

## NOTES

### THE APPLICATION OF CUSTOMARY INTERNATIONAL LAW IN U.S. COURTS: CUSTOM, CONVENTION, OR PSEUDO- LEGISLATION?

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#### I. INTRODUCTION

Prior even to the coining of the term “customary international law,” it has been an integral part of the law of the United States. Prior to the acceptance of the term “customary international law,” U.S. courts used the term “law of nations.” The following excerpt from *The Paquete Habana*, a turn of the century Supreme Court Case, demonstrates the change in nomenclature, as well as the fact that, at least in matters concerning the law of the sea, the Supreme Court has long considered itself bound to apply customary international law.

This review of the precedents and authorities on the subject appears to us abundantly to demonstrate that at the present day, by the general consent of the civilized nations of the world, and independently of any express treaty or other public act, it is an established rule of international law, founded on considerations of humanity to a poor and industrious order of men, and of the mutual convenience of belligerent states, that coast fishing vessels, with their implements and supplies, cargoes and crews, unarmed and honestly pursuing their peaceful calling of catching and bringing in fresh fish, are exempt from capture as prize of war. . . . This rule of international law is one which prize courts administering the law of nations are bound to take judicial notice of, and to give effect to, in the absence of any treaty or other public act of their own government in relation to the matter.<sup>1</sup>

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1. *The Paquete Habana*, 175 U.S. 677, 708 (1900). For further documentation of the history of the role of customary international law in the context of U.S. judicial decisions, see Jordan J. Paust, *Customary International Law and Human Rights Treaties are Law of the United States*, 20 MICH. J. INT'L L. 301 (1999) [hereinafter Paust, *Human Rights Treaties*].

This body of law, whether it be called “customary international law” or the “law of nations,” has never remained static, but recent years have seen dramatic expansion in its importance and prevalence in domestic courts. As noted by a recent journal article, “[w]ith the increasing modern development of certain areas of international law, including international human rights law, customary international law has come to cover many areas of the law that it historically did not.”<sup>2</sup> As the body of customary international law grows, so does its importance in U.S. courts, due to two factors. First, all U.S. statutes which provide for claims based on customary international law necessarily expand with the growth of customary international law. Second, the growth in substantive customary international law makes questions about procedure increasingly pressing, as their resolution will affect a larger area of the law. This process is further complicated, as the procedure of customary international law itself evolves, permitting the application of its rules in new ways. As pointed out by a recent commentator, “modern human rights law—and thus customary international law—seeks to govern not only the relationships between States, but also the relationship between a State and its citizens and relationships of citizens one to another.”<sup>3</sup>

In light of both customary international law’s longstanding importance and its rapidly growing sphere of influence, this Note seeks to examine the appropriateness of the sources of international law applied by U.S. federal courts. In particular, it will examine the potential of present practice to inappropriately undermine domestic law, including congressional legislation, by giving international resolutions and declarations the weight of *de facto* legislation in the field of customary international law. Further, this Note will examine the discrepancy between customary international law as defined by domestic courts and the law which is in fact applied.

Before reaching the central inquiry, some preliminary matters must be explored. After briefly describing the theoretical definition of customary international law, this Note will proceed to a discussion of the stakes in customary international law. While the precise status and definition of customary international law has not yet been decisively adjudicated or fixed upon by theorists, at least in all its implications, a discussion of the possible applications and misapplications clarifies the importance of these questions.

The heart of this Note will focus on customary international law as applied by U.S. federal courts. This topic will be examined in three stages. First, the definition of customary international law, as given by the courts

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2. Daniel H. Joyner, Note, *A Normative Model for the Integration of Customary International Law into United States Law*, 11 DUKE J. COMP. & INT’L L. 133, 134 (2001).

3. *Id.* at 134-35.

themselves, will provide a basis for exploration of their decisions. Second, this Note will explore the sources of customary international law used by U.S. courts in their decisions. Finally, the appropriateness of these sources, in light of the definition the courts espouse, will be evaluated.

## II. CUSTOMARY INTERNATIONAL LAW DEFINED

If there is one consensus in the field of customary international law, it is the theoretical definition of customary international law. Though the content of customary law is the subject of heated debate and complex legal battles, the theoretical definition, at least in its broadest terms, is generally agreed upon: customary international law consists of (1) the general practice of States, which is (2) generally accepted as law by States.<sup>4</sup> Determining what this definition means in practice has proved problematic. Attempts to define the two component parts of customary international law, general practice and general acceptance as law, have failed to overcome two pitfalls. Some definitions, like the broad definition of customary international law given above, fail to give any concrete parameters. On the other hand, definitions that do give concrete parameters or set up applicable tests rarely obtain general approval. In the face of these obstacles, no definition of "general practice" and "general acceptance as law" can simultaneously provide concrete and generally accepted parameters of customary international law: nevertheless, the theoretical consensus that exists, in addition to a brief overview of the most important debates about procedural requirements, should be outlined.

### *A. General Practice*

The question of just how widespread acceptance must be to meet the standard of "general practice" has yet to be answered by a concrete test or standard. Some claim that this aspect of customary international law "has

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4. See, e.g., KAROL WOLFKE, CUSTOM PRESENT IN INTERNATIONAL LAW 53 (2d rev. ed. 1993) ("An international custom comes into being when a certain practice becomes sufficiently ripe to justify at least a presumption that it has been accepted by other interested states as an expression of law."); MICHAEL BYERS, CUSTOM, POWER AND THE POWER OF RULES: INTERNATIONAL RELATIONS AND CUSTOMARY INTERNATIONAL LAW 130 (1999) ("Most international lawyers agree that customary international law results from the co-existence of two elements: first, the presence of a consistent and general practice among States; and, secondly, a consideration on the part of those States that their practice is in accordance with law."); JORDAN J. PAUST, INTERNATIONAL LAW OF THE UNITED STATES 1 (1996) ("[C]ustomary international law actually has two primary components which must generally be conjoined: (1) patterns of practice or behavior, and (2) patterns of legal expectation, 'acceptance' as law, or *opinio juris*."); Olufemi Elias, *The Nature of the Subjective Element in Customary International Law*, 44 INT'L & COMP. L.Q. 501 (1995) ("Doctrine generally holds that customary international law results from (a) the uniform and consistent conduct of States, undertaken with (b) the conscious conviction on the part of States that they are acting in conformity with law, or that they were

not given rise to any serious difficulties of legal theory, however difficult it may be in practice to ascertain or decide whether there exists a general practice of States, and if so, what is its precise content.”<sup>5</sup> While commentators usually use many words in their attempts to make the term “general practice” more concrete and therefore applicable to the concrete problems of customary international law, these attempts frequently produce definitions which are longer but no more explicit than the term they set out to define. In *International Law as Law of United States*, Jordan J. Paust provides one such explanation of the first component of customary international law:

It is also significant that the behavioral element of custom (*i.e.*, general practice) is similarly free from the need for total conformity, and it rests not merely upon the practice of States as such but ultimately upon the practice of all participants in the international legal process. Thus, a particular nation-state might disagree whether a particular norm is customary and might even violate such a norm, but it would still be bound if the norm is supported by patterns of generally shared legal expectation and conforming behavior extant in the community. If the patterns of violation become too widespread, however, one of the primary bases of customary law can be lost.<sup>6</sup>

In other words, general practice must be general, but it need not be universal. If practice is not general enough, then it no longer meets the test for the first component of customary international law. This explanation provides no further information about what the first component of the standard for customary international law is than the phrase “general practice” and it simultaneously suffers from less than universal acceptance.

An opposing view is held by Karol Wolfke, who claims that the “number of states involved in the custom-forming process” is not material.<sup>7</sup> In *Custom in Present International Law*, she claims that the “conduct of even one state, tacitly accepted as a legal right or duty by another, can lead to the formation of a custom, that is, to the arising of a local customary rule binding those two states.”<sup>8</sup> In attempting to clarify the issue of how long a practice must be carried on and by how many States for it reach the level of

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required so to act by law.”).

5. H.W.A. THIRLWAY, *INTERNATIONAL CUSTOMARY LAW AND CODIFICATION: AN EXAMINATION OF THE CONTINUING ROLE OF CUSTOM IN THE PRESENT PERIOD OF CODIFICATION OF INTERNATIONAL LAW* 47 (1972).

6. PAUST, *supra* note 4, at 3.

7. WOLFKE, *supra* note 4, at 59.

8. *Id.*

“general,” Wolfke demonstrates that, while she disagrees with Paust, she is no more capable than he is of coming to a clear definition:

The requirement of a practice being uninterrupted, consistent and continuous also no longer holds good. Everything depends on concrete circumstances. Certainly, interruptions of practice and inconsistencies in such practice often prevent the formation of a custom. This does not mean, however, that every inconsistency or break should lead to such a consequence. On the contrary, a return to the same practice following interruption may sometimes constitute evidence of the force of uniformity in the conduct of states, by no means preventing the development of a custom.<sup>9</sup>

Wolfke maintains that one event may be enough to establish customary international law; on the other hand, one event may sometimes not be enough to show its destruction. In her understanding of customary international law, she admits the breakdown between theory and practical application. Because it all depends on “concrete circumstances,” only the broadest of generalizations—the least helpful towards developing applicable standards—fully describes the meaning of the “general” in the general practice component of customary international law.

The term “practice” has given rise to a debate over what constitutes State practice. This debate has resulted in several concrete suggestions but failed to settle on a general consensus. In *Custom, Power, and the Power of Rules*, Michael Byers discusses the current debate over what may and may not constitute State practice. Byers describes the “polarisation between those writers who think that only acts constitute State practice and those who support a broader conception . . . .”<sup>10</sup> This polarization can be observed in the debate over whether or not the resolutions and declarations of international organizations contribute to the process of creating customary international law.<sup>11</sup> In the words of Byers, “many non-industrial States and a significant number of writers have asserted that resolutions and declarations are important forms of State practice which are potentially creative, or at least indicative, of rules of customary international law.”<sup>12</sup> On the other hand, opposition to this proposition has been voiced by “many powerful States and some writers.”<sup>13</sup>

One issue that does seem to have been resolved is the question the legal implications of State action which does not comply with that State’s

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9. *Id.* at 60-61.

10. BYERS, *supra* note 4, at 135.

11. *Id.*

12. *Id.*

13. *Id.*

statements. Byers points out that some of the basic tenets of customary international law, such as the prohibition against torture, are widely disregarded by many States that voice support for the prohibition against torture.<sup>14</sup> On this issue, however, Byers believes that "there would appear to be a shared understanding among States that such actions which States deny or attempt to conceal do not constitute State practice capable of contributing to the development, maintenance or change of customary rules."<sup>15</sup>

### B. General Acceptance as Law

The second component of customary international law, general acceptance as law, is often referred to as *opinio juris*. Thirlway, author of *International Customary Law and Codification*, refers to this as "the psychological element in the formation of custom."<sup>16</sup> Thirlway also explains the problematic nature of *opinio juris* and the necessity of a better understanding:

[O]pinio juris . . . has probably caused more academic controversy than all the actual contested claims made by States on the basis of alleged custom, put together. A present-day writer may be understandably reluctant to call upon his readers to devote further time to this juridical squaring of the circle, but it is impossible to discuss the future of customary law without some study of the elements which are regarded as going into its making.<sup>17</sup>

This problematic aspect of customary international law is a necessary component of the definition, because, as Byers points out, "something in addition to State practice should be necessary . . . for it is essential that one be able to distinguish between legally binding rules and patterns of behavior which are not legally required."<sup>18</sup> The most fundamental problem with *opinio juris* stems from the fact that "it involves the apparent chronological paradox that States creating new customary rules must believe that those rules already exist, and that their practice, therefore, *is* in accordance with law."<sup>19</sup> Various theories have been suggested as solutions to this inquiry, but, as of yet, none of them seem to have gained consensus support.

For the purposes of this Note, theoretical quandaries aside, the problems of the second component of customary international law closely resem-

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14. *Id.*

15. *Id.* at 149.

16. THIRLWAY, *supra* note 5, at 47.

17. *Id.*

18. BYERS, *supra* note 4, at 130.

19. *Id.* at 130-31.

ble that of the first component: they are practical problems. What degree of acceptance is necessary to meet the standard of "general?" What acts on the part of States or their agents constitute acceptance? The level of acceptance which meets the standard of general is no better defined in the context of the second component than the first. What criteria can the international community use to distinguish between State action motivated by fear, the interests of the State, or belief that the State action is required by customary international law? The definition of "acceptance" within the international legal community is not any clearer than that of "practice" or "general."

This attempt to better understand the basic definition of customary international law, like all such attempts which produce a non-controversial definition, produces very little more than a simple reiteration of the definition. Customary international law is (1) general practice of States which is (2) generally accepted by States as law. Deeper analysis of this definition finds a world divided, in both theory and in practice.

### III. USES, ABUSES, AND IMPLICATIONS OF CUSTOMARY INTERNATIONAL LAW IN DOMESTIC LAW

Debates over the role of customary international law in domestic courts continue to produce differing opinions about the role of customary international law within the U.S. legal structure. While there is general agreement that customary international law plays some role, the extent of this role remains unclear. Three of the most important of the unanswered questions are covered in this section of this Note: (1) whether customary international law has the potential to trump federal legislation, (2) whether customary international law is federal law without empowering legislation from Congress, and (3) which political branch holds ultimate control over the interpretation of customary international law. The resolution of these issues will determine the power of customary international law in U.S. legal systems. In doing this, it may also change the balance of power between the respective federal branches by expanding the judiciary's ability to overrule federal law. In the final analysis, the answers to the preceding questions will determine whether customary international law or Congress controls in domestic legislation. The following section examines some currently viable theories about the power of customary international law in the U.S. legal system.

#### *A. Dominance of Customary International Law over Federal Law*

Jordan J. Paust, who has authored a book and several law review articles on the subject of customary international law, asserts that the incorpo-

ration of this body of law into domestic law is required by the Constitution. He claims that "customary international law has been directly incorporable, at least for civil sanction and jurisdictional purposes, without the need for some other statutory base."<sup>20</sup> According to Paust, "[t]he Founders clearly expected that the customary law of nations was binding, was supreme law, created (among others) private rights and duties, and would be applicable in United States federal courts."<sup>21</sup>

Based on his claims of constitutionally mandated incorporation of customary international law, Paust delineates the areas of domestic law that this affects. In some applications, customary international law enhances the power of the "Executive under Article II, section 3 to 'take care that the Laws be faithfully executed.'"<sup>22</sup> In other applications, customary international law restricts the Executive: "Supreme Court and other opinions have also recognized that while exercising Presidential war powers, the Executive is bound by customary international law."<sup>23</sup> In addition to affecting the President and therefore indirectly the Legislative branch, Paust claims that customary international law directly shapes Congressional power because it "can limit the exercise of an otherwise appropriate Congressional power and thus can function partly as an aid for interpreting the extent of constitutional grants of power."<sup>24</sup> The power of customary international law also affects the courts, where it "may be relevant to an adequate interpretation of various sorts of Congressional power in order to functionally enhance such powers."<sup>25</sup> Finally, Paust claims that the "latter process of incorporation might include an enhancement of the power of Congress under Article I, section 3, clause 18 to enact legislation 'necessary and proper for carrying into Execution . . . all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.'"<sup>26</sup>

Because customary international law thus pervades the federal government, alternately limiting and expanding the powers of the respective branches, it becomes a defining body of law in relationship to the federal government. Hence, Paust writes, "in the case of an unavoidable clash between fundamental human rights supported by customary international law and a federal statute, the human rights (which have a constitutional status)

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20. Paust, *Human Rights Treaties*, *supra* note 2, at 305.

21. *Id.* at 301.

22. Jordan J. Paust, *Customary International Law: Its Nature, Sources and Status as Law of the United States*, 12 MICH. J. INT'L L. 59, 81 (1990).

23. *Id.* at 81-82.

24. *Id.* at 83.

25. *Id.* at 83-84.

26. *Id.* at 84.



must prevail.”<sup>27</sup> In normal conflicts between codified (treaty) international law and federal statute, the last-in-time rule applies; this rule dictates that whichever law was most recently enacted controls.<sup>28</sup> Paust claims that this rule dictates that, in conflicts between customary international law and federal statutes, customary international law always controls.<sup>29</sup> As Paust theorizes, “customary international law would necessarily be ‘last in time,’ since custom is either constantly re-enacted through a process of recognition and behavior involving patterns of expectation and practice or it loses its validity and force as law.”<sup>30</sup> By this reasoning, custom is always a controlling authority in the face of a directly conflicting federal statute.

The extent to which Paust claims that customary international law influences and controls domestic law leads to the question of who, within the U.S. legal system, decides upon the content, interpretation, and manner of application of international law. While all three branches of the federal government will have some indirect control in forming customary international law, it also limits the scope of each. Hence, whichever branch is empowered to control the application and interpretation of this body of law within the domestic legal structure will be that much stronger, relative to the coordinating branches. In Paust’s view, the judicial branch is responsible to “identify, clarify, and apply” this body of law.<sup>31</sup> In response to concerns that this role improperly changes the balance of powers, he asserts that “it is precisely because the federal judiciary has both the power and responsibility to identify and apply customary international law in cases otherwise properly before the courts that there is no violation of the separation of powers when federal courts apply international law while interpreting federal statutes.”<sup>32</sup>

In an article on human rights law and domestic courts, Richard B. Lillich explores the role and the ramifications of customary international law in United States law. Like Paust, Lillich bases his understanding of the role of customary international law on the finding that “customary international law, while not mentioned in the Constitution, is part of the law of the land to be determined and applied by the courts whenever appropriate in making a decision.”<sup>33</sup> Based on this, Lillich states that “[t]he starting point in ascertaining what international human rights norms have been received into customary international law—and therefore are rules of decisions for domestic

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27. PAUST, *supra* note 4, at 95.

28. *Id.* at 89.

29. *Id.*

30. *Id.*

31. *Id.*

32. Paust, *Human Rights Treaties*, *supra* note 2, at 331.

33. Richard B. Lillich, *Invoking International Human Rights Law in Domestic Courts*, 54 U. CIN. L. REV. 367, 393 (1985).

courts—commonly is thought to be the Universal Declaration of Human Rights . . . .”<sup>34</sup> The status of the Universal Declaration of Human Rights as a source of the customary international law rests solely on its position as evidence of existing customary international law. Lillich admits that, while the Universal Declaration of Human Rights resolution was adopted without a dissenting vote by the U.N. in 1948, it is not legally binding as a treaty, as it has never been ratified.<sup>35</sup>

Thus, to the extent Lillich is correct that the Universal Declaration of Human Rights reflects—at least in part—customary international law, and to the extent that both Paust and Lillich are correct that customary international law is part of United States law which should be enforced and interpreted by the courts, it should also “be directly enforceable in domestic courts.”<sup>36</sup> Most customary international law claims in U.S. courts have been based on a statute which provides for such a claim. The most common example of this is the Alien Tort Statute, which dates back to the Judiciary Act of 1789 and provides for federal jurisdiction over “any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”<sup>37</sup> The point of Lillich’s suggestion is that, while there is nothing wrong with providing statutorily for the incorporation of customary international law, as has been done in the past, it is unnecessary or redundant.

The implications of Lillich’s claim that customary international law may and ought to be directly incorporated into United States law even without statutory support are far reaching. He advocates that judges ought to use human rights law—and implicitly all of customary international law—without statutory support. Not only could claims be brought in federal and state courts without the benefit of enabling statutes, but, under the mirror principle, the United States has an obligation, enforceable domestically, to live up to the provisions of customary international law.<sup>38</sup> Beyond this direct effect, which has the potential to permit the voiding of a federal statute on the grounds that it conflicts with customary international law (as defined and recognized by the judiciary), Lillich predicts that customary international law should have the “greatest impact on domestic law in the future by influencing the courts’ approach to constitutional and statutory standards.”<sup>39</sup> This means that the Constitution, federal law, and state law should be interpreted in light of customary international law. As Lillich states, “litigants and

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34. *Id.*

35. *Id.*

36. *Id.* at 397.

37. Judiciary Act, ch. 20, § 9, 1 Stat. 73 (1789) (current version at 28 U.S.C. § 1350 (2000)).

38. Lillich, *supra* note 33, at 397-99.

39. *Id.* at 411.

judges already have invoked the [Universal] Declaration [of Human Rights] for precisely this purpose.”<sup>40</sup> Lillich hails this new world of customary international law’s direct and indirect incorporation into United States law as offering “significant as well as virtually limitless possibilities for achieving greater protection of the rights of individuals.”<sup>41</sup>

*B. Dominance of Federal Law over Customary International Law*

The argument against direct incorporation of customary international law focuses on several perceived evils, with the primary focus resting on lack of constitutional justification and incompatibility with constitutional principles such as separation of powers and democratic rule. In a Note that focuses specifically on the question of whether customary international law supersedes federal statutes, Garland A. Kelley takes a moderate position, claiming that customary international law should not supercede federal law, but that “American courts must attempt to reconcile U.S. federal statutory law with conflicting international norms and standards, whenever possible.”<sup>42</sup> In the course of explaining why federal law ought not be superseded by customary international law, based on constitutional interpretation, Kelley makes an argument for how customary international law has the potential to threaten some of the most basic premises of American constitutional government.

Kelley challenges the claim that the last-in-time doctrine applies to customary international law, pointing out that the Supremacy Clause leaves ambiguous “how conflicts between separate classes of supreme laws are to be resolved.”<sup>43</sup> While conflicts between different types of federal law would normally be resolved through the last-in-time doctrine, Kelley notes that with customary international law this does not result in a comfortable outcome.<sup>44</sup> The precise date of a doctrine of customary international law becoming effective, because of the nature of customary international law, is impossible to determine; hence, any date chosen is entirely arbitrary. Unless one is willing to accept the premise that customary law is constantly in the process of being renewed—and, thus, that customary international law al-

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40. *Id.*

41. *Id.* at 412.

42. Garland A. Kelley, Note, *Does Customary International Law Supersede a Federal Statute*, 37 COLUM. J. TRANSNAT’L L. 507, 507-08 (1999).

43. *Id.* at 509.

44. *Id.*

ways trumps legislative federal law—this issue presents a serious practical obstacle to the application of the last-in-time rule.

In a discussion of *jus cogens*, a specific form of customary international law, Kelley discusses two more fundamental problems of incorporation. Not only is the literature on *jus cogens* conflicting as to the substance of *jus cogens*, but the issue of who, in the arena of domestic law, will determine both the substance and applicability of *jus cogens* does not have an obvious answer.<sup>45</sup> The issue of where to lodge the power of applying customary international law creates a dilemma, but this is not the most daunting problem. Kelley claims that “the most serious objection” is “that ceding peremptory power to *jus cogens* norms is fundamentally at odds with basic American constitutional values.”<sup>46</sup> Modern customary international law conflicts with domestic legal issues, issues concerning the self-governance of Americans. Kelley explains that the heart of the problem lies in the potential for customary international law, over which Americans have no direct control, to undermine democracy and the consent of the governed.

If our form of constitutional government stands for anything, it is the belief that no law is law without the consent of the governed, as expressed through our elected representatives. Preempting domestic statutory law with norms of customary international law, particularly customary international law based not on the practice of nations, but on declarations that are purposeful and hopeful, is to apply law that has been generated by non-United States law-making procedure.<sup>47</sup>

Kelley contends that the loss of a truly consent-based government would not be the only casualty of customary international law’s dominance over federal legislation: such implementation would necessarily come at “considerable cost, upsetting the safeguards inherent in at least three basic U.S. constitutional values and assumptions . . . .”<sup>48</sup> Because directly incorporating customary international law as dominant over federal law would necessitate using the courts as the applying and interpreting body, such incorporation by definition gives previously unknown power to the courts. This power, as Kelley points out, comes at a price. The judicial branch’s gain would come at the expense of the President, Congress, and state governments. According to Kelley, such costs are “excessive and illegitimate.”<sup>49</sup>

In an article on the authoritative sources of customary international law in the United States, Harold G. Maier argues that both the

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45. *Id.* at 517, 527.

46. *Id.* at 528.

47. *Id.* at 529.

48. Kelley, *supra* note 42, at 530.

49. *Id.*

governmental structure of the United States and the functional nature of international law itself compel the conclusion that the authoritative source of public international law in the United States is the will of the United States body politic as reflected in federal law . . . not the will of the world community of nations.<sup>50</sup>

Maier bases much of his argument on the role of territorial sovereignty. Territorial sovereignty and nationhood both require “possession of the internal authority to decide whether to violate international obligations.”<sup>51</sup> Not only is the authority to choose whether to follow international norms vested in the body politic of each nation, but, as a practical matter, this is the only method through which international law can be translated to the domestic front. In the words of Maier, “[i]t is this functional reality, as much as any language of the courts or of the Constitution, that supports the proposition that United States decision makers are not bound by the Constitution to apply rules of customary international law in domestic fora.”<sup>52</sup>

In practice, this theory demands “active affirmative participation” of a nation’s “authoritative decision-makers” for customary international law to have “applicability within a nation’s legal system.”<sup>53</sup> Maier explains what this means within the framework of the U.S. legal system, stating that the “principles of international law are accessible to the federal courts when they decide cases by the common law method.”<sup>54</sup> While available to courts, “those principles are given domestic legal effect by the authority of the court applying them in its traditional common law process, not by some metaphysical omnipresence of the international legal regime.”<sup>55</sup> The courts exercise their discretion in applying and interpreting customary international law.

Customary international law is further checked and, ultimately in the scheme of U.S. law, balanced by the legislative branch. As the will of the people of the United States—as determined through our own law-making process—dominates the common law findings of the judiciary, so the legislative findings of Congress, when they contravene a court’s holding concerning customary international law, reverse the holding of the court system. In the words of Maier, when there is “conflict between the will of the people, reflected by the act of their government institutions, and the will of the international community reflected in customary international law, the municipal will must necessarily control . . .”<sup>56</sup> Maier believes that, within

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50. Harold G. Maier, *The Authoritative Sources of Customary International Law in the United States*, 10 MICH. J. INT’L L. 450, 455 (1989).

51. *Id.*

52. *Id.*

53. *Id.* at 456.

54. *Id.* at 475.

55. *Id.* at 476.

pal will must necessarily control . . . .”<sup>56</sup> Maier believes that, within the U.S. political and legal systems, customary international law can and rightfully does have a guiding role to play; ultimately, however, the decision-making authority is still retained by the people and government, none of whom are “subject to the limitations created by an international legal regime.”<sup>57</sup>

### *C. Summary of the Issues at Stake in the United States Incorporation of Customary International Law*

This section of this Note, on the legal authority of customary international law *vis-a-vis* federal legislation, has not been included with the purpose of discovering which position is correct. Rather, the overview of this debate holds a central place in this Note because it demonstrates some of the issues at stake as U.S. courts begin to integrate customary international law into what were previously thought of as purely or primarily domestic issues. Admittedly, the number of cases using customary international law in this manner is still few and primarily based on some enabling federal statute. Nonetheless, these decisions take on a greater importance in light of the debate discussed above. Should theorists such as Paust and Lillich prevail, these early cases, taking the first modern steps in the process of identifying and applying customary international law would become crucial precedent in a law-making process that Congress would be powerless to overturn. On the other hand, the case law about to be analyzed will lie at the mercy of the will of the people and their Congress, should the theories of Kelley and Garland prove prophetic. It is still too early to know which faction will dominate, but this analysis of their theories does survey the potential spectrum of outcomes and the legal and political issues yet to be determined.

## IV. CUSTOMARY INTERNATIONAL LAW AS APPLIED IN UNITED STATES FEDERAL COURTS

The purpose of this section is to analyze the method current courts use when defining, identifying, and applying customary international law. This Note seeks to scrutinize the process, not the results, of courts applying customary international law. To the extent that this Note considers legal results, it is concerned with potential future results, should the current trend in judicial reasoning continue and be carried into a broader context. For this reason, the outcome and the facts of the cases discussed are of little significance to this analysis. Rather than survey a large body of case law, this sec-

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56. Maier, *supra* note 50, at 460-61.

57. *Id.* at 460.

tion will focus on a few recent cases in which federal courts have dealt with claims based on customary international law. In each of these cases, Congressional legislation provides for a claim under the customary international law, leaving the defining, identifying, and applying of specific doctrines to the courts. The cases were selected with the purpose of using the recent cases, covering differing substantive topics falling under customary international law. In *Iwanowa v. Ford Motor Co.*, a worker forced to labor without compensation in Nazi Germany brought suit against the company for which she had worked.<sup>58</sup> *Kadic v. Karadzic* involved the claims of victims of atrocities committed in Bosnia against one of the Bosnian-Serb leaders responsible for their treatment.<sup>59</sup> In *Beanal v. Freeport-McMoran, Inc.*, an Indonesian citizen brought suit against an American corporation for environmental damage.<sup>60</sup> Finally, in order to put these modern cases in the context of the historical meaning of customary international law, this Note will compare these modern cases with *The Paquete Habana*.<sup>61</sup>

#### A. Defining Customary International Law

In *Iwanowa*, the court defined customary international law as "such widely held fundamental principles of civilized society that they constitute binding norms on the community of nations."<sup>62</sup> This definition of customary international law includes both the traditional components found in most academic versions. "Widely held fundamental principles of civilized society" functions as a custom component, and "binding norms on the community of nations" constitutes the convention aspect. In *Kadic*, the court did not stop to give a general definition of customary international law. Instead, it turned directly to the question of finding the "norms of contemporary international law."<sup>63</sup> The court in *Beanal* referred to customary international law as the "law of nations," which it defined as "customary usage and clearly articulated principles of the international community."<sup>64</sup> Again, the two component parts, this time called "customary usage" and "clearly articulated principle," were present in the definition.

When deciding issues which require substantive consideration of customary international law, the court in *Kadic* did not define customary international law generally before moving forward to consider its substantive

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58. *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424 (D.N.J. 1999).

59. *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995).

60. *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161 (5th Cir. 1999).

61. *The Paquete Habana*, 175 U.S. at 677.

62. *Iwanowa*, 67 F. Supp. 2d at 439.

63. *Kadic*, 70 F.3d at 238.

64. *Beanal*, 197 F.3d at 165.

content in reference to the issue before it. However, in both *Beanal* and *Iwanowa*, the courts paused to give a general definition before considering the substantive content. In both these cases, the courts gave definitions functionally similar to that given by academics, containing both the fundamental elements of customary international law—custom and convention.

### *B. Applying the Definition*

After giving a brief definition of customary international law, the court in *Iwanowa* proceeded to name several potential sources from which to extract the current law. Among the sources given were the works of jurists, general usage of nations, judicial decisions on the customary international law, and non-legally binding treaties.<sup>65</sup> In its consideration of whether forced labor constitutes a violation of customary international law, the court turned to several sources to support its conclusion that “[t]he use of unpaid, forced labor during World War II violated clearly established norms of customary international law.”<sup>66</sup> The court first cited the Nuremberg Tribunals and several jurists commenting thereon.<sup>67</sup> Next, the court referred to various legal precedents, both domestic and foreign, holding that forced labor is against the law of nations.<sup>68</sup> In the citing of these courts and the Nuremberg Trials, the *Iwanowa* court did not refer to any findings of previous courts on international practices or conventions concerning forced labor. Rather than focus on the specific topic of the legal status of slavery, the citations referred to its many horrors.

In *Kadic*, the court faced several questions of customary international law and referred to a variety of sources to find the substantive content it sought. The first issue was whether norms of customary international law are binding on private actors. In affirmatively responding to this question, the court referred to law review articles, statements by the Executive branch, and The Restatement (Third) of the Foreign Relations Law of the United States.<sup>69</sup> The court also cited some U.S. case law, with the purpose of showing that the available case law did not refer directly to the question at hand.<sup>70</sup> The court next turned to the issue of whether genocide is against customary international law, citing, first, two non-binding U.N. General Assembly resolutions and, second, a binding treaty ratified by the United States.<sup>71</sup> While

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65. *Iwanowa*, 67 F. Supp. 2d at 439.

66. *Id.* at 440.

67. *Id.*

68. *Id.*

69. *Kadic*, 70 F.3d at 239-40.

70. *Id.* at 240-41.

71. *Id.* at 241-42.



the *Kadic* court considered other issues of international law, in these instances the court's decision did not rely on custom as a source of law because either a legally binding treaty or U.S. law provided clearly for the crimes in question.

In *Beanal*, the court considered whether environmental damage violates customary international law. The court cited one treatise and a non-binding declaration, the Rio Declaration on Environment and Development, in support of customary international law binding in environmental matters.<sup>72</sup> Ultimately, the court rejected this evidence, stating that the plaintiff "fails to show that these treaties and agreements enjoy universal acceptance in the international community."<sup>73</sup> The court refused to use U.S. domestic environmental legislation to help find "articulable or discernible standards and regulations to identify practices that constitute international environmental abuses or torts."<sup>74</sup>

### *C. Comparing the Definition to the Practice*

In identifying principles of customary international law, U.S. courts refer to a variety of sources. As the previous section demonstrated, courts use law review articles, statements by the executive branch, non-binding international declarations, legally-binding treaties, non-binding international trials, legal treatises, non-binding U.N. Resolutions, the Restatements, and previous domestic precedent as evidence of existing customary international law. It is important to note that none of these sources, except previous domestic cases, has binding force as customary international law in a court's process of finding and applying customary international law; these sources serve as evidence, like clues, in the court's search.

The sources of customary international law used by U.S. courts, while they are useful in determining the convention aspect, do not suffice to accurately identify the practice element. U.N. Resolutions and non-binding declarations both refer specifically to what nations agree practice should be, not what it is. While law review articles, treatises, and the Restatements may attempt to summarize the current state of the law, they typically focus on law and convention, rather than the international events which constitute international practice. Previous U.S. cases, of course, have some binding power, but they are not cited for the purpose of demonstrating international practice, nor would they be the best source for this information. As custom-

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72. *Beanal*, 197 F.3d at 167.

73. *Id.*

74. *Id.*

ary international law, according to both courts and academics, contains the elements of custom and convention, courts should examine international practice, rather than focusing all their attention on convention. Further, it is important to remember that many of these sources, such as U.N. Resolutions and the works of jurists, frequently represent what individuals and groups desire, rather than what they believe exists. Courts must give due attention to the issue of whether a specific source presents customary international law in terms of what the author or expert believes exists versus believes should exist.

Analysis of *The Paquete Habana* will illustrate how courts might take a more balanced approach, identifying the custom as well as the convention aspect of customary international law. In this case, which took place more than a hundred years ago, the Supreme Court considered the status of seized fishing boats under customary international law. Before deciding that principles of customary international law dictated that the proceeds from auctioning the ships must be returned to their fisherman owners, the Court examined many sources. The Court commenced with an exploration of "ancient usage among civilized nations, beginning centuries ago."<sup>75</sup> Beginning with Henry IV of England in 1403, the Court cited international practices, with a focus on the acts of Kings.<sup>76</sup> Rather than focusing on the legal conclusions of commentary, the Court referred to historical incidents. In examining American history, the Court noted actual practices of the American government rather than the opinions or statements of policy.<sup>77</sup> After examining American practice, the Court turned to a detailed analysis of the legal literature and cases, domestic and foreign, available on the law of the sea.<sup>78</sup> Even here, however, there was a marked deference to practice, as many of the works cited were written by men with considerable maritime experience.<sup>79</sup>

The Supreme Court's analysis in *The Paquete Habana* demonstrates how a court can explore an issue of customary international law while directing attention to both custom and convention. In today's cases, a less historically-focused approach than that taken in *The Paquete Habana* would be preferable, as customary international law admittedly evolves at a faster pace than it did in 1900. However, the fast pace of modern customary international law development does not excuse the utter disregard given to practice by current U.S. courts. So long as custom remains an element of customary

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75. *The Paquete Habana*, 175 U.S. at 686.

76. *Id.* at 687.

77. *Id.* at 691.

78. *Id.* at 691-708.

79. *Id.* at 706-08.

international law, courts must include analysis of international practice in their decisions on customary international law.

## V. CONCLUSION

This Note has attempted to demonstrate some of the difficulties of applying customary international law in U.S. courts. At every level, there are unanswered questions. Many of these issues, like how “general” a practice or its acceptance must be in order to constitute customary international law, can only be given imprecise answers. Not only are these general problems inherent in all legal questions involving line-drawing in the defining of customary international law, but there is a virtual war being waged over where that line should be drawn and by whom. This issue, in turn, raises questions of constitutional importance, the gravity of which it is almost impossible to overstate. Practical concerns about the balance of powers, no less than theoretical misgivings over undermining our government’s consent-based authority and legitimacy, demand our attention as the possibility of directly incorporating customary international law, perhaps even when in direct contravention of federal statute, comes closer to becoming a reality.

Current cases do not present any of these possibilities as realities. They do, however, contain the beginnings of what could become fundamental structural changes in customary—and hence, United States—law should the judicial system prove dominant in determining customary international law. Current cases show U.S. courts, on a fairly modest level, defining, determining, and applying customary international law. The cases have yet to produce a real showdown between domestic, either constitutional or congressional, and customary law. To date, congressional and executive actions and statements have been taken as one type of evidence in determining the content of customary international law, but they have not served as dispositive or controlling in the face of overwhelming evidence that customary international law as a whole dictates a contrary outcome.

This, of course, is the real issue. What happens when the will of the people or a dictate of the Constitution conflicts directly with customary international law? No doubt, our courts will do their best to interpret creatively so as to avoid such a conflict, but, eventually, the conflict will come, and a decision will be made. The conflict is inevitable due to the nature of modern customary international law. No longer delegated to issues traditionally understood as exterior, modern customary international law is beginning to define relationships between governments and their citizens and amongst citizens.

The conclusions of this Note are three. First, there is an impending constitutional crisis, with the potential to alter the fundamental structure of our laws and the legal authority (if not the power) of the American people. Second, in this eminent struggle, Congress ought to take the lead, controlling through legislation the authority of customary international law in domestic matters and thus circumventing the potential conflict between international and domestic law by upholding the supremacy of U.S. law in domestic matters. The courts will by necessity play a crucial role, for they must concur that this role belongs to the legislature and that federal law is supreme. Third, U.S. courts must, in their role as interpreters of customary international law, hold ever present in their determinations the recognized definition of customary law, which encompasses both a custom and a convention element: the *practice* of nations ought not be ignored. By this means, they will be surer of applying customary international law as it exists, rather than as courts and commentators wish it to be.