The Federalist Society for Law and Public Policy Studies
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International: National Security vs. International Law?

Panelist

Professor Sarah Cleveland, Louis Henkin Professor of Constitutional and Human Rights;
Professor Kenneth Anderson, American University Washington College of Law;
Professor Rosa Brooks, Georgetown University Law Center;
Professor Julian Ku, Professor of Law and Faculty Director of International Programs, Hofstra University School of Law;
Professor Gregory S. McNeal, Associate Professor of Law, Pepperdine University School of Law

Moderator

Professor John O. McGinnis, Northwestern University School of Law

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PROFESSOR JOHN MCGINNIS: My name is John McGinnis. Michael Ramsey was supposed to run this panel but unfortunately he is ill in California with the flu, and so I'm going to change from my usual immoderate role at these conventions to happily moderate this panel on the tension between international law versus national security. I think this is a great topic and we have a great set of panelists. Let me just introduce the topic very briefly and then introduce the panelists and then we'll get right to it.

International law and national security—two goods—are they in conflict, particularly for the United States? I think one could have very much two views about this. Let me first illustrate how one might think that there's a conflict between them.

One is that our national security is the security of this nation. International law is formed by the consensus of other nations. That might also be underscored by the idea, as one French foreign minister said: the United States is the hyperpower and it can enforce its own national security. And you might say that other nations would like to use international law to tie it down, rather like Lilliputians wanted to tie down Gulliver.

On the other hand, one might think that international law is very important to our long-term national security. Legitimacy in the world is increasingly important in a world
where citizens of the world are engaged in the affairs of the world. They can see what the United States does, and it's very important for our long-term security to be perceived as legitimate.

Perhaps more grandly, the great progress in civilization has come through the expansion of the rule of law from localities to nation states, and putting it in the international realm will redound to the United States' security no less in the end than the rule of law has redounded to the security of communities and individuals within nation states.

So I think there is a very great interest in this topic, particularly because we have more and more international law in the world and we have a wonderful group of panelists to discuss it. One of the things I particularly like is we have people who have done a lot of practical work and also people who have written books on this subject, so I'll briefly introduce them all together now and then we'll go in the order in which I have introduced them.

First we have Sarah Cleveland, the Louis Henkin Professor of Constitutional and Human Rights. She was, from 2009 to 2011, Counselor on International Law to the Legal Advisor. And she's recently been appointed to be a reporter for the next Restatement of Foreign Relations Law.

Next we have Kenneth Anderson, who is a professor of law at American University. He's a blogger on Opinio Juris and the Volokh Conspiracy, and he has a new book out, Living with the U.N.: American Responsibilities and International Law, and it is available from the Hoover Institute.

Next we have Rosa Brooks, professor of law at Georgetown Law School, who is a counsel to the Undersecretary of Defense, and there she founded the Office of the Rule of Law and International Humanitarian Policy.

Next we have Professor Gregory McNeal, a professor at Pepperdine, advisor to the chief—and he also served in government as advisor to the chief prosecutor of the Department of Defense Office of Military Commissions.

And finally we have Julian Ku, professor of law at Hofstra, whose recent book with John Yoo is Taming Globalization: International Law, the U.S. Constitution, and the New World Order, which is available from Oxford University Press.

So now to Sarah Cleveland.

PROFESSOR SARAH CLEVELAND: Thank you so much. And I want to thank the organizers for including me. It's a real privilege to be here.

I was going to speak briefly from my experience about the question which is posed for this panel—"National Security versus International Law"—and I'm going to offer,
hopefully in six minutes, six reasons why I believe people who care about U.S. national security would want the U.S. to comply with international law. I think that the juxtaposition of national security versus international law is a false dichotomy.

So the first point: International law is very enabling and has been critically enabling to many of the most controversial things that the United States has wanted to do as a matter of national security in the last 10 years. This has been true for the law of detention. If you think of the Hamdi case, that the reason that the U.S. Supreme Court was willing to hold that the detention of a U.S. citizen was constitutional in the face of a federal statute that prohibited the detention of U.S. citizens was because international law recognized the longstanding authority of belligerent states to detain incapacitate belligerence in situations of armed conflict.

It's also true for targeting. The authority for U.S. targeting practices comes from international law. Now, of course the quid pro quo, which many don't like, is that international law is enabling and constraining, and if you're going to benefit from the enabling qualities of international law you have to also comply with its constraints.

Second, compliance with international law legitimates U.S. government action domestically and internationally. It allows us to be more forward-leaning and indeed more aggressive than we might be able to be otherwise.

There has been a very interesting exchange on lawfare recently between Jack Goldsmith and Trevor Morrison, making precisely this point, that our allies, for example, have tolerated a more aggressive targeting policy by this administration because the administration is perceived widely as committed to complying with international law.

Third, failure to comply with international law causes the United States tangible national security harm. It harms our relations with our close allies, with whom we rely on for a broad spectrum of national security assistance. Our allies will not share intelligence with us, they will not transfer detainees to our custody, they will not extradite people for criminal prosecution, they will not cooperate with us in multilateral operations if they do not perceive us as complying with international law. This is very real. You see it all the time.

And the reason for this is that they face very real potential legal exposure in their own legal systems for aiding and assisting a state that doesn't comply with international law.

Fourth, compliance with international law is very, very important for an effective military. Many of the rules of international humanitarian law regarding, you know, the principle of distinction and proportionality, protection of civilians, humane treatment of detainees are all about providing clear rules to provide and ensure that you have a disciplined military that doesn't just create chaos. And if you disturb those rules you can inject significant chaos with long-term adverse consequences.
Fifth, international law provides us with an accepted basis for condemning and containing security threats by other states, states ranging from North Korea, China, Arab Spring, and Syria. If we, however, are perceived as failing to comply with our international law obligations, our persuasive ability to bring the international community with us to condemn others loses credibility.

And finally, U.S. action in international law necessarily has reciprocal and copycat effects. We are the biggest foot out there, and if we take an action, other states will feel licensed to follow. So anytime that we want to push the barriers of international law, we need to be conscious that we are not only creating a precedent for the Chinas and Russias and Irans of the world, but that in replicating our behavior, those states may also help develop an international law rule that is not one that we want to be present.

So I would just conclude by arguing that those who think of sovereignty as something that is to be invaded by international law, that international limits to our sovereignty need, they need to appreciate that there are many, many ways in which international law allows the United States to more effectively project its sovereignty in the international community and to protect our national security. So thank you.

PROFESSOR KENNETH ANDERSON: Thank you and I’m delighted to be here. I’d like to start by broadly agreeing with what Professor Cleveland has said about the importance of international law, while at the same time I want to draw a couple of differences, probably a couple of them will be sharp ones.

So if the question is, are these to intention, the answer is yeah, sort of; yeah, not. It depends a lot on what one defines as being international law and how one conceives of international law itself.

And at the same time, something that I do think is right and necessary to put out at the beginning is that if there is one thing that the United States has learned about law, both domestic and international, out of the course of the past 10 years since 9/11, I'd say that the biggest lesson is that urgent claims of pure necessity can get you a certain distance in the immediate emergency but they cannot last as a basis for policy, as a basis for legal practice, as a basis for a sustained way of going forward, at least not if you're the United States of America and its people, that we do wind up believing that we have to base these things on some form of actual legality, as we understand the rule of law.

Now, that said, that's not how most of the world understands what we mean by the rule of law and particularly how that winds up touching on questions of international law. And I think that a large amount of the tension that we're looking at arises in exactly that kind of gap of expectations. And in addition to a gap of expectations, a sort of negotiating gap, because there is a kind of sense that international law becomes a way in which other states, particularly weaker states, are able to look to the loose hegemonic power and try to exert influence on it in various ways.
Now, at this moment I would say that the most important task of policy in relation to both international and domestic law around national security, at least as it regards the last 10 years, is really the question of looking for an institutional settlement in terms of stable, ongoing policies that have the ability to be seen as powers of the executive, things approved or not approved by Congress, things that are legitimate for Presidents to use on a going-forward basis and in ways that cross administrations.

And referring back, for example, to Professor Cleveland's reference to the debate between—on lawfare over this, I think one of the big questions would have been, had there been a President Romney rather than a second President Obama term, I think that there would have been an enormous amount of pressure brought to bear on the question of whether things that were okay for a Democrat to do would be okay for a Republican to do. And I don't think that that's actually a fair way to frame the debate but I do think that's the politics of it. So I think that there is an obligation to try and find forms of an institutional settlement that will be able to survive those kinds of transitions.

Now, the second thing about international law generally is that it's a question in part of international law in the sense of who's international law; who's making it? A crucial question about international law is the way in which it oftentimes winds up not so much altering even the language that's out there, the standard that's out there, whatever is written in some treaty, but the way in which it may wind up altering who is actually the decider, who's the decision maker, where is that coming from? Does it leave it in the hands of the democratic processes of the United States or does it wind up shifting it elsewhere?

And so I think that a lot of the tension that arises around international law is certainly this feeling that at least under some important circumstances it winds up shifting the decision maker in ways that are not actually either desirable or actually consistent with the democratic sovereignty of the United States and its internal processes.

Now, this winds up raising a question of how we actually think of international law, and it's partly a question of how rigid as well as a question of who is supposed to be the authoritative interpreter of it. And the nature of international law is that it's going to be notoriously difficult to the point of being, in many cases, not possible in principle to say who is the authoritative owner of this thing to be able to pronounce on what is authoritatively the law, its interpretation, how it applies in a given case. It doesn't have that kind of structure.

And I would say that the right approach to this, and the one that reduces the tension to the greatest degree possible while understanding that it can't actually go away in some sense, is really the general approach that has been taken over the very long run by the U.S. State Department.

One can agree or disagree or like or dislike any of the particular positions that are taken, but the general methodology of saying, yes, this is international law, it's a hugely important thing, we treat it very seriously, but it is also something which is flexible,
pragmatic. We look for plausible interpretations that we think are defensible. We look for ways in which we can essentially create a body of stuff which responds diplomatically, politically and otherwise.

And that I think is the approach which neither falls into a sort of drastically skeptical position that says this stuff isn't law; it's just politics by any other name, or a position which is simply far too rigid to survive the necessities of great powers in the world that wind up having to do many, many things, and these positions have to evolve.

So I think that that basis of looking for an international law which neither asserts itself nor looks to other people's interpretations to be more than defensible, reasoned, and plausible expressions of the law, that that methodology winds up doing the best for the United States to wind up reducing this otherwise unavoidable tension between international law and the requirements of national security.

Thank you.

PROFESSOR JOHN MCGINNIS: Thank you very much.

Professor Rosa Brooks.

PROFESSOR ROSA BROOKS: Thanks. It's a pleasure to be here. My role on the panel is to be a prophet of doom.

I'm in broad agreement with both Sarah and Ken on the reasons that they have given for why -at least in some circumstances in Ken's version and most circumstances in Sarah's version - respect for international law is going to be in the interests of U.S. national security. But I want to take a completely different tack. I want to argue that whether or, Ken and Sarah are right or not about our current situation, the long-term national security of the United States depends very much on a robust and equitable system of international laws and institutions- for a different and simple reason.

I believe it is largely true, as critics of international law have often argued, that international law can be a “weapon of the weak.” The reason that the early U.S. republic had a very different and more positive attitude towards the law of nations relative to, say, America in 2004 was because the early American Republic was itself a very weak state. As the United States grew stronger, we found ourselves, for a time, with the luxury of being able to treat international law as something of only peripheral importance.

But we are unlikely to have that luxury forever, because the period of American supremacy is coming to an end. If international law has often been a weapon of the weak, more useful to the weak than the strong, we had better embrace it because we are getting weaker.

I know that no one is supposed to admit this openly. During the fall 2012, presidential debates, we saw, a veritable orgy of bipartisan agreement Mitt Romney and Barack
Obama, on the premise that, America will just keep getting better and better. That’s fine for politicians to say – but don't think you will find any serious scholar or diplomat - or defense official for that matter- who will not acknowledge that U.S. power is declining.

U.S. power is declining in two different ways. One of those is relative: we're declining not because there's anything “wrong” with us but just because we're seeing other powers rising. We're seeing Europe, despite its current woes, becoming an important political and economic bloc, globally speaking. We're seeing the rise of states such as India, China, Brazil on the world stage. The US is no longer the sole, dominant superpower. We're still up there. We're still the most powerful single state. But our relative power is declining and I think this is likely to continue.

Also, U.S. autonomy is declining, relatively speaking. Every state’s autonomy is declining as a result of globalization. Technological changes that have enabled much more rapid communication and transportation. These changes have reduced the salience of national borders, and enabled disease, material, money and ideas to zoom instantly around the globe. This has plenty of positive aspects, but it has created many, many problems that the U.S. cannot solve on its own.

Globalization has enabled new threats that don’t stem from a particular bad actor – an adversarial state, for instance- but that is much more systemic, such as climate change, the increased potential for pandemic disease, the extreme interconnectedness of the global financial system, you name it. These are collective challenges that no state, no matter how powerful, can address on its own. So our relative ability to act autonomously in defense of our security has just gone down for that reason as well.

Those are the main relative reasons for a relative decline in US power, but we're also seeing a decline in absolute terms. It pains me and shames me to say this: like many other Americans, I grew up believing that this was the greatest country on earth. But whether you want to look at our sky high incarceration rates, declining life expectancy, high infant mortality rates, dangerously growing inequality, crumbling infrastructures, failing public schools or the declining U.S. share of global output—whatever index you want to look at, we appear to be going down. We are not number one any longer except in the areas where we don't want to be number one, such as in crime rates, incarceration rates, obesity rates, and so forth.

Our proud position as the healthiest, wealthiest nation with the best educational system, the best infrastructure, et cetera, is a thing of the past. And I would like to believe that we could turn that around. In fact, I do believe, in a strictly hypothetical sense, that we could turn this back around. But practically speaking, I don't believe that that's terribly likely. Our domestic political system appears to be badly broken, and the kind of bipartisan agreement that would be necessary to get serious about reversing these trends is not likely to be forthcoming.

So the U.S. is in decline. What do we do about this?
Well, if we're going to face reality, I think we need to acknowledge to ourselves that we're becoming weaker. Empires, just like individuals, eventually grow old and weak, and just like individuals it behooves empires to do some sensible and prudent planning for a future time in which they will be weaker than they are now.

For individuals, we know what it means to plan for age and weakness. Responsible individuals recognize that they will some day become older and weaker, and some day, they won’t be able to work any more. That’s why, as a nation, we invest in a strong Social Security and Medicare system. That’s why we urge young and middle-aged people to invest in retirement accounts and buy long-term care and disability insurance. As people age, some may decide to pay in advance to assure themselves a future place in comfortable retirement or assisted living communities. We urge people to do these things early enough to avoid a sudden crisis in old age.

Empire, like individuals, should also plan for their future decline. And for empires, the equivalent of investing to ensure a future place in a comfortable retirement home is investing in the creation of an equitable and humane global order- a global order that can accommodate the needs of weaker states as well as strong state, since some day, we will find ourselves once again among the weak.

You probably remember the philosopher John Rawls from your college philosophy classes. Rawls urged a thought experiment: imagine you don’t know if you will be born rich or poor, Chinese or American, healthy or disabled, ugly or attractive, white or black, tall or short. If you cannot know your likely future position, what kind of political and moral system would you wish for- what system would be most just? It’s worth asking an international law version of this question as well. If all states were in the Rawlsian original position- if you didn’t know if your state would be weak or strong- what kind of international, legal, and institutional system would you design to protect your state against all possible contingencies?

That, I think, is the conversation that we should be having right now. Instead of asking whether or not we need international law and whether or not its currently crucial to our national security interest, we should ask two very different questions. First, what kind of international legal and institutional order will best protect us in a world in which American power is likely to remain in decline? And second, how can we use our power, while we still have it, to create the international system that will protect us later?

Thanks.

**PROFESSOR JOHN MCGINNIS:** Professor Gregory McNeal.

**PROFESSOR GREGORY MCNEAL:** Well, good afternoon. It's a pleasure to be here.

So I'm going to take a different tack and I'm going to sort of dial down into the weeds on a matter that I'm sure is near and dear to all of your hearts, customary law, customary
international law, specifically customary international humanitarian law. I want to try and make the connection here to national security.

And so let's just start with a bit of an intro. How is customary international law formed? Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation. At least that's what we think—from the statement, we think that's the way that customary international law is formed.

Let's look at how customary international humanitarian law has actually been formed recently. And so what we're starting to see is the influence of—at least within the last two or three decades—of heavy influence coming from NGOs such as the ICRC and international tribunals. And so let me chart out two examples here—and I'll chart these examples for us to think about whether or not the United States is as engaged in these deliberative processes as we should be and whether or not the United States is actually articulating our principled stance on international law or customary international law to the degree that we should be.

And so let's look first at the ICRC's customary international humanitarian law study. This was a massive four-volume set of rules. There was, I think, two volumes that were rules and two volumes on evidence of state practice. Now it has been turned into a customary international humanitarian law database that you can go online and access. It was not published without criticism, and I think it was rightly criticized in many respects.

And so for evidence of state practice as an example, the ICRC looked to the military manuals of various states. And so if you're wondering about what will constitute customary international humanitarian law for the purposes of targeting civilians who have lost their protected status, you can go on the ICRC database. Try it now on your phone. It's a good time. You'll find the military manual of Benin, recently updated in 1995, informing us that civilian persons may only be attacked when they participate directly in hostilities. Togo's military manual is also in there as evidence of state practice, updated in 1996. State civilian persons may only be attacked when they participate directly in hostilities.

So in many respects, like lots of other aspects of international law, we tally up a bunch of nation states, we make the document look really thick and dense. It's like a General Assembly sort of resolution. It's sort of akin, in my view, to the student council election where a bunch of people are all sort of voting on something but they're really not that important. And that's one aspect of how the ICRC is developing their view of what customary international law is.

Now, this is not a new approach but it's an approach that I think the United States should view with skepticism and call out when it's witnessed, and this is something that John Belinger did. He responded to the customary IHL study, and I'll talk about that in a second.
And so those manuals may be informative indicators, but really the best indicators, if you're concerned about national security and international law, would be—the best indicators of practice would be the actual operational practice of nation states that are actually involved in military operations, another point that I'll return to in a second.

The manual was also criticized for giving undue weight to statements of NGOs, including self-citations—ICRS citing its own interpretations, which as law professors we love but as a matter of figuring out what international law is it might not be the best indicator—giving insufficient weight to negative state practice, instances were states opted out, and failing to give adequate weight to the fact that not all state opinions on customary international humanitarian law are entitled to equal consideration, thus elevating the practice of Benin or Togo to a status oftentimes on par with that of the U.S., the U.K., Australia and other nations with significant opportunities to develop carefully considered military doctrine.

And so while the U.S. criticized the ICRC customary international humanitarian law study, I should note that the study weighed in at over 3,000 pages and the U.S. response weighed in at 29 pages. And the U.S. response stated that, "We will update our response as we develop and identify other problems with the study." That was 2007. And as you can probably guess based on the way I'm sort of taking this, there hasn't been a response since 2007 to this growing 3,000-page document that's now a database.

We can also see an example of this in the ICRC's study on the notion of direct participation in hostilities. It's extremely relevant for U.S. operations against al-Qaeda, the Taliban, and associated forces. The ICRC convened a study in 2003 to try and determine or come to consensus on what the statement that, "Civilians may not be targeted unless and for such time as they take a direct part in hostilities," that's found in Additional Protocol I and II to the Geneva Conventions. The question was, what does "for such time" mean? What does "a direct part" mean?

The study reached an impasse with the participants failing to reach consensus. The American experts and others publicly distanced themselves from the study for its failure to recognize the operational realities of warfare, for its heavy emphasis on humanitarian concerns at the expense of operational concerns, and for questionable insertions of human rights law principles into international humanitarian law, the lex specialis for armed conflict.

And so some of you I know, because I know you personally, probably don't really care about international tribunals or international organizations and to you this might be just a bunch of bunk. And you're thinking, well, what are the U.S. interpretations; that's all that matters to me. And you could struggle and you can go into government and try and find an actual statement of what direct participation in hostilities means under the U.S. view and you won't find anything.

And so the United States is not only silent externally; we're silent internally. The closest you get is the *Handbook of Naval Operations*. That states, "Direct participation in
hostilities must be determined on a case-by-case basis”—very helpful guidance. You could look to the DOD Law of War Manual, which those specialists in the room know is like a running joke in the military. The DOD Law of War Manual is simply nonexistent.

And so another troublesome source—how am I doing on time? One minute? Okay. Another troublesome source of interpretive statements comes from IGOs like the U.N., which you take the U.N. Special Rapporteur on Targeted Killing sort of assiduously repeating the DPH study, the ICRC’s DPH study, not making note of the fact that the United States didn't agree with it. Why? Because the United States hasn't actually taken a position on this. And so all that's left out there filling this vacuum is the ICRC interpretation, not the United States' position on this because the United States has been silent.

And so let me just conclude real briefly here with why this matters to the United States. Like it or not, these tribunals are having an influence, and I've got some cites I'll talk about in the Q&A where, in the Hamdan opinion, the ICRC commentary is cited by Justice Souter, it's cited by Justice Alito, it's cited by Justice Kennedy, it's cited by Justice Thomas. Only Justice Scalia tapped out on that. And that's just Hamdan. So if you don't think it's influential, just take a look at the U.S. Supreme Court citing to these commentary.

And also just think if you're an operational lawyer in the military or advising the CIA and you have to make a targeting decision. You have to make a decision about whether or not an individual can be targeted because they're DPHing under the ICRC interpretation or there's something else under the U.S. interpretation. What should guide you? And if you're a cautious attorney, what kind of advice will you give? Will you cite to a well-known law professor who says: I was on this committee and we disagreed with the consensus opinion of the ICRC? Or are you going to cite to the actual published study that's out there that's getting greater influence in the international community?

So it does have an impact on our operations and I think that engagement is the best way for the United States to protect our national security interests, not silence. And I'll get into more of my other points in the Q&A. Thank you.

PROFESSOR JOHN MCGINNIS: Professor Julian Ku.

PROFESSOR JULIAN KU: Thanks. I don't think I've ever been on a panel where everyone has spoken in such short bursts. I'm not going to probably be able to do that. It's amazing.

All right, so I really appreciate the opportunity to speak. I think this is actually an important time for conservatives as we face our time in the wilderness, so to speak. And I think this is a good opportunity to think about some of these issues and think hard in ways that are creative and different than perhaps we might if things had turned out differently on November 6th. And I hope that we can start this—I think the conversation actually is in some ways more important and more interesting at this point now.
Let me just sort of start with my bottom line, which is that I think along with the panelists here, I don't think it's easy to say that international always is to the detriment of U.S. national security. I don't know that anyone actually would take that position. To me it's like constitutional law, right? Some of it's good. Some of it's bad, frankly, right? Some of it I hate. Some of it I think is the best thing in the world. And I feel that way about international law as it affects U.S. national security. I think my view is probably a little bit darker than Sarah and Ken's view about its impact on national security, although I'm not sure I could get much darker than Rosa's view.

[Laughter.]

PROFESSOR JULIAN KU: But I do think that—I want to illustrate a couple of examples of how I think it impacts, negatively, U.S. national security. On the other hand, I do think that it can enhance U.S. national security perhaps in some of the ways as Sarah and Ken mentioned, or Sarah mentioned. All right.

So one example of how—just a quick example recently of how I thought the conversation over international law could be a detriment to national security, just to pull something randomly from current events. You know, there's something that happened in Libya in a place called Benghazi. Some of you might have heard about it. And there was an attack, and the bottom line there is the killing of U.S. officials and a U.S. ambassador.

Now, one thing I was interested in was what would be the U.S. response? Now, we've gotten bogged down in who knew what when, why didn't you stop them, why didn't you do anything, but actually I'm curious about what the U.S. response would be now, right? Can the U.S. use its drones or other military assets right now to go after those people it believes perpetrated the Benghazi assault? In particular, what would be the legal framework for such a decision, especially if there's no way to link the attackers to al-Qaeda or any of the other traditional groups that are involved in the war on terrorism?

And the answer is that it's not entirely clear. There are reasons to doubt that it would be, assuming that it would be a violation of the international law governing the use of force, in particularly the U.N. Charter, for the U.S. to simply reach out and attack someone. Now, the U.S. has declared war in the context of al-Qaeda in a particular context, but outside the al-Qaeda context, could the U.S. simply hit someone on the grounds that it's a reprisal for killing our ambassador? And the answer under international law is actually not entirely clear. Reprisals, the category of international law where you can essentially hit back but that person is not at that moment threatening you, when a country is not at that moment threatening you, it's unclear whether the United Nations Charter would permit such a use of military force.

Now, it seems to me kind of odd. The U.S. has actually done reprisals of this sort very recently. In 1998 President Clinton launched cruise missiles against factories in Sudan in reprisal for attacks on U.S. embassies. In 1986 President Reagan bombed Tripoli, and Tripoli again, as reprisals for terrorist attacks in Germany. But international law—
interestingly, international law, you can sort of see from the scholarship there's some struggle there. I put this on the Opinio Juris blog and got some very negative reactions from my readers, like: What? You can't do that. You can't simply hit someone just because they killed your ambassador.

And the answer is actually I think you can, and I think that you can launch a military reprisal for killing an ambassador. And I think that ultimately I don't think there will be any legal obstacle to the U.S. doing so, but the fact that there's this complicated legal debate I think is a sign of how, in some ways, international law could constrain the decision making of U.S. officials and expose them to legal liability perhaps in some other contexts.

Now, having said that, on the other hand—just to give a very quick example, international law can, in some cases, enhance U.S. national security. And let me just give you one example. The United States has a very large Navy, although, as Rosa points out, it's shrinking, or it's destined to shrink to nothingness—

[Laughter.]

PROFESSOR JULIAN KU: —but at the moment it's going to exist for a while. And the U.S. has always had a very strong interest in freedom of navigation and the customary international law governing freedom of navigation, and in particular the right of warships to travel through international straits…

Now, I'm not going to argue here that we need to join the Law of the Sea Treaty to do all this, but I think that whether you join the treaty or the customary international law rules governing questions of innocent passage, freedom of navigation, and the definition of international straits, it's extremely valuable to the United States.

And you may say: Ah, it's the U.S. Navy. Who can stop us, right? But at the same time you can talk to any naval commander; it's a lot better if you can just claim, as a basis of legal right and make that argument, it really enhances your position in a very strong way that you don't have to make the argument, you don't have to threaten the use of force in order to force your view of what the law is. And I think that's been a benefit to what the U.S. Navy does to preserve U.S. national security.

So I think my argument is that basically international law can have a very negative impact on U.S. national security, constraining the ability of the United States to defend itself in some cases. At the same time it can enhance U.S. national security, perhaps in some of the ways that Professor Cleveland and Professor Anderson and Professor Brooks suggested, and even Professor McNeal. It can really expand cooperation from allies. It can really set the rules of the road for the U.S. military to act.

Okay, so having said that, how do we manage both the good and the bad? And in the book that I recently published with John Yoo, our argument was essentially that for U.S. purposes, within the United States we need to really focus on those U.S. domestic legal
processes that control the impact of international law to give the President freedom to interpret the international law and some discretion to interpret international law, and to have Congress play a key role in the incorporation of international legal duties, and in the extreme case preserve the right of the President to openly violate international law in cases where he believes it is a serious conflict with national security interests.

But last situation, would be the extreme case. Let me just sort of make my last point, which is really my main point, which is that on the other hand that is not enough anymore. I think conservatives over the years have said, well, as long as we can somehow preserve the Constitution and the ability of the President to act freely, that's enough to preserve national security, but here I do side with I think all of the panelists here, in that international law is important enough today—and perhaps it will be even more important for the United States in the future—that we can no longer be satisfied that we can control our domestic sphere. It impacts our international activities, international policies, and our national security.

And so I think the United States must engage with international law at both levels, not just the governmental level but at the civil society level. There has been a lot of movement in the law literature about how NGOs and sort of nongovernmental organizations can really shape and impact international law. And they do. And they do in bad ways and they do in good ways.

I think the group that's been missing from this conversation, frankly, are American conservatives and classical liberals who frankly just say: Well, that's not really law, or that's irrelevant to me; as long as it doesn't affect me that doesn't matter, right? If those groups are out there engaging in that civil society process of shaping and influencing the development of international law, that could make a difference. I think we can no longer afford to cede that territory to sort of groups that we disagree with.

Now, you may say it's hopeless. The input process is just hopeless, right? We're just outnumbered. We can never reshape international law in a way that we think would fit better with our values and interests. But I think that, you know, 40 years ago, right, when the Federalist Society—or 30 or whenever it was founded, I don't know—

ATTENDEE: Thirty.

PROFESSOR JULIAN KU: —30 years ago, right, when I was not conscious of it—

[Laughter.]

PROFESSOR JULIAN KU: —at that time you would have said, constitutional law; how could it ever be shaped in a way—its hopeless, right? The Warren Court; what's going to happen, right? It's hopeless. You crazy people, what are you going to do, right? What have you done? And then you look at the Federalist Society today, and sure there is the whole Obamacare case and stuff like that, but there have been great achievements in thinking about constitutional law affecting the way the mainstream legal academy
thinks about constitutional law, and it's not something to be sniffed at. And I think in a smaller scale international law, maybe it won't ever be that important, but perhaps it will be important enough that it can deserve the attention of a group like this. Thank you.

PROFESSOR JOHN MCGINNIS: Before getting to questions, we'll first ask if members of the panel would like to respond to other members of the panel. I guess I would begin with Sarah—Ms. Cleveland, sorry.

PROFESSOR SARAH CLEVELAND: Thank you. I guess I'd just like—is this on? I guess I would just like to say one thing in response to Greg's point. I completely agree with the overarching conclusion that the solution to the problem is for the United States to engage. I mean, there are many, many examples—

ATTENDEE: Mic?

PROFESSOR SARAH CLEVELAND: Is this on?

ATTENDEE: Get closer.

PROFESSOR SARAH CLEVELAND: Okay. Better?

ATTENDEE: Yes.

PROFESSOR SARAH CLEVELAND: Sounds the same to me.

[Laughter.]

PROFESSOR SARAH CLEVELAND: So there are many examples of, you know, failure by the United States to engage, hurting our interests. A very tangible one is the fact that when the Obama administration came in there had been 10 years of discussions among states parties to the International Criminal Court regarding the definition of the crime of aggression, which was extremely poorly formulated, which the United States had refused to participate in at all.

And the states parties were about to adopt it and the administration had to scramble to mobilize a sort of rear guard action to keep that train from leaving the station in a way that could really harm U.S. long-term interests. Had the U.S. been at the table—we are not Togo, right? We are not a state party to the International Criminal Court, but if we are at the table countries listen to us and they take us very, very seriously. The ICRC listens to us and they don't treat us the same as Togo.

So I should just say, with respect to the ICRC customary international law study and the DPH study, yes the United States had some very specific concerns about both. So did many other countries, the U.K. and others. On the other hand, there was much in both of them that the United States agreed very solidly with and reaches out to all the time. The United States Defense Department, State Department, they look to the ICRC customary
international law study when they need research on an issue. That doesn't mean that they take it as gospel because the ICRC has said it, but the ICRC has provided a service in gathering the information.

Likewise, in the DPH study the ICRC said that a civilian who engages in a continuous combatant function is targetable at any time. That was actually, you know, quite a nice gift to the United States with respect to some of its targeting operations. So I wouldn't want to over-emphasize either the extent to which either of those projects by the ICRC are in any way determinative of international law, or the extent to which the United States doesn't agree with them.

PROFESSOR JOHN MCGINNIS: Professor Anderson?

PROFESSOR KENNETH ANDERSON: So a couple of responses to things here. Let me start with Julian.

I started my career, after getting out of law school, setting up the land mines ban campaign for a human rights organization. And one of the things that I've come away with from that experience is that U.S. administrations of every kind always drastically underestimate what it is that the nongovernmental and civil society sector can do to undermine the legitimacy of government practices. And that's consistent across the board.

And I think that when the NGO sector has decided, as they currently have, that they would like to make targeting killing through the drones the new Guantanamo, I would believe them about it. And I think that one of the big problems for both the Obama administration and Republicans in Congress is that they simply don't take it sufficiently seriously, and they won't until they discover that there has been kind of a change in the general sense of legitimacy about these things, which I'm a big supporter.

Second, with regards to Greg's points about the participation in these things, I take his point completely that there is an enormous need for the U.S. to get out there, particularly in national security matters, but I guess I'd also say that—and partly in response to Sarah's points, that the desire to constantly engage is actually one which turns out to be extremely dangerous for the United States in terms of its final policies, because if you are the biggest player and if you are the hegemonic player that provides, in effect, parallel security to the world outside of the regular international organization system, you are expected in some way to engage in these processes with the eye that you are going to eventually fall into line and reach consensus with folks at some point. The sort of claim that you can walk into a consensus negotiation and time after time after time pull out when you decide that it doesn't meet your expectations just doesn't work eventually and it has tremendous costs that are not always evident.

And then finally, to Rose's very, very interesting point, I don't know whether the U.S. is actually in decline, and I have questions about whether it is embracing decline. I would certainly hope not, and I would hope that the good fortune of new energy and new energy
policies will have some effect on this. So I don't know. This is really sort of a factual question. But I do know that decline is predicated a lot, and the last person whose book I read on sort of serious decline appeared in 1987 and talked about ways in which the United States was so over, and of course within two years the Soviet Union had fallen.

So I don't know what to make of those claims, although I certainly think it's not an auspicious moment to be claiming that the United States is in ascendancy. But I would say that folks—and this is not actually Rose's position, but there are a lot of folks out there who are sort of very good with American decline, and they sometimes are that in the name of universal values of one kind or another and imagine that the international system will somehow pick up and make all of this stuff happen.

My suggestion to them would be to be very, very afraid of what they're wishing for, because my view is that what we call universal values essentially shelters under the sky of American hegemony, and if that American hegemony disappears you might very well see a lot of those universal values disappear as well.

PROFESSOR JOHN MCGINNIS: Professor Brooks?

PROFESSOR ROSA BROOKS: I'll be brief. And if I can quote President Obama, "Let me be clear"—

[Laughter.]

PROFESSOR ROSA BROOKS: —I would rather live in a world in which the U.S. is ascendant than in a world in which the U.S. has declined. And I devoutly hope that all of my dire prognostications are wrong or that we can still turn this aircraft carrier around, however slowly. But I think sometimes it's wise to be pessimistic in terms of hedging. And I've relatively recently come from some discussions with folks in the U.S. government who specialize in sort of forecasting future trends and thinking about potential future shocks, and trying to ask, well, what will the world look like in 20 years? What will it look like in 30 years? What will it look like in 40 years?

And none of the future scenarios look all that great for the United States as a global power, which is why I suggest that we do need to think hard now about what set of rules and institutions we will want if that less-than-rosy future comes to pass.

So I think the only gloss I would put on the comments my colleagues have made, with which I'm in general agreement, is that sometimes there is a tension between the rules and institutions that are in our short-term interest and the rules and institutions that might be in our interest 20, 30, 40 years down the road if my predictions do begin to come true.

As a government we're not terribly good at thinking long term. All of our governmental architecture is very much focused on the crisis. So perhaps that's our jobs as academics, our jobs as relative outsiders who can come in and out of government: to be the prophets of doom and hope that at least some of that has some effect.
PROFESSOR GREGORY MCNEAL: So I guess in response to—so it sounds like we're all in agreement——

[Laughter.]

PROFESSOR GREGORY MCNEAL: —but in response to Sarah's point and Ken's points about sort of the more micro point that I was making, which is that it's not just engagement for the sake of engagement; it's actually engagement—or engagement for the purpose of showing up. You can not show up and engage too and say: We don't agree with the statement that your group came up with. This is our interpretation. This is actually lacking in current operations. So if you look at targeted killing operations in Afghanistan and Pakistan, can you answer for me what the definition is for combatants? Who is being targeted? Are they being targeted because they have a continuous combat function or they're directly participating in hostilities, or is it that they're a member of an organized armed group, and so even if they don't have a continuous combat function, based on their mere membership or mere association with the group, albeit sporadic, the United States government believes they can target them.

I bet if you talk to individuals in the intelligence community, they believe, based on a certain level of sufficient intelligence information, that they—let's say we've got a vehicle and upfront is the lawful target and in the back are five other individuals who they believe are sporadically associated with al-Qaeda. Sometimes they fight on behalf of al-Qaeda; sometimes they don't.

There are many who would follow the DPH study and they would say those individuals, because they're not occupying a continuous combat function, have to be DPHing, and if the truck is merely going to the supermarket, those individuals cannot be targeted either. So you could target the lawful target in the front of the vehicle but you would have to count the five individuals killed as collateral damage or the harm to them as incidental.

And so when we have groups like the Bureau of Investigative Journalism or United Nations groups trying to count civilian casualties, the U.S. number on that would be six and the other side's number would be one combatant and five civilians who happened to be military-age males riding around in areas where you really wouldn't expect them to ride around with an al-Qaeda member. But that's not the nuanced discussion that we're having about that approach because we don't have a definition out there, and this permeates aspects of U.S. policy. And so the question is, why don't we have definitive statements on this?

I was wondering whether I was just missing something, so I went through the task of digging through, doing keyword searches of the U.S. Digests of International Law from 2011 back to 2000, so 11 years of 900 pages of really boring State Department speeches, and more exciting as you get to the Obama administration where you've got a speech on everything but no clear definitive policy that's been laid out there.
[Laughter.]

**PROFESSOR GREGORY MCNEAL:** It's just policy by speech, which I suppose is better than policy by silence, but there's still not an answer there. And I think that it's a critical value and it's important to U.S. national security for us to actually make definitive statements on international law.

This running joke in the defense community that—like there was a statement of Hays Parks in 1990 that the *DOD Law of War Manual* was coming soon; it's going to be out in 1990. You know, I was, like, 14. And now, then fast-forward to 2006. I was at the JAG School. There was a statement that it was coming out in '06. And then there was a recent statement—they had a meeting in 2009—it's coming out soon. Well, it's 2013.

For those of you looking to go into the administration in 2016 if we win, or if you're looking into going into a Democratic administration, because we're a bipartisan group here, you know, or nonpartisan group, hopefully someone will figure out that there's not a lot of operational flexibility to be gained by not making statements about our positions on customary international humanitarian law.

And there's a heck of a lot to be lost, because you just cannot have sustained public debate about why your operations are correct or why they're justifiable if you haven't even given a definitive statement of what legal rules you're following other than blanket statements of we're following international law—which any one of us on this panel could disagree about what constitutes international law, what constitutes custom. We'd be pretty clear on the treaty stuff. And so that's sort of my point, reemphasized a little bit.

**PROFESSOR JULIAN KU:** I wanted to emphasize a couple of things, which are that I think it's really important to emphasize for the United States that it does have the constitutional check, what I call the—so the last resort, which is the President or the U.S. government can decide not to comply with international law. Now, this is not the first choice. It should be, like, the last choice perhaps, but it needs to be a choice in extreme circumstances because international law is something the inputs of which, so to speak, often come out with results that the U.S. can't live with, or are inimical to U.S. interests in a very fundamental way. That doesn't mean everything the U.S. doesn't like it doesn't comply with, but you have to keep that in mind as an option.

And that leads me to my thoughts about Rosa's comments, which, you know, I'm in very broad sympathy with. I'm actually a bit of a pessimist myself about America's future. I was listening to, for instance, Governor Romney and I was totally convinced that if we didn't elect him it's really the end of the world, right? And it might be, but—

[Laughter.]

**PROFESSOR JULIAN KU:** But having said that, one thing I think the U.S.—I don't think the U.S. has ever—I think there was a bubble of U.S. supremacy during the '90s,
which I think—but I don't think the U.S. was ever really quite as dominant as the U.S. has imagined or we've talked about the U.S. being. I think it's a question of, you know, was the U.S. really ever dominant? Like, was the U.S. a dominant power in 1974? Was it a dominant power in—and I think we kind of—we have rosy glasses about when the U.S. was ever really a superpower and so therefore it looks like a further downfall.

And I will just say one thing, and the only good thing I can say from the doom that the U.S. is facing is that it's shared. You know, I've spent a lot of time living in China recently and I'm fairly convinced of that doom will occur before ours. So that's good, right?

[Laughter.]

**PROFESSOR JOHN MCGINNIS:** Well, why don't people come and ask questions? And while we're asking—while people are getting up to ask questions, let me—there's been so much agreement on this panel I'd like to throw in a bit of an apple of discord and ask, isn't the consensus on this panel made by having a very high agreement, or high disagreement, about what the nature of international law is? I mean no one, I guess, would disagreed that the United States should follow international law in respecting the inviolability of embassies, for instance. That seems clear.

Of course there are all sorts of arguments made about international law. By its nature it seems to be the kind of law where there may be more of a penumbra than a core. And if that's the case, is that the nature really of the disagreement? How broad an understanding of international law is consistent with U.S. security? And so I might ask if any of the panelists want to comment on that and maybe offer some way of deciding how much international law is consistent with U.S. security.

**PROFESSOR KENNETH ANDERSON:** I will just say I sounded entirely too conciliatory in everything that I said, and for the reason actually that John has just identified, which is that I put out a criterion of plausibility about international law which is capacious in exactly the way that John identifies, so that I am pretty happy with extremely conflicting versions of international law that I think different states can put out, can put out in a reasoned way, and the effect of that winds up being that it doesn't look like a very unified body of stuff, allows for a huge amount of contradiction.

And that I think is actually pretty reflective of the best way to approach it. But if one were to sort of tighten down on the concept of what international law is supposed to be and force those conflicts away, then I think I would be a lot less conciliatory and sound a lot more disagreeable.

**PROFESSOR SARAH CLEVELAND:** I guess I would just say that because international law doesn't have fora in which it is regularly adjudicated and resolved in the same way that domestic law is in courts, I think there is a broad misperception that there is a lot less consensus about international law than there actually is. I mean, one thing that is quite striking about seeing the U.S. government deal with international law from
the inside is how much international law the U.S. relies on, on a daily basis, and how much consensus there is among states as to what those international law rules are.

Now, that's not to say, with respect to any particular problem, that you won't find an unresolved legal question, but the sources—the sources for identifying the answers may be different. We rely, among other things, a lot on prior U.S. practice and the practice of close allies, mainly other advanced democratic states, but that's not necessarily true. It could be China and Russia also, depending on what the issue is. But I think there can be a great deal of confusion about how much international law there really is clarity on and actually how much it serves U.S. interests on a daily basis to comply with it.

PROFESSOR JULIAN KU: Just to add something, I do think the one area—and this is not an area I really specialize in so this is why I'm going to denigrate it—is the area of government in the use of force by states. I'm just not sure if you—really, no matter how you slice it, I don't think it's ever really been that beneficial to the United States. It's generally always going to be—I'm talking about decisions whether or not to use force. One example would be, can you attack Iran before, you know, it has really threatened you or one of your allies?

I mean, in every context that comes up, given the position—at least the current position of the United States, it's always going to be actually a problem for the United States, and it's never been clear to me that it really provides that many benefits by restraining other states through its legal actions, but maybe I'm not understanding it well.

So that would be one area, John, that I would say that it's generally always a problem for U.S. national security interests as currently constituted.

PROFESSOR KENNETH ANDERSON: Edwin Williamson.

EDWIN WILLIAMSON: Thank you, John, and thank you, panel. It's an interesting question, although I think the question I put to the practice group of the Federalist Society that's sponsoring this program as to exactly what this panel is all about is still kind of unanswered.

[Laughter.]

EDWIN WILLIAMSON: But quite seriously, there are a couple of things that just sort of puzzle me about this, and one is this—we've sort of gotten down to this question Rosa really put up about, you know, the decline of the U.S. and therefore how much we'll need international law. I'm just not sure exactly what the measure is of how it declines. It's sort of what is it that we can't do today vis-à-vis India that we could have done 10 years ago, or what is it that we can do vis-à-vis China today that we will not be able to do in 10 years?

So I would go to a measure that is really sort of what is our ability to defend our vital national interests, which I would define as, you know, our national security. Are we in a
position to defend ourselves? And I think we are, have been, and will continue to be. And then the interplay with that becomes, with international law, and is there something out there, this quote, "international law," that hinders that ability?

And I would be in quite sharp disagreement with Sarah as to the extent of, quote, "the international law that's out there." I think there are a lot of pronouncements of what people would like international law to be, but the real practice—I don't think those pronouncements are based—those conclusions as to it being law are likely to have been based on universal practices that are going to be inconsistent with the U.S. attempt to defend—you know, protect its national security. And so I guess I'll add to the confusion of the thing, and so my question is, do you agree?

[Laughter.]

PROFESSOR JOHN MCGINNIS: Would anyone like to comment on the comment?

PROFESSOR GREGORY MCNEAL: Well, so that it didn't go unanswered, I would agree with you and disagree with Rosa about the decline of the United States. I certainly disagree with some of the metrics. A more obese America is certainly more obese and less attractive, but I don't think that makes us any less able to protect our national security interests. I'm just making a joke. I know that wasn't your central point.

[Laughter.]

PROFESSOR GREGORY MCNEAL: But I do take part of Rosa's point—I'm going to put words in her mouth—to say that now that President Obama has been reelected there's certainly a decline in our ability to protect our national security interests, although I don't think that that was what she had intended either. We still have, you know, these things called aircraft carriers that airplanes can land on—

[Laughter.]

PROFESSOR GREGORY MCNEAL: —although we're going to have fewer of those. And so, you know, by those measures we may be becoming weaker as a relative matter, which I think is the—you know, it's certainly part of Rosa's point that I agreed with.

PROFESSOR ROSA BROOKS: This is a small rejoinder on obesity. A number of retired generals and admirals recently published the second of a two-part series called *Unfit to Fight* and *Still Unfit to Fight*, in which they argue that the obesity epidemic in fact is a major threat to U.S. national security for the simple reason that an astonishingly high percentage of young Americans who would otherwise be eligible to join the military are now too fat. That however is not really my—

[Laughter.]

PROFESSOR GREGORY MCNEAL: More PT.
PROFESSOR ROSA BROOKS: —not really my major point.

But no, I do think that we—you know, as Ken said earlier, it's partly an empirical argument and it would probably take a long time to try to work through all the various measures on which one might argue we're stronger or we're weaker. But I think that one area in which, in fact, you see the relative decline of the United States just in the last 20 years has precisely been in our ability to shape international law as we would like to shape it.

This is a lament that certainly I've heard from many U.S. diplomats, who say, we used to be able to walk into the room and tell our foreign counterparts, the United States really thinks this is a good idea; we should do it this way, and the foreign diplomats would go, oh, that's a really good point; we'd like to try to do that. And now we walk in and even our allies just say, yeah, that's nice, but we're doing something different. Our ability to lead other states and shape international law has gone down.

I don't want to take up too much time on that point because—I'd be happy to talk about it more offline, but I think that in a lot of ways we are seeing our relative power decline. Yes, we still have aircraft carriers - but one of the major issues the national security establishment is now confronting has been the evolution of high-end asymmetrical threats, the evolution of anti-access and area denial technologies possessed or being developed by other states such as China and Iran. These have at least the long-term potential, to render many of our currently most potent weapons- delivery systems far less useful.

So I think there are real things to worry about. Is US decline inevitable? I'd like to hope not, although, as I said, I'm kind of a pessimist. Is it inevitable? No. But does it behoove us nevertheless to prepare for the possibility of a steep decline in US power? Yes. You know, I think that there's a real danger of falling to victims to a sort of Lake Wobegone effect – a danger of being unable to take a long, hard look in the mirror, and instead wanting to just keep saying, oh, we're number one; we're the best.

I think this is just about being brutally honest with ourselves about what we can do and what we're less and less able to do. And at a minimum, hedging our bets: you know, trying to think, okay, let's hope that we are strong and stay strong and indeed perhaps get stronger, but what do we need to do now to prepare for the possibility that it won't be the case?

PROFESSOR JOHN MCGINNIS: Next question.

RODERICK MILLER: Hi. Roderick Miller. I’m a student at Harvard Law School. I'd like to propose that Mayor Bloomberg's ban on large sodas is better thought of as a national security measure.

[Laughter.]
RODERICK MILLER: No, that's not my real question. This is for any of the panelists who'd like to respond. I'm just wondering how—your thoughts on how international law affects national security is affected by the fact that both Russia and China, who are historical adversaries of the United States, are present on the U.N. Security Council and that they have an effective veto on any executive action that the United States wants to take in conjunction with the U.N.

PROFESSOR KENNETH ANDERSON: John, would you like to take a couple of comments first then we could respond?

PROFESSOR ROSA BROOKS: Stack them up, yeah.

PROFESSOR JOHN MCGINNIS: Okay, next one, next—please. We'll take three. We'll have the rule of three.

DAVE CASAZZA: Hello. Dave Casazza, also a student from the chapter at Harvard Law School.

I take Professor McNeal and Professor Cleveland's point that the U.S. would perhaps be better served to be an active participant in the debates over what international law should be, but I'd like to hear from them what they think the United States should do in the place of institutions like the ICC, in which it's been the position of at least certain parts of certain American administrations that regardless of what they adopt as a rule on what is and what is not aggression it is, regardless, an illegitimate institution that's a threat to national sovereignty. And how do we participate in the debate on what your criminal definition should be without undermining our own position that it's not a good idea to have an institution like that at all? Thank you very much.

PROFESSOR JOHN MCGINNIS: One final.

ATTENDEE: Yeah, my question is, if I recall correctly, about a year or so ago an American warship stopped a Somali pirate ship and consulted with what they perceived international law to be and released the pirate ship, deciding they didn't have authority to permanently hold the crew or detain the ship for any longer. And that struck me as odd because prohibition of maritime piracy is a traditional peremptory norm. And so, under that approach, releasing the pirate ship would actually be a violation of international law.

And I guess my question is, in trying to seek joint accommodation with other nations, are we abandoning certain fundamental principles of international law, or have peremptory norms in the natural law basis been eradicated from the modern international law concept?

PROFESSOR JOHN MCGINNIS: Okay, there are three questions on the table. Does anyone want to take them?
PROFESSOR SARAH CLEVELAND: Well, since I was the one that put the ICC on the table, I think it's been a long time since the U.S. government took the position that the ICC was a fundamentally illegitimate institution that in no way serves any affirmative U.S. interests. I mean, the U.S. abstained in the ICC referral of the Sudan situation to the ICC in the prior administration, the Sudan investigations, the Kenya investigations. We voted affirmatively for the Libya referral in Security Council Resolution of 1970.

We have a very complex relationship with this institution. I don’t think that we are likely to ratify the Rome Statute potentially in my lifetime, certainly not anytime soon. But we have recognized that it is actually useful for there to be a standing institution that is capable of exercising criminal jurisdiction over the most egregious atrocities that are committed on the globe. And, you know, the fact that we don't have to create a new institution like the ICTY or the ICTR every time we want someone to be prosecuted is in our interest.

PROFESSOR GREGORY MCNEAL: You also directed that question sort of towards me as well. So, you know, I'm less fearful of the ICC than I think other conservatives are, but that's also because I think it's rather ineffective actually, in contrast to Sarah's points. I mean, you see that now every time there's a new sort of crisis coming up. Even the international criminal law community still wants to create ad hoc tribunals to address matters. There is some critique that the ICC directs a lot of its attention at African states. And so I think that's one of the challenges that it faces.

And to your point about aggression, I think the bigger problem with the ICC is less the substance of how any particular crime might be defined and more two things: One, how subsequent judicial interpretations might change the meaning of IHL as applied. So that's the first challenge. And then the second challenge is widespread U.S. skepticism that the ICC won't follow its complementarity principles.

So Article 17(3) of the Rome Statute defines the circumstances under which the ICC could exercise jurisdiction. Those circumstances are where a host state would be unwilling or unable to effectively investigate or prosecute a crime. And you could see an overzealous, unaccountable international prosecutor taking a fairly broad view of what "unwilling" or "unable" would be for purposes of Article 17(3), and that might very well place individual soldiers under the jurisdiction of the ICC, despite a full-faith effort of the United States government to investigate that.

You could think of the fact that DOJ investigated the allegations of torture/coercive interrogation, and that still wasn't received as an effective or neutral investigation by many critics. And so now take that out of the hands of DOJ, put it into the hands of an international tribunal investigating it, and ask whether they would think that the United States was unwilling or unable and ask whether they think the inability determination was actually one of sort of not able to fairly prosecute your own people, and I think there's some genuine concerns there. So it's less on substance, more on jurisdiction.
PROFESSOR JOHN MCGINNIS: Anyone want to answer the other question about—yes.

PROFESSOR KENNETH ANDERSON: I'll pick up the first question going to the U.N.

I guess I would say about the U.N. Security Council that the purpose of the Security Council is in order to ensure that international law is not pure, and to ensure that it is not overly utopian, and to ensure that it winds up, in effect, keeping the necessary great powers in the tent. And its problem is not in that conception. That conception from 1945 was designed to address the weakness of the league, which was entirely too optimistic and believed in purity.

And so this is the payment that international law gives to the great powers, but with one really crucial element. The existence of the veto in this way winds up having an effect on international law, or at least was intended to have this effect, that it's not just great powers vetoing things that, in effect, run against international law and they're just saying nasty things about international law or refusing to follow it. It's rather that international law in these areas cannot be made in ways that are so contrary to their interests that it gives them no incentive to stay within the game.

And so it's a mechanism in part by which international law de-purifies itself but somehow remains something that still remains in the world at large. And I would say that that's actually a good thing rather than a bad thing.

PROFESSOR ROSA BROOKS: Just a general comment. I take the point that was made earlier about what this panel is about. I can't entirely answer that question since we didn't put the panel together, but I do think that one of the difficulties here—and Greg made this point as well and John has also made this point—is that we often mean quite different things when we use the term “international law.” What does that mean? It's like asking, is U.S. domestic law good for national security or bad for national security? Well, it depends what you're talking about when you say “domestic law.” You know, that covers a lot of territory.

And indeed, as many of you know, one of the topics that international legal scholars have been focusing on in the last few years has been precisely the proliferation and fragmentation of international legal regimes. That there's more and more, “international law” out there and it cuts in all different directions. When you look at, for instance, international trade law, there's a lot that we love. There's a lot that clearly benefits us. There's a lot of international law we created.

You can pick and choose, and I think each of us could undoubtedly find some particular example where we’d each say, well, that's bad, that's a horrible international norm, it works against us, it's substantively wrong. You probably have to drill down into particular areas to get a more focused debate on the content of particular norms. Look at
international human rights law, for instance, or human rights law or the International Criminal Court.

But I do think the one area where we’re probably all in violent agreement is that regardless of how we define our interests, and regardless of what we think about short-term versus long-term needs, you can't make rules that benefit you if you won't play the game. And every time we decide that we're just going to take our ball and go home, we regret it later. Regardless, again, of the substantive content, if we're not in there making our case, there is no question about it; the norms and the institutions will evolve in ways that we will probably not like.

PROFESSOR JULIAN KU: Just to answer the question about the pirates—you forgot about the pirates—that's a good example. I mean, piracy is sort of something that's—it was a peremptory norm and it continues to be a peremptory norm, but one of the difficulties is that new laws have arisen. One of the new laws that has arisen since piracy was developed was human rights law. And so, you know, some of the things that you might have done to the pirate in, you know, 1800 might not quite be okay in 2000.

But that goes to a larger point, right? So the ball keeps moving, right, and evolves. And so some of the reasons—and so there's a certain due process problem for the United States as well. And in particular with the pirates, they just don't have enough evidence. It's a guy on a boat with a gun but, you know, was he doing enough that we would be able to convict him? And sometimes it's just not worth it, not worth the effort for such small stakes.

But I think it points to, I think, the way international law has evolved, and so there's this traditional idea of international law being quite simple. And it's changed so much. Now we have all these other norms that are kind of bumping into the old peremptory norm of a ban on piracy.

PROFESSOR JOHN MCGINNIS: Three more questions and that will wrap us up.

ATTENDEE: Thank you all.

PROFESSOR JOHN MCGINNIS: Please keep the question short so we have enough time to answer them.

ATTENDEE: Very good. Thank you all for your comments this afternoon.

Professor Brooks, I’m particularly interested in your suggestion that as we face this impending decline that our project ought to be, as we stand on this side of the Rawlsian veil of ignorance, that we look to order our affairs in such a way that they'll be palatable once we are no longer capable of protecting our own interests on our own.

It's my impression that the United States, as it has been a part of international affairs for most of the 20th century, has played a very benign and benevolent role, in a unique way,
in history. And you had mentioned at the beginning that international law is often the
weapon of the weak, right? And the reason that it is—and it's for the same reason that the
Rawlsian experiment works—is because there's someone there to enforce the norms upon
which you agree.

So once we hit that point of decline where we have to look to others to protect our
interests, who is that? Who will take the mantle of the benign and benevolent role that
we have played over most of the last 70 years?

PROFESSOR JOHN MCGINNIS: Okay, next question.

ATTENDEE: Also a question for Professor Brooks. You suggested that we should take
steps to protect our long-term interests as a weaker nation compared to the rest of the
world. Could you give some specifics on what that would look like? And then, based off
those specifics, do you think that if we took those actions we would, in effect, create a
self-fulfilling prophecy such that we would be consigning ourselves to a future where the
United States would have less power relative to the world around us?

PROFESSOR JOHN MCGINNIS: Okay, a final question.

ATTENDEE: Great minds think alike—self-fulfilling prophecy for Professor Brooks.

[Laughter.]

PROFESSOR JOHN MCGINNIS: Rosa?

PROFESSOR ROSA BROOKS: Hmm, that actually strikes me as a cousin to the
question about the International Criminal Court and the issue of whether engaging in
discussions about how to improve the elements of crimes or what have you risks
legitimizing an institution that you don't want to legitimize in the first place. So, okay, let
me try to take those questions.

Who will take up the mantle from the United States? I have no idea, and I'm not sure it
will be a single state. I think that the world is becoming more fragmented and more
chaotic. This suggests to me, again, that it’s useful to try to go behind Rawls’ veil of
ignorance, and think about what set of rules and institutions make most sense in a world
in which there may no longer be any single dominant force, but rather many states and
non-states actors jostling for power.

That connects to the other question about specifically what I would do. That's a really
good question. I actually think that the legal community would do well to do what the
military community does quite a lot, and the intelligence community does quite a lot,
which is the equivalent of war gaming, where you think, okay, here are five different
possible futures; let's play them out and see what happens. If we try to play out this
particular scenario, how do things look 20 years down the road or 50 years down the
road? What might we want to do now to prepare for each of these different scenarios?
I don't know the answer. But I think we need to work collectively to figure it out. You know, when you're healthy and young you think, oh, I don't need to pay attention to certain kinds of things because I'm always going to be healthy and strong. And then when you're not as healthy and strong you think, oops, maybe I should have, you know, tried to structure things a little bit differently. I’d like to see us start planning now for the time when the US will likely be much less powerful.

At the moment the U.S. role has not been entirely benevolent. In certain areas we have fought to promulgate international law rules that favor those who possess greater military power, which at the moment we do possess. I think that we may not like those rules as much if we come to a point where we are no longer the possessor of the most dominant military power, which may not happen but nevertheless might.

So I'm not really answering the question because I don't know the answer. What I would like to see us doing more of than we're doing right now, though, is trying to figure this out- not just me sitting in my lonesome little office, but a larger group of people trying to think through precisely the same issues and see if we can generate some consensus on. Given the most plausible futures out there, is there some set of consistent things across all those potential contingencies that it would make sense to do now?

PROFESSOR KENNETH ANDERSON: Let me just make three comments on this. The first is that—or the zero comment is that it is an empirical question. So if we're sort of assuming and looking down the road to that, then I think one has to sort of look at it as an open question in that way, and I think we all are.

I guess the second point, though, about this is that I think the path dependency of the hedging strategy can become self-fulfilling in important ways. And one of the ways in which I think that happens for a hegemon is that if you are the hegemonic stabilizing power, you actually are able to coast along with far less expenditures of power and resources and authority and all the rest on the fact that you've been there and you've been doing it for a long time. And if you wind up adopting a hedging strategy that essentially signals your anticipated decline, then I think you do have a self-fulfilling problem, and I think we have one at this moment in the South China Sea.

And then the last thing, I guess, we have finally found a point of serious disagreement here. So let me just say that I think there are many, many, many things at the United Nations that the U.S. should not be engaging in at all. Interestingly, most of them are not about the areas in which Greg is talking about, because I think in the national security areas—and frankly anything that involves the Security Council—that's always an important place for the U.S. to be engaged.

But as one gets out into values issues and the Human Rights Council and the whole series of things related to human rights, first of all there is a problem that many of those things are not things the U.S. can really engage about because it's not within the gift of any U.S.
administration to go in and negotiate away fundamental American values, particularly as reflected in the Constitution.

And second, I think that the sense that this administration has sometimes had, that it can go in and negotiate these things on value issues as sort of a giveaway for other things, is a huge error because the sense that some of the realists in the administration have is that it's just words on paper and we can always walk away, I think this is fantastically short-sighted. It's not just words on paper. It's actually signaling many important things about your credibility and intentions.

PROFESSOR JOHN MCGINNIS: Question? Yes?

PROFESSOR SARAH CLEVELAND: Well, I don't want to stand between them and the end.

[Laughter.]

PROFESSOR JOHN MCGINNIS: I think we have time for a small last comment, yes.

PROFESSOR SARAH CLEVELAND: Well, just on the Human Rights Council, I don't think it would surprise anyone for me to say that the Human Rights Council is not a perfect institution, right? It's a deeply flawed institution. But the question is, is it a better institution and does it better serve U.S. interests, is the U.S. actively engaged there or can we just walk away from it? And I think the experience in the last four years, not only from the perspective of the United States but also of our allies, is that the U.S. presence there makes a huge difference in the ability of the Human Rights Council, however imperfectly, to try to advance U.S. interests in a number of contexts.

With respect to the U.S. decline, you know, I don't think of it so much as U.S. decline as there are other rising powers which compete with us on the world stage for influence. And I guess, you know, the inverse of that is a necessary decline of U.S. authority. But if you think about it, the South China Sea and Russia in the Arctic are two examples of situations that are increasingly tense and problematic because we have two countries—Russia and China—that are really feeling quite muscular.

China is feeling very muscular economically. They both feel that they are able to assert their interests, China with respect to one of the world's most important shipping lanes, both involving areas of tremendous natural resources in the South China Sea. There is a risk of it, you know, dissolving into conflict. And both are situations that are governed by the rules in the U.N. Convention on the Law of the Sea.

And we're not a party to this convention, so in the situation in which the United States could have the capacity to go in and try to calm and mediate and help neutralize the situations, the first issue that comes up in any conversation in those contexts is: You're not a party to the Convention on the Law of the Sea, so what are you doing talking about this issue? And that is just not helpful to U.S. security interests.
PROFESSOR JOHN MCGINNIS: I think we probably have to close now because we have this room for another talk and they have to actually reconfigure the stage. But thanks to our panelists very much.

[Applause.]