HEINONLINE

DATE DOWNLOADED: Tue Dec 15 17:53:13 2020
SOURCE: Content Downloaded from HeinOnline

Citations:

Bluebook 21st ed.
Report of the Committee on the Formation of Customary International Law , 1999 Proceedings of the American Branch of the International Law Association 100 (1999-2000).

ALWD 6th ed.
, Report of the Committee on the Formation of Customary International Law , 1999 Proceedings of the American Branch of the Intl L Assoc 100 (1999-2000).

APA 7th ed.
(1999-2000). Report of the Committee on the Formation of Customary International Law Proceedings of the American Branch of the International Law Association, 1999, 100-171.

Chicago 7th ed.
"Report of the Committee on the Formation of Customary International Law ," Proceedings of the American Branch of the International Law Association 1999 (1999-2000): 100-171

McGill Guide 9th ed.
"Report of the Committee on the Formation of Customary International Law " (1999-2000) 1999 Proceedings of the American Branch of the International Law Association 100.

AGLC 4th ed.
'Report of the Committee on the Formation of Customary International Law ' (1999-2000) 1999 Proceedings of the American Branch of the International Law Association 100.

MLA 8th ed.
"Report of the Committee on the Formation of Customary International Law ." Proceedings of the American Branch of the International Law Association, 1999, 1999-2000, p. 100-171. HeinOnline.

OSCOLA 4th ed.
'Report of the Committee on the Formation of Customary International Law ' (1999-2000) 1999 Proceedings of the American Branch of the International Law Association 100

-- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at https://heinonline.org/HOL/License
-- The search text of this PDF is generated from uncorrected OCR text.
-- To obtain permission to use this article beyond the scope of your license, please use: Copyright Information

REPORT OF THE COMMITTEE ON FORMATION OF CUSTOMARY INTERNATIONAL LAW

The American Branch Committee on the Formation of Customary International Law is pleased to submit the following report on the role of national court decisions as State practice. The Committee hopes that the report will serve to complement the work of the International Committee on the Formation of Customary International Law, which has been extremely productive in recent years. As part of the Committee's ongoing work, the Committee invites comments on the report from other members of the American Branch. These comments will be useful to the Committee as it follows up on this report and explores related issues.

The report concludes that at least a subset of municipal court decisions should be considered State practice. Courts and scholars consistently view municipal court decisions as State practice, in spite of some theoretical and practical difficulties. The report assesses the practical difficulties – primarily the potential for conflicting State practice on the part of different organs – through an examination of American court decisions applying customary international law. The report concludes that, while these practical difficulties may suggest caution, they should not prevent consideration of municipal court decisions as State practice.

The Rapporteur prepared the initial draft of the report, which was then the subject of significant revision based on comments and suggestions received from members of the Committee and others who, while not official Committee members, participated as observers. Charles Siegal and David Bederman, in particular, provided extensive commentary and suggestions. John Noyes provided both substantive comments, in his capacity as a member of the Committee, and careful editing, in his capacity

as Editor of the American Branch *Proceedings*. The Committee also wishes to thank Alfred P. Rubin as an outside reader who provided significant guidance.

May 2000

Davis Robinson (Chair)
Philip Moremen (Rapporteur)
David Bederman
Jarat Chopra (observer)
John Crook (observer)
Marc Levy (observer)
Daniel Magraw (observer)
Stephen McCaffrey
John Norton Moore (observer)
John Noyes
Maurizio Regazzi (observer)
Stefan Riesenfeld (deceased)
John Setear (observer)
Charles Siegal

NATIONAL COURT DECISIONS AS STATE PRACTICE

by Philip M. Moremen*

Table of Contents

Introduction 104

Part One 109

I. Municipal Court Decisions as the Practice of States 109
A. Municipal court decisions and international law – in general. 109
B. Judicial authority citing municipal decisions as State practice 111
C. The views of writers 115
1. The historical, positivist view 116
2. Modern view on consent related to customary international law 117
3. The modern consensus regarding the role of judicial decisions in the formation of State practice 119
a. The analogy to the doctrine of State responsibility 119
b. Relaxation of the consent requirement and of rigid dualism 121
D. What acts constitute State practice?: physical acts and verbal acts 123
1. In general 123
2. Courts 126
E. Municipal court decisions and the subjective element of custom 128

II. Difficulties with Considering Municipal Court Decisions as International Law 130
A. Inconsistency 131
1. Theory 131
2. Practice 134
B. Comparative expertise 135
C. Municipal courts may only consider limited sources of law 135

* Assistant Professor, School of Diplomacy and International Relations, Seton Hall University.

1. Statutory codifications of international law 136
2. Judicial precedent 140
D. Logistical difficulties in identifying State practice 140

Part Two 141

III. Customary International Law in American Courts 141
A. Overview of customary international law in American courts 141
1. Sovereign immunity and head of state immunity 142
2. Human rights 148
3. Statutory and treaty interpretation 154
a. Prescriptive jurisdiction and federal statutes 155
b. Non-jurisdictional interpretive uses of international law 157
4. Customary international law as a source of affirmative claims 160
B. Crosscutting themes 163
1. How American courts determine State practice and customary international law 163
a. Citations to judicial decisions and national laws as State practice 164
2. Conflicts between the branches of government 166

IV. Conclusion 170

Introduction

There are a number of potential mechanisms through which decisions of municipal courts might influence international law. This report concentrates on the relationship of national court decisions to the formation of customary international law and, specifically, the status of national court decisions as State practice. The report concludes that there is little reason not to treat such decisions as State practice for purposes of the formation of customary international law and examines the rationales supporting this approach. The report also assesses the ramifications and difficulties of treating national court decisions as State practice. As part of this assessment, the report examines the decisions of American courts applying customary international law.

Executive Summary

The report will be divided into two parts. The first part primarily will discuss the theoretical basis for treating national court decisions as State practice, but also will examine the theoretical and practical effects of doing so. The second part will examine American court decisions involving customary international law in order to assess in practical terms the ramifications of treating court decisions as State practice.

Part I

The theoretical portion of the paper will concentrate largely on the views of international law writers, since most theoretical discussion of the role of municipal judicial decisions takes place in the scholarly literature. (To the limited extent that international and national court opinions cite to municipal judicial decisions as State practice, they do not propose theoretical justifications.) The general theoretical debate about customary international law has been shaped by the views of orthodox positivist theorists in the early part of this century, who largely denied any role for national courts in the formation of customary international law. They believed that both treaties and custom resulted from the active and express "will"[1] of states, so that custom was essentially a tacit form of treaty. Accordingly, only the practice of State organs competent to make treaties

---

[1] "Will" might best be viewed as a sort of active consent, or intent, similar to the intent or consent an individual would experience in entering into a contract.

in the name of the State could be considered State practice. The practice of courts did not qualify.

Since that time, views about the nature of consent required for the formation of customary international law have relaxed. The consensus of modern writers who have addressed the question is that national court decisions do constitute State practice. Nevertheless, views regarding State consent still affect the debate about the nature of customary international law and, hence, about the role of national courts as State practice. For example, those with a stronger insistence on state consent might be more willing to prefer executive acts as State practice when those acts conflict with judicial decisions.

The modern commentators who assert that court decisions constitute State practice often base their argument on an analogy to the doctrine of State responsibility, under which a State is responsible under international law for the internationally unlawful acts or omissions of all its officials or State organs. Following this approach, a State should be viewed as a unity in all contexts, so there is no need to evaluate the actions of different organs differently. All official activities of governmental organs – executive, legislative, and judicial – play an equal role in the formation of practice.

This analogy is persuasive, but not conclusive: the doctrines of State responsibility and State practice are not directly linked, and there is no absolute reason why a result in one area should control in the other. What makes the analogy appealing is that both doctrines are based on the assumption of the State as a unity. But the concept of State unity does not compel the conclusion that all State organs speak for the state; it could just as easily lead to the conclusion that only the executive can speak on the State's behalf, so that the State speaks with one voice.

Nevertheless, additional rationales exist that, while perhaps not conclusive on their own, are convincing when taken together with the analogy to State responsibility. Under the relaxed requirement of State consent that prevails today – even if one maintains that some type of State consent is required in the formation of custom – there is less reason to limit State practice to the foreign ministry. In addition, many State organs, including courts, actually do take part in decision-making regarding foreign affairs, and it would be unrealistic to exclude them from State practice. Moreover, at least in some States, municipal courts share the law-making

function with the executive and the legislature; their law-making activities related to international affairs clearly should be considered State practice.

A separate question is the existence of restrictions on the type of acts that can be considered State practice. Some writers have distinguished between physical acts and verbal acts – including claims and unilateral declarations – and have asserted that verbal acts do not themselves constitute practice. A number of writers seemingly have sought to harmonize the two positions by suggesting that the distinction between physical acts and verbal acts should be one of weight, so that physical acts carry greater weight than verbal acts alone. Writers in both camps, however, seem to agree that municipal judicial decisions should be considered State practice. Still, a distinction between acts and verbal acts may be relevant in giving less weight to statements in opinions that constitute mere *dicta*, or that have a minimal effect on relations between States.

A number of theoretical and practical difficulties result from the treatment of municipal court decisions as State practice. These are not fatal, but must be taken into account. First, if the acts of all State organs can constitute State practice, there is a potential for conflict and inconsistency between the positions taken by different organs. From the point of view of other States and of judicial decision-makers, such inconsistency makes determination of State practice difficult. In reality, however – and this is borne out in the American context – actual conflict is comparatively rare. In cases of conflict, given that the practice of State organs is equivalent, the simplest approach is to conclude that there is no precedent-setting State practice on the issue in question.

Second, courts considering customary international law issues often are not able to refer directly to international law. Instead, they may be restricted to considering domestic law transpositions of international law, such as implementing statutes or prior judicial decisions. Municipal court decisions, therefore, may reflect not international law, but a national interpretation of international law. This is not necessarily a problem for the formation of State practice, because State practice, almost by definition, reflects a national view of international law. Nevertheless, some court decisions, restricted by national law requirements, conceivably could dictate a court decision so out of step with international law that any State practice that resulted would be irrelevant.

Third, most municipal court judges possess little expertise in international law or international affairs. Municipal court decisions regarding international law can constitute singularly uninspiring examples of legal reasoning. Nevertheless, the same can be said about the abilities of legislators and executive bureaucrats, even within foreign ministries. Therefore, this may be an argument in domestic political systems for judicial deference to the executive in sensitive cases, but not for disregarding judicial decisions as State practice.

Finally, treating national decisions as State practice would assist judicial decision-makers seeking to determine State practice, since they and legislation very often constitute the only available evidence of State practice.[2] Nevertheless, it appears that courts rarely refer to municipal decisions explicitly as evidence of State practice. Indeed, national courts rarely conduct extensive surveys of State practice, instead relying heavily on the opinions of writers,[3] or on domestic precedent. Even international courts, it would appear, do not often explicitly rely on national judicial decisions as State practice.

Instead, when both national and international courts do cite to national decisions, they often do so either as persuasive authority, or without making their rationale clear. In such cases, a court could be relying on any number of justifications for citing municipal decisions, including as subsidiary means for determining international law, as general principles of international law, as State practice, or as simple persuasive authority. Therefore, the practical effect of treating municipal court decisions as State practice may be limited.

---

[2] IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 54 (5th ed., 1998).

[3] *Id.* at 56. "When points of international law arise in a municipal court, and resort to the executive for guidance does not occur, the court will commonly face very real difficulty in obtaining reliable evidence, in convenient form, of the state of the law, and especially the customary law, on a particular point. An *ad hoc*, yet extensive, research project is out of the question, and counsel cannot always fill the gap. . . ." American courts certainly emphasize the opinions of writers and experts, in preference to detailed surveys of State practice. American courts find norms of contemporary international law by "consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law.'" *Filartiga v. Pena-Irala*, 630 F.2d 876, 880 (2d Cir. 1986) (quoting *U.S. v. Smith*, 18 U.S. (5 Wheat.) 153, 160-61 (1820)).

Part II

In part two, the report will examine American cases involving customary international law. First, the report will provide a brief review of the case law. Then, the report will make some crosscutting observations about how United States courts employ customary international law. First, courts do not often conduct examinations of State practice in their search for customary international law. Second, because of the practice of deferring to the executive, conflict in State practice between the judiciary and the executive will be rare.

Generally speaking, issues of public international law do not arise often in American courts. Even more rarely do cases arise involving customary international law. The cases that do arise can be broken down into two main types. First, courts can apply customary international law substantively. That is, customary international law can provide a cause of action, a basis for a defense, or an integral part of the reasoning necessary for the decision. Rarely do American courts invoke customary international law directly as the source of an affirmative cause of action, at least without some sort of statutory authorization. The majority of cases involving the substantive use of customary international law involve four general subject areas: sovereign immunity, diplomatic and consular immunity, human rights, and expropriation.

Second, courts often look to customary international law to interpret both domestic statutes related to international law and international treaties. Indeed, the use of customary international law in an interpretive role may be more common than its substantive or direct use. In its survey of the case law, the report will examine in depth the areas of sovereign immunity and human rights – as illustrative case studies of the substantive use of custom – and will also examine the interpretive use of customary international law.

At least two observations can be made regarding the use of customary international law by U.S. courts. First, the courts generally do not conduct an exhaustive examination of State practice, but, instead, rely primarily on works of jurists, international treaties and declarations, and American precedents. When they do conduct examinations of State practice, however, a number of decisions have included foreign judicial decisions in their surveys.

Second, conflicts in interpretation of customary international law between the three branches of American government are likely to be rare. When American courts do apply customary international law, they usually follow the lead of the executive branch when the executive expresses a view, especially in cases involving the various immunities.[4]

Even when the executive fails to express a view, American courts are reluctant to render a decision that might step on the recognized prerogative of the executive in international affairs. In human rights cases, the courts possess the sort of independence that potentially could result in conflict with the executive. To date, however, the Justice Department has supported the courts' application of international human rights law, to the extent that there may be a uniform practice by the United States in this area. Nevertheless, courts occasionally resist executive direction in international law matters, even in immunity cases.

In addition, some courts have raised customary international law as a mechanism for constraining the executive. They have attempted to do so either as a matter of substantive law or as a matter of interpretation. For the most part, these cases have not been followed by other courts and their impact often has been limited on appeal.

PART ONE

I. Municipal Court Decisions as the Practice of States

A. Municipal court decisions and international law – in general

Decisions of national courts could contribute to the creation of international law in at least five potential ways. The first three of these correspond to the sources of international law set forth in Article 38 of the Statute of the International Court of Justice.[5] First, national judicial deci-

[4] Of course, judicial interpretation may also conflict with Congressional determination of the content of customary international law. These types of conflicts may not be as serious or as common as conflicts between the judiciary and the executive, since the courts and the legislature engage in a sort of dialogue about the law. As a result, consistent State practice may emerge over time.

[5] "Article 38(1) . . . . is widely recognised as the most authoritative statement as to the sources of international law." MALCOLM N. SHAW, INTERNATIONAL LAW 55 (4th ed., 1997) (citations omitted). Article 38 provides:

> 1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

sions may be subsidiary means for the determination of rules of international law.[6] Second, they may reflect "general principles of law recognized by civilized nations."[7] Third, they may constitute State practice or reflect "acceptance as law," thus contributing to the development of customary law.[8] Fourth, to those who believe that other sources of international law exist beyond those enumerated in Article 38, national judicial decisions regarding international law questions could constitute a separate source of international law: a transnational law or a sort of international common law.[9] Finally, both national and international courts can refer to foreign municipal decisions simply as persuasive authority.

> a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
>
> b. international custom, as evidence of a general practice accepted as law;
>
> c. the general principles of law recognized by civilized nations;
>
> d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.
>
> 2. This provision shall not prejudice the power of the court to decide a case *ex aequo et bono* if the parties agree thereto.

Statute of the International Court of Justice, art. 38(1). Article 38 follows Article 38 of the Statute of the Permanent Court of International Justice, drafted in 1920.

[6] Art. 38(1)(d).

[7] Art. 38(1)(c).

[8] Art. 38(1)(b).

[9] *See, e.g.*, John H. Barton & Barry E. Carter, *International Law and Institutions for a New Age*, 81 GEO. L.J. 535 (1993) ("The overall trend . . . is to hear more such cases [with an international impact] and effectively to develop what amounts to an international common law that lies in between traditional domestic and traditional international law." *Id.* at 547.). *See also* Jonathan I. Charney, *Universal International Law*, 87 AM. J. INT'L L. 529 (1993); Hiram E. Chodosh, *Neither Treaty nor Custom: The Emergence of Declarative International Law*, 26 TEX. INT'L L.J. 87 (1991); Richard B. Lillich, *The Proper Role of Domestic Courts in the International Legal Order*, 11 VA. J. INT'L L. 9 (1970) (national courts can and should act as unofficial agents of the international legal order in rendering decisions based on international law); BENEDETTO CONFONTI, INTERNATIONAL LAW AND THE ROLE OF DOMESTIC LEGAL SYSTEMS 8-11 (1993) (domestic legal operators – including municipal courts – ensure compliance with international law and so constitute the keystone of international law).

Customary international law "results from a general and consistent practice of states followed by them from a sense of legal obligation."[10] While there are other formulations describing customary international law, they all essentially boil down to the same thing. Thus, the definition of custom comprises two distinct elements: (1) the "general practice" of States and (2) "its acceptance as law."[11] This report is interested primarily in the kinds of acts that constitute State practice.

B. Judicial authority citing municipal decisions as State practice

Support exists in national and international judicial decisions[12] for the proposition that municipal court decisions constitute State practice, but is not common.[13] National courts have often referred to decisions of foreign courts when confronted with issues of international law. In the majority of these cases, however, national courts do so without providing any justification, suggesting that they consult foreign decisions primarily as persuasive authority, or as subsidiary means for determining international

[10] RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §102(2) (1986) [hereinafter *Restatement (Third)*]. The most definitive statement of the sources of international law is found in Article 38 of the Statute of the International Court of Justice, which refers to "international custom, as evidence of a general practice accepted as law."

[11] *See* HENKIN, PUGH, SCHACHTER & SMIT, INTERNATIONAL LAW – CASES AND MATERIALS 55 (3d ed., 1993).

[12] A thorough review of international cases is beyond the scope of this report, but may be the subject of a subsequent project by this Committee. The cases surveyed in this section of the report were drawn from a review of secondary sources, a review of opinions of the International Court of Justice, and a review of American cases.

[13] See LAMBERTUS ERADES, INTERACTIONS BETWEEN INTERNATIONAL AND MUNICIPAL LAW: A COMPARATIVE CASELAW STUDY 213-16, 229-39 (Malgosia Fitzmaurce & Cees Flinterman eds., 1993). This study consists of excerpts from, or summaries of, thousands of municipal and international decisions dealing with a variety of international law topics. Judge Erades collected them during the course of some 40 years, and the editors assembled them after his death. The editors consciously decided not to update the cases and to leave them as Judge Erades had chosen them, rather than to fill any possible lacunae. Editors note, *id.* at V-VI. Thus, while not an exhaustive compendium of decisions, the collection is remarkably broad.

law.[14] Seldom, it seems, do national courts cite a need to examine State practice as their motivation for consulting foreign or municipal court decisions.

Nevertheless, a number of such cases do exist. In *The Paquete Habana*, for example, the Court included national court decisions in its survey of past State practice.[15] More recently, in *Qureshi v. USSR*, as evidence of customary international law regarding the restrictive theory of sovereign immunity, the Pakistani Supreme Court explicitly referred to the decisions of national courts as State practice and extensively reviewed a number of them.[16] In *Dralle v. Czechoslovakia*, the Austrian Supreme Court likewise referred to national court decisions as evidence of international law regarding sovereign immunity, although it was unclear

[14] *Id.* at 213-16. Judge Erades reported 12 decisions in which a national court cited a rationale for consulting foreign decisions; he listed in an annex 350 additional cases that did not provide a reason. Of the decisions that provided a reason, most seemed to regard one or several foreign decisions as persuasive authority from another jurisdiction, but not as evidence of international law. Where these courts attempted to determine international law from national decisions, it seemed they were seeking guidance, rather than cataloguing State practice as evidence of custom. Only two cases seemed to rely on foreign court decisions as evidence of State practice, *Qureshi v. U.S.S.R.*, 64 I.L.R. 585, 597-602 (Pak. S. Ct., 1981), and *Dralle v. Czechoslovakia*, 17 I.L.R. 155, 157-58 (Aust. S. Ct., 1950). Erades, *supra note* 13, at 213-14. Erades concludes:

> When in the above reported cases and in the about 350 cases .... listed in Annex I, courts followed what foreign courts decided on issues of international law, they did so voluntarily.
>
> The above reported cases and those included in the survey in Annex I, the present survey of which is by no means intended to be exhaustive, show that there is a widespread practice to the effect that courts, when dealing with matters of international law, look for guidance in the caselaw of other jurisdictions. The practice of national courts decribed [*sic*] in this and in the preceding section could never have developed, if it were true that international law is completely separate from municipal law.

Id. at 215-16.

[15] *The Paquete Habana*, 175 U.S. 677, 691-95 (1900) (exemption from prize condemnation of enemy fishing vessels).

[16] 64 I.L.R. 585, 597-602 (Pak. S. Ct., 1981).

whether the court was looking for evidence of State practice or evidence of general principles of law.[17]

International courts and tribunals have cited the decisions of municipal courts as support for various propositions of international law. Once again, however, it is rare to find a rationale for the citation of foreign municipal court decisions. A review of Judge Erades' survey of decisions reveals that international courts and tribunals most often seem to cite national decisions as persuasive authority.[18]

The Lotus[19] case has been cited for the proposition that national court decisions constitute State practice.[20] In that case, the Court surveyed

---

[17] 17 I.L.R. 155, 157-58 (Austrian S. Ct., 1950). The court stated:

> In view of the fact that we are here concerned with a question of international law we have to examine the practice of courts of civilised countries and to find out whether from that practice we can deduce a uniform view; this is the only method of ascertaining whether there still exists a principle of international law to the effect that foreign States, even in so far as concerns claims belonging to the realm of private law, cannot be sued in the courts of a foreign State.

Id. at 157-58.

[18] Erades, *supra* note 13, at 229-39. Judge Erades concluded:

> [I]t is evident that an international court or tribunal is never bound by a decision of a national court. Decisions of national courts on issues of international law can only have persuasive value in an international court or tribunal. Neither of the two international courts of The Hague has ever shown itself to be persuaded to follow opinions on issues of international law, given by national courts. An inclination to do so, however, was eventually present in the minds of some of their members in separate or dissenting opinions. International [arbitral] tribunals, which are somewhat more within the reach of individuals, seem from time to time to seek guidance in opinions on international law laid down in decisions of domestic courts.

Id. at 239.

[19] *The Lotus*, P.C.I.J. Ser. A., No. 10 (1927), at 23, 28, 29. This case has been cited to support the proposition that decisions of municipal courts can constitute State practice.

[20] *See, e.g., Fourth Interim Report of the Committee on the Formation of Customary (General) International Law,* in INTERNATIONAL LAW ASSOCIATION, REPORT OF THE 68TH CONFERENCE 8 n.10 (1998) [hereinafter *I.L.A. Report (State Practice)*].

national court decisions on several points related to criminal jurisdiction, seemingly in a search for State practice.[21] Nevertheless, the Court specifically refused to determine the role of national court decisions in the establishment of a rule of international law.[22]

In the *Nottebohm* case, the International Court relied in part on the practice of national courts in resolving questions of conflicting nationalities.[23] The Court was not engaged explicitly in an examination of State practice and sought guidance also from the practice of international tribunals, the writings of publicists, and national laws. Indeed, the Court seemed to distinguish the decisions of national and international tribunals from State practice.[24] Accordingly, the Court may have been looking to national court decisions as subsidiary means for the determination of rules of international law under Article 38(1)(d), rather than as State practice.

Some international and national decisions have cited national laws, apparently as evidence of State practice. As State practice, acts of the legislature would seem essentially indistinguishable from acts of national courts. If national laws constitute State practice, so should national court decisions, and vice-versa.

As noted above, in the *Nottebohm* case, the International Court relied partly on national laws regarding the determination of nationality and seemed to suggest that they constituted State practice.[25] Some of the judges in the *North Sea Continental Shelf* cases included national laws or parliamentary bills among State practice that could create rules of

---

[21] *The Lotus*, at 23, 26-27, 28-29.

[22] On one issue, after surveying relevant national decisions, the Court concluded, "[w]ithout pausing to consider the value to be attributed to the judgments of municipal courts in connection with the establishment of the existence of a rule of international law, it will suffice to observe that the decisions quoted sometimes support one view and sometimes the other. . . ." *Id.* at 28.

[23] 1955 I.C.J. 4, 21-23.

[24] *Id.* at 22, 23 ("According to the practice of States, to arbitral and judicial decisions and to the opinions of writers, nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with existence of reciprocal rights and duties.")

[25] *Id.* at 22.

customary law concerning the continental shelf.[26] National court decisions also have discussed national laws as evidence of State practice.[27]

C. The views of writers

Scholarly analyses of customary international law historically have fallen along a spectrum, with natural law at one end and positivism at the other. While this is no place to examine in detail the intricacies of positivism and naturalism, a general understanding of these schools is essential to an appreciation of the theoretical discussion regarding the role of judicial decisions in the formation of State practice. Those scholars who take a natural law perspective view customary rules as a reflection of preexisting duties or rights. Accordingly, customary rules are binding on all states, in contrast to treaties, which are specific obligations between contracting states. Orthodox positivist scholars, in contrast, view both custom and treaties as manifestations of State consent.[28]

---

[26] *See* Michael Akehurst, *Custom as a Source of International Law*, 1974-1975 BRIT. Y.B. INT'L L. 1, 9 n.6 (1977), citing 1969 I.C.J. 3, 129 (Ammoun), 175 (Tanaka), and 228-29 (Lachs).

[27] Akehurst refers to several national decisions. *Id.*, citing *The Scotia*, 14 Wallace 170 (1871) (national laws and regulations regarding the display ships' lights); *The Paquete Habana*, 175 U.S. 677, 688-700 (1900) (exemption from prize condemnation of enemy fishing vessels); *Lagos v. Baggianini*, 23 [sic – 22] I.L.R. 533, 537 (1955) (Italy – diplomatic immunity).

[28] Daniel M. Bodansky, *Book Review: The Concept of Customary International Law*, 16 MICH. J. INT'L L. 667, 671 (1995) (reviewing KAROL WOLFKE, CUSTOM IN PRESENT INTERNATIONAL LAW (2d ed., 1993)). *See also* MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW (3d ed., 1998):

> The consensual notion is, however, not the only possible justification for believing that treaties and custom are proper sources of international law. Some have said that these forms of state conduct are simply manifestations of rules that are bound to exist regardless of state consent and that, beyond general principles of law, there are other sorts of non-consensual rules of international law. Behind such nonconsensual ideas lie notions of natural law that have been more or less fashionable over time.

Id. at 6 (citations omitted).

1. The historical, positivist view

Positivist writers in the late nineteenth and early twentieth centuries – positivism was the dominant school at the time[29] largely denied any direct law-creating effect to municipal court decisions.[30] According to their rigid dualism, municipal law was incapable of becoming a source of international law directly, either in the form of national legislation or judicial decision. In addition, international law rested on sovereign consent, and only the executive, and perhaps even only the foreign ministry, was capable of exercising pre-meditated consent.

For orthodox positivist theorists such as Triepel and Anzilotti, these conclusions followed from their conception of the international legal order.[31] In their view, only the common will of sovereign states, consciously intent on creating law, was able to produce international law. Because municipal law, as evidenced by domestic statutory or judicial law,

---

[29] ARTHUR NUSSBAUM, A CONCISE HISTORY OF THE LAW OF NATIONS 232, 236 (rev. ed., 1961). *See also* David Kennedy, *Symposium: International Law and the Nineteenth Century: History of an Illusion*, 17 QUINNIPIAC L. REV. 99, 101 (1997) (From a somewhat revisionist perspective, Professor Kennedy argues that orthodox positivism was not as dominant in the late nineteenth century as has been thought. Rather, the "orthodox" view was, in part, the creation of scholars who have since sought to react against the positivist view.)

[30] *See* Akehurst, *supra* note 26, at 8-10.

[31] *See, e.g.*, CARL HEINRICH TRIEPEL, VOLKERRECHT UND LANDESRECHT (1899) [French translation: *Droit Internationale et Droit Interne* (1920)]; ANZILOTTI, COURS DE DROIT INTERNATIONALE (1929). Triepel restates his theory more briefly in *Les Rapports entre le droit interne et le droit international*, 1923-I HAGUE RECUEIL 77 (1925). *See* also Nussbaum, *supra* note 29, at 235. Oppenheim was more sympathetic toward the possibility that municipal decisions could inspire the development of custom through State practice, but essentially held similar views:

> [F]or the existence of a rule, and in especial for the recognition of a growing rule, of international law it is ultimately not the attitude of municipal courts, but that of the states themselves and their governments, which is decisive. . . . International law is a law between states, which concerns states only and exclusively; it can not *per se* concern municipal courts, but only when it has partly or totally been incorporated into the law of the land. The attitude of municipal courts can not therefore directly concern international law, although it is, as I have shown, of the greatest importance for the science of international law.

Lassa Oppenheim, *The Science of International Law*, 2 AM. J. INT'L L. 313, 339-40 (1908).

was derived only from the will of a particular state, it could not affect international law. Municipal law and international law simply were situated on different planes. Accordingly, domestic court decisions reflected municipal law only, and were not relevant to State practice.[32]

In addition, because international law rested on the common will of States, only agreements between States – reached explicitly through treaties, or tacitly through custom – could create international law.[33] This emphasis on State consent had the effect of privileging as State practice only the activities of the State organs responsible for international relations.[34] Only the practice of State organs competent to make treaties in the name of the State could be considered State practice for the purpose of creating customary law.[35] Only these organs had the authority and the capacity (in the sense of being able to form intent or consent) to bind the State internationally – thus, only these organs actually *made* international law.

2. Modern views of consent related to customary international law.

A relaxed variant of the consent-based or voluntarist approach probably still represents the majority view of customary international law.[36] Even

---

[32] *See* Oppenheim, *supra* note 31, at 336-41.

[33] David Kennedy describes this model in the following terms:

> Hence, positivism rooted the binding force of international law in the consent of sovereigns themselves, on a loose analogy to the private law of contract, and found the law in expressions of sovereign consent, either through a laborious search of state practice or a catalog of explicit agreements. International legal positivism is simply the working out of the private law metaphor of contract applied to a public legal order.

Kennedy, *supra* note 29, at 113.

[34] Luigi Ferrari Bravo, *Methodes de Recherche de la Coutume Internationale dans la Pratique des États*, 192 HAGUE RECUEIL 237, 260-61 (1985 III).

[35] Karl Strupp, *Les Règles Générales du Droit de la Paix*, 47 HAGUE RECUEIL 263, 313-15 (1934). Strupp conceded that a parliamentary resolution on a point of customary international law, in a democracy, uncontested by the government, could possibly develop a decisive importance. *See also* Akehurst, *supra* note 26, at 8-10 (discussing Strupp's views).

[36] *See* Brownlie, *supra* note 2, at 2; Wolfke, *supra* note 28, at 163-64 ("Writers who reject the criterion of consent in the theory of international customary law, are, however, few."); 1 OPPENHEIM'S INTERNATIONAL LAW: PEACE, 14 (Robert Jennings & Arthur Watts eds., 9th ed. 1992) [hereinafter *Oppenheim*]; Janis, *supra*

those theorists with a more positivist bent seem to have moved away from the orthodox position regarding State practice.[37] Generally speaking, the dominant view of the nature of State consent has changed, so that specific intent to be bound by each individual rule is not necessary.[38]

---

note 28, at 42-43 ("The fundamental idea behind the notion of custom as a source of international law is that states in and by their international practice may implicitly consent to the creation and application of international legal rules. In this sense, customary international law is simply an implied side to the contractual theory that explains why treaties are international law.") To be sure, many commentators argue that consent plays a minor role, if any, in customary international law. *See, e.g.*, Charney, *supra* note 9; John A. Perkins, *The Changing Foundations of International Law: From State Consent to State Responsibility*, 15 B.U. INT'L L.J. 433 (1997).

[37] A brief note in the most recent edition of Oppenheim reflects this change, and clearly is meant to address the orthodox positivist position, although it does not explicitly state that purpose:

> Unlike in the case of treaties, it is not necessary for the creation of international custom that there should be on the part of the acting organs of the state an intention to incur mutually binding obligations; it is enough if the conduct in question, as in the case of decisions of municipal courts on matters of international law, is dictated by a sense of legal obligation in the sphere of international law. For the same reason uniform municipal legislation constitutes in a substantial sense evidence of international custom. . . . The same applies to other manifestations of the views of competent state organs on questions of international law in so far as they partake of an undoubted degree of uniformity, eg [*sic*] governmental instructions, state papers, etc. The difference between custom and evidence of custom is not in practice as clear-cut as may appear at first sight.

Oppenheim, *supra* note 36, at 27 n.6.

[38] The following is a succinct description of the present consensus view of the role of consent in custom formation:

> Some States actively created the practice, some by initiating it, some by imitating it, and others still, who were directly affected by the claims in question, by acquiescing in it. This initiation, imitation and acquiescence may plausibly be described in terms of consent. But others still, who were not directly affected, sat by and did nothing, and in due course found themselves bound by the emerging rule.

Third Interim Report of the Committee on the Formation of Customary (General) International Law, in INTERNATIONAL LAW ASSOCIATION, REPORT OF THE 67TH CONFERENCE 623, 630 (1996) [hereinafter *I.L.A. Report (Subjective Element)*].

Thus, whereas treaties reflect the active and express will of States, with customary law, often the "will is reduced to a mere tacit acquiescence."[39] States may actively consent to some rules and simply acquiesce to many others; sometimes State consent may be assumed to the body of rules comprising international law as a whole, or to the process of creating those rules.[40] A customary rule may be binding on a State, even though that State has not participated in its creation or explicitly acquiesced in its acceptance.[41]

3. The modern consensus regarding the role of judicial decisions in the formation of State practice

The modern commentators who have addressed the status of municipal decisions are apparently unanimous in their view that a national court deciding a case of international law engages in State practice.[42] With a relaxation of the consent requirement and of the rigid dualism maintained by orthodox positivists, there is no longer as strong a rationale for privileging the activities of the executive. Many commentators bolster this conclusion by an analogy to the doctrine of State responsibility.[43] There are difficulties with all these rationales, yet, taken collectively, they make a compelling case in favor of treating at least some subset of national court decisions as State practice.

a. The analogy to the doctrine of State responsibility

Under the doctrine of State responsibility, a State is responsible for the internationally unlawful acts or omissions of its officials or State organs. The precise position of that organ in the constitutional structure and

---

[39] Wolfke, *supra* note 28, at 97.

[40] *See* ANTHONY A. D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW 41 (1971) [hereinafter, D'Amato, *Concept*]; *Oppenheim*, *supra* note 36, §5, at 14; Janis, *supra* note 28, at 36.

[41] *Oppenheim*, supra note 36, at 29. A persistent objector may be able to resist application of a rule, but it may be very difficult in practical terms for a State to maintain persistent objector status.

[42] *See, e.g.*, Brownlie, *supra* note 2, at 5 (providing the example that national court decisions provided a basis for the concept of the historic bay); *Oppenheim*, *supra* note 36, at 26; Shaw, *supra* note 5, at 65; Wolfke, *supra* note 28, at 74, 148.

[43] *See, e.g.*, Karl Doehring, *The Participation of International and National Courts in the Law-Creating Process*, 12 S. AFR. Y.B. INT'L L. 1, 7 (1991-1992); Ferrari Bravo, *supra* note 34, at 259, 284.

hierarchy of the State is irrelevant.[44] Accordingly, any State organ can incur State responsibility, including the judiciary, through denial of justice, for example.[45] Extending the analogy to State practice, the acts of all State organs – administrative, legislative, judicial, sub-national – constitute State practice. Because the State is a single entity, there is no need to evaluate the actions of different organs differently. If the acts of specific State organs conflict with one another, it is up to municipal law to harmonize the conflicts.[46]

While there is an appealing symmetry to the analogy to State responsibility, the analogy is merely persuasive, not conclusive.[47] One can question the application of State responsibility to the formation of international custom. Just because a State is responsible for the wrongful acts of its organs, that does not necessarily and logically lead to the conclusion that the acts of any State organ should constitute State practice.

---

[44] Shaw, *supra* note 5, at 541-549; Rudiger Wolfrum, *Internationally Wrongful Acts*, in 10 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 271, 273 (R. Bernhardt, ed., 1987). Article 5 of the International Law Commission Draft Articles on State Responsibility provides that the conduct of any State organ having that status under internal law shall be considered as an act of the State concerned under international law, provided that organ was acting in that capacity in the case in question. Article 6 states that the conduct of any State organ – whether of the legislature, executive or the judiciary – shall be considered as an act of that State, regardless of the position of the organ in the organization of the State. International Law Commission, *Draft Articles on State Responsibility*, *reprinted in* 37 I.L.M. 440, 443 (1998). According to Shaw, these propositions reflect customary international law. Shaw, *supra* note 5, at 548 n.47.

[45] Shaw, *supra* note 5, at 548 n.47, citing, e.g., *The Sunday Times Case*, 30 Eur. Ct. H.R. (ser. A) (1979), 58 Int'l L. Rep. 491 (grant of injunction by English courts blocking newspaper publication violated the guarantee of freedom of speech in the European Convention of Human Rights, Article 10). A country's judiciary might commit a breach of international law, for example, by violating general principles of orderly jurisdiction, such as denial of justice, or by the non-application or false application of a rule of international law. Wolfrum, *supra* note 44, at 273.

[46] Doehring, *supra* note 43, at 7. National systems differ in their approach toward such harmonization. In some States, the courts are bound by the opinion of the executive in international matters; in others, the independence of the courts is guaranteed. *See id.*

[47] *See I.L.A. Report (State Practice)*, *supra* note 20, at 8 ("It is certainly the case that the activities or organs of the State other than the executive can also engage its international responsibility; and although this is not a conclusive argument, in the present context the analogy seems persuasive." *Id.* (citations omitted).

The doctrines of State responsibility and State practice are not directly related, and there is no reason why a result in one area should control in the other.

Nevertheless, there is a conceptual connection between the concepts of State responsibility and State practice. Underlying both is the essentially positivist assumption of the State as a unity,[48] as the basic unit in an international system consisting of sovereign States. Therefore, the only entity from which an individual or a State can seek recourse for the unlawful acts of State organs is another State. Similarly, only State practice creates customary international law.

The concept of State unity could lead to at least two equally logical conclusions regarding what State organs speak for the State in the formation of customary law. On the one hand, we could say that the unitary State should speak with one voice, that of the executive. On the other, we could just as easily say that the voices of all State organs are competent to speak for the State. Neither view is inconsistent with the doctrine of State responsibility. Indeed, the orthodox positivist view of State practice co-existed happily at the turn of the century with the standard view of State responsibility.

b. Relaxation of the consent requirement and of rigid dualism

For those who reject or question the positivist notions of State sovereignty, State unity, or dualism, State consent is no longer, or never was, relevant.[49] They minimize the role of States or State practice in the formation of international law. Instead, they see a more direct role for municipal courts in the creation of custom and in the creation of international law more generally.

---

[48] Ferrari Bravo, *supra* note 34, at 259. In an interesting analysis that perhaps reflects older views – and foreshadows recent views – regarding transnational law, Clive Parry critiqued the assumption that the State is a unity. CLIVE PARRY, THE SOURCES AND EVIDENCES OF INTERNATIONAL LAW 99 (1965). He argued that the State is more normally conceived of in its role as a "legislative-executive complex." *Id.* at 101. The functions and responsibilities of that complex differ from those of the judiciary. Parry posited two separate legal competences operating in the world: a legislative-executive competence corresponding to the traditional territorial State, and a judicial competence, consisting of the curial jurisdiction of municipal courts interacting with one another.

[49] *See, e.g.*, Barton & Carter, *supra* note 9; Charney, *supra* note 9. In general, commentators with a more naturalist or monist view would take this position.

Under the relaxed requirement of State consent that prevails today, there is less reason to limit State practice to the State Department or foreign ministry. If the active "will" of States to form custom is no longer necessary, there is no longer a need to restrict State practice to actions that supposedly evidence some sort of premeditated, collective consent. The waning of the orthodox positivists' extreme dualism also bolsters this conclusion: the actions of State organs in many instances are no longer considered to be confined entirely to the municipal plane. Several related rationales for treating municipal court decisions as State practice derive from this starting point.

First, since many State organs take part in decision-making in foreign affairs, it simply would be unrealistic to exclude their activities from State practice.[50] Certainly, the acts of all executive branches, and not just the foreign ministry, should count where they are involved in international affairs.[51] In addition, under this rationale, activities of State organs, including courts, that actually affect international affairs should constitute State practice.

Many acts of the legislature and of domestic courts can affect international affairs. For example, in many countries the legislature plays a role in making war and peace and in negotiating treaties. In addition, a country's legislation applies to aliens within its territory, thus affecting their national state, and may apply extraterritorially, affecting the interests of other states.[52]

Similarly, domestic court decisions can affect international relations, for example, decisions concerning State immunity or the extraterritorial

---

[50] "[I]l faut, . . . faire la place qui lui revient aussi à l'activité d'autres organes (législatifs, judiciares, administratifs) si, pour une raison quelconque, ils ont, *en fait*, joué un rôle déterminant dans l'orientation de la pratique de l'Etat auquel ils appartiennent. On voit donc que, encore une fois, il est en réalité impossible de séparer totalement l'aspect international de l'aspect national des problèmes." Ferrari Bravo, *supra* note 34, at 260 (It is necessary to place due importance on the activity of other organs (legislative, judicial, administrative) if, for whatever reason, they have, *in fact*, played a determining role in the orientation of the practice of the State to which they belong. One sees, therefore, that, yet again, it is in reality impossible to separate totally the international aspect of problems from the domestic aspect.) (author's translation; emphasis in original).

[51] *I.L.A. Report (State Practice)*, *supra* note 20, at 8.

[52] *Id.*

application of domestic law.[53] The assertion of extensive jurisdiction to adjudicate in American antitrust cases can give rise to diplomatic protests and retaliatory legislation. In some States, moreover, municipal courts share the law-making function with the executive and the legislature. Judicial decisions can establish legal precedent, effectively making law.

Another rationale is somewhat broader, potentially covering a greater range of acts than those that directly affect international affairs. That is, the subjective element of custom – acceptance as law by States – is the significant factor in the creation of customary international law, so that the identity of the organ that contributes to practice is not important. For the same reason, the formation of intent is irrelevant for the creation of State practice. Therefore, there is no reason why the decisions of municipal courts or other State organs cannot constitute State practice.[54]

D. What acts constitute State practice?: physical acts and verbal acts

1. In general

Once we have determined that municipal judicial decisions and legislation can constitute State practice, we may need some rationale for distinguishing between different types of judicial or legislative acts. Many would agree that legislation that asserts a particular construction of international law does not, without more, directly affect international affairs. Similarly, *dicta* in a judicial decision should not constitute State practice. One way of distinguishing between different types of acts is by reference to the distinction between physical and verbal acts.

In describing the element of practice in the formation of customary international law in general, some writers have distinguished between

---

[53] *Id.*

[54] *Oppenheim*, *supra* note 36, §10, at 26 n.6; Wolfke, *supra* note 28, at 58, 74. The authors of Oppenheim and Wolfke may differ somewhat in their reasoning. The authors of Oppenheim seem to argue that judicial opinions provide their own indication of acceptance as law: "it is enough if the conduct in question, as in the case of decisions of municipal courts on matters of international law, is dictated by a sense of legal obligation in the sphere of international law." Wolfke seemingly would count municipal court decisions as practice, which may or may not also indicate a State's acceptance as law: "Since it is not material whose activity constitutes the practice leading to custom, it is quite natural to include judicial precedents in international practice, which, being not only acquiesced in, but often even expressly accepted by States, contribute to the formation of international custom." Wolfke, *supra* note 28, at 74 (citations omitted).

physical acts/deeds[55] and verbal acts,[56] asserting that verbal acts do not themselves constitute practice.[57] There is also some support for this view in the opinion of at least one I.C.J. judge.[58] Such a view possibly is related to the orthodox positivist insistence on express State consent, but also

---

[55] For example, "[a] state sends up an artificial satellite, tests nuclear weapons, receives ambassadors, levies customs duties, expels an alien, captures a pirate vessel, sets up a drilling rig in the continental shelf, visits and searches a neutral ship, and similarly engages in thousands of acts through its citizens and agents." D'Amato, *Concept*, *supra* note 40, at 88.

[56] Verbal acts involve making statements rather than performing physical acts. *I.L.A. Report (State Practice)*, *supra* note 20, at 4. Verbal acts are sometimes are called speech acts, and may include claims, unilateral declarations, and resolutions. More specifically, verbal acts may consist of attorney generals' opinions, pleadings in an international dispute (there are two sides to a dispute and both cannot be right), diplomatic speeches and writings, foreign office correspondence, and public mass-media speeches. *See* Anthony A. D'Amato, *What "Counts" as Law?*, in LAW-MAKING IN THE GLOBAL COMMUNITY 97 (Nicholas Greenwood Onuf, ed., 1982) [hereinafter D'Amato, *What Counts?*].

[57] *See, e.g.*, Wolfke, *supra* note 28, at 41-43 (subscribing to this view, but describing situations in which verbal acts may be indistinguishable from acts of conduct and admitting a role for verbal acts in custom creation, including as evidence of the subjective element of custom); D'Amato, *Concept*, *supra* note 40, at 39, 51, 88-89; D'Amato, *What Counts?*, *supra* note 56, at 97, 103-07; Alfred P. Rubin, *The International Legal Effects of Unilateral Declarations*, 71 AM. J. INT'L L. 1 1977) (criticizing as without foundation the I.C.J. decision in the *Nuclear Test* cases – *Nuclear Tests*, 1974 I.C.J. 253, and *Nuclear Tests*, 1974 I.C.J. 457 – asserting as an international law rule the binding force of some unilateral declarations). *See also* Reports of the Committee on the Formation of Customary International Law, *The Role of State Practice in the Formation of Customary and Jus Cogens Norms of International Law*, in AMERICAN BRANCH OF THE INTERNATIONAL LAW ASSOCIATION, 1987-1988 PROCEEDINGS AND COMMITTEE REPORTS 102 (1988).

[58] In his dissenting opinion in the *Anglo-Norwegian Fisheries* case, Judge Read stated:

> Customary international law . . . cannot be established by citing cases where coastal States have made extensive claims, but have not maintained their aims by the actual assertion of sovereignty over foreign ships . . . . The only convincing evidence of State practice is to be found in seizures, where the coastal State asserts its sovereignty over trespassing foreign ships.

1951 I.C.J. 116, 191 (Read, dissenting).

distinction between verbal and physical acts is relevant to the status of judicial decisions as State practice in that it is possible to view domestic judicial decisions, or some subset of them, as verbal acts.[59]

The debate between Professors D'Amato and Akehurst well illustrates the arguments in favor of each position. Professor D'Amato argues that claims should not constitute State practice for the following reasons, among others. First, there is a certainty about a State's acts that claims lack. In contrast to claims, a State's acts are easily recognized. Moreover, while a State may say many things, many of them inconsistent, it can act in only one way at one time. Second, until a State takes enforcement action, a claim has little value as a prediction of what a State will actually do. Finally, claims often are self-serving; states make them to advance their own position, rather than to declare their objective understanding of international law. If anything an interested party claims is evidence of international law, then international law could hardly prohibit any actions at all.[60]

Professor Akehurst points out that in several cases the I.C.J. either treated verbal acts as State practice or looked for evidence of custom in various verbal acts.[61] He argues that physical acts do not necessarily

[59] In addition, it is possible to view at least some legislation as a verbal act.

[60] D'Amato, *Concept, supra* note 40, at 88-89; D'Amato, *What Counts?*, *supra* note 56, at 97.

[61] Akehurst, *supra* note 26, at 2-3, citing, *inter alia*, *Fisheries Jurisdiction*, 1974 I.C.J. 3, 47, 56-58, 81-88, 119-20, 135, 161 (10 of 14 judges referred to claims and protests by States in diplomatic correspondence and United Nations conferences without examining whether or not the claims had been enforced); *North Sea Continental Shelf*, 1969 I.C.J. 3, 32-33, 47, 53 (treating the *Truman Proclamation* and similar claims by other States as State practice that gave rise to a rule of customary law); *Rights of United States Nationals in Morocco*, 1952 I.C.J. 176, 200, 209 (looking for evidence of custom in diplomatic correspondence and in conference records). *See also I.L.A. Report (State Practice)*, *supra* note 20, at 4-5 (citing I.C.J. cases referring to various verbal acts: *Nottebohm*, 1955 I.C.J. 4, 21-23; *Fisheries Jurisdiction*, 1974 I.C.J. 3, 24-26; *Military and Paramilitary Activities in and against Nicaragua*, 1986 I.C.J. 14, 97-109; *Gabcíkovo - Nagymoros Project*, 1997 I.C.J. at ¶¶ 49-54, 83, 85; *Threat or Use of Nuclear Weapons*, 1996 I.C.J. 226, 226-29). Independent review of these citations by this author reveal these verbal acts to consist of: practice of domestic courts in determining issues of dual nationality and domestic laws regarding nationality (*Nottebohm*); statements by States at international conferences (*Fisheries Jurisdiction*); statements by the parties before the Court, General Assembly

produce a more consistent picture than claims or other statements. It is artificial, moreover, to try to distinguish between what a State does and what it says, since some verbal acts are clearly accepted as practice without a physical component, such as acts of recognition. As for predictability, in many instances states will act in accordance with previous statements. Akehurst asserts that D'Amato's position represents a minority view, and, indeed, the majority of modern commentators seem to regard verbal acts as State practice.[62]

A number of writers, including Akehurst, seemingly have sought to harmonize the two positions by suggesting that the distinction between physical acts and verbal acts is one of weight, so that physical acts carry greater weight than verbal acts not supported by physical acts.[63] These writers tend to sidestep the question of exactly how much weight to attach to different kinds of verbal acts. To some extent, therefore, viewing the distinction between verbal acts and physical acts in terms of evidentiary weight simply has the effect of changing the parameters of the debate without really resolving it. Nevertheless, this approach makes some sense: D'Amato's criticisms are telling, but suggest that verbal acts are better viewed as evidence of State practice, rather than discounted entirely.

2. Courts

The distinction between physical acts and verbal acts may be relevant in determining what kinds of judicial decisions constitute State practice, or in determining the weight that should be accorded to them. On the one hand, a judicial decision in a matter involving international law seems like a physical act when it affects the interests of other States. On the other

---

declarations and resolutions, charters of regional organizations, declarations of international conferences (*Nicaragua* case) (unclear whether these actions constitute *opinio juris*, practice, or both); International Law Commission draft articles and conventions adopted by the General Assembly (*Gabcíkovo-Nagymaros Project*); statements by the parties in cases before the Court (*Nuclear Weapons*).

[62] *See, e.g.*, *Oppenheim*, *supra* note 36, §10, at 26; Brownlie, *supra* note 2, at 5 (evidence or material sources of custom include enumerated verbal acts); Shaw, *supra* note 5, at 64-66 (claims are evidence of State practice and D'Amato's position is a minority view, citing Akehurst); *I.L.A. Report (State Practice)*, *supra* note 20, at 8-9.

[63] Akehurst, *supra* note 26, at 2 n.1; Shaw, *supra* note 5, at 66; *I.L.A. Report (State Practice)*, *supra* note 20, at 4.

hand, court opinions in some sense can seem more like a declaration about the content of international law, a verbal act rather than a physical one.[64]

Most commentators seem to agree that at least some municipal judicial decisions can be considered State practice. Professor D'Amato has provided a useful justification for treating many court decisions as the equivalent of physical acts:

> [A] domestic court does not contribute to the development of international law merely by saying that it is applying international law. But any court does more than issue an opinion; it issues a decision. The decision itself can affect international interests, and if erroneous, can lead to retaliation by the foreign state. The decision, moreover, embodies a concession for reciprocal treatment when a similar case comes up in a foreign nation's domestic court system. In these respects, decisions of domestic courts involving international questions directly contribute to the form of international rules by the process of custom. The decisions are acts of states containing, in the accompanying opinions, their own articulation.[65]

---

[64] *See I.L.A. Report (State Practice)*, *supra* note 20, at 4 (judicial decisions and national legislation can be considered verbal acts); D'Amato, *What Counts?*, *supra* note 56, at 102 (addressing the view that municipal court decisions are equivalent to unilateral opinions).

[65] D'Amato, *What Counts?*, *supra* note 56, at 102. D'Amato's characterization is similar to that of the New Haven School, although D'Amato differs with the New Haven School in several respects regarding the nature of customary law. *See, e.g.*, INTERNATIONAL LAW ANTHOLOGY 89-94 (Anthony D'Amato, ed. 1994) (excerpts from pieces by D'Amato and McDougal and Reisman). Under the New Haven School approach, custom is a process of claim and response, in which decision-makers assert and assess claims by one another, thereby establishing certain uniformities in expectation for behavior. Myres S. McDougal, *The Hydrogen Bomb Tests and the International Law of the Sea*, 49 AM. J. INT'L L. 356 (1955). *See generally* K. Venkata Raman, *Toward a General Theory of International Customary Law*, in TOWARD WORLD ORDER AND HUMAN DIGNITY: ESSAYS IN HONOR OF MYRES S. MCDOUGAL 365 (W. Michael Reisman & Burns H. Weston eds., 1976). The conduct involved in making claims and responses may be viewed as State practice; this State practice may include the conduct of any authorititative decision-maker, including national courts. "[D]ecision-makers . . . honor each other's unilateral claims . . . not merely by explicit agreements but also by mutual tolerances – expressed in countless decisions in foreign offices, national courts, and national legislatures – which create expectations that effective power will be

Therefore, D'Amato says, a judicial decision is like a physical act – in the sense of constituting State practice – when it affects the international interests of other States or when it embodies a concession for reciprocal treatment.

Just because some judicial acts affect international interests, however, does not mean that they all do. There seems to be little detailed analysis in the literature of whether and how particular types of judicial acts affect the international arena in a way that qualifies them as State practice. Certainly, a court decision that expounds in *dicta* on international law does not directly affect international affairs. We might also think of cases that only affect the parties, but do not have any international ramifications – do they count as State practice?[66]

A sensible way to resolve this issue – and to account for the artificial and blurry distinction between physical and verbal acts – is to assign less evidentiary weight to the judicial acts that resemble verbal acts. Where a judicial decision affects the interests of the litigants in a concrete way, but does not affect the interests of any State, we might attach less evidentiary weight to that decision. Where a statement in a court opinion regarding international law is mere *dicta*, we might view that statement as the equivalent of a unilateral opinion or declaration about international law and accord it considerably less weight, if any.

E. Municipal court decisions and the subjective element of custom

The role of municipal court decisions as State practice is the most significant role national court decisions can play in the formation of customary international law. As noted above, municipal court opinions may play other roles in the creation of international law, separately from, or in addition to, their potential role as State practice. A municipal decision could constitute evidence of the subjective element of custom, the acceptance of State practice as law.

A thorough treatment of this topic is well beyond the scope of the report. Nevertheless, the identification of a few salient issues is in order.

---

restrained and exercised in certain uniformities of pattern." McDougal, *supra*, at 358.

[66] Professor Alfred P. Rubin suggested this possibility in a conversation with the author.

There are at least two main variants of the subjective element.[67] One approach has been to require that State practice arise out of a sense of legal obligation,[68] sometimes called *opinio juris*.[69] The primary rationale for this requirement is that there must be some way to distinguish legal rules from practices followed from some other motivation such as courtesy, comity, or moral or political considerations. Another approach has been to view the subjective element as a requirement for at least some degree of consent by States to the formation of a customary law rule.[70]

A municipal court decision might satisfy the subjective element in several ways. A decision that describes the view of the executive would constitute very clear evidence of a State's acceptance of a rule. Whether a municipal judicial decision itself satisfies the subjective element of custom is a more complicated issue, and may depend on which conception of the subjective element one adopts. (Note that we are discussing here a

---

[67] *See I.L.A. Report (Subjective Element)*, supra note 38, at 628. This report contains a thorough analysis of the subjective element of custom.

[68] *Id. See also* Shaw, *supra* note 5, at 66, 67.

[69] Short for the Latin phrase *Opinio juris sive necessitatis*. One interpretation of this requirement is "a belief in the legally permissible or obligatory nature of the conduct in question, or of its necessity." *I.L.A. Report (Subjective Element), supra* note 38, at 635.

[70] *Id. See also* Wolfke, *supra* note 28, at 44-51, 61-64. The strong version of this voluntarist approach would require every State bound by a rule of custom to have individually agreed to it. That is, the creation of custom is equated with tacit agreement, an informal type of treaty. As discussed above, this strong consent requirement seems to go too far, but that does not rule out a more relaxed conception of State consent that could be tied to the subjective element of custom. (This looser conception might be described in the following way. Some States actively create a practice, some by initiating it, some by imitating it, and others by acquiescing in it. Other States may have done nothing, but find themselves bound by the emerging rule. *I.L.A. Report (Subjective Element), supra* note 38, at 630.) Under a relaxed form of State consent, at least some states would have to consent to, or acquiesce in, the development of a rule.

Even if we adopt an understanding of the subjective element as *opinio juris*, there is still a role for a loose form of State consent in the creation of custom. Some scholars and jurists add a separate requirement of State acquiescence for the creation of customary international law. *See, e.g.*, Akehurst, *supra* note 26, at 38-39; Manley O. Hudson, 2 INT'L LAW COMM'N, YEARBOOK 26 (1950). The requirements of uniformity and consistency in State practice also reflect a consent element.

particular State's satisfaction of the subjective element regarding its own State practice, not whether the subjective element has been satisfied for States in general.) This and other complicating factors could make the identification of the subjective element through municipal court decisions extremely difficult.

If we view the subjective element as *opinio juris*, then almost any municipal judicial decision applying a rule of customary international law may reflect *opinio juris*, in the sense that a court necessarily believes it has reached its decision out of a sense of legal obligation.[71] It may be difficult to tell, however, whether this sense of legal obligation derives from international law, or from domestic law, or from a domestic auto-interpretation of international law.[72] D'Amato comments that "without this objective element of internationality, one could not tell whether the rule articulated would pertain to states in their international relations."[73]

If the subjective element must reflect State consent, whether municipal decisions qualify may depend on whether the judiciary is capable of granting State consent on behalf of a State. Even under a relaxed notion of consent, it may be that some form of consent to a particular rule is required by some number of States in order to begin creating a customary rule. Another complicating factor – perhaps relevant under both conceptions of the subjective element – is the existence of inconsistency between the articulations of international law by State organs. Which articulation of the subjective element represents the State's true state of mind?

II. Difficulties with Considering Municipal Court Decisions as State Practice

A number of theoretical and practical difficulties result from the treatment of municipal court decisions as State practice. First, if the acts of all State organs can constitute State practice, there is a potential for conflict and inconsistency between the positions taken by different organs. Second, it may be that judges do not possess the background or training in international law and international politics to be the best arbiters of State practice. Third, courts considering customary international law issues often

[71] See *Oppenheim*, *supra* note 36, §10, at 26 n.6. (indicating that judicial decisions provide their own indication of acceptance as law).

[72] Anthony D'Amato, *A Reformulation of Customary Law*, in INTERNATIONAL LAW ANTHOLOGY 65 (Anthony D'Amato ed., 1994), citing Strupp, *supra* note 34, at 307.

[73] *Id.*

do not consult international law directly, but are restricted to considering implementing statutes and prior national precedent, potentially resulting in judicial decisions that are largely idiosyncratic. Finally, both national and international courts rarely make exhaustive examinations of national municipal decisions or of State practice generally, more often consulting national decisions simply as persuasive authority or without justification. Nevertheless, to the extent that courts are interested in State practice, municipal court decisions, along with national law in general, are the most readily accessible sources for discovering State practice.

A. Inconsistency

1. Theory

If the acts of all State organs can constitute State practice, there is a great potential for conflict and for inconsistency. Internal inconsistency in State practice may block the formation of a rule of customary law, although opinions vary regarding the degree of uniformity required. Commentators urging a role in State practice for courts have responded that this is an internal problem for States; if States wish to avoid conflict and inconsistency, it is up to them to develop mechanisms for resolving differences.[74] From the point of view of other States and of those attempting to discern a consistent State practice, however, this is not a sufficient answer.

How are we to discern State practice when the practice of State organs is potentially inconsistent? There are some easy cases where municipal court decisions play a determinative role in the orientation of a State's practice. Courts may play such a role, for example, when the other branches have not taken a position on a particular issue, or when the positions of relevant State organs agree. In these situations, at least, it will be easiest to accept that municipal court decisions exemplify State practice.

In addition, there may be some cases of potential conflict that can be resolved by examining the internal distribution of authority between State organs.[75] It may be that the allocation of authority in a particular State provides for primacy of the activities of one branch over others in certain

[74] *See, e.g.*, Doehring, *supra* note 42, at 7 ("It is a matter for municipal law to find harmonisation if the actions of the individual State organs contradict each other.")

[75] It may not be necessary to grant conclusive weight to the constitutionally allocated distribution, since domestic practice may be different in reality.

types of cases. In the United States, for example, determinations of sovereign immunity are assigned exclusively to the judiciary by statute.[76]

The difficult cases are those in which the judiciary and the executive or the legislature have taken contrary actions or disagree about the content of customary international law.[77] The alternatives are to give precedence to the practice of the executive over the practice of the judiciary, or to declare that no consistent State practice can be identified because of the conflict. In such cases, it would be tempting to say that some kinds of practice (i.e., executive actions) override others, in order to resolve inconsistencies.[78] But, if we have rejected the orthodox positivist position privileging the executive in foreign affairs, and have accepted that all State organs are capable of acts constituting State practice, it is difficult to accept executive primacy again through the back door here.[79]

In addition, internal inconsistency could violate the requirement that, for State practice to mature into a rule of customary law, it must be virtually uniform, both internally and collectively.[80] The degree of uniformity required, however, is unclear.[81] The I.C.J. has required a

[76] Foreign Sovereign Immunities Act of 1976 ("FSIA"), Pub. L. No. 94-583, 90 Stat. 2891, 28 U.S.C. §1604.

[77] Indeed, there is difficulty when the courts themselves differ.

[78] Akehurst, *supra* note 26, at 21. For example, some would accord more weight to the position of the executive. *See I.L.A. Report (State Practice)*, *supra* note 20, at 11 (asserting that the resolution of such conflicts is a matter of what weight should be attached to the various instances of a State's practice and suggesting that the executive's formal position ought to be accorded more weight since that branch has primary responsibility for the conduct of foreign affairs).

[79] *See* Akehurst, *supra* note 26, at 21 (no compelling reason to attach greater importance to one kind of practice than another). Of course, when a State's Constitution provides for primary executive authority in the field of foreign affairs, the executive position will be most significant.

[80] *I.L.A. Report (State Practice)*, *supra* note 20, at 11 ("'Internal' consistency means that each State whose behaviour is being considered should have acted in the same way on virtually all of the occasions on which it engaged in the practice in question. 'Collective' consistency means that different States must not have engaged in substantially different conduct, some doing one thing and some another.")

[81] *See* Wolfke, *supra* note 28, at 60 ("The requirement of 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

minimum of uniformity and consistency in its decisions,[82] but, especially in recent years, has allowed great latitude in the application of this rule.[83] Nevertheless, at least where State practice is clearly inconsistent, there can be no State practice as far as the formation of customary law is concerned.

Where a general consistency can be found, however, taking into account the practice of all State organs, it may be possible to identify a sufficiently uniform State practice. In addition, State practice may emerge from conflict over time, from a process of development involving two or more branches, the "convergence of opinion between the powers that form the structure of the state."[84] For example, the legislature could enact

consequence.")

[82] *North Sea Continental Shelf*, 1951 I.C.J. 15 ("an indispensable requirement would be that within the period in question, . . . State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform. . . .").

[83] *Fisheries*, 1951 I.C.J. 116, 138 (internal uniformity need not be perfect; minor inconsistencies are acceptable); *Military and Paramilitary Activities in and against Nicaragua*, 1986 I.C.J. 98. In the latter case, the Court excused some collective inconsistency in language that might also apply to internal inconsistency:

> The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. . . . [T]he Court deems it sufficient that the conduct of states should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indication of the recognition of a new rule.

[84] Ferrari Bravo, *supra* note 34,at 261. Ferrari Bravo says, in full:

> [S]i le système des relations internationales doit être fondé sur le principe de la bonne foi, un problème important devient celui de la prévisibilité du comportement de l'Etat, ce qui soulève la question de la recherche d'un certain degré de stabilité de l'Etat en question. Mais la stabilité, à son tour, n'est que le point d'équilibre et de convergence d'opinion entre les pouvoirs qui forment la structure de l'Etat, telle qu'elle existe réellment, même au-delà de l'interpretation littérale de sa constitution. On voit donc l'importance d'étudier, en plus des manifestations de la pratique qui étaient chères à la doctrine positivist, aussi d'autres éléments pour s'assurer de l'adhésion stable et fiable des Etats aux valeurs juridiques en discussion.

> If the system of international relations must be founded on the principal of good faith, an important problem becomes that of the predictability of the behavior of the State, which underlines the question of researching to

legislation countermanding a judicial decision on international law and stating its own position; this legislation, in turn, could be subject to judicial review and interpretation. It may take a while for the dust to clear in order to identify a consistent State position, and it may be difficult to tell whether the process of development is completed.

2. Practice

In reality, at least in the United States, it is unlikely that municipal court decisions on customary international law matters will conflict frequently with the position of the executive. First, many international law matters that come before municipal courts largely differ from those matters that come before the executive. That is, perhaps the majority of international law cases involve private law, with which the executive is little concerned. The substantive law of these cases, moreover, is most likely to be municipal law rather than international law, as determined through choice of law referrals. True public international cases, where conflict might arise, only come before the courts on comparatively rare occasions.[85]

Second, courts often follow the executive in rendering their decisions in public international law cases. In countries where there is little or no judicial independence, it is unlikely that there will be any conflict between the judiciary and the executive.[86] Even in the United States and other

---

> some extent the stability of the practice of the state in question. But stability itself is nothing but the point of equilibrium and of convergence of opinion between the powers that form the structure of the State, such as they really exist, even beyond the literal interpretation of its constitution. One sees therefore the importance of examining, in addition to the manifestations of practice that were dear to positivist doctrine, other elements, in order to assure oneself of the stable and faithful adherence of States to the juridical values under discussion. (Translation by the author).

See also Akehurst, *supra* note 26, at 22 ("[D]ifferences between the practice followed by different organs of a State tend to disappear in time, as the views of one organ prevail over the views of others. From that moment onwards, the practice of the State becomes consistent and thus capable of contributing to the development of customary international law.")

[85] Phillip R. Trimble, *A Revionsist View of Customary International Law*, 33 U.C.L.A. L. REV. 665, 684-687 (1986).

[86] *See* RICHARD A. FALK, THE ROLE OF DOMESTIC COURTS IN THE INTERNATIONAL LEGAL ORDER 19-20 (1964).

countries with independent judiciaries, the courts will often follow suggestions from the executive or defer to the executive in cases affecting foreign relations.

In the United States, sovereign, consular, and diplomatic immunity are largely regulated by treaty or statute, so that there is little room for customary international law *per se* to play a role. In these and other areas, when courts resort to customary international law, they tend to follow the guidance of the executive. Still, in some notable cases, judicial positions in public international law cases occasionally have conflicted with the legislature or the executive. (See the detailed discussion in Part II of cases and trends in all these areas).

B. Comparative expertise

Another disadvantage to considering judicial decisions as State practice is the relative lack of expertise in international law and international affairs possessed by most municipal court judges.[87] Personnel in the State organs that are involved in international affairs may be better trained and better informed than judges about international affairs and about the political ramifications of taking particular positions on legal issues. Nevertheless, the same observation could be made about the abilities of the legislature and of State organs other than the foreign ministry (including the President).[88] This comparative lack of expertise might be an argument for favoring the executive over the judiciary in cases of inconsistency, or in sensitive cases, but not for disregarding judicial decisions as State practice entirely.

C. Municipal courts may consider only limited sources of law

One difficulty of considering municipal court decisions as State practice is that municipal courts often do not refer to international law directly in making a decision. That is, they may be limited to considering domestic law transpositions of international law, such as implementing statutes or, in common law countries, prior judicial decisions (through *stare*

---

[87] *See* Trimble, *supra* note 85, at 713-16.

[88] *See* Akehurst, *supra* note 26, at 22.

decisis).[89] Municipal court decisions, therefore, may reflect not international law, but a national "auto-interpretation" of international law.[90]

This does not necessarily affect the conclusion that municipal court decisions contribute to State practice, because State practice, almost by definition, reflects a national view of international law. To the extent that courts apply a national auto-interpretation of international law, they are furthering State practice in support of that interpretation. The difficulty, however, is that domestic statutes and judicial precedent conceivably could dictate a court decision that is so out of step with current international law that any State practice that resulted would be irrelevant. In addition, such a decision could conflict with the position of an executive that is attempting to adopt a more modern position, resulting in inconsistent State practice.

1. Statutory codifications of international law

This difficulty may be most acute in cases interpreting statutes that codify customary international law, or, more accurately, that codify a domestic auto-interpretation of customary law.[91] Perhaps the most

---

[89] Erades notes this tendency in cases collected from many countries:

> The cases collected in this section show that national courts consider earlier decisions of the court in their country as evidencing the existence of rules of international law. The majority of decisions have been delivered by courts in the common law countries. This may be an effect of the rule of *stare decisis* obtaining in these countries and obliging them to rely on precedents.

Erades, *supra* note 13, at 213.

[90] *See* Parry, *supra* note 48, at 96-97 (identifying these problems but discounting their seriousness); Daniel P. O'Connell, *The Relationship Between International Law and Municipal Law*, 48 GEO. L. J. 421, 454 (1960) (English courts are limited in their power to neglect precedent and apply new or modified international law, so that English law and international law can take divergent paths). This latter difficulty apparently has been solved in English law: English courts are now free to discover what the prevailing international rule is and to apply that rule, regardless of domestic precedent. Shaw *supra* note 5, at 109 (citing *Trendtex Trading Corp. v. Central Bank of Nigeria*, 2 W.L.R. 356, 64 I.L.R. 111 (1977) (Eng. C.A.)).

[91] *See* Howard S. Schrader, *Note: Custom and General Principles as Sources of International Law in American Federal Courts*, 82 COLUM. L. REV. 751, 756-59 (1982). A potential example of such a statute is the Foreign Sovereign Immunities Act. Erades, *supra* note 13, at 952 ("a statute like the FSIA may turn out to become a petrification of the state of international law as it existed in 1976").

prominent example in the United States of a legislative effort to define international law was the adoption of the "Second Hickenlooper Amendment,"[92] which attempted to reverse the application of the act of state doctrine[93] by United States courts. That legislation provided "no court . . . shall decline on the ground of the federal act of state doctrine to make a determination on the merits. . . [in cases based on] . . . a confiscation or other taking . . . by an act . . . of state in violation of principles of international law, including the principles of compensation and the other standards set out in this sub-section. . . ." Congress had previously set out its version of the relevant principles of international law, including a requirement of "speedy compensation for such property in convertible foreign exchange, equivalent to the full value" of the property taken.[94] This was a much stronger standard for expropriating nations than United States

---

[92] Current version codified at 22 U.S.C. § 2370(e)(2). *See* Schrader, *supra* note 91, at 757-58; Alfred P. Rubin, *Order and Chaos: The Role of International Law in Foreign Policy*, 77 MICH. L. REV. 336, 343-45 (1979). Under the Constitution, Congress has the power to "define . . . Offenses against the law of Nations." U.S. Const. art. 2, § 8, cl. 10. *See generally* Charles D. Siegal, *Deference and Its Dangers: Congress' Power to "Define . . . Offenses Against the Law of Nations,"* 21 VAND. J. TRANSNAT'L L. 865 (1988).

[93] While the act of state doctrine is not a doctrine of international law, the inconsistencies between Congress' and the courts' interpretation of the doctrine illustrates the potential for conflict between the branches in the international area. *But see* Alfred P. Rubin, *U.S. Tort Suits by Aliens Based on International Law*, 18 FLETCHER F. WORLD AFF. No. 2, at 65, 74 (1994) ("The international legal underpinnings for the [act of state] doctrine are analogous to the equally undocumented American "constitutional" underpinnings which Justice Harlan, writing for the Supreme Court [in *Sabbatino*], found arising out of the basic relationships between branches of the American government in a system of separation of powers.")

[94] 22 U.S.C. § 2370(e)(1).

courts had previously applied,[95] and expressed a certainty about the international law of expropriation that did not then exist.[96]

The Second Hickenlooper Amendment not only illustrates legislative State practice regarding the international law of expropriation, but also the danger of taking legislative pronouncements related to international law at face value, without considering their application by the courts. Most U.S. courts have interpreted the amendment's provisions regarding the act of state doctrine narrowly, confining the application of the amendment to a relatively limited class of cases.[97] Thus, courts will often still apply the act of state doctrine in spite of the amendment. The conflict between the judiciary and legislature seems to be moving toward resolution, illustrating Akehurst's point that differences in practice followed by different organs of a State tend to disappear over time, as the views of one organ tend to prevail.

Even if legislation defining international law reflects contemporary customary international law at the time of adoption, customary international law subsequently could diverge a great deal from the statute. At that point, cases construing the statute would have little relevance as State practice. Furthermore, a court attempting to determine the meaning of a term in a statute incorporating international law conceivably would be required to refer to customary international law at the time the statute was

---

[95] *See* Schrader, *supra* note 91, at 758, citing *Banco Nacional de Cuba v. Farr*, 383 F.2d 166 (2d. Cir. 1967). In that case, heard after the adoption of the amendment, the court found that the international law issues were governed by the less stringent standards used in the case's prior appearances in the courts, in which the courts had found a violation of international law anyway. ("This allows us to leave undecided whether the standard set forth in the Hickenlooper amendment differs from the standard which we applied on the former appeal, and which we now apply again." *Id.* at 185.)

[96] In the very case that had prompted Congress to enact the amendment, *Banco Nacional de Cuba v. Sabbatino*, the Court wrote: "There are few if any issues in international law today on which opinion seems to be so divided as the limitations on a State's power to expropriate the property of aliens. . . ." 376 U.S. 398, 428 (1964).

[97] GARY B. BORN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 744 (1996).

enacted.[98] Once again, such a decision would have little relevance as modern State practice.

A contrary suggestion that courts should consult modern international law in construing statutes incorporating international law can be found in cases applying the Alien Tort Claims Act[99] ("A.T.C.A."). In relevant part, the A.T.C.A. grants district courts jurisdiction "of any civil action by an alien for a tort only, committed in violation of the law of nations . . . ." As discussed more fully below, courts in the last twenty years have revived this hitherto little-used statute, allowing alien plaintiffs to bring human rights claims against alien individuals before federal courts.

The question immediately arose whether courts, in determining what constitutes a tort against the law of nations, should refer to the law of nations when the forerunner to the A.T.C.A. was adopted in 1789, or whether they should refer to modern international law. Most of the courts addressing the question have determined that courts "must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today."[100] Because the A.T.C.A. is a statute referring to the content of "the law of nations" generally, however, these precedents arguably might not apply to construction of statutes directly incorporating specific provisions of customary international law.[101]

---

[98] *See* Schrader, *supra* note 91, at 758 (citing *U.S. v. Enger*, 472 F. Supp. 490 (D.N.J. 1978), where the district court sought to interpret a term of a statute by referring to international law sources at the time of enactment, in the 18th century). *But cf. I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421 (1987) (consulting a recent UN handbook as an aid to construing a previously adopted United Nations Protocol).

[99] Now codified at 28 U.S.C. § 1350.

[100] *Filartiga v. Pena-Irala*, 630 F.2d 876, 881 (2d Cir. 1980) (citing *Ware v. Hylton*, 3 U.S. (3 Dall.) 198 (1796), for distinguishing between "ancient" and "modern" law of nations). Subsequent decisions treating the A.T.C.A. have cited this approach with approval. *See, e.g., Kadic v. Karadzic*, 70 F. 3d 232, 238 (2d Cir. 1995). *But see Tel Oren v. Libyan Arab Republic*, 726 F.2d 774, 812-16 (D.C. Cir. 1984) (Bork, J., concurring) (referring to the law of nations when the precursor to the A.T.C.A. was adopted in 18th century as crucial, if not determinative, to an understanding of the modern scope of the A.T.C.A.).

[101] *But cf. Mojica v. Reno*, 970 F. Supp. 130, 151-52 (E.D.N.Y. 1997), *aff'd on other grounds sub nom. Henderson v. I.N.S.*, 157 F.3d 106 (2d Cir. 1998), *cert. denied sub nom. Navas v. Reno*, 526 U.S. 1004 (1999) (citing the proposition to support reliance on international human rights law interpreting a U.S. statute, even though that international human rights law was of recent vintage).

2. Judicial precedent

American courts also consider themselves bound by American precedent in their application of customary international law, and often do not look directly to international law. The district court in *Banco Nacional de Cuba v. Chase Manhattan Bank*,[102] for example, stated:

> As a district court, we are not free to overlook or neglect the interpretation of international law reiterated a hundred times over in the American courts simply because some other nations in public debate and diplomatic correspondence, have expressed a different view. While it is true that there is no international law, except to the extent that civilized nations having commercial intercourse with each other, agree that such law exists, and also agree to what it provides, this Court is bound by precedent and must recognize the precedential decisions of higher American courts unless and until withdrawn, set aside or reversed.[103]

In addition, courts may simply refer to American precedent because doing so is easier than attempting to discern international law through the traditional methods of international lawyers. Perhaps for similar reasons, courts routinely refer to the *Restatement of Foreign Relations*, which sometimes reflects a particularly American view of international law.

D. Logistical difficulties in identifying State practice

Municipal court decisions clearly constitute State practice, and thus play a role in the formation of international customary law. Municipal court decisions may be among the most accessible sources of State practice, given their wide publication in both hard copy and electronic sources. Nevertheless, international courts and the courts of other nations do not routinely cite to municipal decisions as evidence of State practice. Indeed, courts rarely conduct surveys of State practice at all. As Brownlie points out, "[a]n *ad hoc*, yet extensive, research project is out of the question, and counsel cannot always fill the gap. . . . In these circumstances it is hardly surprising that courts have leaned heavily on the opinions of writers."[104] It

[102] 505 F. Supp. 412 (S.D.N.Y. 1980), *modified in part on other grounds*, 658 F.2d 875 (2d Cir. 1981), *and rev'd on other grounds sub nom. Banco Para el Comercio Exterior de Cuba v. First Nat'l City Bank*, 658 F. 2d 913 (2d Cir. 1981), *and rev'd*, 462 U.S. 611 (1983).

[103] *Id.* at 432.

[104] Brownlie, *supra* note 2, at 56.

is likely that courts will continue to rely on municipal court decisions more as persuasive authority or as subsidiary evidence of international law, rather than as evidence of State practice.

PART TWO

III. Customary International Law in American Courts

In order to understand more fully the role municipal court decisions can play in State practice, this section of the report will examine how and when municipal courts in the United States employ customary international law.[105] After conducting an overview, the report will examine some crosscutting themes. The report will discuss the methodology of courts in determining State practice and the likelihood of conflict between the judiciary and the executive in the State practice.

A. Overview of customary international law in American courts[106]

Generally speaking, issues of public international law do not arise often in American courts.[107] Furthermore, the types of cases decided under principles of customary international law have declined in the last twenty years. Congressional statute or treaty have occupied the field in the areas of sovereign immunity and diplomatic and consular immunities. The

[105] We have selected United States cases for this limited case study because this paper represents an initial exploration of the role of municipal courts in the formation of customary international law. A comparative examination of municipal court decisions in other legal systems is warranted as a next step, perhaps to be conducted in conjunction with I.L.A. branches in other countries.

[106] Unfortunately, very few comprehensive surveys exist of cases involving customary international law in American courts. The only recent comprehensive survey was conducted by Phillip Trimble in his 1986 law review article, *A Revisionist View of Customary International Law*. Trimble, *supra* note 85. For his survey, Trimble reviewed more than 2,000 "international law" cases decided between 1789 and 1984, focusing on cases "in which the courts applied a rule of customary international law to create a cause of action or to provide the basis for a defense, or cases in which the courts applied such a rule as an integral part of the reasoning necessary to the decision." *Id.* at 685 n.71. He further limited his selection to public international law cases involving government-to-government relations or limitations on government political authority or conduct. The majority of cases Trimble included in his analysis essentially fell into the areas mentioned above.

[107] *See* Trimble, *supra* note 85, at 685-86, 685 n.71; Schrader, *supra* note 91, at 753.

Supreme Court has declared that the Foreign Sovereign Immunities Act exclusively determines the scope of sovereign immunity in the United States. Treaties largely accomplished the same result with respect to diplomatic and consular immunities. Only in the human rights area has the number of cases increased.

As noted above, the case law can be broken down into two main types. First, courts can apply customary international law substantively. The majority of cases where customary international law is used substantively involve four general subject areas: sovereign immunity, diplomatic and consular immunity, human rights, and expropriation. Second, courts often look to customary international law to interpret a statute or treaty. As case studies, the report will examine the case law in the areas of sovereign immunity and head of state immunity, human rights, and interpretation, as well as the use of customary international law as the source of affirmative claims.

1. Sovereign immunity and head of state immunity[108]

United States courts historically have deferred to the executive in cases involving the various immunities, primarily sovereign immunity. In this century, the courts came to defer completely to the executive branch, until the adoption of the Foreign Sovereign Immunities Act ("F.S.I.A.") in 1976.[109] Since the adoption of the F.S.I.A., the courts have had the sole responsibility for determining the application of sovereign immunity, regardless of the position of the executive.[110] Accordingly, the courts have

[108] *Id.* at 688-90.

[109] 28 U.S.C. §§ 1602-1611. Although the doctrine had its origin in international law, after the 19th century the courts gradually abandoned references to international law in favor of executive deference. In doing so, the courts relied on rationales involving the separation of powers and deference to foreign policy considerations.

[110] Under the Act, a foreign State is presumptively immune from the jurisdiction of United States courts: unless a specified exception applies, a federal court lacks subject-matter jurisdiction over a claim against a foreign State. *Saudi Arabia v. Nelson*, 507 U.S. 349, 355 (1993), citing *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 489 (1983). Indeed, the purpose of the F.S.I.A. was to shift responsibility for determining claims of sovereign immunity from the executive to the courts. 28 U.S.C. § 1602 ("[c]laims of foreign States to immunity should henceforth be decided by courts of the United States in conformity with the principles set forth in this chapter"); H.R. Rep. No. 1487, 94th Cong., 2d Sess. 7, *reprinted in* U.S. Cong. Code and Ad. News 6606, *quoted in Lafontant v. Aristide*,

found that the F.S.I.A. has completely superseded the State Department's role in suggesting sovereign immunity.[111]

Nevertheless, a number of courts have created an exception from the F.S.I.A. for "head of state" immunity, although some have been more cautious than others. Under the doctrine, a head of state recognized by the United States government is absolutely immune from jurisdiction in United States courts, unless that immunity has been waived by statute or by the foreign government recognized by the United States.[112] In applying this

844 F. Supp. 128, 135 (E.D.N.Y. 1994) ("A principal purpose of this bill is to transfer the determination of sovereign immunity from the executive branch to the judicial branch, thereby reducing foreign policy implications of immunity determinations and assuring litigants that these often crucial decisions are made on purely legal grounds.")

[111] *Chuidian v. Philippine National Bank*, 912 F.2d 1095 (9th Cir. 1990) (where the United States government submitted a suggestion of immunity letter, the court held that the pre-1976 common law suggestion of immunity approach was invalid).

[112] *See, e.g., Lafontant v. Aristide*, 844 F. Supp. 128, 132 (E.D.N.Y. 1994) (granting immunity to President Aristide, the Haitian head of state recognized by the United States, from civil suit alleging violations of a person's civil rights by having him killed). The doctrine of head of state immunity in the United States probably originated in international law, although in modern times it may be more a creature of American caselaw. *See Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 137 (1812) (In determining whether a foreign State's ship found in an American port should be immune from jurisdiction, the Court analogized to head of state immunity, which it apparently viewed as an accepted principal of international law: the foreign head of state, as representative of his nation, enjoys extraterritorial status when travelling abroad because he would not intend "to subject himself to jurisdiction incompatible with his dignity, and the dignity of his nation. . . .") Today, the American courts adopting the theory seem to look primarily to precedent in American case law for their inspiration. *But see In re Grand Jury Proceedings*, 817 F.2d 1108, 1110 (4th Cir. 1987) (where the court stated that "[h]ead-of-state immunity is a doctrine of customary international law," even though it cited American precedents). As far as customary international law is concerned, while there may be a shared concept among states that heads of state have some sort of immunity, there is no agreement on a detailed standard. *See* Jerrold C. Mallory, *Note, Resolving the Confusion over Head of State Immunity: the Defined Rights of Kings*, 86 COLUM. L. REV. 169, 179 (1986) ("[D]iffering approaches toward head of state immunity [by the international community] do not supply a useful body of customary law. At most, there exists a universal attitude that heads of state should enjoy certain privileges of immunity. . . . [S]ince there is no agreement on the degree of immunity that attaches to the status of head of state, there is no applicable standard that can be viewed as customary international

doctrine, the courts have reverted to their traditional deference to the executive.

Before the adoption of the F.S.I.A., head of state immunity was an accepted aspect of American foreign sovereign immunity law.[113] It is unclear, however, whether head of state immunity survived the adoption of the F.S.I.A. The Fourth and Eleventh Circuits have accepted the doctrine's continued validity.[114] Two decisions in the Second Circuit, one as recent as 1995, expressed some skepticism about the existence of head of state immunity, but managed to avoid deciding the issue.[115] In addition, because

law.") Regarding head of State immunity generally, see also Arthur Watts, *Legal Position in International Law of Heads of State, Heads of Governments and Foreign Ministries*, 247 HAGUE RECUEIL 9 (1994).

[113] According to the *Second Restatement*, which summarized the common law of sovereign immunity, sovereign immunity extended to the head of state. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 66(b) (1965). The *Third Restatement*, developed after the adoption of the FSIA, deleted in its entirety the discussion of the United States common law of sovereign immunity, substituting a section analyzing sovereign immunity exclusively under the FSIA. *Restatement (Third)*, *supra* note 10, at §§ 451 *et seq.*

[114] *In re Grand Jury Proceedings*, 817 F.2d at 1110; *United States v. Noriega*, 117 F.3d 1206 (11th Cir. 1997) (denying head of state immunity to Manuel Noriega, given the evident position of the executive that he was not entitled to immunity, the failure of the present government of Panama to seek immunity, and the private nature of the underlying acts).

[115] *In re Doe*, 860 F.2d. 40 (2d Cir. 1988) (passage of the F.S.I.A. renders the status of head of state immunity uncertain; the court need only determine that any immunity that exists for a former head of state can be – and has been – waived by that State's present government); *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir.1995). In *Kadic*, Radovan Karadjic sought to avoid the personal jurisdiction of the federal courts by claiming, among other things, head of state immunity, even though the United States had not recognized him as a head of state. The court stated:

> Even if such future recognition, determined by the Executive Branch [citing *Lafantont*], would create head-of-state immunity, but see *In re Doe*, . . . (passage of Foreign Sovereign Immunities Act leaves scope of head-of-state immunity uncertain), it would be entirely inappropriate for a court to create the functional equivalent of such an immunity based on speculation about what the Executive Branch might do in the future.

Id. at 248 (citations omitted). In this convoluted sentence, the court clearly expressed some doubt about the continued validity and scope of head of state immunity. The court cited *Lafontant*, a district court decision within the Second Circuit, to illustrate the scope of the doctrine, but then recalled its own earlier

head of state immunity was not included in the F.S.I.A., judicial re-creation of the doctrine may run into trouble in the Supreme Court, given its decision in *Amerada Hess*[116] restricting the grounds of sovereign immunity to those found in the F.S.I.A.

The district courts have been less restrained. Two district courts have inferred from the legislative history of the F.S.I.A. that Congress did not intend to do away with head of state immunity when it adopted the F.S.I.A.[117] Other district court decisions have asserted the immunity with little or no reservation and with increasing enthusiasm.[118] The State

---

decision in *Doe* expressing doubt about its viability.

[116] *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 443 (1989) (the F.S.I.A. "provides the sole basis for obtaining jurisdiction over a foreign State in the Courts of this country.")

[117] *Lafontant*, 844 F. Supp. at 137; *Domingo v. Marcos*, No. C82 1055 V (W.D. Wash. Dec. 23, 1982), *excerpted in* State Territory, Jurisdiction, and Jurisdictional Immunities, 2 CUMULATIVE DIG. 1981-1988, at 1564-66 (1995) (order granting the Philippine President Ferdinand Marcos head of state immunity, following a State Department suggestions of immunity, and rejecting plaintiff's argument that in enacting the F.S.I.A., Congress intend to eliminate the suggestion of immunity procedure). *See also First American Corp. v. Sheikh Zayed Bin Sultan* Al-Nahyan, 948 F. Supp. 1107, 1119 (D.D.C. 1996) (citing *Lafontant*, declaring that the F.S.I.A. was not intended to affect the power of the executive branch to assert head of state immunity).

[118] *See, e.g., First American Corp. v. Sheikh Zayed Bin Sultan Al-Nahyan*, 948 F. Supp. 1107 (D.D.C. 1996) (granting immunity to the head of the United Arab Emirates, following a State Department suggestion of immunity); *Alicog v. Kingdom of Saudi Arabia*, 860 F. Supp. 379 (S.D. Texas 1994) (dismissing King Fahd from suit, following United States appearance in action acknowledging that he is the head of state of Saudi Arabia); *Lafontant*, 844 F. Supp. 128; *Saltany v. Reagan*, 702 F. Supp. 319 (D.D.C. 1988) (dismissing British Prime Minister from suit, following State Department suggestion of immunity); *Domingo v. Marcos*, No. C82 1055 V (W.D. Wash. Dec. 23 1982), *excerpted in* 2 CUMULATIVE DIG. 1981-1988, at 1564-66 (1995) (order dismissing President of Philippines as party in suit for damages, pursuant to the State Department's suggestion of immunity); *O'Hair v. Wojtyla*, (D.D.C. 1979), *reported in* 1979 State Territory, Jurisdiction and Immunities, DIGEST 897 (dismissing suit to enjoin celebration of Mass by Pope John Paul II on the mall in Washington, D.C. pursuant to State Department suggestion and on other grounds); *Kilroy v. Windsor*, Civ. No. C-78-291 (N.D. Ohio, 1978), *reported in* 1978 DIGEST 641-43 (Prince Charles, the Prince of Wales, granted immunity from suit alleging human rights violations in Northern Ireland pursuant to State Department suggestion).

Department clearly believes that head of state immunity is still viable and has submitted suggestions of immunity to courts on numerous occasions.[119]

In considering head of state immunity, the courts are extremely deferential to the Executive Branch. The courts usually abide by State Department suggestions of immunity, following judicial practice under the pre-F.S.I.A. common law of sovereign immunity.[120] In addition, the courts that have recognized the continuing validity of the immunity generally have required that the person seeking immunity must be the current head of state as recognized by the United States government.[121]

---

[119] *See, e.g.*, appropriate cases cited in note 118 *supra* (as indicated in the accompanying parenthetical). Several district courts have refused to extend head of state immunity to claimants, sometimes as the result of a negative suggestion by the United States government, or the absence of a positive suggestion, especially in cases where it is clear from the political context that the executive branch does not favor immunity. *See, e.g.*, *Paul v. Avril*, 812 F. Supp. 207 (S.D. Fla. 1992) (denying immunity to former military ruler of Haiti, on the grounds that the Haitian government then recognized by the United States could waive head of state immunity); *United States v. Noriega*, 746 F. Supp. 1506 (S.D. Fla. 1990) (rejecting head of state immunity for Manuel Noriega on the grounds that the United States had not recognized him as the Panamanian head of state); *Domingo v. Republic of the Philippines*, 694 F. Supp. 782, 785-86 (W.D. Wash., 1988) (denying immunity where, although the State Department filed a suggestion of immunity in the underlying litigation when Marcos was president, it had not filed a new suggestion of immunity since he left office).

[120] There have been one or two exceptions. In *Republic of Philippines v. Marcos*, 665 F. Supp. 793 (N.D. Cal. 1987), the court rejected the Executive Branch's suggestion to extend head of state immunity to the Philippine Solicitor General, because he clearly was not a head of state. In *In re Grand Jury Proceedings*, 817 F.2d 1108 (4th Cir. 1987), the court stated that, in order to reach its decision, it did not have to decide whether to defer to the State Department's denial of immunity.

[121] *See, e.g., Kadic v. Karadzic* 70 F. 3d 232 (2d Cir. 1995); *First American Corp. v. Sheikh Zayed Bin Sultan Al-Nahyan*, 948 F. Supp. 1107 (D.D.C. 1996) (courts are bound to accept executive branch head of state determinations as conclusive; whereas the head of state of the United Arab Emirates was entitled to immunity, members of the ruling family of Dubai (one of the united emirates) were not because the United States does not recognize Dubai as a State); *Jungquist v. Nahyan*, 940 F. Supp. 312 (D.D.C. 1996), *rev'd on other grounds*, 115 F.3d 1020 (D.C. Cir. 1997) (grandson of the ruler of Abu Dhabi who was the Chairman of the Crown Prince's Court was not entitled to head of state immunity because the Executive Branch had made no determination regarding his status as a head of state); *Alicog v. Kingdom of Saudi Arabia*, 860 F. Supp. 379 (S.D. Texas 1994) (dismissing King Fahd from suit, following United States appearance in action

The courts have also asserted other limitations to head of state immunity. Courts have carved out exceptions for former heads of state. First, a former head of state may not be entitled to immunity when the present government waives that immunity.[122] Second, several courts have suggested that head of state immunity for former heads of state is limited to official duties. These courts have expressed doubt whether the immunity extends to acts that violate international law, or, similarly, to private acts.[123]

There is a suggestion that the courts have invoked the limitations on head of state immunity selectively, in order to follow executive preference. The courts have applied the limitations most notably in cases where it was clear from the political context that the executive branch did not favor immunity or was neutral, such as in the Noriega case and the Marcos litigation. In contrast, the court extended immunity to Haitian President

---

acknowledging that he is the head of state of Saudi Arabia); *Bolkiah v. Superior Court*, 74 Cal. App. 4 984, 88 Cal. Rptr. 2d 540 (1999) (siblings and offspring of Sultan of Brunei do not enjoy head of state status because not recognized by United States government). *But see Kilroy v. Windsor, reported in* 1978 DIGEST 641-43 (upholding head of state immunity even though Prince Charles was not the present head of state).

[122] *See, e.g., In re Doe*, 860 F.2d 40, 45-46 (2d Cir. 1988); *In re Grand Jury Proceedings*, 817 F.2d 1108, 1110-11 (4th Cir. 1987); *Paul v. Avril*, 812 F. Supp. 207 (S.D. Fla. 1992) (denying immunity to former military ruler of Haiti, on the grounds that the Haitian government then recognized by the United States could waive head of state immunity).

[123] *See In re Doe*, 860 F.2d at 45 (2d Cir. 1988); *In re Grand Jury Proceedings*, 817 F.2d at 1111 (4th Cir. 1987); *Republic of Philippines v. Marcos* (Marcos I), 806 F.2d 344, 360 (2d Cir.1986); *United States v. Noriega*, 117 F.3d 1206, 1212 (11th Cir. 1997). In these cases, the courts decided the issue of head of state immunity on other grounds, but questioned whether the immunity extended to private or criminal acts. Of course, the most notable example of this position, albeit in a foreign case, is the decision of the English House of Lords in the Pinochet case. *Regina v. Bow Street Magistrate, Ex Parte Pinochet*, [1999] 2 W.L.R. 827 (H.L.). There, a majority of the Law Lords rejected Pinochet's claim that he was entitled to immunity from arrest on torture charges because he was a former head of state. The majority essentially determined that a former sovereign only is immune for prior official, public acts, and that torture and human rights violations could not be regarded as official duties. For analyses of the Pinochet case, see Christine M. Chinkin, *United Kingdom House of Lords: Regina v. Bow Street Stipendiary Magistrate, Ex Parte Pinochet*, 93 AM. J. INT'L L. 703 (1999); Curtis A. Bradley & Jack L. Goldsmith, *Pinochet and International Human Rights Litigation*, 97 MICH. L. REV. 2129 (1999).

Aristide, even though it was alleged he had ordered an extra-judicial killing.

2. Human rights

The cases in this category are significant because they constitute the majority of cases in which courts have permitted a cause of action based on customary international law. This is one of the few – if not the only – areas in which the customary international law plays an increasing role in American courts. In addition, it is one of the few areas of potential conflict with the executive.

The report will not recount the developments in this area at length, since many commentators have already done so elsewhere.[124] Most claims for violations of international human rights law in American courts have been brought under the Alien Tort Claims Act ("A.T.C.A."),[125] which provides that the federal district courts "shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or treaty of the United States." Long dormant, use of this statute was revived in the 1980 decision, *Filartiga v. Pena-Irala.*[126] There, the Second Circuit determined that the A.T.C.A. provided subject matter jurisdiction in the federal courts for suits by aliens for violations of the customary international law of human rights.

Since *Filartiga*, court decisions have given content to this "new" cause of action based on international law, generally expanding its scope. There

---

[124] For comprehensive surveys of human rights cases in United States courts, see, *e.g.*, Russell G. Donaldson, *Construction and Application of Alien Tort Statute*, 116 A.L.R. Fed. 387 (1993); Gordon A. Christenson, *Customary International Human Rights Law in Domestic Court Decisions*, 25 GA. J. INT'L & COMP. L. 225 (1995-1996); VED P. NANDA & DAVID K. PANSIUS, LITIGATION OF INTERNATIONAL DISPUTES IN U.S. COURTS Ch. 14 (1986; 1998 release). For a sample of academic commentary on customary international human rights law, see the articles collected in *Symposium: Customary International Human Rights Law*, 25 GA. J. INT'L & COMP. L. 1 (1995-1996).

[125] 28 U.S.C. §1350. The Torture Victim Protection Act (TVPA) of 1991 provides an additional basis for bringing claims for certain violations of international human rights law. The statute creates a federal cause of action against foreign officials who commit torture or extrajudicial killing under color of state law. Unlike the A.T.C.A., it allows United States citizens to bring these claims. Pub. L. No. 102-256, 106 Stat. 73 (1992), 28 U.S.C. § 1350 n.1.

[126] 630 F.2d 876 (2d Cir. 1986).

seems to be a growing consensus that the A.T.C.A. not only provides subject-matter jurisdiction, but also provides a cause of action and substantive law of decision.[127] Although the courts have limited claims primarily to abuses of comparatively well-established human rights claims, the courts have been expanding the class of defendants subject to the A.T.C.A.

In comparison to immunity cases, there is little formal role for the executive in the prosecution of human rights cases. There is a significant potential, therefore, that the prosecution of, and decisions in, politically charged cases could conflict with the executive and its conduct of foreign affairs. So far, the executive has largely supported the concept of suits under the A.T.C.A., submitting *amicus* briefs in a number of cases.[128] Accordingly, there would seem to be a consistent State practice in the United States for the position that certain human rights norms constitute customary international law, that suit may be brought against individuals

---

[127] *See, e.g., Hilao v. Marcos, In re Estate of Marcos, Human Rights Litigation,* ("Marcos Estate II") 25 F.3d 1467, 1475 (9th Cir. 1994), *cert. denied,* 115 S. Ct. 934 (1995) (A.T.C.A. "creates a cause of action for violations of specific, universal and obligatory international human rights standards,"); *Kadic v. Karadzic,* 70 F.3d 232, 236 (2d Cir. 1995); *Abebe-Jira v. Negewo,* 72 F.3d 844 (11th Cir. 1996); *Iwanowa v. Ford Motor Co.,* 67 F. Supp. 2d 424, 443-44 (D.N.J. 1999); *Jama v. I.N.S.,* 22 F. Supp. 2d 353, 362-63 (D.N.J. 1998); *Xuncax v. Gramajo,* 886 F. Supp. 162, 179 (D. Mass. 1995). *But see Tel-Oren v. Libyan Arab Republic,* 726 F.2d 774, 798 *et seq.* (D.C. Cir. 1984) (Bork, J., concurring) (independent cause of action must be created by federal statute or international law itself; A.T.C.A. inadequate to do so); *id.* at 775 *et seq.* (Edwards, J., concurring) (suggesting domestic tort law may provide substantive cause of action under A.T.C.A.); *Trajano v. Marcos, In re Estate of Marcos, Human Rights Litigation,* 978 F.2d 493, 503 (9th Cir. 1992) ("Marcos Estate I") (approving the district court's selection – presumably through choice of law analysis – of the domestic law of the foreign jurisdiction to provide the cause of action).

[128] *See, e.g.,* Memorandum for the United States as Amicus Curiae, *Filartiga v. Pena-Irala, reprinted in* 19 I.L.M. 585, 603 (1980). ("Such suits unquestionably implicate foreign policy considerations. But not every case or controversy which touches foreign relations lies beyond judicial cognizance. Like many other areas affecting international relations, the protection of fundamental human rights is not committed exclusively to the political branches of government."); *Brief of the United States as Amicus Curiae, Kadic v. Karadzic, discussed in* Koh, *Commentary: Is International Law Really State Law?,* 111 HARV. L. REV. 1824, 1843 (1998).

for violation of those norms, and that universal jurisdiction exists for such suits.

Nevertheless, there are indications that the executive and the judiciary may not always agree. The Reagan Justice Department reversed the Carter Administration's position favoring A.T.C.A. suits, and submitted an *amicus* brief to that effect in *Trajano v. Marcos*.[129] It is foreseeable that the executive will object to future human rights cases when they conflict with executive foreign policy. By that time, however, unless continued conflict between the executive and the judiciary casts doubt on the content of United States practice, that practice already will have been well-established in the United States.

The courts have been fairly relaxed in their concept of what constitutes customary international law and in the evidence they require to establish violations of customary international law. Nevertheless, following *Filartiga*, the courts have established some threshold that human rights claims must meet before they qualify as violations of international law cognizable in American courts. That is, the plaintiff must show a violation of established, universally recognized norms of international law.[130] This restriction essentially has limited the types of claims courts have been willing to entertain to a subset of human rights violations.[131] Thus, the

---

[129] Memorandum for the United States as Amicus Curiae, *Trajano v. Marcos*, No. 86-2448 (9th Cir. 1989), *reprinted in* 12 HASTINGS INT'L & COMP. L. REV. 4 (1988).

[130] *See, e.g.*, *Kadic*, 70 F.3d at 239; *Marcos Estate II*, 25 F.3d at 1475 (limiting jurisdiction to "violations of specific, universal and obligatory international human rights standards which 'confer . . . . fundamental rights upon all people vis-à-vis their own governments.'"). Several courts have re-cast this qualification as requiring that (1) no State condone the act in question and there is a recognizable "universal" consensus of prohibition against it; (2) there are sufficient criteria to determine whether a given action amounts to the prohibited act and thus violates the norm; (3) the prohibition against it is non-derogable and therefore binding at all times upon all actors. *Beanal v. Freeport-McMoran, Inc.*, 969 F. Supp. 362, 369 (E.D. La. 1997), *aff'd*, 197 F.3d 161 (5th Cir. 1999); *Xuncax*, 886 F. Supp. at 184; *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1539-40 (N.D. Cal. 1987). These courts also cite *Restatement (Third)* sections 701 and 702 as support for this formulation.

[131] Indeed, at least one commentator has decried this restriction, suggesting that the courts essentially have limited admissible claims to those violations of human rights norms that rise to the level of *jus cogens* norms. Christenson, *supra* note 124, at 230 ("several United States courts of appeals now seem to have adopted the exceedingly onerous burden of proving the existence of a norm of *jus cogens*

courts have rejected some human rights claims that are not sufficiently universal or are too vague[132] and have rejected most, if not all, non-human rights claims under the A.T.C.A. on the same grounds.[133]

quality as the threshold to limit tort claims for violations of the law of nations under the Alien Tort Statute.") *See, e.g.*, *Xuncax*, 886 F. Supp. at 183 ("the kinds of wrongs meant to be addressed under §1350 . . . [are] . . . those perpetrated by hostis humani generis ("enemies of all humankind") in contravention of jus cogens (peremptory norms of international law)").

[132] *See* Christenson, *supra* note 124, at 235 (describing cases in which the court determined that claims did not reach the elevated standard of established and universal norms). In the human rights area, one court decided that violation of free speech does not rise to the level of universally recognized human rights and so does not constitute a violation of the law of nations. *Guinto v. Marcos*, 654 F. Supp. 276, 280 (S.D. Cal. 1986). Some courts have ruled that government confiscation of property of a citizen and resident is not a violation of the law of nations. *See, e.g.*, *Siderman de Blake v. Argentina*, 965 F. 2d 699, 711 (9th Cir. 1992); *De Sanchez v. Banco Central de Nicaragua*, 770 F.2d 1385, 1397 (5th Cir. 1985) ("the taking by a state of its national's property does not contravene the international law of minimum human rights"). One court has ruled that conversion is not a violation of the law of nations. *Bigio v. Coca-Cola*, No. 97Civ. 2858 (JSM), 1998 U.S. Dist. Lexis 8295 (S.D.N.Y. June 4, 1998).

[133] As for non-human rights claims under the A.T.C.A., cases involving environmental damage are illustrative. At least three courts have considered whether the A.T.C.A. applies to international environmental torts. None of them found a cause of action for environmental torts in violation of the law of nations, although two courts recognized the possibility. *Beanal*, 969 F. Supp. at 362, *aff'd*, 197 F.3d 161, 166-67 (5th Cir. 1999); *Aguinda v. Texaco, Inc.*, 1994 WL 142006 (S.D.N.Y. 1994); *Amlon Metals, Inc. v. FMC Corp.*, 775 F. Supp. 668, 670 (S.D.N.Y. 1991). *Aguinda* later was dismissed on other grounds – comity, forum non conveniens, and failure to join a necessary party. *Aguinda v. Texaco, Inc.*, 945 F. Supp. 625, 627 (S.D.N.Y. 1996). Earlier, the court referred to the possible application of the A.T.C.A. to environmental practices "which might violate international law." *Aguinda v. Texaco*, 1994 WL 142006, *7 (S.D.N.Y. 1994). The court in *Beanal* rejected the plaintiff's specific international environmental claims, but suggested in *dicta* that two principles may have become customary international law: the principle of good-neighborliness/international cooperation and the obligation reflected in Principle 21 of the Stockholm Declaration and Principle 2 of the Rio Declaration that States have sovereignty over their natural resources and the responsibility not to cause environmental damage. *Beanal*, 969 F. Supp. at 383-84. The court determined that the specific principles of international environmental law the plaintiff cited were too general and non-substantive to "constitute international torts for which there is universal consensus in the international community as to their binding status and their content." *Beanal*,

Accordingly, most of the suits brought under the A.T.C.A. have involved violations of customary international human rights norms under color of State authority. Claims of official torture predominate. Other violations of the customary law of human rights have also provided the basis for claims, including arbitrary detention, summary execution, "disappearance," and cruel and degrading treatment.[134]

Because of the state-oriented nature of international law, until recently courts have also required that claims reflect an element of State action in order to be cognizable. Several courts have expanded the scope of subject matter jurisdiction under the A.T.C.A. to certain conduct of individuals not involving State action, however. In *Kadic*, the Second Circuit declared that "the law of nations, as understood in the modern era, . . .[does not confine] . . . its reach to state action."[135] The court reasoned that because universal

---

969 F. Supp. at 384, citing *Xuncax*, 886 F. Supp. at 186. The appellate court affirmed the trial court's specific holding and reasoning and avoided comment on the status of any environmental principles as international law. *Beanal*, 197 F.3d at 166-67. In *Amlon Metals*, the court rejected the claim that certain soft law principles of international environmental law constituted customary international law. *Amlon Metals*, 775 F. Supp. at 671.

[134] *See, e.g.*, *Marcos Estate II*, 25 F.3d at 1475 (summary execution; disappearance); *Xuncax*, 886 F. Supp. at 184-87 (summary execution; disappearance; arbitrary detention; cruel and degrading treatment where such treatment consists of acts proscribed by the U.S. constitution and by a cognizable principle of international law); *Forti v. Suarez-Mason*, 694 F. Supp., 707, 711 (N.D. Cal. 1988) (disappearance). The *Restatement (Third)* lists a number of human rights violations that, it asserts, have risen to the level of violations of customary international law when committed by States. The courts have clearly relied on this formulation when deciding what types of claims are cognizable under the A.T.C.A. *Restatement* section 702 reads:

> A state violates international law if, as a matter of state policy, it practices, encourages, or condones
> (a) genocide
> (b) slavery or slave trade,
> (c) the murder or causing the disappearance of individuals,
> (d) torture or other cruel, inhuman, or degrading treatment or punishment,
> (e) prolonged arbitrary detention,
> (f) systematic racial discrimination, or
> (g) a consistent pattern of gross violations of internationally recognized human rights.

See Nanda & Pansius, *supra* note 124, at 14-34.

[135] *Kadic*, 70 F.3d at 239.

jurisdiction applied to some crimes capable of being committed by non-state actors,[136] commission of those crimes by individuals could constitute a violation of the law of nations for purposes of the A.T.C.A.[137] Accordingly, certain conduct, such as war crimes and genocide, violates the law of nations whether committed by a State or by a private actor. Furthermore, the court said, individuals might be held responsible even for those violations of the law of nations that require State action, when the individual acts under the color of law.[138]

---

[136] *Restatement (Third)* section 404 provides that "[a] state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism, even where [no other basis of jurisdiction] is present." *Restatement (Third), supra* note 10.

[137] *Id.* at 239-40. In its statement of interest, the executive branch "emphatically" supported the position that private persons may be found liable under the ATCA for acts of genocide, war crimes, and other violations of international humanitarian law. *Id.*, citing *Statement of Interest of the United States*, at 5-13.

[138] *Kadic*, 70 F.3d at 245. To determine whether the defendants had acted under the color of law, the court referred, among other things, to the standards developed under 42 U.S.C. §1983, which provides redress for violations of constitutional rights. At least five district courts have endorsed the Second Circuit's approach. *See Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 242 (D.N.J. 1999) (probably in *dicta*, court determined that A.T.C.A. claim lies against private German companies for employing slave labor during World War II); *Doe v. Islamic Salvation Front*, 93 F. Supp. 3 (D.D.C. 1998) (jurisdiction under the A.T.C.A. lies against an individual defendant on the basis of his membership in an Islamic militant group that has committed atrocities in Algeria); *Beanal*, 969 F. Supp. 362 (E.D. La. 1997) (individuals can be liable for genocide), *aff'd on other grounds*, 197 F.3d 161 (5th Cir. 1999) (the appellate court explicitly declined to address the state action requirement); *Doe v. Unocal Corp.*, 963 F. Supp. 880, 891 (C.D. Cal. 1997); *National Coalition Gov't of the Union of Burma v. Unocal, Inc.*, 176 F.R.D. 329 (1997) (related case) (individuals – here, including corporations – can be liable for slavery; allegations of forced labor were sufficient to constitute an allegation of participation in slave trading); *Eastman Kodak Co. v. Kavlin*, 978 F. Supp. 1078 (S.D. Fla. 1997) (conspiracy by defendant private individual with judge to detain plaintiff in miserable jail conditions for eight days violates international law prohibiting arbitrary detention and meets the A.T.C.A. state action requirement).

3. Statutory and treaty interpretation

The interpretive role of customary international law may be even more significant today than its substantive role,[139] for two reasons. First, the use of customary international law in its interpretive role may be more common.[140] Second, the interpretive use of international law can have the same effect as direct incorporation of international law. When actual congressional intent is ambiguous or absent, applying the canon may be "the same as creating a rule that . . . [a] . . . government regulatory scheme cannot violate international law."[141] Indeed, those who would like to see greater reliance on international law in American courts have relied on international law's interpretative role for this purpose.[142]

When construing statutes or treaties, the courts generally have employed the canon of construction announced by Chief Justice John Marshall in *Murray v. The Schooner Charming Betsy*: "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."[143] In general, courts have employed the *Charming Betsy* canon primarily as "a braking mechanism" to restrain the scope of federal legislation to avoid violations of international law, rather than to expand its scope to include norms identified in international law.[144] Some commentators have urged the use of the canon as a means to

---

[139] Substantive in this context means the use of international law as the controlling rule of decision.

[140] Ralph G. Steinhardt, *The Role of International Law as a Canon of Domestic Statutory Construction*, 43 VAND. L. REV. 1103, 1110 (1990).

[141] Trimble, *supra* note 85, at 675.

[142] Curtis A. Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479, 482-83 (1998).

[143] 6 U.S. (2 Cranch) 64, 118 (1804). *See Restatement (Third), supra* note 10, §114 ("Where fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States.")

[144] Bradley, *supra* note 142, at 490; Jonathan Turley, *Dualistic Values in an Age of International Legisprudence*, 44 HASTINGS L.J. 185, 238 (1993) (courts have applied the *Charming Betsy* canon "largely to avoid jurisdiction or, more recently, to avoid an international conflict by following the least controversial course available under international law.")

incorporate international law norms into United States law, but few courts have followed suit.[145]

The most common use of the *Charming Betsy* canon occurs in cases involving the extraterritorial reach of federal legislation, where the courts have invoked it to apply international rules of prescriptive jurisdiction or comity. In addition, courts have employed the canon to interpret statutes that incorporate or refer to international law. Courts have also cited to the canon to avoid a potential conflict between statutes and treaties.

a. Prescriptive jurisdiction and federal statutes

Courts have most often employed the *Charming Betsy* canon as a rebuttable presumption to limit the extraterritorial effect of legislation where the intent of Congress on this point is ambiguous.[146] In doing so, the

[145] Professor Steinhardt, for example, has argued that courts should and do apply the canon to conform domestic law to international law norms. Steinhardt, *supra* note 140. First, he argues, courts have consulted, and should consult, conventional or customary international law norms in statutory interpretation even when there is no indication that Congress intended to implement or refer to international law. Second, rather than asserting the primacy of domestic law to the exclusion of international law norms in certain cases, courts should seek to incorporate international law norms into the interpretation of the domestic statute at issue, at least where there is no irreducible conflict. *But see* Bradley, *supra* note 142. Professor Bradley criticizes this "internationalist" approach on the grounds that it seeks to employ the canon to make it harder for Congress to violate international law and to facilitate United States implementation of international law. Professor Bradley opposes the idea that courts should impose international law norms without the mediation of the political branch.

[146] It is impossible to consider the effect of the *Charming Betsy* canon in jurisdictional cases without examining a separate but related canon of construction, the presumption against extraterritoriality. That presumption holds that "legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949); *E.E.O.C. v. Arabian Am. Oil Co.*, 499 U.S. 244, 255 (1991).

Today, the two presumptions have a semi-autonomous status that does not really account for their common heritage or for the common policy rationales behind the two doctrines. The two presumptions, which logically and in the abstract would seem to apply to the same types of jurisdictional cases, often dictate different results. This is because current American views of the international law of prescriptive jurisdiction go beyond simple territorial jurisdiction. Thus, extraterritorial legislation that would satisfy the *Charming Betsy* presumption logically might be

courts usually are not really interpreting or construing a linguistic ambiguity in the statute itself, but, rather, are filling in a gap left by Congress regarding the extent of the statute's reach. The courts fill this gap by referring to ostensible rules of prescriptive jurisdiction in international law.[147]

It is unclear, however, exactly what the international law of prescriptive jurisdiction is.[148] American courts applying the *Charming Betsy* canon largely refer to domestic case law or to the *Restatement (Third)* to determine the international law of prescriptive jurisdiction.[149] But the

---

struck down under the territoriality presumption, and vice-versa. *See, e.g., Hartford Fire Insurance Co. v. California*, 509 U.S. 764, 814-15 (1993) (Scalia, J., dissenting) (although, because of long-standing precedent, the territoriality presumption does not bar extraterritorial application of the antitrust laws, extraterritorial application of legislation may be barred under the *Charming Betsy* presumption).

[147] It should be noted that the issue of international law restrictions on prescriptive jurisdiction is separate from the issue of Congress' power under the Constitution to regulate conduct abroad. It is well-settled that Congress constitutionally can apply legislation to conduct outside the United when it wishes to do so. *E.E.O.C. v. Arabian Am. Oil Co.*, 499 U.S. 24 (1991) ("Both parties concede, as they must, that Congress has the authority to enforce its laws beyond the territorial boundaries of the United States.") Indeed, Congress almost certainly possesses the power to exercise prescriptive jurisdiction in violation of international law, at least where it does so unambiguously. *CFTC v. Nahas*, 738 F.2d 487, 495 (D.C. Cir. 1983) ("Federal courts must give effect to a valid unambiguous congressional mandate, even if such effect would conflict with another nation's laws or violate international law."); Born, *supra* note 97, at 513.

[148] Steinhardt provides a neat theoretical overview of the different views. Steinhardt, *supra* note 140, at 114-15. In essence, there is an ambiguity in the international law of jurisdiction: can the rights implicit in the recognized categories of prescriptive jurisdiction be transformed into limitations on the exercise of these rights? On the one hand, "it might be said that the right of each state to exercise prescriptive jurisdiction is limited necessarily by the equal correlative rights of all other states." *Id.* at 114. In this view, extraterritorial application of statutes would be limited. On the other hand, a standard reading of the *Lotus* case requires the party asserting a limitation on jurisdiction to show the existence of prohibitive rules. *The Lotus*, 1927 P.C.I.J. (Ser. A) No. 10.

[149] *Restatement (Third)*, *supra* note 10, at §§ 402-403. The *Restatement* defines rules of prescriptive jurisdiction under international law and asserts that these rules apply in United States courts to restrict extraterritorial application of American legislation.

standard American view of prescriptive jurisdiction found in these sources is certainly not universal. Authorities on one end of the spectrum argue that international law provides little or no restraint on a State's exercise of prescriptive jurisdiction.[150] Authorities on the other assert that international law restricts prescriptive jurisdiction essentially to territorial jurisdiction.[151] Indeed, the view described in the *Restatement* may not accurately even restate American caselaw regarding prescriptive jurisdiction.[152]

b. Non-jurisdictional, interpretive uses of international law

The courts have construed treaties to which the United States is a party in light of customary international law.[153] Curiously, most, if not all, of these cases have involved extradition treaties.[154] In addition, courts have

---

[150] *See, e.g.*, Trimble, *supra* note 85.

[151] *See* Janis, *supra* note 28, at 342-43 (describing the British view of prescriptive jurisdiction as essentially territorial in nature and suspicious of many extraterritorial assertions of jurisdiction, especially those of the United States), citing Mann, *The Doctrine of International Jurisdiction Revisited*, 186 HAGUE RECUEIL 9, 20 (1984).

[152] The *Restatement* approach essentially incorporates the "rule of reason" or balancing test developed in several lines of cases, including, most notably, *Timberlane Lumber Co. v. Bank of America*, 59 F.2d 597 (9th Cir. 1976), and *Lauritzen v. Larson*, 345 U.S. 571 (1953). The *Restatement* approach goes beyond this supporting case law in important respects, however. First, the *Restatement* asserts that the rule of reason is a rule of international law, rather than a domestic principle of comity, as the court held in *Timberlane*. The distinction may be more than just semantic: comity is a prudential doctrine that may be waived in some circumstances, whereas international law rules (assuming that there are identifiable international law rules of prescriptive jurisdiction and that they are controlling) may not be. Second, the rule of reason is not the settled rule in American law. *See, e.g.*, *Hartford Insurance Co. v. California*, 509 U.S. 764 (1993); *Laker Airways Ltd. v. Sabena*, 731 F.2d 909 (D.C. Cir. 1984).

[153] For a detailed analysis of the practice of United States courts in construing treaties, see David J. Bederman, *Revivalist Canons and Treaty Interpretation*, 41 U.C.L.A. L. REV. 953 (1994).

[154] *See, e.g.*, *U.S. v. Alvarez-Machain*, 504 U.S. 655 (1992) (although customary international law can inform the construction of international treaties, customary international law norms prohibiting international abduction are not relevant to the extradition treaty at issue because they do not relate directly to the practice of nations in relation to extradition treaties); *United States v. Rauscher*, 119 U.S. 407 (1886) (implying the customary international law doctrine of specialty – prohibiting the prosecution of an extradited person for a crime other than the crime for which he had been extradited – into an extradition treaty); *Fiocconi v. Att'y*

referred to international law when construing statutes implementing the United States' international obligations or relating in some way to international law. In referring to international law, courts have consulted both customary international law[155] and treaties.[156] In a few cases, courts also have required a clear statement by Congress before construing a later-adopted statute in a way that would repeal a treaty.[157]

Gen'l of the United States, 462 F.2d 475 (2d Cir. 1972) (Judge Friendly followed *Rauscher*, holding that the doctrine of specialty applied to an extradition by comity – not pursuant to treaty; in the present case, however, the charges were similar enough not to violate the doctrine), *aff'd*, 462 F.2d 475 (1972); *Jhirad v Ferrandina*, 355 F. Supp 1155 (S.DN.Y. 1973) (considering whether to read into an extradition treaty the international law rule that the underlying act must be considered a crime by both parties, the court applied American precedent holding that this question was a matter of treaty interpretation and that, at most, all that was necessary was that the offense charged be recognized by the jurisprudence of both countries). *See also Antolok v. United States*, 873 F.2d 369 (D.C. Cir. 1989) (declining to interpret the United States compact with the Marshall Islands and associated legislation providing for the latter's autonomy in light of customary international law of espousal).

[155] *See, e.g.*, *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 178-87 (1993) (referring to international law to determine the meaning of "deport or return" in refugee provision); *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 436-41 (1987) (discussed in text immediately below); *United States v. Rosero*, 42 F.3d 166, 171 (3d Cir. 1994) (consulting international maritime law to determine the meaning of "vessel without nationality" in criminal statute).

[156] *See, e.g.*, *Mojica v. Reno*, 970 F. Supp. 130 (E.D.N.Y. 1997), *aff'd on other grounds sub nom. Henderson v. I.N.S.*, 157 F.3d 106 (2d Cir. 1998), *cert. denied sub nom. Navas v. Reno*, 526 U.S. 1004 (1999) (granting *habeas corpus* relief, partly on the basis of provisions in human rights treaties and customary international law, to permanent resident aliens denied hearing under retroactive application of immigration law requiring expulsion of aliens following conviction of crimes in the United States); *Maria v. McElroy*, 68 F. Supp. 2d 206 (E.D.N.Y. 1999) (relying in part on human rights treaties and customary international law in construing retroactive application of immigration law requiring expulsion of aliens following conviction of crimes in the United States); *Pottinger v. McElroy*, 51 F. Supp. 2d 349 (1999) (same); *United States v. Palestine Liberation Org.*, 695 F. Supp. 1456 (S.D.N.Y. 1988) (finding that statute ostensibly closing the Palestinian U.N. mission could not be so construed in light of the United Nations Headquarters Agreement).

[157] Thus, there is "a firm and obviously sound canon of construction against finding implicit repeal of a treaty in ambiguous congressional action." *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984). *See also Cook v.*

One case is worth discussing at length. In *INS v. Cardoza-Fonseca*,[158] the Supreme Court addressed the meanings of the term "refugee" and the term "well-founded fear of persecution," under the Refugee Act of 1980 ("the Act").[159] Definitions of both of these terms were necessary for determining whether immigrants could qualify for asylum in the United States. Only "refugees" were eligible: people who, among other qualifications, are unable or unwilling to return to their country because of "persecution or a well-founded fear of persecution . . . ."[160] The issue was the burden of proof an asylum applicant must meet in order to demonstrate a well-founded fear.

It was clear from the legislative history that Congress had adopted the Act to bring the United States into conformity with its treaty obligations under the United Nations Protocol Relating to the Status of Refugees,[161] and, specifically, to conform the definition of "refugee" to that in the Protocol.[162] Although the Court never mentioned the *Charming Betsy* canon and relied primarily on the plain language of the statute, the Court also relied on the meaning of the term "refugee" in the international treaty to bolster its interpretation.

In attempting to give additional content to the "well-founded fear" standard, the Court looked at various international sources beyond the treaty,[163] most significantly later interpretation of the standard in a

---

United States, 288 U.S. 102, 120 (1933). *Cf. Weinberger v. Rossi*, 456 U.S. 25, 32 (1982) (construing statute to avoid violation of executive agreement).

[158] 480 U.S. 421 (1987).

[159] Pub. L. No. 96-212, 94 Stat. 102 (codified in scattered sections of 8 U.S.C.). Section 208(a) of the Act, 8 U.S.C. §1158(a), authorizes the Attorney General, in her discretion, to grant asylum to aliens who are refugees.

[160] 8 U.S.C. § 1101(a)(42).

[161] United Nations Protocol Relating to the Status of Refugees, *opened for signature* Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267. The Protocol incorporates much of the 1951 United Nations Convention Relating to the Status of Refugees, including its definition of "refugee." United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150. The United States is a party only to the Protocol, and is not a party to the Convention itself. *Cardoza-Fonseca*, 480 U.S. at 439 n.21.

[162] *Cardoza-Fonseca*, 480 U. S. at 436-37.

[163] *Id.* at 438-40. The Court also considered the historical development of the term in the international context and the *travaux préparatoires* of the Convention Relating to the Status of Refugees.

handbook prepared by the United Nations High Commissioner for Refugees.[164] These sources, especially the handbook, provided guidance on the burden of proof issue not found in the treaty language. Thus, the Court "was guided by the common understanding and practice of States as interpreted by the UNHCR."[165] The Court emphasized the non-binding nature of the UNHCR interpretation.

4. Customary international law as a source of affirmative claims

An ongoing debate exists in the scholarly literature about the appropriate role of customary international law in United States law.[166] Fortunately, for the purposes of this report, we do not need to explore this debate in depth. Perhaps the view of the majority of American international law scholars can be described in the following terms. Customary international law is federal common law, or is like federal common law. Federal judges exercise federal common law-making authority to incorporate crystallized rules of customary international law into federal law. This law-making authority may be subject to federal treaties or statutes or to controlling executive acts.[167]

In practice, however, federal courts are reluctant to rely on customary international law as a source of law, at least on an affirmative basis. Federal courts readily accept the use of customary international law as a defense, most obviously in traditional immunity cases. Federal courts also rely on customary international law in interpretation cases, although rarely in such a way that would seriously restrict executive action.

But federal courts have been reluctant to recognize affirmative claims based on customary international law absent some sort of statutory

---

[164] Office of the United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status* (1979).

[165] Steinhardt, *supra* note 140, at 1156.

[166] *See, e.g.*, Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997) (customary international law is not federal common law); Koh, *Is Customary Law?*, *supra* note 128 (customary international law can be federal common law); Lea Brilmayer, *Federalism, State Authority, and the Preemptive Power of International Law*, 1994 SUP. CT. REV. 295 (customary international law is self-executing federal common law); Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555 (1984) (same).

[167] *See* Koh, *Is Customary Law?*, *supra* note 128, at 1835 n.61 (describing his views and the views of Louis Henkin).

authorization, such as that found in the A.T.C.A. This reluctance may be seen even in human rights cases.[168] The rationales the federal courts use to resist the adoption of customary international law vary. Some courts, as we have seen, find that an asserted customary law rule has not crystallized.[169] Others may find that contrary federal law or executive authority is controlling. But most federal courts simply are reluctant to accept that customary international law, in and of itself, creates private rights of action or other types of affirmative relief.[170]

---

[168] *See* Gordon Christenson, *supra* note 124, at 225-26. Christenson, a proponent of federal court recognition of broad international human rights claims, writes:

> United States courts deeply resist "incorporating" the developing customary international human rights law, even when there is a statutory basis. There is little evidence that courts in the United States are influenced much by such new customary law by itself, without explicit approval by the political branches. . . . Traditional customary law, however, continues to be accepted without express incorporation unless directed otherwise by the political branches. . . .
>
> There is a clear preference in domestic adjudication for presuming that traditional customary international law . . . is part of U.S. law, but against presuming that customary international human rights law is part of U.S. law without enactment.

(citations omitted)

[169] *See, e.g., Amlon-Metals, Inc. v. FMC Corp.*, 775 F. Supp. 668, 670 (S.D.N.Y. 1991).

[170] Nanda & Pansius, *supra* note 124, § 14.02[4][c], at 14-37 (even courts favorable to international law claims have been reluctant to assert that international law, by itself, creates a private right of action). A statement of the dominant view of the federal courts can be found in *Princz v. F.R.G.*, 26 F.3d 1166 (D.C. Cir. 1994). Judge Ginsburg, replying in a footnote to Judge Wald's dissent advocating an exception to the F.S.I.A. for violations of *jus cogens* norms, stated:

> While it is true that "international law is a part of our law," *Paquete Habana*, . . . it is also our law that a federal court is not competent to hear a claim arising under international law absent a statute granting such jurisdiction. . . . We think that something more nearly express is wanted before we impute to the Congress an intention that the federal courts assume jurisdiction over the countless human rights cases that might well be brought by the victims of all the ruthless [regimes] of the world. . . .

Id. at 1174 n.1 (citation omitted).

There are two potential and related obstacles to finding affirmative relief in federal courts under customary international law by itself: the lack of subject matter

There are notable exceptions to these generalizations, but, to date, they remain exceptions. Claims based on international law have been raised most often in regard to alien rights under the immigration laws, usually without success.[171] In cases of expropriation, courts have recognized claims against foreign governments based on customary law regarding expropriation of foreign property. The courts essentially have limited these claims to set-offs in fairly limited circumstances, however. As Trimble notes, this allowance of set-off has been explained on the basis of equitable principles that prevent a plaintiff government from invoking federal court jurisdiction while avoiding responsibility for its expropriations.[172]

---

jurisdiction and the non-self-executing nature of customary international law. Courts are reluctant to recognize that claims for violations of customary international law can independently support "arising under" federal question jurisdiction through 28 U.S.C. § 1331. *See, e.g., Xuncax v. Gramajo*, 886 F. Supp. 162, 193-94 (1995) (although international law is federal common law, because international law is not itself a source of private rights of action, as is the common law of contracts or torts, a plaintiff's claims for violation of human rights cannot ordinarily arise under international law as federal common law) (citing *Tel-Oren*, 726 F.2d at 779-80 n.4 (Edwards, J., concurring); *id.* at 811 (Bork, J., concurring); *Handel v. Artukovic*, 601 F. Supp. 1421, 1428 (C.D. Cal. 1985). *But see, e.g., Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1543-44 (N.D. Cal. 1987). Even were subject-matter jurisdiction to exist absent statute, there remains the issue of whether customary international law provides for a private right of action. Courts have had little difficulty in deciding that it does so in the A.T.C.A. context, but, as demonstrated by *Xuncax*, courts are reluctant to find that customary international law provides a private right of action absent some statutory hook. *See also Heinrich v. Sweet*, 49 F. Supp. 2d 27 (D. Mass. 1999); *Hawkins v. Comparat-Cassani*, 33 F. Supp. 2d 1244 (C.D. Cal. 1999); *White v. Paulsen*, 997 F. Supp. 1380 (E.D. Wash. 1998). Christenson points out that this is hardly surprising, since the approach to imputing causes of action under federal common law is restrictive. Thus, a remedy under federal common law will not be implied from any common law principle if a federal statute does not clearly provide a cause of action. Christenson, *supra* note 124, at 234 (citing *O'Melveny v. Fed. Depositor's Ins. Corp.*, 114 S. Ct. 2048 (1994)).

[171] Nanda & Pansius, *supra* note 124, at 14-28.

[172] Trimble, *supra* note 85, at 694 n.110. Almost all of the relevant cases grew out of Cuban expropriations and arose in the Second Circuit. *See Banco Nacional de Cuba v. Chemical Bank New York Trust Co.*, 822 F.2d 230 (2d Cir. 1987); *Banco Nacional de Cuba v. Chase Manhattan Bank*, 658 F.2d 875 (2d Cir. 1981); *Banco Nacional de Cuba v. Farr, Whitlock & Co.* 383 F.2d 166 (2d Cir. 1967), *cert. denied*, 390 U.S. 956 (1968) (the *Sabbatino* case on remand). *Cf. First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759 (1972). The existence of this

B. Crosscutting themes

1. How American courts determine State practice and customary international law

In modern times, American courts have been fairly relaxed in their concept of what constitutes customary international law and in the evidence they require to establish violations of customary international law. In determining international law, the courts generally have been guided by "the usage of nations, judicial opinions and the works of jurists" as "the sources from which customary international law is derived."[173] In the past, courts occasionally conducted an extensive examination of State practice, as we will see immediately below. Today, however, the courts rarely do so. Rather, they rely largely on American precedent,[174] treatises (especially, the *Restatement*), expert opinion,[175] and international treaties and declarations.[176]

---

type of claim also seems to have been implicitly accepted in *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983). These cases have explicitly stated, or have assumed, that the United States interpretation of the customary international law of expropriation is the appropriate law of decision. A recent unreported decision by the district court for the District of Columbia, however, has extended these precedents to provide a plaintiff an initial cause of action based on customary international law. *McKesson Corp. v. The Islamic Republic of Iran,* 1997 U.S. Dist. Lexis 8903 (D.D.C. 1997). In that case, McKesson sought damages for the expropriation of its operations in Iran following the Iranian revolution. The court found that McKesson had a private right of action based both on the Treaty of Amity between the United States and Iran and on the customary international law of expropriation. The court cited the latest of the Second Circuit's decisions for the proposition that the expropriation violated international law, but did not address the severe limitations the Second Circuit courts had placed on such actions.

[173] *Filartiga,* 630 F.2d at 502.

[174] Part I discusses more fully the reliance on American precedents. The reliance on American precedent is particularly remarkable in the area of extraterritorial jurisdiction.

[175] *See, e.g.*, Harold G. Maier, *The Role of Experts in Proving International Human Rights Law in Domestic Courts: A Commentary*, 25 GA. J. INT'L & COMP. L. 205 (1995/1996). In human rights cases, it is common for international law scholars to submit their opinions to the court.

[176] This is especially true in the human rights context, in *Filartiga* and the cases following it. *See* Schrader, *supra* note 91, at 762-68.

a. Citations to judicial decisions and national laws as evidence of State practice

Examples of cases in which American courts conduct surveys of State practice to determine customary international law are rare, especially in the modern era. Nevertheless, such cases do exist, and a number of them cite to foreign court decisions and national laws as evidence of State practice. The starting point for most of these surveys is the language in the *Paquete Habana*,[177] directing courts, when ascertaining international law, to consult "the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators . . . not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is." In the *Paquete Habana* itself, the Court exhaustively examined State practice – including foreign judicial decisions and national laws – to determine whether the law of nations exempted fishing vessels from being taken as prizes of war.

Subsequent cases have cited to the *Paquete Habana* when conducting surveys of State practice, though, as noted above, most of them do not include reviews of court decisions or national laws. In one recent case, however, the Eleventh Circuit, citing to *The Paquete Habana*, conducted a brief review of State practice[178] to demonstrate "[t]he U.S., foreign and international courts' custom of presuming that an ambassador has authority to speak for his or her country . . . ."[179] As evidence of State practice, the decision did not actually cite to foreign judicial decisions, but it did cite to Australian law and the I.C.J. Rules of Court.

In *The Lusitania*,[180] following the approach of *The Paquete Habana*, the court surveyed state practice regarding the requirement for warships to provide due warning and opportunity to remove passengers before sinking enemy civilian ships. As part of its survey, the court investigated the

---

[177] 175 U.S. 677, 700 (1900).

[178] The Court did not explicitly state that it was engaging in a survey of State practice, but this was clearly its purpose.

[179] *Aquamar v. Del Monte Fresh Produce*, 179 F.3d 1279, 1297 (11th Cir. 1999). The court, without distinguishing among the various sources of international law, referred to Article 38(1) and asserted that courts should look to a number of sources to ascertain principles of international law, including international conventions, international customs, treatises, and judicial decisions rendered in this and other countries. *Id.* at 1295-96.

[180] 251 F. 715 (S.D.N.Y. 1918).

national laws and regulations of various countries, including those of the United States, Russia, Japan, and Germany herself, all of which provided for due warning and opportunity to remove passengers. In a surreal analysis, the court reasoned that because German U-boats had so brazenly flouted this well-established custom, the *Lusitania*'s operators could not be held liable for such an unforeseeable occurrence.

Cases decided before *The Paquete Habana* also conducted surveys of State practice. Indeed *The Paquete Habana* Court relied on one of them, *Hylton v. Guyot*,[181] in making its analysis. In *Hylton v. Guyot*, the Court asserted the role of international law in United States courts in much the same terms it later used in *The Paquete Habana*. The Court conducted an exhaustive survey of relevant precedents, including those found in foreign law and in foreign judicial decisions, to determine the force and effect of foreign judgments in United States courts. Similarly, in *The Scotia*,[182] the Court determined that British rules of navigation, because adopted by more than thirty of the principal commercial states of the world, constituted the relevant law of nations.

Early prize cases often cited to foreign judicial decisions or foreign laws.[183] This is not surprising. The courts of many countries, including the United States, ostensibly followed the law of nations, rather than municipal law, in prize cases.[184] At least in early cases, courts also looked to the law

---

[181] 159 U.S. 113 (1895).

[182] 81 (14 Wall.) U.S. 170 (1871).

[183] *See, e.g.*, *The Anne*, 16 U.S. 436, 447 (1818) (citing a French case). Prize cases often cited to British precedents, but this may have been due to the asserted incorporation of British prize law into American law at the time of Independence, rather than to a commitment to following the law of nations. *See* David G. Bederman, *The Feigned Demise of Prize*, 9 EMORY INT'L L. REV. 31, 66 n.184 (1995) (citing *The Siren*, 80 U.S. (13 Wall.) 389, 393 (1871), for confirming that the United States received English maritime law (including that of prize) at Independence).

[184] Bederman, *supra* note 183, at 51 (regarding prize law) (citing *The Adeline*, 13 U.S. (9 Cranch) 244, 284 (1815); *The Rapid*, 12 U.S. (8 Cranch) 155, 162 (1814); *The Zamora*, [1916] 2 App. Cas. 77, 91 (P.C.) (Parker, L.J.); *The Odessa*, 1915 P. 52, 61; *The Elsebe*, 5 C. Rob. 174, 180, 165 Eng. Rep. 738, 740 (Adm. 1804); J.H.W. VERZIJL, W.P. HEERE & J.P.S. OFFERHAUS, 11 INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE Part IX-c: The Law of Maritime Prize, 596-99 (1992) (national codifications of this principle)). Even so, a prize court sitting in a particular country remained a court of that nation, bound by its procedural and evidentiary practices, and by statutes and Executive pronouncements, which could

of nations in determining maritime law. In ascertaining the law of nations, these courts would, of necessity, look to a wide variety of foreign sources.[185]

2. Conflicts between the branches of government

Conflicts in the substantive or interpretive application of customary international law between the three branches of American government are likely to be rare. When American courts do apply customary international law, they usually follow the lead of the executive branch when the executive expresses a view, especially in cases involving the various immunities.[186] In his survey of cases involving customary international law, Trimble found comparatively few in which the court applied customary international law when the executive branch had not expressed an opinion.[187] Even though there is a potential for conflict between the courts and the executive in human rights cases, the executive has largely

---

be contrary to international law. British and American courts were always careful to say that prize tribunals were not international law courts. *Id.* at 52. Attention to international law was partly motivated by concerns of reciprocity and comity – the incentive was to accord the same privileges to other nations' vessels as were accorded to vessels of the court's nationality. *Id.* at 67.

[185] There may be some reason for caution in relying on early maritime and prize cases as precedent for the proposition that United States courts survey State practice – including foreign judicial decisions and foreign laws – in order to ascertain customary law. This is because there may be a distinction between "the law of nations" – which would include maritime and prize law – as that term was meant in the 18th and 19th centuries, and "international law," as that term is used today. The surveys of foreign laws involved in early prize and maritime cases may have been searches for what we would now call general principles of law, rather than surveys of customary State practice. *See* Rubin, *supra* note 93, at 71-72. Nevertheless, at least by the time of *The Paquete Habana*, the courts' exploration of the law of nations seems more like a survey of State practice in search of custom. Indeed, the Court in that case said it was searching for "international law," *Paquete Habana*, 175 U.S. at 700, not the law of nations, and seemed conscious of the need to demonstrate both State practice and *opinio juris*.

[186] In brief, conflicts between these two branches may not be that serious, because Congress and the courts engage in an ongoing dialogue, through which a consistent practice may emerge.

[187] Trimble, *supra* note 85. Trimble states that of the more than 2,000 cases involving international law decided between 1789 and 1984, fewer than 50 involved the application of customary law when the executive had not expressed an opinion. *Id.* at 685-86.

supported the courts in their application of international human rights law. In interpretation cases, with a few notable exceptions, courts are generally unadventurous, and when the occasion arises, are likely to defer to executive authority.

American courts occasionally do resist executive direction in international law matters, even in immunity cases.[188] In a few cases, moreover, courts have relied on customary international law, either directly or as a matter of interpretation, to restrain executive action. For the most part, other courts have not followed these precedents, and appellate courts have tended to limit their reach.

The courts' creation of affirmative claims and their aggressive use of international law in interpretation are essentially two sides of the same coin. That is, decisions based on an affirmative international law claim can also be based on interpretation of the relevant domestic law in light of international law. Decisions employing interpretation to curb the executive seem to fare better on appeal or as precedent than decisions creating affirmative rights. Accordingly, courts that wish to curtail executive action seem to favor the interpretive approach as a way to avoid almost certain reversal or diminishment of their rulings.

Most of the cases involving creation of affirmative claims or aggressive interpretation have arisen in the context of the immigration laws. For example, the District Court in *Rodriguez-Fernandez v. Wilkinson*[189] essentially created a cause of action based on customary international law, directly applying that law to restrain the executive. The case dealt with the prolonged detention of an excludable alien, a Cuban, who had been awaiting deportation. The court ruled that although the detention was consistent with "the United States Constitution [and] our statutory laws," it nevertheless was "judicially remedial [sic] as a violation of international law."[190] On appeal, the Tenth Circuit affirmed the district court's holding, but on different grounds, relying on international law as a matter of

[188] *See, e.g., Republic of Philippines v. Marcos*, 665 F. Supp. 793 (N.D. Cal. 1987) (rejecting the Executive Branch's suggestion to extend head of state immunity to the Philippine Solicitor General, because he clearly was not a head of state); *In re Grand Jury Proceedings*, 817 F.2d 1108 (4th Cir. 1987) (in order to reach its decision, the court did not have to decide whether to defer to the State Department's denial of immunity.)

[189] 505 F. Supp. 787 (D. Kan. 1980), *aff'd on other grounds*, 654 F.2d 1382 (10th Cir. 1981).

[190] *Id.* at 798.

statutory interpretation. The Tenth Circuit's opinion in *Rodriguez-Fernandez*[191] does not explicitly refer to the *Charming Betsy* canon, but the interpretive use of international law is clear. Other courts considering these decisions have repudiated them.[192]

The appellate court's decision seems to have used customary international law as an aid to interpretation in two ways. First, the court resolved the case as a matter of statutory construction, relying, in part, on international law principles regarding freedom from arbitrary punishment and on the substantive and procedural guarantees of the Fifth Amendment.[193] Second, the court proceeded to discuss the due process questions in light of international law. In ascertaining notions of fairness related to due process, the court looked to the same international human rights law guarantees. It was proper to consider international law principles for this purpose, asserted the court, because the Supreme Court had looked to international law principles when it had upheld Congress' plenary power over exclusion and deportation of aliens.[194]

A trio of district court decisions from the Eastern District of New York recently relied on a similar rationale in immigration cases, sparked by contemporaneous changes in the immigration laws. In the first and most significant of these cases, *Mojica v. Reno*,[195] the plaintiffs sought, by writ of habeas corpus, to challenge I.N.S. deportation orders. Recently adopted legislation had eliminated direct review of government determinations in these cases, and the government argued that the legislation also precluded

---

[191] 654 F.2d 1382 (10th Cir. 1981).

[192] *See Guzman v. Tippy*, 130 F.3d 64 (2d Cir. 1997); *Barrera-Echevarria v. Rison*, 44 F.3d 1441, 1445 (9th Cir. 1995) (en banc); *Gisbert v. Attorney General*, 998 F.2d 1437, 1446 (5th Cir.), *amended*, 997 F.2d 1122 (5th Cir. 1993); *Fernandez-Roque v. Smith*, 734 F.2d 576, 580 n.6 (11th Cir. 1984); *Palma v. Verdeyen*, 676 F.2d 100, 103 (4th Cir. 1982).

[193] The court conceded that, as a general matter, there was no constitutional protection against detention of aliens pending exclusion. Nevertheless, the court determined that the length of Rodriguez-Fernandez's detention, without the prospect of release, had transformed his detention into impermissible punishment. Punishment of excludable aliens, the court found, would be subject to the substantive and procedural due process guarantees of the Fifth Amendment.

[194] *Id.* at 1388, citing *Fong Yue Ting v. U.S.*, 149 U.S. 698 (1983).

[195] 970 F. Supp. 130 (E.D.N.Y. 1997), *aff'd on other grounds sub nom. Henderson v. I.N.S.*, 157 F.3d 106 (2d Cir. 1998), *cert. denied sub nom. Navas v. Reno*, 526 U.S. 1004 (1999).

habeas corpus review.[196] The plaintiffs alleged, among other things, that this interpretation violated various international human rights guarantees to due process. The court avoided deciding this claim, and relied on the *Charming Betsy* canon to construe the new statute so as to preserve the right to habeas corpus relief.[197]

I.N.S. v. Cardoza-Fonseca[198] – the immigration case described above that referred to international refugee law – also can be seen as an example of a court aggressively applying substantive customary international law to construe a statute. That is, the court went beyond the language of the treaty that the statute implemented and relied on substantive international refugee law to construe the statute when it might have refused to do so.[199] A better view, perhaps, is that the Court was simply citing to persuasive authority from the equivalent of another jurisdiction to bolster an interpretation of treaty language. This is not so extraordinary.

This view is bolstered by the Supreme Court's recent decision in *Aguirre-Aguirre*.[200] That case involved the government's interpretation of provisions permitting the withholding of deportation of aliens who fear persecution on return to their home countries (a remedy similar to, but distinct from, the granting of asylum). Aliens are ineligible for withholding who have committed a serious non-political crime before entering the United States. In interpreting the non-political crime exception, the Ninth

[196] *Mojica*, 970 F. Supp. at 156-65. More specifically, the government argued that the only remaining judicial review relating to final orders of deportation for legal permanent resident criminal aliens was to the court of appeals, and then only for substantial constitutional claims, which were not involved in this case.

[197] The court also relied on various other bases for its construction, the most significant of which was domestic law regarding habeas corpus. On appeal, the appellate court relied exclusively on domestic law in upholding the district court decision. *Henderson v. I.N.S.*, 157 F.3d 106 (2d Cir. 1998). In the other two cases, *Maria v. McElroy*, 68 F. Supp. 2d 206 (E.D.N.Y. 1999), and *Pottinger v. McElroy*, 51 F. Supp. 2d 349 (E.D.N.Y. 1999), the court relied in part on human rights treaties and customary international law in construing the retroactive application of the same immigration law. Other district courts hearing similar claims apparently have not relied on international law.

[198] 480 U.S. 421 (1987).

[199] Steinhardt, *supra* note 140, at 1156. *But see* Bradley, *supra* note 142, at 482 (*Cardoza-Fonseca* simply an example of statutory interpretation where statutory terms have an established meaning in international law, especially when there is evidence that Congress intended to incorporate the international law meaning.)

[200] *Aguirre-Aguirre*, 526 U.S. 415 (1999).

Circuit had consulted the very same U.N. Handbook on refugees involved in *Cardoza-Fonseca*.[201]

The Supreme Court, emphasizing that the U.N. Handbook, while a useful interpretive aid, was not binding on the United States government or the courts, reversed the Ninth Circuit interpretation. The government's interpretation was entitled to greater deference, the Court ruled.

IV. Conclusion

American courts refer to customary international law perhaps most often in interpretation cases, in which the court seeks to interpret statutes or treaties in light of customary international law. Outside of interpretation cases, customary law is used most often as a defense – for example, in immunity cases – and less often as the source of an affirmative claim. Even when customary law is used affirmatively, its use may be restricted, as in most expropriation cases, where claims are limited to defensive set-offs. The great exception, of course, is the increasing number of human rights cases under the Alien Tort Claims Act.

In cases involving customary international law, American courts tend to rely on American precedents in determining the content of customary international law. This is particularly evident in the context of extraterritorial jurisdiction. In addition, in some areas, such as sovereign immunity, the American understanding of international law has been codified. This is not necessarily a difficulty for the role of municipal courts in State practice, because State practice essentially reflects a national view of international law. Nevertheless, reliance on domestic statutes and judicial precedent conceivably could result in State practice that was so out of step with current international law that it would be not only old-fashioned, but to some extent irrelevant.

In general, in matters involving international law, the courts will follow the lead of the executive when it is provided. This is especially true in cases involving the various immunities, but is also true in expropriation cases, and even in human rights cases, in which the government often files *amicus* briefs. Accordingly, it is rare to find conflicting State practice between the judiciary and the executive.

Nevertheless, there have been cases in which the courts have raised customary international law as a mechanism for constraining executive

[201] *Aguirre-Aguirre*, 121 F.3d 521 (9th Cir. 1997).

action. This is perhaps most notable in the immigration area. A few courts – mostly district courts – have employed customary international law to limit executive discretion regarding the treatment of immigrants. At least one case has relied on customary international law directly, but others have taken the more subtle approach of employing the *Charming Betsy* canon to construe the immigration laws in accordance with international law principles. For the most part, other courts have not followed these precedents. Some of these district court decisions, moreover, have been limited on appeal.

Conflicts also exist between the legislature and the courts, which is not surprising given the role of the courts to interpret and review congressional legislation. For example, in cases involving extraterritorial jurisdiction, the courts are not shy about determining the reach of American legislation. Where Congress attempts to define international law, moreover, as in the case of the Second Hickenlooper Amendment, the courts may limit the effect of legislation.

Conflict between the judiciary and the legislature may not result in conflicting State practice as often as does conflict between the executive and the judiciary, since the courts and the legislature engage in a dialogue about the law. That is, Congress may alter court rulings by passing subsequent legislation, and courts may alter the effect of legislation through interpretation and review. Eventually, this dialogue may result in a consistent position. Because of this ongoing dialogue, it may take a while for consistent State practice to emerge.

Decisions of American courts clearly can constitute State practice. Ordinarily, it is not likely that court decisions will conflict with the position of the executive. Where they do conflict with the executive or the legislature, the resulting inconsistency will mean that there is no definitive State practice on the point at issue. Because of this inconsistency, and because a consistent position is often the product of the interaction between the branches of government, American court decisions may not always offer a reliable guide to American State practice. Thus, court decisions can be a deceptive indication of State practice: they are comparatively available and straightforward, but they may mask the complexities of the American legal position. For this reason, among others, it may be that municipal decisions are consulted primarily as a source of persuasive authority or as an indication of international law, rather than as State practice.