

Ineffective, Opaque, and Undemocratic: The IOUs of—Too Much—International Law and Why a Bit of Skepticism Is Warranted†

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In this Article I want to give you an outsider’s view of international law, or at least this outsider’s view. And by *outsider* I mean someone who is usually interested in legal philosophy and constitutional law and who may well be thought to lack standing to offer the sort of views and criticisms that are to come.

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Yet brazenly, or otherwise, I am going to press on and do so anyway. It may just be that only someone from outside the international law fraternity or guild would have the inclination and motivation to attempt this sort of critique. But even if that is overstating things, my hope is that there may be a point or two in what follows that either pushes the reader to be slightly more skeptical about the benefits of some aspects of international law or provokes the reader to be angry, even if it just be with me.

I am going to make these criticisms from the vantage of someone who lives in one of the world's oldest and longest standing democracies, say someone living in the United States, Canada, Australia, or the United Kingdom, all jurisdictions with which I am passingly familiar.

The structure of this Article will be simple. I will criticize certain aspects of international law, especially rights-related international law, under the three headings you see in the title to this Article. However, I am going to take those headings and critiques in reverse order to lead with my best foot forward. Yet first, as an entrée into those three headings and my overall claims in this Article, I will lay out a short case study.

I. CASE STUDY TO INTRODUCE MY CRITICISMS

How many readers have found themselves unable to sleep some night and so decided to have a read of the 1989 United Nations Convention on the Rights of the Child (CRC)?¹ Implausible I know, even for lawyers, but it is not the worst strategy for overcoming insomnia. And in your late-night browsing, you would come across Article 19 of that convention or treaty.

Article 19 of the CRC reads in part as follows: “States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence”² Now think about what you figure that covers and does not cover. And remember, while doing so, that drafters have to word all these multilateral treaties such as the CRC to get as many of the world's Sudans, Chinas, and Libyas on board as possible. Also, ignore for the moment that the United States has never ratified the CRC.³ I am not here focusing on, say, the failings of the U.N. Human Rights Council

1. Convention on the Rights of the Child, *adopted* Nov. 20, 1989, 1577 U.N.T.S. 3, *available at* https://treaties.un.org/doc/Treaties/1990/09/19900902%2003-14%20AM/Ch_IV_11p.pdf.

2. Convention on the Rights of the Child, *supra* note 1, art. 19.

3. See *Chapter IV Human Rights, Convention on the Rights of the Child*, UNITED NATIONS TREATY COLLECTION, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en (last updated Feb. 19, 2014, 1:02 PM).

and its predecessor the Human Rights Commission—neither the way authoritarian regimes manage to get voted onto these bodies nor the patently unbalanced obsession they have with Israel. Both of those criticisms are well known.⁴

No, my point here is something else, namely that it is not at all clear what Article 19 of the CRC means. Yes, we know that a lot of countries whose standards look pretty awful compared with those in the United States, Canada, Australia, and the United Kingdom have signed the CRC. Additionally, we know that almost all countries at the time of signing the CRC had municipal laws that permitted parents to spank their own children if the degree of force was reasonable.⁵

But let us assume that some democratic government, say one like the United States, Canada, Australia, or the United Kingdom, had a statute, at the national or state level, that allowed parents to spank their children. Would you say that that statute allowing corporal punishment breached human rights? Let me put that question slightly differently. Would your decision on whether parental corporal punishment infringed human rights depend upon the proper interpretation of Article 19 of the CRC or even be influenced in the least by Article 19? And if you thought parental spanking did *not* breach human rights but you learned some overseas international law experts thought otherwise—ones who were wholly undemocratically chosen and included people from countries that were undemocratic and even from downright authoritarian regimes—would you defer to them?⁶ Would it matter to you in the least what this handful of experts thought? Would it matter to you if these experts were giving their opinions under the aegis of a United Nations body that monitors the CRC treaty?

4. See, e.g., Brett Allen Casper, Ph.D. Candidate, New York University, *Authoritarian Regimes and the Exploitation of the UN Human Rights Council* 1–2, 8 (May 3, 2013) (transcript available on the New York University, Department of Politics website).

5. See *After the Fact*, PARENTALRIGHTS.ORG, http://www.parentalrights.org/index.asp?Type=B_BASIC&SEC=%7B6E783940-B0D5-495B-9702-512A961FEAF9%7D (last visited Mar. 4, 2014).

6. Not all members of the Committee on the Rights of the Child are lawyers, of course. The Human Rights Committee under the International Covenant on Civil and Political Rights (ICCPR) always has only lawyers serving on it, but that is not true of the other treaty committees. Also, note that unlike the representatives in the Human Rights Council, the members of treaty committees are meant to serve in their individual capacities, not as representatives of states—though the extent to which there is this independence is variable or at least open to question in some instances.

These are not off-the-wall questions; this is not a pointless hypothetical. You see, all the big United Nations conventions or multilateral treaties, including the CRC, have committees set up to monitor the implementation progress of the conventions in all the states that have signed them.

Now at this point, you might like to know a couple of key things. Firstly, the membership of these monitoring committees is determined in a less than transparent way—nothing remotely close to how U.S. Supreme Court Justices are picked—that comes nowhere near letting anyone claim those selected have been democratically appointed or anointed. Secondly, committee membership includes those from countries whose leaders you would not take any moral advice from if your life depended on it. Thirdly, and this is the point to take on board if you remember only one, the committee for the CRC has consistently maintained⁷ that parental corporal punishment violates the CRC.⁸

When you learn that fact, and fact it is, would your view of the acceptability of parental spanking change? Let us assume it would not; it certainly would make no difference to me. What if I told you, in rather more grandiose terms, that international law required that you not spank your children because such spanking was a breach of their human rights as set out in Article 19 of the CRC? After all, this is what the CRC committee thinks.⁹

Two roads now diverge. Go down one of them and you simply outsource your view of the acceptability of spanking to the committee for the CRC. You defer to this handful of international law experts, perhaps in the name of complying with international law, because you think the committee is best placed to know what the vague, amorphous Article 19 provisions mean, or even due to your desire to take on board what Jeremy Waldron has styled “the guidance of whatever consensus has been reached among the nations on this point. . . . [A desire to turn] to the legal consensus of civilized nations for assistance.”¹⁰

Whatever the reason for deferring to the committee and its view of the reach, aegis, and ambit of Article 19, this is one option. Spanking breaches human rights; this I know because international law and the committee tell me so.

7. As this is a “committee” and not, say, the International Court of Justice, its views are not made binding under the convention, but they are supposed to carry much weight. *See* Convention on the Rights of the Child, *supra* note 1, art. 45.

8. *See* Comm. on the Rights of the Child, General Comment No. 8, 42d Sess., May 15–June 2, 2006, ¶ 18, U.N. Doc. CRC/C/GC/8 (Mar. 2, 2007).

9. *See id.*

10. Jeremy Waldron, *Foreign Law and the Modern Ius Gentium*, 119 HARV. L. REV. 129, 140, 144 (2005).

Go down the other road, however, and you refuse to be swayed by what this U.N. committee, set up to monitor the CRC, thinks. This refusal, in its turn, can be motivated by two different concerns. In other words, not very far down this second road you find that it splits or bifurcates. One path focuses on international law itself, accepts its core-level legitimacy in resolving such issues as parental corporal punishment but makes legalistic arguments for why the committee is wrong in its understanding of Article 19. These legalistic rejoinders would no doubt focus on the legislative history of the CRC—what the states that signed it intended it to cover—your claim being that they did not intend it to cover parental spanking. To buttress this claim about the intentions of the states that signed it, you would probably point to the fact that at the time of signing, virtually all the countries signing the CRC had domestic legal systems that allowed spanking. This would be external evidence of likely intentions, it being unlikely that a government of a country with spanking would knowingly sign a treaty forbidding spanking. And even if one or two governments did, perhaps to sidestep the need to change domestic law, it is implausible in the extreme that almost all governments signing the CRC did this. Certainly, it is unlikely in the extreme that most democratic governments did.

Notice that those who travel down this subbranch of the second road do *not* make core-level objections to rights-based international law itself being relevant, if not determinative. No, they effectively simply argue for a different understanding of the proper meaning of Article 19. Where the CRC committee seems to see Article 19 as a metaphorical living tree whose reach and meaning are not determined by the intentions of those states that signed it, those traveling down this subbranch want it interpreted differently, perhaps according to some form of originalism or other. They do not shun, reject, or belittle rights-based international law itself. They may just reject the committee and its views in favor of the text itself, a sort of Protestant approach¹¹ to what international law does and does not demand. In addition, no doubt some may seek a halfway house and say this sort of international law is not determinative and conclusive, merely a guide that is relevant and needs to be considered.

Of course this second road of refusing to be swayed by what the CRC committee thinks about spanking has another subbranch. Travelers

11. This is not to say that I would want to frame the Committee on the Rights of the Child as offering the Catholic approach, as it were.

down this subbranch do not make legalistic arguments about how the committee has erred in its understanding of what Article 19 covers. No, much more fundamentally, they simply do not accept the core-level applicability of rights-based international law to the question of whether parents in some of the oldest democracies in the world can or cannot spank their children. They not only dismiss the views of this handful of U.N.-appointed committee members, they dismiss, too, the relevance of rights-based international law itself to the issue. For many such travelers down this second subbranch of this second road, it will be the fundamental lack of democratic legitimacy when it comes to international law that motivates their position. If issues such as parental spanking are covered in whole or in part by an international law treaty couched in indeterminate, abstract terms, then to what extent must it follow that the scope for democratic decisionmaking and letting-the-numbers-count majoritarianism in long-established democracies has been narrowed and enervated?

So this little case study leads on to my first critique, the charge that too much international law is undemocratic in its origins and effects.

II. IT IS UNDEMOCRATIC

A. *Nontreaty-Based—or Undressed—International Law*

When talking of international law, there are two sorts. The sort most lawyers—and virtually all laypeople—will be aware of and will think of when someone mentions or refers to international law is the treaty-based sort. Countries get together and agree to a treaty or convention. Perhaps it is the General Agreement on Tariffs and Trade (GATT),¹² the CRC,¹³ or the International Covenant on Civil and Political Rights.¹⁴ Not all countries sign them. Not all countries ratify them. Some that do are democratic countries; others that do are not—indeed some that sign are out-and-out authoritarian regimes.

Amongst the democratic ones, the process for entering into and ratifying these treaties will vary. Yet in all of them, it will involve some step that confers at least some democratic legitimacy, as we will see below, though of course the democratic respectability of treaties in jurisdictions such as Canada, Australia, and the United Kingdom is less than it is in the United States, noticeably less in fact. But it is not zero or nonexistent.

12. See, e.g., General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-3, 55 U.N.T.S. 187.

13. See, e.g., Convention on the Rights of the Child, *supra* note 1.

14. See, e.g., International Covenant on Civil and Political Rights, *adopted* Dec. 19, 1966, 999 U.N.T.S. 171.

However, let us put that sort of treaty-based international law aside for a moment and start elsewhere, with the sort that does *not* flow from treaties or conventions. I am going to call this other sort of international law, the sort that does *not* flow from treaties or conventions, “undressed international law.” I call it that because it has not yet been dressed up or formalized into a treaty. It has not yet been agreed to by any democratically elected and accountable legislators or members of the executive branch.

This undressed international law is known in legal academic circles as customary international law.¹⁵ Its content cannot be found by looking in some treaty or convention, whether one’s country has signed and ratified that treaty or not. No, this undressed international law that we now turn to is the law that is inferred from the practice of states—or countries. Once a consistent and general practice of states has been identified—and note that this general state practice has to be something that is followed out of a sense of legal obligation—then it becomes part of this undressed international law and its binding legal norms. International custom is that which has been identified as widespread state practice, when it has been engaged in out of a sense of legal obligation.¹⁶

Now throughout that last paragraph, I deliberately used the passive voice. I spoke of practices that “are inferred” and “have been identified” so as intentionally to mask or gloss over the rather important question of who gets to do all this inferring, identifying, and deciding just when it is and is not that states are following some practice or other, and following it out of a sense of legal obligation.

The beauty of the passive voice is that it can give the subtle impression that these practices somehow identify themselves or that some omniscient and unerring God is doing the identifying, inferring, and exercising of otherwise fallible judgment. It can help remove from center stage the fundamental issue of *who* precisely it is that makes these inferences, identifies these practices, and decides not just that a practice exists but that it is motivated by a sense of legal obligation.

In an article such as this, which critiques the undemocratic aspects of too much international law, that simply will not do. So let us put away this dissembling and finessing use of the passive voice and start by focusing

15. See Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 U. CHI. L. REV. 1113, 1113 (1999).

16. See Statute of the International Court of Justice art. 38, June 26, 1945, 59 Stat. 1055.

explicitly on these “who makes it?” and “where is the democratic input?” questions.

Start with the former query. The unadorned answer is that what are termed *publicists* determine this undressed international law. The Statute of the International Court of Justice says it is “the most highly qualified publicists” who have the role of determining this subsidiary sort of international law.¹⁷

Many of those falling into the category of “publicists”¹⁸ are legal academics; they are law professors.¹⁹ Not all law professors of course. You have to be someone who is knowledgeable and writes in this field of international law. So you have to show technical mastery in the field. But you also have to demonstrate to those already recognized as being highly qualified publicists that you have what Harvard law professor Mark Tushnet describes as “soundness.”

Soundness seems to require that one be committed to the project of international law, that is, to the proposition that nation-states ought to resolve an ever-increasing number and ever-wider range of their disputes pursuant to existing and emergent rules of international law rather than, for example, by economic or, worse, military force.²⁰

Let me be a bit blunter. No one gets to vote for these legal academic publicists. They have no democratic warrant at all. Even if we assumed that law professors as a group shared broadly similar political and moral views to the population at large—and that assumption is plain-out false and ridiculous²¹—this would still be immensely unrepresentative because only those unskeptical about the benefits of an ever-increasing role and scope for undressed, and dressed, international law can ever make it into the club.

With a rather enjoyable dollop of understatement, Mark Tushnet goes on to comment on this soundness criterion, this need to be committed to the project, before an otherwise technically proficient law professor can qualify as a publicist. Tushnet puts it rather drily as follows:

This feature of the process of becoming a publicist gives the academic field some degree of self-containment. One is writing in part for other legal academics, to achieve and sustain one’s position as a publicist. But only in part, because

17. *Id.*

18. *See id.* I will consider judicial decisions below.

19. *See* John O. McGinnis et al., *The Patterns and Implications of Political Contributions by Elite Law School Faculty*, 93 GEO. L.J. 1167, 1183 (2005).

20. Mark Tushnet, *Academics as Law-Makers?*, 29 U. QUEENSLAND L.J. 19, 20 (2010).

21. In the United States, international law professors from elite universities contribute to the Democrats over the Republicans by a ratio of nearly five to one. *See* McGinnis et al., *supra* note 19, at 1182–83.

one is also writing for others committed to the project of international law, including notably decision-makers in institutions that clearly do make international law, such as judges on international tribunals and members of the International Law Commission.²²

In terms of who makes this undressed or customary international law, we have not yet moved beyond the part of publicists made up of law professors, and already there are rather massive deficiencies in terms of democratic input. First off, law professors as a whole are significantly to the left of voters at large in their political and moral views. Secondly, it is not all knowledgeable, technically accomplished international law legal academics who get to be publicists and so get to identify these practices of nation-states. It is only that portion of the law professors who are considered sound when it comes to their commitment to the international law project. Think of a self-selecting lawyerly caste of committed experts, and you will get the general idea.

It is not difficult in the least to point out that excluding those who have a modicum of skepticism about international law's benefits is an undemocratic roadblock or filter. On any theory of democratic participation, thin or thick, the starting point is that you count everyone equally.²³ There are no "we do not like your views or values" exclusions or filters at this initial stage. Yet that sort of exclusion or filter is precisely what there is when it comes to who qualifies as a law professor publicist.

That makes this sort of law doubly deficient in democratic terms. Law professors as a whole are nowhere near being representative of voters; they are vastly more left wing on average, across the board, at least in the cosmopolitan left-wing lawyers sense, if not the union left-wing sense. Moreover, even amongst international law professors as a whole, only true believers in the international law project have any realistic prospect of becoming a publicist—someone who gets to infer and identify what the supposed duty-motivated practices of states are and so tell us the content of this undressed international law.

This is not letting-the-numbers-count democratic lawmaking.²⁴ It is more like lawmaking by a caste of experts with views known to diverge

22. See Tushnet, *supra* note 20, at 20.

23. I offer a thin theory of democracy in James Allan, *Thin Beats Fat Yet Again – Conceptions of Democracy*, 25 LAW & PHIL. 533 (2006).

24. The International Court of Justice (ICJ) seems to pay more regular consideration to the International Law Commission's views, and the International Law Commission has a more formalized system for eliciting and recording the views of states. But this

from those of the majority or rather by those from that caste who can in addition pass a test of ideological purity. When issues come up such as over the death penalty, whether what is known as hate speech must be criminalized, or how to structure labor laws, why should the laws on these issues that have been decided by the elected representatives of the voters be influenced in any way at all by customary international law—by this thoroughly undemocratic, and doubly so, undressed international law?

One of the trends of the recent past is that customary international law, or undressed international law, has expanded its reach. It never used to concern itself with a nation's treatment of its own citizens. It very much was about the "law of nations."²⁵ Restricted in that way, as it used to be, one might still balk and say that a democracy such as the United States or the United Kingdom is better placed to decide the advisability of, say, preemptive war than some insular caste of publicists rummaging through the entrails of supposedly perceived state practices. However, go back before undressed international law expanded its reach into the realm of how a nation-state treated its own citizens, and you can see that its scope for conflict with majoritarian, letting-the-numbers-count, democratic lawmaking is pretty small.

Perhaps I can make that point in a better way. If some journalist, NGO, or law professor is going to accuse an elected government of violating international law, of the undressed variety, the scope and ambit for doing so are considerably smaller where that same undressed international law confines itself to matters between nations. You might find a few accusations about the illegality of preemptive war—though no doubt made in the context of Iraq rather than Kosovo—but not much in addition to that.

However, allow undressed international law to inflate and expand its supposed jurisdiction to include how a nation treats its own citizens and the scope for conflict with the rules made by democratically elected lawmakers multiplies exponentially, making suddenly relevant domestic laws on hate speech, workplace relations, the death penalty, or anything in fact that can be translated or transliterated into the language of human rights.

Of course that comparative assessment—that domestic law looks better in terms of quality, effectiveness, and legitimacy than international law—is true of only democracies. With regard to most nondemocracies, and certainly the military juntas, the theocracies, and the one-party

does not much detract from my claim as to democratic deficiency. See Statute of the International Court of Justice, *supra* note 16, art. 50.

25. See Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT'L L. 757, 777 (2001).

states, international law looks better than domestic law when it comes to how a nation treats its own citizens. In other words, there is an asymmetry at work, even regarding legitimacy. The wilder exponents of cultural relativism may wish to dissemble at this point or brazenly claim that international law is better than the domestic law of both nondemocracies and democracies.

That sort of “international law is better” response fails both for being untrue and also for being somewhat—or wholly—inconsistent. It is untrue because as a plain matter of empirical fact, democracies produce superior domestic laws to nondemocracies, pretty much across the board but especially when it comes to the sort of individual liberty and freedom entitlements that lie at the heart of those matters labeled “human rights concerns.” Democracies are not just a little bit superior; they are massively so. And these domestic laws of democracies are superior to international law as well, not just because the treaty-based sort requires compromises to get nondemocracies on board but because the undressed sort is made by such an unrepresentative and unaccountable cohort.

One might be tempted, I suppose, to pretend that undressed international law is superior to all versions of domestic law, whether it comes from nondemocracies or democracies, and indulge in this pretense simply as a ruse to allow international law’s precepts to prevail in nondemocracies where they would clearly be an improvement. This would amount to the “little white lie” school of thinking. It would run something as follows: “I will assert the superiority and jurisdictional dominance of undressed international law over all types of domestic law, not because it is true but simply because I calculate that that fiction or sleight of hand will have the best chance of extending the norms of undressed international law in the world’s nondemocracies. And the benefits of that would outweigh the costs, negatives, and downsides of having them leech into the world’s democracies.”

One might be tempted by that line of thinking, but it is a temptation to be resisted. Here is its fatal flaw or conceit. The world’s nasty regimes will ignore undressed international law when it comes to how they treat their own citizens, and they will ignore it regardless of how far these international law norms influence and reshape things in the world’s democracies. That is the irony. If your unspoken goal is to reform nondemocracies for the better by proclaiming the superiority and preeminence of undressed, and no doubt dressed, treaty-based international law, you will find that that does not come to pass. Instead, you will end up influencing only the

democracies and on balance for the worse. Therein lies the irony or flaw in this little-white-lie way of thinking.

So in my view, any assertions along the lines that international law is better than the domestic law of democracies as regards how to deal with the democracies' own citizens is untrue, and doubly so when we factor in the legitimacy benefits of "rule by the people" as opposed to "rule by international law publicists." That said, such assertions about the supposed superiority of undressed international law are also inconsistent in a way. At least that is the case if the first step or prong in the argument involves an unwillingness to say that the domestic laws of democracies, on average, over time, and overwhelmingly, are markedly superior to and better than those of nondemocracies. Let us suppose one subscribes to a version of cultural relativism that forecloses judging between the laws of democracies and nondemocracies.

My point is that if you feel you cannot judge between the domestic law of democracies and nondemocracies, weighing them up in terms of their competing effectiveness, legitimacy, and overall consequences, then you surely must also be foreclosed from asserting that undressed international law is better than or superior to any sort of domestic law, whatever its provenance. Thinking you are not in a position to be able to judge any *X* better than *Y* is not a worldview that you can turn on and off at will, when convenient, or when it suits your core-level political preferences.

Thus far we have considered only one group of contributors to undressed international law—those international law professors who not only have sufficient technical expertise but who also have been adjudged thoroughly sound and committed to its ongoing and expanding reach and influence. True, it is not at all clear or definite who it is that dispenses the "you are sound" label or guarantee. True, this group is in no way at all democratically chosen, accountable, or representative; indeed, as a group, it is self-selecting or self-appointed. These publicists may have virtues when it comes to their role as lawmakers, but none of those virtues has any connection at all to democracy.

We can see this in plain terms from one unashamed supporter, who tells us flat out that nation-states do not make customary or undressed international law. No, "[i]t is made by the people that care; the professors, the writers of textbooks and casebooks, and the authors of articles in leading international law journals."²⁶

26. Louis B. Sohn, *Sources of International Law*, 25 GA. J. INT'L & COMP. L. 399, 399 (1996).

As for evenhandedness, well, here is how the late Lord Rodger, then of the U.K.'s new Supreme Court—formerly known as the Judicial Committee of the House of Lords and still its top court—assesses that:

My impression is that much of the writing on public international law to which we are referred is slanted towards a particular result that the writer wishes to see prevail as the law. It often appears that the writers have, say, a particular human rights agenda and that their book or article is written with a view to securing that it will come to form part of the corpus of writings which help to shape the law. Indeed, often the writers sit on some international tribunal or other body which deals with the same matter. On occasions, however, it is difficult to see how the writer's argument is to be squared with the wording of the particular international instrument in question – however desirable the result may be.²⁷

That being so, and this being the highly unrepresentative and nonmajoritarian group that it is, it follows that as undressed international law expands its reach, scope, and authority in the democratic world, the result is at least some lessening or contraction of the scope, reach, and authority of majoritarian, democratic decisionmaking. We may still count everyone as equal and let the numbers count in the United States, Canada, Australia, and the United Kingdom, but they will count for less than they did before this expansion of undressed international law. Democracy, if only in small part and at the margins, will have declined.

The picture for majoritarian democrats does not improve when we turn to the other main group of people who make undressed international law.²⁸ These are the judges, the international law judges.

Here we need to consider the United Nations' International Court of Justice (ICJ) and the fifteen judges who sit on this court. Depending on how you categorize Venezuela and Russia, between a third and a half of the ICJ judges come from nondemocracies, which is a more circumspect and polite way of indicating that they hail as well from repressive, authoritarian regimes such as Sierra Leone, China, and Morocco.²⁹ Given how they are selected, they lack even the indirect democratic credentials

27. Lord Rodger of Earlsferry, *Judges and Academics in the United Kingdom*, 29 U. QUEENSLAND L.J. 29, 39 (2010).

28. Article 38(1)(d) also authorizes having regard to national court decisions on the content of international law as a subsidiary or evidentiary source of law. See Statute of the International Court of Justice, *supra* note 16, art. 38(1)(d).

29. The current court includes members from China and Morocco; Sierra Leone had a member on the court up until 2012. *The Court: All Members*, INT'L CT. JUST., <http://www.icj-cij.org/court/index.php?p1=1&p2=2&p3=2> (last visited Mar. 4, 2014).

of top judges appointed by the elected branches—the United States, Canada, and Australia—and then subject to a transparent and sometimes unsuccessful confirmation hearing—the United States.

But I will postpone discussion of how ICJ judges are appointed until my discussion of the opaqueness of international law in my second heading below. Suffice it here to note that the democratic credentials of the international law judges, those on the ICJ, are vanishingly slight to nonexistent. And then let us move on to the better-known sort of international law.

B. Treaty-Based International Law

When we turn to look at treaty-based international law and its democratic credentials, we first need to distinguish the United States and our three other Westminster democracies of Canada, Australia, and the United Kingdom. You see, the democratic credentials of treaties are much higher in the United States. That is because treaties with other countries—bilateral or multilateral—cannot come into force in the United States until they have been passed by the elected upper house of the legislature, the Senate, and on a two-thirds approval basis at that.³⁰ This is not true in the United Kingdom; it is not true in Canada; it is not true in Australia. In all of these latter three jurisdictions, the executive branch of government can ratify treaties without any veto resting in, or any need to win a vote in, one of the elected legislatures. That means that in the United States, President Clinton could sign the Kyoto Treaty but that it could not bind the United States until approved by the Senate, which approval never ended up being given.³¹ The same goes for submitting to an international criminal court or any sort of cap-and-trade emissions trading scheme for carbon dioxide between countries. You need Senate approval that is not always forthcoming because of the fact that the President's party does not always control the Senate, because of greater likelihood in a U.S. presidential system of legislators crossing party lines, and because of the supermajoritarian threshold for achieving treaty passage.

By contrast, in Canada, Australia, and the United Kingdom, the executive branch of government is *not* forced to obtain the approval of elected legislators. No, the executive branches of government in those three Westminster systems, using the prerogative power, can sign, enter into, and ratify treaties all on their own. So bear that difference in mind in

30. U.S. CONST. art. II, § 2, cl. 2.

31. See SUSAN R. FLETCHER, CONG. RESEARCH SERV., RL 30692, GLOBAL CLIMATE CHANGE: THE KYOTO PROTOCOL 2 (2005).

what follows, as much more of the gravamen in this subpart is directed at these three non-U.S. countries.

Having noted that, let us turn back to our case study, my example of the CRC and spanking, to consider two ways in which international law of the treaty-based kind is democratically deficient. Now as it happens, Canada, Australia, and the United Kingdom³² have all ratified or signed the CRC, unlike the United States.³³ And as I have just noted, doing so in a Westminster system is easier than in the United States. The executive can do so without any veto or blocking power lying in the hands of any part of the legislature. Therefore, ratified treaties or conventions clearly have less democratic legitimacy in Canada, Australia, and the United Kingdom than they do in the United States. Indeed this point is often overlooked. When it comes to treaty-based international law and its democratic credentials, the United States looks better than any of our other three longstanding democracies.

Now if you go back forty or fifty years, there was a tradeoff outside the United States for this lack of legislative input when it came to treaties and conventions. That tradeoff was simply this: The executive could ratify and sign treaties all by itself under the prerogative power, yes. But such treaties did *not*, let me doubly stress that negative, become part of the country's domestic law. It applied, perhaps, internationally. It did not apply domestically—not unless it was incorporated into the country's internal laws by also being passed by the elected legislature as a statute.

In the absence of a ratified treaty being explicitly incorporated into domestic law in this way, it was not a source of valid law. You could not argue in court that you should win because of this or that treaty; you could not argue that the written constitution meant this, rather than that, because of some treaty; and only at the margins, when there was clear

32. This basic position was altered in the United Kingdom by the Constitutional Reform and Governance Act 2010, sections 20–23, allowing Parliament to pass a resolution *not* to ratify a treaty. See Constitutional Reform and Governance Act, 2010, c. 25, §§ 20–23 (U.K.). However, under section 22, any minister may opt not to refer a treaty to Parliament and so bypass this new “ask Parliament” regime entirely and without any recourse by the legislature. See *id.* § 22. In addition the upper house has no real “do not ratify” power under this statute. And section 23 exempts certain categories of treaty entirely. See *id.* § 23. So on balance I believe that my main claim here as regards the United Kingdom remains largely correct.

33. See Chapter IV *Human Rights, Convention on the Rights of the Child*, *supra* note 3.

ambiguity, could you even argue that a statute meant *X* rather than *Y* because of this, that, or the other treaty.

In that now bygone world, the American approach to treaties and conventions was in fact *not* more democratic than the approach in the Westminster world. Sure, the Americans took treaties more seriously back then and one might have made an argument for the U.S. approach on that basis, that we should not ratify a treaty unless we are prepared to make it enforceable law. That sort of argument would cash out in *rule of law* terms or *don't deal in aspirations* terms. But in no sense was the old Westminster approach to treaties any less democratic than the U.S. approach. Americans did, and do, take treaties very seriously indeed and demand that they pass through the elected upper house Senate. Our three Westminster countries did not, and do not, demand this, but then, a half century ago, any and all executive-ratified treaties did not become part of the domestic law. Your average voter could ignore them. Full stop.

That is no longer the case in our three Westminster countries. Judges have changed that. Administrative law, the rules and regulations below the level of statute law and including judge-made ones about how tribunals must operate and who must be heard, became permeated with rules plucked by judges from these treaties. Then statutes started to be interpreted with reference to these treaties from international law. It did not matter that the treaties were *not* in orthodox terms part of the domestic law in Westminster systems. The lack of democratic legitimacy compared with a U.S.-type setup for ratifying treaties did not matter to the judges either.

You know the game. First you start by appealing to treaties, however vague, amorphous, indeterminate, or couched in moral abstractions—“all appropriate . . . measures to protect the child from . . . violence”³⁴—when the statute is ambiguous, and only then. That seems fairly harmless. So after a while, once that has bedded down, you go further. You make what the treaties say the presumptive way of interpreting all statutes so that only explicit, clear words in the statute overcome that presumption. No good reason is given for why this should be the default position or why an unincorporated treaty with patently flawed democratic credentials should have such power to influence the meaning of the legislature's statutes, some enacted before the treaty was even signed and ratified. You just move on as though it is self-evident that democratically enacted statutes ought to be interpreted through the prism of this sort of treaty-and-convention-focused international law.

34. Convention on the Rights of the Child, *supra* note 1, art. 19(1).

From there it is a moderately short step to using these unincorporated treaties as filters for interpreting the written constitution. That is what happens in Canada, though Australia still holds out against that last step, barely.³⁵ Meanwhile in the United Kingdom, there is no written constitution, which forecloses this final step of using unincorporated treaties as filters for the task of constitutional interpretation. Alas, that means only that using them to help decide what statutes mean in the United Kingdom is even more problematic and potentially countermajoritarian. There, statutes matter more. So interpreting them through the prism of treaties matters more too.

I said above that there are two ways in which international law of the treaty-based kind is democratically deficient, and I have now outlined the first way. It happens in our three Westminster countries when treaties *that have been signed and ratified* are used by judges to help make and remake administrative law and also to aid in interpreting statutes and constitutional provisions even to the point of making these treaties the default, presumptive positions of what statutes mean. And all this even though these treaties and conventions have not been incorporated into domestic law and are not, on the orthodox understanding that takes democratic concerns seriously, part of the domestic law. That is the first way, and it applies to only our three Westminster countries.

The second way is worse. This second way happens most publicly and most notoriously in the United States, possibly because of the very fact that Americans take ratifying treaties very seriously indeed and expect them to win clear democratic support at least in the Senate.

What happens on this second scenario, and it is not easily defended if you are a democrat, is this: Judges once again are interpreting domestic legal texts such as statutes and constitutional provisions, just as above. And again, the judges are doing this interpreting by referring to treaties or conventions—they may be looking to the treaties for evidence of international views on some issue, or for a moral consensus on some rights-based disagreement, or to see what meaning to give some morally charged phrase or term, or something else. For our purposes that is not the point when it comes to this second way in which treaty-based international law is democratically wanting, deficient, and exiguous. What is the point is that in this second scenario, the treaties and conventions the judges use *have not even been ratified*. For example, they have

35. See *Al-Kateb v Godwin* (2004) 219 CLR 562, 589–93 (Austl.).

failed to win a majority vote in the Senate, if we focus on the United States for a moment. These are therefore unratified treaties without the imprimatur or approval of the domestic democratic politics. Either the treaty failed to win Senate approval, it was not even put to the Senate, or the President himself did not sign it. And yet the judges use such a treaty to help them interpret, say, the U.S. Constitution.

This is precisely what happened back in 2005 in *Roper v. Simmons*.³⁶ The U.S. Supreme Court in that case cited the CRC in the course of deciding what no “cruel and unusual punishment” meant in the Eighth Amendment.³⁷ The issue for those Justices was whether the U.S. Bill of Rights meant they could strike down or invalidate democratically enacted laws that allowed for the possibility of executing juveniles.³⁸

In deciding that question, a majority of the U.S. Supreme Court Justices, as I said, cited the CRC, the very same CRC from my above case study.³⁹ But here is the thing. The United States has never ratified this CRC.⁴⁰ It has no democratic standing or pedigree at all. None. Zero. And yet it is being used to tell us what the over two centuries-old U.S. Bill of Rights and its Eighth Amendment mean.

It does not stop there. In that same case, the Justices—or those in the majority—cited another treaty, the International Covenant on Civil and Political Rights (ICCPR).⁴¹ This treaty had been ratified by the United States, or rather most of it had. Not all of it though. The United States had entered a formal reservation against the ICCPR’s no death penalty provision, meaning that part of the treaty did not apply in the United States.⁴² But the Justices in *Roper* cited it anyway in the context of a death penalty case.

Let me be blunt. Top American Justices, in the course of deciding whether they would gainsay and overrule democratically elected legislators by invalidating one of their statutes, decided to cite and give weight to treaties that the elected political branches had rejected; they cited and gave weight to treaty-based international law that the elected branches

36. 543 U.S. 551 (2005).

37. *See id.* at 576.

38. *See id.* at 555–56.

39. *Id.* at 576.

40. UNICEF, THE STATE OF THE WORLD’S CHILDREN 2012, at 16 (2012), available at http://www.unicef.org/sowc2012/pdfs/SOWC%202012-Main%20Report_EN_13Mar2012.pdf.

41. *See Roper*, 543 U.S. at 567. The treaty cited to is the International Covenant on Civil and Political Rights, *supra* note 14.

42. *See Chapter IV Human Rights, International Covenant on Civil and Political Rights*, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en (last updated Feb. 19, 2014, 1:02 PM).

had specifically and explicitly refused to incorporate into domestic law.⁴³ These top U.S. Justices, and it is only fair to say it was not all of them, exercised their countermajoritarian, antidemocratic Bill of Rights power to strike down statutes but not before referring to, considering, citing, and presumably giving at least some weight to an international treaty that the democratically accountable branches had rejected. To put it mildly, this certainly raises issues of democratic legitimacy.

Now supporters of this sort of use of nonratified treaty-based international law will point out that the top U.S. Justices who did this said they decided based on domestic materials and mentioned or cited the CRC and ICCPR only as “confirmation” of what they had anyway decided, namely to invalidate a democratically enacted law.⁴⁴ Some supporters might even try to make a more subtle point. They might suggest that these majority Justices were using these nonratified treaties as evidence of a consensus of the practice of other states, not as part of an attempt to discern some norm of international law.

However, those attempts, and others, to explain away and legitimate this second way of using treaty-based international law will not satisfy the person like me who is worried about how this all encroaches on democracy. Not by a long shot.

Yet some past and present U.S. Supreme Court Justices vigorously defend this, and reliance on international law more generally, when speaking extrajudicially. Take just a few examples. Justice Stephen Breyer is a committed advocate of using international law in this way and indeed was one of those in the majority in *Roper* who did so.⁴⁵ Justice Ruth Ginsburg can be described in similar terms and was on the same majority side in *Roper*.⁴⁶ In 2005, when giving the keynote address to the Ninety-Ninth Annual Meeting of the American Society of International Law, Justice Ginsburg was vigorous in her defense of citing, referring to,

43. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 573 (2003); *Zadvydas v. Davis*, 533 U.S. 678, 707 (2001) (Kennedy, J., dissenting); *Washington v. Glucksberg*, 521 U.S. 702, 734 (1997).

44. See, e.g., Melissa A. Waters, *Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties*, 107 COLUM. L. REV. 628, 654–59 (2007).

45. See Daniel Bodansky, *The Use of International Sources in Constitutional Opinion*, 32 GA. J. INT'L & COMP. L. 421, 424 (2004).

46. 543 U.S. at 554.

and appealing to international law.⁴⁷ She saw that as one of the “common denominators of basic fairness . . . between the governors and the governed.”⁴⁸ Even Republican-appointed former Justice Sandra Day O’Connor, giving the keynote address to the same society three years earlier, said that “conclusions reached by . . . the international community should at times constitute persuasive authority in American courts.”⁴⁹

However, take the debate down from the Olympian heights of disagreement-finessing abstractions to the quagmire of drawing highly contestable social policy lines—ones having to do with the death penalty and perhaps one day whether parents can spank their children—and it is not at all clear to me why treaty-based international law should influence in any way at all how the U.S. Bill of Rights is interpreted. It is out-and-out democratically illegitimate to pay any heed at all to a nonratified treaty such as the CRC.

The authoritative scope for deciding issues via domestic democratic structures goes down—it reduces, declines, or becomes smaller—when judges appeal to nonratified treaties in the United States to influence in any way how they interpret important legal texts. The same is true when judges in our three Westminster countries appeal to any treaties at all, even ratified ones, to give meaning to their important legal texts, leaving to one side instances where a treaty is put into the form of a statute and incorporated into domestic law by being passed by the legislature.

This all means that the partisan of democratic decisionmaking can complain that the field that was formerly left for resolving issues by the elected branches has been narrowed and shrunk, at least at the margins, by this appeal to treaty-based international law, be it unratified ones in the United States or ratified ones in our other longstanding democracies.

III. IT IS OPAQUE

Over two centuries ago, the philosopher, prison reformer, advocate of ever greater democracy, and legal commentator Jeremy Bentham—famous today still for his exposition of the doctrine of utilitarianism⁵⁰—

47. See Justice Ruth Bader Ginsburg, “A Decent Respect to the Opinions of [Human]kind”: The Value of a Comparative Perspective in Constitutional Adjudication, Keynote Address Before the Ninety-Ninth Annual Meeting of the American Society of International Law (Apr. 1, 2005), in 99 AM. SOC’Y INT’L L. PROC. 351, 354–55 (2005).

48. *Id.* at 354 (internal quotation marks omitted).

49. Justice Sandra Day O’Connor, Keynote Address Before the Ninety-Sixth Annual Meeting of the American Society of International Law (Mar. 15, 2002), in 96 AM. SOC’Y INT’L L. PROC. 348, 350 (2002).

50. See generally JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (J.H. Burns & H. L. A. Hart eds., Methuen & Co. 1982) (1789) (discussing the principle of utility).

attacked the common law.⁵¹ Bentham thought there were big problems with this sort of judge-made law that we in the United States, Canada, Australia, and the United Kingdom all call “the common law.” First off, it was retrospective.⁵² Judges made it at the point of application at the end of a lawsuit, focused on things that had already happened so that any changes in doctrine, however they might be dressed up, effectively had altered the rules of the game for the side that had relied on how things stood before this change of doctrine—for an anachronistic instance, the duties owed by a manufacturer to consumers of those goods not in a contractual relationship with that manufacturer. The contrast with statute law enacted by an elected legislature and set to come into force on some specified future date could not be any more stark as regards this issue of the retrospectivity of the common law.

The next problem Bentham identified was related to that first one. You see, in order to mask that retrospective element, many supporters of the common law talked as though the real, true common law had always been out there in the ether.⁵³ For them, any change in doctrine announced by the judges amounted to telling the rest of us what had always been the correct understanding of the law. It just had not been properly understood as such until now.

Think of this as the “one right answer,” or “judges just discovering what was always out there,” or “it was implicitly part of the best understanding of the settled case law, though earlier judges had not yet recognized it” view of the common law. It solved the problem of retrospectivity. But the cure was in various respects worse than the disease. It was worse because it rested on a patent and palpable fiction, that judges were not ever making law at the point of application. No, they were merely announcing what had always been the law or the best understanding of earlier case law. Bentham had a field day with such claims, which rely on pretending that judge-made law, the common law, does not involve any discretionary input by the judges who definitively decide a case.⁵⁴ So this was another ground he had for disparaging the common law.

51. See GERALD J. POSTEMA, BENTHAM AND THE COMMON LAW TRADITION 147–260 (1986).

52. *Id.* at 207–08.

53. See *id.* at 194, 208.

54. See *id.* at 274.

Bentham also thought this common law was too unsystematic and unfocused on achieving the greatest happiness of the greatest number.⁵⁵ He also saw this sort of judge-made law as extremely opaque and supremely undemocratic.⁵⁶ Those who extolled the common law at least had to concede, thought Bentham, that it was the product of an unrepresentative, unaccountable lawyerly caste—“Judge & Co.”—whose views, interests, and values often could and sometimes did differ from those of the majority.⁵⁷ In such circumstances, why should the judges’ views become law? On what grounds was that legitimate?

In my view much of the Benthamite critique of the common law, the ruthless debunking of its pretensions and illegitimacies, also applies to customary international law. I have already pointed out above some of the antidemocratic failings of this sort of undressed international law, and indeed of the treaty-based sort as well. Yet although one of Bentham’s core grievances had to do with the undemocratic nature of “Judge & Co.” common law, the charge of its opaqueness or opacity was also prominent.

International law can also quite fairly be charged with being opaque, more opaque than the domestic law of longstanding democracies such as the United States, Canada, Australia, and the United Kingdom. For instance, let us return to how the fifteen judges of the ICJ are appointed.

To become an ICJ judge, a candidate needs to be approved by both a majority of General Assembly countries and a majority of Security Council countries.⁵⁸ As you would expect, this is a process chock full of lobbying, vote trading, and buying amongst regional blocs and other sorts of groupings. In that sense it is a highly politicized process, indeed one where luck and fortuitous timing play a big role. Having conceded that, you can see too that the appointments process for ICJ judges is nothing like the U.S. system for appointing and confirming Supreme Court Justices or judges.⁵⁹ Both are politicized but in different ways. The U.S. system forces candidates to answer highly charged questions. Those questions can be evaded, true, but they nevertheless get to be asked in a very public way. Also, the nominee’s personal outlook and sensibilities can be raised. Most noticeably, candidates once nominated are sometimes

55. *See id.* at 204.

56. *See id.* at 204–05.

57. *See id.* at 205.

58. Statute of the International Court of Justice, *supra* note 16, arts. 4, 10.

59. *See* U.S. CONST. art. II, § 2, cl. 2 (giving the President the power to appoint “Judges of the supreme Court”).

rejected and blocked.⁶⁰ In other words, there is a form of public deliberation, albeit an attenuated one.

The ICJ appointments procedure is opaque to a high degree in comparison. It is backroom, horse-trading, factional politics, where geography is a big factor.⁶¹ Even within democratic countries, the nominating of an ICJ candidate is insulated from any direct governmental input—an insulation that may be desirable when it comes to authoritarian regimes, though I suspect such regimes have more tools for getting their preferred candidate nominated anyway, but not to democratic ones.

Take the United States. The President does not nominate American candidates for ICJ openings. Instead, nominations are made by something called a “national group” at the Permanent Court of Arbitration at The Hague. It is the members of these national groups that are nominated by national governments.⁶² In a democracy, where a government’s recourse in the face of an unwanted nomination is highly constrained, these groups are insulated from public accountability and control by the elected government. In nondemocracies, as I suggested above, governments probably have tools for getting their national group to give them the nominee they want, tools that are unavailable, and unwanted, in a democracy.

On top of all that, the ICJ is not well known to citizens of democratic countries, or to those of nondemocratic nations. The percentage of Americans that could name even a single ICJ judge, whether American or otherwise, would be vanishingly small. The same goes for citizens of Canada, Australia, and the United Kingdom. New Zealand might possibly do marginally better on this count because its first ever ICJ nominee, Professor Kenneth Keith, made it successfully onto the court in the

60. For example, in 1987, the Senate blocked the nomination of Robert Bork. CNN Library, *Supreme Court Nominations Fast Facts*, CNN, <http://www.cnn.com/2013/08/27/us/supreme-court-nominations-fast-facts/> (last updated Aug. 27, 2013, 5:16 PM).

61. See SPENCER ZIFCAK, UNITED NATIONS REFORM: HEADING NORTH OR SOUTH? 9 (2009); Ruth Mackenzie & Philippe Sands, *International Courts and Tribunals and the Independence of the International Judge*, 44 HARV. INT’L L.J. 271, 278–79 (2003). For a general critique of judicial hubris when it comes to international law and to American judges citing international law, see Maimon Schwarzschild, *Judicial Independence and Judicial Hubris*, in THE CULTURE OF JUDICIAL INDEPENDENCE: CONCEPTUAL FOUNDATIONS AND PRACTICAL CHALLENGES 177, 182–85 (Shimon Shetreet & Christopher Forsyth eds., 2012).

62. Statute of the International Court of Justice, *supra* note 16, arts. 4–5.

relatively recent past.⁶³ But the self-congratulatory press for that milestone has long since ebbed away, so it is probably much the same in New Zealand as elsewhere. The ICJ gets little press; it is poorly understood; and its judges are unknown, even in legal circles, except those working in the field of international law. Put bluntly, the top court itself has its judges chosen in an opaque—and undemocratic—way, and it operates overwhelmingly outside the public gaze, which is another sort of opaqueness.

Then there is the issue of the reach of undressed customary international law, and whether it is quietly expanding unknown to most citizens in our four longstanding democracies. Of course it may well be that judges on all courts have some interest in increasing the jurisdiction of the court on which they serve. They will be subject to a temptation to increase that jurisdiction, to widen the numbers and sorts of cases their court can hear. Some judges resist this jurisdiction-expanding temptation better than others, but all are subject to it. So it is at least plausible to assert that the judges of the ICJ have an incentive or stake in discerning, discovering, or asserting a wider—or indeed ever wider—scope for this sort of customary international law. This will certainly be so when jurisdiction expands to encompass how a nation treats its own citizens. Yet it will also be affected by the extent of discretionary power that these ICJ judges have when it comes to stating how far this undressed international law does, and does not, extend.

Now as it happens, I think a case can be made that customary international law is expanding its reach, and in an opaque way. There is a ratchet-up effect at work. United States law professors John McGinnis and Ilya Somin attribute some of this ratchet-up effect or trend to a split amongst two schools who see undressed international law in quite different ways. The older school, what they call the “classicists,” “believe that customary international law must be rooted in the widespread consensus of the actual practices of nation-states.”⁶⁴ The job of publicists, on this view, is to look to see what states actually do. It is a question of fact, even on the ancillary issue of what motivates any state action.

Readers will notice that even on this classicist understanding, there will be disagreement. People disagree about facts all the time. And any particular publicist of classicist leanings might think the content of undressed international law is *X* while a fellow classical school member

63. See Audrey Young & Helen Tunnah, *NZ Knight Elected Judge of World's Top Court*, NEW ZEALAND HERALD (Nov. 9, 2005, 5:00 AM), http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10354326.

64. John O. McGinnis & Ilya Somin, *Should International Law Be Part of Our Law?*, 59 STAN. L. REV. 1175, 1199 (2007).

might think it is $X + A$, $X - Y + B$, or anything else. But their disagreement about content will be focused on facts, on what the actual practice of states is, and on whether such practices, when widespread, are motivated—as a matter of fact—by a sense of legal obligation.

That will make the content of undressed international law inherently debatable and contentious. But notice how much freer of a sense of moral proselytizing and morally pregnant human rights presuppositions it is compared with the alternative.

That alternative to this older, classical school is the newer, “modern” school. Professors McGinnis and Somin describe it as follows:

Under a more modern concept of international custom, many scholars embrace a methodology that permits substantial human rights norms to be encompassed within customary international law. They relax the classical standards in several ways that accomplish this. Instead of requiring that nation-states actually engage in a practice, they substitute statements by nation-states that give the norms verbal endorsement. These include resolutions of the General Assembly of the United Nations and multilateral treaties.⁶⁵

Very, very few people, lawyers included, are aware of this move away from an objective—if contentious and disputable—search for what states do⁶⁶ to something less factual and more value-laden that builds in a substantial moral component or human rights input regardless of whether such norms are adhered to in fact or not—and despite the inherently debatable and disputable—and virtually always disputed—nature of human rights norms once they are brought down from the Olympian heights of moral abstractions and applied to real-life issues in the quagmire of day-to-day social policymaking. And so, any such process can be considered to be an opaque one.

This newer, modern school relaxes the need to find actual widespread state practice or what states really do. It relaxes that factual quest in favor of a more morally pregnant or substantive quest to say what states should do. All that is needed are mere statements of verbal endorsement.

First off, it seems to me that this newer, modern approach has more scope to make inroads into democracy by taking the second component of “acting out of a sense of legal obligation” and turning it from a question

65. *Id.* at 1200 (footnotes omitted).

66. I concede that the distinction between what states do and what they say is not by any means watertight. The latter might always provide some basis for the former. So the point here is a relative one, the extent to which the latter is relied upon. Or so it seems to me.

of fact—“Is this why states do X?”—into one more morally pregnant—“Is this an instance in which we can infer that states should feel obliged to do this based on what they have said?”. This is a move from an “is” *not* directly to an “ought” but rather to a sort of combination “is or ought.” In my view this second question has more jurisdiction-expanding potential. Yet secondly, and even if you disagree with that first claim, the more normatively charged “is plus ought” determination is a less transparent, more contestable, and more opaque determination than the straight out factual “is” one. And that gives more open-ended discretionary power to publicists—meaning a handful of “sound” international law professors—and to a few international law judges appointed in the most opaque way imaginable.

IV. IT IS INEFFECTIVE

My third critique of international law, or rather of some aspects of international law, is that it is comparatively ineffective. H. L. A. Hart, over fifty years ago, noted that there is a difference in the scope of enforceability between municipal law aimed at individual human beings and international law aimed at countries. As regards the former, everyone is more or less equal; as regards the latter, single states can be stronger than all the rest combined. Effective enforcement of the law in the case of the former is theoretically much easier than with the latter, where all may depend upon the “stronger than all the rest State” voluntarily complying with some law for it to be effective at all.⁶⁷

Or if we leave aside that sort of Hartian theoretical point about the enforceability of international law, it might be tempting here to rehearse a different sort of critique about ineffectiveness, say the well-known criticisms of various subsidiary parts of the United Nations—some of the second-tier agencies of the United Nations, and more particularly, the rights-related ones. Take today’s U.N. Human Rights Council (UNHRC). This is an intergovernmental body, subsidiary to the U.N. General Assembly.⁶⁸ In 2006, it replaced the U.N. Commission on Human Rights.⁶⁹ The council was created to replace the commission because the latter was widely seen to be—according to taste—ineffective, overly politicized,

67. See H. L. A. HART, *THE CONCEPT OF LAW* 231 (1961).

68. *Welcome to the Human Rights Council*, UNITED NATIONS HUM. RTS. COUNCIL, <http://www.ohchr.org/EN/HRBodies/HRC/Pages/AboutCouncil.aspx> (last visited Mar. 4, 2014).

69. Eric Cox, *State Interests and the Creation and Functioning of the United Nations Human Rights Council*, 6 J. INT’L L. & INT’L REL. 87, 88 (2010).

controlled by voting blocs from the world's despotic regimes, anti-Israel, anti-United States, or some combination of all of the above.⁷⁰

Now that the UNHRC has been up and running since 2006, it is widely seen to be—according to taste—ineffective, overly politicized, controlled by voting blocs from the world's despotic regimes, anti-Israel, anti-United States, or some combination of all of the above. Some think the council is even worse, even more dysfunctional, than its predecessor. Indeed, under the George W. Bush Administration, the United States boycotted the council, though that boycott was lifted by the Obama Administration.⁷¹

For our purposes here, the main feature of the council's work to point to is the periodic reviews—where the council assesses the human rights situations in all 192 U.N. member states.⁷²

Leave aside the obvious observation that the world's Sudans, Libyas, Chinas, Zimbabwes, Cubas, Irans, and Saudi Arabias are comparatively unmoved by such periodic reviews. They might even get themselves voted onto the UNHRC—as Libya has, Cuba has, China has, Kyrgyzstan has, Pakistan has, Saudi Arabia has, and, well, you get the idea—in order to hamper critical periodic reviews by forming voting or power blocs. But even if a periodic review does come out that is critical, the world's authoritarian and theocratic states pay little attention. They are ineffective.⁷³

Meanwhile if we turn to our four longstanding democracies of the United States, Canada, Australia, and the United Kingdom, the questions of “Who gets appointed to staff these periodic reviews?”; “Do their credentials make them better at spotting the rights-respecting course of action in cases where smart, nice, reasonable people simply disagree than the elected representatives of the people?”; and “Why should we

70. See *id.* at 87–88.

71. Colum Lynch, *U.S. To Seek Seat on U.N. Human Rights Council*, WASH. POST, Apr. 1, 2009, at A2.

72. See ZIFCAK, *supra* note 61, at 67–74.

73. In a different vein, but still related to the theme of ineffectiveness, there was a case of a Human Rights Council periodic review of a Pacific Island state that was congratulated in its periodic review by a European state for decriminalizing homosexuality, and in the same periodic review, the same Pacific Island state was criticized by an Islamic state for, you guessed it, decriminalizing homosexuality. See U.N. High Comm'r for Human Rights, *Discriminatory Laws and Practices and Acts of Violence Against Individuals Based on Their Sexual Orientation and Gender Identity*, ¶¶ 40–44, U.N. Doc. A/HRC/19/41 (Nov. 17, 2011); Paul Canning, *Seychelles To Decriminalise Homosexuality, Other Countries Say No and 'Not Yet,'* LGBT ASYLUM NEWS (Oct. 5, 2011), <http://madikazemi.blogspot.com/2011/10/seychelles-to-decriminalise.html>.

care what these periodic reviews allege?” simply cannot be answered in a way that favors these U.N. bureaucrats over elected politicians.

But rather than pursue that particular aspect of international law’s ineffectiveness, I want instead to do two other things. Firstly, I want to contrast rights-related international law to a different sort of international law and argue that that latter sort is anything but ineffective. It is very effective indeed. So my criticisms in this Article, as I made clear at the start, are directed at only some parts of the international law edifice. Then, secondly, I want to focus on international criminal courts and suggest that the case for their effectiveness is much less than many might assume.

For the first of those tasks, let us consider not a rights-related body but rather a trade-related one. This is the World Trade Organization (WTO).⁷⁴ The WTO grew out of GATT, or rather the General Agreement on Tariffs and Trade treaty. Immediately after World War II, about two dozen countries participated in the U.S.-propelled negotiations to cut tariffs. These negotiations were independent of the rather grander attempt, the failed attempt, to agree to the Havana Charter, which would establish something that would be called the International Trade Organization or ITO. The sideline GATT negotiations were completed in 1947, and GATT was born in 1948.⁷⁵ It was assumed it would be temporary, lapsing once the Havana Charter came into force.⁷⁶

However, when the Truman Administration in the United States decided not to pursue congressional approval for the Havana Charter, only GATT was left. And GATT was not only a document assumed by all and sundry to be temporary, it was also a narrowly focused agreement aimed at lowering tariffs. GATT entered into force in 1948, and that was all there was for nearly half a century until the WTO was established in 1995.⁷⁷ Yet GATT still remains the most important legal document in international trade law. The WTO agreement that grew out of the Uruguay Round did *not* supplant or repeal the original GATT document; it merely complemented and supplemented GATT.

Now a first thing to notice is that when supporters of rights-related CRC-type or ICCPR-type international law try to make an analogy to GATT and the WTO, remember this difference. GATT and the WTO are ultimately focused on one thing, lowering—and perhaps one day even eliminating altogether—tariffs. That is their aim, focus, and breadth of

74. For more detail on the WTO, see RAJ BHALA, *INTERNATIONAL TRADE LAW: INTERDISCIPLINARY THEORY AND PRACTICE* 35–37 (3d ed. 2008).

75. See *The GATT Years: From Havana to Marrakesh*, WORLD TRADE ORG., http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm (last visited Mar. 4, 2014).

76. See *id.*

77. *Id.*

concern. It is a massively more circumscribed, contained, and inflation-resistant one than some international convention that is pitched up in the Olympian heights of emotively appealing and disagreement-finessing moral abstractions—one that enumerates a list of vague, amorphous, and indeterminate moral entitlements in the language of rights.⁷⁸

Here is the next thing to notice about trade agreements. Nation-states argue over every phrase, every word, and every comma. In the history of GATT, there have been eight completed sets of rounds of Multilateral Trade Negotiations, all aimed at reducing trade barriers.⁷⁹ These are increasingly difficult to complete—the Doha Round began in 2001 and is still yet to be completed⁸⁰—for the very fact that they emphatically do *not* deal in finessing disagreement under the cover of moral abstractions, vagueness, and amorphousness. These trade rounds, to the contrary, deal in spelling out in minute detail specifics; they enumerate and elaborate with precision; and they aim to make clear up front what countries have committed themselves to, and when. There is no sense of having aimed for the woolliest, least demanding lowest common denominator, which in obverse terms is to say that nondemocracies have as much at stake as democracies, a situation wholly distinct from rights-related treaties.

Trade agreements, in other words, are driven by self-interest that flows from a grasp of comparative advantage, an understanding that free trade—*not* mercantilism—creates the new wealth that can later be allocated as different countries choose, and a recognition that greater trade does not much—contrary to some—reduce the power of domestic governments. If you are in doubt about that last claim, take a visit to China some time and experience for yourself how enfeebled, or otherwise, the Communist Party government of China is. This is the government that has signed China up to the WTO without any overly obvious inability to set domestic policy across the board.

My point here is that the WTO process is one obsessed with detail and trying to spell out probable future scenarios and commitments. It is one

78. I say this while conceding that the scope or potential for inflation in the newer WTO TRIPS Agreement and the General Agreement on Trade in Services is greater than it is as regards the older GATT aspects of the WTO.

79. The rounds include the Geneva Round in 1947, Annecy Round in 1949, Torquay Round in 1951, Geneva Round in 1956, Dillon Round in 1960–1961, Tokyo Round in 1973–1979, and Uruguay Round in 1986–1994. *The GATT Years: From Havana to Marrakesh*, *supra* note 75.

80. *The Doha Round*, WORLD TRADE ORG., http://www.wto.org/english/tratop_e/dda_e/dda_e.htm (last visited Mar. 4, 2014).

that aims to be a “no surprises,” up-front process. It confronts disagreement in order to generate tradeoff compromises; it does not finesse disagreements for some later point-of-application interpreter to award the whole cake to one side or the other.

Consider the approach to these GATT and WTO negotiations. They take place on a product-by-product basis with a focus on reducing tariffs and in the context of an overarching Most Favored Nation (MFN) obligation found in Article I of GATT. The general goal, as I have said, is to lower import barriers and to reduce export subsidies. The MFN obligation requires member states to give the same lower-tariff deal or concessions to all other member states that they give to their most favored member state trading party. Against that background and even though there are some exceptions to MFN treatment, you will see that this sort of trading regime significantly dispenses with reciprocity—you cannot demand something from country *X* in return for your lowering tariffs if you have already lowered them for any other WTO member country.⁸¹ And any country can opt to leave the WTO, though none has done so.⁸²

Again, nothing like that seems true of treaties and conventions related to, say, the rights of the child, indigenous peoples, or the disabled. And so this WTO process is less debilitating of democratic decisionmaking, is arguably slightly more transparent—or less opaque—and is certainly far more effective.

We can even see that there are more constraints on the WTO Dispute Settlement Body panels and Appellate Body than you find when U.S. courts are appealing to unratified treaties or the ICJ is indicating the reach of customary international law. First off, in the WTO, there is no enforcement mechanism the winners can use against the losers other than being paid compensation or undertaking authorized retaliation—think of the EU’s ban on genetically modified crops, which fails the trade test, but that failure, or America’s winning at the WTO, cannot easily be used to change the EU policy, which still exists.

Secondly, the extent of interpretive slippage in the WTO’s Dispute Settlement Understanding process at the appellate body stage has been very slight indeed. At the WTO, we might see the appellate body allowing NGOs to submit briefs in cases or decide who has the burden of proof or

81. Of course there is still a scintilla of reciprocity in the sense that when a state is seeking to set its MFN tariff level for some particular product, it can, and often does, enter into negotiations with its main trading partners to secure reciprocal concessions that are then, post negotiations, all multilateralized via MFN. But I do not think that takes away from my general point.

82. See Marrakesh Agreement Establishing the World Trade Organization art. XV, Apr. 15, 1994, 1867 U.N.T.S. 154.

even, very rarely, cite eminent publicists. But that is the scope of the slippage.

Most relevantly of all for our purposes here, when it comes to the WTO, the outcomes are effective. They influence the conduct of member states, democracies and nondemocracies. Nor does the WTO much affect democratic decisionmaking. Almost all the constraints came in the form of highly detailed and specific undertakings, not in the form of disagreement-finessing abstractions. Or put differently, a democratic government in the past knew the exact detail—or rather almost all the detail—of what it was agreeing to. There is little of the ratchet-up effect we have seen elsewhere.

Perhaps I should sum up in especially blunt terms. The WTO, as a supranational body, is much less democracy debilitating than rights-related supranational bodies. The deal is made up front. It is procedurally easy to back out. There is far less scope for inflation-enhancing “living document” interpretive approaches by those who judge disputes. Those who breach their obligations face only the option of paying or authorized retaliation. Widespread self-interest, in the form of the increasing generation of wealth, at least partly aligns outlooks. Oh, and *every* country has a veto on any changes—you need unanimity to change the bargain.

Hence some forms of international law are clearly very effective indeed.

When it comes to the various international criminal courts, however, I am much more skeptical of their effectiveness. To buttress that claim, let me begin by returning for a minute to Hart. Recall Hart’s argument at the end of chapter nine of *The Concept of Law*.⁸³ Hart was there considering, in effect, the Nuremberg trials after World War II. Hart’s point, with which I agree, is that the attempted natural law defenses of those trials are unconvincing. The better, more convincing way of understanding what was happening is that the victors after the war were passing retrospective laws making illegal what had been legal under the Nazi legal regime. This could be justified, thought Hart, whenever the moral wrongness of using retrospective laws was clearly and unambiguously outweighed by the moral wickedness of what the defendants had done in the past under that former regime, which in Hart’s view and mine was the case with the top Nazis but may well not have been the case if we

83. HART, *supra* note 67, at 210–12.

move forward in time and consider the prosecuting of, say, East German border guards after the fall of the Berlin Wall.

Now if that is the situation in the absence of any international treaty dealing with the prosecuting of thuggish dictators and their cronies, one can certainly see that there will be benefits in moving to a state of affairs in which there exists a laid down, positive international law or treaty, known in advance, that makes illegal at international law morally egregious acts that were legal at the time under some jurisdiction's municipal law. This international law would authorize prosecutions of the top political and military leaders who, under the domestic legal system that they controlled, had done nothing illegal.

As I said, one can see the benefits of such an international criminal court or law. Most obviously such an international law framework removes the need—after the downfall of some nasty regime—to rely on what are in effect retrospective laws to provide a basis for prosecuting the worst offenders. I accept that benefit. My claim here will be only that there are costs as well as benefits in making this move and hence that there are also grounds for being skeptical about the effectiveness of any such international criminal courts.⁸⁴

Take the International Criminal Court (ICC), which came into being in 2002 when the Rome Statute of the International Criminal Court came into force.⁸⁵ The costs that I would note are *not* that countries such as the United States, China, and Israel have not ratified this treaty and show no indication whatsoever of doing so. Nor would I focus too much on the big expense of this court,⁸⁶ with returns thus far that amount to one conviction,⁸⁷ under appeal,⁸⁸ an acquittal, also under appeal,⁸⁹ with two dozen or so cases ongoing from thirty overall indictments.⁹⁰ Nor, again,

84. I will focus on the International Criminal Court, but a similar sort of analysis is possible with the one-off international tribunals for Rwanda and the ex-Yugoslavia.

85. Rome Statute of the International Criminal Court art. 1, July 17, 1998, 2187 U.N.T.S. 91 [hereinafter Rome Statute].

86. See Jon Silverman, *Ten Years, \$900m, One Verdict: Does the ICC Cost Too Much?*, BBC NEWS, www.bbc.co.uk/news/magazine-17351946 (last updated Mar. 14, 2012, 5:55 PM).

87. Thomas Lubanga, Congolese warlord, was found guilty and sentenced to fourteen years in prison. Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Decision on Sentence, ¶ 107 (July 10, 2012), <http://www.icc-cpi.int/iccdocs/doc/doc1438370.pdf>.

88. See *Lubanga Case*, COALITION FOR INT'L CRIM. CT., <http://www.iccnw.org/?mod=drctimelinelubanga> (last visited Mar. 4, 2014).

89. See Prosecutor v. Mathieu Ngudjolo, Case No. ICC-01/04-02/12, Prosecution's Appeal, ¶¶ 1–3 (Dec. 20, 2012), <http://www.icc-cpi.int/iccdocs/doc/doc1531064.pdf>.

90. See *Situations and Cases*, INT'L CRIM. CT., [http://www.icc-cpi.int/en_menus/icc/situations and cases/Pages/situations and cases.aspx](http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx) (last visited Mar. 4, 2014).

would my criticism be the one some make that this court seems to focus on only Africa.⁹¹

Instead I want to point out the incentives such a court throws up when it comes to nasty people leading nasty regimes. Those incentives are clear, namely that it is better to go down fighting than to strike some sort of Idi Amin or Augusto Pinochet-type deal to forsake power. Now of course it is galling in the extreme to see someone as criminally culpable as Idi Amin leave power only to spend a decade or so in very comfortable retirement in Saudi Arabia. Yet it is also the case that he did leave power under that deal and that Uganda did move on without him. And if that is seen as a benefit, that in some circumstances the lesser evil is to get the thug out of power however galling the terms, then an international criminal court makes that almost impossible to accomplish. Think of Zimbabwe and Mugabe or Syria and Assad, and ask why they would ever voluntarily relinquish power, however attractive the supposed deal. They know, we know, that they will be tried under some sort of international law court, either the ICC—if it has jurisdiction⁹²—or some special one-off Rwanda or ex-Yugoslavia-type tribunal if it does not. Knowing that, they will not go; they cannot go, so they will fight to the end.

Those are bad consequences that surely must be part of any sensible cost-benefit analysis of these sorts of international criminal courts and tribunals. They put in place incentives that will have bad, as well as good, consequences. Some will be unintended.

There is no easy answer to any of this. I merely note such ICC-type regimes have various costs that can be lumped under this last heading of mine of ineffectiveness.

V. CONCLUDING REMARKS

In this Article, I have tried to offer you a skeptical outsider's view of some aspects of international law. Perhaps the Article is best seen as an agnostic's guide to—too much—international law. Certainly there are aspects of international law that are ineffective, opaque, and undemocratic. And these IOUs are comparatively worse, and when it comes to democratic

91. See, e.g., Brendan O'Neill, *The International Criminal Court Is, by Any Objective Measurement, Racist. So Why Do Liberals Love It?*, TELEGRAPH, <http://blogs.telegraph.co.uk/news/brendanoneill2/100144112/the-international-criminal-court-is-by-any-objective-measurement-racist-so-why-do-liberals-love-it/> (last updated Mar. 15, 2012).

92. See Rome Statute, *supra* note 85, art. 5(1).

credentials, then far worse than one sees in the domestic law of such longstanding democracies as the United States, Canada, Australia, and the United Kingdom.

That is why I believe that a healthy dose of skepticism is warranted when it comes to international law, and most especially rights-related international law.