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The Permissive Promise

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It is no coincidence that in 1945, following the Second World War, the United States, being one of the few industrialized nations still intact, asserted the right to claim up to 200 nautical miles from their shores as an exclusive economic zone and the victors of World War II became the “Permanent 5” members on the United Nations Security Council—pointedly excluding the then-occupied powers of Japan and Germany. International law is a permissive system, necessarily forming around real-world power distributions. However, if international law were not permissive, if it were not built around these actual distributions, it may not even exist. International law is based on consent, and any supranational system attempting to subvert state sovereignty would not be consented to, particularly if it eroded a state’s standing on the world stage. Rather, international law is an acknowledgement of our collective fate on this planet and an acknowledgement that, through both economic globalization and the advancement of communication technologies, our world has grown necessarily interdependent. International law *is* law, but perhaps not as we have come to understand it domestically. International law seeks to codify the international playing field, to raise a standard to which all nations can reliably attend, yet to maintain the national sovereignty on which the system was formed and maintain each nation’s sense of self-determination.

Even in diplomatic missions, the most fundamental way nations have communicate, we see this essence of international law, this balance of self-determination with an acknowledgement of the necessity of international relations. Indeed, the 1961 Vienna Convention on Diplomatic Relations (VCDR), according to G.R. Berridge, was the “accumulated practice of states that had come to be accepted as binding upon then,” such that it was used to “clarify and tighten it,” and enact the standard as a “multilateral treaty.”[1] This new codification was essential to prevent the integrity of missions from being violated, as the only basis for the absolute security of a mission was customary, not codified with specific regulations. This evolution of international law reflected the status of diplomacy during the neocolonial era. By coming to this widely accepted standard, the ‘efficient functioning’ of a mission, an idea begun with Grotius in the 17th century, finally became an official hallmark of diplomatic relations, the status quo of international relations finally found an official home in the VCDR.[2] However, imbedded within this treaty is the ultimate power of a nation to revoke even a supposedly inviolable member of a foreign state: the declaration of a *persona non grata*, a revocation of a diplomat’s immunity from foreign law. Despite the emphasized inviolability of a diplomatic mission, its content, banks accounts, and movable property, states under the VCDR retain the right to expel any diplomat whose actions are “regarded as pernicious.”[3] Though the unofficial custom was codified in 1961, and immense immunity was given to diplomatic personnel to ensure the ‘effective functioning’ of the mission, the receiving state still retains sovereignty, even if only in respect to controlling who their nation conducts diplomacy with.

Similarly, in the case of treaties, a fundamental tool between nations, codification of the system of treaties gives legitimacy to international agreements and stipulates common understandings of obligations once a treaty device has been signed and ratified. However, as David Bederman asserts in his book, *International Law Frameworks*, “treaty projects that ‘merely’ codify existing law are among the most contentious in modern diplomatic history,” revealing the struggle of an international system to move beyond custom and into the realm of written codification.[4] Ironically enough, however, the 1969 Vienna Convention on the Law of Treaties (VCLT) does just that and is, itself, a multi-lateral treaty on treaties. By offering even this ‘contentious’ platform for international relations, the VCLT gives a basic understanding that a treaty is “an international agreement concluded between states in written form and governed by international law.”[5] Even this basic definition, as accepted by 113 nations, presents a powerful

precedent as nearly all nations accept this doctrine, even if it is merely a codification of the custom that existed before. International law, then, can be understood as a common framework for nations, just as in the reception of diplomats. The ability to reliably enter into an agreement with another state is an incredible boon to international relations, just as domestic contract law fuels economic exchange. By removing ambiguity, the treaty form, as outlined under the VCLT, becomes a "written" commonality for the international community, a dependable mechanism of diplomacy.[6]

Treaties can range from the protection of common resources to an understanding of extradition. However, reality shows us that treaties are not the only way in which nations interact. In 2010, the US Congress passed the Foreign Account Tax Compliance Act (FATCA), a bill drafted by the Treasury Department to root out tax evasion in foreign accounts held by US citizens. The penalty for not disclosing account information, including balances and yearly income on the account, is an assumed 30% taxation on the account, making foreign investment far riskier and tax heavy for US citizens.[7] FATCA illustrates, pointedly, the shortcoming of understanding international law as an absolutist system. This legislations falls under no existing international law and instead the United States is using its strength, both political and economic, to subvert the sovereignty of other nations for its own gain. Sovereignty is theoretically a *jus cogens*, a preemptory norm to which all nations agree, and yet because of this permissive system, a nation is allowed to test what the world will bear. In the case of FATCA, it appears as if Germany, France, Italy, Spain, and the UK are willing to bear an erosion of their sovereignty to keep US funds in their banks. Promised to foreign nations for this concession is reciprocal behavior from US financial institutions—yet this has yet to be codified as official Treasury policy and banks all over the world expect to spend $7.5 billion implementing the necessary systems to report account information to the IRS, which expects to raise an additional $1 billion in new revenue from the bill.[8] In FATCA we see how domestic legislation and international clout can be leveraged to essentially force concessions from other nations. States must protect their own interests, and if that means exerting strong-armed tax policies on the rest of the Western world, the current system of international law allows for it, it allows for the nations of the world to react of their own volition, to allow this subversion of sovereignty to accommodate a world superpower's will. It is, thus, precisely because there is no universal enforcement that international law remains an ad hoc, evolving environment.

However, the self-interests of states often overlap. Though there is no defined provision in FATCA for reciprocal behavior, foreign nations stand to gain tax revenue by cooperating with the United States. Protecting common interests, then, becomes an endeavor which one nation must spearhead. Slightly more engaging than international tax policy, protecting the "international common space" has come to be seen as a definite international responsibility. Entering into force on January 1, 1989, the Montreal Protocol represents what former UN Secretary General, Kofi Annan, called "the single most successful international agreement to date" and provided for the gradual phasing-out of chlorofluorocarbons that had been shown to rapidly deplete the Earth's ozone layer.[9] The United States Environmental Protection Agency, in 2007, submitted one of several accelerated phase-out proposals offered by nations as varied as Argentina, Brazil, the Federated States of Micronesia, Palau, Mauritius, Mauritania, Switzerland, and—not surprisingly—Norway and Iceland; none were adopted, but this perhaps illustrates a changing attitude among nations *back* to self-determination.[10] Though noble attempts from an environmental perspective, the failure for adoption emphasizes both the short attention span of nations to rally behind a cause and that nations' apparent altruism is driven by shared benefit, seeking an arrangement that will benefit all, including one's own nation. Implicit, however, in the notion of shared benefit is that each nation bear an appropriate burden. In the Montreal Protocol and its proposed amendments, benchmarks encourage all nations to aid the global good, regardless of economic status. The notion of shared suffering, with an emphasis on *shared* seems instrumental in coming to accords in environmental protection.

We see, perhaps, the pitfall of attempting to accommodate nations' differing status in the United States' Senate refusal to provide "advice and consent" on the Kyoto Protocol, despite President Clinton's signature on the treaty. While the United States was instrumental in the organizing of both events and the drafting of goals, ratification proved impossible because of domestic economic concerns. Why, of course, should the USA be forced to restrain its usage when developing nations, and indeed most nations on the Protocol, were not restricted to such a degree? The United States' representation to these conferences sought to include the US in this agreement to avoid the "tragedy of commons," a scenario where the environment is irreversibly harmed because no nation possesses explicit

responsibility of the global commons, such as the atmosphere. However, because of domestic sovereign pressure, an international actor is necessarily bound to oblige its own people—especially in a representative republic where leaders may only lead upon vote—and its own domestic interests. Rooted, then, in the international system is an understanding that when engaging on a world stage, a nation is accountable domestically, and international concerns—particularly of lofty environmental protection goals—must come second to domestic wants or needs.

Indeed, even in the case of direct subversions of sovereignty, a nation pressured domestically may willingly overstep the bounds of sovereignty to defend national security interests. In the case of drone attacks in the Middle East, the Obama administration has faced criticism from the Pakistani government and been called to end the campaign.[11] Additionally, the legality of such drone strikes is ambiguous because while Pakistan has, according to Yale University Law Professor, Oona Hathoway, "consented to the strikes," the government has also "denied such allegations," deepening the murky legality.[12] Though international law may not possess the specific *juris* regarding the use of drone strikes, any military operations in foreign nation without the consent of that nation subverts sovereignty and is illegal, then, under international law. In the case of drone strikes abroad, however, the United States takes a proactive, aggressive stance in both asserting the authority to do so and in defending its own national security. Though operating in Pakistani territory and having agreed to cooperate with the Pakistani authorities, on the night of May 1, 2011, the United States sent a team of Navy SEALs into Pakistan and carried out a mission that ultimately resulted in the death of Osama bin Laden.[13] The US took a risk of subverting Pakistani sovereignty by not communicating information faithfully to the Pakistani government as per their agreement (which may or may not exist), but this risk ultimately struck a blow against al-Qaeda and theoretically improved US security prospects abroad. Despite this apparent illegality, the US continues to push this boundary, not assenting to any criticism, even the direct criticism of the Pakistani government. Whether this is the correct course of action is precisely the kind of confusion international law, in its current form, causes; however it is also the exact kind of ambiguity it *allows* for.

Though it is young, international law is—despite all its derived general principles—a different animal from traditional law systems. Instead, international law reflects a real-world distribution of power such that nations are free, in a sense, to test the will of other nations, to stretch the law and assert their own sovereignty. This power takes an almost abusive edge for the United States, where economic might, security concerns, and domestic pressures all culminate into a nation that seemingly subverts the sovereignty of other nations intentionally. Though international law may allow for this elasticity, and though it may be abused, it is precisely this relaxed approach that allows international law to act as both a codification of appropriate norms and a growing, living system. Nations are not necessarily bound by many explicit regulations or rules, but rather are engaged in a global exchange supported by mutual understanding between nations, be it the reception of diplomats or the codification of treaties. International law may never be "law" in the sense that an American sensibility recognizes it, but it provides the machinations for a growing, changing world, keeping the old traditions, but allowing for aggressive change. As disembodied as it may be, international law is distinctly human.

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