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Customary International Law and International Human Rights Litigation in United States Courts: Revitalizing the Legacy of The Paquete Habana

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NOTES

CUSTOMARY INTERNATIONAL LAW AND INTERNATIONAL HUMAN RIGHTS LITIGATION IN UNITED STATES COURTS: REVITALIZING THE LEGACY OF *THE PAQUETE HABANA*

> I'm nothing but a trial judge in one federal court. . . . I don't run the universe, and I have nothing to do with international affairs.[1]

Consider the above quote from a federal district court judge in light of the following: In the early 1990s, members of an Algerian fundamentalist group brutally raped and tortured several Algerian women in Algeria.[2] In addition, the group butchered and summarily executed friends and family members of the women in Algeria.[3] When the Algerian military government banned the fundamentalist group, one of the group's members fled to the United States, sought political asylum, and conducted business on behalf of the group from Washington, D.C.[4] The Algerian women then brought suit against the group in the United States District Court for the District of Columbia, alleging that the actions taken against them, their friends, and their family members in Algeria constituted violations of international law.[5]

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1. Tracy Thompson, *Hijacker Gets 30-Year Prison Term*, WASH. POST, Oct. 5, 1989, at A39 (quoting the Honorable Aubrey E. Robinson, Jr., U.S. District Court for the District of Columbia).

2. The facts presented in this scenario are based on a recent case decided by the United States District Court for the District of Columbia, *Doe v. Islamic Salvation Front (FIS)*, 993 F. Supp. 3, 5-6 (D.D.C. 1998). For a discussion of *Islamic Salvation Front*, see *infra* notes 82-88 and accompanying text. For a detailed account of some of the human rights atrocities that have taken place in Algeria recently, see Ben Macintyre, *Algerian Savagery Grows*, TIMES (London), Jan. 7, 1998, at 10.

3. *See Islamic Salvation Front*, 993 F. Supp. at 5.

4. *See id.* at 6.

5. *See id.* at 5.

Despite the fact that the alleged events described above took place in Algeria, concerned only Algerian citizens, and involved a claim of a violation of international law, a United States district court had jurisdiction over the case under the Alien Tort Claims Act (ATCA).[6] ATCA provides: "The district courts shall have original jurisdiction of any civil [tort] action by an alien . . . committed in violation of the law of nations or a treaty of the United States."[7] Rather than claiming a violation of a treaty to which the United States was a party, the Algerian women based their ATCA claim on a violation of the "law of nations."[8]

Ascertaining whether a violation of the "law of nations" has occurred involves delving into the territory of "customary international law,"[9] a growing body of law that includes norms that emerge when "conduct, or the conscious abstention from certain conduct, of states . . . becomes in some measure a part of [the] international legal order."[10] Determining the scope of customary

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6. Although Congress passed ATCA, 28 U.S.C. § 1350 (1994), as part of the Judiciary Act of 1789 over 200 years ago, it was rarely used until the recent surge of interest and awareness in protecting human rights. *See* FRANK NEWMAN & DAVID WEISSBRODT, INTERNATIONAL HUMAN RIGHTS: LAW, POLICY, AND PROCESS 505 (1996) ("ATCA was not widely used until the 1980s, when a growing interest in protecting human rights and an increase in the number of lawyers familiar with international law heralded a resurgence in use of the statute."); *see also* Alan Frederick Enslen, Commentary, Filartiga's *Offspring: The Second Circuit Significantly Expands the Scope of the Alien Tort Claim Act With its Decision in* Kadic v. Karadzic, 48 ALA. L. REV. 695, 695 (1997) (noting that the Second Circuit's decision in Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980), "lifted the now more than 200-year-old Alien Tort Claim Act (ATCA) from obscurity" (footnote omitted)); *infra* notes 82-88 and accompanying text (discussing *Islamic Salvation Front*).

7. 28 U.S.C. § 1350.

8. *See Islamic Salvation Front*, 993 F. Supp. at 8.

9. Many experts agree that customary international law is considered part of the "law of nations." *See, e.g.*, *Filartiga*, 630 F.2d at 880 ("[W]e find that an act of torture committed by a state official against one held in detention violates established norms of the international law of human rights, and hence the law of nations."); *Islamic Salvation Front*, 993 F. Supp. at 7 ("The law of nations, [is] currently known as international customary law . . . ."); Joan Fitzpatrick et al., *Enforcing Human Rights in the United States*, 19 WHITTIER L. REV. 267, 268 (1997) (noting that *Filartiga* stood for the proposition "that present-day norms of customary international law, including human rights norms, are the law of nations to which the ATCA refers").

10. HENRY J. STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 28 (1996). For additional information on attempts to define customary international law, see *infra* notes 31-55 and accompanying text.

international law is often difficult. Although the *Restatement (Third) of the Foreign Relations Law of the United States*[11] ("*Restatement*") and a few federal court cases[12] provide clarification and reinforce the authority of customary international law in U.S. courts, ambiguities remain. The *Restatement* itself acknowledges some of this uncertainty: "No definition of customary law has received universal agreement . . . . Each element in attempted definitions has raised difficulties. There have been philosophical debates about the very basis of the definition: how can practice build law?"[13]

The ambiguities inherent in defining and using customary international law have sparked heated debates regarding its use, particularly in international human rights claims in domestic courts.[14] On one side of the debate are those who maintain that U.S. courts have a responsibility to enforce and uphold international law, and should continue to do so even when decid-

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11. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 102, 702 (1987); *see also infra* notes 36-44 and accompanying text (discussing the *Restatement*'s treatment of customary international law). Although the *Restatement* has no official legal status, judges considering international legal issues consult it frequently for guidance. *See* STEINER & ALSTON, *supra* note 10, at 147. The *Restatement* explicitly asserts that customary international law is U.S. law. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 cmt. c ("The customary law of human rights is part of the law of the United States to be applied as such by State as well as federal courts.").

12. *See infra* text accompanying notes 56-92 (discussing cases in which courts have upheld the use of customary international law).

13. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102, reporters' note 2.

14. *See, e.g.*, Curtis A. Bradley & Jack L. Goldsmith, *The Current Illegitimacy of International Human Rights Litigation*, 66 FORDHAM L. REV. 319 (1997) (arguing that absent an express legislative direction, courts should not apply customary international law); James Crawford et al., *Application of Customary International Law by National Tribunals*, 76 AM. SOC'Y OF INT'L L. PROC. 231, 231-67 (1982) (discussing the use of customary international law in English courts); Anthony D'Amato, *Human Rights as Part of Customary International Law: A Plea for Change of Paradigms*, 25 GA. J. INT'L & COMP. L. 47 (1995-96) (pointing to public sentiment as a reason for change within international law and discussing jurisdictional issues); Harold H. Sprout, *Theories as to the Applicability of International Law in the Federal Courts of the United States*, 26 AM. J. INT'L L. 280 (1932) (discussing various theories as to the sources of international law); Symposium, *Customary International Human Rights Law: Evolution, Status and Future*, 25 GA. J. INT'L & COMP. L. 47 (1995) (discussing the importance, changes, problems, and future of customary international law of human rights).

ing a claim requires the courts to make difficult customary international law findings.[15] On the other side are critics who argue that the ambiguities of customary international law are too great, that U.S. courts lack the authority to "find" customary international law, and that letting them do so offends federalism and separation of powers principles.[16] For example, some critics assert that customary international law is unenforceable in U.S. courts without an explicit congressional authorization.[17] An increase in the number of international human rights cases reaching federal courts,[18] and the recent trend toward loosening the requirements of and decreasing the time necessary for establishing customary norms,[19] have intensified the customary international law debate and imposed urgency on the need to resolve it.

Almost a century ago, in *The Paquete Habana*,[20] the Supreme Court acknowledged that "[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction."[21] The Court, in *The Paquete*

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15. *See, e.g.*, Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1564-67, 1569 (1984); Richard B. Lillich, *The Proper Role of Domestic Courts in the International Legal Order*, 11 VA. J. INT'L L. 9, 44-45 (1970); Beth Stephens, *The Law of Our Land: Customary International Law as Federal Law After* Erie, 66 FORDHAM L. REV. 393, 453-61 (1997).

16. *See, e.g.*, Fritz W. Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517, 575 (1966); Phillip R. Trimble, *A Revisionist View of Customary International Law*, 33 UCLA L. REV. 665, 708-09 (1986).

17. *See* Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 874 (1997) (questioning customary international law's accepted status).

18. *See, e.g., id.* (noting the "burgeoning number of international cases in U.S. courts"); Fitzpatrick et al., *supra* note 9, at 267 ("The past two decades have witnessed a remarkable flourishing of litigation in United States courts against individual perpetrators of human rights violations.").

19. *See, e.g.*, KAROL WOLFKE, CUSTOM IN PRESENT INTERNATIONAL LAW 59 (2d rev. ed. 1993) ("At present . . . an international custom can arise even in a very short time."); Paul C. Szasz, *General Law-Making Processes, in* THE UNITED NATIONS AND INTERNATIONAL LAW 2, 31 (Chris C. Joyner ed., 1997) (explaining that the speed by which customary international law is created has increased substantially with the "general acceleration of international interactions").

20. 175 U.S. 677 (1900).

21. *Id.* at 700. The case involved the United States's capture and sale of two Spanish fishing vessels off the coast of Cuba during the Spanish-American War. *See id.* at 678-79. Although no treaty or other written international agreement specified that ordinary fishing vessels were exempt from capture as a prize of war, the Court

Habana, upheld the idea that U.S. courts should not ignore cases with international law elements; rather, they should engage in a legal analysis that incorporates recognition of international law principles.[22] *The Paquete Habana* also specifically acknowledged the validity of customary international law by further clarifying that international law could be binding even when no treaty or legislation codified that law:

> [W]here there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat.[23]

Since Justice Gray wrote the Court's opinion in *The Paquete Habana*, major world events have expanded the scope of international law and increased the significance of its definition, interpretation, and enforcement.[24] As international law has grown in importance in the United States, domestic judicial decisions on international law issues, particularly those involving human rights, have cited *The Paquete Habana* in support of the use of customary international law as authority in U.S. courts.[25] A

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traced the practice of maintaining such an exception throughout history and found that the United States had violated international law as established through custom. *See id.* at 686-711. The Court determined that the capture of the vessels was unlawful and ordered the proceeds of the sale returned to the claimant with damages and costs. *See id.* at 714.

22. *See id.* at 700.

23. *Id.*

24. Consider the following examples: the Versailles Treaty, ending World War I, resulted in the development of the League of Nations and the International Labour Organization; the International Tribunal at Nuremberg after World War II led to the prosecution of war criminals; and the creation of the United Nations, also occurring in the aftermath of World War II, established a world organization committed to cooperative international peace and security efforts. *See* PETER MALANCZUK, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 23-32 (7th rev. ed. 1997). After it signed the U.N. Charter in 1945, the United States committed itself to "establish[ing] conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained." U.N. CHARTER preamble, para. 3.

25. *See, e.g.*, Hileo v. Estate of Marcos, 25 F.3d 1467, 1473 (9th Cir. 1994) (quoting

court's decision to find and adhere to a customary international norm thus has important implications for the legacy of respect for international law fostered by *The Paquete Habana*. Finding and adhering to customary international norms reinforces the legacy of *The Paquete Habana* and conveys the United States's commitment to ensuring that it serves as a cooperative member of an increasingly globalized world; refusing to find and adhere to customary international norms unravels the legacy and suggests a rebellion against international constraints.

This Note contends that U.S. courts should reinforce—not unravel—*The Paquete Habana*'s legacy by recognizing and upholding norms of customary international law in international human rights cases, in spite of the growing criticism of that practice. As this Note argues, the ambiguity inherent in the nature of customary international law is not a justification for ignoring the authority of customary international law. That ambiguity is in fact quite similar to uncertainties in other areas of law in which courts routinely make decisions. Foreclosing or severely limiting the viability of international human rights claims based on customary international law in U.S. courts not only eliminates the possibility of relief for many injured plaintiffs,[26] it also sends a disturbing message to the world community that justice

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The Paquete Habana's phrase, "International law is part of our law"); Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 787 n.19 (D.C. Cir. 1984) (citing *The Paquete Habana* to support the proposition that the "law of nations" is an "integral part of the laws of this country"); Lareau v. Manson, 507 F. Supp. 1177, 1188 n.9 (D. Conn. 1980) (citing *The Paquete Habana* to support the proposition that "[i]t is well established that customary international law is part of the law of the United States"), *aff'd in part and modified in part*, 651 F.2d 96 (2d Cir. 1981).

26. Plaintiffs bringing ATCA claims in U.S. courts often have no other forum available to them. Even if civil suits could be filed in the country in which the acts took place,

> [t]hose suits may not . . . adequately protect or compensate victims. For instance, repressive governments may refuse to enforce or even permit the legal actions. Also, when there is armed conflict, normal judicial processes may be disrupted and judgments not enforced. . . . Another mechanism might be a case in the International Court of Justice. ICJ jurisdiction, however, is limited to suits between governments and judgments are not enforceable by individuals.

NEWMAN & WEISSBRODT, *supra* note 6, at 500. If no treaty applies and the plaintiffs are unable to rely on customary international law to get into a U.S. court, they may be without a remedy.

in the United States does not encompass challenges of internationally recognized abuses of human rights.[27]

The first section of this Note discusses attempts made to define customary international law, including those in the *Restatement*. The second section discusses successful, albeit controversial, uses of customary international law in ATCA claims in U.S. courts, including the Second Circuit's decisions in *Filartiga v. Pena-Irala*[28] and *Kadic v. Karadzic*,[29] and the recent federal district court decision in *Doe v. Islamic Salvation Front (FIS)*.[30] The third section addresses some of the criticisms regarding the use of customary international law in U.S. courts and discusses an unsuccessful attempt to use customary international law, without ATCA, that is consistent with those criticisms. The fourth section proposes reasons why, in spite of those criticisms, U.S. courts should continue to reinforce the legacy of respect for customary international law as the new century approaches.

ATTEMPTS TO DEFINE CUSTOMARY INTERNATIONAL LAW

Although a full discussion of the history of customary international law is beyond the scope of this Note,[31] some background on past attempts to define and identify it is necessary. In *The Paquete Habana*, the Supreme Court noted that ascertaining customary international law entails "resort . . . to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well

27. A renowned human rights advocate has suggested that one reason why the United States should provide a remedy for human rights victims is to "serve notice to the world that the United States is committed to deal fairly and impartially—in the courts—with cases having foreign policy implications." Kenneth Jost, *Don't Say 'No' to Human Rights*, NAT'L L.J., Jan. 16, 1989, at 14 (referring to remarks made by Professor Anthony D'Amato).

28. 630 F.2d 876 (2d Cir. 1980).

29. 70 F.3d 232 (2d Cir. 1995).

30. 993 F. Supp. 3 (D.D.C. 1998).

31. For additional background information on customary international law, see M. Erin Kelly, Comment, *Customary International Law in United States Courts*, 32 VILL. L. REV. 1089, 1090-1101 (1987).

acquainted with the subjects of which they treat."[32] These words may not provide an explicit definition of *what* customary international law is, but they do provide a guide as to *how* to find it. In accordance with the words of *The Paquete Habana*, courts seeking to identify international legal norms have looked to experts in the field of international law for guidance on the extent to which certain practices have become so widespread as to be considered part of international law.[33] These experts have been instrumental in determining the status of various practices; however, their role is not to steer the law in a specific direction.[34] Rather, they work with existing definitions and examples of practices that already have become customary international law in making their assessments.[35]

In their analysis, experts and judges may look to the *Restatement*.[36] The *Restatement* acknowledges that a precise definition of customary international law remains elusive;[37] nevertheless it attempts to provide a workable definition. In its section on sources of international law, the *Restatement* describes customary international law as "result[ing] from a general and consistent practice of states followed by them from a sense of legal obligation."[38] Clarification in the comments and reporters' notes

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32. The Paquete Habana, 175 U.S. 677, 700 (1900).

33. *See, e.g.*, *Filartiga*, 630 F.2d at 880 & n.4, 886 (identifying the opinions of experts regarding the use of customary international law).

34. As stated in *The Paquete Habana*, the works of jurists and international law experts "are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is." *The Paquete Habana*, 175 U.S. at 700.

35. *Cf.* 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, 211 (1995) (explaining that "scholarly opinions are not themselves authoritative sources of customary international law but provide indirect evidence of the existence and content of international legal norms"). Maier also points out that although experts testifying in cases involving customary international law may possess certain advocate tendencies, situations in which experts testify in other areas of the law are no different. *See id.* at 213.

36. *See infra* notes 90-92 and accompanying text (alluding to the fact that several courts considering customary international claims specifically cited to the *Restatement* in their decisions).

37. *See supra* note 13 and accompanying text.

38. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987).

to section 102 indicates that the determination as to when a practice actually becomes law through custom is "often difficult"[39] and that today a practice can achieve customary international law status in a short period of time.[40]

The *Restatement*'s "Human Rights" section is more precise, explicitly listing practices that have achieved the status of customary international law. According to section 702:

> 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.[41]

This list is not meant to be exhaustive. Comment (a) of section 702 offers a caveat: "The list is not necessarily complete, and is not closed: human rights not listed in this section may have achieved the status of customary law, and some rights might achieve that status in the future."[42] The comments also note that

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39. *Id.* § 102 cmt. c ("A practice initially followed by states as a matter of courtesy or habit may become law when states generally come to believe that they are under a legal obligation to comply with it. It is often difficult to determine when that transformation into law has taken place.").

40. The comments provide:

> Earlier definitions implied that establishment of custom required that the practice of states continue over an extended period of time. That requirement began to lose its force after the Second World War, perhaps because improved communication made the practice of states widely and quickly known, at least where there is broad acceptance and no or little objection.

Id. at reporters' note 2; *see also supra* note 19 (discussing the rapidity by which customary international law evolves).

41. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702.

42. *Id.* § 702 cmt. a. The reporters' notes restate this caveat: "Other rights may already have become customary law and international law may develop to include additional rights. It has been argued that customary international law is already

systematic religious discrimination, the right to own and not be arbitrarily deprived of property, and gender discrimination were either already principles of customary international law at the time the American Law Institute (ALI) adopted the *Restatement* in 1987, or were on the verge of achieving that status.[43]

According to the *Restatement*, therefore, a plaintiff seeking to prove a violation of customary international law can offer evidence that the practice at issue constitutes one of those stated in (a) through (f) of section 702 of the *Restatement*, is part of a consistent pattern of gross violations within section (g), or is not on the list, but has achieved the status of customary law since the ALI's adoption of the *Restatement*. A court then weighs the evidence offered in support of the alleged violation to determine whether customary international law should apply to the action in question.[44]

In *Forti v. Suarez-Mason*,[45] a federal district court offered three additional criteria for ascertaining whether an act or practice falls within the scope of ATCA as part of customary international law. According to *Forti*, in order to establish a violation of customary international law, the act or practice at issue has to be "universal, definable, and obligatory."[46] Several experts have adopted these categories as a means of demonstrating whether a customary international norm exists.[47] Even with these criteria, however, it remains difficult for courts to discern identifiable norms of international law.[48]

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more comprehensive than here indicated and forbids violation of any of the rights set forth in the Universal Declaration." *Id.* at reporters' note 1.

43. *See id.* § 702 cmts. j-l.

44. As mentioned earlier, although the *Restatement* has no official legal status, judges do consult it for guidance on international legal issues. *See supra* note 11.

45. 672 F. Supp. 1531 (N.D. Cal. 1987).

46. *Id.* at 1540.

47. *See* Affidavit of International Law Scholars at 23, Ortiz v. Gramajo, 886 F. Supp. 162 (D. Mass. 1995) (No. 91-11612 WD), *reprinted in* BETH STEPHENS ET AL., SUING FOR TORTURE AND OTHER HUMAN RIGHTS ABUSES IN FEDERAL COURT: A LITIGATION MANUAL app. 8 at 51A-64A (1993).

48. *See* Enslen, *supra* note 6, at 704-06 (discussing the difficulty of ascertaining whether a norm has been violated when it is unclear whether the violation at issue is "universal"); *see also supra* note 39 and accompanying text (citing the *Restatement*'s recognition of the difficulty in ascertaining the status of international practices).

The fact that the list of customary norms constantly increases only compounds the problem. One expert has noted that "developments affecting human rights in the past decade indicate that the list of customary law rights may have significantly increased."[49] The right to basic sustenance; the right to public assistance in matters of health, welfare, and basic education; and the rights of women to full equality and protection against discrimination have all gained such acceptance in international legal thought that courts may begin to acknowledge them as customary international law.[50]

On the other hand, just because the list of customary international norms continues to grow and the standards remain somewhat ambiguous does not mean that every practice that apparently violates international standards inevitably will become part of customary international law. Despite numerous attempts over the past few years to enlarge the list of customary international norms binding on the United States,[51] the list remains quite small.[52] For instance, courts have yet to find *uniformly* that cruel, inhuman, or degrading treatment of an individual violates customary international law.[53] Similarly, courts have yet to rule that the right to education and the right to free speech are customary international law norms, despite strong arguments for their inclusion.[54]

Perhaps the absence of a definitive explanation of what it takes to establish a customary international law norm contributes to the fact that the list of customary international law

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49. OSCAR SCHACTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 338 (1991).

50. *See id.* at 340.

51. For a list of practices proposed for inclusion in customary international law during the past decade, see Stephens, *supra* note 15, at 455 n.307.

52. *See id.* at 455 (describing the current list of customary international law norms as "extremely short").

53. *See* Ryan Goodman & Derek P. Jinks, Filartiga's *Firm Footing: International Human Rights and Federal Common Law*, 66 FORDHAM L. REV. 463, 506-09 (1997).

54. *See Richard B. Lillich, The Growing Importance of Customary International Human Rights Law*, 25 GA. J. INT'L & COMP. L. 1, 6 (1995) (citing Guinto v. Marcos, 654 F. Supp. 276, 280 (S.D. Cal. 1986) (discussing the right to free speech) and In re Alien Children Educ. Litig., 501 F. Supp. 544, 596 (S.D. Tex. 1980), *aff'd sub nom.* Plyler v. Doe, 457 U.S. 202 (1982) (discussing the existence of a right to education)).

norms remains small. The various attempts to define customary international law remain largely unsuccessful because this area does not lend itself to static definition. Most experts and judges agree that judges must assess whether a violation of the "law of nations" has occurred according to current rather than past definitions of international law.[55] The definition of what constitutes a violation therefore will constantly evolve as individual international practices gradually develop into customary international law.

SUPPORTING THE LEGACY: SUCCESSFUL USES OF CUSTOMARY INTERNATIONAL LAW IN U.S. COURTS

A brief illustration of successful uses of customary international law in U.S. courts helps provide a logical context for the above-mentioned attempts to define and identify customary international law. At least two important cases from the Second Circuit, *Filartiga v. Pena-Irala* and *Kadic v. Karadzic*, and one from the district court for the District of Columbia, *Doe v. Islamic Salvation Front*, illustrate judicial acceptance of the authority of customary international law in U.S. courts. In all three cases, the court relied on the "law of nations" and on customary international law to hold that individuals bringing claims under ATCA have a right to use U.S. courts to enforce norms of international law.

Filartiga v. Pena-Irala

In *Filartiga*, a father and daughter from Paraguay brought a suit under ATCA[56] against a fellow Paraguayan for acts of torture committed in Paraguay against a member of their family.[57] The father and daughter alleged that a member of the Paraguayan police violated international law by kidnapping Joelito Filartiga, a local physician, and torturing him to death because of his father's opposition to the Paraguayan government.[58] They

55. *See* STEPHENS ET AL., *supra* note 47, at 35-36.
56. 28 U.S.C. § 1350 (1994).
57. *See* Filartiga v. Pena-Irala, 630 F.2d 876, 878 (2d Cir. 1980).
58. *See id.* The court had personal jurisdiction over the defendant because he was

based their claim on a violation of the "law of nations" rather than on any action arising directly under a treaty.[59] The court relied on the U.N. Charter[60] and the Universal Declaration of Human Rights[61] in holding that official torture "violates established norms of the international law of human rights, and hence the law of nations."[62] The court cited *The Paquete Habana* as well as the U.N. Charter to support the proposition that "in this modern age a state's treatment of its own citizens is a matter of international concern."[63] *Filartiga* also reaffirmed the existence of a binding international law that confers rights on individuals,[64] and referenced U.S. foreign policy prohibiting security assistance to countries that violate human rights as support for the notion that the United States abides by international law on human rights issues.[65]

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served with a summons and civil complaint while in the United States. *See id.* at 879.

59. *See Filartiga*, 630 F.2d at 880.

60. The U.N. Charter commits signatories, of which the United States is one, to "achiev[ing] international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion." U.N. CHARTER art. 1, para 3. International human rights issues took on global importance through the implementation of the *U.N. Charter* and the U.N. General Assembly's subsequent adoption of the *Universal Declaration on Human Rights*. *See, e.g.*, Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT'L & COMP. L. 287, 290-91 (1995).

61. G.A. Res. 217 III(A), U.N. GAOR, 3d Sess., at 71, U.N. Doc. A/810 (1948).

62. *Filartiga*, 630 F.2d at 880.

63. *Id.* at 881 (citing U.N. CHARTER; The Paquete Habana, 1875 U.S. 677, 700 (1900)). The relevant portions of the *U.N. Charter* provide:

> With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations . . . the United Nations shall promote . . . universal respect for, and observance of, human rights and fundamental freedoms for all without distinctions as to race, sex, language or religion. All Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55.

U.N. CHARTER arts. 55-56.

64. *See Filartiga*, 630 F.2d at 884-85 ("The treaties and accords cited above as well as the express foreign policy of our own government, all make it clear that international law confers fundamental rights upon all people vis-a-vis their own governments." (footnote omitted)).

65. *See id.* at 885 n.17.

The *Filartiga* decision helped verify the credibility of customary international law and the ability of U.S. courts to recognize and enforce such law.[66] The Second Circuit noted that even the district court, which had dismissed the case on jurisdictional grounds, had "recognized the strength of appellants' argument that official torture violates an emerging norm of customary international law."[67]

Kadic v. Karadzic

In *Kadic*, Croat and Muslim victims of crimes committed in Bosnia sued the President of the unrecognized Bosnian-Serb State for rape, forced prostitution, torture, summary execution, genocide, and other atrocities.[68] As in *Filartiga*, the plaintiffs based their suit on a violation of the "law of nations," under ATCA, rather than on any action arising under a treaty.[69] Although the district court had found that it did not have jurisdiction under ATCA to review acts of torture allegedly committed by private actors,[70] the Second Circuit panel reviewing the decision disagreed. Chief Judge Newman acknowledged at the outset of the Second Circuit's opinion that "[m]ost Americans would probably be surprised to learn that victims of atrocities committed in Bosnia are suing the leader of the insurgent Bosnian-Serb forces in a United States District Court in Manhattan,"[71] yet the court found that the plaintiffs sufficiently alleged violations of customary international law for purposes of ATCA, and held that a U.S. court could hold Karadzic liable for the violations.[72]

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66. For discussions on the impact of the *Filartiga* decision, see NEWMAN & WEISSBRODT, *supra* note 6, at 505, 509 ("The Second Circuit's decision in *Filartiga v. Pena-Irala* . . . paved the way for many subsequent suits to compensate victims for violations of international law."); Peter Schuyler Black, *Recent Development*, Kadic v. Karadzic: *Misinterpreting the Alien Tort Claims Act*, 31 GA. L. REV. 281 (1996) (explaining that both courts and litigants struggle with the ATCA's ambiguities); Bradley & Goldsmith, *supra* note 17, at 831-34.

67. *Filartiga*, 630 F.2d at 880.

68. *See* Kadic v. Karadzic, 70 F.3d 232, 236-37 (2d Cir. 1995).

69. *See id.* at 241.

70. *See* Doe v. Karadzic, 866 F. Supp. 734, 741 (S.D.N.Y. 1994).

71. *Kadic*, 70 F.3d at 236.

72. *See id.*

Kadic reiterated the validity of using customary international law to establish jurisdiction to litigate international human rights cases in U.S. courts.[73] The decision, viewed as an expansion of *Filartiga*,[74] relied heavily on that case and the idea that the "law of nations" and customary international law provide jurisdiction for a cause of action in U.S. courts.[75] Karadzic had argued that ATCA, like the Torture Victim Protection Act of 1991 (TVPA),[76] requires a "state actor," but the court rejected his argument.[77] Instead, the court declared:

> We do not agree that the law of nations, as understood in the modern era, confines its reach to state action. Instead, we hold that certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals.[78]

The court also noted Congress's desire to sustain a separate cause of action that would "permit suits based on other norms [not specified in the TVPA] that . . . may ripen in the future into rules of customary international law."[79] Finally, the court cautioned against judicial retreat from disputes that have foreign policy implications, quoting from the Supreme Court's opinion in *Baker v. Carr*[80] that "it is 'error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.'"[81]

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73. *See id.* at 239-40.

74. *See* Enslen, *supra* note 6, at 722-23 ("The *Kadic* opinion is not merely a small step forward from *Filartiga*. Rather, it may properly be viewed as a giant leap for both the rights of individual aliens and the plight of international human rights advocates.").

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

76. 28 U.S.C. § 1350 (1994). TVPA codified the *Filartiga* holding. *See* NEWMAN & WEISSBRODT, *supra* note 6, at 550. It provides a cause of action for specific torture crimes similar to the cause of action provided by ATCA, but it differs from ATCA in that it provides the cause of action to both U.S. citizens and aliens, and it actually eliminates the need for a court to find a customary international norm because it specifies a cause of action for certain identified actions. *See id.* at 551.

77. *See Kadic*, 70 F.3d at 239.

78. *Id.*

79. *Id.* at 241 (quoting H.R. REP. NO. 102-367, at 4 (1991), *reprinted in* 1992 U.S.C.C.A.N. 84, 86).

80. 369 U.S. 186 (1962).

81. *Kadic*, 70 F.3d at 250 (quoting Japan Whaling Ass'n v. American Cetacean

Doe v. Islamic Salvation Front (FIS)

Islamic Salvation Front, the case described briefly at the beginning of this Note, involved eight anonymous Algerian and French women suing a high-ranking official in the Algerian Islamic Salvation Front.[82] Like the plaintiffs in *Filartiga* and *Kadic*, the women in *Islamic Salvation Front* based their claim on ATCA, alleging that the defendant violated customary international law—and thus the "law of nations"—by participating in crimes such as summary execution, rape, mutilation, sexual slavery, and murder.[83] At the outset, the district court declined to follow a prior fragmented D.C. Circuit decision, *Tel-Oren v. Libyan Arab Republic*,[84] which had found that the court lacked subject matter jurisdiction over Israeli citizens who had claimed relief under ATCA for acts of torture committed against them by armed members of the Palestine Liberation Organization (PLO).[85] Instead, in *Islamic Salvation Front*, the court adhered to the reasoning set forth in *Kadic*. Judge Sporkin stated: "The decision in [*Kadic v.*] *Karadzic* came after this Circuit's opinions in *Tel-Oren*. . . . Because of the clarity of the Second Circuit's decision and because the facts there are similar to those in the instant case, this Court finds that it is the appropriate precedent to apply in this case."[86] Discussing the validity of the customary international law claims at issue, the court restated the same ATCA legislative history cited in *Kadic* that left open the possibility of ATCA being used to find remedies for undefined customary norms.[87] The court then denied the defendant's motion to dismiss, reiterating that U.S. courts could hold private actors responsible for claims under ATCA and that the alleged acts of the defendant violated international law.[88]

Soc'y, 478 U.S. 221, 229-30 (1986) (quoting *Baker*, 369 U.S. at 211)).

82. *See* Doe v. Islamic Salvation Front, 993 F. Supp. 3, 3, 5 (D.D.C. 1998).

83. *See id.* at 5, 7.

84. 726 F.2d 774 (D.C. Cir. 1984).

85. *See Islamic Salvation Front*, 993 F. Supp. at 8 (citing *Tel-Oren*, 726 F.2d at 775).

86. *Id.* at 8.

87. *See id.* at 7 (citing H.R. REP. NO. 102-367, at 4 (1991), *reprinted in* 1992 U.S.C.C.A.N. 84, 86); *see also supra* text accompanying note 79 (quoting *Kadic*'s understanding of ATCA legislative history).

88. *See Islamic Salvation Front*, 993 F. Supp. at 8.

Summary

Filartiga, *Kadic*, and *Islamic Salvation Front* embraced the legacy of *The Paquete Habana* by supporting the validity of international human rights claims in U.S. courts based on customary international law. These decisions make clear that the United States has codified the "international law is our law" concept through ATCA, legislation that facilitates U.S. court resolution of claims with international elements.[89] The legacy of respect for international law obtains further potency from the *Restatement*, cited in *Islamic Salvation Front*,[90] *Kadic*,[91] and *Filartiga*.[92]

Although such evidence suggests that the legacy of support for the use of customary international law in U.S. courts is strong, counterevidence demonstrates a solid and growing resistance to the idea that "international law is our law." This counterevidence, which includes specific criticism of *Filartiga* and *Kadic*, general criticism of judicial encroachments into international law, a notable rejection of customary international law by the United States Court of Appeals for the Eleventh Circuit, and overall questions about the sincerity of the United States's commitment to human rights issues, exposes several weaknesses in *The Paquete Habana*'s legacy.

UNRAVELING THE LEGACY: UNDERCURRENTS OF RESISTANCE TO USE OF CUSTOMARY INTERNATIONAL LAW IN U.S. COURTS

Criticism of Filartiga, Kadic, *and Judicial Encroachment into International Law*

Critics of the use of customary international law in U.S. courts have attacked the *Filartiga* and *Kadic* decisions for their flawed reasoning[93] and "inappropriate leniency in allowing U.S.

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89. *See supra* notes 6-7 and accompanying text.

90. *See Islamic Slavation Front*, 993 F. Supp. at 9.

91. *See* Kadic v. Karadzik, 70 F.3d 232, 240 (2d Cir. 1995).

92. *See* Filartiga v. Pena-Irala, 630 F.2d 876, 885 (utilizing RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (1987)).

93. For a critique of the reasoning used in *Filartiga*, see Bradley & Goldsmith, *supra* note 17, at 834. Bradley & Goldsmith state:

> [T]he [*Filartiga*] court relied uncritically on pre-Erie precedents applying [customary international law]. The court appeared not to understand that

courts jurisdiction over international human rights cases."[94] Some fault *Kadic* for broadening the scope of viable claims under ATCA, thereby "increas[ing] the number of potential defendants and consequently the amount of litigation pertaining to international human rights cases."[95] One complaint is that, in an already crowded judicial system, a flood of international human rights cases based on unidentified customary norms, to be decided by judges lacking expertise in international law,[96] poses inherent dangers.[97] Presumably, without clarity on how to assess the validity of customary international law claims adequately, stability and predictability of judicial review evaporate, injecting confusion into courtrooms and fostering arbitrary decisionmaking.[98] To avoid this problem, critics have called for a more narrow construction of ATCA.[99] These critics argue that courts have interpreted the legislation facilitating international claims in U.S. courts too broadly.[100]

Chief Justice Fuller's dissent in *The Paquete Habana* provides ammunition for these critics as well as for those who remain generally opposed to the use of customary international law in U.S. courts:

> these precedents applied [customary international law] as general common law, not federal law. . . . [I]t failed to contemplate the significance of *Erie* for the legal status of [customary international law] . . . . Finally, the court failed to consider the numerous and potentially profound collateral consequences that follow from the view that [customary international law] is federal common law.

Id. (citation omitted).

94. Black, *supra* note 66, at 281.

95. Enslen, *supra* note 6, at 728.

96. *See* Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617, 1668 (1997) (observing that "[j]udges generally lack foreign relations information and expertise").

97. *See* Enslen, *supra* note 6, at 728-29 (discussing the possibility that such cases will burden the United States judicial system).

98. *Cf.* Joan Fitzpatrick, *The Future of the Alien Tort Claims Act of 1789: Lessons from In Re* Marcos Human Rights Litigation, 67 ST. JOHN'S L. REV. 491, 494 (1993) (discussing the basis for challenges to domestic judicial determination of international human rights cases).

99. *See* Joseph Modeste Sweeney, *A Tort Only in Violation of the Law of Nations*, 18 HASTINGS INT'L & COMP. L. REV. 445, 446-47, 453-78 (1995) (arguing that Congress intended ATCA to cover only wrongs committed in violation of the law of prize when United States war vessels search neutral merchant vessels).

100. *See id.*

> I am unable to conclude that there is any such established international rule, or that this court can properly revise action which must be treated as having been taken in the ordinary exercise of discretion in the conduct of war. It cannot be maintained "that modern usage constitutes a rule which acts directly upon the thing itself by its own force, and not through the sovereign power."[101]

Many arguments of those opposing the use of customary international law hinge on what Chief Justice Fuller alluded to—the lack of express domestic authorization for enforcing such law.[102]

Critics also can point to a lack of legislation on international human rights issues and ambiguities in the *Restatement*[103] that make it challenging for the judiciary to rule on the authority of international human rights law in the United States. In addition, critics can highlight the fact that courts in other countries, such as Canada and Great Britain, almost never allow customary international law to be used in human rights litigation in their courts,[104] indicating that the United States should refrain from doing so as well.

The Eleventh Circuit's Decision in Garcia-Mir v. Meese

In *Garcia-Mir v. Meese*,[105] decided between the Second Circuit's *Filartiga* and *Kadic* decisions, the Eleventh Circuit issued an opinion consistent with some of the prevalent criticisms of

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101. The Paquete Habana, 175 U.S. 677, 715 (1900) (Fuller, C.J., dissenting).

102. *See, e.g.*, Bradley & Goldsmith, *supra* note 17, at 817-21, 870-73. Bradley & Goldsmith acknowledge, however, that under "the prevailing view . . . no congressional authorization is necessary in order for courts to apply [customary international law] as federal law; indeed, courts are bound to do so even in the absence of such authorization." *Id.* at 820 (citations omitted). They assert that the "prevailing view" is based upon flawed assumptions and conclude that "the notion that federal courts may apply any law, including [customary international law], without domestic authorization cannot survive *Erie*." *Id.* at 857.

103. *See supra* notes 13, 39 and accompanying text.

104. *See* Anne Bayefsky & Joan Fitzpatrick, *International Human Rights Law in United States Courts: A Comparative Perspective*, 14 MICH. J. INT'L L. 1, 33-34 (1992) (assessing the use of customary international law in Canada and Great Britain and concluding that "it is virtually impossible to identify any instances in which customary international law has played a determinant, or even mildly significant, role in human rights litigation [in those countries]").

105. 788 F.2d 1446 (11th Cir. 1986).

the use of customary international law in U.S. courts.[106] *Garcia-Mir*, which did not include a claim under ATCA, presented the Eleventh Circuit with a customary international law challenge different from the one faced by the Second Circuit in *Filartiga* and *Kadic* and the United States District Court for the District of Columbia in *Islamic Salvation Front*. *Garcia-Mir* involved an appeal of several consolidated cases brought by Cubans who fled to the United States in the Mariel boat lift.[107] One of the charges was that U.S. officials had violated what amounted to a customary international norm against prolonged arbitrary detention.[108] In response to a huge insurge in Cuban refugees, U.S. authorities detained the Cubans in federal penitentiaries because U.S. immigration law rendered them "excludable" and therefore removable,[109] but no other country had agreed to admit them.[110] Domestic law failed to protect them because "excludable" aliens have no legal rights in the United States; therefore, the Cubans sought to prove that their indefinite detention in U.S. prisons constituted a violation of international human rights law.[111]

Other federal district court decisions involving Cuban refugees had intimated that a customary international prohibition on arbitrary detention existed, and that the United States had violated it through its actions against the Cubans. In *Fernandez-Roque v. Smith*,[112] for example, a federal district court stated in dictum that "the various international law principles proscribing prolonged, arbitrary detention of persons are binding on this country and require the same sort of procedural safeguards as the Court has determined below are mandated by the Constitution of the United States."[113] The district court cited the Univer-

106. *See id.* at 1453-55.
107. *See id.* at 1448.
108. *See id.* at 1453; *see also* Fernandez v. Wilkinson, 505 F. Supp. 787, 791-92 (D. Kan. 1980) (adjudicating the claims of Cuban refugees detained by the United States government as an earlier phase of the case), *aff'd on other grounds sub nom.* Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382 (10th Cir. 1981).
109. *See Garcia-Mir*, 788 F.2d at 1453.
110. *See id.* at 1447-48
111. *See id.*
112. 567 F. Supp. 1115 (N.D. Ga. 1983), *rev'd*, 734 F.2d 576 (11th Cir. 1984).
113. *Id.* at 1122 n.2.

sal Declaration of Human Rights,[114] the American Convention on Human Rights,[115] the International Covenant on Civil and Political Rights,[116] and the Protocol Relating to the Status of Refugees[117] for support.[118]

Garcia-Mir rejected these prior indications of support for a decision based on customary international law, producing instead a decision that reflected many of the concerns expressed by critics of customary international law. Although the court did not explicitly deny the existence of an international norm against arbitrary detention, it ultimately found that such a norm was not legally binding in a U.S. court because a "controlling executive or legislative act" on the issue had the power to render the norm nonbinding in the United States.[119] The court found that the requisite "controlling executive act" existed because the Attorney General had acted contrary to the norm against arbitrary detention in deciding to incarcerate the Cubans indefinitely, pending deportation, and that his action as an executive branch official was sufficient to permit departure from the norm.[120] The Eleventh Circuit added that even if the Attorney General's actions were not sufficient, a controlling judicial decision, such as the one in *Jean v. Nelson*,[121] which held that "even an indefinitely incarcerated alien 'could not challenge his continued detention without a hearing,'"[122] would render the norm nonbinding.[123]

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114. G.A. Res. 217 III(A), U.N. GAOR, 3d Sess., at 71, U.N. Doc. A/810 (1948).

115. Nov. 22, 1969, art. 4, para. 5, 1144 U.N.T.S. 144, 146, 9 I.L.M. 673, 676 (entered into force July 18, 1978).

116. *Opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 (entered into force Mar. 23, 1976).

117. Jan. 31, 1967, 19 U.S.T. 6224, 606 U.N.T.S. 267 (entered into force Oct. 4, 1967).

118. The court did not, however, discuss these sources' authority over the court or their impact on the decision. *See* Fernandez-Rogue v. Smith, 734 F.2d 576, 582 n.10 (11th Cir. 1984).

119. Garcia-Mir v. Meese, 788 F.2d 1446, 1453 (11th Cir. 1986) (quoting The Paquete Habana, 175 U.S. 677, 700 (1900)).

120. *See id.* at 1454-55.

121. 727 F.2d 957 (11th Cir. 1984), *aff'd*, 472 U.S. 846 (1985).

122. *Garcia-Mir*, 788 F.2d at 1455 (quoting *Jean*, 727 F.2d at 974-75)

123. *See id.* at 1453-55.

The *Garcia-Mir* court thus carefully avoided an outright disavowal of customary international law while still providing customary international law critics with precedent for their arguments. The decision advised a narrow interpretation of the scope of international law claims supported by *The Paquete Habana* and, in so doing, upheld the view espoused by many critics that the judiciary should refrain from basing decisions on international standards.[124] In addition, *Garcia-Mir* signaled a new warning for plaintiffs of the potential difficulties they could face in attempting to enforce customary international law against U.S. officials.

Doubts About the Sincerity of the United States Commitment to Human Rights Issues

United States foreign policy provides a more general example of resistance to the legacy of *The Paquete Habana*. Ultimately, the legacy of *The Paquete Habana* centers on a respect for international law and a recognition that the United States should adhere to and protect the integrity of international law. To some extent, such respect is evident in the United States. Federal courts have been willing to hear cases based on international law even when none of the events giving rise to a case occurred in the United States.[125] Paying credence to international law in U.S. courts, moreover, Congress has codified international law principles in legislation, including ATCA. This express support manifests the United States's appreciation of the relevance of international law. In addition, the United States's willingness to become a party to several human rights treaties further validates the authority of international human rights law in U.S. courts. Among the human rights treaties to which the United States is a party are the Protocol Relating to the Status of Refugees,[126] the Convention on the Political Rights of Women,[127] the

124. *See id.* at 1454.

125. *See supra* notes 56-88 and accompanying text.

126. Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 (entered into force Oct. 4, 1967).

127. *Opened for signature* Mar. 31, 1953, 27 U.S.T. 1909, 193 U.N.T.S. 135 (entered into force July 7, 1954, and for the U.S. Nov. 1, 1968).

Convention on the Prevention and Punishment of the Crime of Genocide,[128] the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment,[129] and the International Convention on the Elimination of All Forms of Racial Discrimination.[130]

Respect for international law is not, however, as entrenched in the United States as it might seem. Although efforts in the United States do convey some support for enforcement of international rights through the making of treaty law, a closer look at U.S. treaty policy indicates that the United States's commitment to human rights issues is less than firm.[131] Although the United States has provided full support for a handful of human rights treaties,[132] more often it has imposed reservations to those treaties,[133] failed to ratify them for several years, if at all,[134] or refrained from signing them entirely.[135]

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128. *Opened for signature* Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951, and for the U.S. July 7, 1976).

129. *Opened for signature* Feb. 4, 1985, S. TREATY DOC. NO. 100-20 (1988), 23 I.L.M. 1027 (entered into force June 26, 1987, and for the U.S. Feb. 23, 1989).

130. *Opened for signature* Mar. 7, 1966, 660 U.N.T.S. 195, 5 I.L.M. 352 (entered into force Jan. 4, 1969, and for the U.S. Nov. 20, 1994).

131. *See* STEINER & ALSTON, *supra* note 10, at 750 ("One might say that the U.S. has a lesser commitment to and concern with developing international human rights than do many (say, European and Commonwealth) states of a roughly similar political and economic character.").

132. *Cf.* NATALIE HEVENER KAUFMAN, HUMAN RIGHTS TREATIES AND THE SENATE 143-45 (1990) (discussing the signing and ratifying of the Supplementary Slavery Convention and the Convention on the Political Rights of Women).

133. *See id.* at 148-74 (discussing the United States's habitual practice of imposing reservations to treaties).

134. Treaties do not become truly effective until the parties ratify the agreement. The United States often signs treaties and then fails to ratify them for long period of time. *See supra* notes 126-30 and accompanying text. The following treaties are examples of treaties that the United States has signed but not ratified: Convention on the Rights of the Child, *opened for signature* Nov. 20, 1989, 28 I.L.M. 1448 (entered into force Sept. 2, 1990); Convention on the Elimination of All Forms of Discrimination Against Women, *opened for signature* Mar. 1, 1980, 1249 U.N.T.S. 13, 19 I.L.M. 33 (entered into force Sept. 3, 1981); American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123, 9 I.L.M. 673 (entered into force July 18, 1978); and the International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 19, 1966, 993 U.N.T.S. 3, 6 I.L.M. 360 (entered into force Jan. 3, 1976). *See* Naomi Roht-Arriaza, *International Human Rights Law in United States Courts: Professor Riesenfeld's Contributions*, 20 HASTINGS INT'L & COMP. L. REV. 601, 604 n.20 (1997).

135. Examples of treaties the United States has failed to sign include: Inter-Ameri-

Critics of the use of customary international law in U.S. courts can point to weaknesses in the United States's commitment to international treaties, particularly in the field of human rights law, to bolster the argument that courts have no business dictating policy that conflicts with executive branch foreign policy decisions.[136] The theory is that if the President wanted to have the principles reflected in the treaties incorporated into U.S. law, he would sign and submit the treaties to the Senate for ratification.[137] Likewise, if the Senate wanted to incorporate the treaties into U.S. law, it would sign and ratify them.[138] One therefore might view the United States's failure to sign and ratify treaties as signifying that the principles espoused in the unsigned, unratified treaties are not meant to be incorporated into U.S. law. Furthermore, courts should not be free to make and apply those treaties that have been implicitly rejected by the other branches of government.

Summary

Although the resistance to using international law as authority in U.S. courts remains a mere undercurrent at the moment,[139] it does serve to shake the foundation of the underlying

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can Convention on the Prevention, Punishment and Eradication of Violence Against Women, *opened for signature* June 9, 1994, 27 U.S.T. 3301 (entered into force Mar. 5, 1995) (26 States parties); Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty, G.A. Res. 44/128, Annex, 44th Sess., Supp. No. 49, at 207, U.N. Doc. A/44/49 (1989) (entered into force July 11, 1991) (29 States parties); Optional Protocol to the International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16 at 59, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 302 (entered into force Mar. 23, 1976) (87 States parties); Convention Relating to the Status of Refugees, *opened for signature* July 28, 1951, 189 U.N.T.S. 150 (entered into force Apr. 22, 1954) (127 States parties). *See* NEWMAN & WEISBRODT, *supra* note 6, at 39.

136. *See, e.g.*, BURNS H. WESTON ET AL., INTERNATIONAL LAW AND WORLD ORDER 775 (2d ed. 1990) ("What about the possibility of the judiciary embarrassing the executive branch in 'cases having foreign policy implications'?").

137. *See* Curtis A. Bradley & Jack L. Goldsmith, *Federal Courts and the Incorporation of International Law*, 111 HARV. L. REV. 2260, 2268-72 (1998); *cf.* Goldsmith, *supra* note 96, at 1665 (arguing that there is virtually no need for judicial intervention in foreign affairs because of the President's authority in that area, and that such intervention fosters likelihood of judicial error).

138. *See* Bradley & Goldsmith, *supra* note 137, at 2268-72.

139. That customary international law is binding authority in United States courts

principle that U.S. courts are bound by international law. As the resistance gains exposure, courts may begin to question the continued viability of that underlying principle. With the growing prevalence of international human rights cases in U.S. courts,[140] the possible effects of the undercurrents become more consequential, and the threat to the legacy of *The Paquete Habana* becomes more real.

THE FUTURE OF THE LEGACY

In spite of the growing criticism of the use of customary international law in domestic litigation, several factors demonstrate that a significant narrowing, or an express prohibition on its use in U.S. courts, is neither immediately inevitable nor advisable. First, paralleling the recent strong movement to prohibit or narrow use of customary international law in human rights litigation is an equally powerful movement to protect it. Academic criticism of domestic use of customary international law, although prevalent, has been met with persuasive, frequent rebuttals by those who support its use.[141] These rebuttals—by some of the country's most notable international law scholars—refute the critics' arguments and resoundingly declare the continued legitimacy and importance of customary international law in domestic courts.

Harold Hongju Koh notes, for example, that the criticism of customary international law "may have superficial appeal for

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remains the current "prevailing view." *See supra* note 102; *see also* Gordon A. Christenson, *Customary International Human Rights Law in Domestic Court Decisions*, 25 GA. J. INT'L & COMP. L. 225, 225 (1995) ("Traditional customary international law, however, continues to be accepted without express incorporation unless directed otherwise by the political branches."); Henkin, *supra* note 15, at 1557 ("[F]rom our national beginnings both state and federal courts have treated customary international law as incorporated and have applied it to cases before them without express constitutional or legislative sanction.").

140. *See supra* note 18 and accompanying text.

141. *See, e.g.*, Goodman & Jinks, *supra* note 53; Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824, 1827 (1998); Gerald L. Neuman, *Sense and Nonsense About Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 FORDHAM L. REV. 371 (1997); Beth Stephens, *The Law of Our Land: Customary International Law As Federal Law After* Erie, 66 FORDHAM L. REV. 393 (1997).

those not well steeped in the fields of international and foreign affairs law" and that the critics' "anti-judicial-activism rhetoric makes for lively and provocative reading . . . . But even casual reflection compels the conclusion that [those critics] are utterly mistaken."[142] Koh also notes that "[t]he Framers never suggested . . . that the federal courts' power to construe customary international law should be somehow subordinated to the concurrent authority of the political branches to define the law of nations."[143] Similarly, Gerald Neuman points out inherent flaws in critiques of customary international law, such as the critique offered by Curtis Bradley and Jack Goldsmith,[144] and demonstrates that judicial application of customary international law is thoroughly consistent with "the American understanding of democracy."[145] Furthermore, although the federalism and separation of powers arguments against the use of customary international law are provocative, experts have consistently discredited those arguments and explained that customary international law remains compatible with constitutional principles.[146]

Rebuttals such as these, combined with the recent legislative history on TVPA, which specifically preserves the use of customary international law in U.S. courts for norms not individually listed in that Act,[147] suggest that the legacy of support for customary international law remains strong.

Second, although the critics may be correct in noting that significant ambiguities remain in the area of customary international law, those ambiguities do not necessarily defeat the effectiveness and value of using customary international law in international human rights litigation in U.S. courts. Understandably, the argument that customary international law contains

142. Koh, *supra* note 141, at 1827.

143. *Id.* at 1825 n.7.

144. *See* Neuman, *supra* note 141, at 371-83.

145. *Id.* at 383-88.

146. *See* Henkin, *supra* note 15, at 1559-60. For a persuasive, thorough argument as to why the use of customary international law is consistent with the American legal system, see Stephens, *supra* note 141, at 408-61.

147. *See* H.R. REP. NO. 102-367, at 4 (1991), *reprinted in* 1992 U.S.C.C.A.N. 86 (noting that suits based on norms not specified in TVPA that "may ripen in the future into rules of customary international law" remain permissible); *see also supra* note 79 and accompanying text (quoting the legislative history of ATCA).

great ambiguities could lead to a call for clarity and guidance from the *Restatement*, or perhaps from some sort of legislation. From a purely practical perspective, further clarity and guidance on customary international law issues could prove useful for plaintiffs, defendants, lawyers, and judges. From a theoretical perspective, clarification might help codify emerging customary international law trends and reaffirm the enforceability of customary norms in federal courts.

A call for precise clarity and guidance regarding customary international law, however, probably would not be successful and might even be destructive. Customary international law is by its very nature indefinable; it is law that treaties or legislation do not clearly define.[148] Putting forth a very specific definition with firm guidelines for discerning customary norms is not only inadvisable because it inevitably would be underinclusive; it also is impossible due to the continually evolving nature of international law. Furthermore, ambiguities are prevalent throughout many other areas of law. As one international law scholar explained:

> There are, of course, uncertainties and ambiguities in international law, but questions about state practice and community norms are not necessarily more difficult to answer than, for example, questions about due process, equal protection and legislative intent. In purely domestic cases, novel and highly complex technical issues are regularly and successfully addressed. Few international matters are more formidable.[149]

Indeed, part of the judiciary's job is to wade through those ambiguities to make difficult determinations.

The related argument that judges lack the expertise required to make informed decisions regarding international law[150] is simply without merit. If ignorance of the law is no excuse for those

148. *See* Neuman, *supra* note 141, at 376 ("The doctrine [of customary international law] enables the federal courts to fill the gap left when Congress has not specified the domestic legal stance toward an international obligation of the United States or of a foreign state.").

149. Jonathan I. Charney, *Judicial Deference in Foreign Relations*, 83 AM. J. INT'L L. 805, 809 (1989).

150. *See* Goldsmith, *supra* note 96, at 1668.

required to obey the law, it should not be an excuse for those required to decide the law. Judges routinely rule on issues on which they lack expertise.[151] Instead of succumbing to the view that international law is outside the realm of the judiciary and foreclosing to plaintiffs the right to judicial redress, "[t]he challenge now is to educate both domestic advocates and judges as to the usefulness and applicability of an increasing body of law, so that judges routinely consider international law-based arguments with the same ease they consider constitutional or statutory ones."[152]

Third, although it might be true that some other countries do not grant customary international law significant authority in their domestic courts,[153] it is extremely plausible that because these countries tend to ratify human rights treaties more often than the United States, they consequently do not need to rely on customary international law.[154] In addition, some other countries *do* actually demonstrate respect for customary international law in their domestic courts. For example, both German and Austrian courts recognize customary international law and allow it to take precedence over domestic law even if the domestic law is more recent than the customary international law at issue.[155]

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151. *See* Charney, *supra* note 149, at 809. Charney explains:

> The role of the judiciary in these cases does not differ from that played in other cases it routinely decides. The courts are provided with the necessary information by attorneys acting in their roles as advocates. True, individual judges may not hear many international cases, but the judiciary as a whole has done so often. Judges may thus rely upon their personal experience, augmented by resort to prior decisions of other judges, scholarly writings, codifications of the law and the opinions of experts.

Id.

152. Roht-Arriaza, *supra* note 134, at 601. Groups occasionally sponsor voluntary seminars for judges on various topics. *See, e.g.*, Ruth Marcus, *Issues Groups Fund Seminars for Judges*, WASH. POST, Apr. 9, 1998, at A1. Perhaps holding such seminars on the broad topic of international law and, more specifically, customary international law would yield substantial benefits for the judicial system as customary international law claims continue to appear in U.S. courts.

153. *See supra* note 104 and accompanying text (mentioning that Canada and Great Britain almost never use customary international law in their courts).

154. *See* Bayefsky & Fitzpatrick, *supra* note 104, at 38.

155. *See* Henkin, *supra* note 15, at 1565 n.34; *see also* Hannum, *supra* note 60, at 294, 347 (discussing German cases applying customary international law); Lillich, *supra* note 15, at 17-18 & n.89 (discussing use of customary international law in

Given the United States's questionable record with human rights treaties,[156] enforcement of customary international law in U.S. courts is essential to the United States's ability to maintain an international reputation as a strong supporter of individual liberties and a champion of human rights.[157] Allowing the judiciary to rule on human rights claims would not sanction broad judicial activism; rather, it would ensure that the judiciary carries out duties for which it shares responsibility.

> [I]t is submitted that courts cannot be oblivious to the consequences of judicial decisions that ignore international human rights, and, by inaction or restrictive statutory interpretation, tolerate or permit their violation. In the application of constitutional guarantees and in the interpretation of laws that affect human rights, the Supreme Court in particular can neither restrict nor abandon its special constitutional role as the protector of fundamental human rights. In the words of Justice Thurgood Marshall, in his last dissenting opinion before retiring from the Court, the Supreme Court ought not "squander the authority and the legitimacy of this Court as a protector of the powerless."[158]

Finally, perhaps critics can take solace in recognizing that there actually may be little harm in allowing the enforcement of customary international law in U.S. courts. If a court upholds a norm that the legislature finds invalid, a controlling executive or legislative act can subsequently render the norm nonbinding.[159]

German and Austrian courts).

156. *See supra* notes 131-38 and accompanying text.

157. According to some, that reputation has already grown weak. *See* Peter J. Spiro, *The States and International Human Rights*, 66 FORDHAM L. REV. 567, 567 (1997). Spiro writes:

> After several decades in which we could (perhaps with some justification) hold our domestic practice out as the measure against which to judge respect for human rights in other nations, we no longer can claim leadership in this realm. The United States has violated international human rights, on both an episodic and systemic basis.

Id.

158. Edward D. Re, *Judicial Enforcement of International Human Rights*, 27 AKRON L. REV. 281, 287-88 (1994) (quoting Payne v. Tennessee, 111 S. Ct. 2597, 2625 (1991) (Marshall, J., dissenting)).

159. *See supra* note 17 and accompanying text. Congress has a history of responding

The damage done would be minimal. Critics' concerns about the enforcement of norms against U.S. authorities, and the resulting separation of powers anxieties that enforcement might engender, likely are without basis, as the *Garcia-Mir* case demonstrated.[160] Locating a controlling executive or legislative act to render the norm nonbinding probably would present little difficulty, given the broad reading the court in *Garcia-Mir* gave to a "controlling act."[161] The ambiguity surrounding customary international law thus cuts both ways; it not only enables plaintiffs to assert claims that might otherwise be nonjusticiable, it also allows courts the room to moderate the ultimate impact of those claims.

In short, although enforcement of customary international law in human rights litigation in U.S. courts is currently under attack from critics, the legacy of respect for customary international law fostered by *The Paquete Habana* remains defensible. Use of customary international law does force the judiciary to make difficult decisions, but, in spite of the quote at the beginning of this Note,[162] "courts cannot isolate themselves from the great moral issues of the day" and "cannot risk the fate of becoming irrelevant in their crucial role of applying the law as an instrument of justice."[163] Even more fundamentally, in making his statement about the inapplicability of any type of foreign affairs to his role as judge, Judge Robinson apparently overlooked the oft-quoted maxim from Justice Brennan in *Baker v. Carr:* "[I]t is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance."[164]

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swiftly in order to express its disapproval of judicial action it finds unacceptable. For example, through the Civil Rights Act of 1991, Congress expressly overruled the Supreme Court's decision in *Ward's Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), which had allocated the burdens of proof in disparate impact employment discrimination cases in a way that proved extremely difficult for plaintiffs to meet. *See* Stephen L. Hayford & Michael J. Evers, *The Interaction Between the Employment-At-Will Doctrine and Employer-Employee Agreements to Arbitrate Statutory Fair Employment Practices Claims: Difficult Choices for At-Will Employers*, 73 N.C. L. REV. 443, 463 n.99 (1995).

160. *See* Garcia-Mir v. Meese, 788 F.2d 1446 (11th Cir. 1986).

161. *See supra* note 119 and accompanying text.

162. *See supra* text accompanying note 1.

163. Edward D. Re, *Human Rights, Domestic Courts, and Effective Remedies*, 67 ST. JOHN'S L. REV. 581, 591-92 (1993).

164. Baker v. Carr, 369 U.S. 186, 211 (1962).

CONCLUSION

The approaching 100-year anniversary of *The Paquete Habana* sets the stage for a clarification of the United States's commitment to the principle that "[i]nternational law is part of our law."[165] Clarification becomes imperative with the growing number of United States courts hearing international law claims stemming from both treaties and customary international law norms. Much evidence supports the strength of *The Paquete Habana*'s legacy, but resistance to the legacy increases as the reach of international law continues to expand. Harnessing that reach and retreating to an isolationist view that shelters courts from making decisions based on customary international law is an unsettling solution, one that would send the United States tumbling backwards into the past as a new century begins. On the other hand, embracing *The Paquete Habana*'s legacy and reiterating the authority of federal courts to rule on claims based on customary international law would enable courts to carry out their responsibility for protecting the powerless, salvage the United States's reputation for fostering individual liberty, demonstrate an eagerness to participate in global accountability, and move the country confidently into the future.

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165. The Paquete Habana, 175 U.S. 677, 700 (1900).