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# Unsigning

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# Unsigning

Edward T. Swaine\*

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## INTRODUCTION

What accounts for the tumult over the Bush Administration's decision to "unsign" the treaty establishing the International Criminal Court (ICC)?<sup>1</sup> On its face, the decision was not only rational, but to everyone's benefit. When signing the Rome Statute, President Clinton restated American objections to the

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\* Assistant Professor, The Wharton School, University of Pennsylvania. I would like to thank the colloquium organizers and its participants, particularly Curt Bradley, Mariano-Florentino Cuéllar, Eric Posner, and Judith Resnik, for comments at the colloquium and afterwards. Errors remain my own.

1. The decision was formally conveyed in a letter from Under Secretary of State John Bolton to the Secretary-General of the United Nations, *see* Letter from John R. Bolton, Under Secretary of State for Arms Control and International Security, to U.N. Secretary-General Kofi Annan (May 6, 2002), *available at* <http://www.state.gov/r/pa/prs/ps/2002/9968.htm>, in keeping with the latter's role as the treaty depositary. Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 (1998), 37 I.L.M. 999 [hereinafter Rome Statute], *available at* <http://www.un.org/law/icc/statute/romeofra.htm>. The decision was also announced on the same day by other U.S. officials, who sought to elaborate on its rationale. *See* Marc Grossman, Under Secretary of State for Political Affairs, American Foreign Policy and the International Criminal Court, Remarks to the Center for Strategic and International Studies, Washington, D.C. (May 6, 2002), *available at* <http://www.state.gov/p/9949.htm>; Pierre-Richard Prosper, U.S. Ambassador for War Crimes Issues, Issues Update: US Has No Legal Obligation to the International Criminal Court (May 6, 2002), *available at* <http://www.wfa.org/issues/wicc/unsigning/prosperunsigning.html>; Donald Rumsfeld, Secretary Rumsfeld Statement on the ICC Treaty (May 6, 2002), *available at* [http://www.defenselink.mil/news/May2002/b05062002\\_bt233-02.html](http://www.defenselink.mil/news/May2002/b05062002_bt233-02.html).

ICC's jurisdiction,<sup>2</sup> claimed that his intention in signing was to maintain an avenue for changing the court,<sup>3</sup> and signaled that he would not submit the treaty to the Senate unless significant revisions were made—and would recommend that his successor likewise refrain.<sup>4</sup> Whatever promise for eventual ratification this tack once held disappeared when the Bush Administration made known that it sided with the Senate in categorically opposing U.S. participation.<sup>5</sup> Rather than maintaining an ambiguous or duplicitous stance, the United States simply reverted to the status it might have retained all along—namely, that of a nonparty<sup>6</sup>—by complying punctiliously with the notice required by the Vienna Convention on the Law of Treaties, to which the United States is not even a party.<sup>7</sup> Unsigning, on this view, was simply being forthright, and by providing more accurate information about the U.S. position, better enabled other signatories and nonparties to promote their own interests.<sup>8</sup>

Many did not see it that way, however. The widespread disapproval of the U.S. decision is probably easiest to understand in substantive terms. Those having faith in the ICC would have preferred full-fledged U.S. participation, and disliked unsigning because it signaled a decisive setback for that

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2. William Jefferson Clinton, President of the United States, Statement on Signature of the International Criminal Court Treaty, Washington, D.C., at 1 (Dec. 31, 2000), 37 WEEKLY COMP. PRES. DOC. 4 (Jan. 8, 2001), available at <http://usinfo.state.gov/topical/pol/usandun/00123101.htm>.

3. *Id.* (“With signature, however, we will be in a position to influence the evolution of the court. Without signature, we will not. Signature will enhance our ability to further protect US officials from unfounded charges and to achieve the human rights and accountability objectives of the ICC.”).

4. *Id.* (“The United States should have the chance to observe and assess the functioning of the court, over time, before choosing to become subject to its jurisdiction. Given these concerns, I will not, and do not recommend that my successor . . . submit the treaty to the Senate for advice and consent until our fundamental concerns are satisfied.”).

5. For early indications, see Bill Nichols, *Bush Voices Objection to Court Treaty*, USA TODAY, Jan. 3, 2001, at 6A (noting opposition by President-elect Bush and Secretary of Defense-nominee Donald Rumsfeld, as well as Senate opposition); David R. Sands, *Powell Previews Bush Agenda*, WASH. TIMES, Jan. 18, 2001, at A3 (describing confirmation hearings for Secretary of State-nominee Colin Powell, and concluding from his remarks that the Rome Statute would be “quickly abandoned”).

6. As President Clinton noted in signing the treaty, however, one of the principal U.S. objections to the Rome Statute was its concern that the court could exercise authority over the personnel of nonparty states. See Clinton, *supra* note 2 (noting that “[i]n particular, we are concerned that when the court comes into existence, it will not only exercise authority over personnel of states that have ratified the Treaty, but also claim jurisdiction over personnel of states that have not”).

7. Vienna Convention on the Law of Treaties, art. 18, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 (1969) (entered into force Jan. 27, 1980) [hereinafter Vienna Convention]; see *infra* text accompanying note 45 (quoting article 18).

8. See Steven Mufson & Alan Sipress, *UN Funds in Crossfire over Court*, WASH. POST, Aug. 16, 2001, at A1 (citing senior administration official's opinion that, given Senate opposition to the Rome Statute, providing notice of unsigning “would arguably just be stating the truth”).

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possibility—and the end to any obligation the United States assumed as a signatory. But this substantive explanation is also incomplete. The United States's longstanding objections to certain basic aspects of the court's operation, and its failure (despite concerted effort) to persuade other negotiating states of those objections' merits, make it implausible that remaining a signatory would have led it to participate harmoniously in the new regime<sup>9</sup>—let alone to engage in what Harold Koh has labeled “an international Marbury versus Madison moment.”<sup>10</sup> If so, ICC-based objections to unsigned were either highly optimistic or preoccupied with the gesture's symbolism.<sup>11</sup>

International lawyers also regarded the mere act of unsigned as significant in itself. Some seemed to think it impossible,<sup>12</sup> and the European Union's

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9. See, e.g., Diane Marie Amann & M.N.S. Sellers, *The United States of America and the International Criminal Court*, 50 AM. J. COMP. L. 381, 404 (2002) (concluding prior to unsigned that, given political opposition within the United States and the defeat of U.S.-proposed revisions, “the United States is very unlikely either to join or to support the International Criminal Court at any time in the foreseeable future”). For a thorough explication of the reasons for signing—albeit on the assumption that U.S. ratification remained tenable—see David J. Scheffer, *Staying the Course with the International Criminal Court*, 35 CORNELL INT'L L.J. 47, 55-68 (2002). See also *id.* at 73-86 (describing progress achieved in resolving U.S. objections); *id.* at 98-99 (describing steps that might be taken to resolve continuing concerns).

10. Neil A. Lewis, *U.S. Is Set to Renounce Its Role in Pact for World Tribunal*, N.Y. TIMES, May 5, 2002, at A18.

11. I do not mean to suggest that such concerns were misplaced, or that the bases for U.S. opposition (and, ultimately, the unsigned) were persuasive, but only to focus attention on the nature of the criticisms lodged against the ultimate decision to unsigned. It is important to consider, certainly, whether the act of unsigned was harmful because it was perceived as part of a broader U.S. rejection of cooperative internationalism. It bears mention, however, that the United States's aggressive negotiating position during the development of the Rome Statute had already given rise to that perception, well before the treaty was (surprisingly) signed, and it may be doubted whether any active attempt by the United States to renew its campaign would have been welcome. Cf. William K. Lietzau, *International Criminal Law After Rome: Concerns from a U.S. Military Perspective*, LAW & CONTEMP. PROBS., Winter 2001, at 119, 119 (describing perception that cheers by delegates approving the text of the Rome Statute were “as much to celebrate the defeat of the United States, which had demanded the vote, as they were to applaud the adoption of the text”).

12. It was unclear whether this objection was legal or just semantic. See Michael J. Kelly, *Imperfect Justice*, SAN DIEGO UNION-TRIB., Feb. 7, 2001, at B7 (“America has already signed the document. It cannot be ‘unsigned.’ Upon signature, the U.S. committed itself under international law to refrain from acting in any manner to undermine the object and purpose of the treaty. Consequently, we are already obligated to back the creation of this court.”); accord Michael J. Kelly, *Ignoring Criminal Treaty Harms U.S. Legacy*, USA TODAY, Apr. 16, 2002, at 12A. This view was, I should stress, unrepresentative. See, e.g., Anthony Aust, *Letter to the Editor*, FIN. TIMES (London), May 9, 2002, at 18 (explaining that unsigned “sets no legal precedent”); Anthony Aust, *Letter to the Editor*, TIMES (London), Apr. 5, 2002, at 25 (explaining that the interim obligation ceases “once the state ha[s] made it clear that it will not ratify, and that has been evident for a long time”); Curtis Bradley, *U.S. Announces Intent Not to Ratify International Criminal Court Treaty*, ASIL INSIGHTS, May 2002 (explaining that providing notice of intent not to sign is consistent with the Vienna Convention on the Law of Treaties), available at <http://www.asil.org/insights/insigh87.htm>.

official reaction hedged as to its effect.<sup>13</sup> It was, in any event, apparently unprecedented,<sup>14</sup> and a precedent some considered troubling. U.S. officials and their political supporters urged the unsigned of a number of important treaties that the United States has signed but not yet ratified—such as the Kyoto Protocol, the Biodiversity Treaty, the Comprehensive Test Ban Treaty, the Convention on the Rights of the Child, and the ILO Convention on Race Discrimination in Employment.<sup>15</sup> Other states, such as Israel, are considering the possibility with respect to the Rome Statute.<sup>16</sup> Given the number of unratified signatures to multilateral treaties, not to mention the number of multilateral treaties still open to signature, the scope of the obligation imposed on signatories—and the limits, if any, to unsigned—are questions of considerable moment to treaty law. The former head of the U.S. delegation to the ICC negotiations cautioned that “there is a whole list of treaties that we’ve ratified that other states have signed but not yet ratified. . . . If we ‘unsigned’ the ICC, we give a signal that a new practice is acceptable, and we lay the

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13. Declaration by the Presidency on Behalf of the European Union on the Position of the US Towards the International Criminal Court (May 13, 2002), *available at* [http://europa.eu.int/comm/external\\_relations/human\\_rights/doc/declicc.htm](http://europa.eu.int/comm/external_relations/human_rights/doc/declicc.htm) (noting “with disappointment and regret” the U.S. declaration that it does not intend to ratify the Rome Statute “and th[a]t it *considers itself* released from any legal obligation arising from its signature of the Statute” (emphasis added)).

14. *See, e.g.*, William J. Aceves, *The President’s Roman Holiday*, SAN DIEGO UNION-TRIB., Sept. 5, 2002, at B11 (describing unsigned as “unique in the history of international law,” with “U.N. officials indicat[ing] that no such precedent exists”); Lewis, *supra* note 10 (citing concurring views of U.N. and former U.S. officials).

15. Jeremy Rabkin, *End Them, Don’t Mend Them*, WKLY. STANDARD, Jan. 22, 2001, at 18; *see also* David C. Scott, *Presidential Power to “Un-sign” Treaties*, 69 U. CHI. L. REV. 1447, 1447-48 (2002) (discussing background to President George W. Bush’s position that the United States should “escape permanently” from the Comprehensive Test Ban Treaty (CTBT)). Professor Rabkin also highlighted the possibility of unsigned the 1997 amendments to the ABM Treaty, but the United States subsequently gave formal notice that it would withdraw from the underlying ABM Treaty altogether. Text of Diplomatic Notes Sent to Russia, Belarus, Kazakhstan and Ukraine (Dec. 14, 2001), *at* <http://www.state.gov/r/pa/prs/ps/2001/6859.htm>; Press Release, President Discusses National Missile Defense (Dec. 13, 2001), *at* <http://www.whitehouse.gov/news/releases/2001/12/print/20011213-4.html>; *infra* text accompanying note 113; *cf.* Letter from Michael Posner, Executive Director, Lawyers Committee for Human Rights, to President George W. Bush (Apr. 4, 2002), *available at* <http://www.lchr.org/IJP/icc.htm> (predicting that ICC unsigned would “[o]pen the floodgate to disaffected interested groups of all stripes seeking to roll back U.S. signature on any number of treaties,” and citing examples); Letter from Kenneth Roth, Executive Director, to President George W. Bush (May 3, 2002), <http://www.hrw.org/press/2002/05/icc0506-ltr.htm> (suggesting similar dynamic for United States and other signatories).

16. Harvey Morris, *Legal Move to Halt Israeli Assassinations*, FIN. TIMES (London), July 26, 2002, at 13.

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groundwork for undermining a whole range of treaties,<sup>17</sup> including for other states desirably constrained by international law.<sup>18</sup>

Unsigning exposed a potentially significant flaw in the prevailing law of treaties.<sup>19</sup> Part I briefly explicates the legal consequences of signature under the Vienna Convention, which is generally regarded as establishing default rules for bilateral and multilateral treaties between states.<sup>20</sup> As the relative significance of ratification has increased, international lawyers have wrestled with how to maintain the legal significance of treaty signatures; at least following the Vienna Convention, the majority view is that “mere” signatories (states that have signed but not yet ratified the treaty in question) assume an intermediate, interim obligation to refrain from frustrating the treaty’s object and purpose.

Part II, the heart of this Article, considers the interim obligation as a potential solution to the strategic problems posed by signature. Within the formalist perspective predominant among international lawyers, the interim obligation is understood as a mechanism for retaining a vestigial role for signature. I reconceive the interim obligation as a partial answer to ex post and ex ante commitment problems observable in the treaty context and elsewhere, but conclude that it is unable to resolve them satisfactorily. Were interim obligations made effective, moreover, they would still destabilize multilateral treaty regimes, since signatories can effectively withdraw from their obligations without the delay that withdrawal provisions impose on ratifiers.

What, if anything, is to be done? Part III continues with an assessment of the alternative legal mechanisms for addressing these strategic problems. After considering other options, I propose a simple means of reducing the exit gap

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17. Mufson & Sipress, *supra* note 8.

18. See, e.g., Ian Williams, *Mary Quite Contrary*, IN THESE TIMES (Chicago), Oct. 14, 2002, at 16 (citing opinion of Mary Robinson, outgoing U.N. Commissioner on Human Rights, that “[n]ow if other countries are under pressure on human rights instruments they’ve signed, they may say, ‘Well, if the U.S. can unsign a treaty, so can we.’” (internal quotation marks omitted)); Letter from Michael Posner, *supra* note 15 (arguing that ICC unsigning would “[e]ncourage autocratic leaders to ignore the international commitments,” citing “the U.S. precedent to justify backing out of international commitments that are important to the U.S.”).

19. For reasons of space, I do not here address the constitutional questions that interim obligations pose—chiefly for divided power systems like the United States, where the President’s ability to bind the United States without Senate advice and consent is potentially controversial. For discussions focusing on these domestic questions, see MICHAEL J. GLENNON, CONSTITUTIONAL DIPLOMACY 169-75 (1990); Scott, *supra* note 15.

20. As explained below, many states are not parties to the Vienna Convention, but it is commonly regarded as stating the customary international law applicable to the questions relevant here—and a number of nonratifying parties, including the United States, have declared as much. See *infra* text accompanying note 82. It is important to stress, however, that for parties and nonparties alike, the Vienna Convention only states default principles of treaty law, and individual treaties may directly or indirectly provide for a different rule.

between withdrawal mechanisms and unsigned that diminishes any strategic opportunities created by this emerging practice.

### I. THE FORMAL LEGAL CONSEQUENCES OF SIGNATURE

The history of the law of treaties, greatly simplified, supports a shift in gravity from signature to ratification.<sup>21</sup> Signature was generally regarded as sufficient between monarchs or, for that matter, between their duly authorized representatives. Even in the early twentieth century, dictators sometimes personally negotiated, signed, and through those acts made binding treaties along much the same lines.<sup>22</sup> But separate ratification procedures also have an ancient pedigree in international relations, have come to be required by numerous national constitutions, and are now the default procedure for international agreements.<sup>23</sup>

The relationship among negotiating authority, signature, and ratification raises a host of technical issues, but at least one of potential consequence: If ratification is required before a state can become a party, what significance

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21. To be clear, I use “ratify” and “ratification” in the sense used by international lawyers—that is, to refer to a conclusive act by which a state party communicates its consent to an international agreement to its treaty partners. See Vienna Convention, *supra* note 7, art. 2 (explaining that for purposes of the Convention, “‘ratification’, ‘acceptance’, ‘approval’ and ‘accession’ mean in each case the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty”). Ratification is also used to refer to internal procedures (like those under Article II of the U.S. Constitution) that national law requires as a condition precedent for ratification in the international law sense. The link between national and international procedures is obviously quite strong. But it is possible that a treaty may be ratified in the international sense without having properly been ratified according to domestic procedures, or that a treaty may have been ratified for domestic purposes without having been satisfactorily communicated on the international plane. See, e.g., G.G. Fitzmaurice, *Do Treaties Need Ratification?*, 15 Brit. Y.B. Int’l L. 113, 113-15 (1934).

22. JOSÉ SETTE CAMARA, *THE RATIFICATION OF INTERNATIONAL TREATIES* 19-26 (1949); INGRID DETTER, *ESSAYS ON THE LAW OF TREATIES* 18 (1967); FRANCIS O. WILCOX, *THE RATIFICATION OF INTERNATIONAL CONVENTIONS* 21-23 (1935); Fitzmaurice, *supra* note 21, at 119; Harvard Research in Int’l Law, *Law of Treaties*, 29 AM. J. INT’L L. 653, 770 (1935) [hereinafter Harvard Research].

23. CAMARA, *supra* note 22, at 26-47; WILCOX, *supra* note 22, at 28-30; John Eugene Harley, *The Obligation to Ratify Treaties*, 13 AM. J. INT’L L. 389, 389-93 (1919). *But cf.* KAYE HOLLOWAY, *MODERN TRENDS IN TREATY LAW* 40 (1967) (claiming broadly, and implausibly, that “[o]ne of the most significant aspects of trends in the evolution of treaty law has been the growing importance of signature in all its aspects”). Ratification is not, to be sure, invariably required, but it has become the norm. Compare Fitzmaurice, *supra* note 21, at 129 (contending that ratification is unnecessary unless expressly or implicitly required by a particular treaty), and Vienna Convention, *supra* note 7, art. 11 (recognizing that treaties may provide for consent by “signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed”), with CAMARA, *supra* note 22, at 43-44 (noting that in practice, ratification is “essentially necessary” in light of overwhelming practice), and Vienna Convention, *supra* note 7, art. 12 (detailing conditions under which consent may be indicated by signature alone).

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remains for prior acts, particularly signature? To be sure, signature has some recognizable, if often overlooked, consequences. Collectively, signature tends to fix the treaty's substantive terms—at least in the absence of reservations.<sup>24</sup> It also establishes the terms by which a treaty is to come into force, such as by setting a time limit for ratification or stipulating the minimum number of signatories.<sup>25</sup>

Commentators puzzled, however, over the significance of individual signatures for state consent, a problem made more acute by widespread and prolonged delays in ratification.<sup>26</sup> Some conceded that the signature lacked any legal effect,<sup>27</sup> but most shrunk from such a nihilistic view. At the opposite end of the spectrum, some claimed that signature created an obligation to ratify.<sup>28</sup> But this would basically divest *ratification* of significance, and in the process slight the functional arguments for it. Because adding discrete stages to the consent process may improve the likelihood of cooperation, rendering ratification redundant may harm the objectives of treaty-making.<sup>29</sup> Moreover, to the extent that domestic ratification processes broaden participation—as in the United States, where ratification increases public scrutiny, requires legislative participation, and presents the executive branch with a second

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24. Reservations are not, in fact, universally permitted. The Rome Statute, for example, formally precluded them. Rome Statute, *supra* note 1, art. 20. In practice, however, some states appear to have secured their functional equivalent. See Ruth Wedgwood, *The Irresolution of Rome*, LAW & CONTEMP. PROBS., Winter 2001, at 193, 194-95 (citing examples of the prohibition's application and circumvention).

25. See J. MERVYN JONES, FULL POWERS AND RATIFICATION 86 & n.2 (1949). Signature may also invest the signatory with particular rights under the treaty. See *infra* text accompanying notes 57, 106.

26. See, e.g., JONES, *supra* note 25, at 105-22.

27. See, e.g., Quincy Wright, *Conflicts Between International Law and Treaties*, 11 AM. J. INT'L L. 566, 568 n.9 (1917) (contending that "a state which has signed but not ratified a treaty is legally in the same situation as a state which has had nothing to do with the instrument").

28. See Harley, *supra* note 23, at 404 (compiling authorities); Harvard Research, *supra* note 22, at 770-72 (same).

29. John K. Setear, *An Iterative Perspective on Treaties: A Synthesis of International Relations Theory and International Law*, 37 HARV. INT'L L.J. 139, 148-50, 193-96 (1996) [hereinafter Setear, *An Iterative Perspective*] (discussing signature as an iterative stage in treaty-making); John K. Setear, *Law in the Service of Politics: Moving Neo-Liberal Institutionalism from Metaphor to Theory by Using the International Treaty Process to Define "Iteration,"* 37 VA. J. INT'L L. 641, 682-89 (1997) (same). Setear recognizes that iteration models apply imperfectly to treaty-making, since (among other things) the graduated structure of interactions is not the same as repeat plays to a game. On the other hand, it should be noted that weak concerns about making ratification redundant—for example, that signature and ratification might become functionally indistinguishable—would be redemptive, rather than unfortunate, under the iteration model.



opportunity to evaluate the treaty—requiring ratification on the international plane may improve the credibility of treaty commitments.<sup>30</sup>

In any event, the argument for an obligation to ratify faded for more conventional reasons. Such an obligation may have made more sense when diplomats were regarded as personal agents of a head of state, and could be viewed in terms of a conventional principal-agent relationship, but identifying the principal (conceivably, the head of state, a legislature, or the state itself), the agent (not only the envoy, but the head of state, too), and the nature and consequences of delegated authority became less straightforward.<sup>31</sup> Any such obligation also had to confront the fact that states frequently do not ratify treaties that they have signed, which is powerful evidence that no such principle existed as a matter of customary international law.<sup>32</sup> Perhaps mindful of that problem, those presupposing a legal obligation to ratify, and even the greater number regarding any such obligation as purely moral in character, imagined categories of acceptable excuses: The exceeding of negotiating powers, duress, conflict with prior or otherwise superior legal norms, or fundamental changes in circumstances were all regarded as permissible bases for nonratification.<sup>33</sup> By the time the Harvard Research in International Law project was compiling a code of treaty law, it felt comfortable stating conclusively that there was no duty whatsoever to ratify a signed treaty.<sup>34</sup> Special Rapporteurs to the International Law Commission's subsequent efforts at codification, which formed the basis for what became the Vienna Convention, urged inclusion of a binding legal duty "[t]o submit the instrument to the proper constitutional authorities for examination with the view to ratification,"<sup>35</sup> but admitted that such a duty went beyond what existing law

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30. See John K. Setear, *The President's Rational Choice of a Treaty's Preratification Pathway: Article II, Congressional-Executive Agreement, or Executive Agreement?*, 31 J. LEGAL STUD. S5 (2002).

31. See JONES, *supra* note 25, at 87 (noting strained character of agency under modern practice).

32. See, e.g., Harley, *supra* note 23, at 397-403 (discussing examples); Harvard Research, *supra* note 22, at 775-77 (citing frequency of failures to ratify, and absence of their condemnation under international law); cf. Statute of the International Court of Justice, June 26, 1945, art. 38, 59 Stat. 1055, 1060, 3 Bevens 1153, 1187 (defining sources of law to include "international custom, as evidence of a general practice accepted as law").

33. See, e.g., WILCOX, *supra* note 22, at 103-04; Harley, *supra* note 23, at 397; see also CAMARA, *supra* note 22, at 33-34 (noting "elastic" nature of exceptions); Harvard Research, *supra* note 22, at 771-73 (describing arguments favoring moral or legal obligations to ratify and their qualifications).

34. Harvard Research, *supra* note 22, at 769 (stating, in article 8 of proposed code, that "[t]he signature of a treaty on behalf of a State does not create for that State an obligation to ratify the treaty").

35. *Report by Mr. H. Lauterpacht, Special Rapporteur to the General Assembly*, [1953] 2 Y.B. Int'l L. Comm'n 90, 108, U.N. Doc. A/CN.4/SER.A/1953/Add.1 [hereinafter *Lauterpacht Report*] (detailing proposed article 5(2)(a)).

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provided,<sup>36</sup> and that, together with the obligation's vague character, ultimately doomed it.<sup>37</sup>

A third, intermediate possibility was that ratification, though necessary to make an obligation binding, had an effect retroactive to the time of signature.<sup>38</sup> Whatever the potential merits of that rule, it too was regarded as inconsistent with the migration from ratification of the signature to ratification as a separable mechanism for indicating consent.<sup>39</sup> By the time of the Harvard Research project in 1935, retroactive ratification was considered "obsolete,"<sup>40</sup> a judgment reiterated in the International Law Commission's proceedings.<sup>41</sup>

A fourth possibility, that endorsed by the Harvard project,<sup>42</sup> the International Law Commission,<sup>43</sup> and ultimately by those negotiating the

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36. *Id.* at 111.

37. See Report by G.G. Fitzmaurice, *Special Rapporteur*, [1956] 2 Y.B. Int'l L. Comm'n 104, 113, U.N. Doc. A/CN.4/101 (explicating proposed article 30); *First Report on the Law of Treaties by Sir Humphrey Waldock, Special Rapporteur*, [1962] 2 Y.B. Int'l L. Comm'n 27, 46, 47, U.N. Doc. A/CN.4/144 (replicating similar duty, but noting lack of legal basis and "tenuous and imperfect" nature); *Summary Records of the 14th Session*, [1962] 1 Y.B. Int'l L. Comm'n 88, 88-96 (summarizing criticisms at the International Law Commission's 644th Meeting); *id.* at 96-100 (summarizing criticisms, and rejection of proposal, at the International Law Commission's 645th meeting); *Fourth Report on the Law of Treaties by Sir Humphrey Waldock, Special Rapporteur*, [1965] 2 Y.B. Int'l L. Comm'n 3, 36, U.N. Doc. A/CN.4/177 & addenda 1, 2 (explaining redaction); see also Richard D. Kearney & Robert E. Dalton, *The Treaty on Treaties*, 64 AM. J. INT'L L. 495, 509 (1970) (describing rejection of similarly progressive proposal that states must refrain from acts tending to frustrate treaty objects during negotiations).

38. See, e.g., JONES, *supra* note 25, at 92-107; J. Mervyn Jones, *The Retroactive Effect of the Ratification of Treaties*, 29 AM. J. INT'L L. 51 (1935); see also *Montault v. United States*, 53 U.S. (12 How.) 47, 51 (1851) (holding that a treaty is binding as of the date of its signature); *United States v. Reynes*, 50 U.S. (9 How.) 127, 148 (1850) (opining that treaties "must be considered as binding from the period of their execution; their operation must be understood to take effect from that period, unless it shall, by some condition or stipulation in the compact itself, be postponed"); *United States v. Arredondo*, 31 U.S. (6 Pet.) 691, 748 (1832) (stating that a treaty relates back to the date of agreement between the two governments for purposes of intergovernmental rights); *Certain German Interests in Polish Upper Silesia (Ger. v. Pol.)*, 1926 P.C.I.J. (ser. A) No. 7 (May 25), at 29-31.

39. See JONES, *supra* note 25, at 64-65; Joni S. Charme, *The Interim Obligation of Article 18 of the Vienna Convention on the Law of Treaties: Making Sense of an Enigma*, 25 GEO. WASH. J. INT'L L. & ECON. 71, 85-87 (1992).

40. Harvard Research, *supra* note 22, at 780 (citing, and endorsing, *Mavrommatis Palestine Concessions (Greece v. Gr. Brit.)*, 1924 P.C.I.J. (ser. A) No. 2 (Aug. 30), at 57 (Moore, J., dissenting)).

41. See Charme, *supra* note 39, at 87-88 (citing *Summary Records of the 647th Meeting*, [1962] 1 Y.B. Int'l L. Comm'n 111, 117, U.N. Doc. A/CN.4/SER.A/1962).

42. Article 9 provided that

[u]nless otherwise provided in the treaty itself, a State on behalf of which a treaty has been signed is under no duty to perform the obligations stipulated, prior to the coming into force of the treaty with respect to that State; under some circumstances, however, good faith may require that pending the coming into force of the treaty the State shall, for a reasonable time after signature, refrain from taking action which would render performance by any party of the obligations stipulated impossible or more difficult.

Harvard Research, *supra* note 22, at 778.

Vienna Convention, was to redeem the signature by imposing a distinct duty on signatories. A handful of cases decided following World War I indicated that signatories—including, at least arguably, mere signatories—assumed some kind of duty not to disrupt the treaty's operation.<sup>44</sup> In that spirit, article 18 of the Vienna Convention provides that:

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43. The Commission's final draft of 1966 proposed in article 15 that

[a] State is obliged to refrain from acts tending to frustrate the object of a proposed treaty when:

(a) It has agreed to enter into negotiations for the conclusion of the treaty, while these negotiations are in progress;

(b) It has signed the treaty subject to ratification, acceptance or approval, until it shall have made its intentions clear not to become a party to the treaty;

(c) It has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.

*Reports of the Commission to the General Assembly*, [1966] 2 Y.B. Int'l L. Comm'n 202, U.N. Doc. A/6309/Rev.

44. The cases commonly cited did not involve mere signatories—in the sense of parties that had signed a treaty, but had not taken the discretionary step of ratifying it—but instead involved the duties of state parties who, for one reason or another, were not yet parties to a treaty in force at the time of the relevant acts. Thus, the Turkish-Greek Mixed Arbitration Tribunal held that Turkey had acted unlawfully in seizing the property of a Greek national after Turkey had signed a peace treaty with Greece, but before the treaty had entered into force, since “[f]rom the time of the signature of the Treaty and before its entry into force the contracting parties were under the duty to do nothing which might impair the operation of its clauses.” *Megalidis v. Turkey*, 8 RECUEIL DES DECISIONS DES TRIBUNAUX MIXTES 386, 395 (Turkish-Greek Mixed Arb. Trib. 1928), reprinted in 1927/28 ANN. DIG. PUB. INT'L L. 395 (Arnold D. McNair & H. Lauterpacht eds., 1931). The decision is generally regarded as the only true precedent for the interim obligation. Paul V. McDade, *The Interim Obligation Between Signature and Ratification of a Treaty*, 32 NETH. INT'L L. REV. 5, 14 (1985); Martin A. Rogoff, *The International Legal Obligations of Signatories to an Unratified Treaty*, 32 ME. L. REV. 263, 277 (1980); cf. JONES, *supra* note 25, at 81-83 (finding other precedent wanting). Some commentators have suggested that the decision's precedential force may be limited because the conduct was an international delict even absent the treaty. See, e.g., Charne, *supra* note 39, at 81 & n.39; Rogoff, *supra*, at 277-78.

The greater weakness, in my view, is that these and other cases typically evaluated the behavior of states that had ultimately become parties to the treaty, rather than those that definitively had refrained or whose status had not been resolved by the time of the decision—thus permitting the tribunals to assume that the states concerned had decided that observing the treaty served their national interests. Indeed, the realistic prospect of nonratification is not discussed in these cases, and there are indications that any such possibility would cut against state responsibility. In one case, an umpire rejected a claim by a Mexican national for property damages caused by American troops following the signing of a peace treaty, but prior to Senate ratification. The umpire noted that “it is well understood that a peace is not a complete peace until ratified,” and that “the ratifying authority has the power of refusing unless, for that time, it has given up this power beforehand.” *Ignacio Torres v. United States*, No. 565 (Zacualtipan Claims, The American and Mexican Joint Commission 1868), reprinted in 4 JOHN B. MOORE, HISTORY AND DIGEST OF THE INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY 3798, 3801 (1898). In language more widely quoted, however, he noted in dicta that “if a peace were signed with a moral certainty of its ratification and one of the belligerents were . . . making grants of land in a province which is to be ceded, before the final ratification, it would certainly be considered . . . a fraudulent and invalid transaction.” *Id.* (emphasis added).

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A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:

(a) It has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or

(b) It has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.<sup>45</sup>

As explained in slightly greater detail below, article 18's terms, and its influence, are unclear.<sup>46</sup> But its dominance as a legal tactic for coping with the diminished checks on treaty signatures is beyond dispute. The Vienna Convention made no attempt to revive signature as the legally definitive juncture for state consent, and there has been little attempt to do so outside the Convention. Similarly, the Convention bypassed the opportunity to endorse the civil law principle of *culpa in contrahendo*, according to which liability may be imposed for bad faith conduct during negotiations.<sup>47</sup> Even if the failure to adopt such alternatives is of little assistance in interpreting article 18,<sup>48</sup> the choice to adopt exclusively the interim obligation approach—which has been followed by commentators and non-parties as well<sup>49</sup>—makes it relatively easy to assess the default rules for treaty formation.

## II. SIGNATURE AS A STRATEGIC PROBLEM

With occasional exceptions, the debates in the literature about what to do with signature in the age of ratification have been based in, and limited by, doctrinal considerations.<sup>50</sup> The focus is understandable, given the usual

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45. See Vienna Convention, *supra* note 7, art. 18.

46. See *infra* Part II.B. For fuller legal analyses of article 18, see Charme, *supra* note 39; Maria Frankowska, *The Vienna Convention on the Law of Treaties Before United States Courts*, 28 VA. J. INT'L L. 281 (1988); Jan Klabbbers, *How to Defeat a Treaty's Object and Purpose Pending Entry into Force: Towards Manifest Intent*, 34 VAND. J. TRANSNAT'L L. 283 (2001); McDade, *supra* note 44, at 9-28; Rogoff, *supra* note 44.

47. See Charme, *supra* note 39, at 93-98.

48. See *id.* at 85-98 (reviewing the implicit failure of the drafters to adopt these alternatives, but cautioning that they provide "limited insight into the content of the obligation").

49. For example, as discussed below, the United States—which is not a party to the Vienna Convention—has become convinced that it states customary international law on this matter, see *infra* text accompanying note 82, and the same approach has been adopted by the American Law Institute. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 312(3) (1987) ("Prior to the entry into force of an international agreement, a state that has signed the agreement or expressed its consent to be bound is obliged to refrain from acts that would defeat the object and purpose of the agreement.").

50. The problem has not been addressed even in works considering the strategic issues posed by treaties. See, e.g., RICHARD B. BILDER, *MANAGING THE RISKS OF INTERNATIONAL AGREEMENT* (1981) (discussing risk-management techniques in the formation of treaties);

domain and expertise of international lawyers; even the Vienna Convention, which afforded the opportunity to develop new norms, sought (nominally, at least) only to state preexisting principles of customary international law.<sup>51</sup> But here, as elsewhere, the doctrinal focus has tended to obscure questions potentially of concern to states.

A. *Ex Post and Ex Ante Considerations*

The essential ambition, from a doctrinal point of view, has been to establish *some* legal significance for the signature within the process of consent.<sup>52</sup> The Harvard Research project augmented somewhat its case for an interim obligation by citing the desirability, as a matter of principle, of protecting the legitimate expectations of other signatories.<sup>53</sup> Sir Hersch Lauterpacht's report for the International Law Commission echoed that argument, explaining that the purpose of the rule supporting an interim obligation on signatories "is to prohibit action in bad faith deliberately aiming at depriving the other party of the benefits which it legitimately hoped to achieve from the treaty and for which it gave adequate consideration."<sup>54</sup> His arguments for retaining significance for signatures—and more particularly in support of the distinct, and unsuccessful, proposal that states should be legally obliged to seek the ratification of signed treaties—also sounded, unconvincingly, in contractual terms.<sup>55</sup>

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ARIE E. DAVID, *THE STRATEGY OF TREATY TERMINATION: LAWFUL BREACHES AND RETALIATIONS* (1975) (discussing decisionmaking in terminating and revising treaties).

51. See generally I.M. SINCLAIR, *THE VIENNA CONVENTION ON THE LAW OF TREATIES* 1-26 (1973) (describing tension in the Vienna Convention between progressive development of customary law and its codification).

52. See, e.g., Harvard Research, *supra* note 22, at 780 (submitting that "[i]t is believed that when a duly authorized plenipotentiary signs a treaty on behalf of his State, the signature is not a simple formality devoid of all juridical effect and involving no obligation whatever, moral or legal, on the part of the State whose signature the treaty bears"). For a more recent example of this formalistic approach, see Charme, *supra* note 39, at 89 (arguing that "viewing ratification, acceptance or approval as the exclusive means by which a state manifests consent renders the act of signature meaningless"; "[t]hus, any interpretation of article 18 which exalts the importance of ratification, acceptance or approval to the total detriment of the role of signature, would run counter to the two-stage model"). Note, however, that even if a signature imposes no immediate behavioral constraints on the signing state, it may nonetheless have legal consequences for the terms and operation of the signed instrument. See *supra* text accompanying notes 24-25.

53. Harvard Research, *supra* note 22, at 780-81.

54. Lauterpacht Report, *supra* note 35, at 110.

55. *Id.* at 109-10.

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1. *Ex post effects.*

Lurking within Lauterpacht's doctrinal objections, however, were some practical concerns. A signatory could be influential, he recalled, in shaping the procedural and substantive terms of treaties. States making concessions to that signatory, and lured by its signature into signing themselves, would feel their concession had been "made in vain seeing that the consideration that they legitimately [sic] expect[ed] will not be forthcoming."<sup>56</sup> Mere signatories, he added, were often entitled to a voice in determining the admissibility of another state's reservations and with respect to accessions, and it would be "proper" to obligate them somehow in exchange for those rights.<sup>57</sup>

These and kindred accounts seem facially plausible, though their details require further unpacking. If a state were to take a hard line in negotiations, and if it were sufficiently worthwhile to secure its participation, other states might be induced to make concessions in order to secure its signature. Lauterpacht's concern seemed to be that the hard-line state, left free to ignore its signature, could act to the disadvantage of other signatories. But in a world where treaty signature imposed no legal duties, any *other* signatory would be equally free to betray its commitments, so the two might deter one another—or, at the very least, permit the betrayed signatory adequate recourse. One might further assume, of course, that other mere signatories will be victimized because they behave more honorably, but it is difficult to imagine that imbalance persisting for long.

The multilateral setting is more difficult to manage. One concern is that mere signatories can, during the course of treaty negotiations, extract terms that impose costs on the other signatories—but costs that are not so substantial as to warrant collective renegotiation of the treaty's terms when it becomes apparent that the treacherous signatory will not adhere. Second, other signatories may have actually ratified the treaty, imposing upon themselves an obligation to adhere to its terms at least with respect to other signatories. Perhaps, in retrospect, they ought to have waited, but having gone ahead—perhaps in the accurate expectation that a sufficient number of others would do likewise—they may be vulnerable to treaty-inconsistent behavior by mere signatories.<sup>58</sup>

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56. *Id.* at 110. In the instance of the ICC, for example, the European Commissioner for External Relations accused the United States of "refusing to take yes for an answer," and asked "[w]hy should people make concessions to America if the United States is going to walk away in any case?" Chris Patten, *Why Does America Fear This Court?*, WASH. POST, July 9, 2002, at A21. Others suggested that the U.S. signature had perhaps encouraged others to sign, and even to ratify. Hilary Charlesworth, *Clinton's Policy a Triumph for Justice*, AUSTRALIAN, Jan. 18, 2001, at 11.

57. Charlesworth, *supra* note 56. Under the Rome Statute, for example, reservations were not permitted, *see supra* note 24, but signatories were entitled to observer status in the Assembly of States Parties. Rome Statute, *supra* note 1, art. 112.

58. This makes sense, for example, of the allegation that the United States had developed "a new 'brinkmanship' approach to treaty negotiations, accompanying everyone

2. *Ex ante effects.*

If these scenarios seem overly exotic and anecdotal, more systematic, *ex ante* effects can be identified. Where parties are free to exit a relationship at any point and for any reason, they will under-invest in reliance—that is, fail to depend upon the relationship’s perpetuation in ways that might be efficient.<sup>59</sup> In the treaty context, such under-investment can take several forms. States may decide not to negotiate at all if they believe that signatures are unreliable, and may even invest their resources in activities inconsistent with what would otherwise be the treaty regime—such as in pursuing treaty relations with other partners, or acting unilaterally. If they elect nonetheless to negotiate, they may be inclined to agree to less exacting terms than would be ideal, if and to the extent that those terms would impose fewer costs if one side reneged on its signature. Finally, states may simply wait to ratify, perhaps mutually deterring one another’s ratification.<sup>60</sup> As one commentator complained shortly before the International Law Commission began its codification efforts,

[n]owadays a general practice most harmful to the international relations is the indefinite postponement of ratification by states instead of actual repudiation of a treaty. In political agreements, this policy, the so-called “watchful waiting,” is not infrequently applied. Each state waits for the other one’s ratification before approving the convention. This practice of indefinite postponement is largely due to the example of the United States. . . . [N]o less than 288 treaties submitted to the American Senate for ratification during the period 1789-1931 remained unratified until October, 1942. The American Government has always favored the conclusion of treaties to be ratified “as soon as possible,” so that the Senate’s traditional policy of indefinite

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else to the ledge and cheering them as they jumped off, but remaining behind to pick and choose what it liked or didn’t like.” *The Vienna Convention on the Law of Treaties: The Consequences of Participation and Nonparticipation*, 78 AM. SOC’Y INT’L PROC. 270, 282 (1984) [hereinafter *The Vienna Convention on the Law of Treaties*] (remarks by Frederick S. Tipson). There is no ledge, in the ordinary sense, as other signatories have not taken any irreversible step; as explained below, however, it may be more difficult for those who have ratified to retrace their steps. See *infra* text accompanying notes 111-12.

Perhaps contemplating this type of problem, the Vienna Convention provides as a default rule that a treaty, multilateral or otherwise, will be presumed to come into force “as soon as consent to be bound by the treaty has been established for all the negotiating States.” Vienna Convention, *supra* note 7, art. 24(2). But it is common, instead, for treaties to come into force earlier, upon the consent of a certain number of signatories. See, e.g., *id.* art. 84(1) (“The present Convention shall enter into force on the thirtieth day following the date of deposit of the thirty-fifth instrument of ratification or accession.”).

59. See generally Lucian Arye Bebchuk & Omri Ben-Shahar, *Precontractual Reliance*, 30 J. LEGAL STUD. 423 (2001); Richard Craswell, *Offer, Acceptance, and Efficient Reliance*, 48 STAN. L. REV. 481 (1996); Avery W. Katz, *Contract Formation and Interpretation*, in 1 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 425, 427-29 (Peter Newman ed., 1998); Avery W. Katz, *When Should an Offer Stick? The Economics of Promissory Estoppel in Preliminary Negotiations*, 105 YALE L.J. 1249 (1996).

60. See, e.g., ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 83 (2d ed. 2000) (noting continuing problem of delayed ratification).

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postponement could have full scope to reject conventions which did not further the interests of the Nation, without recourse to the outright refusal, to which public opinion is inclined to be somewhat hostile.<sup>61</sup>

The end result is that otherwise efficient reliance expenditures—those that may improve the potential for cooperation—will be placed at risk. A conventional solution is to “reward” reliance by more readily implying the existence of a binding agreement.<sup>62</sup> Such an approach has a number of drawbacks—it tends to deter the initiation of discussions, for example—and has in any event already been decisively rejected in the treaty context.<sup>63</sup>

A second solution is to impose liability on those inducing reliance—either measured by the degree of reasonable or efficient reliance,<sup>64</sup> by strict liability for the least-cost avoider (i.e., the more powerful bargaining party),<sup>65</sup> or by some other intermediate rule.<sup>66</sup> This solution, too, seems to have been rejected in the treaty context,<sup>67</sup> perhaps because the traditional liability inquiries are not easily adapted to treaties.<sup>68</sup> As a practical matter, too, the international legal

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61. CAMARA, *supra* note 22, at 34-35. A contemporary opined:

In recent years, one of the most formidable checks to speedy ratification—noted particularly in connection with conventions dealing with economic matters—has been the fear of ratifying governments that they would be placed at a temporary disadvantage in relation to neighbouring or competing states not yet parties to the convention. Each state hesitates to make the first move. Rather it prefers to wait and see what step its neighbours will take.

WILCOX, *supra* note 22, at 115; accord HOLLOWAY, *supra* note 23, at 47 & n.29 (noting persistence of problem).

Given concerns about this strategy, commentators who cite the number of treaties actually *declined* by the Senate—particularly as a means of rebutting the Senate’s reputation as the “graveyard of treaties”—are arguably missing the point. See, e.g., David A. Koplow, *Constitutional Bait and Switch: Executive Reinterpretation of Arms Control Treaties*, 137 U. PA. L. REV. 1353, 1394 & n.176 (1989). The problem persists, instead, if the Senate is merely “a place for cold storage.” Louis Henkin, *Treaties in a Constitutional Democracy*, 10 MICH. J. INT’L L. 406, 411 (1989). Of course, even were the Senate more efficient, see CONG. RESEARCH SERV., STUDY FOR THE SENATE COMM. ON FOREIGN RELATIONS, TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE, S. REP. NO. 106-71, at 117-18 (2001) [hereinafter *ROLE OF THE SENATE*] (asserting that “[f]ew treaties languish indefinitely or are returned to the President without approval, and even fewer are defeated outright by vote of the Senate”); Charles I. Bevans, *Contemporary Practice of the United States Relating to International Law*, 62 AM. J. INT’L L. 149, 162-63 (1968) (tabulating Senate record between 1789 and 1967), one would have to include treaties not submitted to the Senate for consideration, or held afterwards without ratification by the President.

62. Cf. Craswell, *supra* note 59, at 507-43 (describing willingness of courts to find offer and acceptance, as well as estoppel, in order to redeem reliance).

63. See *supra* text accompanying notes 28-37 (describing failure of efforts to imply duty to ratify from signature).

64. See Craswell, *supra* note 59.

65. See Katz, *Contract Formation and Interpretation*, *supra* note 59, at 428-29.

66. See Bebchuk & Ben-Shahar, *supra* note 59.

67. See *supra* text accompanying note 47.

68. Reliance will be hard to verify. Even where the aggrieved party has ratified a treaty, it may have done so to serve independent national interests, or perhaps (in a multilateral treaty) in contemplation of a range of other ratifying probabilities. Reliance will



system is ill suited to provide the right remedies. While states are supposed to pay for their international delicts,<sup>69</sup> international law lacks the kind of efficient, effective arbiters available for private contractual disputes.<sup>70</sup>

Notwithstanding these formal barriers, it remains possible that the same result could be achieved by other means. Lawyers tend to overstate the significance of formal sanctions at the expense of other means by which international norms may be enforced.<sup>71</sup> States have, in fact, a substantial incentive to internalize the sort of rules that they ought to: Unsigning with abandon, or exploitatively, would cause their reputations to suffer, leading fewer nations to trust them as signatories (and likely impugning, in the bargain, their more general reputations for honoring commitments). The same incentives obtain even in the divided-power systems that encouraged the rise of ratification and the devaluation of signature: Legislatures will be inclined to approve treaties negotiated by their nations' executives not only because their prior mandate has been sought (and complied with), but also because they

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also be impossible to monetize. Finally, an analysis of relative bargaining power would go down a path already rejected as a basis for overturning treaty commitments. In combination, these features suggest that a liability regime for treaties would fail to create sufficient incentives for reliance expenditures. It is also possible to err by creating too much liability, which might adversely affect the exchange of information and impair the "courtship" between states toward a treaty commitment. See Jason Scott Johnston, *Communication and Courtship: Cheap Talk Economics and the Law of Contract Formation*, 85 VA. L. REV. 385, 430-33 (1999). But for the reasons just discussed, excessive liability, in the strictly legal sense, is implausible in this context.

69. See *Draft Articles on State Responsibility: Titles and Texts of the Draft Articles on Responsibility of States for Intentionally Wrongful Acts Adopted by the Drafting Committee on Second Reading*, art. 31, U.N. GAOR, Int'l L. Comm'n, 53d Sess., Supp. No. 10, at 4, U.N. Doc. A/CN.4/L.602/Rev.1 (2001) (providing that "[t]he responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act," and that "[i]njury includes any damage, whether material or moral, caused by the internationally wrongful act of a State"); e.g., *Chorzow Factory (Ger. v. Pol.)*, 1927 P.C.I.J. (ser. A) No.9, at 21 (July 26) ("It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation therefore is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself.").

70. Though international compensation schemes have flourished, they remain exceptional in character, and rely ultimately on compliance that is essentially voluntary in character. Cf. *Head Money Cases*, 112 U.S. 580, 598 (1884) (noting that, while a treaty may provide for individual redress, it "depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it. If these fail, its infraction becomes the subject of international negotiations and reclamations, so far as the injured party chooses to seek redress, which may in the end be enforced by actual war. It is obvious that with all this the judicial courts have nothing to do and can give no redress.").

71. George W. Downs, *Enforcement and the Evolution of Cooperation*, 19 MICH. J. INT'L L. 319, 321-22 (1998) (describing differing perspectives of political economists and international lawyers with respect to enforcement mechanisms).

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desire to maintain the nation's reputation for the sake of future commitments.<sup>72</sup> If this is plausible, perhaps the notion that states should heed their signatures is less a matter of customary international law (as even the Vienna Convention assumed) than the result of sheer self-interest,<sup>73</sup> and the unsigned Rome Statute was simply aberrational.

Self-interest of this kind may well explain the novelty of the ICC episode and establish a safeguard of continuing importance, but it is unlikely to be a complete solution. States might be independently motivated to impose intermediate obligations on themselves, perhaps not unlike those described by article 18 of the Vienna Convention, as a means of demonstrating that they are credible partners (and, in divided-power systems, as a way of according the agent some but not too much binding authority). But reputation is a complex construct,<sup>74</sup> and its disciplining function surely depends in part on the existence and clarity of rules permitting or prohibiting the conduct in question.<sup>75</sup> It is worth examining, accordingly, how well the interim obligation—the only means by which the Vienna Convention addresses mere signatories, and an exemplar of the kind of rules states might otherwise construct—performs.

#### B. *The (In)Adequacy of Interim Obligations*

Article 18 was developed, as has been recounted, more for formalistic reasons—as a means of preserving the legal significance of the signature—than as a remedy for the particular *ex post* and *ex ante* effects just described. Yet it is nonetheless possible to rationalize the interim obligation as being an answer of sorts: By reducing the difference between nonratification and ratification, the interim obligation reduces the risk of exploitation. If signatories are

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72. Even with differing preferences, a nation's legislature and its executives profit from the ability to make this kind of commitment. See LISA L. MARTIN, *DEMOCRATIC COMMITMENTS: LEGISLATURES AND INTERNATIONAL COOPERATION* 39-41 (2000).

73. Professors Goldsmith and Posner have been vigorous about insisting on this distinction. See Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 U. CHI. L. REV. 1113 (1999). *Contra, e.g.*, Edward T. Swaine, *Rational Custom*, 52 DUKE L.J. 559 (2002) (arguing that the distinction between obligations under customary international law and self-interest is overstated).

74. Compare, *e.g.*, Goldsmith & Posner, *supra* note 73, at 1135 (noting generally that a "reputation for compliance with international law is not necessarily the best means—and certainly not the only means—for accomplishing foreign policy objectives"), and Jack Goldsmith, *Sovereignty, International Relations Theory, and International Law*, 52 STAN. L. REV. 959, 985 (2000) (book review) (suggesting that the value of establishing a reputation for obeying international law is exaggerated as a diplomatic tool), with Swaine, *Rational Custom*, *supra* note 73 (relying on reputation for legal obedience in defending consistency of international law theory with rational choice models).

75. See, *e.g.*, James D. Morrow, *The Laws of War, Common Conjectures, and Legal Systems in International Politics*, 31 J. LEGAL STUD. S41, S43 (observing that "[r]eciprocal enforcement depends on a shared understanding of what conduct is unacceptable and what consequences follow from such conduct").

encumbered by duties that meaningfully approximate those imposed on parties, their incentives to defect from ratification—that is, to seek out or to maintain status as a mere signatory—may be diminished.

Having said that, there are evident problems with attributing such a function to article 18. For one, the interim obligation's substantive scope is probably not well tailored to this purpose. The Vienna Convention does not suggest any easily administered test for determining a treaty's "object and purpose" or, for that matter, for assessing when a state's actions would "defeat" it,<sup>76</sup> and there is little in the way of clarifying practice.<sup>77</sup> Some commentators regard compliance with article 18 as turning on the observance of major or indispensable treaty provisions, an approach relatively well suited to the above-described functional approach.<sup>78</sup> But the interim obligation is more commonly understood to safeguard against acts that would disable the mere signatory (or others) from complying with the treaty once it entered into force—in an attempt to maintain, as relevant, the status quo ante.<sup>79</sup> If interim obligations are so limited, they can only correspond imperfectly with any goal of reducing the gap between mere signatories and ratifiers. The interim obligation does not, in any

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76. See, e.g., AUST, *supra* note 60, at 94 (noting uncertain nature of obligation's extent); Charme, *supra* note 39, at 74 (finding article 18 "vague and amorphous," and lacking "inherent value," but somehow virtuous); McDade, *supra* note 44, at 45-47 (noting lack of clarity in interim obligation); Rogoff, *supra* note 44, at 297 (noting that "[t]he content of the obligation as it emerges from application by international tribunals is extremely uncertain and there are few interpretational guides").

77. See AUST, *supra* note 60, at 94 (noting that there "is virtually no practice in the application of the provision").

78. See, e.g., McDade, *supra* note 44, at 42. Such an approach is consistent with that taken to reservations. See *infra* text accompanying note 85 (discussing opinion of the Human Rights Committee).

79. Anthony Aust, for example, stressed that a state that has not ratified is not under a duty to comply with the treaty, nor to refrain from acts inconsistent with its provisions, but instead need only avoid "anything which would affect its *ability* fully to comply with the treaty once it has entered into force." AUST, *supra* note 60, at 94; see also RESTATEMENT (THIRD) OF FOREIGN RELATIONS, *supra* note 49, § 312 cmt. i; Klabbers, *supra* note 46, at 293-94 (rejecting provision-centered approach as inconsistent with the organic focus of article 18, and approaching making signature the equivalent of ratification); Rogoff, *supra* note 44, at 297 (stressing that "the obligation in its present form imposes no affirmative duty upon a signatory to do certain acts or to carry out specific provisions of the treaty"); *id.* at 298-99 (concluding that "the purpose of the rule is to prevent a signatory from claiming the benefits to which it is entitled under the treaty while at the same time engaging in acts that would materially reduce the benefits to which the other signatory or signatories are entitled").

The argument in favor of this lesser obligation is often based on limits in the customary precedent, or first principles. But it also appears consistent with the Vienna Convention's distinction of a treaty's "provisional application," which parties-to-be are required to observe only when they have so agreed. See Vienna Convention, *supra* note 7, art. 25(1) (providing that "[a] treaty or a part of a treaty is applied provisionally pending its entry into force if: (a) the treaty itself so provides; or (b) the negotiating States have in some other manner so agreed").

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event, attempt to establish a degree of interim responsibility proportionate to the risk of defection and its costs.

Nor, for that matter, does the Vienna Convention's formal reach inspire confidence. The Convention applies only to treaties concluded by states after the Convention has entered into force with respect to them.<sup>80</sup> There is some dispute as to whether article 18 codifies customary international law that would independently bind nonparties;<sup>81</sup> given the ambiguity in article 18, it is unsurprising that the answers vary, and perhaps meaningfully. For example, the United States—which, coincidentally enough, has signed but not ratified the Vienna Convention—has represented that it regards article 18 as reflecting customary international law.<sup>82</sup> Its acknowledgements have been opaque, however, as to how it understands the interim obligation, and it remains free to claim that it follows customary international law, and even article 18, without acquiescing in a state party's interpretation of what the interim obligation requires.

Finally, the interim obligation is also not easily enforced. Neither the Vienna Convention nor customary international law creates any institutional mechanism for policing such obligations. Given that a minority of states acquiesce in the compulsory jurisdiction of the International Court of Justice,<sup>83</sup>

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80. Vienna Convention, *supra* note 7, art. 4. For fuller consideration, see E.W. Vierdag, *The Law Governing Treaty Relations Between Parties to the Vienna Convention on the Law of Treaties and States Not Party to the Convention*, 76 AM. J. INT'L L. 779 (1982). This has a potentially substantial impact on the Vienna Convention's application. See *The Vienna Convention on the Law of Treaties*, *supra* note 58, at 282 (remarks by Maria Frankowska) (estimating, based primarily on data from 1979, that less than half of the major treaty-making states (as of 1984) were parties to the Vienna Convention, 70% of the treaty activity of Vienna Convention parties was conducted with nonparties, and only 10% of bilateral treaties were covered). The number of parties to the Vienna Convention has increased considerably, of course, but the point remains that gaps in the Convention's coverage reduce its application geometrically.

81. See AUST, *supra* note 60, at 94 (noting uncertainty); GLENNON, *supra* note 19, at 171-72 (noting controversy, but concluding that the better view is that the Convention reflects customary international law "as it existed at the time the Vienna Convention was adopted"); SHABTAI ROSENNE, *DEVELOPMENTS IN THE LAW OF TREATIES, 1945-1986*, at 149 (noting that article 18 is "highly controversial" due to its perceived departure from customary international law, and was not included among the articles for discussion in connection with the 1986 Vienna Conference on the treaties of international organizations); SINCLAIR, *supra* note 51, at 22, 38-40 (noting controversy, and opining that article 18 at least represented a "progressive development" in customary international law).

82. Robert E. Dalton, *The Vienna Convention on the Law of Treaties: Consequences for the United States*, 78 AM. SOC'Y INT'L PROC. 276, 278 (1984) (citing representations by Secretary of State William P. Rogers in 1971 and Ambassador Elliot Richardson in 1979); see also GLENNON, *supra* note 19, at 172 & n.54 (citing representation by Secretary of State John Hay).

83. For a collection of current declarations, see Int'l Court of Justice, *Declarations Recognizing as Compulsory the Jurisdiction of the Court*, at <http://www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasicdeclarations.htm> (last visited Mar. 13, 2003).

the only formal dispute resolution process available in most cases is due to the particular treaty in question—to which a mere signatory is not, by definition, a party. Where an institution has been made competent to resolve similar questions, the results have not been inspiring. The International Court of Justice, addressing the subject of reservations to the Genocide Convention, emphasized in a vague way the obligations of a signatory, but acknowledged that they “necessarily var[y] in individual cases.”<sup>84</sup> More recently, the Human Rights Committee took a broad, and arguably ad hoc, view of the kind of reservations that would be incompatible with the “object and purpose” of the International Covenant on Civil and Political Rights, a question prompted by article 19 of the Vienna Convention.<sup>85</sup> Its inquiry, however, prompted some state parties to object both to the Committee’s substantive conclusions and to its assertion of authority to resolve the matter—at the evident expense of the role for state objections.<sup>86</sup>

Arguably the strongest evidence of the interim obligation’s inadequacy lies in state practice. To be sure, a mere signatory’s failure to comport with a treaty may engender protests,<sup>87</sup> and some states have appeared willing to comply with a treaty notwithstanding the lack of ratification.<sup>88</sup> But it is easy to explain such

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84. Advisory Opinion No. 12, Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951 I.C.J. 15, 28 (May 28) [hereinafter Advisory Opinion on Reservations to the Genocide Convention].

85. *Covenant on Civil and Political Rights General Comment 24: Issues Relating to Reservations Made Upon Ratification or Accession to the Covenant or the Optional Protocols Thereto, or in Relation to Declarations Under Article 41 of the Covenant*, U.N. GAOR, Hum. Rts. Comm., 52d Sess., U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994).

86. See, e.g., *Observations by the United States of America on General Comment No. 24 (52)*, U.N. Doc. A/50/40, vol. 1, annex VI, at 126-27 (1996).

87. See Klabbers, *supra* note 46, at 284-85 (citing example of criticisms by activists of Angola’s decision to use landmines after signing the Anti-Landmine Convention). Academics, indeed, are adept at detecting circumstances in which the interim obligation may be invoked against dilatory ratifiers like the United States. See, e.g., Michael McDonnell, *Cluster Bombs over Kosovo: A Violation of International Law?*, 44 ARIZ. L. REV. 31, 107 (2002) (claiming that the use by the United States of an indiscriminate weapon would violate its duties as a signatory of the First Protocol).

88. Thus, in the absence of Senate consent to Strategic Arms Limitation Talks (SALT) II, President Reagan indicated that the United States would “refrain from actions which undercut [existing agreements] so long as the Soviet Union shows equal restraint,” but the terms of his representation seemed to turn more on how the United States perceived its interests rather than on the existence of any obligation imposed by international law. GLENNON, *supra* note 19, at 169.

In the Clinton Administration, Secretary of State Albright informed foreign governments that “the United States is legally bound to observe the nuclear test-ban treaty, despite the Senate’s rejection of the pact.” Scott, *supra* note 15, at 1448 (citations omitted). As noted above, the position that article 18 entails a duty to observe the treaty proper is a minority view, and the State Department later clarified that the interim obligation did not require such fidelity:

[T]here is a misunderstanding that needs to be clarified. The president is not claiming that the United States is bound by the Comprehensive Test Ban Treaty. We cannot be bound by a treaty that has not been ratified and that is not in force.

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behavior as serving political objectives independent of the interim obligation. States have not in general behaved as though the interim obligation imposes a burden. The strongest evidence of salience are cases in which states considered interim obligations as one reason among many for failing to sign a treaty, though even there concern about interim obligations is difficult to distinguish from less-transient substantive objections.<sup>89</sup>

The evidence contraindicating the efficacy of interim obligations seems more persuasive. The number of instances in which states are mere signatories has remained high, and in many cases such instances have persisted for a prolonged period without significant legal controversy. It is somewhat surprising, if the interim obligation had teeth, for such situations to have persisted—at least for treaties like the Genocide Convention, in which a signatory might have substantial concern about being called to account. One might expect, at the very least, that states would have been involved in more conflicts concerning the scope of their interim obligations, and that more allegations of breach would have been aired—unless the rules were clear, which they are not.

Even the recent controversy involving the ICC, which brought the issue of interim obligations to the fore, demonstrates their inadequacy. The evidence regarding article 18's influence on U.S. behavior prior to unsigning is at least mixed. On the one hand, the United States's decision to sign the Rome Statute,

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[W]hat we are saying is that as a signatory, there is an understanding in the international community that if you're a signatory and you intend to seek ratification later, that you not take steps to defeat the object and purpose of the treaty. That is the legal term of art. . . . [W]e are going to seek a second chance to get approval for the Comprehensive Test Ban. And in the meantime, the president is going to continue pursuing the policy that has been in effect since 1992; that is, not to conduct any nuclear explosions.

And let me be clear. As a signatory that has not ratified the treaty, the point is that we're not obligated to abide by every term and provision of an elaborate treaty document; but with respect to the basic object and purpose of the treaty not to test nuclear explosions, that is the basic object and purpose.

U.S. State Dept. Briefing, FED. NEWS SERVICE, Nov. 5, 1999 (remarks of Jamie Rubin). Notwithstanding the clarification, the overall impression was that the President was essentially electing the degree of obligation as a matter of national policy.

89. In considering the Law of the Sea Convention, for example, the United Kingdom reportedly considered the interim obligation as a factor counseling against signature, though it ultimately decided to decline for unrelated reasons. See SINCLAIR, *supra* note 51, at 274. The United States, too, had substantive concerns with respect to the interim obligation, though it in fact decided to sign the Convention. See *The Vienna Convention on the Law of Treaties*, *supra* note 58, at 284 (remarks by Frederick S. Tipson). Just to confuse matters further, after the Convention went into force the United Kingdom elected to become a party and the United States, as yet, has not. United Nations, Department of Oceans and the Law of the Sea, Division for Ocean Affairs and the Law of the Sea, Chronological Lists of Ratifications of, Accessions and Successions to the Convention and the Related Agreements as at [sic] 12 November 2001, at [http://www.un.org/Depts/los/reference\\_files/chronological\\_lists\\_of\\_ratifications.htm](http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm) (updated Dec. 10, 2002). For a brief summary of U.S. policy, see Marjorie Anne Brown, *The Law of the Sea Convention and U.S. Policy* (Feb. 14, 2001) (Cong. Research Serv. Issue Brief 95010), available at <http://www.ncseonline.org/NLE/CRSreports/Marine/mar-16.cfm>.

while having little expectation of ratifying it as such, seems facially inconsistent with an understanding that it thereby assumed a burdensome obligation.<sup>90</sup> On the other hand, in withdrawing its signature, U.S. officials did allude—at least as a secondary matter—to the virtue of avoiding interim obligations.<sup>91</sup> Although it is hard to disentangle the Bush Administration's motivations, its domestic and international stance against the ICC—along with concerted opposition in the Senate—were probably sufficient reasons, independent of its interim obligations, to warrant unsigned. The need to maintain a consistent message was made all the more acute by the U.S. agenda of pursuing so-called article 98(2) bilateral agreements to further ensure the exemption of U.S. personnel from ICC jurisdiction, an agenda arguably inconsistent with any attempt to maintain that the Rome Statute was workable.<sup>92</sup>

Whatever its motivation, the fact of unsigned provides the keenest lesson. Article 18, as noted previously, does not require that the interim obligation be observed for all eternity, but instead only “until [the signatory] shall have made its intention clear not to become a party to the treaty.”<sup>93</sup> There is no guidance on how this intention may be made manifest,<sup>94</sup> and while it may be absurd to contend that violating a treaty's object and purpose itself constitutes an adequate signal of that intention,<sup>95</sup> there is no reason to believe that the procedure is particularly burdensome.<sup>96</sup> The bottom line, in any case, is that if

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90. This was also evident in some of the remarks by Secretary of State-nominee Colin Powell, reflected in Wedgwood, *supra* note 24, at 195-96.

91. Thus Ambassador Prosper, responding to a query as to why the United States unsigned the treaty rather than simply failing to ratify, cited the interim obligation, indicating that the United States

to maintain our flexibility—not only to protect our interests but to pursue alternative judicial mechanisms—decided to make clear that we will not be part of this treaty and thus be able to take different approaches that may be different to the object and purpose [of] the ICC treaty.

Prosper, *supra* note 1. The interim obligation was not, however, cited in the notification by Under Secretary of State Bolton, *supra* note 1, nor in the remarks by Secretary Rumsfeld, *supra* note 1, nor by Under Secretary of State Grossman, *supra* note 1.

92. See Rome Statute, *supra* note 1, art. 98(2). But see Scheffer, *supra* note 9, at 59 (arguing that U.S. signature was intended to enhance the ease of securing article 98(2) agreements).

93. Vienna Convention, *supra* note 7, art. 18(a).

94. The procedure appears to have had no precedent in customary international law. See McDade, *supra* note 44, at 23-24.

95. But see *United Nations Conference on the Law of Treaties, Documents of the Conference*, 1st & 2d Sess., at 100, U.N. Doc. A/Conf./39/11/Add.2 (1968-1969) (reporting statement by French delegate that “the most obvious way for a State to make clear its intention not to become a party to the treaty was for it to frustrate the object of the treaty”).

96. A more legitimate question concerns whether the refusal to submit a treaty for legislative consent, or the legislature's rejection of a treaty, constitutes a sufficient signal in the absence of a more formal notice of the kind provided with respect to the Rome Statute. See, e.g., *Mayaguezanos por la Salud y el Ambiente v. United States*, 38 F. Supp. 2d 168, 175 n.3 (D.P.R.) (asserting interim obligation to adhere to the “purposes and principles” of the United Nations Convention on the Law of the Sea based on presidential signature, at

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a signatory feels burdened by the interim obligation, and contemplates taking acts that might be viewed as violating a treaty's object and purpose, it can quickly disengage itself. This ease of exit greatly limits the potential force of the interim obligation. Now that unsigning has been deployed, states interested in pressing mere signatories into compliance must weigh the possibility that their actions will *widen* the gap between ratification and nonratification by driving signatories to unsign.

This kind of complete exit—as opposed to the failure of signatories to progress toward ratification—may have been the most upsetting to international expectations. The practice of letting signed treaties linger, without ratifying or unsigning them, seems to have created an expectation that the treaty process was a one-way ratchet: A mere signatory's hesitance might mean that its participation in a treaty would not (at least for a time) be fully realized, but once it had signed, it would not, and could not, turn its back on the matter.<sup>97</sup> Such an understanding would, in theory, help ease the transition from signature to ratification, and ensure consistency with the priority on securing even imperfect adherence to multilateral treaties—a point emphasized by the International Court of Justice's tolerance for state reservations and, notably, its characterization of signature as “a first step toward ratification.”<sup>98</sup> This vision is, of course, strictly inconsistent with article 18's apparent tolerance for exit, and contemplating that possibility makes the potentially perverse effects of interim obligations immediately evident.

### C. Implications

The resulting predicament adds a novel twist to the conventional account concerning the enforcement of international obligations. Vague standards like the interim obligation, it is thought, may be intentionally selected—not incidentally, because they permit negotiators to achieve agreement where it

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least “pending ratification or rejection by the Senate”), *aff'd on other grounds*, 198 F.3d 297 (1st Cir. 1999). Though a full exploration of these questions is beyond the scope of this Article, it is enough to note their practical implications. Were rejection by the U.S. Senate enough, for example, some might argue that a re-signing by the President would reinstate the interim obligation, at least assuming that were permissible under the relevant treaty. See Garrett Epps, *Restarting the CTBT*, NATION, May 15, 2000, at 5 (urging just such a course with respect to the CTBT). Such a rule would also be inconsistent with U.S. domestic practice, under which the Senate ordinarily remains seized of a treaty even after having rejected it—and on at least one occasion, reconsidered the treaty and approved it just days after having initially rejected it. See ROLE OF THE SENATE, *supra* note 61, at 8, 12, 144-45.

97. This line of thought is implicit in some of the commentary on the United States's initial signing, as well as its unsigning, of the Rome Statute. See, e.g., Charlesworth, *supra* note 56, at 11 (asserting that since “[e]ven signing a treaty imposes a general obligation not to act in a way that is contrary to the object and purpose of the treaty . . . the US is committed to the creation of an independent and impartial International Criminal Court”).

98. Advisory Opinion on Reservations to the Genocide Convention, *supra* note 84, at 28.



would not otherwise be possible.<sup>99</sup> By the same token, however, they are less likely to prove adequate in any deeper efforts at cooperation, which create greater incentives to defect.<sup>100</sup>

The Rome Statute illustrates this tension in treaty formulation even in the processes of treaty *formation*, and suggests the difficulties of achieving a universal solution by tinkering with the interim obligation. The potential upside to strengthening mere signatories' obligations, to be sure, is obvious enough. Because the ICC imposed potentially significant costs on signatories, the risk of cheating—even on lesser, interim obligations, to the extent they retain meaning—cannot be discounted. The reputational cost of such cheating, moreover, would be low if there were no clear, shared understanding of what constituted a violation. Finally, more defined or more easily enforced interim obligations might be desirable as a means of reducing the strategic advantage that mere signatories retain over state parties, and thus encouraging complete subscription.

Any resulting attrition among signatories, it may also be argued, is not invariably a bad thing. Strengthening obligations helps to identify states that may be unwilling to abide by a treaty, and to that extent causes precisely the right states to drop out.<sup>101</sup> But such a depiction may also be overly static. Mere signatories may be undergoing a process of adjustment and adaptation, either internationally (through norm internalization, for example, or by negotiating changes in the treaty's terms) or domestically (by selling the treaty to domestic audiences), and may legitimately be uncertain as to how either process will pan out—rather than being, say, uncertain as to whether or not they would choose to comply should they ratify.

States may also, at least on occasion, be less concerned with imposing and enforcing equivalent obligations than with increasing the sum of compliance with a set of norms. The Rome Statute is part of a modern wave of treaties oriented toward universal participation,<sup>102</sup> and it is well understood that such

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99. See, e.g., Downs, *supra* note 71, at 330 (observing that to political economists, “it is often a sensible strategy to claim ambiguity as a cover for noncompliance,” and “[t]hey also suspect that ambiguity is often built into the agreement intentionally as a device that negotiators can use strategically to reap the political benefits of reaching an agreement when one might otherwise not be achieved”); *id.* at 343 (observing that “ambiguity in treaty language and claims of incapacity are often instrumentally useful for States,” which— “[w]ithin certain bounds”—may “deliberately choose how ambiguous to make treaties and how much oversight capacity they will employ in connection with a given agreement”).

100. George W. Downs, David M. Roche & Peter N. Barsoom, *Is the Good News About Compliance Good News About Cooperation?*, 50 INT'L ORG. 379, 380, 384-87 (1996).

101. See Morrow, *supra* note 75, at S48-50, S57-58.

102. See Phillipe Kirsch, *The International Criminal Court*, 46 MCGILL L.J. 255, 259 (2000) (accounting, by Chairman of the Preparatory Committee for the Establishment of the International Criminal Court, of the tension between “a strong statute and strong support from the international community,” with emphasis on the desire for “widespread signature and ratification” and the goal of achieving “support that is as universal as possible”); cf. Jose E. Alvarez, *The New Treaty Makers*, 25 B.C. INT'L & COMP. L. REV. 213, 220-21 (2002).

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an objective entails greater flexibility as to substantive standards and noncompliance.<sup>103</sup> If the goal of background treaty rules is to encourage states to make reliance investments in their desired regimes, it is important to ensure that those rules are not unduly biased against investments in breadth rather than depth of cooperation.

### III. STRATEGIC SOLUTIONS

Understanding the range of variables involved suggests that the most promising solutions to the problem of unsigned may be treaty-specific or, at most, take the form of default rules. But for the reasons just discussed, it may be difficult to establish any clearer, universal set of expectations for mere signatories—and hazardous, to the extent it generalizes about the relative virtues of treaty breadth and depth. Even with respect to individual treaties, negotiators may find it difficult enough to find common ground with respect to parties' ultimate obligations, and have little taste—and, if ambiguity is thought advantageous, little genuine desire—for trying to resolve which treaty obligations are paramount for mere signatories.

Another set of strategies would try to reduce the incidence of mere signature. One such option involves establishing a deadline for signature, beyond which states desiring to participate in a treaty regime must accede completely, domestic ratification and all.<sup>104</sup> Narrowing the window of opportunity for signature necessarily reduces the ease of state entry, and may thus impose costs in terms of breadth of participation. The experience with this mechanism under the Rome Statute, moreover, suggests that it may simply encourage hasty signatures—President Clinton's signature was not only in the “twilight of his Administration,” but also on the “last possible day for a

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(describing Rome Statute as exemplary of broad-based treaty-making in organizations “aspiring to universal or nearly universal membership”).

103. Advisory Opinion on Reservations to the Genocide Convention, *supra* note 84, at 21-22 (concluding that the “very wide degree of participation envisaged” by the Genocide Convention, and the reliance on majority voting in determining its provisions, called for “flexibility” in establishing rules for its operation); *id.* at 23 (characterizing Convention as pursuing the “common interest,” such that the “individual advantages or disadvantages to States,” and “the maintenance of a perfect contractual balance between rights and duties,” are substantially irrelevant). The same approach may be evidenced by the treatment of virtual reservations to the Rome Statute. *See supra* note 24.

104. The Vienna Convention itself leaves the choice of ratification, accession, or other means of consent wholly to the negotiating parties. *See Vienna Convention, supra* note 7, art. 11; *see also id.* arts. 12-15 (detailing provisions for means of expressing consent, but providing for few practical differences). The relationship between ratification and accession has proven arcane, *see, e.g., JONES, supra* note 25, at 124-32 (discussing controversies), but in modern practice the distinction typically arises when a state has missed a deadline for signature or otherwise been denied the opportunity to sign. *See AUST, supra* note 60, at 88.

signature without ratification”<sup>105</sup>—and thus increase the likelihood of shallow engagement and eventual exit. A second such option, limiting the rights of signatories, focuses less on reducing the initial population of mere signatories than on encouraging them to make the transition to party status. Nonetheless, limiting signatories’ rights is likely to have a direct effect on entry, and even ratification, by decreasing the incentive for states to sign.<sup>106</sup>

A third possibility would be to limit the time available for ratification by signatories. States may be encouraged to ratify early if doing so is prestigious,<sup>107</sup> but it seems implausible that prestige alone could serve as the basis for additional leverage. Negotiators may instead create an absolute deadline or establish a maximum period between a state’s signature and the tendering of its final consent. Doing either would, in theory, reduce the period during which discrepant obligations applied, and encourage signatories to progress more rapidly toward ratification. These options are available under the existing law of treaties, but are rarely exploited,<sup>108</sup> perhaps largely because of the collective interest in maximizing the opportunities for ratification.<sup>109</sup> But there are also practical impediments to limiting opportunities for ratification. On the rare occasions when absolute deadlines have been established, as within the League of Nations, they have later been modified in order to enhance the treaty’s scope, and thus may lack credibility.<sup>110</sup> An individuated limit may encounter the different problem that, given the widespread possibilities for treaty accession, any state finding its signature

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105. Wedgwood, *supra* note 24, at 193; *see* Rome Statute, *supra* note 1, art. 125(1) (providing that “the Statute shall remain open for signature in New York, at United Nations Headquarters, until 31 December 2000”). *But cf.* Scheffer, *supra* note 9, at 68 (concluding that “[t]he President’s decision represented work on the ICC throughout his Administration, and thus was anything but a rushed decision at the end of December 2000”).

106. That tradeoff may not be inevitable, as suggested by the striking example of the practice of objecting to reservations: Mere signatories obtain the right to object, but the status of their objections is contingent upon their own ratification. See Advisory Opinion on Reservations to the Genocide Convention, *supra* note 84, at 28 (“[W]ithout ratification, signature does not make the signatory State a party to the Convention; nevertheless, it establishes a provisional status in favour of that State. . . . Pending ratification, the provisional status created by signature confers upon the signatory a right to formulate as a precautionary measure objections which have themselves a provisional character. These would disappear if the signature were not followed by ratification, or they would become effective on ratification.”). This particular variant is unavailable, of course, where reservations are impermissible, as in the case of the Rome Statute.

107. *Cf.* AUST, *supra* note 60, at 81 (speculating that a state may ratify before implementing legislation has been enacted “so that it can say that it has been one of the first to ratify, and thereby gain kudos at home and abroad”).

108. *See, e.g.*, AUST, *supra* note 60, at 83 (noting that “[i]t is not usual to set a deadline for ratification”); ARNOLD DUNCAN MCNAIR, *THE LAW OF TREATIES* 88 (1938).

109. *See, e.g.*, AUST, *supra* note 60, at 81.

110. *See* JONES, *supra* note 25, at 86 n.2; WILCOX, *supra* note 22, at 143-44 (describing experience of the League of Nations with the Conference on the Exportation of Hides, Skin, and Bones).

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lapsed may simply re-sign. Establishing any more general principle, like desuetude for signature, would likely run into similar obstacles.

Using interim obligations to approximate parties' obligations, or otherwise attempting to encourage ratification, seems for these reasons to be of limited value in answering the unsigned problem. A more promising avenue, in my view, is instead to reduce somewhat the advantages that mere signatories have with respect to exit. Treaty parties generally retain, of course, the opportunity to withdraw from their obligations.<sup>111</sup> Where such a right exists, but no conditions are stipulated, the Vienna Convention provides that no less than twelve months' notice is required.<sup>112</sup> The result, as noted earlier, is that a mere signatory can exit more expeditiously than can a party with more substantial and well-defined obligations.

It seems wholly reasonable, and feasible, to extend the parties' regimen to mere signatories: Where a signatory wishes to provide notice of its intention not to ratify under article 18, that notice's effect would be delayed for twelve months, or for whatever period provided for party withdrawal under the particular treaty. The notion is not entirely unprecedented. Uncertain as to the continuing force of the ABM Treaty after the Soviet Union's dissolution, the Clinton Administration negotiated and signed a Memorandum of Understanding (MOU) purporting to extend the treaty to the newly independent states, but refrained from submitting the MOU to likely defeat in the Senate. The Bush Administration, in turn, faced an ABM Treaty of uncertain continuing authority (but which its officials had proclaimed dead upon the Soviet Union's breakup) and an MOU that at most imposed an interim obligation under article 18. Although it had the option, by its lights, of disavowing the ABM Treaty and unsigned the MOU with immediate effect, it instead elected to comply with the ABM Treaty's original requirements for withdrawal—which entailed notice and a delay in the entry into force.<sup>113</sup>

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111. Under the Vienna Convention, however, the right to withdraw is not universally available; if the right is not specifically afforded within a particular treaty's terms, it is unavailable unless it can be established that the parties intended to permit withdrawal or such a right may be implied by the nature of the treaty. Vienna Convention, *supra* note 7, art. 56(1). While this may seem to be an undue, if self-imposed, constraint on national sovereignty, the inability to withdraw makes perfect sense in the context of treaties, like those settling borders, in which permanence is highly prized. *But see* Setear, *An Iterative Perspective*, *supra* note 29, at 208-09 (querying distinction among types of treaties with respect to withdrawal or denunciation, while advocating approach biased against withdrawal from or denunciation of any type of treaty).

112. Vienna Convention, *supra* note 7, art. 56(2).

113. *See supra* note 15 (citing withdrawal notices). The rationale was best laid out by Robert Turner, whose testimony before the Senate Committee on Foreign Relations stated the case for regarding the ABM Treaty as defunct, noted the interim obligation not to betray the object and purpose of the MOU, and argued for the discretionary act of notifying withdrawal in accord with the ABM Treaty's original terms. *See National Missile Defense and the ABM Treaty (Part 2), Hearings Before the Senate Comm. on Foreign Relations, 107th Cong., 1st Sess. (July 24, 2001)* (testimony of Robert F. Turner); Robert F. Turner,

The better question may be how such a norm might be more generally implemented, given that unsigned states may not always exhibit such largesse. The most aggressive approach would be to infer a default requirement of unsigned lead-time from the Vienna Convention. As previously noted, article 18 does not specify any particular method of providing notice of the intent not to become a party to a treaty, and might be amenable to importing a default method stipulated elsewhere, such as for withdrawal. The difficulty, however, is that the interim obligation is supposed to last only from the point of signature “until” the mere signatory has made its intention clear, which is facially inconsistent with the automatic implication of an additional twelve-month buffer.<sup>114</sup> It may also be argued that unsigned without adequate lead-time is *itself* inconsistent with a treaty’s object and purpose, but that argument seems to depend overmuch on the minority position as to the provisional, treaty-mimicking character of the interim obligation. Any attempt to find a default rule within the Vienna Convention, finally, would not only be susceptible to telling criticisms as to treaty construction, but would certainly exceed any requirement imposed by customary international law, and thus would fail to bind nonparties like the United States.

The surer course would be to incorporate such terms on a treaty-by-treaty basis. Article 18 does not, on its face, permit derogation by the parties to a particular treaty, but one may reasonably argue that the greater power of permitting parties to make signature determinative of consent includes the power to subject signatories to stricter conditions than those imposed by article 18. Such an approach would have at least two distinct advantages. First, while the strategic considerations discussed in Part I counsel in favor of limiting the advantage mere signatories may have over ratifiers in multilateral treaties, they have far less application to bilateral treaties, suggesting that the one-size-fits-all approach in article 18 may be inappropriate to the problem of unsigned. Second, there is no reason to believe that the balance of considerations—in particular, the fear of deterring would-be signatories through excessive restrictions on exit, versus the concern that mere signatories may be in a position to exploit ratifiers or even to slow down or halt the treaty’s entry into force—will be the same for every kind of treaty. Indeed, while I have suggested that the period for withdrawal may be easily borrowed in order to establish the lead time for unsigned, it is by no means obvious that that is the right answer for each and every strategic situation.

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*National Missile Defense and the 1972 ABM Treaty*, 36 NEW ENG. L. REV. 807 (2002) (reprising testimony).

114. See Vienna Convention, *supra* note 7, art. 18.

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*UNSIGNING*

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## CONCLUSION

Unsigning, in short, should be acknowledged as a legitimate and understandable course of action under the Vienna Convention, albeit one that may impair the successful pursuit of multilateral treaties. If little is asked of mere signatories, the risk that unsigning will become endemic is low. But with the continued popularity of multilateral conventions, and the proliferation of parties actively engaged in making and enforcing international law, it is becoming steadily less likely that states will be able to maintain any kind of collective repose. Under these circumstances, unsigning may well become more common, and in the process threaten the possibilities for international cooperation.

Repairing the situation may require more sustained reflection on the synergistic effects on incentives for the various levels of entry, the several kinds of exit, and the desired intensity of treaty commitments. But acknowledging the strategic issues involved, and moving past more doctrinaire legal analysis, is an important first step.