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Defining and Punishing Offenses Under Treaties

ABSTRACT. One of the principal aims of the U.S. Constitution was to give the federal government authority to comply with its international legal commitments. The scope of Congress's constitutional authority to implement treaties has recently received particular attention. In *Bond v. United States*, the Court avoided the constitutional questions by construing a statute to respect federalism, but these questions are unlikely to go away. This Article contributes to the ongoing debate by identifying the Offenses Clause as an additional source of Congress's constitutional authority to implement certain treaty commitments. Past scholarship has assumed that the Article I power to "define and punish . . . Offences against the Law of Nations" is limited to customary international law. But the Framers of the Constitution understood the law of nations to include both custom and treaties, or what they called "the conventional law of nations." The history and purpose of the Offenses Clause show that it was intended to reach treaties and—despite the prevailing view in the academy—that Congress and the Supreme Court have shared this understanding of the Clause through most of our nation's history.

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INTRODUCTION

One of the principal aims of the U.S. Constitution was to give the federal government authority to comply with the United States's international legal commitments.[1] In recent years, Congress's power to implement treaties has received particular attention from both the legal academy and the Supreme Court. Scholars have debated the application of federalism principles to treaties and whether the combination of the Article II treaty power and the Necessary and Proper Clause gives Congress constitutional authority to regulate matters that would otherwise lie beyond its Article I powers.[2]

Last Term, these debates reached the U.S. Supreme Court in *Bond v. United States*.[3] The defendant argued that Congress lacked the power to apply the Chemical Weapons Convention Implementation Act of 1998[4] to her attempt to poison a romantic rival with toxic chemicals.[5] In the end, the Court avoided the constitutional question, holding as a matter of statutory interpretation that the Act did not reach Bond's conduct in the absence of "a clear indication that Congress meant to reach purely local crimes."[6] Justices Scalia and Thomas, on the other hand, would have held that the Necessary and Proper Clause does not give Congress the power to implement treaties,[7] while Justices Thomas, Scalia, and Alito were prepared to impose subject-matter limitations on the treaty power.[8] Justice Thomas predicted that "[g]iven the increasing frequency with which treaties have begun to test the limits of the Treaty Power," the chance to address the constitutional limits on Congress's authority "will come soon enough."[9]

1. *See generally* David M. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition*, 85 N.Y.U. L. REV. 932 (2010) (arguing that the Constitution was designed to ensure that the United States would comply with the law of nations).

2. *See, e.g.*, Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390 (1998); David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075 (2000); Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 HARV. L. REV. 1867 (2005); Edward T. Swaine, *Does Federalism Constrain the Treaty Power?*, 103 COLUM. L. REV. 403 (2003); Carlos Manuel Vázquez, Missouri v. Holland*'s Second Holding*, 73 MO. L. REV. 939 (2008).

3. 134 S. Ct. 2077 (2014).

4. Pub. L. No. 105-277, 112 Stat. 2681-856 (codified as amended in scattered sections of 18 U.S.C. and 22 U.S.C.).

5. *Bond*, 134 S. Ct. at 2085.

6. *Id*. at 2090.

7. *Id*. at 2098-2102 (Scalia, J., concurring).

8. *Id*. at 2103-10 (Thomas, J., concurring).

9. *Id*. at 2111.

This Article contributes to the ongoing debate by identifying and comprehensively exploring the role of the Offenses Clause as an additional source of congressional authority to implement certain treaty commitments. That clause gives Congress the power "[t]o define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations."[10] Past scholarship has commonly assumed that the phrase "the Law of Nations," as used in the Offenses Clause, refers exclusively to customary international law.[11] Under this reading, Congress may rely on the Offenses Clause to legislate regarding a rule of customary international law, but if Congress wishes to enact legislation to implement a treaty, it must invoke some other authority, such as its commerce power or the Article II treaty power coupled with the Necessary and Proper Clause. This Article demonstrates that this conventional academic wisdom is mistaken and that the Offenses Clause constitutes an additional and complementary source of authority for Congress to implement certain treaty commitments.

We attribute the conventional and narrow reading of the Offenses Clause to the intensive focus of foreign relations law scholars over the past thirty-five years on the Alien Tort Statute (ATS).[12] The ATS uses the phrase "law of na-

10. U.S. CONST. art I, § 8, cl. 10.

11. *See, e.g.*, J. Andrew Kent, *Congress's Under-Appreciated Power To Define and Punish Offenses Against the Law of Nations*, 85 TEX. L. REV. 843, 845 (2007) ("Today's customary international law is the closest modern analogue of the eighteenth-century 'law of nations.'"); Eugene Kontorovich, *The "Define and Punish" Clause and the Limits of Universal Jurisdiction*, 103 NW. U. L. REV. 149, 155 (2009) ("[T]he Offenses power refers to customary rather than conventional international law . . . . "); Charles D. Siegal, *Deference and Its Dangers: Congress' Power To "Define . . . Offenses Against the Law of Nations,"* 21 VAND. J. TRANSNAT'L L. 865, 867 (1988) ("[T]he offenses clause of the Constitution . . . permit[s] Congress to define violations of customary international law as domestic crimes."); Beth Stephens, *Federalism and Foreign Affairs: Congress's Power To "Define and Punish . . . Offenses Against the Law of Nations,"* 42 WM. & MARY L. REV. 447, 482 (2000) ("Given that treaties are otherwise covered by the Constitution, it is likely that the Offenses Clause primarily addresses violations of customary international law."). *But see* LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 69 (2d ed. 1996) (noting that the Offenses Clause allows Congress to implement "international law or a treaty of the United States"); Vázquez, *supra* note 2, at 952 ("Congress has the power to 'define' as an offense against the law of nations any conduct that would constitute a breach of the treaty.").

12. 28 U.S.C. § 1350 (2012); *see, e.g.*, Anthony J. Bellia Jr. & Bradford R. Clark, *The Alien Tort Statute and the Law of Nations*, 78 U. CHI. L. REV. 445 (2011); Jeffrey M. Blum & Ralph G. Steinhardt, *Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act After* Filartiga v. Peña-Irala, 22 HARV. INT'L L.J. 53 (1981); Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT'L L. 587 (2002); Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AM. J. INT'L L. 461 (1989); William R. Casto, *The Federal Courts' Protective Jurisdiction over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467 (1986); Sarah H. Cleveland, *Global Labor Rights and the Alien Tort Claims Act*, 76 TEX. L. REV. 1533 (1998) (reviewing HUMAN RIGHTS, LABOR RIGHTS, AND INTERNATIONAL TRADE (Lance A. Compa & Stephen F. Diamond eds., 1996)); William

tions" to refer to the unwritten law of nations[13] in contradistinction to treaties, providing district court jurisdiction over any civil action "by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[14] Most scholars have simply assumed that the phrase "law of nations" in the Offenses Clause must have the same limited meaning that it has in the ATS.[15] Yet this is a dangerous assumption. The term "international law," for example, is generally understood today to include both customary international law and treaties,[16] despite the fact that it is sometimes used to refer more narrowly to customary international law alone.[17]

The same was historically true of the phrase "law of nations." The Framers of the Constitution clearly understood the law of nations to include treaties, or what they called "the conventional law of nations." The principal purpose of the Offenses Clause—to facilitate compliance with the United States's international commitments—also supports reading its reference to the "law of nations" to include treaties. And reading the phrase broadly is most consistent with the pre-1787 history, as well as the drafting and ratification of the Offenses Clause. In other words, the most accurate modern translation of the "law of nations" as used in the Offenses Clause into contemporary parlance is not "cus-

S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the "Originalists,"* 19 HASTINGS INT'L & COMP. L. REV. 221 (1996); Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347 (1991); Thomas H. Lee, *The Safe-Conduct Theory of the Alien Tort Statute*, 106 COLUM. L. REV. 830 (2006); Kenneth C. Randall, *Federal Jurisdiction over International Law Claims: Inquiries into the Alien Tort Statute*, 18 N.Y.U. J. INT'L L. & POL. 1 (1985).

13. Throughout this Article, we use the word "unwritten" to refer to those categories of international law other than treaties, which include rules based on natural law and rules based on custom. *See infra* notes 46-50 and accompanying text. We are not the first to adopt this usage. *See* Thirty Hogsheads of Sugar v. Boyle, 13 U.S. (9 Cranch) 191, 198 (1815) ("The law of nations is . . . in part unwritten, and in part conventional.").

14. 28 U.S.C. § 1350.

15. *See, e.g.*, Kent, *supra* note 11, at 871-72 (looking to the Supreme Court's interpretation of the ATS in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), to inform interpretation of the Offenses Clause); Stephens, *supra* note 11, at 520-24 (linking the ATS to the Offenses Clause). *Cf.* United States v. Bellaizac-Hurtado, 700 F.3d 1245, 1251 (11th Cir. 2012) (relying on ATS cases to conclude that "law of nations" in the Offenses Clause means customary international law).

16. *See* 1 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102 (1987) (listing customary international law and international agreements as sources of international law).

17. *See, e.g.*, 10 U.S.C. § 802(a)(11)-(12) (2012) (subjecting certain persons to the Uniform Code of Military Justice "[s]ubject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law"); Rasul v. Bush, 542 U.S. 466, 472 (2004) (referring to "international law, and treaties of the United States"); United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 318 (1936) ("[O]perations of the nation in [foreign] territory must be governed by treaties, international understandings and compacts, and the principles of international law.").

tomary international law" but rather "international law," which includes both customary international law and treaties.[18]

The Offenses Clause thus formed part of a comprehensive effort to ensure that Congress could enforce *all* international law, and to free the United States from having to rely on enforcement by the several States. The Framers accomplished this by creating an express enumerated power to punish in the Offenses Clause that overlaps with, and complements, Congress's authority under the Commerce Clause[19] and under the Necessary and Proper Clause coupled with the Article II treaty power.[20] Indeed, the Framers considered the power to penalize individual conduct to be such an important part of the United States's overall authority to enforce international law that the power to define and punish offenses against the law of nations in the Offenses Clause is one of just three enumerated powers in the Constitution that expressly grant Congress the power to punish.[21]

The understanding that the Offenses Clause allows enforcement of all international law has not been entirely lost. Despite the prevailing view in the

18. Our reading of the Offenses Clause applies to treaties in the international sense, including both Article II treaties and executive agreements. *See* Vienna Convention on the Law of Treaties art. 2(1)(a), May 23, 1969, 1155 U.N.T.S. 331 ("'Treaty' means an international agreement concluded between States in written form and governed by international law . . . whatever its particular designation."). Vattel described the conventional law of nations as consisting of any agreement that bound a country internationally, using the words "agreement" and "treaty" interchangeably. *See* E. DE VATTEL, THE LAW OF NATIONS, Intro. § 24 (1758) (Charles G. Fenwick trans., Carnegie Inst. 1916) ("The various agreements which Nations may enter into give rise to a new division of the Law of Nations which is called *conventional*, or the law *of treaties*."). And the purpose of the Offenses Clause to enable the United States to comply with its international commitments applies equally to executive agreements.

Allowing Congress to define and punish offenses under executive agreements would not expand Congress's Article I powers. *See* Oona A. Hathaway, *Treaties' End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE L.J. 1236, 1339 (2008) ("[U]nlike agreements concluded under the Treaty Clause, congressional-executive agreements are limited in scope by the powers enumerated in Article I."). Sole executive agreements are similarly "limited to commitments that are within the President's own constitutional powers." Oona A. Hathaway, *Presidential Power over International Law: Restoring the Balance*, 119 YALE L.J. 140, 211 (2009). To the extent implementing legislation is required for sole executive agreements, Congress possesses the necessary authority under the Necessary and Proper Clause. *See* U.S. CONST. art. I, § 8, cl. 18 (granting power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, *and all other powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof*" (emphasis added)).

19. U.S. CONST. art. I, § 8, cl. 3.

20. *Id.* art. I, § 8, cl. 18; *id.* art. II, § 2, cl. 2.

21. The others are the Counterfeiting Clause, *id.* art. I, § 8, cl. 6, and the Treason Clause, *id.* art. III, § 3, cl. 2.

academy, Congress, the executive branch, and the Supreme Court have shared this understanding of the Offenses Clause through most of our nation's history. When enforcing treaties, Congress has not always specified the source of its authority. But when it has, it has often invoked the Offenses Clause, at times in conjunction with its powers under the Commerce Clause and the Article II treaty power. Indeed, in recent years, Congress has increasingly invoked the Offenses Clause as authority for legislation to enforce treaties.[22] Reading the Offenses Clause to reach treaties is also consistent with past decisions of the Supreme Court, which have focused on the Clause's core purpose of furthering the United States's "vital national interest in complying with international law"[23] and have expressly recognized that Offenses Clause legislation can include enforcement of treaties.[24]

Reading the Offenses Clause to extend to both treaties and customary international law is as important today as it was at the Founding. International lawmaking is increasingly dominated by international agreements, including agreements that codify and expand upon preexisting norms of customary international law. It makes little sense to think that Congress could exercise authority under the Offenses Clause to punish assaults against diplomats when their protection under international law rested exclusively on custom, but that when the United States ratified the Vienna Convention on Diplomatic Relations in 1972, Congress was deprived of the authority to implement those more detailed treaty obligations through the Offenses Clause and had to rely on other constitutional grants of legislative power.

Our argument responds to some, though not all, of the constitutional questions raised by the concurring opinions in *Bond*.[25] Justice Scalia (joined by Justice Thomas) would have held that the Necessary and Proper Clause gives Congress the power to help the President make treaties but not to implement

22. *See, e.g.*, MILITARY COMMISSIONS ACT OF 2006, H.R. REP. NO. 109-664, pt. 1, at 24 (2006); INTERNATIONAL ANTI-BRIBERY ACT OF 1998, S. REP. NO. 105-277, at 3 (1998); WAR CRIMES ACT OF 1996, H.R. REP. NO. 104-698, at 1 (1996); TORTURE VICTIM PROTECTION ACT OF 1991, S. REP. NO. 102-249, at 5-6 (1991); *infra* notes 265-293 and accompanying text.

23. Boos v. Barry, 485 U.S. 312, 323 (1988); *see also* United States v. Arjona, 120 U.S. 479, 483 (1887) (noting that "Congress is expressly authorized 'to define and punish . . . offenses against the law of nations'" because the national government is "made responsible to foreign nations for all violations by the United States of their international obligations").

24. *See* Hamdan v. Rumsfeld, 548 U.S. 557 (2006); *In re* Yamashita, 327 U.S. 1 (1946); *Ex parte* Quirin, 317 U.S. 1 (1942); *infra* notes 325-342 and accompanying text.

25. *See* Bond v. United States, 134 S. Ct. 2077, 2098-2102 (2014) (Scalia, J., concurring) (stating that the Necessary and Proper Clause gives Congress power to help the President "make" but not to "implement" treaties); *id.* at 2102-11 (Thomas, J., concurring) (stating that the treaty power is limited to certain subject matters); *id.* at 2111 (Alito, J., concurring) (same).

them.[26] Justice Scalia's argument was both textual and structural. With respect to text, he noted that the Necessary and Proper Clause gives Congress authority "[t]o make all Laws which shall be necessary and proper for carrying into Execution" powers vested in the President,[27] but that Article II vests in the President only the power "to make Treaties."[28] With respect to structure, Justice Scalia argued that his reading was necessary to avoid a "vast expansion of congressional power."[29] Particularly if "the Treaty Clause comes with no implied subject-matter limitations,"[30] Congress would be "only one treaty away from acquiring a general police power."[31] Others have explained why this exceedingly narrow reading of the Necessary and Proper Clause and the treaty power is mistaken.[32] Our argument simply renders Justice Scalia's reading moot with respect to the implementation of certain treaty obligations, because we identify an Article I basis for Congress's power in addition to the Commerce Clause.[33]

Justice Thomas (joined by Justices Scalia and Alito), and Justice Alito writing for himself, would also have recognized subject-matter limitations on the treaty power by holding that "the Treaty Power can be used to arrange intercourse with other nations, but not to regulate purely domestic affairs."[34] The Supreme Court, however, has long held that the treaty power "extends to all

26. *See id.* at 2099 (Scalia, J., concurring) ("[A] power to help the President *make* treaties is not a power to *implement* treaties already made."). Justice Scalia's reading follows the argument in Rozenkranz, *supra* note 2.

27. U.S. CONST. art. I, § 8, cl. 18.

28. *Id.* art. II, § 2, cl. 2.

29. *See Bond*, 134 S. Ct. at 2100 (Scalia, J., concurring).

30. *Id.*

31. *Id.* at 2101. Interestingly, Justice Scalia did not appear to have such concerns regarding self-executing treaties, which are directly enforceable in the courts without implementing legislation. *Id.* at 2101-02.

32. *See* Michael D. Ramsey, *Congress' Limited Power To Enforce Treaties*, 90 NOTRE DAME L. REV. 1539 (2015); *see also* Vázquez, *supra* note 2, at 953-63 (responding to Rosenkranz, *supra* note 2).

33. Indeed, the additional Article I basis for Congress's power under the Offenses Clause could itself be supplemented by the Necessary and Proper Clause, as the Court has regularly done with respect to other Article I powers. *See, e.g.*, Sabri v. United States, 541 U.S. 600, 605 (2004) ("Congress has authority under the Spending Clause to appropriate federal moneys to promote the general welfare, Art. I, § 8, cl. 1, and it has corresponding authority under the Necessary and Proper Clause, Art. I, § 8, cl. 18, to see to it that taxpayer dollars appropriated under that power are in fact spent for the general welfare . . . . "). For further discussion, see *infra* notes 454-456 and accompanying text.

34. *Bond*, 134 S. Ct. at 2103 (Thomas, J., concurring); *see also id.* at 2111 (Alito, J., concurring) ("[T]he treaty power is limited to agreements that address matters of legitimate international concern.").

proper subjects of negotiation with foreign governments."[35] As Oona Hathaway and her co-authors have shown, the drafters of the Constitution understood the need for flexibility and deliberately refrained from imposing specific subject-matter constraints on the treaty power; they also intended the political branches, not the courts, to police the appropriate subject matter for treaties.[36] To the extent that subject-matter limitations on treaties exist, however, they would also apply to our reading of the Offenses Clause. Congress has no power to define and punish offenses under a treaty unless the treaty is valid in the first place.

Our argument has implications for a range of other contemporary contexts—from piracy to international counter-narcotics activity—in which Congress has adopted penal legislation to implement treaties.[37] As with other enumerated powers, Congress enjoys some discretion in determining how to enforce international law by defining and punishing offenses against treaties. We identify four categories of treaties that Congress may implement under the Offenses Clause: (1) treaties that operate directly on individuals to prohibit conduct; (2) treaties that require domestic legislation punishing certain conduct, such as the Convention Against Torture and the Chemical Weapons Convention; (3) treaties that clearly proscribe certain conduct, without expressly mandating punishment for its breach, such as the Vienna Convention on Consular Relations; and (4) treaties that authorize, but do not require, punishment of certain conduct, such as the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.

I. THE ORIGINAL UNDERSTANDING OF THE OFFENSES CLAUSE

Modern international law is typically divided into two categories—international agreements and customary international law.[38] Modern scholars have tended to impose the same two-part division on historical sources, assuming that since "treaties" are clearly international agreements, the "law of nations" must refer to the antecedents of modern customary international law,

35. Ross v. McIntyre, 140 U.S. 453, 463 (1891).

36. Oona A. Hathaway et al., *The Treaty Power: Its History, Scope, and Limits*, 98 CORNELL L. REV. 239 (2013).

37. *See generally infra* Part IV.

38. *See* Statute of the International Court of Justice art. 38(1), *annexed to* U.N. Charter (referring to "international conventions" and "international custom"); 1 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102 (1987) (referring to "[c]ustomary international law" and "[i]nternational agreements"). These sources also recognize a third category of "[g]eneral principles common to the major legal systems." *Id.* § 102 (1987). General principles are a supplementary or "secondary source" of legal rules "resorted to for developing international law interstitially in special circumstances." *Id.* § 102 cmt. l.

which today "results from a general and consistent practice of states followed by them from a sense of legal obligation."[39] As Andrew Kent representatively puts it, "Today's customary international law is the closest modern analogue of the eighteenth-century 'law of nations.'"[40] This assumption has, in turn, been superimposed on the Offenses Clause, for which scholars likewise have typically assumed that the Constitution's reference to the "law of nations" must correspond to customary international law.[41] Scholars have noted that the Constitution addresses "treaties," "agreements," and "compacts" elsewhere, and they have assumed that the Constitution's treatment of codified international law is limited to those provisions. Thus, for example, Eugene Kontorovich writes: "The Treaty and Offenses Clauses separately address the two primary sources of international law. This dichotomy suggests that the Offenses Clause becomes relevant only when the United States is not party to a treaty that would authorize the relevant legislation."[42] The common assumption in the academy that the Offenses Clause is limited to customary international law has been bolstered by the fact that the founding generation sometimes *did* use the phrase "law of nations" when referring to unwritten international law, notably in the Alien Tort Statute, which has been the focus of most recent academic scholarship regarding the "law of nations."[43]

We challenge the conventional wisdom by placing the Offenses Clause's reference to the "law of nations" into a broader context. Drawing on the dominant international law writers familiar to the Framers, as well as the writings of the Framers themselves, we show that the eighteenth-century conception of the "law of nations" was significantly different from the modern concept of customary international law and encompassed as many as four different categories of international law, including treaties.[44] The broader understanding of the "law of nations" is also consistent with the purposes of the Offenses Clause,

39. 1 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102(2) (1987).

40. Kent, *supra* note 11, at 845.

41. *See supra* note 11. A notable exception is Louis Henkin, who noted that the Offenses Clause would allow Congress to punish individual violations of "international law or a treaty of the United States," HENKIN, *supra* note 11, at 69, and "to enforce by criminal penalties any new international obligations the United States might accept," *id.* at 70. Henkin did not elaborate on this conclusion.

42. Eugene Kontorovich, *Discretion, Delegation, and Defining in the Constitution's Law of Nations Clause*, 106 NW. U. L. REV. 1675, 1689 n.58 (2012); *see also* Stephens, *supra* note 11, at 482 ("Given that treaties are otherwise covered by the Constitution, it is likely that the Offenses Clause primarily addresses violations of customary international law.").

43. *See supra* note 12 and accompanying text.

44. For an overview, see William S. Dodge, *Withdrawing from Customary International Law: Some Lessons from History*, 120 YALE L.J. ONLINE 169, 171-75 (2010), http://www.yalelawjournal.org/forum/withdrawing-from-customary-international-law-some-lessons-from-history [http://perma.cc/A4J2-E9EL].

which was a direct response to one of the significant deficiencies of the Articles of Confederation—the States' unwillingness to discharge the Nation's international commitments, including its commitments under treaties. The Offenses Clause grew out of a 1781 Resolution of the Continental Congress recommending that the States provide "punishment" for "offences against the law of nations," including specifically "infractions of treaties."[45] The specific history of the Clause's drafting and ratification also supports its application to treaties. We conclude that the most accurate modern translation of the "law of nations" as used in the Offenses Clause is not "customary international law" but rather "international law," which today includes both customary international law and treaties.

A. The Meaning of the "Law of Nations"

At the Founding, the "law of nations" was generally used not to refer narrowly to unwritten international law, but to refer more broadly to all of international law. The two authorities that the founding generation consulted most frequently—Emmerich de Vattel's *Law of Nations* and William Blackstone's *Commentaries on the Laws of England*—both used "law of nations" in this comprehensive sense. Vattel divided the law of nations into four categories: (1) the necessary law of nations; (2) the voluntary law of nations; (3) the conventional law of nations; and (4) the customary law of nations.[46] The "necessary law of nations" was based directly on natural law. It was immutable and binding, but only internally upon the conscience of the sovereign.[47] The "voluntary law of nations" was also based on natural law, but it created external rights and duties. It was also not "voluntary" in the modern sense of the word, for nations were obligated to consent to it.[48] For Vattel, the voluntary law of nations was the most important category, and most of the rules discussed in his treatise fell within this category.[49] The "customary law of nations" was based on state practice, like today's customary international law, but with the important difference that nations were free to withdraw from particular rules.[50]

45. 21 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 1136-37 (Gaillard Hunt ed., 1912).

46. *See* David L. Sloss, Michael D. Ramsey & William S. Dodge, *International Law in the Supreme Court to 1860*, *in* INTERNATIONAL LAW IN THE U.S. SUPREME COURT: CONTINUITY AND CHANGE 7, 8 (David L. Sloss, Michael D. Ramsey & William S. Dodge eds., 2011).

47. *See* VATTEL, *supra* note 18, Intro. §§ 7-9.

48. *See id.*, Intro. §§ 21, 28; *id.*, Book III §§ 188-92.

49. *See* Dodge, *supra* note 44, at 173-75.

50. *See* VATTEL, *supra* note 18, Intro. §§ 25-26; *id.*, Book IV § 106; *see also* Curtis A. Bradley & Mitu Gulati, *Withdrawing from International Custom*, 120 YALE L.J. 202, 216-18 (2010) (dis-

Finally, there was the "conventional law of nations," based on express consent and consisting of treaties. Vattel explained:

> The various agreements which Nations may enter into give rise to a new division of the Law of Nations which is called *conventional*, or the law *of treaties*. As it is clear that a treaty binds only the contracting parties *the conventional Law of Nations* is not universal, but restricted in character.[51]

Elsewhere, Vattel observed that "States, like individuals, can acquire rights and contract obligations by express promises, by compacts and by treaties, from which there results a *conventional* Law of Nations particular to the contracting parties."[52] Another prominent eighteenth-century writer, Jean-Jacques Burlamaqui, likewise maintained that "[t]he subject of public treaties constitutes a considerable part of the law of nations."[53]

William Blackstone also included treaties within his definition of the law of nations. "The law of nations," he wrote, "must necessarily result from those principles of natural justice, in which all the learned of every nation agree: *or they depend upon mutual compacts or treaties between the respective communities*."[54] In short, as used by Vattel, Blackstone, and others, the concept of the "law of nations" had a meaning closer to the modern concept of "international law," which includes both treaties and custom, than to "customary international law," which constituted only one part of the law of nations.

Individual members of the founding generation shared this approach and repeatedly referred to the law of nations as including treaties in the years both before and after the 1787 Convention. Representing the British defendants in the famous 1784 case of *Rutgers v. Waddington*, Alexander Hamilton expressly

cussing Vattel's view that nations could withdraw from rules of the customary law of nations).

51. VATTEL, *supra* note 18, Intro. § 24.

52. *Id.*, Preface, at 11a; *see also id.*, Book I § 93 ("Hence this right [to carry on commerce] is only acquired by treaties and belongs to that division of the Law of Nations called *conventional*."); *id.*, Book III § 192 ("If such an agreement existed, it would come under the conventional Law of Nations, which is a matter of historical proof, not of reasoning, and is based, not upon principles, but upon facts.").

53. 2 J.J. BURLAMAQUI, THE PRINCIPLES OF NATURAL AND POLITIC LAW 216 (Thomas Nugent trans., 5th ed. 1807); *see also* 1 *id.* at 138 ("These remarks give us room to conclude, that the whole might perhaps be reconciled, by distinguishing two species of laws of nations. There is certainly an universal, necessary, and self-obligatory law of nations, which differs in nothing from the law of nature, and is consequently immutable, insomuch that the people or sovereigns cannot dispense with it, even by common consent, without transgressing their duty. There is besides another law of nations, which we may call arbitrary and free, as founded only on an *express or tacit convention* . . . . " (emphasis added)).

54. 4 WILLIAM BLACKSTONE, COMMENTARIES *66-67 (emphasis added).

invoked Vattel, explaining to the court that "[t]he positive or external law of nations [is] subdivided into the *voluntary*[,] the *conventional*[,] and the *customary*."[55] James Iredell similarly relied on Vattel in preparing a 1791 memorandum commenting on Attorney General Randolph's report on the judiciary.[56] "The Conventional Law of Nations," Iredell explained, "is that part of the Law of Nations arising from Treaties; which when made according to the constitutional power of the respective Countries is undoubtedly binding on the People of both."[57] And Thomas Jefferson, giving his opinion as Secretary of State in 1793 on whether the United States could renounce its treaties with France—an opinion that relied heavily on Vattel, as well as other writers—observed: "The Law of nations, by which this question is to be determined, is composed of three branches. 1. The Moral law of our nature. 2. The Usages of nations. 3. Their special Conventions."[58]

James Wilson served at the Constitutional Convention on the Committee of Detail, which produced the Offenses Clause and took an active role in the debates over its language during August and September 1787.[59] In lectures on law delivered in 1790 and 1791, shortly after ratification and while Wilson was a Justice of the Supreme Court, he explained that "*[n]ational treaties are laws of nations*, obligatory solely by consent,"[60] and, again, that "there is one part of the law of nations . . . which is founded on the principle of consent: of this part, publick compacts and customs received and observed by civilized states form the most considerable articles."[61] Instructing the grand jury in *Henfield's Case* in 1793, Justice Wilson stated: "[T]here are laws of nations which are founded altogether on human consent; of this kind are national treaties."[62]

55. Brief No. 2, Rutgers v. Waddington (N.Y. City Mayor's Ct. 1784), *reprinted in* 1 THE LAW PRACTICE OF ALEXANDER HAMILTON: DOCUMENTS AND COMMENTARY 341 (Julius Goebel Jr. ed., 1964).

56. *See* James Iredell, *Memorandum on Attorney General Edmund Randolph's Report on the Judiciary* (1791), *in* 4 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800, at 541 (Maeva Marcus ed., 1992).

57. *Id.* at 542 (emphasis omitted).

58. Thomas Jefferson, *Opinion on French Treaties* (Apr. 28, 1793), *in* 6 THE WRITINGS OF THOMAS JEFFERSON 219, 220 (Paul Leicester Ford ed., 1895).

59. *See infra* notes 133-160 and accompanying text.

60. James Wilson, *Lectures on Law Delivered in the College of Philadelphia in the Years 1790 and 1791*, *in* 1 THE WORKS OF JAMES WILSON 150 (Robert Green McCloskey ed., 1967) (emphasis added).

61. *Id.* at 165. Another famous law lecturer in the 1790s, James Kent, similarly noted that nations "may give and receive particular priviledges, and thereby create a new set of rights and duties, which form the *conventional* law of nations." JAMES KENT, DISSERTATIONS: BEING THE PRELIMINARY PART OF A COURSE OF LAW LECTURES 60 (1795).

62. Henfield's Case (No. 6,360), 11 F. Cas. 1099, 1107 (C.C.D. Pa. 1793); *see also* James Wilson's Charge to the Grand Jury of the Circuit Court for the District of Virginia, May 23, 1791, *in* 2

Justice Samuel Chase's 1796 opinion in *Ware v. Hylton*[63] captured the understanding of the founding generation that treaties were part of the law of nations:

> The law of nations may be considered of three kinds, to wit, *general*, *conventional*, or *customary*. The *first* is *universal*, or established by the general consent of mankind, and binds *all nations*. The *second* is founded on *express* consent, and is not universal, and only binds those nations that have assented to it. The *third* is founded on TACIT consent; and is only obligatory on those nations, who have adopted it.[64]

Indeed, the Supreme Court's use of the phrase "conventional law of nations" continued into the nineteenth century.[65] Leading nineteenth-century treatise writers, including Kent, Wheaton, and Halleck, followed suit.[66] So the general

THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800: THE JUSTICES ON CIRCUIT 1790-1794, at 179 (Maeva Marcus ed., 1988) ("The law of nations has its foundation in the principles of *natural law*, applied to states; and in *voluntary institutions*, arising from custom or convention.").

63. 3 U.S. (3 Dall.) 199 (1796).

64. *Id.* at 227 (Chase, J.).

65. *See* The Estrella, 17 U.S. (4 Wheat.) 298, 307 (1819) (noting that the rule whereby the courts of the captor's nation have exclusive jurisdiction over questions of prize is "well established by the customary and conventional law of nations"); The Commercen, 14 U.S. (1 Wheat.) 382, 389 n.i (1816) (Story, J.) ("The modern conventional law of nations has generally excluded provisions and naval stores from the list of contraband . . . ."); Thirty Hogsheads of Sugar v. Boyle, 13 U.S. (9 Cranch) 191, 198 (1815) (Marshall, C.J.) ("The law of nations is . . . in part unwritten, and in part conventional."); The Venus, 12 U.S. (8 Cranch) 253, 283 (1814) ("The conventional law of nations is in conformity with those principles. It is not uncommon to stipulate in treaties that the subjects of each shall be allowed to remove with their property, or to remain unmolested."); *see also* United States v. The La Jeune Eugenie, 26 F. Cas. 832, 846 (C.C.D. Mass. 1822) (No. 15,551) (Story, J.) ("Now the law of nations may be deduced, first, from the general principles of right and justice, applied to the concerns of individuals, and thence to the relations and duties of nations; or, secondly, in things indifferent or questionable, from the customary observances and recognitions of civilized nations; or, lastly, from the conventional or positive law, that regulates the intercourse between states.").

66. *See, e.g.*, H.W. HALLECK, INTERNATIONAL LAW 46 (1861) (noting that "*the positive law of nations* . . . has been sub-divided into the *conventional* law of nations and the *customary* law of nations"); *id.* at 47 ("*The Conventional Law of Nations* results from the stipulations of treaties, and consists of the rules of conduct agreed upon by the contracting parties."); *id.* at 48 ("[T]he stipulations of treaties between highly civilized nations form an important branch of the general law of nations."); 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 3 (2d ed. 1832) ("The law of nations is a complex system, composed of various ingredients. It consists of general principles of right and justice, equally suitable to the government of individuals in a state of natural equality, and to the relation and conduct of nations; of a collection of usages and customs, the growth of civilization and commerce; and of a code of conventional or positive law."); 1 HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW 56 (1836) ("The

understanding of the "law of nations," from at least the publication of Vattel's *The Law of Nations* in 1758 until well into the nineteenth century, embraced all forms of international law, including treaties.

To be sure, members of the founding generation occasionally used "law of nations" to refer to the unwritten law of nations in contradistinction to treaties, when both terms were employed together. For example, in his widely circulated pamphlet *Vices of the Political System of the Government of the United States*, James Madison referred to "violations of the laws of nations and of treaties,"[67] while Edmund Randolph opened the Constitutional Convention with a speech in which he complained that under the Articles of Confederation, Congress "could not cause infractions of treaties or of the law of nations, to be punished."[68] Similarly, the Alien Tort Statute refers separately to both "the law of nations [and] a treaty of the United States."[69] This usage seems to have been common when people referred to treaties expressly and needed a catch-all phrase to refer to the other categories of the law of nations. "Customary law of nations" would not do, because the unwritten law of nations included both the "customary" and the "voluntary" law of nations.[70] So they used the general phrase "law of nations," which would encompass both the "customary" and the "voluntary" law of nations, despite this phrase's redundancy with respect to the "conventional" law of nations – that is, treaties.

There is nothing particularly surprising about this variation in usage. "International law" is sometimes used today in the same way to refer to customary international law in contrast to treaties, despite the fact that "international law" plainly includes both customary international law and treaties.[71] Such instances from the Founding era in no way suggest that the "law of nations" as used in the Offenses Clause excluded treaties. The available evidence suggests that both Madison[72] and Randolph[73] intended the Clause to include treaties, and

Conventional Law of Nations [is] derived from the express consent of nations, as evidenced in treaties and other international compacts.").

67. James Madison, *Vices of the Political System of Government in the United States* (1787), *in* 9 PAPERS OF JAMES MADISON 348-49 (William Hutchinson et al. eds., 1962-1991).

68. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 19 (Max Farrand ed., 1911) (Madison's notes of Randolph's speech) [hereinafter FARRAND'S RECORDS].

69. Judiciary Act, ch. 20, § 9, 1 Stat. 73, 76-77 (1789), *codified at* 28 U.S.C. § 1350 (2012); *see supra* notes 12-17 and accompanying text.

70. *See supra* notes 46-50 and accompanying text.

71. *See supra* note 17 and accompanying text.

72. *See infra* notes 124-126 and accompanying text.

73. *See infra* notes 104-115 and accompanying text.

the ATS (with its express reference to treaties) is commonly thought to rest at least in part on Congress's offenses power.[74]

In sum, the general understanding of the "law of nations" at the Constitution's adoption was that it included all international law—the "voluntary," the "customary," and the "conventional," which is to say treaties. The fact that the phrase was sometimes used more narrowly to refer to the unwritten law of nations, when it was expressly coupled with "treaties," at best suggests a potential ambiguity. But the Offenses Clause does not refer separately to the law of nations and treaties. Moreover, any ambiguity is resolved by the context in which the Offenses Clause was adopted, by the history of its drafting, and by the arguments made for ratification.

B. The Historical Context of the Offenses Clause

Compliance with the law of nations—including compliance with treaties—was a matter of acute concern under the Articles of Confederation. From the moment of independence, as John Jay would later write for the Supreme Court, "the *United States* had, by taking a place among the nations of the earth, become amenable to the laws of nations; and it was their interest as well as their duty to provide, that those laws should be respected and obeyed."[75] Violations of the law of nations were considered a just cause for war,[76] a point that Jay would note specifically in *Federalist No. 3*.[77] The Framers genuinely feared that "violations of the law of nations & Treaties . . . must involve us in the calamities of foreign wars."[78] Finally, "[n]ational honor was at stake as well, an idea the Revolutionary generation took quite seriously."[79]

On June 12, 1776, even before the Declaration of Independence was signed, the Continental Congress appointed a "committee to prepare a plan of treaties to be proposed to foreign powers."[80] That committee reported a draft, which

74. *See infra* notes 191-197 and accompanying text.

75. Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 474 (1793) (Jay, C.J.).

76. 4 BLACKSTONE, *supra* note 54, at *68 (noting that, in case of offenses against the law of nations, "recourse can only be had to war"); VATTEL, *supra* note 18, Book II §§ 51-52 (discussing the right to use force for redress or punishment); *id.*, Book III § 26 ("Whatever constitutes an attack upon these rights is an *injury* and a just cause of war.").

77. THE FEDERALIST NO. 3, at 44 (John Jay) (Clinton Rossiter ed., 1961) ("[E]ither designed or accidental violations of treaties and of the laws of nations afford *just* causes of war . . . . ").

78. 1 FARRAND'S RECORDS, *supra* note 68, at 316 (James Madison's speech on the Patterson Plan).

79. Sloss, Ramsey & Dodge, *supra* note 46, at 7.

80. 5 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, *supra* note 45, at 433 (Worthington Chauncey Ford ed., 1906).

was discussed and approved on July 18.[81] On February 6, 1778, the United States entered a Treaty of Alliance[82] and a Treaty of Amity and Commerce[83] with France. These treaties were critical in helping the United States obtain the military support necessary to secure its independence by force of arms. Over the next decade, the United States entered treaties on the same basic model with the Netherlands,[84] Sweden,[85] Prussia,[86] and Morocco.[87] In 1783, the United States also concluded the Definitive Treaty of Peace with Great Britain, acknowledging the United States's independence.[88] The United States's inability to secure compliance with its treaty obligations under the Articles of Confederation, however, soon became apparent. In 1786, Foreign Secretary John Jay prepared a long report for the Continental Congress detailing treaty violations by the several States.[89] State violations of the Treaty of Peace with Britain—particularly Articles IV and V, dealing with debts and confiscated properties—were of particular concern because they gave Britain an excuse not to evacuate military posts on U.S. soil.[90]

81. *See id.* at 576-89. The final, edited version of the proposed treaty appears in the Journal for September 17, 1776. *See id.* at 768-79.

82. Treaty of Alliance Between the United States of America and His Most Christian Majesty, U.S.-France, Feb. 6, 1778, 8 Stat. 6.

83. Treaty of Amity and Commerce Between the United States of America and His Most Christian Majesty, U.S.-Fr., Feb. 6, 1778, 8 Stat. 12 [hereinafter Treaty of Amity with France].

84. Treaty of Amity and Commerce Between Their High Mightinesses the States General of the United Netherlands, and the United States of America, U.S.-Neth., Oct. 8, 1792, 8 Stat. 32 [hereinafter Treaty of Amity with the Netherlands].

85. Treaty of Amity and Commerce Concluded Between His Majesty the King of Sweden and the United States of North-America, U.S.-Sweden, Apr. 3, 1783, 8 Stat. 60 [hereinafter Treaty of Amity with Sweden].

86. Treaty of Amity and Commerce Between His Majesty the King of Prussia and the United States of America, U.S.-Prussia, July 1785, 8 Stat. 84 [hereinafter Treaty of Amity with Prussia].

87. Treaty of Peace and Friendship Between the United States of America, and His Imperial Majesty the Emperor of Morocco, U.S.-Morocco, Jan. 1787, 8 Stat. 100.

88. Definitive Treaty of Peace Between the United States and His Britannic Majesty, U.S.-Gr. Brit., Sept. 3, 1783, 8 Stat. 80 [hereinafter Treaty of Peace with Britain].

89. 31 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, *supra* note 45, at 781-874 (John C. Fitzpatrick ed., 1934).

90. During the Revolutionary War, for example, several states had passed laws preventing British creditors from collecting their debts. These state laws obstructed U.S. compliance with the 1783 Treaty, under which both countries guaranteed that lawful contracted debts would be paid to creditors on both sides. *See* Treaty of Peace with Britain, *supra* note 88, arts. IV-V, 8 Stat. at 82; AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 47 (2005). Britain responded by refusing to relinquish certain territorial outposts, and other foreign states declined to enter into treaties with the United States. The Continental Congress was unable to do anything but adopt resolutions urging the states to comply. SAMUEL B. CRANDALL, TREA-

While state treaty violations attracted the most attention before and at the Philadelphia Convention, treaty violations by individuals were also of concern. The 1778 Treaty of Amity with France contained a number of provisions proscribing individual conduct and requiring punishment for infractions, some of which were repeated in subsequent treaties with other nations. Article IX provided that the inhabitants of each party "shall abstain and forbear to fish in all places possessed, or which shall be possessed by the other party" and that ships "found fishing contrary to the tenor of this treaty . . . shall be confiscated."[91] Article XV stated that privateers of either party "shall be forbid doing any injury or damage to the other side; and if they act to the contrary they shall be punished, and shall moreover be bound to make satisfaction for all matter of damage."[92] Article XXI prohibited the subjects of France and people and inhabitants of the United States from taking commissions or letters of marque to act as privateers against the other side, providing specifically that "if any person of either nation shall take such commissions or letters of marque, he shall be punished as a pirate."[93] And Article XX guaranteed safe conduct for merchants of the other nation and their goods in case war broke out, supplementing the unwritten law of nations with respect to safe-conducts.[94]

TIES: THEIR MAKING AND ENFORCEMENT 37-38 (2d ed. 1916); *see also* FREDERICK W. MARKS III, INDEPENDENCE ON TRIAL: FOREIGN AFFAIRS AND THE MAKING OF THE CONSTITUTION 3-10 (1986); Sloss, Ramsey & Dodge, *supra* note 46, at 9-12.

Andrew Kent has argued that the Offenses Clause gave Congress authority to punish state violations of the law of nations as well as those by individuals. *See* Kent, *supra* note 11. If correct, Kent's thesis would support our argument, because the state violations of the law of nations about which the Framers were most concerned were state violations of treaties.

91. Treaty of Amity with France, *supra* note 83, art. IX, 8 Stat. at 16.

92. *Id.*, art. XV, 8 Stat. at 22; *see also* Treaty of Amity with the Netherlands, *supra* note 84, art. XIII, 8 Stat. at 40; Treaty of Amity with Sweden, *supra* note 85, art. XV, 8 Stat. at 68-70.

93. Treaty of Amity with France, *supra* note 83, art. XXI, 8 Stat. at 24; *see also* Treaty of Amity with the Netherlands, *supra* note 84, art. XIX, 8 Stat. at 44; Treaty of Amity with Sweden, *supra* note 85, art. XXIII, 8 Stat. at 74; Treaty of Amity with Prussia, *supra* note 86, art. XX, 8 Stat. at 94. The proposed treaty approved by the Continental Congress in 1776 would additionally have obligated both parties to "endeavour by all Means, that all Pirates, and Sea Robbers, and their Partners, Sharers, and Abettors be found out, apprehended, and suffer condign Punishment." 5 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 45, at 769 (Worthington Chauncey Ford ed., 1906). This provision, however, was not included in any of the United States's early treaties.

94. Treaty of Amity with France, *supra* note 83, art. XX, 8 Stat. at 24; *see also* Treaty of Amity with the Netherlands, *supra* note 84, art. XVIII, 8 Stat. at 42; Treaty of Amity with Sweden, *supra* note 85, art. XXII, 8 Stat. at 72-74; Treaty of Amity with Prussia, *supra* note 86, art. XXIII, 8 Stat. at 94-96. A number of other treaty provisions gave rise to implied safe-conducts. *See* Lee, *supra* note 12, at 874-79. Under the law of nations at the time, safe-conducts obligated a state "to prevent injury to the person or property of an alien within its territory and also abroad where it had a military presence," to punish the injurer, and to require the injurer to pay damages. *Id.* at 873.

There were also neutrality provisions in these treaties providing for "a firm, inviolable and universal peace" between the parties and their inhabitants.[95] The Peace Treaty with Great Britain similarly provided that "[t]here shall be a firm and perpetual peace between his Britannic Majesty and the said States, and between the subjects of the one and the citizens of the other."[96] During the Neutrality Crisis in 1793, individuals were prosecuted by the federal government for violating the neutrality provisions of the treaties with Britain, the Netherlands, and Prussia if they aided the French, with whom these powers were at war.[97]

The Continental Congress soon expressed concern about individual violations of international law in a 1781 Resolution[98] that is properly viewed as a forerunner of the Constitution's Offenses Clause.[99] The Resolution expressly identified "infractions of *treaties and conventions* to which the United States are a party" as "*offences against the law of nations*"[100] and recommended that the several States "provide expeditious, exemplary and adequate punishment."[101] The Articles of Confederation had granted Congress the power of "appointing courts for the trial of piracies and felonies committed on the high seas,"[102] but they otherwise contained no provision allowing Congress to define and punish offenses against the law of nations, whether unwritten or conventional. This lack of legislative authority meant that the United States was largely dependent upon the several States for adherence to its international obligations. But a committee consisting of Edmund Randolph, James Duane, and John Witherspoon reported to Congress "[t]hat the scheme of criminal justice in the several states does not sufficiently comprehend offenses against the law of nations."[103]

The 1781 Resolution, which Randolph drafted,[104] therefore provided as follows:

95. Treaty of Amity with the Netherlands, *supra* note 84, art. I, 8 Stat. at 32; Treaty of Amity with Prussia, *supra* note 86, art. I, 8 Stat. at 84; Treaty of Amity with Sweden, *supra* note 85, art. I, 8 Stat. at 62; Treaty of Amity with France, *supra* note 83, art. I, 8 Stat. at 14.

96. Treaty of Peace with Britain, *supra* note 88, art. VII, 8 Stat. at 83.

97. *See infra* notes 207-219 and accompanying text.

98. 21 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, *supra* note 45, at 1136-37.

99. *See infra* note 114 and accompanying text.

100. 21 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, *supra* note 45, at 1137 (emphases added).

101. *Id.* at 1136.

102. ARTICLES OF CONFEDERATION of 1781, art. IX, para. 1.

103. 21 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, *supra* note 45, at 1136.

104. *Id.* at 1137 n.1 (noting that the resolution is "in the writing of Edmund Randolph").

> *Resolved*, That it be recommended to the legislatures of the several states to provide expeditious, exemplary and adequate punishment:
>
> First. For the violation of safe conducts or passports, expressly granted under the authority of Congress to the subjects of a foreign power in time of war:
>
> Secondly. For the commission of acts of hostility against such as are in amity, league or truce with the United States, or who are within the same, under a general implied safe conduct:
>
> Thirdly. For the infractions of the immunities of ambassadors and other public ministers, authorised and received as such by the United States in Congress assembled . . . :
>
> Fourthly. For infractions of treaties and conventions to which the United States are a party.
>
> The preceding being only those offences against the law of nations which are most obvious, and public faith and safety requiring that punishment should be co-extensive with such crimes:
>
> *Resolved*, That it be farther recommended to the several states to erect a tribunal in each State, or to vest one already existing with power to decide on offences against the law of nations, not contained in the foregoing enumeration, under convenient restrictions.
>
> *Resolved*, That it be farther recommended to authorise suits to be instituted for damages by the party injured, and for compensation to the United States for damage sustained by them from an injury done to a foreign power by a citizen.[105]

The 1781 Resolution demonstrates that Congress was concerned about individual treaty violations and that it understood such violations to be "offences against the law of nations."[106] The Resolution identifies as included in the "law of nations" three specific violations that were of particular concern (safe-conducts, breaches of neutrality, and immunities of ambassadors and diplomats) as well as general "infractions of treaties."[107] Notably, the Resolution twice refers expressly to "infractions of treaties" as "offences against the law of nations." First, in the sentence immediately following the reference to "infrac-

105. *Id.* at 1136-37.

106. *Id.* at 1137.

107. *Id.*

tions of treaties," Congress describes "[t]he preceding"—that is, violations of safe-conducts, breaches of neutrality, infractions of the rights of ambassadors, and *violations of treaties*—as "being only those offences against the law of nations which are most obvious."[108] Second, Congress recommends that the States appoint tribunals "to decide on offences against the law of nations, not contained in the foregoing enumeration."[109] In other words, "infractions of treaties" were understood to be "offences against the law of nations" that were "contained in the foregoing enumeration."[110]

Apart from the general "infractions of treaties" provision, the Resolution's discussion of specific violations indicates that at least some of these also covered rights established by treaty. The Resolution urges punishment for violations of safe-conducts "*expressly granted under the authority of Congress*," and for breaches of neutrality against states "*in amity, league or truce with the United States*."[111] The United States routinely granted express safe-conducts and entered states of amity with other countries by treaty. Indeed, by the time of the 1781 Resolution, the Treaty of Amity with France expressly guaranteed safe conduct for merchants in case of war[112] and pledged peace between the two countries and their inhabitants,[113] thereby adding a layer of treaty protection to the unwritten law of nations. The Resolution made no attempt to distinguish violations of safe-conducts and breaches of neutrality under treaties from the unwritten law of nations.

The 1781 Resolution's reference to treaties is also significant because that resolution—which calls for "punishment" of "offences against the law of nations"—is properly viewed as an antecedent of the Constitution's Offenses Clause itself.[114] The Clause was intended to address the same failure of the States to punish violations of international law identified in the Resolution, and the Resolution's author, Edmund Randolph, would play a key role in drafting the Offenses Clause.[115] The fact that this forerunner to the Offenses

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* at 1136.

112. *See supra* note 94 and accompanying text.

113. *See supra* note 95 and accompanying text.

114. *See* Kontorovich, *supra* note 42, at 1694 (noting that "the 1781 report clearly foreshadowed the Constitution's Offenses Clause"); Siegal, *supra* note 11, at 874 (discussing the 1781 Resolution); Stephens, *supra* note 11, at 469 (noting that the 1781 Resolution "presaged the wording of the Offenses Clause"). The 1781 Resolution is also a forerunner of the Alien Tort Statute, 28 U.S.C. § 1350 (2012). *See* Casto, *supra* note 12, at 490-91; Dodge, *supra* note 12, at 226-29.

115. *See infra* note 131 and accompanying text.

Clause expressly identified treaty violations as offenses against the law of nations, and drew no distinction between treaty violations and violations of unwritten law, strongly suggests that the Offenses Clause reaches such violations.

Only Connecticut and South Carolina passed statutes responding to the 1781 Resolution.[116] Connecticut's 1782 statute punished violations of safe-conducts, breaches of neutrality, and infractions of the immunities of ambassadors—thus addressing violations of existing treaties to the extent such treaties granted safe-conducts or promised peace[117]—but it did not implement the 1781 Resolution's recommendation to punish infractions of treaties more generally.[118] South Carolina's 1785 law was limited to protecting the rights of ambassadors.[119] The latter may have been motivated by the famous Marbois Incident during the summer of 1784, in which a French Consul-General was assaulted on the streets of Philadelphia.[120] Because Pennsylvania had no applicable statute, Marbois's assailant was prosecuted at common law and convicted in Pennsylvania state court for "an infraction of the law of Nations."[121] Faced with inaction on the part of the states, the Continental Congress in 1785 directed John Jay, the U.S. Secretary for Foreign Affairs, to draft "an act to be recommended to the legislatures of the respective states, for punishing the infractions of the laws of nations, and more especially for securing the privileges and immunities of public Ministers from foreign powers,"[122] although there is no record of Jay's ever drafting such an act.[123] The dismal record of the states in punishing violations of the law of nations in general—and treaties in particular—provided a powerful motivation for the Constitutional Convention to vest such power in the national government.

116. *See* Kent, *supra* note 11, at 881 n.180.

117. *See supra* notes 94-95 and accompanying text.

118. *See* An Act for Securing to Foreigners in This State, Their Rights, According to the Laws of Nations, and To Prevent Any Infractions of Said Laws, ACTS & L. ST. CONN. IN AM. 82, 82-83 (1784).

119. An Act for Preserving the Priviledges of Public Ministers of Foreign Princes and States, ACTS, ORDINANCES & RESOLVES GEN. ASSEMBLY ST. S.C. (1785).

120. For discussions of the Marbois Incident, see Casto, *supra* note 12, at 491-94; and Dodge, *supra* note 12, at 229-30.

121. Respublica v. De Longchamps, 1 U.S. (1 Dall.) 111, 116 (Pa. Oyer & Terminer 1784).

122. 29 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, *supra* note 45, at 655 (John C. Fitzpatrick ed., 1933).

123. *See* Casto, *supra* note 12, at 493 n.144.

C. *Drafting the Offenses Clause*

Treaty violations and other offenses against the law of nations were very much on the minds of the delegates who gathered in Philadelphia during the summer of 1787. During the previous winter, James Madison had written *Vices of the Political System of the United States*, which was widely circulated.[124] Among these vices, Madison listed "[v]iolations of the law of nations and of treaties."[125] The rest of Madison's discussion shows that he viewed treaties as an integral part of the law of nations. He complained specifically that "[t]he Treaty of peace – the treaty with France – the treaty with Holland have each been violated" and added that "[t]he causes of these irregularities must necessarily produce frequent violations of the law of nations *in other respects*."[126] In other words, violations of the treaties with Britain, France, and Holland were troubling violations of the law of nations, but they were not the only violations of the law of nations that were cause for concern.

Virginia Governor Edmund Randolph opened the Constitutional Convention with a speech in which, according to Madison's report, he complained that under the Articles of Confederation, Congress "could not cause infractions of treaties or of the law of nations, to be punished: that particular states might by their conduct provoke war without controul."[127] Like Madison, Randolph distinguished treaties from the law of nations in this instance, but elsewhere he understood the violation of a treaty to be an offense against the law of nations. It was Randolph, after all, who drafted the 1781 Resolution for the Continental Congress that expressly listed "infractions of treaties and conventions to which the United States are a party" as "offences against the law of nations."[128]

The original plans submitted to the Convention by the Virginia delegation, by delegate Charles Pinckney, and by delegate William Paterson on behalf of New Jersey, each proposed to address violations of the law of nations not

124. Madison, *supra* note 67.

125. *Id.* at 349. As explained above, writers who wished to emphasize treaties sometimes used "law of nations" as a catch-all for the unwritten categories of international law. *See supra* notes 67-70 and accompanying text.

126. *Id.* (emphasis added).

127. 1 FARRAND'S RECORDS, *supra* note 68, at 19 (Madison's notes of Randolph's speech); *see also id.* at 24-25 (McHenry's notes of Randolph's speech) ("If a State acts against a foreign power contrary to the laws of nations or violates a treaty, it cannot punish that State, or compel its obedience to the treaty. It can only leave the offending State to the operations of the offended power. It therefore cannot prevent a war. If the rights of an ambassador be invaded by any citizen it is only in a few States that any laws exist to punish the offender.").

128. 21 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, *supra* note 45, at 1137; *see supra* notes 104-115 and accompanying text.

through the legislature but through the judiciary.[129] As George Mason described the thinking of the Virginia delegation in a letter to Arthur Lee, "[t]he most prevalent idea" was to establish "a judiciary system with cognizance of all such matters as depend upon the law of nations."[130] The Offenses Clause first emerged in a draft outline of the Constitution:

> 6. To provide tribunals and punishments for mere offences against the law of nations.
>
> 7. To declare the law of piracy, felonies and captures on the high seas, and captures on land.[131]

The draft Constitution that the Committee of Detail reported to the Convention on August 6, 1787, gave Congress the power

> [t]o declare the law and punishment of piracies and felonies committed on the high seas, and the punishment of counterfeiting the coin of the United States, and of offences against the law of nations.[132]

This provision came up for debate on August 17, and the discussion focused on the words "declare," "define," and "punish."[133] James Madison moved to strike the words "and punishment."[134] George Mason questioned whether this would suggest that Congress lacked the power to punish the offenses listed, "considering the strict rule of construction in criminal cases."[135] Randolph did not think "that expunging 'the punishment' would be a constructive exclusion

129. *See* William S. Dodge, *The Constitutionality of the Alien Tort Statute: Some Observations on Text and Context*, 42 VA. J. INT'L L. 687, 705-06 (2002).

130. Letter from George Mason to Arthur Lee (May 21, 1787), *in* 3 FARRAND'S RECORDS, *supra* note 68, at 24.

131. 2 FARRAND'S RECORDS, *supra* note 68, at 143. For the fact that this document is in Randolph's handwriting, see *id.* at 137 n.6. In this context, the word "mere" may mean "pure." *See* Kent, *supra* note 11, at 898.

132. 2 FARRAND'S RECORDS, *supra* note 68, at 182.

133. Gouverneur Morris did propose that the power to punish counterfeiting not be limited to U.S. coin since "[b]ills of exchange for example might be forged in one State and carried into another," and another delegate suggested "that *foreign* paper might be counterfeited by Citizens; and that it might be politic to provide by national authority for the punishment of it." *Id.* at 315-16. This is notable in light of the Supreme Court's decision a century later in *United States v. Arjona*, 120 U.S. 479 (1887), that Congress could punish counterfeiting foreign securities as an offense against the law of nations. *See infra* notes 304-312 and accompanying text.

134. 2 FARRAND'S RECORDS, *supra* note 68, at 315. Although the records are not entirely clear, this would not appear to have affected the Counterfeiting Clause.

135. *Id.*

of the power."[136] Wilson agreed, noting that "[s]trictness was not necessary in giving authority to enact penal laws; though necessary in enacting & expounding them."[137]

Although Madison won his motion, Gouverneur Morris successfully proposed another to strike out "declare the law" and insert "punish,"[138] effectively undoing what Madison had just accomplished. This left Congress with the right "[t]o punish piracies [etc.]," at which point Madison and Randolph moved to insert "define &" before "punish."[139] Madison explained that "felony at common law is vague."[140] He did not think that felonies should be defined by English law because "no foreign law should be a standard farther than is expressly adopted."[141] But neither should felonies be defined by state law, for then "the citizens of different States would be subject to different punishments for the same offence at sea."[142] "The proper remedy for all these difficulties was to vest the power proposed by the term 'define' in the Natl. legislature."[143] Oliver Ellsworth enlarged the motion to amend the Clause to read "to define and punish piracies and felonies committed on the high seas, counterfeiting the securities and coin of the U. States, and offences agst. the law of Nations," which was agreed to without objection.[144]

In the Committee of Style, the clause on counterfeiting was broken into a separate provision and the Offenses Clause made to read as follows: "To define and punish piracies and felonies committed on the high seas, and punish offences against the law of nations."[145] The Clause came up for debate again on September 14. "Govr. Morris moved to strike out 'punish' before the words 'offences agst. the law of nations.' so as to let these be *definable* as well as punishable . . . ."[146] This time, the debate over Congress's power to define focused not on felonies, but on the law of nations. James Wilson objected to the proposal on the ground that "[t]o pretend to *define* the law of nations which depended on the authority of all the Civilized Nations of the World, would have a look of

136. *Id.*

137. *Id.*

138. *Id.* at 316.

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.* at 595 (internal punctuation omitted).

146. *Id.* at 614.

arrogance. [T]hat would make us ridiculous."[147] Morris responded that "[t]he word *define* is proper when applied to *offences* in this case; the law of nations being often too vague and deficient to be a rule."[148] Morris carried the day by a vote of 6-5, and the Offenses Clause took its present form.[149]

Wilson's reference in this exchange to law "which depended on the authority of all the Civilized Nations of the World" clearly refers to the unwritten law of nations, but it would be a mistake to conclude on that basis that the Offenses Clause as a whole was so limited. We have seen that Wilson thought that "[n]ational treaties are laws of nations"[150] and that "one part of the law of nations [consisted of] publick compacts."[151] The fact that Wilson thought it would "have a look of arrogance"[152] to define one part of the law of nations in no way suggests that he believed the Clause was limited to that part. Nor does Morris's response that the law of nations was "often too vague and deficient to be a rule"[153] suggest that the clause was limited to the unwritten law of nations, for there was no necessary correspondence between treaties and clarity, or unwritten law and vagueness. The prohibition against piracy, for example, although it formed part of the unwritten law of nations, was generally acknowledged to be sufficiently clear as not to require further definition by the legislature.[154] Indeed, the Articles of Confederation had given the Continental Congress authority to appoint courts to try piracies without any further power to define the term,[155] and the Supreme Court similarly concluded in *United States v. Smith* that Congress had adequately "defined" the crime of piracy by referring to the unwritten law of nations.[156] On the other hand, certain treaty provisions could benefit from further definition. For example, following Gideon Henfield's acquittal in the most prominent neutrality prosecution on charges of violating the neutrality provisions of the treaties with Britain, the Nether-

147. *Id.* at 615.

148. *Id.* (internal punctuation omitted).

149. *Id.*

150. Wilson, *supra* note 60, at 150.

151. *Id.* at 165. For further discussion, see *supra* notes 59-62 and accompanying text.

152. 2 FARRAND'S RECORDS, *supra* note 68, at 615.

153. *Id.*

154. *See, e.g.*, 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 531 (Jonathan Elliot ed., 1836) (recording James Madison's observation at the Virginia Convention that "*[p]iracy* is a word which may be considered as a term of the law of nations"); THE FEDERALIST NO. 42, at 266 (James Madison) (Clinton Rossiter ed., 1961) ("The definition of piracies might, perhaps, without inconveniency, be left to the law of nations . . . . ").

155. *See supra* note 102 and accompanying text.

156. 18 U.S. (5 Wheat.) 153 (1820).

lands, and Prussia by aiding the French,[157] Congress passed the 1794 Neutrality Act, which specified in clear terms the kinds of acts that would be punishable.[158] Even if some treaty provisions were clear and not in need of further definition before they were applied, it is important to recall that Morris said the law of nations was "*often* too vague and deficient to be a rule,"[159] not that it was *always* too vague.

In sum, the drafting history does not show that the Offenses Clause used the phrase "Law of Nations" in a narrower sense than the common understanding of the era, which included treaties, or in a narrower sense than the 1781 Resolution, which expressly identified "infractions of treaties" as "offences against the law of nations."[160] While the inclusion of treaties within the scope of the Offenses Clause was not specifically discussed at the Convention, those who participated in the debates – like Randolph, Madison, and Wilson – all believed that the law of nations included treaties, and their rationales for adopting the Offenses Clause applied equally to treaties.

D. Ratification Debates

The Offenses Clause received relatively little attention during the ratification debates.[161] But in *Federalist No. 42*, Madison explained the purpose of the Clause in terms that applied as readily to treaties as to unwritten international law. Madison noted that the Articles of Confederation "contain no provision for the case of offenses against the law of nations; and consequently leave it in the power of any indiscreet member to embroil the Confederacy with foreign nations."[162]

In *Federalist No. 3*, John Jay defended the assignment of power over the law of nations to the federal government in more general terms. But buried in this essay again is evidence to support the understanding that this power encompassed treaties. Jay observed that "[t]he prospect of present loss or advantage may often tempt the governing party in one or two States to swerve from good faith and justice," citing "[t]he case of the treaty of peace with Britain" as a par-

157. Henfield's Case, 11 F. Cas. 1099 (C.C.D. Pa. 1793) (No. 6,360).

158. Neutrality Act of June 4, 1794, 1 Stat. 381. For further discussion, see *infra* notes 220-224 and accompanying text.

159. 2 FARRAND'S RECORDS, *supra* note 68, at 615 (emphasis added).

160. 21 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, *supra* note 45, at 1136-37.

161. *See* Kent, *supra* note 11, at 905 ("There was very little discussion of the Law of Nations Clause in the ratification debates in the states during late 1787 and 1788."); Siegal, *supra* note 11, at 877-78 ("By and large the offenses clause was lost in the struggles over . . . larger issues.").

162. THE FEDERALIST NO. 42, *supra* note 154, at 265.

ticular example.[163] He then noted that "the national government, not being affected by those local circumstances, will neither be induced to commit the wrong themselves, nor want power or inclination to prevent or punish its commission by others."[164] The word "punish" makes it likely that Jay was referring specifically to the Offenses Clause. If so, he would have understood that clause to include violations of treaties, for his specific example of the sort of "wrong" the national government would be able to "punish" was a violation of "the treaty of peace with Britain."

As Secretary of Foreign Affairs under the Articles of Confederation, Jay had prepared the 1786 report for Congress on state treaty violations,[165] and it is reasonable to think that he would have been as concerned to punish violations of treaties as violations of the unwritten law of nations. Jay summarized his point in a much-quoted passage:

> So far, therefore, as either designed or accidental violations of treaties and of the laws of nations afford *just* causes of war, they are less to be apprehended under one general government than under several lesser ones, and in that respect the former most favors the *safety* of the people.[166]

Jay's argument in *Federalist No. 3* for assigning power of the law of nations to the federal government thus parallels Madison's specific description of the purpose of the Offenses Clause, but Jay made it explicit that this argument also applied to violations of treaties.

Another discussion of the Offenses Clause in the newspapers supports the understanding that the Offenses Clause included violations of treaties. In November 1787, the Anti-Federalist writer Cincinnatus published an essay arguing that the Offenses Clause was so broad as to threaten freedom of the press.[167] A writer calling himself Anti-Cincinnatus responded with an essay in a Massachusetts paper that clearly read the Offenses Clause to apply to treaties:

> [I]t is needful, to that end only to consider, that by the law of nations, is intended, those regulations and articles of agreement by which different nations, in their treaties, one with another, mutually bind them-

163. THE FEDERALIST NO. 3, *supra* note 77, at 43-44.

164. *Id.* at 44.

165. *See* 31 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, *supra* note 45, at 781-874 (John C. Fitzpatrick ed., 1934).

166. THE FEDERALIST NO. 3, *supra* note 77, at 44.

167. *See Cincinnatus I: To James Wilson, Esquire*, N.Y.J., Nov. 1, 1787, *reprinted in* 13 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 531-32 (John P. Kaminski & Gaspare J. Saladino eds., 1998).

> selves to regulate their conduct, one towards the other. A violation of such articles is properly defined an offence against the law of nations: and there is and can be no other law of nations, which binds them with respect to their treatment one of another, but these articles of agreement contained in their public treaties . . . .[168]

Certainly, the writer was mistaken in thinking that the "law of nations" in the Offenses Clause referred *only* to treaties. But this essay offers further proof that the phrase could be understood—and indeed *was* understood—to include treaties.[169]

The evidence from the ratification debates is limited because of the relatively scant attention the Offenses Clause received, but what evidence exists supports reading the clause to encompass all of the law of nations, including treaties. Madison's specific discussion of the clause is consistent with this reading; Jay referred particularly to treaty violations in discussing the federal government's power to "punish" wrongs against other countries, and Anti-Cincinnatus expressly read the clause to apply to treaties. Moreover, to our knowledge, there is nothing in the ratification debates to support the idea that "law of nations" was used in a narrow sense to exclude treaties.

E. Constitutional Design

Our conclusion that the Offenses Clause was intended to promote U.S. compliance with international law as a whole finds further support in the constitutional design. The Framers' concern in Philadelphia was to ensure that the United States would be able to enforce U.S. international law commitments at the national level.[170] The Constitution accordingly gave the President the "Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur"[171] and the duty to "take Care that the Laws be faithfully executed."[172] It gave Congress the powers—

168. Anti-Cincinnatus, HAMPSHIRE GAZETTE (Mass.), Dec. 19, 1787, *reprinted in* 5 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 167, at 489-90.

169. *See also* Kent, *supra* note 11, at 929 ("One of the few explicit discussions of the meaning of the Law of Nations Clause during ratification was an essay which argued that the Clause allowed Congress to punish violations of treaties.").

170. Golove & Hulsebosch, *supra* note 1, at 988 ("The most immediate concern, based on bitter experience, was to ensure that localist pressures at the state level would not undermine the nation's capacity to comply [with the law of nations]. To accomplish this result, the Constitution centralized the foreign affairs powers in the hands of the federal government."); *see supra* notes 124-128 and accompanying text.

171. U.S. CONST. art. II, § 2, cl. 2.

172. *Id.* art. II, § 3.

among numerous others implicating U.S. foreign relations—"[t]o regulate Commerce with foreign Nations,"[173] "[t]o define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations,"[174] and "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."[175] The Constitution provided for a federal judiciary with jurisdiction over "all Cases . . . arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority,"[176] as well as an array of specific instances likely to raise foreign relations concerns.[177] It provided 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."[178] And it forbade the States from exercising a range of powers relating to foreign relations, including the power to "enter into any Treaty."[179] As Golove and Hulsebosch have correctly observed:

> Considered as a whole, and understood in historical perspective, the text establishes a comprehensive regime for dealing with foreign affairs with an eye equally on centralizing all of the relevant powers in the federal government and on ensuring, as far as possible, that the federal government would uphold the nation's international duties.[180]

The Offenses Clause was only one piece of the constitutional scheme ensuring that the federal government had sufficient authority to secure the United States's compliance with its international obligations. But it was an important piece—so important that the Offenses Clause is one of the only explicit powers to impose punishment that appears in the Constitution.[181]

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173. *Id.* art. I, § 8, cl. 3.

174. *Id.* art. I, § 8, cl. 10.

175. *Id.* art. I, § 8, cl. 18. As mentioned, Article II vests the power in the President, "by and with the Advice and Consent of the Senate, to make Treaties." *Id.* art. II, § 2, cl. 2.

176. *Id.* art. III, § 2, cl. 1.

177. These include "all Cases affecting Ambassadors, other public Ministers and Consuls," "all Cases of admiralty and maritime Jurisdiction," and "Controversies . . . between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." *Id.* art. III, § 2, cl. 1.

178. *Id.* art. VI, cl. 2.

179. *Id.* art. I, § 10, cl. 1.

180. Golove & Hulsebosch, *supra* note 1, at 989.

181. *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 416-17 (1819). In addition to the power to define and punish piracy, felonies on the high seas, and offenses against the law of nations, the Constitution only expressly provides for punishment of counterfeiting and treason. *See* U.S. CONST. art. I, § 8, cl. 6; *id.* art. III, § 3, cl. 2.

The fact that the Constitution addresses treaties elsewhere creates no implication that the Offenses Clause excludes them. Powers granted by the Constitution frequently overlap.[182] The Supreme Court has repeatedly held that the express grant of one power does not limit the exercise of others, often citing the Offenses Clause as an example.[183] This proposition has long been clear to students of the Constitution like Justice Story, who made the point with specific reference to the Offenses Clause in his *Commentaries on the Constitution of the United States*. "It is obvious," he wrote, "that this [offenses] power has an intimate connexion and relation with the power to regulate commerce and intercourse with foreign nations, and the rights and duties of the national government in peace and war, arising out of the law of nations."[184]

The purpose of the Clause—to give Congress the authority to ensure compliance with international law by punishing violations—was also clear to Justice Story:

> As the United States are responsible to foreign governments for all violations of the law of nations, and as the welfare of the Union is essentially connected with the conduct of our citizens in regard to foreign nations, congress ought to possess the power to define and punish all

182. *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 585 n.1 (1980) (Brennan, J., concurring in the judgment) ("The Constitution was not framed as a work of carpentry, in which all joints must fit snugly without overlapping. Of necessity, a document that designs a form of government will address central political concerns from a variety of perspectives."); Akhil Reed Amar, *Constitutional Redundancies and Clarifying Clauses*, 33 VAL. U. L. REV. 1, 10 (1998) ("[A] good constitution . . . may well feature a certain kind of good redundancy represented by various clauses that are clarity-enhancing and doubt-removing.").

183. *See, e.g.*, United States v. Flores, 289 U.S. 137, 149 (1933) ("In view of the history of the two clauses and the manner of their adoption, the grant of power to define and punish piracies and felonies on the high seas cannot be deemed to be a limitation on the powers, either legislative or judicial, conferred on the national government by Article III, § 2 [defining the judicial power to include admiralty and maritime jurisdiction]."); Legal Tender Cases, 79 U.S. (12 Wall.) 457, 535-36 (1870) (rejecting the argument that express authorizations like the Offenses Clause "impl[y] an exclusion of all other subjects of criminal legislation"); *McCulloch*, 17 U.S. (4 Wheat.) at 416-17 (noting that "the government may, legitimately, punish any violation of its laws; and yet, this is not among the enumerated powers of Congress" and giving the Offenses Clause as one example of an enumerated power); Brown v. United States, 12 U.S. (8 Cranch) 110, 151 (1814) (Story, J., dissenting) ("[T]he affirmative power 'to define and punish piracies and felonies committed on the high seas,' has never been supposed to negative the right to punish other offences on the high seas." (quoting U.S. CONST. art. I, § 8, cl. 10)).

184. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1160, at 57 (Fred B. Rothman & Co. 1991) (1833).

> such offences, which may interrupt our intercourse and harmony with, and our duties to them.[185]

This rationale so clearly implicates treaties as well as customary international law that it is hard to understand why the Clause would have excluded them.

In sum, we believe that the historical evidence shows that the Framers did not exclude treaties from the Offenses Clause. The understanding of the "law of nations" at the time of the Founding included not just the unwritten law of nations but also treaties—what Vattel and others called "the conventional law of nations." The Offenses Clause has its origins in a 1781 Resolution of the Continental Congress that expressly listed "infractions of treaties" as "offences against the law of nations." The drafting history of the Clause is consistent with a broad understanding, and although the specific evidence from the ratification debates is limited, there is evidence that some readers understood the Clause to reach treaties, while there appears to be none to the contrary. Having established that the original understanding of the Offenses Clause embraces both the unwritten law of nations and treaties, we turn next to consider the Clause's interpretation by Congress and the Supreme Court.

II. CONGRESSIONAL AND JUDICIAL INTERPRETATIONS

The Constitution draws its meaning not only from the understanding of the Framers but also from the practical construction of the document over time.[186] Congress has not invoked the Offenses Clause with great frequency, but the evidence nevertheless shows a consistent congressional understanding—from the very first Congress—that the Offenses Clause authorizes Congress to define and punish all violations of international law, including offenses under treaties. Supreme Court decisions also describe the Offenses Clause as applying to international law obligations generally. The Court's discussion of

185. *Id.* at 57-58; *see also* WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 108 (2d ed. 1829) ("[T]he power to define and to punish this class of offences is . . . given to congress. The United States [are] responsible to foreign nations for all that affects their mutual intercourse, and tends to promote the general relations of good order and just demeanour . . . .").

186. *See* Mistretta v. United States, 488 U.S. 361, 401 (1989) (noting that "'traditional ways of conducting government . . . give meaning' to the Constitution" (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S., 579, 610 (1952) (Frankfurter, J., concurring))); *Youngstown*, 343 U.S. at 610 ("The Constitution is a framework for government. Therefore the way the framework has consistently operated fairly establishes that it has operated according to its true nature."); *see also* Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411 (2012) (examining reliance on historical practice in the context of separation of powers).

the purpose of the clause applies equally to treaties, and in several cases the Court has applied the clause to uphold legislation implementing treaties.[187]

A. Congress's Understanding of the Offenses Clause

Congress often does not specify the source of its authority,[188] but legislation from the 1789 Alien Tort Statute to the 2006 Military Commissions Act shows that Congress has consistently understood its authority under the Offenses Clause to extend to the implementation of treaties. These acts of Congress and other legislative materials establish two additional points. First, treaty obligations often overlap with and incorporate customary international law, and Congress repeatedly has passed legislation to implement U.S. treaty obligations and customary international law together. The interrelationship between treaties and customary international law therefore provides an additional reason not to view the Offenses Clause as limited to only one kind of international law.[189] Second, the Offenses Clause is only one of several constitutional authorities that Congress may use to implement treaties. Even when Congress has specifically invoked the Offenses Clause, it has often cited other constitutional powers as well. The Foreign Commerce Clause and the Necessary and Proper Clause, in particular, grant broad authority to implement the United States's treaty obligations. Congress has not understood the Offenses Clause to be exclusive of those other powers, but rather as an additional and complementary source of authority.[190]

187. Although we do not consider the executive branch's views separately, the evidence shows that the President has shared the view that the Offenses Clause extends to the implementation of treaties. Most obviously, over the course of two centuries, the President has signed the statutes that Congress has passed in reliance on the Offenses Clause to implement treaties. *See infra* Part II.A. At times, the President has expressly called on Congress to use its "constitutional power to define and punish crimes against treaty rights." *See infra* notes 243, 250 and accompanying text. And the executive branch has repeatedly defended the constitutionality of statutes implementing treaties as valid exercises of the Offenses Clause. *See infra* notes 241 and 312.

188. Nor is Congress obligated to so do. *See* United States v. Arjona, 120 U.S. 479, 488 (1887) ("[T]here is no more need of declaring in the statute that it is such an offence [against the law of nations] than there would be in any other criminal statute to declare that it was enacted to carry into execution any other particular power vested by the Constitution in the Government of the United States."); *see also* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2598 (2012) ("The 'question of the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise.'" (quoting Woods v. Cloyd W. Miller Co., 333 U.S. 138, 144 (1948))).

189. *See infra* notes 350-370 and accompanying text.

190. *See infra* notes 228-293 and accompanying text.

Congress apparently first exercised its power under the Offenses Clause in 1789 by enacting the provision of the First Judiciary Act known today as the Alien Tort Statute (ATS) or Alien Tort Claims Act (ATCA)—a provision that expressly extends to treaty violations. As originally enacted, the ATS provided that "the district courts shall have . . . cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States."[191] Although the ATS undoubtedly rested on other legislative powers as well,[192] commentators with a range of views about the statute have concluded that the ATS falls squarely within Congress's authority under the Offenses Clause.[193] It would have been natural for Congress to rely on the Offenses Clause in passing the ATS because both the statute and the constitutional provision had their origins in the Continental Congress's 1781 Resolution recommending that the states provide "punishment" for "offences against the law of nations."[194] The ATS grew out of the final paragraph of that resolution, recommending that the states "authorise suits to be instituted for damages by

191. *See* Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 76-77 (codified as amended at 28 U.S.C. § 1350 (2012)).

192. *E.g.*, U.S. CONST. art. I, § 8, cl. 9 (giving Congress the power "[t]o constitute Tribunals inferior to the supreme Court").

193. *See* HENKIN, *supra* note 11, at 359 n.20 (noting that "[i]t has been suggested that Congress enacted [the ATS] under its power to define offenses against the law of nations" and that the ATS can also "find support in other powers of Congress"); David J. Bederman, *Deference or Deception: Treaty Rights as Political Questions*, 70 U. COLO. L. REV. 1439, 1472 (1999) ("Congress legislated the ATCA in pursuance of its power to 'define and punish . . . Offenses against the Law of Nations' . . . ." (quoting U.S. CONST. art. I, § 8, cl. 10); Anthony J. Colangelo, *Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law*, 48 HARV. INT'L L.J. 121, 137 (2007) (noting that the ATS was "evidently enacted pursuant to the Offences Clause"); Kontorovich, *supra* note 42, at 1678 ("Though there is no legislative history for the ATS, courts have generally regarded it as Offenses Clause legislation since the statute directly borrows the constitutional language." (footnote omitted)); Michael Stokes Paulsen, *The Constitutional Power To Interpret International Law*, 118 YALE L.J. 1762, 1809 (2009) ("The Law of Nations Clause is also the constitutional basis for the Alien Tort Statute . . . ."); Michael H. Posner & Peter J. Spiro, *Adding Teeth to United States Ratification of the Covenant on Civil and Political Rights: The International Human Rights Conformity Act of 1993*, 42 DEPAUL L. REV. 1209, 1225 n.75 (1993) (listing the ATS as an exercise of the Offenses Clause power); Stephens, *supra* note 11, at 490 ("In its first session, as part of the Judiciary Act of 1789, the First Congress also codified the civil side of the Offenses Clause, authorizing federal court jurisdiction over claims by aliens for 'a tort only in violation of the law of nations.'" (quoting Judiciary Act of 1789, ch. 20, § 9, 1 Stat. at 76-77)); Arthur M. Weisburd, *The Executive Branch and International Law*, 41 VAND. L. REV. 1205, 1247 n.190 (1988) (noting that "the power of Congress over international commerce and the power granted by the 'define and punish' clause . . . amply sustain [the Alien Tort Claims Act]").

194. *See supra* notes 98-115 and accompanying text.

the party injured."[195] Civil liability was a natural counterpart to criminal prosecution, and the power to authorize actions for damages was understood to be within Congress's authority under the Clause.[196] Like the 1781 Resolution, the ATS extended not just to violations of the unwritten law of nations but also to violations of "a treaty of the United States." This reveals that, like the drafters of the 1781 Resolution, the First Congress viewed the Offenses Clause as reaching both unwritten and conventional law.[197]

Congress exercised its authority under the Offenses Clause again the following year when it passed the Crimes Act of 1790.[198] The Crimes Act addressed piracy as well as two of the substantive violations identified in the 1781 Resolution, violations of safe conducts and assaults on ambassadors, thereby punishing violations of both unwritten law and treaties. Sections 8 through 12 of the Crimes Act defined and punished piracy, assisting pirates, concealing pirates, and confederating with pirates.[199] U.S. treaties with France, the Netherlands, Sweden, and Prussia provided that U.S. inhabitants taking commissions or letters of marque to act as privateers against the other party would be punished as pirates.[200] The piracy provisions of the Crimes Act therefore implemented these provisions as well as the more general prohibition against piracy in the unwritten law of nations. Section 28 of the Act provided punishment for the violation of "any safe-conduct or passport duly obtained and issued under the authority of the United States."[201] U.S. treaties with France, the Nether-

195. 21 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, *supra* note 45, at 1137; *see* Casto, *supra* note 12, at 490-94; Dodge, *supra* note 12, at 226-29; *see also* Sosa v. Alvarez-Machain, 542 U.S. 692, 716, 722-24 (2004) (discussing the 1781 resolution as a precursor of the ATS).

196. For a comprehensive discussion, see Stephens, *supra* note 11, at 483-525. *See also* Kontorovich, *supra* note 42, at 1742 ("The Offenses Clause's punishing power encompasses civil liability."). Congress has also relied on the Offenses Clause in authorizing civil suits under the Foreign Sovereign Immunities Act, *see* H.R. REP. NO. 94-1487, at 12 (1976) (listing the Offenses Clause as one basis of congressional authority); S. REP. NO. 94-1310, at 12 (1976) (same), and the Torture Victim Protection Act, *see* S. REP. NO. 102-249, at 5-6 (1991) (listing the Offenses Clause as one basis of congressional authority). For further discussion of these acts, see *infra* notes 258-264, 270-278 and accompanying text.

197. As noted above, the fact that the ATS itself expressly refers to treaties of the United States in addition to the law of nations does not suggest that the phrase "law of nations" in the Offenses Clause excludes such treaties. *See supra* notes 12-17 and accompanying text.

198. An Act for the Punishment of Certain Crimes Against the United States, 1 Stat. 112 (1790) [hereinafter Crimes Act of 1790].

199. *Id.* §§ 8-12, 1 Stat. at 113-15.

200. *See* Treaty of Amity with France, *supra* note 83, art. XXI, 8 Stat. at 24; Treaty of Amity with Prussia, *supra* note 86, art. XX, 8 Stat. at 94; Treaty of Amity with Sweden, *supra* note 85, art. XXIII, 8 Stat. at 74; Treaty of Amity with the Netherlands, *supra* note 84, art. XIX, 8 Stat. at 44.

201. Crimes Act of 1790 § 28, 1 Stat. at 118.

lands, Sweden, and Prussia supplemented the unwritten law of nations on safe conduct by expressly granting a period of time for merchants of the other party to remove themselves and their goods in case of war between the parties.[202] Section 28 provided punishment for violations of these treaty provisions as well as the unwritten law of nations.[203]

The Crimes Act did not itself fully implement the recommendations in the 1781 Resolution; it did not address neutrality, and it lacked a general prohibition against violating treaties, unlike the provision of the 1781 Resolution recommending that the states punish "infractions of treaties and conventions to which the United States are a party"[204] and the ATS's clause authorizing civil

202. *See* Treaty of Amity with France, *supra* note 83, art. XX, 8 Stat. at 24; Treaty of Amity with Prussia, *supra* note 86, art. XIX, 8 Stat. at 94-96; Treaty of Amity with Sweden, *supra* note 85, art. XXII, 8 Stat. at 72-74; Treaty of Amity with the Netherlands, *supra* note 84, art. XVIII, 8 Stat. at 42. For further discussion of treaty provisions in relation to the unwritten law of nations, see Lee, *supra* note 12, at 874-79.

203. The Crimes Act also provided for the immunity of ambassadors and other public ministers from suit and made it a crime to serve or prosecute them or to offer violence to their person, *see* Crimes Act of 1790 §§ 25-28, 1 Stat. at 117-18, but none of the early U.S. treaties dealt with the rights of ambassadors. In 1788, the United States did enter into a Consular Convention with France, which was the first treaty to be ratified under the new Constitution. *See* Convention Between His Most Christian Majesty and the United States of America, U.S.-Fr., Nov. 14, 1788, 8 Stat. 106. The parties had agreed in their 1778 Treaty of Amity, *supra* note 83, art. XXIX, 8 Stat. 28, to conclude a Consular Convention, but the treaty proved controversial in the United States. *See* Editorial Note, *in* 14 THE PAPERS OF THOMAS JEFFERSON 67 (Julian P. Boyd ed., 1958); Golove, *supra* note 2, at 1150-51 & n.225. Consuls were generally not entitled to the immunities of ambassadors and other public ministers under customary international law. *See* VATTEL, *supra* note 18, Book IV § 75 (noting that consuls "are not public ministers, and consequently are not under the protection of the Law of Nations"). So Longchamps's prosecution for violating the law of nations by assaulting French Consul-General Marbois, *see supra* notes 120-121 and accompanying text, depended not on the fact that Marbois was Consul-General but rather on the fact that he was Secretary of the French Legation. *See* Respublica v. De Longchamps, 1 U.S. (1 Dall.) 111, 115 (Pa. Oyer & Terminer 1784) ("The distinction, between a Consul and a member of the Legation, is not warranted in this case; for, Monsieur Marbois never ceased to be the latter. As Secretary to the Legation, his authority descends from a high source, his commission being made out in the same form as the Minister's, and signed in the same manner, by the King his master."). The 1788 Consular Convention supplemented the unwritten law of nations by providing that consuls, vice-consuls, and their staffs "shall enjoy a full and entire immunity." Convention Between His Most Christian Majesty and the United States of America, *supra*, art. II, 8 Stat. at 106. But §§ 25-28 of the 1790 Crimes Act would not have implemented this treaty, because the statutory provisions were limited to "any ambassador or other public minister." In 1792, Congress passed legislation to implement the Consular Convention, but it made no mention of immunities and contained no criminal provisions. *See* An Act Concerning Consuls and Vice-Consuls, 1 Stat. 254 (1792).

204. 21 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, *supra* note 45, at 1137; *see supra* notes 98-115 and accompanying text.

suits for torts in violation of "a treaty of the United States."[205] But Congress's failure to enact such a provision does not mean that Congress lacked authority under the Offenses Clause to do so. The assumption in the 1790s seems to have been that at least some treaty violations could be subject to prosecution at common law, jurisdiction having been granted by the provision of the 1789 Judiciary Act giving the district courts "cognizance of all crimes and offences that shall be cognizable under the authority of the United States."[206] That was the theory in *Henfield's Case*, the most prominent of the neutrality prosecutions brought by the Washington Administration in 1793, which specifically charged the defendant with several treaty violations.[207] Henfield had joined the French ship *Citizen Genet* in Charleston, South Carolina, serving as its prize master when it captured as a prize the British ship *The William*.[208] Justice James Wilson charged the grand jury in Philadelphia, instructing them both that "under our national constitution, treaties compose a portion of the public and supreme law of the land," and that treaties were part of the law of nations.[209] "[T]here are laws of nations which are founded altogether on human consent," Wilson observed, and "of this kind are national treaties."[210] The grand jury returned an indictment of twelve counts against Henfield.[211] Six of these counts charged him specifically with violating the neutrality provisions of the U.S. treaties with Great Britain, the Netherlands, and Prussia.[212] The remaining counts

205. 28 U.S.C. § 1350 (2012); *see supra* notes 191-197 and accompanying text.

206. Judiciary Act, ch. 20, § 9, 1 Stat. 73, 76 (1789). As Charles Warren noted, the original version of this clause included a restriction that the crimes be "defined by the laws of the same"—that is, of the United States—which was dropped from the final Act. "The only rational meaning that can be given to this action striking out the restrictive words is, that Congress did not intend to limit criminal jurisdiction to crimes specifically defined by it." Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 73 (1923).

207. *See* Henfield's Case, 11 F. Cas. 1099 (C.C.D. Pa. 1783) (No. 6,360).

208. *Id.* at 1112.

209. *Id.* at 1106-07.

210. *Id.* at 1107.

211. *Id.* at 1109-15.

212. The counts are not numbered in the indictment, but the counts that charged treaty violations are the first, second, third, seventh, eighth, and ninth. *See* Treaty of Amity with the Netherlands, *supra* note 84, art. I, 8 Stat. at 32 ("There shall be a firm, inviolable and universal peace and sincere friendship, between their High Mightinesses, the Lords the States General of the United Netherlands, and the United States of America, and between the subjects and inhabitants of the said parties . . . . "); Treaty of Amity with Prussia, *supra* note 86, art. I, 8 Stat. at 84 ("There shall be a firm, inviolable and universal peace and sincere friendship between His Majesty the King of Prussia, his heirs, successors and subjects, on the one part, and the United States of America, and their citizens, on the other, without exception of persons or places."); Treaty of Peace with Britain, *supra* note 88, art. VII, 8 Stat. at 83

charged him with violating the unwritten law of nations on neutrality by acts of hostility against Britain, the Netherlands, and Prussia, but these charges also noted the existence of the treaties that put the United States at peace with those countries.[213]

A panel of three judges – consisting of Wilson, Justice James Iredell, and Judge Richard Peters – deliberated on the legal issues and instructed the petit jury in a charge delivered by Wilson. Wilson told the jury: "It is the joint and unanimous opinion of the court, that the United States, being in a state of neutrality relative to the present war, the acts of hostility committed by Gideon Henfield are an offence against this country, and punishable by its laws."[214] He pointed both to the unwritten law of nations and to "positive laws, existing previous to the offence committed, and expressly declared to be part of the supreme law of the land," noting that "[t]he constitution of the United States has declared that all treaties made, or to be made, under the authority of the United States, shall be part of the supreme law of the land."[215] As applicable to the case at issue, Wilson cited the first article of the Treaty of Amity with the Netherlands, the seventh article of the Treaty of Peace with Britain, and the first article of the Treaty of Amity with Prussia.[216] "These treaties were in the most public, the most notorious existence, before the act for which the prisoner is indicted was committed."[217] Although Henfield was acquitted,[218] the case illustrated the assumption that at least some treaty violations by individuals could be prosecuted even without a statute.[219]

("There shall be a firm and perpetual peace between his Britannic Majesty and the said States, and between the subjects of the one and the citizens of the other . . . . ").

213. *Henfield's Case*, 11 F. Cas. at 1109-15.

214. *Id.* at 1120.

215. *Id.*

216. *See id.*

217. *Id.*

218. *Id.* at 1122.

219. The Supreme Court put an end to federal common-law prosecutions in *United States v. Hudson*, 11 U.S. (7 Cranch) 32 (1812), and *United States v. Coolidge*, 14 U.S. (1 Wheat) 415 (1816). *See also* Viereck v. United States, 318 U.S. 236, 241 (1943) ("One may be subjected to punishment for crime in the federal courts only for the commission or omission of an act defined by statute, or by regulation having legislative authority, and then only if punishment is authorized by Congress."). Today it is accepted that a treaty ordinarily cannot create a crime directly, but must be implemented by legislation. *See* Hopson v. Kreps, 622 F.2d 1375, 1380 (9th Cir. 1980) ("Treaty regulations that penalize individuals, on the other hand, are generally considered to require domestic legislation before they are given any effect."); The Over the Top, 5 F.2d 838, 845 (D. Conn. 1925) ("It is not the function of treaties to enact the fiscal or criminal law of a nation. For this purpose no treaty is self-executing."); *see also* 1 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 111 cmt. i (1987) ("[I]t has been assumed that an international agreement creating an international crime (*e.g.*, genocide) or re-

In response to Henfield's acquittal and those of other defendants,[220] Congress passed the Neutrality Act, which specifically prohibited persons within the United States from accepting commissions from foreign states and enlisting in their service, as well as fitting out ships, augmenting their armaments, and launching military expeditions against foreign states with which the United States was at peace.[221] In *United States v. Arjona*, the Supreme Court identified the 1794 Neutrality Act (and those of 1797, 1817, and 1818) as an exercise of Congress's authority under the Offenses Clause.[222] Some scholars have criticized this conclusion, arguing that "[i]nternational law did not prohibit private citizens from carrying contraband to belligerents, nor did it bar the service of a third-country national on belligerent privateers."[223] But *Arjona*'s conclusion seems more sound once we recognize that the Offenses Clause extends to treaties as well as the unwritten law of nations. The treaties that Henfield was alleged to have violated pledged peace not only between the United States and the states of Britain, the Netherlands, and Prussia, but also between the *people* of each.[224] To be sure, the Neutrality Act went beyond implementation of these treaties by prohibiting persons in the United States from violating neutrality even where no treaty existed. But given that the Neutrality Act was a direct response to the acquittal in *Henfield's Case*—a case that had specifically charged the defendant with violating treaties—it is reasonable to view that Act as at

quiring states parties to punish certain actions (*e.g.*, hijacking) could not itself become part of the criminal law of the United States, but would require Congress to enact an appropriate statute before an individual could be tried or punished for the offense."); HENKIN, *supra* note 11, at 203 ("A treaty, it is accepted, cannot itself enact criminal law . . . . "). Violations of the laws of war have been treated differently, and the Supreme Court has held that Congress may authorize the trial of such violations by military commission without defining them by statute. *See* Hamdan v. Rumsfeld, 548 U.S. 557, 602 (2006) (plurality opinion); *Ex parte* Quirin, 317 U.S. 1, 30 (1942).

220. None of the government's pre-Neutrality Act prosecutions was successful. *See* WILLIAM R. CASTO, FOREIGN AFFAIRS AND THE CONSTITUTION IN THE AGE OF FIGHTING SAIL 100 (2006).

221. An Act in Addition to the Act for the Punishment of Certain Crimes Against the United States, ch. L, §§ 1-5, 1 Stat. 381, 381-84 (1794). Section 8 of the Neutrality Act expressly mentions treaties, giving the President authority to use the army, navy, or militia "to compel any foreign ship or vessel to depart the United States, in all cases in which, by the laws of nations or the treaties of the United States, they ought not to remain within the United States." *Id.* § 8, 1 Stat. at 384.

222. 120 U.S. 479, 488 (1887). For further discussion of *Arjona*, see *infra* notes 304-312 and accompanying text.

223. Kontorovich, *supra* note 42, at 1709; *see also* Jules Lobel, *The Rise and Decline of the Neutrality Act: Sovereignty and Congressional War Powers in United States Foreign Policy*, 24 HARV. INT'L L.J. 1, 19 (1983) ("[W]hile aspects of the Act were in conformity with international law, substantial provisions of the Neutrality Act went well beyond the legal obligations of international law in 1793.").

224. *See supra* note 212.

least in part an implementation under the Offenses Clause of U.S. treaty provisions pledging peace.

Congress's actions from 1789 to 1794 thus suggest that it viewed the Offenses Clause as encompassing treaties. In the Judiciary Act of 1789, Congress exercised its authority under the Clause to authorize civil suits for torts in violation of "a treaty of the United States."[225] In the Crimes Act of 1790, Congress criminalized piracy and violations of safe-conducts, which corresponded to obligations in existing treaties.[226] And in the Neutrality Act of 1794, Congress ensured that the Gideon Henfields of the future would not escape punishment if they violated treaties committing the United States to peace.[227] It is worth noting that each of these exercises of the offenses power implemented *both* the unwritten law of nations and treaties. The ATS expressly mentions both, whereas the 1790 Crimes Act and the 1794 Neutrality Act encompassed treaty obligations but also went beyond them to define and punish what Congress understood to be violations of the unwritten law of nations. Implementing treaties and custom together made sense, for these two types of international law were often intertwined, just as they are today.

While treaties and custom often overlapped, so too did the constitutional authorities for implementing treaties. Early Congresses certainly did not believe that their authority to implement treaties was limited to the Offenses Clause. As Jean Galbraith has recently pointed out, congressional debate over the 1796 Jay Treaty focused on the Necessary and Proper Clause.[228] So did debates over the 1815 commercial treaty with Great Britain.[229] Because these treaties addressed numerous bilateral issues, the thrust of which was primarily commercial, the Offenses Clause would not have seemed as natural a fit as the treaty power together with the Necessary and Proper Clause or the Commerce Clause. But in the 1880s, when Congress looked to implement a treaty requiring its parties to enact legislation to punish violations and considered legislation to protect the treaty rights of aliens, it expressly invoked the Offenses Clause.

To understand Congress's understanding of its own authority under the Offenses Clause during the late nineteenth century, it is best to begin with the legislative history of the 1884 Counterfeiting Act, which prohibited the coun-

225. *See supra* notes 191-197 and accompanying text.

226. *See supra* notes 198-203 and accompanying text.

227. *See supra* notes 220-224 and accompanying text.

228. Jean Galbraith, *Congress's Treaty-Implementing Power in Historical Practice*, 56 WM. & MARY L. REV. 59, 83-87 (2014). Congress also implemented the 1788 Consular Convention in a manner that would not have implicated the Offenses Clause. *See supra* note 203.

229. *See* Galbraith, *supra* note 228, at 88-89.

terfeiting of foreign government notes, bonds, and other securities.[230] Although this Act did not implement a treaty, the House Report clearly described the offenses power in terms that comprehended treaties:

> "The law of nations," as used in this clause, is obviously what is now known among publicists as international law; in other words, what the Constitution termed the law of nations, or *jus gentium*, is now termed the *jus inter gentes*, or international law.
>
> Whatever, therefore, may be regarded as an offense against the law which regulates the just relations between nations, may be defined and punished as an offense against the law of nations under [the Define and Punish] [C]lause of the Constitution.[231]

Congress thus described the law of nations as extending to all of "international law" and read the Offenses Clause as encompassing whatever "may be regarded as an offense against the law which regulates the just relations between nations."[232]

Just a few years later, Congress acted on this understanding of the Offenses Clause, expressly invoking the Clause to support legislation to implement the Convention for the Protection of Submarine Cables,[233] a multilateral treaty ratified by the United States in 1884. Article II of the Convention stated that "[t]he breaking or injury of a submarine cable . . . shall be a punishable offense,"[234] while Article XII committed the parties "to take or to propose to their respective legislative bodies the measures necessary in order to secure the execution of this Convention, and especially in order to cause the punishment" of persons violating its provisions.[235] To implement the Convention, Congress passed the

230. Counterfeiting Act of 1884, ch. 52, 23 Stat. 22.

231. H. COMM. ON THE JUDICIARY, COUNTERFEITING WITHIN THE UNITED STATES, H.R. REP. NO. 48-1329, at 1 (1884). The report continued:

> It seems to your committee to be clear that the Constitution vests in Congress power to define and punish as offenses against the law of nations, everything which is done by a citizen of the United States hostile to the peaceful relations between them and foreign nations, or which is contrary to the integrity of the foreign country in its essential sovereignty, or which would disturb its peace and security.

Id. at 2. The Supreme Court would endorse Congress's view of the Offenses Clause and uphold the constitutionality of the Counterfeiting Act in *United States v. Arjona*, 120 U.S. 479 (1887). *See infra* notes 304-312 and accompanying text.

232. H.R. REP NO. 48-1329, at 2.

233. Mar. 14, 1884, 24 Stat. 989.

234. *Id.* art. II.

235. *Id.* art. XII.

Submarine Cable Act of 1888, sections 1 and 2 of which criminalized breaking submarine cables—legislation that is still in effect today.[236] The bill was twice reported out of the House Committee on Foreign Affairs, and each report stated that the Offenses Clause and the Foreign Commerce Clause were sufficient to answer the question "whether or not Congress is empowered to pass this bill."[237]

During this same period, both the Offenses Clause and the Necessary and Proper Clause were invoked as authority for proposed legislation protecting the treaty rights of aliens—legislation that ultimately failed to pass. From the 1880s through the turn of the century, violence and lynchings against resident aliens, particularly Italians and Chinese protected under treaties with the United States, were a cause of significant diplomatic concern, leading the executive and later Congress to seek to use federal criminal statutes to punish such crimes.[238] The 1880 U.S. treaty with China, for example, provided that "[i]f Chinese . . . meet with ill treatment at the hands of any other persons, the Government of the United States will exert all its power to devise measures for their protection and to secure to them the same rights, privileges, immunities, and exemptions as may be enjoyed by the citizens or subjects of the most favored nation."[239] The Supreme Court had previously held in *Baldwin v. Franks* that existing federal statutes could not be construed to prohibit the conduct at issue.[240] But the Court had emphasized that Congress clearly possessed the power to enact legislation protecting aliens' treaty rights: "That the United States have power under the Constitution to provide for the punishment of those who are guilty of depriving Chinese subjects of any of the rights, privileges, immunities, or exemptions guarantied to them by this treaty we do not doubt."[241]

236. Submarine Cable Act, ch. 17, 25 Stat. 41 (1888) (codified as amended at 47 U.S.C. §§ 21-33 (2012)).

237. *See* H. COMM. ON FOREIGN AFFAIRS, PROTECTION OF SUBMARINE CABLES, H.R. REP. NO. 50-524, at 3 (1888); H. COMM. ON FOREIGN AFFAIRS, PROTECTION OF SUBMARINE CABLES, H.R. REP. NO. 49-3198, at 3 (1886). There appeared to be some doubt whether the act was within the commerce power, and the House Report quoted a recent decision of the Supreme Court to show that the instrumentalities of commerce it could regulate were not limited to those in use when the Constitution was adopted. *See* H.R. REP. NO. 50-524, at 3 (quoting Pensacola Tel. Co. v. Western Union Tel. Co., 96 U.S. 1, 9 (1877)). But Congress appears not to have entertained any doubt that it was "empowered to pass this bill" by the Offenses Clause. H.R. REP. NO. 50-524, at 3; H.R. REP. NO 49-3198, at 3.

238. *See* S. COMM. ON FOREIGN RELATIONS, VIOLATIONS OF TREATY RIGHTS OF ALIENS, S. REP. NO. 56-392, at 1-3 (1900) (listing incidents of violence and diplomatic responses).

239. Treaty Concerning Immigration art. III, U.S.-China, Nov. 17, 1880, 22 Stat. 826, 827.

240. 120 U.S. 678, 692-94 (1887).

241. *Id.* at 683. The lower court had sustained the constitutionality of the legislation under the Article II treaty power and the Necessary and Proper Clause, *see In re* Baldwin, 27 F. 187, 191

An 1891 lynching in New Orleans brought renewed urgency to the topic.[242] In his resulting address to Congress, President Harrison called for legislation "to make offenses against the treaty rights of foreigners domiciled in the United States cognizable in the Federal courts," referring expressly to the United States's "constitutional power to define and punish crimes against treaty rights."[243] In response, the Senate adopted a resolution directing the Foreign Relations Committee to propose legislation that would enable the United States "to use its constitutional power to define and punish crimes against treaty rights conferred upon such foreigners."[244] The Committee reported legislation that would have made it a federal crime to commit a violation of state law that also violated an alien's rights under a treaty, and that would have enforced the penalties provided under state law.[245] In the ensuing congressional debates, many parties agreed that Congress possessed constitutional authority to implement U.S. treaty commitments.[246] At least one speaker expressly invoked the Necessary and Proper Clause,[247] while another stated that Congress must carry out any punishment for acts committed against foreign citizens under its treaty obligations "in the only mode in which it can exercise the power committed to it by the Constitution, and that is by defining a crime and annexing a punishment."[248] The proposed legislation failed.[249] As a subsequent Senate report noted, "The chief ground of this opposition was not that Congress lacked power to so legislate, but that it was unnecessary to confer such jurisdiction on the United States courts, and, therefore, impolitic, because the prosecution of

(C.C.D. Cal. 1886), while the United States argued before the Supreme Court that the statute was also supported by the Offenses Clause, devoting the bulk of its argument regarding congressional authority to that theory. *See* Brief for Respondent at 25-27, Baldwin v. Franks, 120 U.S. 678 (1887). The Supreme Court did not specify which provision of the Constitution gave Congress the authority, though it is worth noting that *Baldwin* was decided on the very same day as *Arjona*, in which the Court adopted a broad reading of the Offenses Clause.

242. Benjamin Harrison, Third Annual Message (Dec. 9, 1891), 13 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 5615, 5617 (James D. Richardson ed., 1897) ("The lynching at New Orleans in March last of eleven men of Italian nativity by a mob of citizens was a most deplorable and discreditable incident.").

243. *Id.* at 5618.

244. 23 CONG. REC. 1266 (1892).

245. *See id.* at 4549 (setting forth the text of the proposed legislation).

246. *See, e.g.*, *id.* at 4550 (statement of Sen. Dolph); *id.* at 4557 (statement of Sen. Davis); *id.* at 4600 (statement of Sen. Morgan).

247. *Id.* at 4607 (statement of Sen. Hiscock) (citing the treaty power and quoting the Necessary and Proper Clause).

248. *Id.* at 4551 (statement of Sen. Gray).

249. S. REP. NO. 56-392, at 5 (1900) (The bill "was reported favorably from the Committee on Foreign Relations, but was opposed in the Senate and its passage prevented.").

such offenses could be safely intrusted to the State courts."[250] Clearly, Congress's view during the late nineteenth century was that the Offenses Clause, as well as other provisions of the Constitution, gave it authority to enact penal legislation required by a treaty or to protect rights guaranteed under a treaty.[251]

When Congress attempted to adopt anti-lynching civil rights legislation in the 1940s, it again looked to the Offenses Clause as a source of constitutional authority.[252] In addition to the Fourteenth Amendment and the Republican Guarantee Clause,[253] the House Report invoked "[t]he treaty power" and "the power to define and punish offenses against the law of nations" as authority for the legislation.[254] The report pointed to U.S. treaty obligations under Articles 55 and 56 of the United Nations Charter to promote "universal respect for, and observance of, human rights . . . without distinction as to race, sex, language, or religion"[255] and added that the same principle was reflected in "peace treaties with Italy, Rumania, Bulgaria, and Hungary containing guaranties that those countries would protect racial minorities in their midst from discrimination."[256] In light of these treaty obligations, the report concluded, "[c]learly we have here an adequate constitutional basis, either under the power to implement treaties or under the power to define offenses against international law, for a statute protecting all individuals against violence or threats of violence because of race or religion."[257]

In passing the Foreign Sovereign Immunities Act (FSIA) in 1976,[258] Congress again based its constitutional authority on the Offenses Clause, along with its authority to prescribe the jurisdiction of federal courts, the Foreign

250. *Id*. President McKinley renewed the request for legislation in 1899, quoting President Harrison's 1891 message to Congress, including its reference to the United States's "constitutional power to define and punish crimes against treaty rights." *Id.* at 3. President Roosevelt in 1906 and President Taft in 1909 also called for legislation to protect alien treaty rights, WILLIAM H. TAFT, THE UNITED STATES AND PEACE 66-68 (1914), but neither of these efforts was successful. As constitutional authority for such legislation, President Taft pointed to the treaty power and the Necessary and Proper Clause. *See id.* at 80-83.

251. *See supra* notes 230-250 and accompanying text. For commercial treaties during this period, Congress continued to rely on the Necessary and Proper Clause. *See* Galbraith, *supra* note 228, at 89-92 (discussing commercial treaties with Hawaii).

252. *See* H.R. REP. NO. 80-1597, at 6 (1948).

253. *Id.* at 5-6.

254. *Id.* at 6.

255. *Id.* at 7 (quoting U.N. Charter art. 55).

256. *Id.*

257. *Id*. The bill never became law. *See* Lynda G. Dodd, *Presidential Leadership and Civil Rights Lawyering in the Era Before* Brown, 85 IND. L.J. 1599, 1655 (2010) (noting the failure of President Truman's legislative civil rights program).

258. Pub. L. No. 94-583, 90 Stat. 2891 (1976) (codified as amended at 28 U.S.C. §§ 1330, 1332, 1391(f), 1441(d), 1602-11 (2012)).

Commerce Clause, and the treaty power plus the Necessary and Proper Clause.[259] The FSIA established rules governing the immunity of foreign states and their agencies and instrumentalities, U.S. jurisdiction over suits against foreign states and service of process, and attachment and execution against the property of foreign states to satisfy a judgment. Although most of these issues were not governed by international agreements,[260] a few were. The FSIA therefore provides for service of process "in accordance with an applicable international convention on service of judicial documents."[261] With respect to execution of judgments, the FSIA made the immunity of government property subject not just to the exceptions stated in the Act[262] but also to "existing international agreements to which the United States is a party."[263] As the legislative history explains, "[a] number of treaties of friendship, commerce and navigation concluded by the United States permit execution of judgments against foreign publicly owned or controlled enterprises."[264] So the FSIA is properly viewed as an implementation not only of customary international law and international comity, but also of certain treaty obligations.

Over the past three decades, Congress has acted repeatedly and expressly to implement treaties using its authority under the Offenses Clause. In 1984, Congress passed the Aircraft Sabotage Act[265] "to implement fully the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation,"[266] which required punishment of various acts of violence against aircraft, airports, or their personnel.[267] Congress explained that such offenses under the Convention "gravely affect interstate and foreign commerce, and are offenses against the law of nations."[268] With respect to Congress's authority, the Senate

259. H.R. REP. NO. 94-1487, at 12 (1976); S. REP. NO. 94-1310, at 12 (1976).

260. The House and Senate Reports mention "the possibility that sovereign immunity might become the subject of an international convention" at some point in the future. H.R. REP. NO. 94-1487, at 10; S. REP. NO. 94-1310, at 6. Some issues were governed by customary international law, but in other cases the United States extended immunity as a matter of comity. *See* Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 486 (1983) ("[F]oreign sovereign immunity is a matter of grace and comity on the part of the United States.").

261. 28 U.S.C. § 1608(a)(2), (b)(2) (2012).

262. *See id.* §§ 1610-11.

263. *Id.* § 1609.

264. H.R. REP. NO. 94-1487, at 27 (1976); S. REP. NO. 94-1310, at 27 (1976).

265. Pub. L. No. 98-473, §§ 2011-15, 98 Stat. 1837, 2187 (1984) (codified as amended at 18 U.S.C. §§ 31-32 (2012) and 49 U.S.C. § 46501(2)(D)(iii) (2012)).

266. *Id.* § 2012(3), 98 Stat. at 1837; *see also* S. REP. NO. 98-619, at 1 (1984) (stating that the Act's purpose was to implement the Convention).

267. Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, *concluded* July 18, 1975, 15 U.S.T. 295, 974 U.N.T.S. 178 (entered into force Jan. 26, 1973).

268. Pub. L. No. 98-473, § 2012(2), 98 Stat. at 1837.

Report stated that the Act "is an exercise of the treaty power, of the power to regulate interstate and foreign commerce, and of the power to punish offenses against the laws of nations."[269]

In 1992, Congress passed the Torture Victim Protection Act (TVPA), which created an express cause of action for civil damages for acts of torture and extrajudicial killing committed under color of foreign law.[270] Congress stated that its purpose in adopting the TVPA was to "carry out the intent of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,"[271] and relied expressly on the Offenses Clause as a constitutional basis for the legislation.[272] Congress explained the law as follows: "The [C]onvention [Against Torture] obligates state parties to adopt measures to ensure that torturers within their territories are held legally accountable for their acts. This legislation will do precisely that—by making sure that torturers and death squads will no longer have a safe haven in the United States."[273]

It is clear that in providing a civil remedy for acts of torture, the statute was intended to implement the treaty—as Congress indicated—and not simply the prohibition against torture in customary international law. Article 4 of the Convention Against Torture mandates that states parties must make all acts of

269. S. REP. NO. 98-619, at 2.

270. Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 note (2012)).

271. S. REP. NO. 102-249, at 3 (1991).

272. *Id*. at 5-6 ("Congress' ability to enact this legislation also drives [sic] from article I, section 8 of the Constitution, which authorizes Congress to 'define and punish * * * Offenses against the Laws of Nations.'" (quoting U.S. CONST. art. I, § 8, cl. 10)). Congress also relied on its authority under Article III to confer jurisdiction over cases arising under the law of the United States, which Congress understood to include international law. *See id.* at 5. In a Minority Report, Senators Simpson and Grassley expressed doubt that the TVPA was within Congress's power under the Offenses Clause, but their objection was based on the civil nature of the statute. They expressed no concern about whether the Offenses Clause could be used to implement a treaty. *See id.* at 13-14. As noted above, we believe the Offenses Clause permits Congress to provide for both criminal and civil liability. *See supra* note 196 and accompanying text.

In 1994, when the United States ratified the Convention Against Torture, Congress added a criminal prohibition of extraterritorial torture to further implement the Convention. *See* Foreign Relations Authorization Act, Fiscal Years 1994 and 1995, Pub. L. No. 103-236, § 506, 108 Stat. 382, 463 (1994) (codified at 18 U.S.C. §§ 2340, 2340A (2012)). There is no legislative history for the provision, and thus no express invocation of a particular constitutional authority. For further discussion, see *infra* notes 362, 387 and accompanying text.

273. S. REP. NO. 102-249, at 3. The Report noted that the bill closely tracked the definition of torture set forth in the Convention Against Torture, in light of U.S. understandings adopted when the Senate gave its advice and consent, *id.* at 6, as well as the treaty provisions relating to complicity and reliance on the orders of a superior, *id.* at 8-9 & n.16.

torture "punishable by appropriate penalties,"[274] and although Article 4 mandates that this must include criminal penalties, it otherwise leaves the choice of penalties to individual States.[275] Article 14 of the Convention further requires states parties to "ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation."[276] The United States adopted an understanding upon ratification that the Article 14 *obligation* applied only to torture committed in territory under a state's jurisdiction,[277] but Article 14 clearly *permits* states to go further and to provide a civil remedy for torture occurring elsewhere, as the TVPA did. Of course, the TVPA also implemented customary international law, particularly in its creation of a cause of action for extrajudicial killing,[278] and Congress could have adopted a civil damages remedy against torturers to punish violations of the customary international law prohibition on torture even in the absence of the Convention. But this fact simply shows that treaties and customary international law are often intertwined today, just as they were at the Founding, and it highlights the problems with limiting the Offenses Clause to only one species of international law.

Congress expressly invoked the Offenses Clause again when it passed the War Crimes Act of 1996 to implement the grave breaches provisions of the Geneva Conventions. The original statute made it a federal crime for any U.S. national or servicemember to "commit[] a grave breach of the Geneva Conventions," as defined in the four Geneva Conventions of 1949.[279] The House Report stated that the Act was adopted "to carry out the international obligations of the United States under the Geneva Conventions [of 1949] to provide criminal penalties for certain war crimes,"[280] noting that the Geneva Conventions required states parties to "enact appropriate implementing legislation criminalizing the commission of grave breaches."[281] Congress claimed constitu-

274. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 4, *opened for signature* Dec. 10, 1984, S. TREATY DOC. NO. 100-20 (1988), 1465 U.N.T.S. 85 (entered into force June 26, 1987) [hereinafter Convention Against Torture].

275. *See id.*

276. *Id.* art. 14.

277. 136 CONG. REC. S17486 (daily ed. Oct. 27, 1990) ("[I]t is the understanding of the United States that Article 14 requires a State Party to provide a private right of action for damages only for acts of torture committed in territory under the jurisdiction of that State Party.").

278. *See* S. REP. NO. 102-249, at 6 ("The TVPA incorporates into U.S. law the definition of extrajudicial killing found in customary international law.").

279. Pub. L. No. 104-192, § 2, 110 Stat. 2104, 2104 (1996) (codified as amended at 18 U.S.C. § 2441 (2012)).

280. H.R. REP. NO. 104-698, at 1 (1996).

281. *Id.* at 3; *see also id.* ("'The [signatory countries] undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed,

tional authority for the legislation under the Offenses Clause, stating that "[t]he constitutional authority to enact federal criminal laws relating to the commission of war crimes is undoubtedly the same as the authority to create military commissions to prosecute perpetrators of these crimes."[282] Congress further pointed to the Supreme Court decisions in *Yamashita* and *Quirin*,[283] which had upheld that authority under the Offenses Clause and construed the Clause as extending to treaties.[284] When Congress amended the War Crimes Act in 1997, it again invoked the Offenses Clause.[285]

In 1998, Congress amended the Foreign Corrupt Practices Act (FCPA) to implement the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, a multilateral treaty that was modeled on the FCPA but differed in a few respects. The sole and express purpose of the legislation was to implement the treaty.[286] Most of the FCPA amendments fell squarely within the Foreign Commerce Clause, which was the authority for the original Act. But it was less clear that the commerce power would sustain the prohibition on unlawful payments that took place completely outside the United States. To implement this part of the Convention, Con-

any of the grave breaches of the present Convention[s] * * *. Each [signatory country] shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts.'" (quoting Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 49, Aug. 12, 1949, 75 U.N.T.S. 31; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 50, Aug. 12, 1949, 75 U.N.T.S. 85; Convention (III) Relative to the Treatment of Prisoners of War art. 129, Aug. 12, 1949, 75 U.N.T.S. 135; Convention (IV) Relative to the Protection of Civilian Persons in Time of War art. 146, Aug. 12, 1949, 75 U.N.T.S. 287)).

282. *Id.* at 7.

283. *Id.* (quoting *In re* Yamashita, 327 U.S. 1, 7 (1946) (discussing *Ex parte* Quirin, 317 U.S. 1 (1942))).

284. *See infra* notes 325-334 and accompanying text. In 2006, Congress retroactively amended the War Crimes Act to redefine a war crime as "any serious violation of Common Article 3 of the Geneva Conventions," including "torture, cruel or inhumane treatment, murder, mutilation or maiming, intentionally causing great suffering or serious injury, and taking hostages," as well as three "outrages upon personal dignity: biological experimentation, rape and sexual assault." H.R. REP. NO. 109-664, pt. 1, at 3 (2006). In doing so, however, the House Report again noted that the "United States' treaty obligations require that the United States criminalize grave breaches of the Geneva Conventions." *Id.* at 26.

285. *See* EXPANDED WAR CRIMES ACT OF 1997, H.R. REP. NO. 105-204, at 9 (1997) ("The constitutional authority to enact federal criminal laws relating to the commission of war crimes is undoubtedly the same as the authority to create military commissions to prosecute perpetrators of these crimes." (internal citation omitted)).

286. *See* INTERNATIONAL ANTI-BRIBERY ACT OF 1998, S. REP. NO. 105-277, at 2 (1998) ("This Act amends the FCPA to conform it to the requirements of and to implement the OECD Convention.").

gress also invoked the Offenses Clause, stating that the exercise of "jurisdiction over U.S. businesses and nationals in furtherance of unlawful payments that take place wholly outside the United States" fell within Congress's power to "define and punish * * * Offenses against the Law of Nations."[287]

In the Military Commissions Act of 2006, Congress authorized the trial by military commission of "alien unprivileged enemy belligerents for violations of the law of war."[288] The House Armed Services Committee stated that the list of triable offenses "is based upon international treaties and U.S. criminal law" and reflects "the codification of the law of war into the United States Code pursuant to Congress's constitutional authority to 'Define and Punish * * * Offences against the Law of Nations.'"[289] The report further noted that "[m]ost of the listed offenses constitute clear violations of the Geneva Conventions, the Hague Convention, or both,"[290] that the definition of "unlawful enemy combatants" excluded persons recognized as "non-combatants under the Geneva Conventions,"[291] and that in the view of Congress the commissions were a "regularly constituted court, . . . for purposes of common Article 3 of the Geneva Conventions."[292] Leaving aside the question whether Congress correctly interpreted international law for these purposes, the Act clearly reflects Congress's view that the Offenses Clause authorized Congress to punish violations of international treaties governing armed conflict. The House Judiciary Committee found "the authority for this legislation in article 1, section 8 of the Constitution, including clauses 10 [the Offenses Clause], 11 [the Declare War Clause], 14 [the Rules for Armed Forces Clause] and 18 [the Necessary and Proper Clause]."[293]

Although this is not a comprehensive survey, the statutes discussed here are examples in which Congress has expressly invoked its authority under the Offenses Clause to implement U.S. treaty obligations. We note that Congress has passed a number of other statutes—specifically intended to implement treaties—for which the Offenses Clause would be a natural fit, including those

287. *Id.* at 3 (quoting U.S. CONST. art I, § 8, cl. 10).

288. Pub. L. No. 109-366, § 948b(a), 120 Stat. 2600, 2602 (codified at 10 U.S.C. § 948b(a) (2012)).

289. MILITARY COMMISSIONS ACT OF 2006, H.R. REP. NO. 109-664, pt. 1, at 24 (2006) (quoting U.S. CONST. art. I, § 8, cl. 10).

290. *Id.* at 25.

291. *Id.* at 6.

292. *Id.*

293. H. COMM. ON THE JUDICIARY, MILITARY COMMISSIONS ACT OF 2006, H.R. REP. NO. 109-664, pt. 2, at 15 (2006).

punishing genocide,[294] hostage taking,[295] crimes involving foreign officials and internationally protected persons,[296] terrorism financing,[297] and nuclear materials,[298] as well as the Chemical Weapons Convention Implementation Act,[299] which is discussed further in Part IV.

It appears, then, that Congress has consistently understood its authority under the Offenses Clause to extend to the implementation of treaties. Some of the Acts discussed above have implemented a treaty alone, while others have defined and punished offenses under both treaties and customary international law. But Congress has rejected any artificial division between these different forms of international law. In the words of an 1884 House Report on Counterfeiting, "'[t]he law of nations,' as used in this clause, is obviously what is now known among publicists as international law."[300]

Congress has also understood its authority to implement treaties under the Offenses Clause as one authority among many. It has therefore also invoked the Foreign Commerce Clause, the treaty power plus the Necessary and Proper Clause, and the power to establish lower federal courts, along with the Offens-

294. Genocide Convention Implementation Act of 1987 (the Proxmire Act), Pub. L. No. 100–606, 102 Stat. 3045 (1988) (codified as amended at 18 U.S.C. § 1091 (2012)) (implementing the Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277, as well as the customary international law prohibition on genocide).

295. 18 U.S.C. § 1203 (2012) (implementing the International Convention Against the Taking of Hostages, Dec. 17, 1979, 18 I.L.M. 1456, 1316 U.N.T.S. 205); *see* Act for the Prevention and Punishment of the Crime of Hostage Taking, Pub. L. No. 98-473, § 2003, 98 Stat. 1837, 2186 (1984) (providing that § 1203 would take effect on "the date the International Convention Against the Taking of Hostages has come into force and the United States has become a party to that convention").

296. Act for the Prevention and Punishment of Crimes Against Internationally Protected Persons, Pub. L. No. 97-351, 96 Stat. 1663 (1983) (codified as amended at 18 U.S.C. §§ 112, 878, 1116 & 1201 (2012)) (implementing the 1973 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, 28 U.S.T. 1975, 1035 U.N.T.S. 167).

297. Terrorist Bombings Convention Implementation Act of 2002, Pub. L. No. 107–197, 116 Stat. 721 (2002) (codified as amended at 18 U.S.C. § 2339C (2012)) (implementing the International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, S. TREATY DOC. NO. 106-49, 2178 U.N.T.S. 197).

298. Convention on the Physical Protection of Nuclear Material Implementation Act of 1982, Pub. L. No. 97-351, 96 Stat. 1663 (codified as amended at 18 U.S.C. § 831 (2012)) (implementing the Convention on the Physical Protection of Nuclear Material, Oct. 26, 1979, 1456 U.N.T.S. 101).

299. Chemical Weapons Convention Implementation Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681 (codified at 22 U.S.C. §§ 6701-6771 (2012)); *see infra* notes 400-406 and accompanying text.

300. H. COMM. ON THE JUDICIARY, COUNTERFEITING WITHIN THE UNITED STATES, H.R. REP. NO. 48-1329, at 1 (1884).

es Clause, in passing legislation to implement treaties. Congress's view is thus consistent with the original understanding, discussed above, that the Offenses Clause is one piece of a constitutional package designed to comprehensively ensure that the United States could comply with its international obligations.

B. Supreme Court Precedent

As discussed above, through at least the first third of the nineteenth century, the U.S. Supreme Court consistently regarded the law of nations as including a "conventional law of nations" consisting of treaties.[301] Furthermore, although the Court has considered the Offenses Clause only a few times, its decisions also support the conclusion that treaties fall within the scope of the Clause. The Court has treated the Clause as a source of congressional power to implement international law generally in passing upon laws prohibiting counterfeiting, protecting embassies, and establishing military tribunals, among others.[302] In so doing, the Court has emphasized the overarching purposes of the Clause to allow Congress to punish violations of international law and to meet the international commitments of the United States. The Court has not attempted to distinguish carefully between rules of customary international law and rules that are treaty-based, but has drawn from either source, as appropriate for the context. In short, the Court has looked generally to international law – which encompasses both treaties and customary international law – as the modern referent for the "law of nations." At times, the Court has specifically applied the Offenses Clause to uphold statutes implementing treaties. On other occasions, the Court has appeared to construe the Clause quite broadly as allowing the prohibition of any conduct that could give rise to state responsibility or harm U.S. relations with foreign states.

At the most general level, the Court has cited the Offenses Clause as evidence of the Constitution's purpose of giving the federal government control over matters of international law and foreign relations. In *Fong Yue Ting v. United States*, for example, the Court observed that "[t]he United States are a sovereign and independent nation, and are vested by the constitution with the entire control of international relations, and with all the powers of government necessary to maintain that control, and to make it effective," citing the Offenses Clause as an example.[303]

301. *See supra* notes 63-65 and accompanying text.

302. *See* Sarah H. Cleveland, *Our International Constitution*, 31 YALE J. INT'L L. 1, 13 (2006).

303. 149 U.S. 698, 711-12 (1893); *see also* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 427 n.25 (1964) (citing the Offenses Clause as "reflecting a concern for uniformity in this country's dealings with foreign nations and indicating a desire to give matters of international significance to the jurisdiction of federal institutions"); Holmes v. Jennison, 39 U.S. (14

More specifically, the Supreme Court's decisions emphasize that the purpose of the Offenses Clause is to enable the United States to comply with its international commitments, a purpose that applies equally to treaties and to customary international law. In *United States v. Arjona*,[304] the Court considered the constitutionality of the 1884 Counterfeiting Act, which criminalized the counterfeiting of foreign securities.[305] As discussed above, Congress had invoked the Offenses Clause as the constitutional authority for adopting the Act.[306] The Court noted that the Constitution makes the national government "responsible to foreign nations for *all* violations by the United States of their international obligations, and because of this congress is expressly authorized 'to define and punish . . . offenses against the law of nations.'"[307] No treaty obligation was at issue in *Arjona*, but the Court relied on Vattel to establish that "the obligation of one nation to punish those who, within its own jurisdiction, counterfeit the money of another nation has long been recognized,"[308] an obligation the Court concluded should be extended to foreign securities.[309] The Court emphasized that "the United States must have the power to pass [such a law] and enforce it themselves, or be unable to perform a duty which they may owe to another nation, and which the law of nations has imposed on them as part of their international obligations."[310] Consequently, the Court concluded, "if the thing made punishable is one which the United States are required by their international obligations to use due diligence to prevent, it is an offense against the law of nations."[311] This definition of the scope of the Offenses Clause, as applying to any acts which the United States has an "international obligation" to prevent, would readily include treaties.[312]

Pet.) 540, 570 (1840) (noting that "[a]ll the powers which relate to our foreign intercourse are confided to the general government" and giving the Offenses Clause as an example).

304. 120 U.S. 479 (1887).

305. *Id.* at 483-88.

306. Counterfeiting Act of 1884, ch. 52, 23 Stat. 22; *see supra* note 230-232 and accompanying text.

307. *Arjona*, 120 U.S. at 483 (emphasis added).

308. *Id.* at 484.

309. *Id.* at 486-87.

310. *Id.* at 487.

311. *Id.* at 488.

312. Both parties also described Congress's authority under the Offenses Clause in terms broad enough to apply to treaties. The United States argued that "'[t]he law of nations,' as used in this clause, is obviously what is now known among publicists as international law." Brief for United States at 8, *Arjona*, 120 U.S. 479 (No. 1100). The defendant also cited Chancellor Kent to define international law as a "collection of rules customary, *conventional* and judicial . . . determining [states'] *rights*, prescribing *their duties* and regulating *their intercourse*." Brief for Defendant at 16, *Arjona*, 120 U.S. 479 (No. 1100) (first emphasis added). The defendant

The same day that *Arjona* was decided, the Supreme Court decided *Baldwin v. Franks*, in which the Court confirmed that Congress had authority to create federal criminal remedies for attacks on aliens whose rights were protected by treaty.[313] There is no question that the rights at issue in that case were treaty-based, and the brief on behalf of the United States Marshal relied substantially on an Offenses Clause theory.[314] Although the Supreme Court did not specify the constitutional basis for the power to punish treaty violations that it recognized, the decisions in these two cases support the view that the Court did not consider the Offenses Clause authority to be limited to customary international law.[315]

A century later, the Supreme Court reiterated *Arjona*'s approach in *Boos v. Barry*.[316] At issue in *Boos* was the constitutionality of a provision of the District of Columbia Code, which prohibited the display of signs that offended the dignity of embassies and prohibited assembly within 500 feet of an embassy.[317] The Court indicated that Congress had enacted the provision in 1938 "pursuant to its authority under Article I, § 8, cl. 10, of the Constitution to 'define and punish . . . Offenses against the Law of Nations.'"[318] Ultimately the Court avoided the issue of constitutional authority to enact the provision, holding that the display clause was not narrowly tailored to serve the government's interests[319] and upholding the assembly provision based on a narrowing construction.[320]

In the course of its opinion, however, the Court elaborated on the purpose of the Offenses Clause:

> As a general proposition, it is of course correct that the United States has a vital national interest in complying with international law. The Constitution itself attempts to further this interest by expressly author-

contended that counterfeiting private securities did not implicate the interests of a foreign sovereign and thus did not constitute a violation of the law of nations. *Id.* at 15-16.

313. Baldwin v. Franks, 120 U.S. 678, 683 (1887).

314. Brief for Respondent at 26-28, *Baldwin*, 120 U.S. 678 (discussing the Offenses Clause and contending that "[a] treaty is a law of nations, a public law of the United States, and a violation of the treaty is an offense against the law of nations.").

315. *See supra* note 241 and accompanying text.

316. 485 U.S. 312 (1988).

317. D.C. CODE § 22-1115 (1981) (repealed 1988).

318. *Boos*, 485 U.S. at 316 (quoting U.S. CONST. art. I, § 8, cl. 10).

319. *Id.* at 324-29.

320. *Id.* at 329-32.

> izing Congress "[t]o define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations."[321]

The Court observed that the D.C. law was most strongly supported by the dignity interest protected by Article 22 of the Vienna Convention on Diplomatic Relations, "which all parties agree represents the current state of international law."[322] The Vienna Convention, which entered into force in 1964, was adopted largely to codify customary international law concerning diplomats.[323] Although the Court discussed the United States's interest in enacting the law in terms of "international law" and "international relations," it did not attempt to distinguish between customary international law and the Convention.[324] Moreover, the United States's "vital national interest in complying with international law"—the interest that "[t]he Constitution itself attempts to further" through the Offenses Clause—plainly applies not just to customary international law but also to treaties.

While *Arjona* and *Boos* articulate purposes for the Offenses Clause that are consistent with encompassing treaties, the Supreme Court's military commission cases furnish specific examples of decisions construing the Offenses Clause to reach treaties. The first such case was *Ex parte Quirin*,[325] in which the Court held that German saboteurs captured in the United States were properly tried by military commission under the 1920 Articles of War.[326] In enacting Article 15 referring to military commissions, the Court reasoned, Congress had

> exercised its authority to define and punish offenses against the law of nations by sanctioning, within constitutional limitations, the jurisdiction of military commissions to try persons for offenses which, according to the rules and precepts of the law of nations, and more particularly the law of war, are cognizable by such tribunals.[327]

The Court did not view the "law of nations" in this context as limited exclusively to customary international law. The Court defined the law of war "as including that part of the law of nations which prescribes, for the conduct of war,

321. *Id.* at 323 (quoting U.S. CONST. art. I, § 8, cl. 10).

322. *Id.* at 322. The Court noted that Article 22 "imposes on host states '[the] special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity.'" *Id.*

323. *See infra* note 358 and accompanying text.

324. *See Boos*, 485 U.S. at 322-24.

325. 317 U.S. 1 (1942).

326. An Act To Amend an Act Entitled "An Act for Making Further and More Effectual Provision for the National Defense, and for Other Purposes," Pub. L. No. 66-242, 41 Stat. 759 (1920).

327. *Quirin*, 317 U.S. at 28.

the status, rights and duties of enemy nations as well as of enemy individuals,"[328] and it relied expressly on the definition of "belligerent" in the Fourth Hague Convention of 1907.[329] That Convention "recognized that there is a class of unlawful belligerents" not entitled to treatment as prisoners of war and "by Article 15 of the Articles of War Congress has made provision for their trial and punishment by military commission, according to 'the law of war.'"[330]

In *Application of Yamashita*, the Court confirmed the jurisdiction of a military commission to try the commanding general of the Japanese army in the Philippines for failing to prevent atrocities by troops under his command.[331] The Court reiterated its conclusion in *Quirin* that Article 15 was an exercise of Congress's power under the Offenses Clause[332] and that Congress had "adopted the system of military common law applied by military tribunals[,] . . . as further defined and supplemented by the Hague Convention, to which the United States and the Axis powers were parties."[333] The Court also looked to other articles of the Fourth Hague Convention as establishing the law of nations with respect to protection of civilians in occupied territory, and to the Fourth and Tenth Hague Conventions and the Geneva Red Cross Convention of 1929 for a commander's responsibility for violations by his forces.[334] The

328. *Id.* at 27-28.

329. *Id.* at 30 n.7 (citing Annex to the Fourth Hague Convention art. 1, Oct. 18, 1907, 36 Stat. 2295, "which defines the persons to whom belligerent rights and duties attach," and noting that the Convention had been signed by 44 nations); *id.* at 34 (noting that this definition of lawful belligerents had been incorporated into the United States's Rules of Land Warfare); *id.* at 35 (quoting the Fourth Hague Convention Preamble).

330. *Id.* at 35.

331. 327 U.S. 1 (1946).

332. *Id.* at 7.

333. *Id.* at 8.

334. With respect to command responsibility, the Court stated:

> [T]he law of war presupposes that its violation is to be avoided through the control of the operations of war by commanders who are to some extent responsible for their subordinates.
>
> This is recognized by the Annex to Fourth Hague Convention of 1907, respecting the laws and customs of war on land. Article I lays down as a condition which an armed force must fulfill in order to be accorded the rights of lawful belligerents, that it must be "commanded by a person responsible for his subordinates." 36 Stat. 2295. Similarly Article 19 of the Tenth Hague Convention, relating to bombardment by naval vessels, provides that commanders in chief of the belligerent vessels "must see that the above Articles are properly carried out." 36 Stat. 2389. And Article 26 of the Geneva Red Cross Convention of 1929, 47 Stat. 2074, 2092, for the amelioration of the condition of the wounded and sick in armies in the field, makes it "the duty of the commanders-in-chief of the belligerent armies to provide for the details of execution of the foregoing articles, [of the convention]

Court concluded that the principle of command responsibility established by these treaties could be applied by military commissions created by Congress under the Offenses Clause to punish violations of the laws of war. *Yamashita* thus confirms that the Court considered the law of war—part of the law of nations—to include treaties.

In 1950, Congress replaced the Articles of War with the Uniform Code of Military Justice (UCMJ), but Article 15 was carried over as Article 21 of the UCMJ.[335] In *Hamdan v. Rumsfeld*,[336] the Supreme Court struck down the system of military commissions established by President Bush in 2001.[337] The Court found that the commissions violated the Geneva Conventions and therefore failed to comply with the statutory mandate that commissions comply with the laws of war.[338] The Court observed that "the 'rules and precepts of the law of nations'—includ[e], *inter alia*, the four Geneva Conventions signed in 1949"[339] and concluded that the commissions could not be considered "regularly constituted court[s]" within the meaning of Common Article 3 of the Geneva Conventions.[340] Writing for four members of the Court, Justice Stevens further concluded that the charge of conspiracy was not clearly a violation of the law of nations and that Congress had not "in exercise of its constitutional authority to 'define and punish . . . Offences against the Law of Nations,' U.S. Const., Art. I, § 8, cl. 10, positively identified 'conspiracy' as a war crime."[341] He noted that "none of the major treaties governing the law of war identifies conspiracy as a violation thereof."[342] In other words, the most recent word from

> as well as for unforeseen cases . . . " And, finally, Article 43 of the Annex of the Fourth Hague Convention, 36 Stat. 2306, requires that the commander of a force occupying enemy territory, as was petitioner, "shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country."
>
> These provisions plainly imposed on petitioner, who at the time specified was military governor of the Philippines, as well as commander of the Japanese forces, an affirmative duty to take such measures as were within his power and appropriate in the circumstances to protect prisoners of war and the civilian population.

Id. at 15-16 (second alteration in original).

335. 10 U.S.C. § 821 (2012). For Article 15 of the Articles of War, see An Act To Amend an Act Entitled "An Act for Making Further and More Effectual Provision for the National Defense, and for Other Purposes," Pub. L. No. 66-242, 41 Stat. 759 (1920).

336. 548 U.S. 557 (2006).

337. *Id.* at 613.

338. *Id.* at 625-35.

339. *Id.* at 613 (quoting *Ex parte* Quirin, 317 U.S. 1, 28 (1942)).

340. *Id.* at 632-33.

341. *Id.* at 601-02 (plurality opinion).

342. *Id.* at 610.

the Court on the Offenses Clause confirms—consistent with *Quirin* and *Yamashita*—that Congress may punish offenses "defined by . . . treaty" by exercising its power under the Offenses Clause.

The Supreme Court's military commission cases also demonstrate that Congress's authority under the Offenses Clause is not limited to passing legislation that a treaty obligates it to adopt. Although the Geneva Conventions do obligate the United States to punish war crimes,[343] no treaty requires the United States to use military commissions for this purpose. In sustaining the use of military commissions to punish violations of the law of war—including violations of treaties—the Supreme Court has acknowledged that Congress enjoys some discretion under the Offenses Clause in determining how to punish violations of the law of nations, a point to which we return in Part IV.

In sum, the Supreme Court's precedents are fully consistent with the reading of the Offenses Clause advanced here. The Court has repeatedly pointed to the Clause as evidence of the Framers' intent to confer authority on the federal government over questions of international law and foreign relations. It has stressed that the purpose of the Clause is to allow Congress to ensure compliance with the United States's international commitments. Finally, in the military commission cases, it has expressly construed Congress's power under the Offenses Clause to implement treaties defining the laws of war. The Court's decisions are consistent with the original understanding of the Clause discussed above.[344] And its approach is sensible given the increased importance of treaties and their interrelationship with customary international law in the modern era.

III. THE SIGNIFICANCE OF TREATIES IN MODERN INTERNATIONAL LAW

International law has changed dramatically since the Offenses Clause was adopted. Over the course of the nineteenth century, international law came to be seen in positivist terms.[345] Vattel's categories of the law of nations based on natural law—the necessary and the voluntary law of nations[346]—fell away, leaving an international law that consisted only of treaties and customary international law based on state practice. Modern customary international law differs

343. *See supra* note 281 and accompanying text.

344. *See supra* Part I.

345. For a detailed discussion from an American perspective, see William S. Dodge, *Customary International Law, Congress and the Courts: Origins of the Later-in-Time Rule*, *in* MAKING TRANSNATIONAL LAW WORK IN THE GLOBAL ECONOMY: ESSAYS IN HONOUR OF DETLEV VAGTS 531, 544-55 (Pieter H.F. Bekker et al. eds., 2010).

346. *See supra* notes 46-50 and accompanying text.

from Vattel's "customary law of nations" in that a general and consistent practice of states, taken under a sense of legal obligation, is now understood to give rise to universally binding rules from which nations are not free to withdraw.[347] The law of treaties has remained largely the same, but treaties are no longer commonly referred to as the "conventional law of nations."[348] Instead, "international law" became the modern concept that encompasses both treaties and customary international law. Partly as a result of these changes, the original understanding that the "law of nations" included violations of treaties was largely lost.

Other changes in international law, however, may have made the Offenses Clause's embrace of treaties even more important. Although treaties have been intertwined with customary international law from the beginning of the Republic,[349] the significance of treaties as a form of international lawmaking has dramatically increased in modern times. As the *Restatement (Third) of Foreign Relations Law* observes, "In our day, treaties have become the principle vehicle for making law for the international system; more and more of established customary law is being codified by general agreements."[350] The nineteenth-century impulse towards codification led to an increase in the number of treaties designed both to create new obligations and to restate, clarify, and further elaborate upon existing obligations under customary international law. Particularly in the period since World War II, customary international law has increasingly been codified into multilateral international conventions, including through the activity of the International Law Commission, which was established by the U.N. General Assembly in 1948 for the explicit purposes of codifying international law and contributing to its progressive development. A reading of the Offenses Clause as limited to customary international law would not only create difficult line-drawing problems but would also undercut the purpose of the Clause to facilitate U.S. compliance with international law.

A comprehensive consideration of codification and progressive development is beyond the scope of this Article, but we offer a few examples that seem particularly relevant to Congress's authority under the Offenses Clause. As noted above, although the crime of piracy was defined by the unwritten law of

347. *See* 1 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102(2) (1987); Dodge, *supra* note 44, at 180-86.

348. The Supreme Court last referred to treaties by this name in 1819, though treatise writers continued to use the phrase through the mid-nineteenth century. *See supra* notes 65-66 and accompanying text.

349. *See supra* notes 111-113, 191-224 and accompanying text.

350. 1 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, pt. I, ch. 1, intro. note. For a discussion of codification generally, see ALAN BOYLE & CHRISTINE CHINKIN, THE MAKING OF INTERNATIONAL LAW 163-209 (2007); Timothy Meyer, *Codifying Custom*, 160 U. PA. L. REV. 995 (2012).

nations at the Founding,[351] piracy has since been codified by the Convention on the High Seas[352] and by the United Nations Convention on the Law of the Sea (UNCLOS).[353] With some exceptions, both conventions were largely intended to codify customary international law[354] and are generally regarded as having done so, including with respect to piracy.[355] The United States has ratified the Convention on the High Seas, and while it has not yet ratified the UNCLOS, the United States regards most of its provisions as restatements of customary international law.[356]

The protection of ambassadors and other public ministers under the Offenses Clause also dates back to the First Congress.[357] While the rights of such officials were then based in the unwritten law of nations, they have been codified and developed by the 1961 Vienna Convention on Diplomatic Relations (VCDR),[358] the 1963 Vienna Convention on Consular Relations (VCCR),[359]

351. *See* United States v. Smith, 18 U.S. 153, 154 (1820).

352. Convention on the High Seas art. 15, Apr. 29, 1958, 13 U.S.T. 2312, 450 U.N.T.S. 11, 90.

353. United Nations Convention on the Law of the Sea art. 101, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

354. *See* Convention on the High Seas, *supra* note 352, pmbl. (stating the parties' "desir[e] to codify the rules of international law relating to the high seas" (emphasis removed)); UNCLOS, *supra* note 353, pmbl. (referring to the convention as "the codification and progressive development of the law of the sea").

355. *See* 2 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW pt. V, intro. note (1987) (noting that the 1958 Convention "largely restated customary law as of that time"); *id.* (noting that "by express or tacit agreement accompanied by consistent practice, the United States, and states generally, have accepted the substantive provisions of the Convention [on the Law of the Sea], other than those addressing deep sea-bed mining, as statements of customary law"); *see also* United States v. Ali, 718 F.3d 929, 936 (D.C. Cir. 2013) ("Despite not being a signatory, the United States has recognized, via United Nations Security Council resolution, that the U.N. Convention on the Law of the Sea ('UNCLOS') 'sets out the legal framework applicable to combating piracy and armed robbery at sea.'" (citation omitted)); United States v. Dire, 680 F.3d 446, 462 (4th Cir. 2012) ("UNCLOS's definition of general piracy . . . reflects an existing norm of customary international law.").

356. *See* United States Oceans Policy, Statement by the President, 19 Weekly Comp. of Pres. Docs. 383 (Mar. 10, 1983), 83 Dep't State Bull., No. 2075, at 70-71, 22 I.L.M. 464 (objecting to provisions on deep sea-bed mining but noting that "the convention also contains provisions with respect to traditional uses of the oceans which generally confirm existing maritime law and practice and fairly balance the interests of all states").

357. *See supra* notes 198-203 and accompanying text.

358. Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95; *see* Finzer v. Barry, 798 F.2d 1450, 1458 (D.C. Cir. 1986) ("The principles embodied in the Vienna Convention [on Diplomatic Relations] were for the most part already established under customary international law."); 1 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW pt. IV, ch. 6, subch. A., intro. note. (1987) ("In 1961, the customary law of diplomatic immunities was codified in the Vienna Convention on Diplomatic Relations.").

and the 1973 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents.[360] Various provisions of the U.S. Code now implement these treaty obligations to prohibit violence against foreign officials.[361] Given the clear purpose of the Offenses Clause to allow Congress to punish violations of U.S. international law commitments, it makes little sense to think that Congress's authority to protect ambassadors and other public ministers under the Offenses Clause is limited to the customary international law obligations that have been subsumed and further developed by these treaties.

The post-World War II era has seen the rise of human rights treaties that partially codify customary international law and that have contributed to the development of customary law, such as the Convention Against Torture, the Genocide Convention, and the major multilateral human rights treaties. Congress has implemented the Genocide Convention and the Convention Against Torture by, *inter alia*, adopting criminal statutes[362] as well as providing for civil liability.[363] Although the Genocide Convention perhaps preceded the recognition of genocide as a customary norm, each of these treaties now represents, at least to some extent, a codification of customary international law.[364] It would

359. Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261; *see* 1 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW pt. IV, ch. 6, intro. note, (1987) ("Many of the provisions of the Convention reflect customary law and are therefore applicable between the United States and states not parties to the Convention.").

360. Dec. 14, 1973, 28 U.S.T. 1975, 1035 U.N.T.S. 167.

361. *See supra* note 296 and accompanying text.

362. 18 U.S.C. § 1091 (2012) (genocide); 18 U.S.C. § 2340A (2012) (torture); *see* Foreign Relations Authorization Act, Fiscal Years 1994 and 1995, Pub. L. No. 103-236, § 506, 108 Stat. 382, 463 (1994) (adding § 2340A and entitled "Torture Convention Implementation"); GENOCIDE CONVENTION IMPLEMENTATION (PROXMIRE) ACT OF 1988, S. REP. NO. 100-333, at 1 (1988) (noting the purpose of § 1091 was "to implement the International Convention on the Prevention and Punishment of the Crime of Genocide").

363. *See, e.g.*, Alien Tort Statute, 28 U.S.C. § 1350 (2012) (jurisdiction over torts in violation of the law of nations or a treaty of the United States); Torture Victim Protection Act of 1991, Pub. L. 102–256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 note (2012)) (civil cause of action for torture and extrajudicial killing under color of foreign law); Foreign Sovereign Immunity Act, 28 U.S.C. § 1605A(c) (2010) (civil cause of action against state sponsors of terrorism and their officials for torture, extrajudicial killing, aircraft sabotage, and hostage taking).

364. With respect to the genocide, the International Court of Justice has noted "that the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation." Reservations to the Convention on Prevention and Punishment of Crime of Genocide, Advisory Opinion, 1951 I.C.J. 15, 23 (May 28).

The purpose of the Convention Against Torture was not to codify customary international law, but rather to establish additional treaty obligations to "achiev[e] a more effective

be odd to conclude that the Offenses Clause does not authorize Congress to implement the more detailed provisions of the Genocide and Torture Conventions, but only the customary international law principles reflected in those conventions.

Similarly, prior to the twentieth century, much of the law of war was unwritten.[365] Now most of the law of armed conflict is treaty-based, at least for international armed conflicts, particularly through the 1907 Hague Conventions and the 1949 Geneva Conventions and their additional protocols, which reflect a mixture of customary and conventional law.[366] As previously noted, Congress has exercised its authority under the Offenses Clause to criminalize grave breaches of the Geneva Conventions,[367] and the Supreme Court has pointed to other treaties as the basis for Congress's authorization of military commissions.[368] These are just a few examples of the diverse ways in which the

implementation of the existing prohibition under international and national law of the practice of torture and other cruel, inhuman or degrading treatment or punishment[.]" G.A. Res. 39/46, pmbl., U.N. Doc. A/Res/39/46 (Dec. 10, 1984). However, aspects of the Convention have been understood by some tribunals as a codification of customary international law. *See* Prosecutor v. Furundžija, Case No. IT-95-17/1-A, Judgment, ¶ 111 (Int'l Crim. Trib. for the Former Yugoslavia July 21, 2000) (holding that the definition of torture in Article 1 of the Convention "reflects customary international law").

365. General Order No. 100, Instructions for the Government of Armies of the United States in the Field, of April 24, 1863, commonly known as the Lieber Code, is generally viewed as the first comprehensive codification of the international laws of war. *See* FRANCIS LIEBER, INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD (1898), *reprinted in* RICHARD HARTIGAN, LIEBER'S CODE AND THE LAW OF WAR 34 (1983). *See generally* JOHN FABIAN WITT, LINCOLN'S CODE: THE LAWS OF WAR IN AMERICAN HISTORY (2012).

366. Common Article 3 of the Geneva Conventions is widely regarded as now reflecting customary international law. The International Court of Justice has stated that "the Geneva Conventions are in some respects a development, and in other respects no more than the expression, of [fundamental general principles of humanitarian law]." Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 218 (June 27); *see also* Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶¶ 79, 82 (July 8). Judge Meron criticized the *Nicaragua* judgment on this point, *see* Theodor Meron, *The Geneva Conventions as Customary Law*, 81 AM. J. INT'L L. 348, 351-58 (1987), but concluded that "[a]ll of the Conventions contain a core of principles . . . that express customary law," *id*. at 364-65. He added that "the identification of the various provisions as customary or conventional law presents the greatest difficulties." *Id*. at 365.

367. 18 U.S.C. § 2441 (2012); *see* WAR CRIMES ACT OF 1996, H.R. REP. NO. 104-698, at 1 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2166 (noting that § 2441 was adopted "to carry out the international obligations of the United States under the Geneva Conventions to provide criminal penalties for certain war crimes"). For further discussion of the legislative history of the War Crimes Act, which expressly invoked the Offenses Clause, see *supra* notes 279-285 and accompanying text.

368. *See, e.g.*, Application of Yamashita, 327 U.S. 1, 8 (1946) (relying on the Hague Convention); *see also* notes 325-342 and accompanying text.

relationship between treaties and customary international law has become more complex and intertwined.

It is also important to recall that the United States often agrees by treaty to punish individual conduct that does not violate customary international law—like damaging submarine cables, bribing foreign officials, or financing terrorism.[369] As a matter of international law, the United States is no less bound to comply with these treaty commitments than when the conduct condemned in the treaty is also prohibited by customary international law.[370] Given that a principal purpose of the Offenses Clause is to enable the United States to comply with its international commitments, it makes little sense to distinguish obligations that are tied in some way to customary international law from those that rest on a treaty alone.

In short, while changes in international law since the adoption of the Constitution may have obscured the meaning of the phrase "law of nations" in the Offenses Clause, they have also made it even more important to recapture the original understanding of that phrase as encompassing treaties. The United States's international obligations are increasingly treaty-based. Those treaties often build on a foundation of customary international law. It is frequently difficult to determine which treaty provisions codify existing customary international law and which impose additional obligations, particularly since codification itself can contribute to the further development of customary international law. An interpretation of the Offenses Clause that authorizes Congress to implement unwritten customary international law but not treaties is artificial and unworkable when these two sources of international law are so deeply entwined.

If the Offenses Clause were in fact limited to customary international law, then treaties could be invoked as a basis for congressional authority under the Offenses Clause only to the extent that they reflected custom. But it is simply implausible to conclude that Congress could exercise authority under the Offenses Clause to punish assaults against ambassadors when the protection of diplomats under international law rested exclusively on custom, but could not implement the Vienna Convention on Diplomatic Relations under the same authority, or could do so only to the extent that the treaty did not alter custom-

369. Convention for the Protection of Submarine Cables, Mar. 14, 1884, 25 Stat. 1424, T.S. No. 380; Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, S. TREATY DOC. NO. 105-43 (1998); International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, S. TREATY DOC. NO. 106-49, 2178 U.N.T.S. 197.

370. 1 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 321 (1987) ("Every international agreement in force is binding upon the parties to it and must be performed by them in good faith.").

ary international law. Nor would such an approach be consistent with the constitutional design.

Fortunately, the historical record shows that this is not how the Offenses Clause has been understood and applied over time. The Clause instead has always been understood as giving Congress a basis for enforcing international law—including complying with the United States's international law obligations and domestically punishing violations of international law—whether based upon treaties, customary international law, or both. Neither Congress in adopting legislation under the Offenses Clause, nor the Supreme Court in evaluating and enforcing such legislation, has drawn bright lines to limit application of the Clause to U.S. customary international law obligations. On the contrary, the practice throughout the nation's history—consistent with the original understanding—has been to construe and apply the Clause in terms that embrace both treaties and unwritten international law.

IV. IMPLICATIONS FOR IMPLEMENTING LEGISLATION

Recognizing that the Offenses Clause allows Congress to define and punish offenses under treaties leaves open important questions regarding the scope of that authority. Some limiting principles are internal to the Offenses Clause itself. For example, in order for Congress to punish an "Offence[] against the Law of Nations," the conduct being punished must be proscribed by international law; punishment may not be imposed simply to advance international relations. These internal limiting principles, and the discretion Congress enjoys under the Offenses Clause, are the subject of this Part. Other limiting principles are external to the Offenses Clause. For example, under the First Amendment, legislation implementing a treaty may not impose content-based restrictions on speech unless necessary to serve a compelling state interest.[371] While we will refer to some of these external limitations in passing, a full consideration of such limitations is beyond the scope of this Article.

With respect to internal limiting principles, we believe—and historical practice suggests—that the Offenses Clause allows Congress to adopt civil or criminal legislation in at least the following circumstances: (1) a treaty operates directly on individuals to prohibit the conduct; (2) a treaty requires domestic legislation punishing the conduct; (3) a treaty clearly proscribes the conduct, even if it does not operate directly on individuals or expressly mandate punishment; and (4) a treaty authorizes punishment of the conduct, even if it does not require it.

371. *See* Boos v. Barry, 485 U.S. 312, 329 (1988) (holding that legislation to implement the Vienna Convention on Diplomatic Relations violated the First Amendment).

These four categories include not only treaties that require the United States to punish conduct, but also treaties that authorize the United States to punish conduct without requiring it to do so. The first is uncontroversial. In *United States v. Arjona*, the Supreme Court confirmed that the Offenses Clause gave Congress, at a minimum, the power to punish conduct that could give rise to state responsibility, holding that "if the thing made punishable is one which the United States are required by their international obligations to use due diligence to prevent, it is an offense against the law of nations."[372] The state responsibility reading of *Arjona* and the scope of the Offenses Clause has been adopted by scholars ranging from Jack Goldsmith to Louis Henkin.[373] But there is also historical support for the view that the Clause permits Congress to address conduct that international law authorizes, but does not require, states to punish. A traditional example is piracy. Although condemned under international law, piracy was not an act that states were required to punish under all circumstances. Pirates were *hostis humani generis*, and states were authorized by international law, but not obligated, to punish them wherever they were found.[374] This remains true today under operative treaties.[375] Nevertheless, piracy has long been prohibited by international law and recognized as a violation of the law of nations that the United States could punish under either the piracy prong of Article I, Section 8, Clause 10, or the Offenses Clause.[376] A modern example is the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, which authorizes but does not

372. 120 U.S. 479, 488 (1887); *see also id.* at 487 (noting that the Clause allowed punishment "to perform a duty which [the United States] may owe to another nation, and which the law of nations has imposed on them as part of their international obligations").

373. HENKIN, *supra* note 11, at 70 (explaining *Arjona* as holding that the Offenses Clause "enable[s] Congress to enforce by criminal penalties any new international obligation the United States might accept"); Jack L. Goldsmith, *Define and Punish Clause*, HERITAGE GUIDE TO CONST., http://www.heritage.org/constitution/#!/articles/1/essays/48/define-and-punish-clause [http://perma.cc/SQ83-Z6EC] (noting that under *Arjona*, the Offenses Clause, to which Goldsmith refers as the Define and Punish Clause, not only "permit[s] Congress to punish actual violations of the law of nations but also to punish offenses that would trigger the international responsibility of the United States if left unpunished").

374. *See* United States v. Smith, 18 U.S. (5 Wheat.) 153, 176-77 n.a (1820) (noting that because a pirate is *hostis humani generis*, "every community hath a right to punish" piracy).

375. *See, e.g.*, UNCLOS, *supra* note 353, art. 100 ("States shall co-operate to the fullest possible extent in the repression of piracy . . . . "); *id.* art. 105 ("On the high seas . . . every State *may* seize a pirate ship or aircraft . . . and arrest the persons and seize the property on board." (emphasis added)).

376. *Cf. Smith*, 18 U.S. (5 Wheat.) 153 (analyzing a piracy statute in terms of both the piracy and offenses prongs of art. I, § 8).

require the punishment of narcotics offenses in certain situations, including offenses committed within the territorial waters of another nation.[377]

Some authority goes even further, suggesting that Congress may punish under the Offenses Clause any conduct that gives offense to foreign nations and thus interferes with the foreign relations of the United States. In 1833, Justice Story described the Clause as giving Congress "the power to define and punish all such offences, which may interrupt our intercourse and harmony with, and our duties to [foreign nations]."[378] There are also broad dicta in *Arjona* that could be understood to allow Congress to punish any conduct that could cause annoyance to a foreign state.[379] We believe this suggestion goes too far. The text of the Offenses Clause requires that the punishable conduct be an "Offence[] against the Law of Nations,"[380] not an "Offence to a foreign nation." The fact that conduct may interfere with foreign relations does not, by itself, satisfy that requirement. International law must proscribe the conduct.

Finally, Congress enjoys considerable discretion under the Offenses Clause to define offenses under customary international law and treaties. But as we discuss below, Congress may not create or recategorize offenses without support from international law. Congress also has discretion in punishing such offenses to choose a means rationally related to what is required or authorized by international law. In addition, Congress's discretion is subject to whatever other limitations international law or the U.S. Constitution might impose.[381]

A. Four Categories of Treaties

For purposes of exposition, we identify four categories of treaties that, in our view, provide the basis for Congress to exercise its authority under the Offenses Clause. In reality, treaty commitments come in many variations, and it may be more accurate to think of them as spanning a spectrum from those that directly prohibit individual conduct to those that proscribe conduct and authorize, but do not require, punishment.

377. United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances art. 3(1), 3(4), 4(1)(b), *opened for signature* Dec. 20, 1988, 1582 U.N.T.S. 95, 28 I.L.M. 493; *see infra* notes 419-425 and accompanying text.

378. 3 STORY, *supra* note 184, at 57-58.

379. United States v. Arjona, 120 U.S. 479, 487 (1887) (suggesting that the Offenses Clause reaches conduct that would "give just ground of complaint, and thus disturb that harmony between the governments which each is bound to cultivate and promote").

380. U.S. CONST. art. I, § 8, cl. 10.

381. *See infra* Part IV.B.

1. Treaties That Directly Prohibit Conduct by Individuals

In this category, the treaty itself creates international law obligations not simply for states, but for individuals directly. The operation of treaties in this category is analogous to the operation of certain customary international law rules on individuals—like the prohibition against piracy historically and the prohibition against torture today. When a treaty operates directly on individuals, the Offenses Clause allows Congress to define the conduct more specifically, if necessary, as well as to establish the appropriate punishment.

The neutrality provisions at issue in *Henfield's Case* could be characterized as falling into this group—at least as they were understood by the Washington Administration.[382] Treaties that would truly satisfy this category are, however, rare in U.S. practice. Different legal systems have different ways of incorporating treaties into their domestic laws. In the United States, it has been generally accepted that a self-executing treaty ordinarily cannot be the basis for a criminal prosecution, and that a statute is required to create a criminal offense.[383] As a result, the United States generally does not negotiate treaties that operate directly on individuals where criminal punishment is contemplated.

2. Treaties That Require Domestic Legislation Punishing Conduct

Many treaties throughout U.S. history have mandated that states parties adopt penal legislation. Sometimes the treaty imposes an obligation to punish conduct that is already an offense under customary international law. Sometimes the treaty both codifies and develops an offense under international law, while adding an obligation to punish the offense. Often a treaty proscribes conduct that does not violate customary international law and requires a state to punish that conduct.

The Convention Against Torture is perhaps the clearest example of a treaty that requires states parties to punish conduct already prohibited by customary international law. With respect to torture that meets the Convention's definition,[384] each state is required to "ensure that all acts of torture are offences un-

382. *See supra* notes 207-220 and accompanying text. Other provisions in early U.S. treaties also appeared to impose direct obligations on individuals. *See, e.g.*, Treaty of Amity with France, *supra* note 83, at art. IX (prohibition on persons fishing in places possessed by the other party); *id.* art. XVII (prohibition on privateers doing injury to the other side); *id.* art. XXIII (prohibition on persons taking letters of marque against the other party). For further discussion, see *supra* notes 91-94 and accompanying text.

383. *See supra* note 219.

384. *See* Convention Against Torture, *supra* note 274, art. 1 (defining torture as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punish-

der its criminal law"[385] and "punishable by appropriate penalties."[386] The United States implemented these obligations by adopting criminal legislation addressing extraterritorial acts of torture[387] and by enacting the TVPA.[388] Although the civil remedies available under the TVPA are broader than the understanding the United States adopted at the time of ratification,[389] the TVPA's creation of a civil damages remedy against perpetrators, in addition to the establishment of criminal remedies, is entirely consistent with the Article 4(2) obligation to make torture "punishable by appropriate penalties."[390]

Other treaties—like the Genocide Convention and the Geneva Conventions—both codify and develop customary international law, while adding a treaty obligation to punish the conduct. Article I of the Genocide Convention, for example, "confirm[s] that genocide, whether committed in time of peace or in time of war, is a crime under international law which [states parties] undertake to prevent and to punish."[391] Articles II and III define genocide and related punishable acts, while Article V commits states parties "to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide or of any of the other acts enumerated

ing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity"). This definition may be narrower than the prohibition of torture under customary international law. *See supra* note 364 and accompanying text.

385. Convention Against Torture, *supra* note 274, art. 4(1).

386. *Id.* art. 4(2). Article 5 requires states parties to establish jurisdiction over acts of torture that occurred outside its territory in a number of instances. *Id.* art. 5. Article 14 obligates states to provide "an enforceable right to fair and adequate compensation" for victims of torture. *Id.* art. 14.

387. 18 U.S.C. § 2340A (2012).

388. 28 U.S.C. § 1350 note (2012). For further discussion, see *supra* notes 270-278 and accompanying text.

389. *See supra* notes 277 and accompanying text.

390. *See* Convention Against Torture, *supra* note 274, art. 4(2). Of course, even in the absence of the Convention, Congress would have had authority to pass the TVPA under the Offenses Clause because torture and extrajudicial killing are violations of existing customary international law.

391. Convention on the Prevention and Punishment of the Crime of Genocide art. I, Dec. 9, 1948, 102 Stat. 3045 (1988), 78 U.N.T.S. 277.

in article III."[392] Congress met this obligation, *inter alia*, by passing the Genocide Convention Implementation Act.[393]

Still other treaties require the states parties to prohibit individual conduct that does not otherwise violate international law. Thus, the 1884 Convention for the Protection of Submarine Telegraph Cables,[394] which Congress implemented via the Offenses Clause, identified the punishable offense and mandated the adoption of any necessary legislation "to cause the punishment" of violators.[395] The 1973 Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation,[396] which Congress also implemented through the Offenses Clause,[397] specifies the conduct to be prohibited and mandates that states parties "make the offenses mentioned . . . punishable by severe penalties."[398] Numerous other treaties follow this format, including conventions on aircraft sabotage, hostage taking, counterterrorism, and biological or nuclear weapons—a number of which Congress has explicitly enforced through the Offenses Clause.[399]

The Chemical Weapons Convention, which was at issue in *Bond v. United States*,[400] also requires the prohibition of individual conduct that does not otherwise violate international law. Article VII(1)(a) of the Convention obligates the United States to "[p]rohibit natural and legal persons . . . from undertaking any activity prohibited to a State Party under this Convention, including enacting penal legislation with respect to such activity."[401] The Convention de-

392. *Id.* art. V.

393. Genocide Convention Implementation Act of 1987, Pub. L. No. 100-606, 102 Stat. 3045 (1988) (codified at 18 U.S.C. § 1091 (2012)).

394. Mar. 14, 1884, 25 Stat. 41 (1888), U.S.T.S. 380; *see supra* note 233 and accompanying text.

395. *Id.* art. II (stating that "[t]he breaking or injury of a submarine cable, done willfully or through culpable negligence, and resulting in the total or partial interruption or embarrassment of telegraphic communication, shall be a punishable offense"); *id.* art. XII (committing the parties "to take or to propose to their respective legislative bodies the measures necessary in order to secure the execution of this Convention, and especially in order to cause the punishment" of persons violating its provisions).

396. *Opened for signature* Sept. 23, 1971, 24 U.S.T. 565, 974 U.N.T.S. 178 (entered into force Jan. 26, 1973) [hereinafter Civil Aviation Convention].

397. *See* 18 U.S.C. §§ 31-32 (2012); 49 U.S.C. § 46501(2)(D)(iii) (2012); *supra* notes 265-269 and accompanying text.

398. Civil Aviation Convention, *supra* note 396, arts. 1 & 3.

399. *See supra* notes 265-293 and accompanying text.

400. 134 S. Ct. 2077 (2014).

401. Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction art. VII(1)(a), *opened for signature* Jan. 13, 1993, 1974 U.N.T.S. 45.

fines chemical weapons and prohibits their development, acquisition, or use.[402] The Chemical Weapons Convention Implementation Act adopted by Congress closely tracks these provisions.[403] In *Bond*, the Supreme Court did not address the constitutional basis for the Act, holding instead that the Act did not reach "purely local crimes" in the absence of a clear indication that Congress meant to do so.[404] Our reading of the Offenses Clause provides a clear constitutional basis for the Act, in addition to Congress's authority under the Commerce Clause and the Article II Treaty Clause coupled with the Necessary and Proper Clause.[405] However, by grounding the act directly in an Article I power, our reading also avoids the potential problems that Justice Scalia saw in combining the Necessary and Proper Clause with the Article II treaty power.[406]

3. *Treaties That Mandate Certain Conduct but Do Not Expressly Require Punishment for Violations*

Treaties in this category impose obligations on the United States that individual conduct may violate, but they do not specifically require that a state party adopt penalties for their violation. Punishing conduct contrary to such obligations is fully consistent with the purposes of the Offenses Clause, including the Court's approach in *Arjona*, since the treaties impose an international legal obligation on the United States to secure compliance.

For example, Article 36 of the Vienna Convention on Consular Relations obligates states parties to inform any detained national of a foreign state party

402. *Id.* arts. I-II.

403. Chemical Weapons Convention Implementation Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681 (codified at 22 U.S.C. §§ 6701-6771 (2012)). The fact that the convention requires domestic "penal legislation," but does not specifically mandate imposition of criminal punishment, is not an obstacle to Congress's ability to adopt criminal implementing legislation. Under both the Offenses Clause and the Necessary and Proper Clause, Congress enjoys some discretion in determining the appropriate punishment (including choosing between civil and criminal penalties) for conduct that international law proscribes. In the case of the Chemical Weapons Convention, most, if not all, states that have adopted implementing legislation have imposed criminal penalties for violations. *See CWC National Implementing Legislation Database*, ORGANISATION FOR PROHIBITION CHEMICAL WEAPONS, http://www.opcw.org/our-work/national-implementation/implementing-legislation/legislation-database [http://perma.cc/E63L-RTRR].

404. 134 S. Ct. at 2090.

405. The government had disavowed reliance on the Commerce Clause before the lower courts. *See id.* at 2087 (citing United States v. Bond, 681 F.3d 149, 151 n.1 (3d Cir. 2012)).

406. *See id.* at 2098-2102 (Scalia, J., concurring in the judgment) (arguing that the combination of these two powers gives Congress authority only to help "make" treaties but not to implement them); *see also supra* notes 26-33 and accompanying text.

of his right to have his consulate notified of his detention.[407] Although the Convention does not obligate states parties to punish individual violations of these requirements or otherwise expressly address the issue of remedies, the Convention does mandate that "the laws and regulations of the receiving state . . . must enable full effect to be given" to the obligations under the Article.[408] The Offenses Clause therefore would seem fairly to encompass the imposition of civil or criminal penalties for violations of this obligation.[409]

The treaty obligations that formed the basis for the proposed legislation protecting aliens against violence in the 1880s and 1900s fall into this category. Treaties such as the 1880 U.S.-China Treaty pledged that if nationals of the foreign state residing in the United States "meet with ill treatment at the hands of any other persons, the Government of the United States will exert all its power to devise measures for their protection and to secure to them the same rights, privileges, immunities, and exemptions as may be enjoyed by the citizens or subjects of the most favored nation."[410] Although the treaties did not require any specific legislation to accomplish this end, either the federal conspiracy statutes at issue in *Baldwin* or the later proposed statute establishing federal jurisdiction over crimes violating alien treaty rights would have been reasonable measures for Congress to adopt under the Offenses Clause in order to secure compliance with the treaty.[411]

A final example is the statute regulating embassy protests, which was at issue in *Boos v. Barry*.[412] Article 22(2) of the Vienna Convention on Diplomatic Relations provides that the receiving state "is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity."[413] The United States maintained that the relevant leg-

407. Vienna Convention on Consular Relations art. 36, *entered into force* March 19, 1967, 21 U.S.T. 77, 596 U.N.T.S. 261. The United States ratified the convention in 1969.

408. *Id.* art. 36(2).

409. Indeed, the Seventh Circuit has construed the U.S. civil rights statute, 42 U.S.C. § 1983, as providing a civil damages remedy against local officials for violations of Article 36 obligations, a construction that could be understood as enforcement of the Vienna Convention under the Offenses Clause. *See* Jogi v. Voges, 480 F.3d 822, 835 (7th Cir. 2007). *But see* Gandara v. Bennet, 528 F.3d 823, 827 (11th Cir. 2008) (disagreeing that Article 36 creates individually enforceable rights); Cornejo v. Cnty. of San Diego, 504 F.3d 853, 855 (9th Cir. 2007) (same).

410. Treaty Concerning Immigration art. III, U.S.-China, Nov. 17, 1880, 22 Stat. 826, 827.

411. *See supra* notes 238-251 and accompanying text.

412. 485 U.S. 312 (1988); *see supra* notes 316-324 and accompanying text.

413. Vienna Convention on Diplomatic Relations art. 22(2), Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95.

islation constituted "appropriate steps" to secure this obligation,[414] although the Supreme Court was unconvinced that the act was sufficiently tailored to the international legal obligation. The D.C. Circuit, on the other hand, had upheld the legislation as a valid exercise of the Offenses Clause, which "authorized Congress to derive from the often broadly phrased principles of international law a more precise code, as it determined that to be necessary to bring the United States into compliance with rules governing the international community."[415] The Court of Appeals appears to be correct, so far as the analysis goes. The very generally worded Article 22(2) obligation to "prevent any disturbance of the peace of the mission" and any "impairment of its dignity" clearly affords Congress some discretion in deciding what legislation is appropriate under the Offenses Clause to comply with the United States's international obligations.[416] Congress had also exercised that authority by adopting other, more narrowly tailored legislation protecting consular premises. But such a generally worded treaty obligation nevertheless may not provide the compelling government interest necessary to overcome First Amendment concerns, as the *Boos* Court recognized.[417]

4. Treaties That Authorize Punishment of Certain Conduct

In some cases, although a treaty proscribes certain conduct, it does not mandate enforcement in a particular context, but instead establishes international law *authority* to punish where such authority would not otherwise exist under international law. Such examples often involve international agreements that override customary international law rules of jurisdiction, which would otherwise limit a state's authority to prescribe conduct and enforce its law outside its own territory.[418] Positive international law, however, can overcome

414. Brief for the United States as Amicus Curiae at 24, Boos v. Barry, 485 U.S. 312 (1988) (No. 86-803), 1987 WL 881337 (The United States observed that Article 22(2) "does not explicitly address the question of picketing and other demonstrations in the vicinity of a foreign mission. Nor is there any occasion here to decide whether Article 22(2) in itself imposes a mandatory duty on the signatory states to prohibit some or all such activity within some area surrounding an embassy. For . . . the limited restrictions imposed by D.C. Code § 22-1115 are unquestionably 'appropriate steps' for this Nation to take . . . .").

415. Finzer v. Barry, 798 F.2d 1450, 1455 (D.C. Cir. 1986).

416. *See infra* Part IV.B.

417. *Boos*, 485 U.S. at 324 (1988) (stating that "the fact that an interest is recognized in international law does not automatically render that interest 'compelling' for purposes of First Amendment analysis").

418. *See* 1 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §§ 402-04 (1987) (jurisdiction to prescribe); *id.* §§ 431-33 (jurisdiction to enforce).

such jurisdictional barriers, whether in the form of the consent of the foreign state or a Security Council resolution.

For example, the UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, which the United States ratified in 1990, was adopted for the purpose of "promot[ing] co-operation . . . [to] address more effectively . . . illicit traffic in narcotic drugs and psychotropic substances having an international dimension."[419] The Convention expressly admonishes states to comply with the Convention "consistent with the . . . territorial integrity of States."[420] The Convention specifies in detail a range of drug-related offenses, and Article 3 declares that each state party "shall adopt such measures as may be necessary to establish [such acts] as criminal offences under its domestic law."[421] With respect to prosecution, Article 4 then distinguishes two groups of cases. First, it provides that states parties "[*s*]*hall*" establish criminal jurisdiction over drug offenses committed within their territory or on state-registered vessels or aircraft.[422] Second, it provides that states parties "*may*" assert criminal jurisdiction over the relevant offenses if committed by a national or resident of the state or if committed in relation to an offense within the territory of the state, or over conduct on a foreign vessel outside the state's territory based on an agreement with another state party.[423] In the first group of cases, the Convention mandates punishment, and thus falls into category two above. In the second group of cases, the Convention *authorizes*, but does not *require*, the exercise of criminal jurisdiction. Article 17 further provides that "[t]he Parties shall co-operate to the fullest extent possible to suppress illicit traffic by sea, in conformity with the international law of the sea,"[424] and contemplates bilateral or regional agreements to authorize enforcement activity that would otherwise violate international law.[425]

Pursuant to this regime, the United States has entered approximately two dozen bilateral agreements with foreign states authorizing the United States to exercise criminal jurisdiction over drug trafficking activity in a foreign state's territorial waters with the consent of the foreign state. For example, the United States has entered into an agreement with Panama providing that Panama may "waive its right to exercise jurisdiction and authorize the enforcement of the

419. United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, *supra* note 377, art. 2(1).

420. *Id.* art. 2(2).

421. *Id.* art. 3(1).

422. *Id.* art. 4(1)(a) (emphasis added).

423. *Id.* art. 4(1)(b) (emphasis added).

424. *Id.* art. 17(1).

425. *See id.* arts. 17(4) & (9).

other Party's law against the vessel, cargo and/or persons on board."[426] In 1986, in anticipation of the Narcotics Convention, Congress established a statutory basis for exercising such extraterritorial jurisdiction, the Maritime Drug Law Enforcement Act ("MDLEA"), which criminalizes drug trafficking on "a vessel subject to the jurisdiction of the United States,"[427] including "a vessel in the territorial waters of a foreign nation if the nation consents to the enforcement of United States law by the United States."[428]

Under this treaty regime, the United States has a legal obligation to cooperate in the suppression of illicit drug-trafficking activity; a legal obligation to punish specified drug trafficking activity that occurs in its territory or on its vessels or aircraft; and authority under the Convention to punish the same specified conduct if committed by a U.S. national or, pursuant to an appropriate agreement, in the territorial waters of another state party.[429]

If the Offenses Clause authorizes Congress to punish only conduct that the United States is obligated by international law to prohibit, it is not clear that the Clause would allow Congress to implement all of the provisions of the MDLEA. The United States has no specific international legal obligation to exercise criminal jurisdiction over drug trafficking activity by its nationals or in foreign territorial waters.[430] The vagueness of the Article 17 obligation to "cooperate to the fullest extent possible to suppress illicit traffic by sea" would provide a rather tenuous basis for legislation under the Offenses Clause.

In *United States v. Bellaizac-Hurtado*,[431] the Eleventh Circuit held that the MDLEA exceeded Congress's power under the Offenses Clause because drug trafficking was not prohibited by the law of nations, which the court misunderstood as limited to customary international law.[432] Of course, the statute could

426. Supplementary Arrangement Between the Government of the United States of America and the Government of the Republic of Panama to the Arrangement Between the Government of the United States of America and the Government of the Republic of Panama for Support and Assistance from the United States Coast Guard for the National Maritime Service of the Ministry of Government and Justice art. XI, U.S.-Pan., Feb. 5, 2002, T.I.A.S. No. 02-205.1.

427. 46 U.S.C. §70503(a)(1) (2012).

428. *Id.* § 70502(c)(1)(E).

429. United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, *supra* note 377, arts. 17(1), 4(1)(a) & 4(1)(b).

430. *Id.* art. 4(1)(b).

431. 700 F.3d 1245 (11th Cir. 2012).

432. *Id.* at 1251 ("[T]he eighteenth-century phrase, the 'law of nations,' in contemporary terms, means customary international law."). In reaching this conclusion, the court relied exclusively on cases interpreting the meaning of the "law of nations" in the Alien Tort Statute, *see id.*, which for the reasons noted above is not a reliable basis for determining the meaning of the Offenses Clause. *See also* Eugene Kontorovich, *Beyond the Article I Horizon: Congress's Enumerated Powers and Universal Jurisdiction Over Drug Crimes*, 93 MINN. L. REV. 1191, 1195 (2009) (arguing that the MDLEA exceeds Congress's Article I powers because, *inter alia*,

also be understood as an exercise of Congress's constitutional authority under the treaty power and the Felonies Clause, each coupled with the Necessary and Proper Clause.[433] But we believe that the statute in that case should have been upheld under the Offenses Clause because the treaty proscribed trafficking and authorized its punishment.

Similarly, in an effort to strengthen global efforts to suppress piracy in the Gulf of Aden, the UN Security Council has adopted a number of resolutions authorizing states to exercise jurisdiction over acts of piracy beyond what would be traditionally allowable under international law. Specifically, since 2008, the Security Council, with Somalia's consent, has authorized states to conduct counter-piracy operations in the territorial waters of Somalia—operations that they otherwise would be authorized to conduct only on the high seas.[434] The Security Council has made clear that this particular authorization is specific to Somalia and does not purport to establish a new rule of customary international law.[435] These authorities have been renewed and strengthened over time. The Security Council has further called upon states to exercise robust enforcement authority in the Somali piracy context. For example, in 2011 resolutions, the Security Council urged "States to favourably consider the prosecution of suspected, and imprisonment of convicted, pirates apprehended off the coast of Somalia,"[436] and "[*r*]*ecognize*[*d*] the need to

Congress's power to legislate extraterritorially under the Offenses Clause is limited to crimes subject to universal jurisdiction under customary international law).

433. *See* Government's Petition for Rehearing En Banc, United States v. Bellaizac-Hurtado (Jan. 11, 2013) (on file with the authors). The Eleventh Circuit denied the United States's petition for rehearing en banc, and the United States did not petition for certiorari.

434. *See* S.C. Res. 1816, para. 7(a)-(b), U.N. Doc. S/RES/1816 (June 2, 2008) ("*Decides* that . . . States cooperating with the TFG in the fight against piracy and armed robbery at sea off the coast of Somalia . . . may . . . [e]nter the territorial waters of Somalia for the purpose of repressing acts of piracy and armed robbery at sea, in a manner consistent with such action permitted on the high seas with respect to piracy . . . and . . . [u]se . . . all necessary means to repress acts of piracy and armed robbery."). *Compare* UNCLOS, *supra* note 353, art. 100 ("All States shall cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State."). For further discussion, see Ricardo Gosalbo-Bono & Sonja Boelaert, *The European Union's Comprehensive Approach to Combating Piracy at Sea: Legal Aspects*, *in* THE LAW AND PRACTICE OF PIRACY AT SEA: EUROPEAN AND INTERNATIONAL PERSPECTIVES 101 (Panos Kourtrakos & Achilles Skordas eds., 2014).

435. S.C. Res. 1816, *supra* note 434, para. 9 ("Affirms that the authorization provided in this resolution applies only with respect to the situation in Somalia and shall not affect the rights or obligations or responsibilities of member states under international law, including any rights or obligations under the Convention, with respect to any other situation, and underscores in particular that it shall not be considered as establishing customary international law."); *see also* S.C. Res. 1851, para. 10, U.N. Doc. S/RES/1851 (Dec. 16, 2008) (same); S.C. Res. 1846, para. 11, U.N. Doc. S/RES/1846 (Dec. 2, 2008) (same).

436. S.C. Res. 1976, para. 14, U.N. Doc. S/RES/1976 (Apr. 11, 2011).

investigate and prosecute not only suspects captured at sea, but also anyone who incites or intentionally facilitates piracy operations, including key figures of criminal networks involved in piracy who illicitly plan, organize, facilitate, or finance and profit from such attacks."[437] The authority established by Resolution 1816 to exercise traditional authorities over piracy in Somali territorial waters is binding on the United States under the UN Charter,[438] and thus establishes international legal authority—but not an obligation—to prosecute and punish piracy there.

In our view, Congress's authority under the Offenses Clause should properly extend to treaties that authorize the punishment of specifically defined individual conduct, even if they do not require punishment of that conduct. As noted above, one of the paradigm offenses under the Clause was piracy, which international law authorized, but did not require, states to punish.[439] Moreover, treaty negotiations are often complex and must take into consideration a range of international and domestic considerations. Sometimes the states parties may wish to reserve discretion about whether to prohibit conduct in particular situations. To insist that Congress may exercise its authority under the Offenses Clause only when a treaty has *obligated* the United States to act would be to adopt an unrealistic view of the way that treaties are negotiated and potentially to hamstring U.S. negotiators by limiting their range of options.

B. Congress's Discretion Under the Offenses Clause

Congress necessarily enjoys some discretion in determining how to define and punish conduct in the course of honoring the United States's international legal commitments,[440] but this discretion is not boundless. Here we find it useful to distinguish the deference owed to Congress's definition of the offense from the deference owed to its choice of the means for punishment.

The word "define" strongly suggests that Congress lacks authority under the Offenses Clause to create new violations of the law of nations out of whole

437. S.C. Res. 2020, para. 4, U.N. Doc. S/RES/2020 (Nov. 22, 2011).

438. U.N. Charter art. 25.

439. *See supra* notes 374-375 and accompanying text.

440. *See* David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 734 (2008) ("Congress's power to 'define and punish . . . Offences against the Law of Nations' gives the legislature substantial authority to decide what conduct violates international law, and to make that conduct unlawful under domestic law."); Stephens, *supra* note 11, at 545 ("[I]n deciding what falls within the reach of the [Offenses] Clause, Congress's decisions are entitled to significant deference from the judiciary.").

cloth.[441] In the early years of the Republic, one question was whether Congress could punish anything it wished on the high seas simply by calling it piracy.[442] Just a few years after ratification of the Constitution, Justice James Wilson expressed in a grand-jury charge his doubt that murder on the high seas could be considered piracy "consistently with the predominant authority of the law of nations."[443] Three decades later, the Supreme Court held in *United States v. Furlong* that Congress could not punish simple murder as piracy.[444] If Congress were allowed to do so, the Court reasoned, "what offence might not be brought within their power by the same device?"[445] In *Arjona*, the Court reiterated that "[w]hether the offense as defined is an offense against the law of nations depends on the thing done, not on any declaration to that effect by congress."[446]

441. *See* Military Commissions, 11 Op. Att'y Gen. 297, 299 (1865) (James Speed) ("Congress has power to *define*, not to make, the laws of nations."); Siegal, *supra* note 11, at 877 ("The notion of 'define,' however, was not that Congress could invent new offenses, but rather that it could clarify existing offenses.").

442. Piracy was generally understood as robbery on the high seas. *See* 4 BLACKSTONE, *supra* note 54, at *71 (defining piracy as "robbery and depredation upon the high seas"); United States v. Smith, 18 U.S. (5 Wheat.) 153, 162 (1820) ("[P]iracy, by the law of nations, is robbery upon the sea . . . . ").

443. James Wilson, *A Charge Delivered to the Grand Jury in the Circuit Court of the United States, for the Distriction of Virginia* (May 1791), *in* 2 THE WORKS OF JAMES WILSON, *supra* note 60, at 814. At the Constitutional Convention, Wilson had questioned whether it was appropriate for Congress to define the law of nations at all. *See supra* notes 147-152 and accompanying text.

444. 18 U.S. (5 Wheat.) 184, 198 (1820) ("Nor is it any objection to this opinion, that the law declares murder to be piracy. These are things so essentially different in their nature, that not even the omnipotence of legislative power can confound or identify them."); *see also* United States v. Palmer, 16 U.S. (3 Wheat.) 610, 641-42 (1818) (Johnson, J., concurring) ("[C]ongress cannot make that piracy which is not piracy by the law of nations, in order to give jurisdiction to its own courts over such offences.").

445. *Furlong*, 18 U.S. (5 Wheat.) at 198. Customary international law's definition of piracy has evolved over the past two centuries and today includes not just robbery but any illegal acts of violence for private ends committed by the passengers or crew of a private ship against the ship, passengers, or crew of another ship on the high seas, as reflected in the Convention on the High Seas and the UNCLOS. *See* Convention on the High Seas, *supra* note 352, art. 15; UNCLOS, *supra* note 353, art. 101; *see also* United States v. Dire, 680 F.3d 446, 454-69 (4th Cir. 2012) (discussing the evolution of customary international law on piracy).

446. United States v. Arjona, 120 U.S. 479, 488 (1887). These authorities cast doubt on Judge Brown's assertion, in her separate opinion in *al Bahlul v. United States*, that "[t]he judiciary must give Congress extraordinary deference when it acts under its Define and Punish Clause powers." 767 F.3d 1, 59 (D.C. Cir. 2014) (Brown, J., concurring in the judgment in part and dissenting in part). Judge Brown was careful to add that "deference does not mean there are no limits," and her conclusion that Congress could punish conspiracy as an offence against the law of nations was premised on the assumption that Congress's determination was "a reasonable interpretation of international law." *Id.* at 62. In our view, exercises of congres-

Definition of the offense is often less difficult with treaties than with customary international law. To be sure, some treaty provisions require further definition before they are incorporated into a domestic criminal code, like the neutrality provisions of early U.S. treaties implemented by the Neutrality Act[447] or Article 22(2) of the Vienna Convention on Diplomatic Relations, which imposed a duty on the United States "to prevent any disturbance of the peace of the mission or impairment of its dignity."[448] But most modern treaties—particularly those that authorize or require the United States to punish conduct—define the prohibited conduct with great specificity. The Genocide Convention, for example, provides a detailed definition of genocide,[449] which the U.S. implementing legislation tracks quite closely.[450]

Turning to the means of punishment, some treaties limit Congress's discretion by requiring particular kinds of legislation. The Convention Against Torture and the UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, for example, require the United States to make certain conduct a "criminal" offense.[451] The Chemical Weapons Convention, on the other hand, requires the United States to prohibit certain conduct through "penal legislation,"[452] an obligation that Congress presumably could have satisfied by adopting civil penalties.

sional authority under the Offenses Clause are entitled to ordinary—not extraordinary—deference.

447. *See supra* notes 220-224 and accompanying text.

448. Vienna Convention on Diplomatic Relations art. 22(2), Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95. This was the treaty provision implemented by the legislation struck down in *Boos v. Barry*, 485 U.S. 312 (1988). *See supra* notes 316-324 and accompanying text.

449. Convention on the Prevention and Punishment of the Crime of Genocide art. II, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277.

450. Genocide Convention Implementation Act of 1987, Pub. L. No. 100-606 (codified at 18 U.S.C. § 1091(a) (2012)); *see also* Act for the Prevention and Punishment of the Crime of Hostage Taking, 18 U.S.C. 1203(a) (2012) (defining offense of hostage taking with language that closely tracks the International Convention Against the Taking of Hostages art. 1, Dec. 17, 1979, 18 I.L.M. 1456, 1316 U.N.T.S. 205); Torture Victim Protection Act § 3(b), 28 U.S.C. § 1350 note (2012) (defining torture with language that closely tracks the Convention Against Torture, *supra* note 274, art. 1(1)).

451. *See* Convention Against Torture, *supra* note 274, art. 4(1) ("Each State Party shall ensure that all acts of torture are offences under its criminal law."); United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, *supra* note 377, art. 3(1) ("Each Party shall adopt such measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally [the following offenses].").

452. Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction art. VII(1)(a), *opened for signature* Jan. 13, 1993, S. TREATY DOC. NO. 103-21, 1974 U.N.T.S. 317.

In the absence of specific limitations in the treaty, and in the absence of constitutional limitations external to the Offenses Clause,[453] we think Congress has authority under the Offenses Clause to adopt any mode of punishment that is rationally related to enforcing the treaty. We draw this rational relationship test from cases interpreting the Necessary and Proper Clause,[454] but we believe it is appropriate to do so for two reasons. First, the Supreme Court has applied a similarly deferential test to Congress's exercise of enumerated powers generally.[455] Second, the discretion that Congress may exercise under the Offenses Clause with respect to choice of punishment is supplemented by its discretion under the Necessary and Proper Clause.[456] In *Bond v. United States*, Justice Scalia argued that the Necessary and Proper Clause, coupled with the Article II

453. *See supra* note 371 and accompanying text; *infra* notes 462-474 and accompanying text.

454. *See* United States v. Comstock, 560 U.S. 126, 134 (2010) ("[I]n determining whether the Necessary and Proper Clause grants Congress the legislative authority to enact a particular federal statute, we look to see whether the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power."); *see also* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819) ("But we think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.").

455. "While our government must be acknowledged by all to be one of enumerated powers, *McCulloch v. Maryland*, 4 Wheat. 316, 405, 407, the Constitution does not attempt to set forth all the means by which such powers may be carried into execution. It leaves to Congress a large discretion as to the means that may be employed in executing a given power." The Lottery Case, 188 U.S. 321, 354-55 (1903); *see also, e.g.*, Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2600 (2012) ("The Affordable Care Act's requirement that certain individuals pay a financial penalty for not obtaining health insurance may reasonably be characterized as a tax. Because the Constitution permits such a tax, it is not our role to forbid it, or to pass upon its wisdom or fairness."); South Dakota v. Dole, 483 U.S. 203, 207 (1987) ("In considering whether a particular expenditure is intended to serve general public purposes [under the spending power], courts should defer substantially to the judgment of Congress."); Kleppe v. New Mexico, 426 U.S. 529, 539 (1976) (noting that the Property Clause "in broad terms, gives Congress the power to determine what are 'needful' rules 'respecting' the public lands."); Woods v. Cloyd W. Miller Co., 333 U.S. 138, 144 (1948) ("Here it is plain from the legislative history that Congress was invoking its war power to cope with a current [housing] condition of which the war was a direct and immediate cause. Its judgment on that score is entitled to the respect granted like legislation enacted pursuant to the police power.").

456. The Court regularly relies on the Necessary and Proper Clause in addition to other enumerated Article I powers. *See, e.g.*, Sabri v. United States, 541 U.S. 600, 605 (2004) ("Congress has authority under the Spending Clause to appropriate federal moneys to promote the general welfare, Art. I, § 8, cl. 1, and it has corresponding authority under the Necessary and Proper Clause, Art. I, § 8, cl. 18, to see to it that taxpayer dollars appropriated under that power are in fact spent for the general welfare . . . . ").

treaty power, gives Congress only the power to help the President make treaties and not the power to implement them.[457] But even if he were correct, using the Necessary and Proper Clause in conjunction with the Offenses Clause is not subject to the same objection because the Offenses Clause *is* an Article I power to *implement* treaties.

In practice, Congress is most likely to exercise discretion in determining the means of punishment. For example, with respect to the treaty rights of aliens with which Congress was concerned in the late nineteenth century, Congress could have enacted legislation establishing incentives to encourage greater state enforcement, adopted specific legislation creating a federal crime, or federalized offenses against aliens according to the terms provided under state law (which is what the proposed legislation would have done).[458]

The Supreme Court's military commission cases offer further support for the proposition that the Offenses Clause allows Congress discretion with respect to the means of punishment adopted under the Offenses Clause. In *Quirin* and *Yamashita*, the Supreme Court not only upheld the United States's authority to prosecute conduct that was recognized as a war crime under international law, but also upheld Congress's authority to establish military commissions. In enacting legislation authorizing military commissions, the Court reasoned, Congress had

> exercised its authority to define and punish offenses against the law of nations by sanctioning, within constitutional limitations, the jurisdiction of military commissions to try persons for offenses which, according to the rules and precepts of the law of nations, and more particularly the law of war, are cognizable by such tribunals.[459]

Prosecution of war crimes is obligatory under the modern law of armed conflict, as Congress recognized in adopting the 1996 War Crimes Act.[460] However, prosecution of war crimes *via military commission* is not. Indeed, some states today have eliminated a separate system of military justice altogether, including for their own armed forces. Certainly, nothing under international law *requires* the establishment of military commissions to prosecute war crimes. Nevertheless, the Supreme Court upheld the establishment of military commissions as a proper exercise of Congress's authority under the Offenses Clause. This decision suggests that the Offenses Clause not only provides constitutional au-

457. 134 S. Ct. 2077, 2098-2102 (2014) (Scalia, J., concurring in the judgment); *see supra* notes 26-33 and accompanying text.

458. *See supra* notes 244-250 and accompanying text.

459. *Ex parte* Quirin, 317 U.S. 1, 28 (1942).

460. *See supra* notes 279-285 and accompanying text.

thority for Congress to impose penalties for "any new international obligation the United States might accept,"[461] but also allows Congress some discretion to decide how best to punish conduct that international law prohibits or to meet the United States's international law commitments.

Finally, it is important to bear in mind that Congress's authority under the Offenses Clause may be subject to constitutional limits external to that clause.[462] A brief discussion of *al Bahlul v. United States*[463] illustrates the point. The defendant, a personal assistant to Osama bin Laden, was convicted by a military commission of conspiracy to commit war crimes, providing material support for terrorism, and solicitation of others to commit war crimes under the 2006 Military Commissions Act.[464] On appeal, the D.C. Circuit sitting en banc vacated al Bahlul's material support and solicitation convictions under the Ex Post Facto Clause, while rejecting the ex post facto challenge to his conspiracy conviction under a "plain error" standard of review.[465] The court remanded the remaining issues to the three-judge panel, including whether Congress violated Article III by vesting military commissions with jurisdiction to try crimes that are not offenses under the international law of war.[466]

Prospectively, Congress clearly has ample Article I authority to establish conspiracy, solicitation, and material support for terrorism as crimes that may be prosecuted in Article III courts. Indeed, to the extent that counterterrorism treaties to which the United States is a party address such conduct,[467] our reading of the Offenses Clause bolsters such authority. But as *al Bahlul* makes clear, Congress's exercise of its Article I authority can be subject to the limitations of the Ex Post Facto Clause.[468]

On remand in *al Bahlul*, the three-judge panel is considering another potential limitation external to the Offenses Clause: whether Article III limits the jurisdiction of military commissions to crimes that are offenses under the in-

461. HENKIN, *supra* note 11, at 70.

462. *See supra* note 371 and accompanying text.

463. 767 F.3d 1 (D.C. Cir. 2014).

464. *See id.* at 7-8.

465. *See id.* at 18-31.

466. *See id.* at 31.

467. *See, e.g.*, International Convention for the Suppression of Terrorist Bombings art. 2, Dec. 15, 1997, 2149 U.N.T.S. 284 (entered into force May 23, 2001); International Convention for the Suppression of the Financing of Terrorism art. 2, Dec. 9, 1999, 2178 U.N.T.S. 197 (entered into force Apr. 10, 2002).

468. In *al Bahlul*, the court assumed without deciding that the Ex Post Facto Clause applies to cases involving aliens detained at Guantanamo based on a concession to that effect by the United States. *See al Bahlul*, 767 F.3d. at 10.

ternational law of war.[469] *Ex parte Quirin* recognized an exception to the Article III right to jury trial, but that exception applies only to "offenses committed by enemy belligerents *against the law of war*."[470] Not all violations of the law of nations are violations of the law of war.[471] If *Quirin*'s exception is limited to offenses against the international law of war,[472] then Article III would prohibit the trial of conspiracy, solicitation, and material support for terrorism by military commissions, notwithstanding Congress's authority under the Offenses Clause (and its other Article I powers) to criminalize those offenses.[473] The Offenses Clause would *not* permit Congress to avoid this limitation by relabeling a violation of the law of nations (treaty or customary international law) as a violation of the law of war any more than it permitted Congress to relabel murder as piracy back in the nineteenth century.[474]

In sum, Congress has some discretion under the Offenses Clause to define offenses under customary international law and treaties, but it may not create or relabel offenses that are not recognized by international law. Congress also has discretion in selecting punishment for such offences to choose a means rationally related to what is required or authorized by international law. But of course, Congress's discretion is subject to whatever other limitations international law and the U.S. Constitution might impose.

CONCLUSION

The history of the Offenses Clause establishes that the Clause was adopted to allow the United States to enforce all forms of international law, both cus-

469. *See id.* at 21 (remanding this question to the panel).

470. 317 U.S. 1, 41 (1942) (emphasis added).

471. *See id.* at 27-28 ("From the very beginning of its history this Court has recognized and applied the law of war as including that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of enemy nations as well as of enemy individuals.").

472. The United States has argued that the exception also extends to offenses like conspiracy in violation of the American common law of war. *See* Brief for the United States at 54, al Bahlul v. United States, No. 11-1324 (D.C. Cir. Sept. 17, 2014); *see also al Bahlul*, 767 F.3d at 73-74 (Kavanaugh, J., concurring in the judgment in part and dissenting in part) (arguing that *Quirin*'s exception to Article III is not limited to offenses under the international law of war).

473. For an excellent discussion of the law of war's relevance to Article III, see Stephen I. Vladeck, *The Laws of War as a Constitutional Limit on Military Jurisdiction,* 4 J. NAT'L SEC. L. & POL. 295, 336-39 (2010).

474. *See* United States v. Furlong, 18 U.S. (5 Wheat.) 184, 198 (1820) ("Nor is it any objection to this opinion, that the law declares murder to be *piracy*. These are things so essentially different in their nature, that not even the omnipotence of legislative power can confound or identify them."); *see also supra* notes 442-444 and accompanying text.

tomary international law and treaties. Although the historic understanding of the "law of nations" as including the "conventional law of nations" has been largely lost in the legal academy, Congress and the Supreme Court have shared this understanding and have consistently applied the Offenses Clause to enforce treaty commitments.

Reading the Offenses Clause to allow enforcement of treaties does not dramatically alter the overall scope of congressional authority. Throughout U.S. history, Congress has been understood to enjoy general power to implement treaties under the Article II treaty power together with the Necessary and Proper Clause. Congress's other enumerated authorities in the realm of foreign relations, including under the Commerce Clause, have become more capacious over time. Reliance on the Offenses Clause also presumably would not eliminate the federalism concerns relating to criminal statutes articulated by the Supreme Court in *Bond*. The clear statement rule that the Court applied there to statutes implementing treaties had previously been applied to criminal statutes adopted under Congress's enumerated Article I powers. Understanding the Offenses Clause to incorporate enforcement of treaties, however, is significant in at least three respects.

First, it recaptures the original understanding of the phrase "law of nations" as used in the Offenses Clause, an understanding that has been obscured by the intensive scholarly attention given to the Alien Tort Statute and the assumption that the phrase must have the same meaning in both contexts. Understanding the Offenses Clause to reach treaties allows us to see the central importance that the Framers placed on complying comprehensively with *all* of the United States's international legal commitments—so much so that they established an explicit enumerated authority to define and punish international law violations in addition to Congress's general constitutional authority to implement treaties under the treaty power and the Necessary and Proper Clause.

Second, reading the Offenses Clause to cover treaties avoids the need to disentangle customary international law from treaty obligations in establishing the constitutional basis for penal legislation intended to enforce international law. From the beginning of the Republic, treaty obligations concerning piracy, safe-conduct, and neutrality were intertwined with customary international law, and the same is true today on a number of other topics, from diplomatic immunity to war crimes. Reading the Offenses Clause to apply regardless of the kind of international law at issue avoids meaningless line drawing and is most consistent with the purpose of the Clause: to provide the national government with comprehensive authority to comply with the United States's international commitments.

Finally, the Offenses Clause creates a clear Article I basis for congressional power to enforce a range of international treaties in contexts where such authority may otherwise be contested. For example, it establishes a clear addi-

tional constitutional basis for the Chemical Weapons Convention Implementation Act that responds to the objections of Justice Scalia in *Bond* because it does not rest on the Article II treaty power. It likewise establishes a constitutional basis for the Maritime Drug Law Enforcement Act in cases like *Bellaizac-Hurtado*, where the narcotics trafficking is wholly extraterritorial and may therefore lie beyond the scope of even the Foreign Commerce Clause.

Debates about the implementation of treaties in the U.S. legal system, the limits of Congress's authority, and the requirements of federalism are bound to continue. But those debates will be more productive if they are informed by a clearer understanding of Congress's complete power to enforce treaties, including its powers under the Offenses Clause.