# International Law as Law of the United States

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## Second Edition

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# *Preface*

What we term international law, based in international agreements or customary law, has recognizably been part of the law of the United States since the formation of the Constitution of the United States. Indeed, the text of the Constitution makes this relationship explicit with respect to treaties and, although too little known today, there are also textual bases for the incorporation of customary international laws as "Laws" and "Laws of the United States" (with or without congressional involvement).

For at least the first twenty years of juridic attention to the Constitution, its interpretation and application, there had been little doubt, given these constitutional bases and predominant expectations of the Founders, that both treaty-based and customary international laws were directly incorporable. For example, they were directly incorporated for the resolution of individual rights, the identification and clarification of individual and/or governmental duties, the application of both civil and criminal sanctions, questions pertaining to jurisdiction, and the limitation or enhancement of Executive power. Similarly, it was well-understood that such laws were incorporable indirectly in order to identify and clarify the content of other legal norms contained, for example, in the Constitution, federal statutes or the common law.

Only later did questions begin to emerge whether treaties or customary international law should continue to be applied directly as the basis or an alternative basis for federal criminal prosecution. For instance, should a treaty be "self-executing" for criminal sanction purposes or should treaty-based crimes be operative as federal crimes only through congressional implementing legislation? Is customary international law merely "common law" or a different form of law having also a constitutional base for incorporation without the need for implementing legislation? Perhaps surprisingly in view of early expectations and practice, these questions concerning criminal sanctions generally remain, although treaties and customary law can still be self-operative domestically for civil sanction purposes.

Still later, questions arose concerning an unavoidable clash between treaty-based or customary international law and a federal statute. In response, the federal judiciary fashioned a general rule concerning treaties and federal statutes and later identified several significant exceptions to what has become known as the "last in time" rule, exceptions documented in modern times only in this writing despite their great import with respect to questions of

right, duty and limitations on governmental power. Concerning an unavoidable clash between customary international law and a federal statute, patterns of expectation have emerged which support the primacy of either of these forms of federal law and, although the primacy of customary international law has the edge, the question of preemption generally remains open. Here, it is even possible to recognize that customary norms relating to certain contexts, rights, or governmental powers are thought to be peremptory, while saving the possibility of differing approaches with respect to customary law and statutes more generally.

With respect to international law and presidential power, the views of the Founders and overwhelming trends in judicial and other opinion are quite clear and affirm that (1) the President is bound by international law, (2) no President has openly admitted violating international law absent some allegedly compelling need to do so under a preemptive constitutional or statutory mandate, and (3) presidential illegalities (by themselves) cannot change constitutional duty. Nonetheless, recently in U.S. history some have raised a question whether our President or others in Executive officialdom should be able to violate international law. In a related vein, the Executive branch (here, primarily the Department of Justice) in the 1980s began to assert a claim of Executive freedom, not to violate treaties as such, but to ignore customary international law with respect to mistreatment of alines under a question-begging concept of "controlling" executive action — and some lower federal court judges have been confused or misled concerning the origins of such a concept. Clearly these latter claims, if followed more generally, would play havoc with the well-received notion of international law as law of the United States. Is there support for such a claim in the text of the Constitution, the overall views of the Founders, or subsequent and predominant constitutional opinion and practice? Indeed, in an increasingly interdependent world should our President, or any governmental official, be above international law?

More generally, what is customary international law, how has this law actually been identified and used by the federal judiciary over the last two hundred years, what constitutional bases exist for the incorporation (directly or indirectly) of such law, and what implications arise with respect to federally protected rights, federal duties and powers? What are "self-executing" and "non-self-executing" treaties, when did such a distinction arise, should the judicially-invented distinction between them rest on the terms of a particular treaty considered in context or should it be predetermined because of the existence of some related congressional power, what does the text of the Constitution indicate, what have been the relevant views of the Founders and actual trends in judicial decision over the last two hundred years? What is the "last in time" rule, what are the judicially recognized exceptions to that rule, and what are the implications of these with respect to internationally protected rights and constitutional duties and powers?

These and numerous other questions are explored below in various chapters the titles of which demonstrate particular and compelling foci with respect to the theme of the overall inquiry: what has been, can and should be the interrelationship between international and domestic rights, duties and powers. While exploring these, one can understand that the actual incorporation of international law, either treaty-based or customary, directly as supreme law of land or indirectly, has been both extensive and rich in variation. Trends and details often inform debate and overwhelm false myth. Yet certain important questions of status, interconnection, and effect remain, and the very openness of these questions demands greater attention by practitioners, governmental officials, judges, and scholars. As in the past, the incorporation or nonincorporation of international law can have profound consequences with regard to constitutionally based rights, presidential duties and power, congressional power, and judicial power and responsibility (and, thus, the separation and balance of powers)—either in times of war or relative peace. An understanding of which issues are relatively settled and which questions remain, of which approaches to incorporation have actually been accepted or utilized and which approaches are still possible, and of which consequences are likely to flow from various alternatives is therefore quite important.

Unlike other reference works, this study contains detailed inquiry into each of these concerns. With respect to several specific topics, it offers not only an exposition of each relevant constitutional textual provision and various known views of the Founders, but also the only detailed exposition of relevant trends in judicial opinion and opinions of the Attorney's General throughout our nation's history. For the first time in our history, computer-assisted research has allowed the identification of all relevant cases and actual patterns and trends in expectation, approach, and decision. Relevant patterns of judicial expectation are often found in several cases through time and are explained by or rest upon no single case or set of facts. They exist as part of the process of judicial application and are of value in their own right as evident patterns of judicial expectation concerning particular approaches to incorporation, competencies, rights or duties, whether or not they were required for a particular holding or, for example, whether or not a case was primarily civil, criminal, prize or admiralty in focus.[1] Literally thousands of cases and opinions were researched in order to provide the most complete evidence of rele-

1. In United States practice, dicta and extended rationales can be far more important and enduring than the holding of a case. *See, e.g.,* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 315–20 (1936); Geofroy v. Riggs, 133 U.S. 258, 266–67 (1890); The Prize Cases, 67 U.S. (2 Black) 635, 668 (1863); Foster v. Neilson, 27 U.S. (2 Pet.) 253 (1829); The Santissima Trinidad, 20 U.S. (7 Wheat.) 283, 350–55 (1822); Marbury v. Madison, 5 U.S.(1 Cranch) 137 (1803); Ware v. Hylton, 3 U.S. (3 Dall.) 199, 272, 276 (1796) (Iredell, J.); Edwards v. Carter, 580 F.2d 1055, 1057–58 (D.C. Cir.), *cert. denied*,

vant trends and patterns of expectation and practice known to date. For example, over three thousand U.S. cases addressing the phrases international law, law of nations, or treaties were investigated. Additionally, over one thousand of the cases addressing human rights or equivalent phrases were discovered, documented, and studied. The product of such investigations should prove to be historically and constitutionally significant, for through this effort sometimes newly discovered or rediscovered questions, interpretations, trends, norms, and exceptions or alternatives have emerged which hopefully will enrich understanding and provide far greater insight into both the processes and possibilities of incorporation.

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436 U.S. 907 (1978). Such are often part of the process of judicial identification and application of legal precepts and competencies, and they can be far more significant than particular holdings in shaping or stabilizing expectations about rights, duties, and powers. By focusing merely on holdings, one can miss significant or even essential patterns of judicial expectations, trends, and conditioning factors.

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Chapter 4: from the American Society of International Law, American Journal of International Law, vol. 81, at 377–390 (1987); and the Virginia Journal of International Law, vol. 34, at 981–989 (1994);
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