states are not the only actors. Of course, neither international law nor foreign policy have ever been completely restricted to states, but the proliferation and influence of nonstate actors has “gone viral” in recent years.¹¹³ And so it is inevitable that the United States 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.”¹¹⁴

One early and important landmark was the Voluntary Principles on Security and Human Rights, an initiative I helped launch in 2000 during my last days as Assistant Secretary of State for Democracy, Human Rights, and Labor in the Clinton Administration.¹¹⁵ 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.¹¹⁶ Because this initiative is explicitly “voluntary” in name, it hardly constitutes “international lawmaking” in a traditional sense. At the same time, it represents a way of setting standards and pursuing the *ends* of human-rights lawmaking—fostering a culture of

¹¹⁰ See Robert O. Keohane, *The Demand for International Regimes*, 36 INT’L ORG. 325 (1982).

¹¹¹ See Peter M. Haas, *Introduction: Epistemic Communities and International Policy Coordination*, 46 INT’L ORG. 1 (1992).

¹¹² See Robert M. Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4, 42 (1983).

¹¹³ See, e.g., Anthea Roberts & Sandesh Sivakumaran, *Lawmaking By Nonstate Actors: Engaging Armed Groups in the Creation of International Humanitarian Law*, 37 YALE J. INT’L L. 107, 113 (2012) (noting that “various nonstate actors, including nongovernmental organizations (NGOs), global economic players, and the global media, play an increasingly important role in the international community”).

¹¹⁴ See, e.g., Davinia Aziz, *Global Public–Private Partnerships in International Law*, 2 ASIAN J. INT’L L. 339, 339 (2012) (“[P]ublic–private partnerships between states and a variety of non-state actors have proliferated as vehicles for functional co-operation at the global level.”).

¹¹⁵ See *Timeline of Events*, VOLUNTARY PRINCIPLES ON SECURITY & HUMAN RIGHTS, <http://www.voluntaryprinciples.org/timeline/index.php> (last visited Nov. 2, 2012).

¹¹⁶ See *Participants*, VOLUNTARY PRINCIPLES ON SECURITY & HUMAN RIGHTS, <http://www.voluntaryprinciples.org/participants/> (last visited Nov. 2, 2012).

respect for certain rights—but using the novel *means* of a public–private forum to advance that project. The Voluntary Principles help companies identify human-rights risks and take meaningful steps to address those risks in a manner that helps ensure respect for human rights in their operations.¹¹⁷

One thing we’ve done to advance this project during the Obama Administration is to advocate the creation of an entity to provide administrative and financial support to the Voluntary Principles Initiative. Rather than sign an international agreement or create a new international institution, the participants have now done something novel: set up a corporate-type “association” *under Dutch law*, with a U.S. government official serving on the board of directors on a rotating basis.¹¹⁸ So the current 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.¹¹⁹ Over the last decade or so, we have seen an increased need both to utilize private contractors in high-risk environments and to hold those contractors accountable¹²⁰—highlighted most tragically by the killings in Nisoor Square in Iraq, a case that the Justice Department is currently prosecuting.¹²¹ In response to these killings, the Bush Administration engaged in the development of the Montreux Document,¹²² a “nonlegally binding” but politically consequential international instrument that laid out important principles for the regulation of private contractors in a military environment. In addition to compiling a set of good practices, the document set out the *established law* applicable to this new phenomenon—an effort not unlike the cyber work I’ve just described. Since Montreux, we’ve added another layer by helping to create the International Code of Conduct.¹²³ Instead of negotiating a traditional state-to-state agreement, we have helped develop an innovative public–private partnership, striving to bring government, industry, and

¹¹⁷ See *Timeline of Events*, VOLUNTARY PRINCIPLES ON SECURITY & HUMAN RIGHTS, <http://www.voluntaryprinciples.org/timeline/index.php> (last visited Nov. 2, 2012).

¹¹⁸ See The Voluntary Principles on Security & Human Rights, Request for Proposal for Hosting the Secretariat of the Voluntary Principles on Security and Human Rights, at app. B (Oct. 22, 2012), http://voluntaryprinciples.org/files/Voluntary_Principles_Request_for_Proposals_VPs_Secretariat_October_2012.pdf (describing the new entity).

¹¹⁹ INTERNATIONAL CODE OF CONDUCT FOR SECURITY SERVICE PROVIDERS (2010), http://www.icoc-ppsp.org/uploads/INTERNATIONAL_CODE_OF_CONDUCT_Final_without_Company_Names.pdf.

¹²⁰ See Harold Hongju Koh, Legal Advisor, U.S. Dep’t of State, Remarks at Signing Ceremony for International Code of Conduct for Private Security Service Providers 2 (Nov. 9, 2010), *available at* <http://www.state.gov/documents/organization/179307.pdf>.

¹²¹ See Frederic J. Frommer, *DOJ To Seek New Indictment in Blackwater Shooting*, ASSOCIATED PRESS, July 25, 2012, *available at* <http://www.federalnewsradio.com/489/2960619/DOJ-to-see-new-indictment-in-Blackwater-shooting>.

¹²² THE MONTREUX DOCUMENT: ON PERTINENT INTERNATIONAL LEGAL OBLIGATIONS AND GOOD PRACTICES FOR STATES RELATED TO OPERATIONS OF PRIVATE MILITARY AND SECURITY COMPANIES DURING ARMED CONFLICT (2008), *available at* http://www.icrc.org/eng/assets/files/other/icrc_002_0996.pdf; *see id.* at 41 (describing the creation of the document).

¹²³ INTERNATIONAL CODE OF CONDUCT FOR PRIVATE SECURITY SERVICE PROVIDERS (2010), *available at* http://www.icoc-ppsp.org/uploads/INTERNATIONAL_CODE_OF_CONDUCT_Final_without_Company_Names.pdf.

civil society together to promote higher standards for private security companies. 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 five hundred private security companies (PSCs), including many that contract with the U.S. government in places like Iraq and Afghanistan.¹²⁴ Companies that sign the Code commit to principles regarding the conduct of personnel and security-management practices. Just as important, they commit to work with other stakeholders toward the establishment of governance and oversight mechanisms to ensure implementation of the principles laid out in the Code through effective certification, auditing, monitoring, and reporting, as well as through the development of third-party-complaint mechanisms. Stakeholders are making progress in moving this initiative forward, evidenced in part by the finalization earlier this year of an American National Standards Institute standard on PSC operations that may be utilized by the certification process.¹²⁵ The nature of the PSC industry creates significant practical challenges for traditional legal regimes, but innovative initiatives such as the Code offer a chance to make real progress in changing security-contracting practices and improving compliance with recognized principles and norms.¹²⁶

CONCLUSION

In closing, professors and students taking classes in international law still like to focus on concrete treaty language and judicial decisions. These remain important and are still the leading texts of international law. But the world has become far more fluid and messy. International legal instruments do not come neatly packaged into tripartite constitutional boxes. The process of ensuring national compliance with international obligations—both before and after ratification of a treaty—now often takes us out of courtrooms and into the halls of Congress, or onto blogs and Twitter, or into the offices of foreign policy bureaucrats or even local sheriffs.

Increasingly, traditional forms of international legal engagement do not convey the entire picture of our legal diplomacy. We help our clients advance foreign policy objectives through an innovative array of binding and nonbinding arrangements, layered cooperation, normative dialogues, and hybrid public–private partnerships. We have broadened our focus beyond a narrow view of international lawmaking that focuses only on the wording of particular treaties, to include innovative techniques of norm enunciation and forum creation that promotes adherence to important shared principles.

Twenty-first-century lawmaking is not limited to traditional “lawmaking” in the sense of drafting codes and static texts, so much as it is a process of building relationships to foster normative principles in new issue areas, leading to “soft law,” “regime-building,” and sometimes eventually crystallizing into legal norms. Now this is not new. In their classic 1988 political

¹²⁴ See THE INTERNATIONAL CODE OF CONDUCT FOR PRIVATE SECURITY SERVICE PROVIDERS SIGNATORY COMPANIES, http://www.icoc-psp.org/uploads/Signatory_Companies_-_October_2012_-_Composite_List_SHORT_VERSION.pdf (updated Oct. 1, 2012).

¹²⁵ See Press Release, Am. Nat'l Standards Inst., ASIS International Releases American National Standard on Management of Private Security Providers (May 3, 2012), http://web.ansi.org/news_publications/news_story.aspx?menuid=7&articleid=3235.

¹²⁶ The Code focuses directly on the conduct of the companies that agree to undertake these commitments, and while states do not undertake any binding obligations as a result of this process, our engagement has helped facilitate the development of this process.

science book *Hanging Together*, Harvard's Robert Putnam and Nicholas Bayne described how the G-8 summit evolved from an informal meeting into a quasi-international institution, without ever crossing the line into formal lawmaking.¹²⁷ But increasingly, we now develop international law more and more through diplomatic law talk—dialogue within epistemic communities of international lawyers working for diverse governments and nongovernmental institutions. On a regular basis, I find myself holding meetings with groups of Legal Adviser counterparts to discuss emerging legal norms in an array of areas.

Perhaps someday these norms will crystallize and, if necessary and advisable, become a basis for a multilateral treaty negotiation. But even if they don't, some of what we do creates a record of state practice and builds a process of generating *opinio juris*, the notion that states engage in those practices out of a sense of legal obligation. So even when their meetings don't involve drafting and concluding agreement language, government lawyers find themselves contributing to the development and application of international law.

What I hope this lecture has conveyed is that twenty-first-century international lawmaking is not a rote checklist of traditional hornbook tools, such as treaties and executive agreements. Instead, it includes a living, breathing human tapestry of meetings, relationships, and other communications—personal and virtual—all focused on the broader tasks of promoting cooperation, engagement, and norm promotion.

Make no mistake: this is not your grandfather's international law. This is not a Westphalian top-down process of treaty making 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.¹²⁸ The story is neither simple nor static. Twenty-first-century international lawmaking has become a swirling interactive process whereby norms get "uploaded" from one country into the international system and then "downloaded" elsewhere into another country's laws or even a private actor's internal rules.

Now I am sure that Hugo Grotius had it good in his time. But believe me: there has never been a more challenging and exciting time to be an international lawyer or an international lawmaker. I have been lucky to spend my whole career steeped in this heady environment as a lawyer, scholar, advocate, and public official. To be sure, there will always be challenges. But still, I find no belief more contagious than this simple, idealistic conviction, shared by so many: that even in a new millennium, it is still possible to aspire to help build a vibrant world order based on law.

¹²⁷ ROBERT D. PUTNAM & NICHOLAS BAYNE, *HANGING TOGETHER: COOPERATION AND CONFLICT IN THE SEVEN-POWER SUMMITS* (1984).

¹²⁸ See generally Koh, *supra* note 62.