

The Covert Action Statute: The CIA's Blank Check?

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...[T]hese CIA directives are not sufficient. Administrations change, CIA directors change, and some day in the future what was tried in the past may once again become a temptation. Assassination plots did happen. It would be irresponsible not to do all that can be done to prevent their happening again. A law is needed.¹

INTRODUCTION

In October 2015, a *New York Times* article described how U.S. government attorneys had crafted a legal justification for the raid to kill or capture Osama bin Laden.² In the article, journalist Charlie Savage made the assertion that the administration's attorneys had what they

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¹ *Interim Report: Alleged Assassination Plots Involving Foreign Leaders*, S. REP. NO. 94-465, at 282-83 (1975) (hereinafter, *Church Committee Report*). In 1975, in response to revelations of abuse, including domestic spying and assassination plots, by various U.S. intelligence and law enforcement agencies, both the House of Representatives and the Senate convened committees to investigate these allegations and make recommendations to prevent them from reoccurring in the future. The Senate convened the Church Committee, which published its report in 1975. The House Permanent Select Committee on Intelligence convened the Pike Committee (named after the Committee Chairman, Otis G. Pike). While the Pike Committee Report was never published, it was leaked to the news media. See, e.g., *Investigation of Publication of Select Committee on Intelligence Report*, 94th Cong. 2 (1976). The 1975 Church Committee interim report recommended a statutory ban on assassinations in light of revelations concerning CIA assassination plots. The statutory ban never materialized, but Executive Order 12333 (1981) represents an attempt to ban assassinations in response to these Congressional inquiries. 50 U.S.C. § 3093 (first passed in 1991) represents a compromised attempt to provide a degree of legislative branch oversight of executive branch covert actions – including those which may involve lethal force.

² Charlie Savage, *How 4 Federal Lawyers Paved the Way to Kill Osama bin Laden*, N.Y. TIMES (Oct. 28, 2015), http://www.nytimes.com/2015/10/29/us/politics/obama-legal-authorization-osama-bin-laden-raid.html?hp&action=click&pgtype=Homepage&module=first-column-region®ion=top-news&WT.nav=top-news&_r=2.

considered a “trump card”; specifically, they maintained that the covert action statute allowed the president to authorize an action that would violate international law.³ In short order the blogosphere erupted in criticism.⁴ International legal scholars argued that all treaties are the law of the land, that the Central Intelligence Agency (CIA) is bound by treaty obligations whether those treaties are “self-executing” or not, and that customary international law is also the domestic law of the United States.⁵ However, this position appears to be in contrast with the official view of the CIA as expressed in a number of public fora.

Former CIA General Counsel Stephen Preston articulated the legal framework that is generally applicable to CIA covert actions.⁶ Preston indicated that there are three overarching principles that apply to CIA operations: (1) all CIA operations must be properly authorized under U.S. law; (2) all CIA activities must comply with governing law and policy; and (3) CIA operations are subject to strict internal and external scrutiny.⁷ Additionally, Preston indicated that international law principles “may be applicable.”⁸ At least one international legal scholar noted that this reasoning appeared to relieve the CIA from the requirement to comply with international law. This conclusion was based on Preston’s reference to international law

³ *Id.*

⁴ One commenter on the blog OPINIO JURIS has proposed that imprisonment may change an attorney’s views on international law vis-à-vis U.S. law, thus implying that the administration and attorneys are guilty of criminal malfeasance in their actions and legal advice. Benjamin Davis, Comment to *Contra CIA, Non-Self-Executing Treaties Are Still the Supreme Law of the Land*, OPINIO JURIS (Oct. 29, 2015, 9:01 PM), <http://opiniojuris.org/2015/10/28/contra-cia-non-self-executing-treaties-are-still-the-supreme-law-of-the-land/>. Another commenter viewed the administration’s legal reasoning as so flawed that the he was moved to profanity. Benjamin Davis, Comment to *So It’s Settled: The President Can Violate Customary International Law*, OPINIO JURIS (Oct. 29, 2015, 8:54 PM), <http://opiniojuris.org/2015/10/29/so-its-settled-the-president-can-violate-customary-international-law/#comments>.

⁵ Deborah Pearlstein, *Contra CIA, Non-Self-Executing Treaties Are Still the Supreme Law of the Land*, OPINIO JURIS (Oct. 28, 2015, 2:45 PM), <http://opiniojuris.org/2015/10/28/contra-cia-non-self-executing-treaties-are-still-the-supreme-law-of-the-land/>.

⁶ Stephen Preston, Gen. Counsel, Cent. Intelligence Agency, Remarks at Harvard Law School: CIA and the Rule of Law (Apr. 10, 2012).

⁷ *Id.* External scrutiny mentioned by Preston includes the House and Senate Intelligence Committees, the FISA Court, the National Security Council, the Director of National Intelligence, and the Department of Justice.

⁸ *Id.*

“principles,” as opposed to rules, and his indication that such principles “may” be applicable to a given CIA operation.⁹ Current CIA General Counsel Caroline Krass expressed a similar view in written responses to queries from Congress in advance of her confirmation hearing. Specifically, Krass indicated that 50 U.S.C. § 3093 stated that the president may not authorize an action that would violate the Constitution or any statute of the United States.¹⁰ Krass further indicated that the covert action statute did authorize the CIA to perform covert actions that would violate some forms of international law.¹¹ International legal scholars in the blogosphere retorted that all treaties are the “supreme law of the land,” and that the president and CIA are bound to follow them.¹² The legal positions described by Savage, that the CIA can “violate international law,” and by international law scholars that the CIA is bound to abide by all international law, lack nuance, are unduly broad, and somewhat misleading characterizations of the domestic legal landscape.

In short, the covert action statute provides *domestic* authorization to violate *some* international law.¹³ The question that must be asked is what international law may the CIA violate when conducting covert actions, and which international law is it bound to obey? In answering this question, I will attempt to provide a legal analysis that could have been applied to

⁹ Deborah Pearlstein, *CIA General Counsel Speech on Hypothetical Uses of Force*, OPINIO JURIS (Apr. 11, 2012, 11:10 AM), <http://opiniojuris.org/2012/04/11/cia-general-counsel-speech-on-hypothetical-uses-of-force/>. Preston also indicated that the CIA applies the four basic principles in the law of armed conflict – military necessity, distinction, proportionality, and humanity – as a matter of execution but did not say that the CIA follows those principles out of a sense of legal obligation. Preston specifically addressed the Osama bin Laden raid and mentioned that it was conducted in compliance with the law of armed conflict; however, Preston did not discuss other international law norms, such as sovereignty and non-interference in the internal affairs of other states. Preston, *supra* note 6.

¹⁰ S. SELECT COMM. ON INTELLIGENCE, 113TH CONG., ADDITIONAL PREHEARING QUESTIONS FOR MS. CAROLINE D. KRASS UPON HER NOMINATION TO BE THE GENERAL COUNSEL OF THE CENTRAL INTELLIGENCE AGENCY 6-7.

¹¹ The freedom to violate a non-self-executing treaty would apparently be limited to those not implemented by statute. *See, e.g., id.* The distinction drawn by Krass appears uncontroversial to the House and Senate Intelligence Committees, given her confirmation by a vote of 95-4. 160 CONG. REC. S1612-13 (daily ed. Mar. 13, 2014).

¹² *See, e.g.,* Pearlstein, *supra* note 5.

¹³ The author concedes that no domestic statute can provide *international legal sanction* to violate international law, and that U.S. officials who violate international law may be subject to punishment in international tribunals.

reach the conclusion described with a critical lack of distinction by Savage, and lambasted by international legal scholars. In short, the CIA is bound to obey international law in the form of both self-executing treaties, and in the form of non-self-executing treaties or Customary International Law (CIL) which have been implemented by statute. However, the covert action statute provides domestic legal authority to violate customary international law and non-self-executing treaties that have not been implemented through legislation by Congress.

This article will present a legal basis for this conclusion. Part I will address the standing of treaties under U.S. constitutional law. Part II will examine the covert action statute and its application to three areas of international law: self-executing treaties, non-self-executing treaties, and customary international law. Finally, Part III will address the covert action statute's application to potential international law questions posed by the bin Laden raid.

I. THE U.S. CONSTITUTION AND THE SUPREMACY CLAUSE

The supremacy clause of the U.S. Constitution provides, in pertinent part, that "...all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land, and the Judges in every State shall be bound thereby..." The supremacy clause has three primary dimensions, each governing a different aspect of conflicts or inconsistencies in law. The first dimension deals with federal statutes vis-à-vis the U.S. Constitution. Not surprisingly, the Constitution prevails over inconsistent or conflicting federal statutes.¹⁴ The second dimension of the supremacy clause is that of federal law vis-à-vis state law.

As a general rule, federal law preempts inconsistent or contrary state law, such that the inconsistent state law may no longer remain in effect.¹⁵ This proposition applies to preemption

¹⁴ *United States v. Butler*, 297 U.S. 1 (1936). The same constitutional preemption can also apply to other government functions such as executive branch actions. *See generally*, *Marbury v. Madison*, 5 U.S. 137, 180 (1803).

¹⁵ *See, e.g.*, *City of New York v. FCC*, 486 U.S. 57, 63-64 (1988).

of state laws not only by the Constitution, but also by federal statutes.¹⁶ However, the Constitution places limits on this federal preemption through the structure of the federal government itself.¹⁷ As pertains to the topic at hand, because treaties made by the federal government stand on equal footing as federal statutes, they must preempt inconsistent or conflicting state statutes.¹⁸ The remaining question is what to make of federal statutes vis-à-vis treaties made by the federal government?

Federal statutes and treaties stand on equal footing under the Constitution.¹⁹ Because of this, the “later in time” rule provides that a treaty may be abrogated by a subsequent, inconsistent statute; and that a statute may be superseded by a later-in-time treaty.²⁰ However, a later-in-time statute will not be construed as abrogating a treaty provision unless the statutory intent is clearly expressed in either the language of the statute or in the statutory history.²¹ Finally, treaties are subject to judicial review to the same degree as statutes passed by Congress.²² In reviewing treaties, U.S. courts have long found a distinction between “self-executing” treaties on the one hand, and “non-self-executing” treaties on the other. The basic distinction is that self-executing treaties create enforceable domestic legal obligations upon ratification, while non-self-executing treaties may create international obligations but do not have the force of law in domestic courts

¹⁶ See, e.g., *Alden v. Maine*, 527 U.S. 706, 731 (1999).

¹⁷ See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 550 (1985) (explaining that the principal means chosen by the Framers to protect the states from federal overreach were “the delegated nature of Congress’ Article I powers” and “the structure of the Federal Government itself”).

¹⁸ See *Santovincenzo v. Egan*, 284 U.S. 30, 40 (1931). *Santovincenzo* did not address the question of treaty provisions that conflict with state constitutions; however, there is every reason to believe that the principles applied in other cases involving conflicts between federal statutes and state constitutions would be applicable such that the federal treaty would prevail.

¹⁹ *Cf. Whitney v. Robertson*, 124 U.S. 190, 193-94 (1888). While not expressly discussed by the court, this makes intuitive sense as both statutes and treaties have to some extent been vetted and approved by both of the “political branches.”

²⁰ See *id.*; *Edye v. Robertson*, 112 U.S. 580, 597-98 (1884); *Cherokee Tobacco*, 78 U.S. 616, 621 (1871).

²¹ See e.g., *Lem Moon Sing v. U.S.*, 158 U.S. 538, 549 (1895).

²² See, e.g., *In re Metzger*, 46 U.S. 176, 188 (1847).

unless and until implemented by Congress.²³ This basic understanding provides the backdrop against which to view various forms of international law vis-à-vis the covert action statute. In assessing whether the covert action statute provides a domestic justification to violate international law, the examination must begin with the language of the statute itself.

II. THE COVERT ACTION STATUTE VIS-À-VIS INTERNATIONAL LAW

The covert action statute provides that the president may authorize “covert actions,” which are defined as “...activities of the United States Government to influence political, economic, or military conditions abroad, where it is intended that the role of the United States Government will not be apparent or acknowledged publicly.”²⁴ The covert action statute requires both a finding by the president to support the conduct of covert actions,²⁵ and detailed reporting of all covert actions to the House Permanent Select Committee on Intelligence and the Senate Select Committee on Intelligence (hereinafter, Intelligence Committees).²⁶ The Central Intelligence Agency (CIA) is the default U.S. agency tasked to perform covert actions, and the president must specify in reports to the Intelligence Committees any other agencies participating in covert actions.²⁷ In many ways, the covert action statute “operationalizes” the constitutional separation

²³ See, e.g., *Whitney*, 124 U.S. at 194.

²⁴ 50 U.S.C. § 3093(a), (e) (2014).

²⁵ Subsections (b) and (c) of the covert action statute dictate the required timing of any Presidential findings and reports to Congress. As a general rule both the finding, and reporting to the intelligence committees will take place prior to the contemplated covert action, but circumstances may dictate that either, or both the Presidential finding and reporting to Congress take place in a timely manner after the covert action has been conducted. 50 U.S.C. § 3093(b), (c) (2014). Apparently, in the case of the bin Laden raid the administration determined to report to Congress after the raid was complete; however, CIA Director Leon Panetta (presumably in compliance with the default rules) had already briefed Congress prior to the execution of the raid. Savage, *supra*, note 2.

²⁶ 50 U.S.C. § 3093(a) (2014).

²⁷ *Id.*; 50 U.S.C. 3036(d) (1947). The CIA tasked function in 50 U.S.C. 3036(d)(4) to “perform such other functions and duties related to intelligence affecting the national security as the President . . . may direct,” is generally regarded as authorizing CIA covert action and is sometimes referred to as the “fifth function.” The other four functions are to (1) collect intelligence through human and other appropriate sources, (2) to correlate and evaluate intelligence related to national security, (3) to appropriately disseminate intelligence, and (4) to provide overall direction and deconfliction in the collection of national intelligence. *Id.*

of powers between the president and Congress. As explained in Justice Jackson's seminal concurrence in the *Youngstown Steel* case, there are three degrees of presidential authority:

- (1) Presidential authority is at its maximum when operating within a power granted by the Constitution, and pursuant to a grant of authority by Congress;²⁸
- (2) the President operates in a "zone of twilight" when operating in the absence of Congressional action,²⁹ and
- (3) the President's power is at its minimum when operating in the face of Congressional opposition, in which case the only powers the President may exercise are those expressly granted to the President, and not granted to Congress, in the Constitution.³⁰

In this context, the President enjoys broad, almost plenary powers, to conduct foreign relations.³¹ The covert action statute authorizes actions to influence conditions abroad, and thereby falls squarely within the President's foreign relations powers pursuant to Article II of the Constitution. To determine the extent of Presidential authority to perform such actions, it is necessary to examine the portion of the covert action statute that purports to allow the CIA to violate international law.

A. *Language of the Covert Action Statute*

In pertinent part, the covert action statute reads, "[a presidential] finding may not authorize any action that would violate the Constitution or any statute of the United States."³² It is a basic tenet of statutory construction that analysis of the meaning of any statute begins with the language of the statute.³³ Furthermore, it is a "cardinal canon" of statutory construction that "a

²⁸ In Justice Jackson's formulation, in these circumstances, the President can "be said . . . to personify the federal sovereignty." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 636 (1952).

²⁹ In this zone, the President can exercise his own Constitutional authorities. Furthermore, the President may tread into areas granted to Congress by the Constitution, but Congress may essentially acquiesce through indifference or inaction. *Id.* at 636-37.

³⁰ *Id.* at 637.

³¹ *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936).

³² 50 U.S.C. § 3093(a)(5) (2014).

³³ *Se. Cmty. Coll. v. Davis*, 442 U.S. 397, 405 (1979).

legislature says in a statute what it means and means in a statute what it says there.”³⁴ Thus, where the statutory language is clear and unambiguous, then the statute must be enforced according to its own terms.³⁵

The language of the covert action statute provides that no covert action may “violate the Constitution or any *statute* of the United States.”³⁶ By this language it seems clear that Congress intended that the President could authorize, and that the CIA could perform actions which would violate other forms of law.³⁷ For instance, if Congress meant that the president and CIA could not violate any “law”³⁸ of the United States, then Congress could, and should have used that language.³⁹ Congress has done so in the past, and has even used language that is purposefully more expansive in saying, “notwithstanding any other provision of law (*statutory or otherwise*)...” when discussing judicial review of orders of removal in the immigration context.⁴⁰ Thus, the plain meaning of the statute is to prohibit covert actions that violate the U.S. Constitution or statutes, but not those actions that would violate other forms of law such as common law forms of law which do not have the same standing as statutes.⁴¹ Therefore, in the context of creating U.S. domestic legal obligations, there are three primary sources of

³⁴ Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253-54 (1992).

³⁵ Hardt v. Reliance Standard Life Ins. Co., 560 U.S. 242, 251 (2010).

³⁶ 50 U.S.C. § 3093(a)(5) (2014) (emphasis added).

³⁷ See, e.g., Leatherman v. Tarrant Cty. Narcotics Intelligence and Coordination Unit, 507 U.S. 163, 168 (1993); United States v. Mills, 186 F. Supp. 2d 965, 967 (E.D. Wis. 2002) (describing the doctrine of *expressio unius est exclusio alterius* – “the expression of one thing is the exclusion of another”).

³⁸ As distinct from, and broader than the term “statute.”

³⁹ See, e.g., 18 U.S.C. §§ 926B, 926C (2016) (using the verbiage “notwithstanding any other provision of law...” when discussing exceptions to normal criminal provisions governing firearms for current and retired law enforcement personnel); see also 22 U.S.C. §2378d (2016); Iraq Sanctions Act of 1990, Pub. L. No. 101-513 § 586C (using the language “notwithstanding any other provision of law...” when discussing the prohibition on provision of funds for the benefit of the Government of Iraq).

⁴⁰ 8 U.S.C. § 1252 (a)(5) (2016) (emphasis added).

⁴¹ The statutory history on this point is of little help. The Senate Report discussing the covert action statute mentions that the CIA may not violate the Constitution or statutes of the U.S. It goes on to state, however, that because of particular statutory authorities, the CIA may perform acts which would violate other statutes, but are inapplicable to the CIA. The argument (at least in the statutory history) is that “the CIA possesses statutory authorities ... that are unavailable to to other government agencies,” and therefore, CIA actions do not violate the same federal statutes that would restrict other agencies. S. REP. NO. 102-85, at 37 (1991).

international law: self-executing treaties, non-self-executing treaties,⁴² and customary international law.⁴³

B. Forms of International Law and the Covert Action Statute

These three forms of international law do not have equal force in domestic courts, and have different impacts on the covert actions statute's grant of presidential authority.

1. Self-Executing Treaties

Courts in the United States have long found a distinction between treaties that are self-executing, those that have effect of their own accord,⁴⁴ and non-self-executing treaties, those which require some implementing legislation to give them domestic legal effect.⁴⁵ The concept of self-executing treaties grew out of the supremacy clause, and is intended to ensure federal enforcement of treaty obligations vis-à-vis the states, such that the states may not violate treaty obligations with impunity.⁴⁶ The general test of whether a treaty is self-executing is whether a treaty engages either, or any, of the states party to it to perform a particular act.⁴⁷ This test is somewhat complicated in practice, but has been refined as expressing four "doctrines" which may make a treaty self-executing.⁴⁸

The first doctrine has been termed the "intent based" approach, and renders a treaty self-executing if the treaty contemplates some future act to be undertaken by the parties, or some

⁴² See, e.g., *United States v. Bahel*, 662 F.3d 610, 629-630 (2d Cir. 2011) (discussing both self-executing, and non-self-executing treaties).

⁴³ See, e.g., RESTATEMENT (THIRD) FOREIGN RELATIONS. LAW. OF U.S., § 102 (AM. LAW INST. 1987).

⁴⁴ See, e.g., *Foster v. Neilson*, 27 U.S. 253, 314 (1829) ("Our Constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as *equivalent to an act of the Legislature, whenever it operates of itself*, without the aid of any legislative process.") (emphasis added).

⁴⁵ See, e.g., *Robertson v. General Electric Co.*, 32 F.2d 495, 500 (1929), *cert denied*, 280 U.S. 571 (1929).

⁴⁶ Carlos M. Vazquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L. 695, 699 (1995). This rule was put in place to remedy the weakness inherent in the Articles of Confederation, inherited from the British legal tradition, that no treaty was self-executing, that all treaties required implementation by Parliament/Congress, and that absent that implementation the individual states could violate federal treaties with impunity.

⁴⁷ *Foster v. Neilson*, 27 U.S. at 314-15.

⁴⁸ *Id.*

future act by the legislature in order to effect the ends of the treaty.⁴⁹ While there is some lack of clarity as to whether it is the intent of the executive branch,⁵⁰ two-thirds of the Senate,⁵¹ or the intent of both the president and the Senate that controls the self-executing nature of a treaty, the general proposition is that it is best left to the political branches to determine whether international legal norms are self-executing.⁵²

The second doctrine relates to the justiciability of a particular treaty provision, and involves questions such as: whether the United States (or another sovereign nation) has waived sovereign immunity with regard to a particular claim,⁵³ or whether a plaintiff has standing to sue for enforcement of a treaty provision.⁵⁴ This looks less to the “intent” of the instrument, than to whether the treaty provides some sort of judicially enforceable rule, or is otherwise within the judicial cognizance of the United States.⁵⁵

The third doctrine deals with whether a treaty provision purports to impose obligations which are within the exclusive domain of Congress under the Constitution.⁵⁶

⁴⁹ *Id.*; *United States v. Percheman*, 32 U.S. 51, 88-89 (1833). While this is described as a narrow exception, and one which creates the presumption that treaties are self-executing, it appears to have become the proverbial “hole you can drive a truck through,” as some judges have interpreted the rule to mean the opposite (that treaties are presumed to be non-self-executing), *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 808 (D.C. Cir. 1984) (Bork, J., concurring), or providing judicial guidance such that the political branches can easily ensure that most treaties are non-self-executing. Vazquez, *supra* note 46, at 701 n.30.

⁵⁰ *Islamic Republic of Iran v. Boeing Co.*, 771 F.2d 1279, 1284 (9th Cir. 1985) (involving a pre-ratification statement by the President), *cert. dismissed*, 479 U.S. 957 (1986); *Cook v. United States*, 288 U.S. 102, 115 n. 10 (1932) (relying in part on a pre-ratification statement by the Secretary of State); *see also* Letter from Julia Frifield, Assistant Secretary of State, Legislative Affairs, to Representative Mike Pompeo, United States House of Representatives (Nov. 19, 2015) (indicating that the Joint Comprehensive Plan of Action, the “Iran Nuclear Deal,” represents political commitments and is not legally binding).

⁵¹ *See, e.g.*, S. EXEC. REP. NO. 110-12, at 9 nn.34-35 (2008) (noting that the treaties at issue are within a class of treaties which are generally self-executing).

⁵² *Al-Bihani v. Obama*, 619 F.3d 1, 9-10 (Kavanaugh, J., Concurring) (D.C. Cir. 2010).

⁵³ *Cohens v. Virginia*, 19 U.S. 264, 380-381 (1821); *United States v. Lee*, 106 U.S. 196, 207 (1882).

⁵⁴ RESTATEMENT (THIRD) FOREIGN RELATIONS. LAW. OF U.S., §111, rep. notes (AM. LAW INST. 1987).

⁵⁵ Vazquez, *supra* note 46, at 711.

⁵⁶ RESTATEMENT (THIRD) FOREIGN RELATIONS. LAW. OF U.S., §111, rep. n.6 (AM. LAW INST. 1987).

Finally, and related to the second doctrine, is whether a treaty creates a private right of action.⁵⁷ Regardless, the analysis into whether a treaty is self-executing, or non-self-executing involves a thorough examination of the language of the particular instrument, as well as any accompanying executive or legislative materials.

In a rationale which is akin to the canon of statutory interpretation, if a treaty is self-executing, then it will be enforced according to its plain meaning; otherwise, the courts will resort to an examination of accompanying materials to divine the “intent” of the parties about the obligations that a treaty imposes.⁵⁸ Furthermore, when a treaty is self-executing, it stands on equal footing with federal statutes.⁵⁹ Because self-executing treaties and statutes stand on equal footing, a “later in time” rule applies, such that if the two are inconsistent, then whichever came into force later in time prevails.⁶⁰ However, a later in time statute will not be construed as abrogating a self-executing treaty unless the statutory intent is clear.⁶¹

From this discussion, it seems apparent that the covert action statute is not intended to abrogate any statute or self-executing treaty provisions. Self-executing treaty provisions are equivalent to statutes in U.S. domestic courts.⁶² The covert action statute language does not clearly indicate abrogation of treaty provisions that have attained the force of a statute in domestic courts;⁶³ thus, it follows that the covert action statute does not provide domestic authorization to violate self-executing treaties. This appears to be the legal analysis applied by

⁵⁷ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732-733 (2004).

⁵⁸ *See, e.g., Meier v. Schmidt*, 150 Neb. 383 (1948).

⁵⁹ *Cheung v. United States*, 213 F.3d 82, 95 (2d Cir. 2000) (finding an extradition treaty to be self-executing). The Cheung court explains that extradition treaties belong to a category of treaties that are generally presumed to be self-executing absent evidence of Congressional or executive intent to the contrary.

⁶⁰ *Whitney v. Robertson*, 124 U.S. 190, 193-94 (1888).

⁶¹ *Lem Moon Sing v. United States*, 158 U.S. 538, 549 (1895).

⁶² *Robertson*, 124 U.S. at 193-94.

⁶³ 50 U.S.C. § 3093(a)(5) (2012); S. REP. No. 102-85, at 230 (1991) (discussion of subsection (a)(5) of the covert action statute does not provide clear evidence of such intent, and is in fact silent on the matter of treaties).

the CIA, and expressed by Krass in her written responses in support of her confirmation as CIA general counsel.⁶⁴ However, treaties which are non-self-executing present a different question.⁶⁵

2. *Non-Self-Executing Treaties*

Non-self-executing treaties are those that do not have any domestic legal effect of their own accord.⁶⁶ Non-self-executing treaties require congressional action, in the form of implementing legislation, to make them enforceable in domestic courts.⁶⁷ Furthermore, treaties are not the only international instruments that are unenforceable in domestic courts. Other international law rules or instruments that have been held unenforceable in U.S. domestic courts are decisions by the International Court of Justice⁶⁸ and United Nations Security Council Resolutions.⁶⁹ As discussed, those treaties which generally require some action on the part of the parties other than a specific or particular action are non-self-executing; however, there are other factors which can result in a treaty being found to be non-self-executing.

In addition to the four “doctrines” addressed above, courts have found that the existence of an international diplomatic avenue of redress indicates that a treaty may be non-self-executing.⁷⁰ Furthermore, various approaches have been used by a number of courts over the years to find a dizzying array of treaties to be non-self-executing.⁷¹ The basic thrust of these decisions is that

⁶⁴ See *Additional Prehearing Questions for Ms. Caroline D. Krass upon Her Nomination to Be the General Counsel of the Central Intelligence Agency*, Senate Select Comm. on Intelligence, 6-7, <http://www.intelligence.senate.gov/sites/default/files/hearings/krassprehearing.pdf>.

⁶⁵ Carlos Manuel Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L. 695 (1995).

⁶⁶ *Foster v. Neilson*, 27 U.S. 253, 314-15 (1829) (“[W]hen the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court”).

⁶⁷ *Robertson*, 124 U.S. at 194; *Igartua-De La Rosa v. United States*, 417 F.3d 145, 150 (1st Cir. 2005).

⁶⁸ *Medellin v. Texas*, 552 U.S. 491, 498-99 (2008).

⁶⁹ *Tarros S.p.A. v. United States*, 982 F. Supp. 2d 325, 344-45 (S.D.N.Y. 2013).

⁷⁰ *United States v. Bahel*, 662 F.3d 610, 629-30 (2d Cir. 2011).

⁷¹ *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 373-77 (7th Cir. 1985) (finding Articles 55 and 56 of the U.N. Charter non-self-executing); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 808-12 (D.C. Cir. 1984) (Articles 1 and 2 of the U.N. Charter, and Geneva Conventions III and IV); *Huynh Thi Anh v. Levi*, 586 F.2d 625, 629 (6th Cir. 1978) (neglecting to find that Articles 24, 49 of GC IV were self-executing); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 734 (2004); *Comm. of the U.S. Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 938 (D.C. Cir.

the question presented to the courts is better resolved by the political branches than the courts.⁷²

This is not to say that a treaty's non-self-executing character provides an international justification to violate the terms of the treaty; rather, the treaty obligation is unenforceable under domestic law.⁷³

a. Non-Self-Executing Treaties Implemented by Congress

When a non-self-executing treaty is implemented by Congress, the means of implementation is a statute.⁷⁴ Because no covert action may violate "any statute of the United States,"⁷⁵ this prohibition applies to treaty provisions codified by Congress in implementing legislation. Therefore, the president may not authorize any covert action that violates such an implementing statute. Note, however, that non-self-executing treaties which have not been implemented by statute do not have the force of law in domestic courts.

b. Non-Self-Executing Treaties Not Implemented by Congress

Non-self-executing treaties which have not been implemented by Congress through legislation create no domestically enforceable rule of law.⁷⁶ Regardless of whether the United States is bound to carry out treaty obligations under international law, not all international obligations constitute binding federal law that U.S. courts may enforce.⁷⁷ In light of this

1988) (finding that Article 94 of the Vienna Convention calls on states to take action, but does not have binding independent effect).

⁷² *Medellin*, 552 U.S. at 516.

⁷³ *Alvarez-Machain*, 542 U.S. at 734 (discussing the International Covenant on Civil and Political Rights and finding that while they may be enforceable under international law, they have no domestic legal effect); *Al-Bihani v. Obama*, 619 F.3d 1, 8 n.8 (D.C. Cir. 2010) (Brown, J., concurring).

⁷⁴ War Crimes Act of 1996, Pub L. No. 104-192, 110 Stat 2104 (1996) (enacted to "carry out the international obligations of the United States under the Geneva Conventions to provide criminal penalties for certain war crimes") (codified as 18 U.S.C. § 2441 (2012)); *Robertson*, 124 U.S. at 194; *Alaska v. Kerry*, 972 F. Supp 2d 1111, 1140 (D. Alaska 2013) (finding that there was a congressional act implementing the relevant treaty, thus the treaty had effect).

⁷⁵ 50 U.S.C. § 3093(a)(5) (2012).

⁷⁶ *Robertson*, 124 U.S. at 194; *Reagan*, 859 F.2d at 938; *Sukwanputra v. Gonzales*, 434 F.3d 627, 631-32 (3d Cir. 2006) (no self-executing right to file for asylum under Article 34 of the 1951 UN Convention Relating to Status of Refugees).

⁷⁷ *Medellin*, 552 U.S. at 504.

practice, the Senate has expressed its intent that “all treaties – whether self-executing or not – are the supreme law of the land...” and that the president should seek to meet U.S. treaty obligations even where a treaty is not self-executing.⁷⁸

Rather than providing an unqualified expression of the congressional opinion that all treaties, self-executing or not, create binding domestic law, this statement can be read as advocating that, in light of the Supreme Court’s decision in *Medellin v. Texas* (2008), all treaties provide an unambiguous statement by the executive as to whether the treaty at issue is self-executing.⁷⁹ The *Medellin* case involved a number of foreign nationals bringing suit to challenge their state court convictions on the grounds that they were not advised of their rights under Article 36 of the Vienna Convention.⁸⁰ The International Court of Justice (ICJ) held that this entitled these foreign nationals to review and reconsideration of their state court convictions despite their failure to comply with state court procedural rules barring their challenges.⁸¹ The Supreme Court held that neither the Vienna Convention, the *Avena* opinion, nor a Presidential Memorandum indicating that the United States would “discharge its international obligations” under *Avena* had binding domestic effect.⁸² As a result, the Supreme Court upheld the dismissal of Medellin’s challenge to his Texas state conviction. Part of the reasoning in *Medellin* was that a self-executing treaty “conveys an intention that it be ‘self-executing’ and is ratified on these terms.”⁸³

Thus, in light of *Medellin*, this statement in a Congressional Committee Report can be read as advocating that the treaties at issue are self-executing, and as expressing the preference that

⁷⁸ COMM. ON FOREIGN RELATIONS, EXTRADITION TREATIES WITH THE EUROPEAN UNION, S. EXEC. DOC. NO. 110-12, at 10 (2d Sess. 2008).

⁷⁹ *Id.* In fact, this Senate Report goes on to state that the Senate should not give its advice and consent unless it is convinced that the United States will be able to implement the treaty through legislation. This reasoning is superfluous if Congress believes that all treaties are binding and thus do not require implementing legislation.

⁸⁰ *Medellin*, 552 U.S. at 497.

⁸¹ Case Concerning *Avena* and Other Mexican nationals (Mex. V. U.S.), 2004 I.C.J. 12 (hereinafter, *Avena*).

⁸² *Medellin*, 552 U.S. at 498-99.

⁸³ *Id.* at 504 (emphasis added).

the executive branch clearly indicate its intent as to the self-executing nature of a treaty. Even if this Congressional report does constitute an unambiguous statement of the sense of Congress, it is not clear that this statement, which is not a statute, is enough to either (1) imbue non-self-executing treaties with the force of statute, or (2) sufficient to override the intent of the executive, or the present state of the law governing self-executing treaties in U.S. courts.

In light of the president's broad, near plenary power, to conduct foreign affairs, it is unsettled as to whether such a statement in a Senate Committee Report is sufficient to render any treaty to be self-executing should the executive branch express the opposite intent.⁸⁴ This principle appears to be accepted by several U.S. courts, which have issued rulings applying the self-executing/non-self-executing distinction following this 2008 congressional statement of intent.⁸⁵ Thus, if the executive branch indicates its intent that a treaty be non-self-executing, and an examination of the treaty language indicates that the treaty is non-self-executing, then that treaty would not create any rule of domestic law. The corollary would be that the president could authorize covert actions that would violate the treaty. Even if the intent of the Senate Committee on Foreign Affairs proves persuasive to courts, the covert action statute would still permit the president to authorize a covert action that would violate a provision of law that is not equivalent to a statute.

As discussed previously, the covert action statute prohibits the president from authorizing any covert action that violates the Constitution or U.S. statute.⁸⁶ The converse of this proposition is that the covert action statute permits the president to authorize a covert action that violates

⁸⁴ See *Curtiss-Wright Export Corp.*, 299 U.S. at 319; *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-37 (1952) (Jackson, J., concurring) (describing the extent of executive power).

⁸⁵ See *Bahel*, 662 F.3d 629 (2nd Cir. 2011); *Al-Bihani v. Obama*, 619 F.3d 14 (D.C. Cir. 2010) (Kavanaugh, J., concurring in the denial for rehearing en banc).

⁸⁶ 50 U.S.C. § 3093(a)(5) (2014).

other types of U.S. law, such as some form of federal common law or Customary International Law (CIL).⁸⁷ Where a non-self-executing treaty has not been implemented by statute, even if it does create some federal legal obligation, it is one that is unenforceable in U.S. courts under current jurisprudence.⁸⁸ This being the case, the covert action statute provides no domestic prohibition against the violation of non-self-executing treaties which have not been implemented by Congress.⁸⁹ The standing of CIL in U.S. courts is more nebulous.

3. *Customary International Law*

Customary international law arises from the “general and consistent practice of [nation] states, followed from a sense of legal obligation.”⁹⁰ There are essentially two categories of international law norms within CIL. There are those norms that are generally applicable, but which a state may dissent from, or persistently lodge an objection to, such that the particular state

⁸⁷ To the extent that any federal common law exists in light of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938) (addressing the applicability of state or Federal common law to a tort claim). *Erie* generally stands for the proposition that there is no general Federal common law; rather, federal law must derive from either a Constitutionally sanctioned process or a Statute. In the context of international law, the *Erie* decision is generally viewed as standing for the proposition that Customary International Law does not create binding domestic legal obligations because it does not derive from any Constitutionally sanctioned process. See, e.g., *Banco Nacional De Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964) (applying a common law rule “act of state doctrine” to dismiss a tort claim against the Cuban government); *but, c.f.*, Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 852-53 (*Erie* does not mean that there is no federal common law, simply that the grounds of that common law are limited and must have some grounding in the lawmaking powers of Congress). Furthermore, statutory grants to perform actions which would otherwise violate some law are not uncommon, and often employed in the criminal context. See, e.g., 22 U.S.C. § 2378 (1996) (permitting foreign assistance to otherwise prohibited countries “notwithstanding any other provision of law” upon a Presidential determination that the assistance is important to the national interests of the United States) (emphasis added).

⁸⁸ See *Bahel*, 662 F.3d at 629 (2nd Cir. 2011); *Al-Bihani*, 619 F.3d 13 (D.C. Cir. 2010) (Kavanaugh, J., concurring in the denial of rehearing en banc).

⁸⁹ This does not mean, however, that the United States can escape international legal sanction for actions that violate a non-self-executing treaty. See, e.g., *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12, 39-41 (discussing the United States’ obligations to foreign nationals imprisoned pursuant to U.S. prosecutions); *Medellin*, 552 U.S. at 510-11 (holding that the ICJ opinion in *Avena* created no domestically enforceable legal obligation); *Al-Bihani*, 619 F.3d at 8 n.8 (Brown, J., concurring in the denial of rehearing en banc) (explaining that although courts cannot enforce non-self-executing treaties against the President, his or her disregard of them may have political consequences).

⁹⁰ RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S., *supra* note 43, § 102(2).

is not bound by the norm.⁹¹ For instance, while the 1977 Additional Protocol I (API) to the Geneva Conventions is generally regarded as CIL, the United States has lodged its objection to the status of certain provisions of API as CIL.⁹² There are also norms which are considered *jus cogens*, or peremptory, and cannot be derogated by state objection or individual state discretion.⁹³ The standing of CIL in domestic courts is as yet an unsettled question. There are two contrasting approaches; the “modern approach,” and those who repudiate the modern approach.

a. The Modern Approach to Customary International Law

The “modern approach” to CIL embraces the notion that CIL is the domestic law of the United States.⁹⁴ This position appears to be based on the Supreme Court statement that,

“[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations...”⁹⁵

While some scholars viewed the *Paquete Habana* rationale that CIL is domestic federal law as dead following *Erie*,⁹⁶ the concept behind the “modern approach” gained renewed vigor with the

⁹¹ *Id.* at cmt. d.

⁹² Michael Matheson, Deputy Legal Advisor, U.S. Dept. of State, Comments Presented to the Sixth Annual American Red Cross-Washington College of Law Conference on International, Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, in 2 AM. U. J. INT'L L. & POLICY 419 (1987); Memorandum for Mr. John H. McNeill, Assistant Gen. Counsel, Office of the Sec'y of Def., Customary International Law Implication (May 9, 1986) (reprinted in The Judge Advocate General's Legal Center & School, Law of War Documentary Supplement 388, 389 (Sean Watts ed., 2006)).

⁹³ RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S., *supra*, note 43, § 102, cmt. k. The prohibition on genocide is one such *jus cogens* norm.

⁹⁴ Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1555-61 (1984).

⁹⁵ The *Paquete Habana*, 175 U.S. 677, 700 (1900). The *Paquete Habana* case involved two fishing vessels taken as prizes of war by the United States during the Spanish-American War. *Id.* at 678-79. In the absence of a specific treaty on the matter, the Supreme Court applied “ancient usage among civilized nations,” or CIL, to find that taking the two fishing vessels as prizes of war was unlawful under international law, and thus invalid. *Id.* at 686, 700, 714.

⁹⁶ 304 U.S. 64 (1938) (finding that there is no general federal common law); Phillip Jessup, *The Doctrine of Erie Railroad v. Tompkins Applied to International Law*, 33 AM. J. INTL. L. 740 (1939) (arguing that *Erie* effectively spelled the end of the application of CIL in domestic courts).

Supreme Court's decision in *Banco Nacional De Cuba v. Sabbatino* (1964).⁹⁷ The *Sabbatino* case involved the Cuban government taking ownership of sugar owned by an American company without a realistic avenue for compensation or legal recourse.⁹⁸ The U.S. Department of State described the taking as "manifestly in violation of those principles of international law which have long been accepted by the free countries of the West."⁹⁹ The district and appeals courts ruled in favor of the American plaintiffs on the grounds that the taking was in violation of international law, and therefore did not convey good title.¹⁰⁰ However, the Supreme Court reversed the appeals court by applying an "act of state doctrine," which essentially holds that U.S. courts "will not sit in judgment on the acts of the [Cuban government] done within its own territory," on the rationale that the rule of judicial restraint was necessary to serve the foreign relations interests of the United States.¹⁰¹

Much of the modern approach effectively rests on the argument that the *Sabbatino* court did not apply CIL, but did apply a judicially made "foreign relations law," which served the foreign relations needs of the United States.¹⁰² This approach is succinctly captured in the Restatement (Third) of the Foreign Relations Law of the United States (Restatement (3rd)). According to the Restatement (3rd), international law, including CIL and international agreements, is the law of the United States, and are supreme over the laws of the states.¹⁰³ While the United States is generally bound by CIL, this does not apply to CIL from which the United States has dissociated

⁹⁷ 376 U.S. 398 (1964); see Henkin, *supra* note 94, at 1559.

⁹⁸ *Banco Nacional De Cuba v. Sabbatino*, 376 U.S. 398, 401-403 (1964). It is curious that the "modern approach" tenet that CIL is within the judicial cognizance of the United States is based on a case in which the Supreme Court specifically declined to apply CIL to a case under consideration.

⁹⁹ *Id.* at 402-403.

¹⁰⁰ *Id.* at 406-407.

¹⁰¹ *Id.* at 415-16.

¹⁰² Henkin, *supra* note 94, at 1559. In essence, that application of a "foreign relations law" rescuscitated federal common law in the foreign relations context.

¹⁰³ RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S., *supra* note 43, § 111(1).

itself.¹⁰⁴ This being the case, the modern approach regards CIL as being within the judicial cognizance of domestic courts as a means of serving the foreign relations interests of the United States.¹⁰⁵ Professor Harold Koh discusses the fact that, while many CIL norms are outside of the cognizance of U.S. courts, the *Sabbatino* court declared that “[t]he greater the degree of codification or consensus concerning a particular area of international law... the more appropriate it is for the judiciary to render decisions regarding it...”¹⁰⁶ The modern position also relies on certain tort cases to conclude that CIL creates enforceable domestic law.¹⁰⁷ This does not mean, however, that all CIL is justiciable under the modern approach.

Issues such as the failure of a treaty to establish a private cause of action have resulted in dismissal of claims under CIL.¹⁰⁸ This being the case, there are also questions over who would be the appropriate plaintiff in a suit brought under CIL. If a treaty fails to create a private cause of action, it is unclear whether CIL could do so.¹⁰⁹ Even if a CIL norm did guarantee an individual right, there might still be questions of standing.¹¹⁰ Furthermore, if the plaintiff were a

¹⁰⁴ *Id.* at cmt. b.

¹⁰⁵ See Harold Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824, 1842 (1998).

¹⁰⁶ *Id.*; *Sabbatino*, 376 U.S. at 428.

¹⁰⁷ *Filartiga v. Pena-Irala*, 630 F.2d 876, 878 (2d Cir. 1980) (applying the Alien Tort Statute, 28 U.S.C. § 1350, to find that U.S. courts had federal jurisdiction over claims of torture in violation of CIL or “the law of nations” as required in the statute.). *But, cf.*, *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985) (affirming the dismissal of a tort claim for terrorist activities in violation of CIL as beyond the subject matter jurisdiction of U.S. courts). The modern approach does not clearly indicate whether CIL creates domestic law equivalent to statute; however, this would be a nonsensical assertion as CIL would not have been vetted by either the executive or legislative branches.

¹⁰⁸ *Dreyfus v. Von Finck*, 534 F.2d 24, 24 (2d Cir. 1976), *cert. denied by*, 429 U.S. 835 (1977).

¹⁰⁹ See, e.g., *Hunt v. B.P. Exploration Co. (Libya), Ltd.*, 492 F.Supp. 885, 903 (N. Dist. Tx., 1980). In *Hunt*, the court held, in part that Hunt did not have standing to sue British Petroleum for a violation of international law because, “there is a general consensus... that (the law of nations) deals primarily with the relationship among nations rather than among individuals. Like a general treaty, the law of nations has been held not to be self-executing so as to vest a plaintiff with individual legal rights. It has been held inapplicable to torts such as unseaworthiness of a vessel and failure to provide a seaman with a safe place to work, and to the right of a Russian citizen to recover the proceeds of a life insurance policy...”, *citing to Dreyfus v. Von Finck*, 534 F.2d at 31 (internal citations omitted).

¹¹⁰ See, e.g., *U.S. v. Royal Caribbean Cruises*, 11 F.Supp. 1358, 1372-73 (S. Dist. Fla., 1998) (holding in part that Royal Caribbean Cruise Lines could not assert CIL or U.N. Convention on the Law of the Sea (UNCLOS) provisions as a defense to violation of Federal pollution regulations because neither CIL, nor UNCLOS (which the U.S. has not ratified) were self-executing and as a result, Royal Caribbean lacked standing to assert CIL or UNCLOS provisions in U.S. courts).

government or government official there would likely be significant reluctance on the part of those entities to submit themselves to the jurisdiction of U.S. courts.¹¹¹ Other barriers to bringing suit under CIL in U.S. courts include lack of any waiver of sovereign immunity by the United States or the defendant country.¹¹² One issue related to the waiver of sovereign immunity is that the United States will not consent to a suit if an alien plaintiff's state does not provide reciprocal privileges to U.S. nationals.¹¹³ The basic thrust of the modern position is that, while significant barriers to justiciability of a suit exist, CIL does create domestically enforceable law.

b. Repudiating the Modern Approach

More recent court cases and scholarship have appeared to repudiate the modern approach to CIL.¹¹⁴ For instance, the D.C. Circuit Court of Appeals has expressly declined to apply international law norms to a question of detention pursuant to the Law of Armed Conflict and a domestic Authorization for the Use of Military Force (AUMF).¹¹⁵ In the *Al-Bihani* case, two separate concurring opinions articulate that international law does not necessarily have any effect on, nor does it supersede, domestic law.¹¹⁶ The critique of the modern approach focuses on two basic tenets. First, after the Supreme Court's decision in *Erie* which negated the existence of a general federal common law, CIL is no longer a valid basis upon which to establish enforceable

¹¹¹ REST. (3RD), *supra*, note 343, § 111 and commentary. *See, e.g.*, 28 U.S.C. § 1605A (2014) (providing that designated state sponsors of terrorism may be sued in U.S. courts; the converse being true that states not so designated remain immune from suit).

¹¹² *Cohens v. Virginia*, 19 U.S. 264, 411-12 (1821); *United States v. Lee*, 106 U.S. 196, 207 (1882).

¹¹³ 28 U.S.C. § 2502 (1992). Other instances in which the United States has not waived sovereign immunity include claims under the Federal Tort Claims Act for claims arising in a foreign country. 28 U.S.C. § 2680(k) (2006).

¹¹⁴ This apparent repudiation is not particularly recent, as even at the time the modern approach was taking hold there were those scholars who disagreed with its basic premise. *See, e.g.*, Martha A. Field, *Sources of Law: The Scope of the Federal Common Law*, 99 HARV. L. REV. 883, 890-91 (1986) (indicating that while the Supreme Court may look to international law for guidance, it is not bound to follow international law).

¹¹⁵ *Al-Bihani*, 619 F.3d at 1.

¹¹⁶ *Id.* at 3-4, (Brown, J., concurring); *Id.* at 9-10 (Kavanaugh, J., concurring).

domestic law.¹¹⁷ The argument is essentially that the 1900 *Paquete Habana* statement that “international law is our law” is no longer valid after the 1938 ruling in *Erie*.¹¹⁸ Federal courts have variously stated that the role of the judiciary is “to enforce the Constitution, laws, and treaties of the United States, not to conform the law of the land to norms of customary international law,”¹¹⁹ and that “[s]tatutes inconsistent with principles of customary international law may well lead to international law violations. But within the domestic legal realm, that inconsistent statute simply modifies or supersedes customary international law.”¹²⁰ The related second tenet has to do with the constitutionality of CIL as a basis for creating enforceable domestic law.

Customary international law does not arise from any mechanism described or provided for in the Constitution.¹²¹ In *Medellin*, the Supreme Court described the “careful set of procedures that must be followed before federal law can be created under the Constitution,” explaining that the creation of federal law is “[vested] in the political branches.”¹²² While this concept was applied in the context of treaties, it is clear that the creation of binding domestic law requires the participation and ratification of a norm by both the president and Congress.¹²³ There is no sound rationale to do violence to this constitutional requirement where an international legal norm is CIL, as opposed to memorialized in a non-self-executing treaty.

¹¹⁷ Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 852-53 (1997).

¹¹⁸ See, e.g., *Al-Bihani*, 619 F.3d at 10 (Kavanaugh, J., concurring).

¹¹⁹ *United States v. Yunis*, 924 F.2d 1086, 1091 (D. C. Cir. 1991) (declining to apply CIL norms to limit U.S. jurisdiction to try Yunis for taking hostages aboard a commercial airliner outside of the United States).

¹²⁰ *Comm. of United States Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929 (D.C. Cir. 1988). (dismissing claims based in international law relating to the U.S. policy of funding Nicaraguan rebels (“contras”) as being outside of the jurisdiction of the court, and based on the fact that subsequent legislation had superseded any domestic effect of the international law norms claimed by plaintiffs).

¹²¹ Bradley & Goldsmith, *supra* note 87, at 817, 838.

¹²² *Medellin*, 552 U.S. at 515.

¹²³ *Id.* (indicating that for treaties to become domestic law they must be made by the President, and approved by Congress).

Despite protestations to the contrary,¹²⁴ many scholars also now argue that the modern position is irreconcilable with *Erie*.¹²⁵ Domestic legal scholars argue that CIL is irreconcilable with constitutional principles for the establishment of binding rules of domestic law,¹²⁶ such as: a lack of clarity or control by the political branches in the establishment of the law,¹²⁷ no grounding in the Constitution or any other domestic law, and a failure to recognize the fact that federal statutes would be able to abrogate CIL as a domestically enforceable rule of law.¹²⁸ In essence, these positions distill down to an argument that because CIL has not been vetted by both of the political branches, it cannot create domestically enforceable law.¹²⁹ This squares with arguments that the modern position's reliance on *Sabbatino* is a misapplication of the rule established in that court.

Specifically, the *Sabbatino* court applied a judicially made "act of state" doctrine to dismiss a claim of wrongful expropriation of personal property located in Cuba by the Cuban government.¹³⁰ Despite allegations that Cuba's actions violated international law, the court applied the act of state doctrine to decline to review the actions of a government, within that government's territory, which were facially valid under the laws of that state.¹³¹ In essence, the court said that concepts of international law were not germane to the question, and that the court would only require the district court to examine whether the taking was valid under Cuban law.¹³² The *Sabbatino* court expressly declined to apply international law as a rule enforceable

¹²⁴ See, e.g., Koh, *supra* note 105, at 1827-1830 (defending the modern position against the arguments made by Bradley and Goldsmith).

¹²⁵ Ernest A. Young, *Sorting Out the Debate Over Customary International Law*, 42 VA. J. INT'L L. 365, 372 (2002).

¹²⁶ *Id.* at 462-63.

¹²⁷ *Al-Bihani*, 619 F.3d at 10; Bradley & Goldsmith, *supra* note 87, at 858.

¹²⁸ *Id.* at 842-43.

¹²⁹ See *Medellin*, 552 U.S. at 515.

¹³⁰ *Sabbatino*, 376 U.S. at 401-02.

¹³¹ *Id.* at 430-31.

¹³² *Id.* at 438.

in U.S. courts.¹³³ To be sure, there are cases in which domestic courts have applied international law after *Sabbatino*; however, those cases generally involve a statute which requires the courts to determine or apply international law.¹³⁴

While court decisions and scholarship provide much debate on the issue, on balance it appears that courts have applied the post-modern interpretation that CIL does not create enforceable domestic law, unless required to give effect to international law by statute.¹³⁵ Thus, in many ways CIL acts much like a non-self-executing treaty in that some legislative act is required in order to give CIL principles domestic legal effect. Furthermore, as described previously, a statute may supersede whatever (if any) domestic legal effect could be given to CIL. In much the same way that the president's authority as the "sole organ of the nation in its external relations,"¹³⁶ in conjunction with the covert action statute allows the president to authorize acts that violate non-self-executing treaties, the president may also authorize those acts which would violate CIL.¹³⁷

This is true even if CIL does create domestically enforceable law, as CIL is clearly not a statute, nor equivalent to a statute.¹³⁸ In light of the covert action statute's sanction to violate law

¹³³ Bradley & Goldsmith, *supra* note 87, at 830. This fact is also conceded by proponents of the modern position, who nonetheless argue that *Sabbatino*'s application of a court made domestic rule of common law (the "act of state" doctrine) somehow resuscitates the standing of CIL as a domestically enforceable international form of common law. See, e.g., Henkin, *supra* note 94, at 1560.

¹³⁴ See, e.g., *Sosa v. Alvarez-Macahin*, 542 U.S. 692, 746-47 (2004) (Scalia, J., concurring) (applying international law in the context of the Alien Tort Statute, which specifically provides for causes of action for torts "committed in violation of the law of nations," which the court interpreted to mean CIL); see also, *Banco Nacional de Cuba v. Farr*, 383 F.2d 166, 177-78 (1967) (applying the "Hickenlooper Amendment" to 22 U.S.C. § 2370 levying sanctions against Cuba, which reads in pertinent part that "no court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits *giving effect to the principles of international law...*") (emphasis added).

¹³⁵ See, e.g., *Al-Bihani v. Obama*, 619 F.3d 1, 17-18 (2d Cir. 2011) ("*Erie* means that, in our constitutional system of separated powers, federal courts may not enforce law that lacks a domestic sovereign source.>").

¹³⁶ *New York Times Co. v. United States*, 403 U.S. 713, 756 (1971) (quoting 10 ANNALS OF CONG. 613 (1800)).

¹³⁷ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF UNITED STATES § 111 cmt. h.

¹³⁸ *Al-Bihani*, 619 F.3d at 17.

other than the “Constitution or any *statute* of the United States,”¹³⁹ even if CIL is enforceable domestically as a sort of international common law, the president may authorize covert actions that violate CIL.

III. THE BIN LADEN RAID

The bin Laden raid presents a well-developed factual case study to assess the application of the covert action statute in practice. While the United States was engaged in combat operations in Afghanistan pursuant to both United Nations and domestic legal authorities, there were still international legal issues surrounding the cross-border raid into Pakistan to kill or capture bin Laden. The first legal issue has to do with the *jus in bello* question of whether bin Laden was a legitimate military target under the Law of Armed Conflict (LOAC).¹⁴⁰

A. Osama bin Laden's Targetable Status

On September 11, 2001, al Qaeda operatives conducted an attack using civilian aircraft that killed 2,996 people.¹⁴¹ Bin Laden was the undisputed leader of al Qaeda, and had been the driving force behind the organization's ideology and operations since 1989.¹⁴² In 2001, in response to the 9/11 terrorist attacks, the U.N. Security Council issued a resolution classifying the 9/11 attacks as a “threat to international peace and security.” Furthermore, the U.N. Security Council Resolution (UNSCR) affirmed the United States' right to both individual and collective self-defense against the non-state actors responsible for the attacks, thereby providing an

¹³⁹ 50 U.S.C. § 3093(a)(5) (2014).

¹⁴⁰ Also sometimes known as International Humanitarian Law (IHL).

¹⁴¹ NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMM'N REPORT (2004) [hereinafter “9/11 COMMISSION REPORT”]; Brad Plumer, *Nine Facts About Terrorism in the United States Since 9/11*, WASH. POST (Sept. 11, 2013), <https://www.washingtonpost.com/news/wonk/wp/2013/09/11/nine-facts-about-terrorism-in-the-united-states-since-911/>.

¹⁴² 9/11 COMMISSION REPORT, *supra* note 141, at 48, 56, 59.

independent international legal basis to target bin Laden.¹⁴³ Thus, under international law,¹⁴⁴ as the operational leader of al Qaeda, the entity responsible for the 9/11 attacks, bin Laden was a legitimate military target pursuant to LOAC.¹⁴⁵

This is the case as bin Laden was a member of a declared hostile force, and as such was targetable by military personnel even if he was not engaged in combat or operational planning activities at the time he was targeted.¹⁴⁶ This would certainly be the case had the president opted for an air strike, which was apparently considered as a potential course of action.¹⁴⁷ However, the conduct of a military raid complicates the issue. While not negating bin Laden's targetable status, the conduct of a raid could present a scenario wherein killing bin Laden would violate the Law of Armed Conflict. For instance, if bin Laden were to be captured, wounded, or surrendering, then he would potentially be placed *hors de combat*, and while still a member of a declared hostile force, he could no longer lawfully be killed.¹⁴⁸ Not only would this violate international law, it would also violate the U.S. War Crimes Statute which prohibits "grave breaches" of the Geneva Conventions such as murder, which would include killing enemies who

¹⁴³ S.C. Res. 1368, U.N. Doc. S/RES/1368 (Sept. 12, 2001).

¹⁴⁴ While not relevant to questions of international law, there was also a domestic legal authorization to use force against those responsible for the 9/11 attacks, which would certainly include bin Laden. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) [hereinafter "2001 AUMF"].

¹⁴⁵ See Barry A. Feinstein, *Operation Enduring Freedom: Legal Dimensions of an Infinitely Just Operation*, 11 J. TRANSNAT'L L. & POL'Y 201 (2002).

¹⁴⁶ See Luis E. Chiesa & Alexander Greenwalt, *Beyond War: Bin Laden, Escobar, and the Justification of Targeted Killing*, 69 WASH. & LEE L. REV. 1371, 1377-78 (2012).

¹⁴⁷ Savage, *supra* note 2; CHARLIE SAVAGE, *POWER WARS: INSIDE OBAMA'S POST-9/11 PRESIDENCY* 261 (Little, Brown and Company, 2015). In *Power Wars*, Savage explains that the air strike option contemplated dropping as many as thirty-two 2,000-pound bombs; this option was ultimately rejected because of concerns over collateral damage and proportionality.

¹⁴⁸ Meagan S. Wong, *Targeted Killings and the International legal Framework: With particular Reference to the US Operation against Osama bin Laden*, 11 CHINESE J. INT'L L. 127 (2012) (indicating that bin Laden was targetable, but taking umbrage with the location of the raid (Pakistan), as well as relying on reports that bin Laden was captured at the time he was shot for the proposition that, even conceding that bin Laden was targetable, the raid was potentially in violation of international law as this would have placed bin Laden *hors de combat* or in the process of surrendering/having surrendered). Such reports are bolstered by the claims of former Navy SEAL Matthew Bissonnette, who claims that he and another SEAL shot bin Laden at close range while bin Laden was mortally wounded, and *hors de combat*. MARK OWEN & KEVIN MAURER, *NO EASY DAY* 315 (Penguin Books, 2012).

have surrendered, are detained, or are *hors de combat*.¹⁴⁹ This statute would not mean that the raid to kill bin Laden was presumptively illegal, but that situations may have arisen during the execution of that raid which could have violated the War Crimes Statute, and thus be impermissible under the Covert Action Statute.¹⁵⁰

The ultimate conclusion with regard to bin Laden's targetable status is that he was a legitimate military target under both international and domestic law.¹⁵¹ While situations could have arisen during the raid in which killing bin Laden could have violated the War Crimes Act, nothing about the decision to launch the raid would presumptively or necessarily have violated any U.S. statute or domestically enforceable international law regarding the killing of legitimate enemy military targets during an armed conflict.¹⁵² However, the location of the raid, Pakistan, provides thornier questions under international law.

B. Location of the Raid and the Question of Sovereignty

Article 2(4) of the U.N. Charter, to which the United States is a party, prohibits the threat or use of force against the territorial integrity of other sovereign nations. Article 2(4) standing alone, however, does not appear to have the force of statute within the United States and would thus not prohibit covert actions which would violate international law.¹⁵³ Article 2 of the U.N.

¹⁴⁹ War Crimes Act, 18 U.S.C. § 2441 (2012) (prohibiting grave breaches of the Geneva Conventions of 1949. Section (d) defines murder in common Article 3 context of a Non-International Armed Conflict (NIAC), which is the general construct applicable to U.S. operations against al Qaeda, a non-state actor). Other definitions of "grave breaches" of the Geneva Conventions can be found at Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 147, [hereinafter "GC IV"]; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, art. 85(3) [hereinafter "AP I"].

¹⁵⁰ According to one source, these types of situations were considered by administration officials and attorneys, though one may argue with their conclusion that bin Laden could only be deemed to have "surrendered" if he was "naked with his hands up." Savage, *supra* note 2. The point is that these legal questions concerning compliance with LOAC and the War Crimes Act were considered.

¹⁵¹ SAVAGE, *supra* note 147, at 259.

¹⁵² Jordan J. Paust, *Permissible Self-Defense Targeting and the Death of bin Laden*, 39 DENV. J. INT'L. L. & POL'Y 569, 580 (2011).

¹⁵³ *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 809 (D.C. Cir. 1984) (Bork, J., concurring) (finding Article 2 of the U.N. Charter to be non-self-executing).

Charter has been held to be non-self-executing, and that appears to fit within the general test under U.S. law in that Article 2(4) addresses itself to actions which are to be taken (or in this case refrained from) by the parties, as opposed to engaging any signatory to perform a specific or particular action.¹⁵⁴ Furthermore, Article 2(4) is appropriately addressed by the political branches, in particular the president under the Article II authority as Commander in Chief, and Congress pursuant to its constitutional authority to declare war. Thus, the courts are unlikely to enforce Article 2(4), as any decision to use or threaten force against the territorial integrity of another sovereign nation is necessarily within the constitutional power of the political branches and would not create domestically enforceable law.

This broad Article 2(4) prohibition supports the concept of sovereignty as an inviolable premise of international law.¹⁵⁵ However, there is no affirmative treaty provision establishing an international law norm of sovereignty, and the modern concept of sovereignty is a CIL norm, rather than an affirmative treaty obligation.¹⁵⁶ This is also the case with exceptions to the normal Article 2(4) prohibitions. While Article 51 of the U.N. Charter provides for the inherent right of self-defense, the specific parameters of that right are often a subject of CIL. This is true with regard to the widely accepted right of anticipatory self-defense,¹⁵⁷ as well as the more disputed “unable or unwilling” standard which allows the use of force in self-defense without the consent of the state in which the right is exercised if that state is informed of and unwilling or unable to

¹⁵⁴ Cf. *Medellin*, 552 U.S. at 505-507.

¹⁵⁵ Lieutenant Colonel Patrick W. Franzese, *Sovereignty in Cyberspace: Can it Exist?*, 64 A.F. L. REV. 1, 7-8 (2009).

¹⁵⁶ See Winston P. Nagan & Aitza M. Haddad, *Sovereignty in Theory and Practice*, 13 SAN DIEGO INT'L L. J. 429, 461-470 (2012) (discussing modern sovereignty).

¹⁵⁷ Michael Schmitt, *Preemptive Strategies in International Law*, 24 MICH. J. INT'L L. 513, 529-34 (2003) (discussing the CIL development of anticipatory self-defense doctrine from the 1837 *Caroline* case through the present day).

address the threat.¹⁵⁸ This would appear particularly relevant in regards to the bin Laden raid, as Pakistan apparently did not consent to the U.S. raid.¹⁵⁹

The merits of the United States' anticipatory self-defense argument, or the validity of the "unwilling or unable" test aside, for the purposes of argument assume that the bin Laden raid violated Pakistani sovereignty, and that there was no justification in international law relating to self-defense. In such a case, the bin Laden raid would clearly violate international law, in the form of the non-self-executing Article 2(4) of the U.N. Charter, as well as CIL norms regarding sovereignty.¹⁶⁰ However, as discussed previously, the covert action statute permits violations of non-self-executing treaties and CIL. Thus, the bin Laden raid, while presumptively illegal from an international law standpoint, would not violate U.S. statutory law. Because the bin Laden raid did not violate the Constitution or any statute of the United States, it was permitted pursuant to the covert action statute.

CONCLUSION

The protestations of international law scholars notwithstanding, not all international law creates domestically enforceable law. Self-executing treaties,¹⁶¹ non-self-executing treaties implemented by statute,¹⁶² and CIL when required or implemented by a statute¹⁶³ all create domestically enforceable law. On the contrary, non-self-executing treaties and CIL which do not

¹⁵⁸ See Ashley Deeks, "Unwilling or Unable": Toward a Normative Framework for Extra-Territorial Self-Defense, 52 VA. J. INT'L L. 483 (2013); see also, Jonathan Horowitz, *A Legal Map of Airstrikes in Syria (Part 2)*, JUST SECURITY BLOG, (Dec. 8, 2015, 1:55 PM), <https://www.justsecurity.org/28199/legal-map-airstrikes-syria-part-2/#more-28199> (indicating that the "unwilling or unable" test may be gaining acceptance in the international community as Australia, Canada, Turkey, the United Kingdom, and the United States have all referenced the "unwilling or unable" test in regard to military interventions in Syria to combat the Islamic State (IS)).

¹⁵⁹ Savage, *supra* note 2; SAVAGE, *supra* note 1347, at 263-64.

¹⁶⁰ See, e.g., Wong, *supra* note 148, at 127-163.

¹⁶¹ See *Whitney v. Robertson*, 124 U.S. 190, 194 (1888).

¹⁶² See *Medellin*, 552 U.S. at 505.

¹⁶³ See, e.g., *Sosa v. Alvarez-Machain*, 542 U.S. 692 (discussing the Alien Tort Statute, 28 U.S.C. § 1350); *Banco Nacional de Cuba v. Farr*, 383 F.2d 166 (1965) (discussing the Hickenlooper Amendment, 22 U.S.C. § 2370).

have statutory backing may create international legal obligations,¹⁶⁴ but do not create any domestically enforceable rule of law. Even if these two forms of international law did create some domestically binding rule of law, they are not statutes, nor are they equivalent to statutes.¹⁶⁵

The plain meaning of the covert action statute is that covert actions may not violate the Constitution or any statute,¹⁶⁶ but that covert actions may violate other forms of law.¹⁶⁷ This being the case, the covert action statute,¹⁶⁸ and the president's broad Article II foreign affairs powers¹⁶⁹ provide clear domestic authority to violate international law in the form of non-self-executing treaties and CIL.¹⁷⁰ In this context, the raid to kill or capture Osama bin Laden may be assumed to violate international law governing Pakistani sovereignty; however, the raid would be permissible under the covert action statute as it did not violate any statute, or equivalent self-executing treaty, of the United States.

¹⁶⁴ See *Al-Bihani v. Obama*, 619 F.3d 1, 8 n.8 (Brown, J., concurring).

¹⁶⁵ *Medellin*, 552 U.S. at 511, 516.

¹⁶⁶ Cf. *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (emphasizing the plain meaning canon of construction for unambiguous provisions).

¹⁶⁷ The doctrine of *expressio unius est exclusio alterius* ("the expression of one thing is the exclusion of another") is appropriate in this case in light of the fact that Congress specified that covert actions may not violate the Constitution or statutes of the United States, 50 U.S.C. § 3093(a)(5) (2012), but has specifically and conspicuously included other forms of law in "notwithstanding" provisions (provisions which allow conduct "notwithstanding" other provisions of law which would prohibit the conduct) in other statutes such as 18 U.S.C. §§ 926B-926C (2012); 22 U.S.C. § 2378 (2012); and 8 USC § 1252 (2012). See, e.g., *Leatherman v. Tarrant Cty. Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168 (1993) *United States v. Mills*, 186 F.Supp.2d 965, 967 (E.D. Wis. 2002).

¹⁶⁸ 50 U.S.C. § 3093(a)(5) (2012).

¹⁶⁹ See *Curtiss-Wright Export Corp.*, 299 U.S. at 319.

¹⁷⁰ This combination of constitutional authority and congressional authorization in the form of the covert action statute likely mean that the President is operating at his maximum power in authorizing covert actions that violate non-self-executing treaties and CIL. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-37 (1952) (Jackson, J., concurring).