Brooklyn Journal of International Law

VOLUME VIII SUMMER 1982 NUMBER 2

Articles

THE ENFORCEABILITY OF CUSTOMARY NORMS OF PUBLIC INTERNATIONAL LAW

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INTRODUCTION

International law is part of the law of the United States. Treaties signed and ratified according to constitutional procedures are expressly stated by the Constitution itself to be "the supreme law of the land."[1] Since the earliest days of the Republic, customary international law has been recognized as having equal dignity.[2]

The jurisprudential basis for the incorporation of customary international law into the *corpus juris americanum* has been the subject of extensive academic analysis, and no small amount of dispute.[3] In many of the reported cases concerning the determination and application of customary norms, it has not been necessary for the courts to resolve this matter. These cases usually have involved statutes or other instruments referring expressly to the law of nations. In such cases, interpretation of this vexed term was required in order to give meaning to the texts in which it appeared.

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1. U.S. CONST. art. VI, § 2: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the Land. . . ."

2. *See, e.g.*, Respublica v. De Longchamps, 1 U.S. (1 Dall.) 111, 114 (1784). For a classic historical analysis of the role of international law in the legal system of the newly independent colonies *see* Dickinson, *The Law of Nations as Part of the National Law of the United States* (pts. 1 & 2), 101 U. PA. L. REV. 26, 792 (1952-1953).

3. Customary international law may be part of the laws of the United States because it is part of the federal common law, or because the law of nations generally binds a sovereign acting through its judiciary absent a legislative expression that it does not consent to be bound. Whatever the jurisprudential basis for the proposition, however, it is clear that "the Law of Nations is a part of the law of the land to be ascertained and administered, like any other, in the appropriate case." Dickinson, *supra* note 2, at 26. *See also* the learned discussion of this question in Filartiga v. Peña-Irala, 630 F.2d 876, 885-7 (2d Cir. 1980).

For example, in *United States v. Smith*,[4] the Supreme Court rejected the contention that a statute imposing capital punishment for "the crime of piracy as defined by the law of nations" was unconstitutionally vague.[5] The Court explained that given the discernible and determinate content of the international proscription of piracy, a potential defendant had sufficient notice of the elements of the offense.[6] Yet, customary international law, not positive law, provided the missing definition.

Similarly, in *The Paquete Habana*,[7] the Court construed a presidential proclamation which expressly limited the seizure of prize during the Spanish-American War to those vessels which could be taken under "the law of nations."[8] The question presented was whether a coastal fishing vessel could be taken as prize, or whether the proclamation's express reference to international law effectively conferred immunity upon it.[9] Mr. Justice Gray found that the exemption of coastal fighting vessels from capture as prizes of war had matured from a principle of comity[10] into one of law,[11] and that therefore the Habana could not be taken from its owners.[12] As in *Smith*, the Supreme Court relied on international custom for a guide to its understanding of the words "the law of nations."

United States v. Smith and *The Paquete Habana*, however, may be seen primarily as exercises, not in international law, but in statutory construction. International questions arose in those cases because the meaning and content of the term "the law of nations" were expressly implicated.

Mr. Justice Gray wrote in *The Paquete Habana* that

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4. 18 U.S. (5 Wheat.) 153 (1820).

5. *Id.* at 160-62. *See* An Act to protect the commerce of the United States, and punish the crime of piracy, ch. 77, § 5, 2 Stat. 510 (1819). This statute, essentially unchanged, is today codified at 18 U.S.C. § 1651 (1976).

6. 18 U.S. (5 Wheat.) at 160-62.

7. 175 U.S. 677 (1900).

8. *Id.* at 712. The proclamation announced that the United States would maintain a blockade of Cuba "in pursuance of the laws of the United States, and the laws of nations applicable to such cases." Presidential Proclamation of April 22, 1898, 30 Stat. 1769 (1898).

9. 175 U.S. at 686.

10. *Id.* at 694. "[R]ules of politeness, convenience, and good will . . . are not rules of law, but of Comity. The Comity of Nations is not a source of International Law. But many a rule which formerly was a rule of International Comity only is nowadays a rule of International Law." 1 L. OPPENHEIM, INTERNATIONAL LAW 32-33 (Lauterpacht ed. 1961).

11. 175 U.S. at 708.

12. *Id.* at 714.

"[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination."[13] It therefore follows that the application of customary international law in no way depends upon such express reference by the executive or the legislature as was at issue in *Smith* and *The Paquete Habana.* Surely, determining the content of customary law may often present difficulties of identification which do not arise in the interpretation of domestic law or even of treaties. But the resolution of these difficulties -— that is, the determination that a particular practice has risen to a level of a binding customary norm -— should not call into question the status of international custom as a source of law. The law of nations is part of the United States law whether or not Congress expressly directs the Court's attention to it.[14]

Recently, several federal courts have been presented with claims of rights based primarily in customary international law.[15] In *Filartiga v. Peña-Irala,*[16] the Court of Appeals for the Second Circuit held that the right to be free from torture is a human right, deriving from customary international law and enforceable in domestic courts. Similarly, in *Rodriguez-Fernandez v. Wilkinson,*[17] the Court of Appeals for the Tenth Circuit found that there is an international right to be free from arbitrary imprisonment. However, in *Hanoch Tel-Oren v. Libyan Arab Republic,*[18] a district court declared that if indeed there is a customary norm condemning terrorism, it is not judicially enforceable in the absence of international agreement that such a norm provides for a private right of action.

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13. *Id.* at 700.

14. The Nereide, 13 U.S. (9 Cranch) 388, 423 (1815). ("[T]he Court is bound by the law of nations, which is part of the law of the land."). *See also* Filartiga v. Peña-Irala, 630 F.2d at 886-7.

15. *See, e.g.*, Fernandez v. Wilkinson, 505 F. Supp. 787 (D. Kan. 1980), *aff'd sub nom.* Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382 (10th Cir. 1981); Filartiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980); Hanoch Tel-Oren v. Libyan Arab Republic, 517 F. Supp. 542 (D.D.C. 1981), *appeal docketed,* No. 81-1870 (D.C. Cir. Aug. 4, 1981). *See also* Lareau v. Manson, 507 F. Supp. 1177, 1188 n.9 (D.Conn. 1980); Sterling v. Cupp, 290 Or. 611, 625 P.2d 123, 131 n.21 (1981) (en banc).

16. 630 F.2d 876 (2d Cir. 1980).

17. 505 F. Supp. 787 (D. Kan. 1980), *aff'd sub nom.* Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382 (10th Cir. 1981).

18. 517 F. Supp. 542 (D.D.C. 1981), *appeal docketed,* No. 81-1870 (D.C. Cir. Aug. 4, 1981).

These cases have provoked a much-needed reexamination in judicial decisions and academic writings of the role of customary international norms in the law of the United States.[19] Yet some judges and commentators have failed to appreciate the role and meaning of custom as a source of international law and hence of American domestic law. In addition, the procedural distinctions between the interpretation of a treaty and the identification of a customary norm have become confused. This has resulted in the introduction of a new and potentially disruptive barrier to the full implementation of the emerging international law of human rights in United States courts.

The nature of the confusion concerning the application of customary law may be simply stated: treaties must be either self-executing[20] or legislatively implemented before they may be invoked as a basis for individual rights. If a treaty is self-executing, it does not require express legislative or executive action to make it enforceable; it is enforceable by its nature. Failing to appreciate the parallelism between treaty and custom as sources of law, some writers have searched for executive or legislative implementation of customary law, and, not finding it, have concluded that international custom is not enforceable.[21] Others, under a logically equivalent misunderstanding, have sought to locate the express creation of "a private right of action"[22] as an element of customary international norms before acknowledging that they may create or recognize individual rights.[23]

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19. *See, e.g., Federal Jurisdiction, Human Rights, and the Law of Nations: Essays on* Filartiga v. Peña-Irala, 11 GA. J. INT'L & COMP. L. 307 (1982); *Symposium on the Future of Human Rights in the World Order*, 9 HOFSTRA L. REV. 337 (1981); 4 HOUS. J. INT'L L. _ (1982) (symposium issue).

20. A treaty is self-executing when it generates rights that are directly enforceable; a self-executing treaty does not require implementing legislation to be effective as domestic law. Thus, in People of Saipan v. United States Dep't of Interior, 502 F.2d 90, 97 (9th Cir. 1974), *cert. denied*, 420 U.S. 1003 (1975), the court held that the United Nations Trusteeship Agreement with respect to United States administration of the Trust Territories of the Pacific Islands could be invoked absent express congressional authorization, since it "suggests the intention to establish direct, affirmative, and judicially enforceable rights." But nowhere is it stated in terms that "this agreement shall be self-executing."

21. *See, e.g.*, Note, *Torture as a Tort in Violation of International Law:* Filartiga v. Peña-Irala, 33 STAN. L. REV. 353 (1981).

22. *See generally* Hazen, *Implied Private Remedies Under Federal Statutes: Neither a Death Knell Nor a Moratorium — Civil Rights, Securities Regulation, and Beyond*, 33 VAND. L. REV. 1333 (1980). *See infra* note 43.

23. *See, e.g.*, Hanoch Tel-Oren v. Libyan Arab Republic, 517 F. Supp. 542 (D.D.C. 1981), *appeal docketed*, No. 81-1870 (D.C. Cir. Aug. 4, 1981). *See infra* text accompanying notes 85-88.

It is the thesis of this article that such an analysis is fundamentally erroneous. The existence of a private right of action alleging violation of customary norms follows from, and is determined by, the content of those norms themselves. A private right of action against the perpetrator of certain conduct is the logical correlative of the right to be free from that conduct, or, in other words, of a legal prohibition against that conduct.

It is the same in the interpretation of treaties. A treaty generates the right to invoke the judicial process when, and only when, it creates binding legal obligations. Modern international law, as reflected in both treaty and custom, has made great strides toward specifying and particularizing the rights and duties of individuals.[24] To that extent international law has become a proper basis of federal court jurisdiction in suits implicating those rights and duties.[25]

There is nothing new in this thesis. Indeed, as will presently be shown, courts have consistently relied on such an analysis to distinguish between those treaties which are self-executing and those which are not.

I. When Is A Treaty Self-Executing?

Much of the academic and judicial writing on the issue of when treaties are self-executing has not moved toward a answer to that question. Rather, it has moved in a circle around it. A classic example of such circular reasoning is the following statement of the United States Court of Appeals for the Third Cir-

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24. For a collection of human rights instruments *see* Human Rights: A Compilation of International Instruments (1978), U.N. Doc. ST/HR/1/Rev.1. For background on the development of international human rights *see* United Nations Action in the Field of Human Rights (1980), U.N. Doc. ST/HR/2/Rev.1; L. Henkin, The Rights of Man Today (1978); L. Sohn & T. Buergenthal, International Protection of Human Rights (1973); E. Schwelb, Human Rights and the International Community (1964); Bilder, *The Status of International Human Rights Law: An Overview*, in International Human Rights: Law and Practice 1, 8 (Tuttle rev. ed. 1978); Sohn, *A Short History of United Nations Documents on Human Rights*, in The United Nations and Human Rights, 18th Report of the Commission 71 (Commission to Study the Organization of Peace ed. 1968).

25. *See generally* R. Falk, The Role of Domestic Courts in the International Legal Order (1964); Lillich, *The Proper Role of Domestic Courts in the International Legal Order*, 11 Va. J. Int'l L. 9 (1970). *See also* Nayer, *Human Rights: The United Nations and United States Foreign Policy*, 19 Harv. Int'l L.J. 813 (1978); Salzberg & Young, *The Parliamentary Role in Implementing International Human Rights: A U.S. Example*, 12 Tex. Int'l L.J. 251 (1977); Weissbrodt, *Human Rights Legislation and U.S. Foreign Policy*, 7 Ga. J. Int'l & Comp. L. 231 (1977).

cuit: "[U]nless a treaty is self-executing, it must be implemented by legislation before it gives rise to a private cause of action."[26] Or, as the Court of Appeals for the Fifth Circuit noted, "treaties affect the municipal law of the United States only when those treaties are given effect by congressional legislation or are, by their nature, self-executing."[27]

Since the term "self-executing treaty" generally means a treaty which generates rights that are directly enforceable,[28] it will be seen that these two judicial formulations are straightforward tautologies. They simply reiterate the definition of the term "self-executing." For the purposes of this analysis, that approach will be set aside. Instead of seeking to establish whether a treaty is self-executing to determine the viability of a private cause of action thereunder, the following is the proper question to pose: Does the treaty purport to recognize or create an individual right to demand, or to be free from, certain conduct, whether public or private?[29]

The question posed is far from simple, but it is one which may be assaulted with the traditional weapons of the judicial armory: statutory construction, recourse to legislative history, reasoning by analogy to other areas of law, and an entire battery of precedents, maxims, and principles. Courts routinely approach cases in this manner, although not often expressly and perhaps not even deliberately. No exhaustive list could conceivably be devised of all indicia pointing to or creating individual rights, but some of the more important indicators which the courts must canvass will be discussed below.

A. What does the treaty actually say?

In some treaties rights are quite expressly acknowledged or created, or conversely, it is clearly said that no rights should be inferred. These are the easy cases, over which judges rarely must tarry long. It should be noted that express recognition in a treaty of a private right of action is a sufficient though not a

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26. Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1298 (3d Cir. 1979) (citations omitted).

27. United States v. Postal, 589 F.2d 862, 875 (5th Cir.), *cert. denied*, 444 U.S. 832 (1979) (citations omitted).

28. *See supra* note 20.

29. This is what H.L.A. Hart called a "primary right," as opposed to a "secondary right," the right of access to a specific legal process or remedy. *See generally* Hart, *Definition and Theory in Jurisprudence*, 70 LAW Q. REV. 37 (1954).

necessary condition for the holding that such a right exists.

Thus, in *Asakura v. City of Seattle*,[30] the Supreme Court found the language of a bilateral agreement between the United States and Japan[31] to be unambiguous in its prohibition of a Seattle licensing ordinance.[32] The ordinance required all pawnbrokers to obtain a license but made United States citizenship a prerequisite to qualification.[33] The international agreement read as follows:

> The citizens or subjects of each of the High Contracting Parties shall have liberty to enter, travel and reside in the territories of the other to carry on trade, wholesale and retail, to own or lease and occupy houses, manufactories, warehouses and shops, to employ agents of their choice, to lease land for residential and commercial purposes, and generally to do anything incident to or necessary for trade upon the same terms as native citizens or subjects, submitting themselves to the laws and regulations there established . . . . The citizens or subjects of each . . . shall receive, in the territories of the other, the most constant protection and security for their persons and property . . . .[34]

The Court said of the Seattle regulation that "[t]he ordinance violates the treaty," and enjoined its enforcement.[35] The treaty, however, was silent on the queston of its enforceability by individuals.

On the other hand, a treaty may specifically obligate each party to do something, such as to perform an executive or a legislative act, which will itself engender consequent rights. Until that act is done, those rights are not created. This was the situation in the landmark decision of Chief Justice Marshall in *Foster v. Neilson*,[36] said to be the *locus classicus* of the notion of

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30. 265 U.S. 332 (1924).

31. Treaty of Commerce and Navigation, Feb. 21, 1911, United States - Japan, 37 Stat. 1504, T.S. No. 558 [hereinafter cited as Treaty of Commerce and Navigation].

32. 265 U.S. at 342-43.

33. *Id.* at 339-40.

34. *Id.* at 340, *quoting* Treaty of Commerce and Navigation, *supra* note 31, art. 1.

35. 265 U.S. at 343.

36. 27 U.S. (2 Pet.) 253, 314 (1829). Chief Justice Marshall developed the following contractual analysis to determine if any rights existed under the treaty:

> A treaty is in its nature a contract between two nations, not a legislative act. It does not generally effect, of itself, the object to be accomplished, especially so far as its operation is infra-territorial; but is carried into execution by the sovereign power of the respective parties to the instrument.
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> In the United States a different principle is established. Our constitution

self-executing treaties. In *Foster*, the treaty under review contained a commitment by the United States to ratify legislatively certain grants of land by the King of Spain.[37] The United States failed to ratify the grant upon which the plaintiff sought to rely. Chief Justice Marshall held that unless and until the required legislation was enacted, the grant could not be recognized.[38] Since the United States had contracted to perform a particular act, rights flowing from that act were created, not by the treaty, but by its legislative implementation.

B. What obligations, if any, does the treaty impose?

Some treaties require that States or their subjects act, or refrain from acting, in certain ways. Others merely exhort them to meritorious conduct. Since the language of the human rights provisions of the United Nations Charter[39] — articles 55 and 56 — seems to be hortatory rather than mandatory, many courts have concluded that those provisions are not self-executing.[40] Though the matter is far from clear,[41] it is submitted that this

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declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court.

37. *Id.* at 310. Treaty of Amity, Settlement, and Limits, Feb. 22, 1819, United States-Spain, arts. 6 & 8, 8 Stat. 252, T.S. No. 327.

38. 27 U.S. (2 Pet.) at 315.

39. U.N. CHARTER, art. 55, 59 Stat. 1033 (1945), T.S. No. 993, states:

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

(a) higher standards of living, full employment, and conditions of economic and social progress and development;

(b) solutions of international economic, social, health, and related problems; and international cultural and educational co-operation; and

(c) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

Article 56 states: "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." The U.N. Charter is a treaty of the United States.

40. Hitai v. Immigration and Naturalization Service, 343 F.2d 466, 468 (2d Cir.), *cert. denied*, 382 U.S. 816 (1965); Pauling v. McElroy, 164 F. Supp. 390, 393 (D.D.C. 1958), *aff'd*, 278 F.2d 252 (D.C. Cir.), *cert. denied*, 364 U.S. 835 (1960); Sei Fujii v. State, 38 Cal. 2d 718, 242 P.2d 617, 620-21 (1952).

41. For a statement of the opposing view (although the "opposition" is to the means

view is correct: as treaty provisions in a historical vacuum, articles 55 and 56 are not sufficiently precise to create or to acknowledge individual rights. But to concede that point is not to desert the human rights banner on the field of battle: for through custom, as will be seen, the normative content of the Charter articles reemerges as independently enforceable.[42]

C. Can the treaty fairly be said to create a "protected class" of individuals?

It is commonplace that whether a statute creates a private right of action — that is, whether an individual plaintiff can maintain an action against an alleged violator — depends to a large extent upon whether the individual who would exercise that right is a member of a class protected by the statute.[43] This is a question normally resolved, by American courts at least,[44] after analysis of the intentions of the legislature which enacted the law, as revealed in the legislative history.[45]

In the case of treaties, this analysis contains two strands. First, there is the genesis of the treaty itself: the *travaux préparatoires* of its drafters and negotiators. Second, there is the legislative process surrounding its ratification by the United States.

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of the conclusion, not to the conclusion itself), *see* Paust, *Book Review*, 56 N.Y.U. L. REV. 227, 238-42 (1981).

42. *See infra* text accompanying notes 50-52.

43. The seminal case on this point is Cort v. Ash, 422 U.S. 66 (1975). The Supreme Court enunciated a four-part test to determine whether plaintiffs had an implied right of action for damages under a criminal statute:

> First, is the plaintiff 'one of the class for whose *especial* benefit the statute was enacted.' . . . that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? . . . Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? . . . And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law? . . .

Id. at 78 (emphasis in original) (footnotes omitted). For recent Supreme Court cases on implied private right of action *see* Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11 (1979) (securities regulation); Davis v. Passman, 442 U.S. 228 (1979) (constitutional rights); Cannon v. University of Chicago, 441 U.S. 677 (1979) (statutory civil rights).

44. It is otherwise in England, for example. The existence or absence of a protected class is determined there without recourse to extrinsic authorities, at least in theory. *See, e.g.*, Sagnata Investments Ltd. v. Norwich Corp., [1971] 2 Q.B. 614.

45. *See* Cort v. Ash, 422 U.S. at 82-84.

Thus even when the actual text of a treaty may leave room for doubt as to whether individual rights are either acknowledged or created, the historical process which gave rise to that text may resolve these doubts. Furthermore, the Senate of the United States, in giving its advice and consent as laid down in the Constitution,[46] may expressly decline to endorse rights provisions.[47] To this, however, two caveats must be sounded: such a reservation must comport with the rules of international law governing reservations generally.[48] Also, even an express reservation with respect to a norm of treaty law may be inadequate to deflect the development of an identical norm through customary international law.[49]

It will be noted, however, that the existence of a "protected class" under a treaty does not require an express textual provision to that effect. A statute incidentally conferring a private cause of action need not so state. This is rather a conclusion for the courts to infer, on the basis of the criteria discussed above, and perhaps of others as well.

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46. U.S. CONST. art. II, § 2, cl.2.

47. For example, President Carter sent the International Covenant on Civil and Political Rights, G.A. RES. 2200A, 21 U.N. GAOR, Supp. (No. 16) 52, U.N. Doc. A/6316 (1966), to the Senate with the request that advice and consent be given to its ratification. The President's accompanying transmittal letter explained that "[w]henever a provision [of the treaties] is in conflict with United States law, a reservation, understanding or declaration has been recommended." Message of the President Transmitting Four Treaties Pertaining to Human Rights, 14 WEEKLY COMP. OF PRES. DOC. 395 (Feb. 23, 1978). For the specific recommendations *see* Letters of Submittal from Warren Christopher, Department of State, to President Carter, of the Discrimination Convention, the Economic, Social and Cultural Covenant, and the Civil and Political Covenant (Dec. 17, 1977), S. EXEC. DOC. Nos. C,D,E,F, 95th Cong., 2d Sess. V-XV (1977). For an analysis of these recommendaions *see* Comments, *The International Covenant on Civil and Political Rights and United States Law: Department of State Proposals for Preserving the Status Quo,* 19 HARV. INT'L L.J. 845 (1978).

48. *See* Vienna Convention on the Law of Treaties, arts. 19-23, *done* May 23, 1969, U.N. Doc. A/CONF. 39/27, *entered into force* Jan. 27, 1980 (procedures regarding reservations).

49. There is tantalizingly little express authority on this point. Judge Rogers of the United States District Court for the District of Kansas appears, however, to uphold customary international norms as binding on the United States even in the face of a refusal by the Senate to ratify treaties codifying them. Fernandez v. Wilkinson, 505 F. Supp. 787, 798-900 (D.Kan. 1980), *aff'd sub nom.* Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382 (10th Cir. 1981). Later emergence of a binding custom should override a prior legislative act under normal canons of statutory interpretation. *But cf.* L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 221-22 (1972) ("[I]t has not been decided whether a newly developed principle of customary international law would be applied by the courts in disregard of an earlier statute . . . .").

D. Have subsequent events materially altered the content of treaty obligations?

In the face of a universal tendency to interpret treaty provisions in certain ways, silence by the legislature may well constitute an endorsement of the emerging interpretation. Like the Constitution itself, treaties may be said to evolve, and that evolution may include the birth and maturation of rights perhaps not thought present before.

Some commentators believe that after thirty years of widespread adoption and endorsement as a guide to the interpretation of the United Nations Charter human rights provisions,[50] the Universal Declaration of Human Rights[51] has supplied the requisite specificity to make those provisions enforceable.[52] Nor is construction of a statutory instrument by reference to subsequent legislative action or inaction a novel technique in difficult cases.[53]

Rights founded in a treaty — once they have been determined through such an analysis as this one — take their place in the panoply of rights vouchsafed by the Constitution. They are fully part of the patrimony of all persons subject to the treaty, and they may be protected through appropriate judicial procedures.

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50. U.N. CHARTER, arts. 55 & 56. *See supra* note 39.

51. Universal Declaration of Human Rights, G.A. Res. 217, U.N. Doc. A/1810 at 271 (1948).

52. Although the Universal Declaration of Human Rights is not a treaty and was adopted in the form of a nonbinding resolution, international publicists and many governments today assert that it provides an authoritative definition of the fundamental human rights recognized in the United Nations Charter which States are under an obligation to promote. *See* Filartiga v. Peña-Irala, 630 F.2d 876, 881-83 (2d Cir. 1980); Legal Consequence For States Of The Continued Presence of South Africa In Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 16, 76 (Advisory Opinion of June 21) (separate opinion of Judge Ammoun); Proclamation of Teheran, Final Act of the International Conference on Human Rights 3, at 4, para. 2, U.N. Doc. A/CONF. 32/41 (1968); R. LILLICH & F. NEWMAN, INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW AND POLICY 7 (1979); Bilder, *The Status of International Human Rights Law: An Overview*, INTERNATIONAL HUMAN RIGHTS: LAW AND PRACTICE 1, 8 (Tuttle rev. ed. 1978); Sohn, *A Short History of the United Nations Documents on Human Rights*, in UNITED NATIONS AND HUMAN RIGHTS, 18th REPORT OF THE COMMISSION 71-73 (Commission to Study the Organization of Peace ed. 1968).

53. An interesting illustration of this point may be seen in the disagreement between the Courts of Appeals for the Second and Fifth Circuits in Real v. Simon, 510 F.2d 557 (5th Cir. 1975) and in Richardson v. Simon, 560 F.2d 500 (2d Cir. 1977), *appeal dismissed*, 435 U.S. 939 (1978). *See also* Tagle v. Regan, 643 F.2d 1058 (5th Cir. 1981).

II. When Are Customary International Norms Enforceable?

Strictly speaking, international custom cannot be described as self-executing, since that is a term correctly reserved for textual provisions. But with only minor alterations, the analysis suggested above applies equally to the enforceability of customary norms. This result is not unexpected: as we have seen, customary law and treaty law stand on equal footing as part of the law of the United States.[54]

The analytic technique of searching for rights which may be recognized or guaranteed, rather than concentrating on such formal matters as the presence or absence of legislative implementation, yields the same result for custom as for treaty. When customary norms may be said to have created rights, those rights are enforceable in United States courts, because customary international law is part of the law of the United States.

There is, however, one question that must be asked when a customary norm is asserted which need not be posed in the case of a treaty. Since custom cannot be determined unequivocally by however careful a reading of treaty texts, a court confronted with a case asserting a right under customary law must first ascertain whether, in fact, a relevant customary norm exists at all. For example, if it determines that there is a customary prohibition against certain actions, it must then, conducting the kind of survey proposed herein, decide whether the norm is of the sort that warrants private enforcement.

Determination of the existence and content of a customary international norm is no easy matter. But there do exist techniques, endorsed by both domestic and international tribunals, to aid judges in carrying out that task.

These techniques are the ones set down by Mr. Justice Gray in *The Paquete Habana:* in the absence of a controlling treaty or statute,

> 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. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning

54. *See supra* text accompanying notes 1-14.

> what the law ought to be, but for trustworthy evidence of what the law really is.[55]

The Statute of the International Court of Justice,[56] in article 38, lists three primary sources and one secondary source of international law. First to be consulted are treaties,[57] "international custom, as evidence of a general practice accepted as law,"[58] and "the general principles of law recognized by civilized nations."[59] A "subsidiary means" of determining the law to be applied is the body of judicial and academic writings on the point.[60]

Strict standards must be met before a custom is recognized as having been transmuted into a binding legal norm. Lack of unanimity or universality will normally defeat this metamorphosis, unless it can be explained away. Thus, the United States Supreme Court declined to find an international custom prohibiting uncompensated expropriations in *Banco Nacional de Cuba v. Sabbatino*.[61] The International Court of Justice held without normative force a custom concerning delimitation of the continental shelf in the *North Sea Continental Shelf Cases*.[62] And in

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55. 175 U.S. at 700.

56. Statute of the International Court of Justice, art. 38, June 26, 1945, 45 Stat. 1055, 1060 (1945). It is part of the United Nations Charter, *see id.* art. 92, and therefore is a treaty of the United States. *See supra* note 39.

57. Statute of the International Court of Justice, art. 38(1)(a).

58. *Id.* art. 38(1)(b).

59. *Id.* art. 38(1)(c).

60. *Id.* art. 38(1)(d). Pursuant to Article 59 of the Statute of the International Court of Justice, judicial decisions do not bind parties in future cases, but serve only as evidence of custom.

61. 376 U.S. 398, 428-430 (1964).

62. North Sea Continental Shelf (W. Ger. v. Den., W. Ger. v. Neth.), 1969 I.C.J. 3, 45, para. 81 (Judgment of Feb. 20). In determining whether a mandatory rule of customary international law had crystallized, the Court developed the following test to analyze the evidence of State practice concerning boundary delimitation:

> [E]ven if these instances of action by non-parties to the Convention were much more numerous than they in fact are, they would not, even in the aggregate, suffice in themselves to constitute the *opinio.juris;* — for, in order to achieve this result, two conditions must be fulfilled. Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis.* The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough. There are many international acts, e.g., in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy,

the *Nuclear Tests* case,[63] the International Court of Justice declined to hold that France was bound by a custom of which the proffered evidence was express endorsement by over ninety nations.[64]

Once a customary norm is found using traditional techniques, it must still be scrutinized before it may be validly asserted as a source of primary rights.[65] In conducting that operation, however, one should neither seek nor expect to find provision for a private right of action as an express component of the norm. Rather, such a right is to be inferred, established as a correlative of the norm's substantive content.

This is precisely the structure of the decision of the Court of Appeals for the Second Circuit in *Filartiga v. Peña-Irala.*[66] The court found sufficient authority to indicate the existence of a customary norm of international law prohibiting official torture.[67] It then found that norm sufficiently precise and explicit to create (or to recognize) the right to be free from torture.[68] Plainly such a norm has as its entire inspiration the protection of a class of persons, to which plaintiffs' decedent in *Filartiga* was alleged to belong.[69]

Given these factors, the court held that there is a right in customary international law, and therefore in the law of the United States, to be free from torture.[70] If there is such a right — as the court emphatically concluded — then there should be no need to continue the search for a private cause of action to enforce it. To be free from torture is a right under United States law. That is enough to enlist the aid of the judiciary in the pro-

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convenience or tradition, and not by any sense of legal duty.

Id. at 44, para. 77.

63. Nuclear Tests (Aust. v. Fr.), 1974 I.C.J. 253 (Judgment of Dec. 20); Nuclear Tests (N.Z. v. Fr.), 1974 I.C.J. 457 (Judgment of Dec. 20).

64. *See, e.g.*, Nuclear Tests (Aust. v. Fr.), 1974 I.C.J. 253, 288 (Judgment of Dec. 20) (Separate opinion of Judge Gros).

65. *See supra* note 29 and accompanying text.

66. 630 F.2d 876 (2d Cir. 1980).

67. *Id.* at 884.

68. *Id.* at 884-85.

69. Since at issue in *Filartiga* was defendant's motion to dismiss, the allegations in the complaint were taken as true. *See, e.g.*, Newport News Shipbuilding & Dry Dock Co. v. Schauffer, 303 U.S. 54, 57 (1938) (allegations of facts, but not conclusions of law, accepted as true on motion to dismiss).

70. "[I]nternational law confers fundamental rights upon all people vis-a-vis their own governments . . . [W]e hold that the right to be free from torture is now among them." 630 F.2d at 885.

tection of that right.[71]

Specifically at issue in *Filartiga* was the construction of 28 U.S.C. § 1350,[72] which gives the district courts original jurisdiction over tort suits brought by aliens, alleging "violation of the law of nations or a treaty of the United States."[73] Of the three jurisdictional prerequisites, two — that the suit be one in tort and that the plaintiffs be aliens — were plainly satisfied in *Filartiga*. Judge Kaufman eloquently established the third: that the torture alleged in the complaint was a violation of (customary) international law.

Judge Kaufman went further, however, and showed also that torture is a violation of United States law, since international law is part of the law of the land.[74] If this part of the holding is correct — and it is submitted that it is — then jurisdiction in *Filartiga* would have lain not only under section 1350, but under section 1331[75] as well.[76] As Judge Kaufman noted, it was not necessary for the court to address this point;[77] nevertheless, *Filartiga* amply supports the proposition that customary international law is incorporated in United States law, and that United States courts possess jurisdiction to decide cases in which it is invoked.[78] Nor is *Filartiga* a case of the *United States v. Smith* variety: the invocation of custom as a source of law does not derive its force from the express reference to "the law of nations" in a statute. Judge Kaufman found customary law to be enforceable in United States courts to the extent that it creates or recognizes individual rights.

Similarly, the district court in *Fernandez v. Wilkinson*[79] found that an international customary norm condemning arbitrary imprisonment had as its correlative an individual right to

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71. The author has explored the Latin maxim *ubi jus, ibi remedium* in *The Legal Rights of Refugees*, 3 MICH. Y.B. INT'L LEGAL STUD. 373 (1982).

72. 28 U.S.C. § 1350 (1976). The statute was originally enacted as § 9(b) of the Judiciary Act of 1789, 1 Stat. 73, 77.

73. 28 U.S.C. § 1350 (1976).

74. 630 F.2d at 885-9.

75. 28 U.S.C. § 1331 (1976).

76. Judge Kaufman discusses this question briefly in a footnote: 630 F.2d at 887 n.22.

77. *Id.*

78. 630 F.2d at 880-1. The author has discussed this aspect of the *Filartiga* holding in more detail in his article, *The Legal Rights of Refugees*, *supra* note 71.

79. 505 F. Supp. 787 (D. Kan. 1980), *aff'd sub nom.* Rodriguez-Fernandez v. Wilkinson 654 F.2d 1382 (10th Cir. 1981).

be free of that practice.[80] Nor did the United States Court of Appeals for the Tenth Circuit, in sustaining the district court's decision on avowedly different grounds,[81] in any way derogate from the underlying principle enunciated by the district court. The court of appeals did not rely on customary international law as the ultimate source of plaintiff's right, as the district court had, finding a more satisfactory basis in the Constitution.[82] But the court of appeals looked to international law as a gloss upon constitutional guarantees of due process.[83] Moreover, the court found that there is an individual right to be free from arbitrary imprisonment and that such a right has a basis in international law.[84]

That rights may have constitutional as well as customary international law underprinnings is, of course, all to the good. It is, indeed, a great measure of the majesty of our Constitution that, after nearly two centuries, its precepts of human dignity have hardly been overtaken by the law of nations however rapidly developing.

The analysis set out above, however, has not been universally observed by the courts. In *Hanoch Tel-Oren v. Libyan Arab Republic*,[85] Judge Joyce Hens Green of the United States District Court for the District of Columbia was confronted with a claim that certain terrorist acts allegedly perpetrated by the Palestine Liberation Organization were in violation of a customary norm which gave individuals the right to be free of such acts.

It would have been sufficient to hold that there is inadequate evidence of an international norm prohibiting such acts,[86]

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80. 505 F. Supp. at 798.

81. 654 F.2d at 1389. The court of appeals found that the Immigration and Naturalization Act of 1952, 8 U.S.C. § 1101 *et seq.*, did not permit indefinite detention as an alternative to excluding aliens.

82. *Id.* at 1387. The court of appeals declared that "an excluded alien in physical custody within the United States may not be 'punished' without being accorded the substantive and procedural due process guarantees of the Fifth Amendment."

83. *Id.* at 1388.

84. "No principle of international law is more fundamental than the concept that human beings should be free from arbitrary imprisonment." *Id.* Customary international law has similarly been employed by the United States District Court for the District of Connecticut in Lareau v. Manson, 507 F. Supp. 1177, 1187-89 n.9 & 1193 n.18 (D. Conn. 1980) (citing international human rights principles establishing the right to be free from cruel and inhuman prison conditions).

85. 517 F. Supp. 542 (D.D.C. 1981), *appeal docketed*, No. 81-1870 (D.C. Cir. Aug. 4, 1981).

86. The court listed a number of United Nations declarations and treaties, eight of which the United States has not ratified, but apparently concluded that these instru-

and that even if there were such a norm it is of insufficient precision to establish individual rights.[87] The decision of the district court, however, did not stop there.[88] Judge Green's opinion contains the following language, which, it is respectfully submitted, is most unfortunate:

> [U]nless treaties to which the United States is a party or even the law of nations generally provide a private right of action, no jurisdictional grant, be it § 1331 or § 1350, can aid a plaintiff seeking relief in federal district court. . . . Absent the clear indication . . . that nations intend to subject themselves to such worldwide jurisprudential assaults [*i.e.* private lawsuits alleging violation of customary international law], jurisdiction under § 1350 will not vest.[89]

It is most important that *Tel-Oren* not be taken in future cases to stand for the proposition that a private cause of action, to enforce a right derived from customary international law, must be separately provided for. As in the case of treaty norms, enforceability is established by the existence of an individual right such a cause would seek to vindicate. One can reasonably infer from the statements cited above and from other *dicta*[90] that Judge Green did posit the requirement of consensus to rem-

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ments were not sufficient evidence for the existence of an international prohibition. 517 F. Supp. at 545-46.

87. The court found that neither treaties nor the law of nations provided plaintiff with a cause of action by which individual rights could be vindicated. *Id.* at 548. But the decision does not expressly address the question whether there is a customary norm which is sufficiently precise to create individual rights.

88. The author believes that, for numerous reasons, the decision of Judge Green dismissing the complaint was ultimately correct. For an explanation of these reasons, *see* Schneebaum, *A Reply to Professor Oliver*, 4 HOUS. J. INT'L L. _ (1982).

89. 517 F. Supp. at 549-50. Plaintiffs had alleged jurisdiction under 28 U.S.C. § 1331 (1976) (federal question jurisdiction) and 28 U.S.C. § 1350 (1976) (Alien Tort Claims Act). For an examination of the Alien Tort Claims Act as a basis of jurisdiction *see* Filartiga v. Peña-Irala, 630 F.2d at 880, 885, 887-89; Blum & Steinhardt, *Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act after* Filartiga v. Peña-Irala, 22 HARV. INT'L L.J. 53 (1981).

90. For example, the court declares that the drafters of the Constitution and the Judiciary Act "did not contemplate the use of the federal courts as a substitute for an international tribunal, adjudicating claims arising under international law, when no private right of action was provided." 517 F. Supp. at 551 (footnote omitted). Of course, neither in 1789 nor today would private plaintiffs have standing to bring a complaint before an international tribunal. "International Law is primarily concerned with the rights and duties of States and not those of other persons; . . . States only possess full procedural capacity before international tribunals." 1 L. OPPENHEIM, INTERNATIONAL LAW 20 (Lauterpacht ed. 1961).

edies.[91] Such too is the implication of a sentence the Judge excerpts from a law review critique of *Filartiga:* "[T]o interpret international human rights law to create a private right of action overstates the level of agreement among nations on remedies for human rights violations."[92]

Customary international law creates individual rights, or recognizes their existence, when the indicia of custom point to the evolution of certain legal norms. Just as a treaty need not expressly provide for private enforcement to be the basis for a claim of rights,[93] there need be no specific consensus as to remedies for violations of customary law. The nations of the world may not have agreed to have the legality of alleged acts of terrorism adjudicated in foreign courts, but this is because they have not yet agreed that those acts are committed in violation of the rights of their victims. Were there to be such an agreement, there would be a concomitant acquiescence to the jurisdiction of any court before whom the perpetrator could be brought to justice.

There need not be international agreement for an international wrong to be remediable in United States courts, whether the offending act violates treaty or custom. It is enough that there be agreement on rights. At present, there may be no such consensus with respect to the legal status of the acts alleged in *Tel-Oren.* But the existence of consensus, indeed near-unanimity, among nations in the prohibition of torture (*Filartiga*) and of arbitrary imprisonment (*Fernandez*) has been clearly established.[94] Until cases or controversies alleging other violations of customary international law are presented to the courts for adjudication, it will not be known in what other areas international custom has fully evolved into a guarantor of rights.[95]

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91. Elsewhere, however, the Judge declares "that only treaties with a specific provision permitting a private action, or one to be clearly inferred, may suffice as the basis for federal jurisdicton." 517 F. Supp. at 546; *see also id.* at 547, 548 ("private rights of action — express or implied"), 549 and 550.

92. 517 F. Supp. at 549, *citing* Note, *Torture as a Tort in Violation of International Law:* Filartiga v. Peña-Irala 33 STAN. L. REV. 353, 357 (1981).

93. *E.g.*, the treaty explicated in *Asakura, see supra* text accompanying note 34, or that in *Saipan, supra* note 20.

94. None of this is to say that offenses against these norms are not committed with alarming and distressing regularity. *See* Filartiga v. Peña-Irala, 630 F.2d at 884 n.15.

95. For a discussion of what acts, other than torture, may be actionable human rights violations *see* Blum & Steinhardt, *Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act after* Filartiga v. Peña-Irala, 22 HARV. INT'L L.J. 53, 87-97 (1981).

Conclusion

Customary international law shares entirely with treaty law the dignity of forming a part of the law of the United States. Where each is of sufficient precision and of proper content to acknowledge or to generate individual rights, it can stand, without more,[96] as the basis of a claim justiciable in United States courts. It is unnecessary that the existence of a private remedy be somewhere expressly provided for customary law to be enforceable, just as it has never been required that a treaty, to be self-executing, expressly so state.

It is respectfully submitted that judges confronted with claims founded in international custom should search for consensus on rights, not remedies.[97] For it is the genius of our legal system that where the former are vouchsafed, the latter inexorably follow.

96. This assumes that other jurisdictional prerequisites, such as jurisdiction over the person of the defendant, compliance with relevant statutes of limitations, and so on, have been met.

97. Similarly, advocates concerned with the prosecution of such claims bear responsibility for formulating them in ways that emphasize such an analysis.