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CUSTOMARY INTERNATIONAL LAW: ITS NATURE, SOURCES AND STATUS AS LAW OF THE UNITED STATES

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Customary international law is one of the primary components of law in the international legal process, a dynamic process profoundly interconnected with our own domestic legal processes for at least the last 250 years. In our history, customary international law has also been received as part of the "law of nations," a phrase used interchangeably by our courts with the phrase "international law" from the dawn of the United States. What, more particularly, has been the perceived nature of customary international law in the United States? Despite much theoretical discussion (usually without adequate attention to actual trends in judicial decision), what have been recognizable sources or evidences of that law and its components? What constitutional bases exist for the incorporation of customary international law, and what sorts of status are possible? These and related questions are explored below.

THE NATURE AND SOURCES OF CUSTOMARY LAW

In one of the earliest of our Supreme Court opinions, it was recognized that the customary law of nations is human law "established by the general consent of mankind." Such a recognition has generally been echoed in subsequent Supreme Court opinions: "founded on the common consent as well as the common sense of the world;" the


2. Ware v. Hylton, 3 U.S. (3 Dall.) 199, 227 (1796); see also United States v. Darnaud, 25 F. Cas. 754, 760 (C.C.E.D. Pa. 1855) (No. 14,918) ("[M]ankind recognize... mankind concur in... mankind concur in. . . the general sense of mankind. . . .").

“generally accepted” and “common consent of mankind.”

Even earlier in England it was recognized by Blackstone that “[t]he law of na-

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619, 631-32 (1839)), aff’d, 170 F.2d 360 (2d Cir 1948); cf. Ahmad v. Wigen, 726 F.Supp. 389, 406-07 (E.D.N.Y. 1989), quoting M. FRANKEL & E. SAIDMAN, OUT OF THE SHADOWS OF NIGHT: THE STRUGGLE FOR INTERNATIONAL HUMAN RIGHTS 37 (1989) (“[G]enerated by... beliefs of the civilized people of the world.”); but see United States v. One Hundred Barrels of Cement, 27 F. Cas. 292, 298 (D.C.E.D. Mo. 1862) (No. 15,945) (“[T]he so-called public opinion of the world... is no more the law of nations than is popular opinion at home the municipal law. Public opinion, ever shifting, cannot be substituted by courts for constitutions and statute books.”)

With respect to the last quoted remark, it is true, of course, that patterns of relevant expectation are but one element of customary law and are not “law” in themselves. It would also be true that mere “public opinion” or “popular opinion” is insufficient. As explained in the text following note 6, infra, the subjective element of customary law involves a more particular set of expectations, i.e., expectations that something is legally appropriate or required, opinio juris or “acceptance” as law. See also text at notes 12-13, infra. Consider also DIG. JUL. I. 3.32 (“[S]ince leges themselves are binding on us for no other reason than that they been received by the judgment of the people, it is proper that those [legal] things of which the people have approved without any writing shall also be binding on everyone.”).


For relevant decisions at the international level, see, e.g., Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. paras. 176-192, 202-03, 207, reprinted in 25 I.L.M. 1023, 1063-67, 1069-71 (1986); North Sea Continental Shelf Cases, 1969 I.C.J. 4, 41, 44; id. at 229-31 (Lachs, J., dissenting); Anglo-Norwegian Fisheries (U.K. v. Nor.), 1951 I.C.J. 116, 148-49; United States v. von Leeb, 11 TRIALS OF WAR CRIMINALS 462, 487-88, 490 (1950) (“Since international common law grows out of the common reactions and the composite thinking... it is pertinent to consider the general attitude of the citizens of states... the general and considered opinions of the people within states—the source from which international common law springs... the composite thinking in the international community, for it is by such democratic processes that [international] common law comes into being.”); Judgment and Sentences, International Military Tribunal at Nuremberg, reprinted in 41 AM. J. INT’L L. 172, 219-20 (1947). See also L. CHEN, AN INTRODUCTION TO CONTEMPORARY INTERNATIONAL LAW: A POLICY-ORIENTED PERSPECTIVE 361-62 (1989); H. LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS 120 (reprint 1968); M. McDougal, L. Lasswell & L. Chen, HUMAN RIGHTS AND WORLD PUBLIC ORDER 74, 80 n.208, 81, 88-9, 207-16, 413, 416, 471 (1980); M. McDougal, H. Lasswell & J. Vlastic, LAW AND PUBLIC ORDER IN SPACE 116-17 (1963). The 1907 Hague Convention No. IV Respecting the Laws and Customs of War on Land contained an early recognition that the “law of nations” results “from the usages established among civilized peoples, from the laws of humanity, and from the dictates of the public conscience.” Oct. 18, 1907, preamble, 36 Stat. 2277, T.S. No. 539, 94 (XCVI) L.N.T.S. No. 2138 (emphasis added), quoted in Ex parte Quirin, 317 U.S. 1, 35 (1942); Cobb v. United States, 191 F.2d 604, 611 n.30 (9th Cir. 1951); Aboitiz & Co. v. Price, 99 F.Supp. 602, 614 (D. Utah 1951).

Such language was repeated in common articles of the 1949 Geneva Conventions (e.g., Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 158, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287) and was repeated in part in more recent treaties addressing the law of armed conflict or humanitarian law. See, e.g., Meron, The Geneva Conventions as Customary Law, 81 AM. J. INT’L L. 348, 352 n.13, 364-65 n.52 (1987).
tions is a system of rules... established by universal consent among the civilized inhabitants of the world” and “all the people.” And still today the Statute of the International Court of Justice equates customary international law with “general practice accepted as law.” As the latter definition affirms, customary international law actually has two primary components which must generally be conjoined: (1) patterns of practice or behavior, and (2) patterns of legal expectation, “acceptance” as law, or opinio juris. It is this last component, the subjective element, which seems to have been stressed most often, but both elements are necessary for the formation and continued validity of a customary norm.

There are several significant points evident even in such a meager documentation of relevant trends in legal decision. First, contrary to false myth perpetuated in the early twentieth century, the subjective element of customary international law (i.e., opinio juris) is to be gathered from patterns of generally shared legal expectation among mankind, not merely among official State elites. The acceptance “as law” to which the Statute of the International Court refers is actually a dynamic process of “acceptance” or expectation among human beings. Significantly, the language of the Statute does not contain any reference to the State or to any other formal institutional arrange-
ment,\(^8\) and thus the process of acceptance to which the Statute refers is not to be measured merely by a documented acceptance among official elites or those representing "the State" any more than it had been at the birth of our Constitution. The expectations of all human beings ("mankind," "the world," "the people") are not only relevant but they also provide the ultimate criterial referent.

Indeed, no other ultimate referent would be realistic, since all human beings recognizably participate in such a process of acceptance and the shaping of attitudes whether or not such participation is actually recognized by each individual or is as effective as it might otherwise be (e.g., even if apathetic "inaction" is the form of participation for some, a form that simply allows others a more significant role).\(^9\) It is this ultimate referent, moreover, that provides customary law with a built-in basis for its own general efficacy, resting as it does on actual patterns of generally shared legal expectation, and with a claim to being the most democratic form of international law.\(^10\) Born more di-

8. See supra note 6; Raman, supra note 7, at 377-78 ("It is not without significance that paragraph (b) of Article 38(1) of the Statute... is silent as to 'whose' behavior the decisionmaker should take into account. ... "). This is in sharp contrast to subsections (a) and (c) which refer to "states" and "nations." Significantly also, the United Nations Charter, of which the Statute is "an integral part" (U.N. Charter, arts. 92; see also id. at art. 93(1)), was proclaimed in the name of "the Peoples of the United Nations." U.N. Charter, preamble (emphasis added). See also Universal Declaration of Human Rights, preamble, G.A. Res. 217A, 3 U.N. GAOR at 71, U.N. Doc. A/810 (1948) ("[T]he conscience of mankind..., aspiration of the common people,... peoples... have in the Charter reaffirmed... [and] standard... for all peoples and all nations.").

9. See, e.g., McDougall, Lasswell & Reisman, Theories About International Law: Prologue to a Configurative Jurisprudence, 8 VA. J. INT'L L. 188, 193 (1968); McDougall, Remarks at the Proceedings of the 75th Anniversary Convocation of the American Society of International Law, 75 PROC., AM. SOC'y INT'L L. 198-99 (1981); Reisman, International Lawmaking: A Process of Communication, 75 PROC., AM. SOC'y INT'L L. 101, 106-07, 109 (1981). See also Raman, supra note 7, at 390-91; notes 30-31 infra. Actors may also have a more significant role in any given social context because of relatively higher respect, power, enlightenment, skill, wealth and so forth; but such relative outcomes (or "value positions" at any given moment) are tied to the dynamics of the social process in which all participate, however directly or indirectly or seemingly integrated, dominated or alienated. The same can be said of state actors, including the judiciary. See also Ferrari-Bravo, Methodes de Recherche de la Coutume Internationale dans la Pratique des Etats, 192 RECUEIL DES COURS 233, 246-47 ([1985 III] 1986).

If some had become less than attentive to this general truism (relevant also to the "process of review," see infra note 30), it was brought forcibly to the forefront at the end of the 1980s by the people, the common and creative people, of the Philippines, Poland, East Germany, Hungary, Czechoslovakia and Romania. See also Burley, Essay: Revolution of the Spirit, 3 HARV. H.R.J. 1 (1990). And if scholars project merely their personal needs and insecurities onto perceived processes of customary law, they will miss other needs, interests, objectives, expectations and forms of participation and interaffectation. They might be blind to normative detail evident in actual patterns of expectation, to the actual strength of customary norms and to opportunities for refinement and change of normative content.

10. See United States v. von Leeb, 11 TRIALS OF WAR CRIMINALS 462, 487-88, 490 (1950); Raman, supra note 7, at 366, 378 ("Custom is believed to be the most democratic form of lawmaking because all whose interests are affected—irrespective of their formal authority or status—can participate in it."); but see Steinhardt, The Role of International Law As a Canon of Domestic Statutory Construction, 43 VAND. L. REV. 1103, 1108 (1990) (cf. id. at 1187). Those of less than a democratic orientation and those of a relatively rigid positivist orientation may tend
rectly of real authority and strength, it is likely to be more directly authoritative in particular social contexts. Indeed customary law, resting as it does upon the authority and practice of all, is undaunting in its force, uncircumscribed by a minority of elites.

Of further significance is the fact that relevant patterns of legal expectation, perhaps contrary to Blackstone, need only be generally shared in the international community. Universality or unanimity are not required. Yet, for fuller exposition and understanding it is suggested that the researcher identify not merely how widespread a particular pattern of expectation is or has been, but also how intensely held or demanded a particular norm is or has been within the community. Awareness of the degree and intensity of general acceptance to disagree or to prefer treaties as the highest form of international law, treaties, that is, to which they consent. See also Reisman, supra note 9, at 107 (Re: opposition to "this democratization of prescription"). Perhaps alternatively, they may only prefer "custom" to which they consent or which has been applied by their domestic elites. See The Over the Top, 5 F.2d 838, 842 (D. Ct. 1925) (Dictum)("International practice is law only in so far as we adopt it. . . . ") Same re: "comity"); Zenith Radio Corp. v. Matsushita Elec. Indus. Co., Ltd., 494 F.Supp. 1161, 1180 n.42 (E.D. Pa. 1980); Arroyo v. M/V Island Queen II, 259 F.Supp. 15, 16 (D.P.R. 1966) (dictum) ("The law maritime. . . like all international law. . . is applicable within a nation only in so far as that nation has incorporated the international law into its own law."); West Rand Central Gold Mining Co. v. The King, [1905] 2 K.B. 391; see also Maier, The Authoritative Sources of Customary International Law in the United States, 10 Mich. J. Int'l L. 450, 455, 456 & n.18, 480 (1989); Trimble, supra note 7, at 673, 678, 707, 716-17, 721, 727-30; but see United States v. Smith, 27 F. Cas. 1233, 1237 (C.C.D. N.Y. 1806) (No. 16,342a) (argument of counsel)("[T]he law of nations. . . is perpetual, and does not require to have its meaning declared every second year."); Heathfield v. Chilton, 4 Burrow 2015, 2016 (K.B. 1767) (Lord Mansfield affirming just before our Revolution that the law of nations is a part of the common law of England and cannot be altered by an act of Parliament.); text accompanying notes and sources cited infra notes 32, 38, 44-48, 50, 53-57. Domestic elites and those who serve them may also attempt to limit the role of customary law because it can be seemingly less certain and manageable than written law and, as law "from the bottom up," it is potentially threatening to specially favored value positions. Cf. J. Brierly, supra note 4, at 62. See also Reisman, supra note 9, at 106. Efforts to wrest from elites related monopolizations of authority and control have early judicial benchmarks. See, e.g., Dr. Bonham's Case, 77 Eng. Rep. 646, 652 (1610) (Coke, C.J.) (The common law will control an inconsistent statute.); Grey, Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought, 30 Stan. L. Rev. 843 (1978); Paust, supra note 1, at 440-41 n.91. For a contrary viewpoint, see Maier, supra at 475 (assumption that "common law decision-making is legitimate. . . only when there is no legislation. . . and must give way. . . after the legislature speaks").

11. See, supra notes 2-4, 6; L. Chen, supra note 4, at 363. See also infra note 14.

12. See L. Chen, supra note 4, at 364; Paust, The Concept of Norm: Toward a Better Understanding of Content, Authority, and Choice, 53 Temple L.Q. 226, 244-45 (1980); Kirgis, Custom on a Sliding Scale, 81 Am. J. Int'l L. 146, 149 (1987). Professor Kirgis has stressed the following factors or qualities: "clearly demonstrated opinio juris," "morally distasteful," "widely accepted human values," and has also stated that "a clearly demonstrated opinio juris establishes a customary rule without much (or any) affirmative showing that governments are consistently behaving in accordance with the asserted rule." See also L. Hannikainen, supra note 7, at 236-37; Raman, supra note 7, at 382 (adding frequency, intensity, duration, repetition, geographic range as factors to be considered as well as other features of context); H. Thirlaway, International Customary Law and Codification 66, 70 (1972); K. Wolfke, Custom in Present International Law 36, 68, 155-56 (1964) (because of better communications, fewer precedents are now necessary and the objectivation of the will of the parties is the actual criterion
provides a more realistic approach to the identification and clarification of normative content and should aid those who must apply customary international law in making informed and rational choices. It would also be useful to know how long such patterns of expectation have existed, although a prior stability evident through time is no guarantee of continued acceptance in the future and time is not otherwise a determinative factor. It is possible, of course, to have a relatively recently widespread and intensely held expectation that something is legally appropriate or required and that such a pattern of opinio juris could form one of the components of a new rule of customary international law, one that will even be more stable in the future.

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


13. See also L. CHEN, supra note 4, at 363-64; Jimenez de Arechaga, supra note 12, at 25-26; Raman, supra note 7, at 368, 387-88, 390; Wright, Remarks, 64 (No. 4) AM. J. INT'L L. 52 (1970); cf. D'Amato, supra note 7, at 102 (State acts and "accommodations" of "state interests" are "authoritative. . . because they manifest. . . latent stability.").

14. A contrary view, one followed by what seems to be a minority of textwriters, advances the illogical proposition that a dissenting State should be "exempt" from a new rule of customary law (as opposed to prior rules still extant, and whether or not the State is newly created). See, e.g., T. BUERGENTHAL & H. MAIER, supra note 7, at 24; L. HANNIKAINEN, supra note 7, at 227, 239-40; Charney, The Persistent Objector Rule and the Development of Customary International Law, 56 BRIT. Y.B. INT'L L. 1, 2, 5, 16, 21-22 (1985) (considering mostly of British and Soviet writers of a positivist bent); Colson, How Persistent Must the Persistent Objector Be?, 61 WASH. L. REV. 957 (1986); Stein, The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law, 26 HARV. INT'L L.J. 457 (1985); Tunkin, Co-Existence and International Law, 95 RECUEIL DES COURS 3, 13 ([1958 III] 1959); RESTATEMENT, supra note 7, § 102, Comments b & d ("[I]n principle a state that indicates its dissent from a practice while the law is still in the process of development is not bound by that rule even after it matures," although "[h]istorically, such . . . exemption . . . has been rare.");), Reporters' Note 2 (same); see also Hartman, "Unusual" Punishment: The Domestic Effects of International Norms Restricting the Application of the Death Penalty, 52 U. CINN. L. REV. 655, 683 (1983); Maier, supra note 10, at 455, 470-71, 480; but see RESTATEMENT, supra note 7, § 102, Comment k and Reporters' Note 6 (no such exemption from peremptory norms); L. HANNIKAINEN, supra note 7, at 240-42, 283, 285, 289-92 (same); Raman, supra note 7, at 384-86, 388, 391, 399 n.9; H. THIRLWAY, supra note 12, at 110; Charney, supra at 5 ("support . . . in State practice and judicial decisions is limited"), 9-22, 24; Kelly, supra note 7, at 152 (professorial preference for "persistent objector
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if it is no longer generally expected that a norm is legally appropriate

concept has little support in state practice”); Randall, Universal Jurisdiction Under International Law, 66 Tex. L. Rev. 785, 823, 830-31 (1988); Steinhardt, supra note 10, at 1164.

Such a viewpoint is also inconsistent with predominant trends in U.S. opinions and is theoretically unsound since customary international law rests upon general assent (not unanimous consent) and, as the U.S. Supreme Court has declared emphatically, “[t]hat law is of universal obligation.” The Scotia, 81 U.S. (14 Wall.) 170, 187 (1871). See also The Paquete Habana, 175 U.S. 677, 711 ((1900) quoting The Scotia; United States v. Arjona, 120 U.S. 479, 484 (“law of nations requires every national government”), 487 (noting re: a “right given by the law of nations, . . . what is law for one is, under the same circumstances, law for the other” and a “right secured by the law of nations . . . is one the United States . . . are bound to protect.”) (1887)); Caperton v. Bowyer, 81 U.S. (14 Wall.) 216, 236 (1872) (“rule is universal and peremptory . . . by the law of nations”); Cliquot’s Champagne, 70 U.S. (3 Wall.) 114, 139 (1866) (argument of counsel); Cooper, 143 U.S. 472, 491 (1892) (argument of counsel)); id. at 267 (argument of counsel: “This doctrine is acknowledged by all nations of Europe, except England. But England cannot make the law of nations.”); Ware v. Hylton, 3 U.S. (3 Dall.) 199, 227 (1796) (Chase, C.J.) (noting that “general” law of nations is “universal . . . and binds all nations” but also stating that “customary . . . only binds all nations that have assented to it”); Ross v. Rittenhouse, 2 U.S. (2 Dall.) 160, 162 (1792) (“the great universal law” must not be altered); James v. Allen, 1 U.S. (1 Dall.) 188, 190 (1786) (argument of counsel: “the law of nations, which is common to all the world”); The Hellig Olav, 282 F. 534, 543 (2d Cir. 1922) (quoting Cheriot v. Foussat, 3 Binn. 220, 256 (Pa. 1810) (Tilghman, C.J.) (“The United States have always considered themselves bound by the law of nations . . . .”); Martin v. United States, 278 F. 913, 916 (2d Cir. 1922) (quoting Smith, 18 U.S. (5 Wheat) at 161); Gandolfo v. Hartman, 49 F. 181, 182 (C.C.S.D. Cal. 1892) (“universally acknowledged.”) (quoting Kennett v. Chambers, 55 U.S. (14 How.) 38, 50 (1852)); In re Long Island N. Shore Passenger & Freight Transp. Co., 5 F. 599, 622 (S.D.N.Y. 1881) (quoting The Scotia, 81 U.S. (14 Wall.) 170); United States v. Williamson, 28 F. Cas. 686, 692 (E.D. Pa. 1855) (No. 16,726) (“because of its universal obligation, is called the ‘law of nations.’”); United States v. One Hundred Barrels of Cement, 27 F. Cas. 292, 298 (E.D. Mo. 1862) (No. 15,945) (“universal”); La Jeune Eugenie, 26 F. Cas. 832, 847 (C.C.D. Mass. 1822) (No. 15,551); United States v. The F.W. Johnson, 25 F. Cas. 1232, 1232 (D. Md. 1861) (No. 15,179) (“law of nations . . . that universal law . . . .”); United States v. Darnaud, 25 F. Cas. 754, 760 (C.C.E.D. Pa. 1855) (No. 14,918) (“universal”); The Scotia, 21 F. Cas. 783, 795-96 (C.C.S.D. N.Y. 1870) (No. 12,513) (“[I]t would seem to follow, that the vessels of all nations are now bound to observe them [i.e., new customary norms], whether their own particular government has approved them or not; for, if the general consent of nations, however expressed, is effectual to establish international law, the failure of a particular nation to express its consent does not destroy the rule.”); Poland v. The Spartan, 19 F. Cas. 912, 916 n.2 (D.C.D. Me.) (No. 11,246) (“universal”); Hollingsworth v. The Betsey, 12 F. Cas. 348, 351 (D. Pa. 1795) (No. 6,612) (“No one nation has . . . the right to dictate in this or any other particular . . . what shall be the law of nations . . . .”); Henfield’s Case, 11 F. Cas. 1099, 1102, 1107 (C.C.C.D. Pa. 1793) (No. 6,360) (adding: “On states as well as individuals the duties of humanity are strictly incumbent . . . .” (emphasis added)); Dole v. New England Mut. Marine Ins. Co., 7 F. Cas. 837, 847 (C.C.D. Mass. 1864) (No. 3,966) (citing speech of Chief Justice Marshall in the United States House of Representatives, 18 U.S. (5 Wheat.) app. 8, “No particular nation can increase or diminish the list of offences.”); The Chapman, 5 F. Cas. 471, 474 (N.D. Cal. 1864) (No. 2,602) (quoting “the celebrated argument by Mr. (afterward Chief Justice) Marshall, in United States v. Robins, 27 F. Cas. 825, 860, 862 (D.S.C. 1799) (No. 16,175): ‘piracy, under the law of nations . . . punishable by all nations . . . . No particular nation can increase or diminish the list of offenses thus punishable’”); Finzer v. Barry, 798 F.2d 1450, 1456-58 (D.C. Cir. 1986), rev’d in part and aff’d in part sub nom., Boos
or required, the other base of customary law can be lost. When either

v. Berry, 485 U.S. 312 (1988); 11 Op. Att'y Gen. 297, 299-300 (1865); 9 Op. Att'y Gen. 356, 362-63 (1859); 1 Op. Att'y Gen. 566, 570-71 (1822) ("in common with other nations ... strict observance"); 1 Op. Att'y Gen. 509, 511-12 (1821) ("[T]he law of nations] presents an entire system ..." and "every part of it is equally obligatory on all nations ... [I]f a nation may take it upon herself ... to modify, enlarge, restrain, and alter it at pleasure, to suit her interest or convenience, without the consent and against the interest of other nations, ... that equality, which is the basis of this law, is gone, and it becomes the peculiar law of the nation which possesses this self-dispensing power; or, in other words, the law of the strongest ...."); 1 Op. Att'y Gen. 61, 62 (1796); Iredell, Charge to the Grand Jury for the District of South Carolina (May 12, 1794), in Gazette of the United States (1794) ("The Law of Nations, by which alone all controversies between nation and nation can be determined") (emphasis added); Wilson, Charge to the Grand Jury for the District of Virginia (May 23, 1791), in 2 The Works of James Wilson 813-14 (R. McCloskey ed. 1967) ("voluntary" law of nations related to treaties and can be altered, but "no state or states can ... alter or abrogate the law of nations any further ... [i]f this they can no more do, than a citizen can, ... or two citizens can, ... alter or abrogate the laws of the community, in which they reside."); 3 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 502 (J. Elliot ed. 1836) (statement of G. Nicholas) ("law of nations" is "permanent" and "superior to any act or law of any nation; it implied the consent of all, and was mutually binding on all"); H. Grotius, supra note 5, at bk. I, ch. III, pt. XVI; J. Kent, supra, at 3 ("The law of nations ... is equally binding ... upon all mankind."); E. Vattel, The Law of Nations livii (1758) ("as this law is immutable and the obligations that arise from it necessary and indispensable, nations can neither make any changes in it by their conventions, dispense with it in their own conduct, nor reciprocally release each other from the observance of it"); Gasser, Remarks, 81 AM. SOC'Y INT'L L. PROC. 32 (1987); Humphrey, The International Bill of Rights: Scope and Implementation, 17 WM. & MARY L. REV. 527, 529 (1976); Jay, The Status of the Law of Nations in Early American Law, 42 VAND. L. REV. 819, 827-28 (1989); Paust, supra note 1, at 419-21 & n.55, 440 n.91; cf. The Peterhoff v. United States, 72 U.S. (5 Wall.) 28, 57 (1866) ("[w]e administer the public law of nations, and are not at liberty to inquire what is for the particular advantage or disadvantage of our own or another country. We must follow the lights of reason and the lessons of the masters of international jurisprudence."); The Star, 16 U.S. (3 Wheat.) 78, 99-100 n.1 (1818) (English cases, which should be compared with Heathfield v. Chilton, 4 Burrow 2015 (K.B. 1767); Fitzsimmons v. The Newport Ins. Co., 8 U.S. (4 Cranch) 185, 188 (1808) (argument of counsel that "[u]pon a question of general law, or the law of nations, we are not to look to the practice of one nation only"); Jay, Charge to the Grand Jury for the District of New York New Hampshire Gazette, Apr. 4, 1790 ("part of the laws of this, and every other civilized nation") (emphasis added); but see Reid v. Covert, 354 U.S. 1, 58 n.8 (1957) (Frankfurter, J., concurring); Farrell v. United States, 336 U.S. 511, 517 (1949) (use of the use of maritime rules is "in a peculiar sense an international law, but application of its specific rules depends upon acceptance by the United States") (quoted in Lauritzen v. Larsen, 345 U.S. 571, 578 (1953) (another maritime law case)). It is not unimportant that the Continental Congress resolved in 1779 that "the law of nations [must] ... be most strictly observed." 14 J. Cont. Cong. 635 (W. Ford ed. 1909).

As a Japanese court rightly noted, customary rules and obligations, "by their very nature, must have equal force for all the members of the international community, and cannot therefore be the subject of any right of unilateral exclusion exercisable at will by any one of them in its own favor." Judgment of Apr. 22, 1982, Chisai (District Court), Tokyo, 27 JAPANESE ANN. OF INT'L L. 148, 167 (1984). See also L. Chen, supra note 4, at 363 ("the function of customary international law is precisely to vitiate the requirement of specific consent as the basis of international obligation ... [i]t permits 'sovereign' states — new as well as old — to be subject to international law without specific consent."); A. D'Amato, supra note 7, at 165, 187-95, 199, 234, 236, 246, 261; R. FALK, The Role of Domestic Courts in the International Legal Order 171 (1964); K. Raman, supra note 7, at 384-86, 388, 391, 399 n.9; Charney, supra note 14, at 5 (arguments against "the consensual theory of international law ... might ... also require rejection of the persistent objector rule"), 15-22, 24; Higgins, The United Nations and Lawmaking: The Political Organs, 64 AM. SOC'Y INT'L L. PROC. 37, 43, 58 (1970); Jimenez de Arechaga, supra note 12, at 28-30 (cf. id. at 30); McDougal, Remarks, 73 AM. SOC'Y INT'L L. PROC. 332 (1979) [hereinafter Remarks (II)]; McDougal, Remarks, 64 AM. SOC'Y INT'L L. PROC. 56, 57 (1970) [hereinafter Remarks (I)]; Reisman, supra note 9, at 111 ("norms are prescribed because
base is no longer generally extant, there can be no conjoining of general patterns of legal expectation and behavior and, for such a social moment at least, a prior customary law will no longer be operative.

Since each nation-state, indeed each human being, is a participant in both the attitudinal and behavioral aspects of dynamic customary international law, each may initiate a change in such law or, with others, reaffirm its validity. Indeed, such a law at least, born of what people think and do, is constantly reviewed and "re-enacted" in the social process, changed, or terminated. In the long-term, one wants to view such law with a movie camera; and yet at any given social moment (or at the time of a particular decision or activity), the existence of a customary international law will be dependent upon relevant patterns of expectation and behavior then extant.\(^{15}\)

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they are policies which part of the community does not voluntarily or spontaneously support\(^{2}\); 2 The Works of James Wilson 814 (R. McCloskey ed. 1967) (quoting Justice Wilson's 1791 charge to a grand jury that the customary law of nations is not "voluntary"). But see Jackson v. People's Republic of China, 794 F.2d 1490, 1494 (11th Cir. 1986) (claim of China that a developing customary rule of international law is not binding on states that do not agree with it); Maier, supra note 10, at 455, 456 & n.18. For an attack on the now more widely discredited consent theory from a neo-naturalist perspective, see Teson, International Obligation and the Theory of Hypothetical Consent, 15 Yale J. Int'l L. 84, 85, 94-107 (1990).

15. See also Charney, The Power of the Executive Branch of the United States Government to Violate Customary International Law, 80 Am. J. Int'l L. 913, 914-15 n.7 (1986) (while change in opinio juris "may contribute substantially to the development of customary law, I doubt that . . . [such] can effect a change in the absence of state practice"—yet, precisely because there must be a conjoining of patterns of expectation and practice for the creation and/or continuation of a norm, the lack of one of the elements, e.g., opinio juris, can lead to the demise of a customary norm. See also Reisman, supra note 9, at 108, 119.); Kirgis, supra note 12, at 149-50. For this reason, even those who later aid in the change or termination of a customary norm (who could be any sort of participant) might be subject to civil or criminal sanctions for a particular violation — creators all, but individually bound while a given norm is extant. See also note 14 supra; Christensen, The World Court and Jus Cogens, 81 Am. J. Int'l L. 93, 96 (1987); Paust, The President Is Bound By International Law, 81 Am. J. Int'l L. 377, 388-89 & n.73 (1987); Franck, Remarks, 80 Proc., Am. Soc. Int'l L. 307 (1986); Charney, Remarks, id. at 308; but see Maier, supra note 10, at 470-71, 480; Weisburd, The Executive Branch and International Law, 41 Vand. L. Rev. 1205, 1254-56 & n.211 (1988) (also arguing unrealistically that only States participate in the formation of customary international norms — see id. at 1253-55). Clearly also any new State and any State that has not had an opportunity to act in accordance with a customary norm, or to refrain from acting, and has not yet expressed its view is bound by extant law (and consent is not determinative—see note 14, supra), although members of the new entity (as any other) continue to participate in processes of norm formation, continuation, and termination (through their actions and inactions—see text at note 9, supra, and notes 30-31, infra). Cf. Mullerson, Sources of International Law: New Tendencies in Soviet Thinking, 83 Am. J. Int'l L. 494, 504 (1989).

For Professor Maier, if a State "acts contrary to . . . a preexisting rule," say the prohibition of genocide, "[t]he only time when it can accurately be said that a state violates international law is when [it so acts] . . . and continues to act in the face of legal protests from other community members . . . because the protests reaffirm that the state acts contrary to . . . legitimate expectations. . . . " Id. at 470-71. See also Weisburd, supra at 1207, 1254-56 (assuming simplistically that violations of law are merely "votes" to change the law and that courts and others have no power to participate in the formation, continuation, or termination of a customary norm, arguing also that "voters" or those who represent them are not legally bound or accountable); cf. Trimmer, supra note 7, at 711; but see Charney, supra note 15, at 915 ("[u]ntil . . . new [legal] regime . . . [actor] was in violation"), 916 ("the actor is in violation"), 917 ("[s]uch a violation does not immunize the state from treatment as a violator. . . . "); Glennon, Can the President Do No
These recognitions are also critical for the researcher's task. In one sense, they simplify that task since one need only identify patterns of what real people generally think and do. Yet, in another sense, researching customary law is significantly complicated by the fact that each person ultimately is a participant in the shaping of customary law and thus each viewpoint and every sort of human interaction could be relevant. But relevance is also a delimiting criterion. Which patterns of expectation and which patterns of action and inaction are, to be investigated will depend in part on choice about relevance. And there are additional limitations and even acceptable substitutes for full inquiry.

For example, it is often impossible for one researcher to identify every relevant pattern of expectation and behavior. However, far less than perfect investigation has been accepted by courts and others, especially if documentation of such patterns is with reference to "judicial decisions, ... the works of jurists and commentators, and [documented]. ... acts and usages of ... nations." Any evidence of

Wrong?, 80 AM. J. INT'L L. 923, 928 (1986) ("and thus represent violations"); Hartman, supra note 14, at 683; Rowles, supra note 7, at 317; Schachter, Remarks, 81 Proc. Am. Soc. Int'l L. 164 (1987). Under such a theoretical viewpoint, which is counterposed literally to "common sense" (see text at note 3, supra) and common right and reason, initial acts of genocide must be permitted if they are quick (with no "and continues to act") or, if they continue, are not met by "legal protests" (presumably while the acts of genocide are occurring and not thereafter) — even if most others refrain from committing acts of genocide and general patterns of expectation (perhaps even including those within the violator's nation) were and continue to be that genocide is an international crime.

16. See also L. CHEN, supra note 4, at 362, 364; M. McDOUGAL, H. LASSWELL & L. CHEN, supra note 4, at 73-74, 88-89, 96-107, 161-79, 413; McDOUGAL, supra note 14, at 328, adding: "norms did not simply exist; they were manifested in a continuous process of evolution and hence emanated from several different sources. ... No one of these sources of law carried ultimate or exclusive importance; in each case, particular inferences might be drawn about expectations, but in the greatest likelihood, they would come from several diverse sources."; McDOUGAL, supra note 9, at 199; Reisman, supra note 9, at 104-07, 120. Similarly, theoretical questions of which comes first (opinio or behavior) or which mirrors the other (opinio or practice) are less than useful and/or "chicken or egg." See also note 15, supra; notes 30-31, infra.

customary norms and relevant patterns of expectation or behavior can

be useful. In fact, in addition to judicial opinions and the works of textwriters U.S. courts have considered treaties and other international agreements, domestic constitutions or legislation;
executive orders, declarations or recognitions;\textsuperscript{21} draft conventions


21. See, e.g., In re Yamashita, 327 U.S. 1, 37 (1946) (Murphy, J., dissenting); Ex parte Quarin, 317 U.S. 1, 31-37 (1942); United States v. Flores, 289 U.S. 137, 156 & n.9 (1933); The Paquete Habana, 175 U.S. 677 687-90, 692-700 (1900); United States v. Rodgers, 150 U.S. 249, 264-65 (1893); The Nereide, 13 U.S. (9 Cranch) 388, 443, 453 (1815); West v. Multibanco Comernex, S.A., 807 F.2d 820, 832 (9th Cir. 1987); Finzer v. Barry, 798 F.2d 1450, 1458 (D.C. Cir. 1986); United States v. Quemener, 789 F.2d 145, 152-53 (2d Cir. 1986); United States v. County of Arlington, Va., 702 F.2d 485, 487-88 (4th Cir. 1985); Cruz v. Zapata Ocean Resources, Inc., 695 F.2d 428, 434 (9th Cir. 1982); Banco Nacional de Cuba v. Chase Manhattan
or codes;\textsuperscript{22} reports, resolutions or decisions of international organizations;\textsuperscript{23} and even the testimony or affidavits of textwriters.\textsuperscript{24}

Since any such evidence of expectation and behavior can be useful,
it is also partly misleading to ask whether a United Nations General Assembly resolution can be a source of customary law. A more realistic question, for example, might be whether a nearly unanimous resolution concerning the content or application of a norm of international law evidences a pattern of generally shared legal expectation or *opinio juris*. The very act of voting on a resolution is in some sense also an


instance of behavior, but the most relevant forms of behavior will probably involve other patterns of action and inaction outside the U.N. plaza.\textsuperscript{26} Importantly also, U.N. resolutions have been utilized by U.S. courts as aids in identifying the content of customary international law.\textsuperscript{27}

\textsuperscript{26} See, e.g., \textsc{Restatement}, supra note 7, § 102 Comment b and Reporters' Note 2; A. D'Amato, supra note 7, at 78-79; Higgins, supra note 14, at 47; Kirgis, supra note 12, at 148 n.9; McDougal, supra note 9, at 199, 204; Reisman, Remarks, 79 Proc., Am. Soc. Int'l L. 278 (1985); Reisman, supra note 9, at 104, 106-07, 119-20; Schwebel, Remarks, 73 Proc., Am. Soc. Int'l L. 301 (1979); but see D'Amato, \textit{Trashing Customary International Law, supra note 7, at 102 ("opinio juris has nothing to do with 'acceptance' of rules in such documents").

\textsuperscript{27} See note 23 supra.
Yet it might also be unrealistic to depend entirely on a General Assembly resolution to reflect relevant patterns of legal expectation. General Assembly resolutions reflect a one-state-one-vote system that can provide evidence of the legal expectations of humankind only if it is assumed that each state adequately represents its people and that somehow the actual vote reflects what would have been a weighted voting pattern based on population numbers. When the General Assembly passes a unanimous or nearly unanimous resolution, the chances are obviously greatly increased that one has an evidence of the opinion of humankind.28 Indeed, a unanimous resolution of the General Assembly may yet be the best evidence of such a pattern of expectation, but such an evidence is not inherently perfect.

It can also be recognized that resolutions declaring international law or applying such law after serious and notorious events presumably might better reflect well-considered and strong or intensely-held preferences of the international community.29 When one can identify a series of such resolutions through time, one can also rightly assume that such preferences or expectations are relatively stable within a given period and if they are matched with generally conforming behavior, one has evidence of a relatively stable customary norm.

Importantly, however, no single institutional arrangement necessarily reflects what other real people (outside of a particular institutional process) actually think and do. The most thorough inquiry

28. See e.g., United States v. Altstoetter (The Justice Case), 3 Trials of War Criminals Before the Nuremberg Military Tribunal Under Control Council Law No. 10, 1946-1949, 3, 979 (1950) ("The General Assembly is not an international legislature, but it is the most authoritative organ in existence for the interpretation of world opinion. Its recognition of genocide as an international crime is persuasive evidence of the fact."); L. CHEN, supra note 4, at 364-65 ("a new institutional mode by which the peoples of the world can clearly communicate expectations of authority and control . ."); cf. id. at 60, 369; T. BUERGENTHAL & H. MAIER, supra note 7, at 45; Bhatt, Remarks, 64 AM. J. INT'L L. 56 (1970); Jiminez de Arechaga, supra note 12, at 34 ("the "town meeting of the world"); McDougal, Remarks (II), supra note 14, at 328-29; Sohn, Remarks (I), supra note 25, at 203-04; Sohn, Remarks (II), supra note 25, at 61-62; but see D'AMATO, supra note 7, at 102; Trimble, International Law, World Order, and Critical Legal Studies, 42 STAN. L. REV. 811, 819 & n.41 (1990) (missing the point about unanimous resolutions, especially those addressing international law); Trimble, supra note 7, at 680-81 & n.60.

29. See also RESTATEMENT, supra note 7, § 102, Comment b and Reporters' Note 2; L. CHEN, supra note 4, at 365; Sohn, Remarks (I), supra note 25, at 203-04; Sohn, Remarks (II), supra note 25, at 61-62; but see D'Amato, supra note 7, at 102. It has also been suggested that the views of "important" States or those "'whose interests were particularly affected'" should have some special weight or consideration. See RESTATEMENT, supra, Reporters' Notes 2 and 5 (quoting, the North Sea Continental Shelf Cases, 1969 I.C.J. 3, 42); Charney, supra note 14, at 19, 23; Schwebel, supra note 25, at 305, 307-08, 331-32. Participation of such States might assure a more serious, thorough and realistic consideration of normative content, alternatives, and likely consequences. Yet ultimately the views of the entire community, however shaped by such participation, are determinative. See also A. D'AMATO, supra note 7, at 65-66, 68-70; Christenson, supra note 15, at 97 n.13, 101 (citing Weil, Towards Relative Normativity in International Law?, 77 AM. J. INT'L L. 413, 441 (1983)); McDougal, Remarks (II), supra note 14, at 328-29, 332; Raman, supra note 7, at 369, 372, 375, 384-86, 388; cf. Higgins, supra note 14, at 42, 44.
would test each institutional decision not merely with respect to ongoing patterns of relevant behavior, but also with respect to the common or generally accepted opinions of humankind about what is legally appropriate or required. In this sense, the thorough researcher's task is to investigate the ongoing "process of review" to which each institutional decision actually is subject.\textsuperscript{30} Here again, far less than perfect investigation has been accepted, but knowing what should be investigated, what may be missing, can have important and realistic influences.

With respect to general practice, it is also important to note that "inaction" or compliance because of a choice to not violate a norm may often be more relevant than the nonconforming practice of a few violators of the norm,\textsuperscript{31} and yet such a practice may be difficult to

\textsuperscript{30} On the "process of review," see McDougal, Lasswell & Reisman, \textit{supra} note 9; Paust, \textit{supra} note 12, at 231-38, \textit{passim}; Reisman, \textit{supra} note 9, at 106-07, 113; W.M. Reisman, \textit{Nullity and Revision—The Review and Enforcement of International Judgments and Awards} 3-4, 239 (1971); see also McDougal, remarks (I), \textit{supra} note 14, at 56 ("It is not so much . . . the intent of the communicators . . . that is important, as the expectations that are created . . . in the larger community of mankind")—the same point can be made about particular words or phrases printed in some document, i.e., what is of primary import is the \textit{opinio} attached thereto by the community).

Some pretend that decisions of constituted elites are necessarily authoritative, thereby conferring primary authority with that delegated to official elites and ignoring the "review" of elite decisions in ongoing domestic and international processes. See, e.g., Maier, \textit{supra} note 10, at 453-54 & n.10, 455, 459, 461, 474-75; Maier, \textit{Ethics, Law and Politics}, 15 \textit{Yale J. Int'l L.} 190, 193-94 (1990) [henceforth Maier, \textit{Ethics}]; see also D'\textsc{A}MATO, \textit{supra} note 7, at 102; but see Jay, \textit{supra} note 14, at 836-37; Maier, \textit{supra} at 194-95 (recognizing the theoretically inconsistent viewpoint that "[i]n each instance the authority to act and the legitimacy of that authority is created by public acceptance . . . Official actors are nothing more than persons whose power the state's populace has clothed with authority by accepting the legitimacy of their exercises of power."). Professor Maier's general theoretic construct is also admittedly "dualist" at base and assumes, equally unrealistically, that "legal rules . . . can have no applicability . . . without the active affirmative participation of . . . authoritative decision-makers." Maier, \textit{supra} note 10, at 456 & n.18; see also \textit{id.} at 461 ("rule has whatever authority is attributable to the decisions of the institution of government"), 465 n.59 (dualism, "entirely independent but congruent systems"); Maier, \textit{Ethics, supra}, at 193-94; \textit{but see id.}, at 194-95. Not surprisingly, such a positivist orientation leads not merely to the conclusion that we are basically stuck with the decisions of elites that we have constituted but also to speculations that they can ignore or even violate customary international law (perhaps prohibitions of genocide, war crimes and torture). See Maier, \textit{supra} note 10, at 455, 470-71, 480; see also Maier, \textit{Remarks}, 80 \textit{PROC.}, \textit{AM. SOC. INT'L L.} 298 (1986); Weisburd, \textit{supra} note 15, at 1254-56; \textit{but see Franck, Remarks}, 80 \textit{PROC.}, \textit{AM. SOC. INT'L L.} 307 (1986); Charney, \textit{Remarks}, 80 \textit{PROC.}, \textit{AM. SOC. INT'L L.} 308 (1986). State-centric views (see note 7 \textit{supra}) are also necessarily less than fully realistic, disentangled as they are from a "common sense" of real human beings and "real world" processes of authority and power in which individuals, with varied value positions (see note 9, \textit{supra}), participate. On authority and relevant international legal standards, see, e.g., Paust, \textit{Authority: From a Human Rights Perspective}, 28 \textit{AM. J. JURIS.} 64 (1983); Paust, \textit{Human Rights and the Ninth Amendment: A New Form of Guarantee}, 60 \textit{Cornell L. Rev.} 231, 236-37, 240-44, 252, 266 (1975), reprinted in \textit{The Bill of Rights and American Legal History} (P. Murphy ed. 1990); Paust, \textit{supra} note 12.

\textsuperscript{31} See \textit{Restatement}, \textit{supra} note 7, § 102 Comment b; T. \textsc{Buergenthal} & H. \textsc{Maier}, \textit{supra} note 7, at 23; L. \textsc{Hannikainen}, \textit{supra} note 7, at 232; Hartman, \textit{supra} note 14, at 669; Perluss & Hartman, \textit{Temporary Refugee: Emergence of a Customary Norm}, 26 \textit{VA. J. INT'L L.} 551, 556-57, 577-78 (1986); Raman, \textit{supra} note 7, at 390; Zamora, \textit{supra} note 12, at 19 n.48; A. D'\textsc{A}MATO, \textit{supra} note 7, at 61-63, 88-89; \textit{but see id.} at 82-83. See also L. \textsc{Hannikainen}, \textit{supra}
measure. Knowing what behavioral patterns should be measured and what should not be unduly emphasized, however, can also have important consequences with respect to research and choice about the formation, change and termination of customary law. Too often textwriters argue that the death of a norm, even a treaty norm, has occurred because of the actions of a few States. Instead, what should be investigated are the patterns of expectation more generally extant (including those even of such law violators), and the actions and inactions of all participants. It is also too simplistic to argue that law violations which, in a relatively unorganized community, have not been subject to effective sanctions have, therefore, necessarily led to the demise of a customary norm. It would be ludicrous to argue, for example, that when a law-violating official elite of a State knows that its actions are prohibited by customary law, when others generally expect that such conduct is and remains illegal, and when violations are scarce, the customary norm is obviated by a failure effectively to ensure sanctions against such an elite. Even in a relatively organized community the lack of effective sanctions against several law violators (e.g., several of those who commit murder) does not necessarily lead one to the conclusion that a norm (e.g., the prohibition of murder) has thereby been obviated.

CONSTITUTIONAL BASES AND STATUS

Although customary international law has been incorporated both directly and indirectly in civil and criminal cases from the beginning of the United States, the only express reference to the "law of nations" note 7, at 235; Kirgis, supra note 12, at 147 n.8 (citing Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. U.S.), 1986 I.C.J. paras. 206-08 reprinted in 25 I.L.M 1023, 1069-71 (1956)(even law violators "have not justified their conduct by reference to a new right . . . or a new exception to the principle. . ."); id. at para. 186; Memorandum for the United States at 16, Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980) (No. 79-6090) ("While some nations still practice torture, it appears that no state asserts a right to torture . . . Rather, nations accused . . . unanimously deny the accusation and make no attempt to justify its use. That conduct evidences an awareness that torture is universally condemned."); Filartiga v. Pena-Irala, 630 F.2d 876, 880, 884 n.15; The Emulous, 8 F. Cas. 697, 701-02 (C.C.D. Mass. 1813) (No. 4,479) ("Surely a relaxation of the law in practice cannot be admitted to constitute an abolition in principle, when the principle is asserted. . ."); Meron, supra note 4, at 369 (citing Schachteter, supra note 17, at 336 ("episodic breaches" are relatively unimportant and a better consideration is "the 'intensity and depth of the attitudes of condemnation' " extant in the community)); Mullerson, supra note 15, at 506; Schneebaum, International Law as Guarantor of Judicially-Enforceable Rights: A Reply to Professor Oliver, 4 HOUS. J. INT'L L. 65, 67 (1981).

32. See, e.g., Paust, On Human Rights: The Use of Human Right Precepts in U.S. History and the Right to an Effective Remedy in Domestic Courts, 10 MICH. J. INT'L L. 543, 620-25 (1989). Professor Strossen has remarked that customary international law has "played a less vital part in domestic adjudication" from the mid-19th century until the mid-20th. See Strossen, supra note 19, at 818. But Lexis demonstrates a major increase in use of the terms "law of nations" or "international law" since 1900 in all but the Supreme Court, and the same holds for the periods 1900-1940 or 1900-1950 when compared with use in the 18th and 19th centuries combined. It is...
found in the Constitution is that aligned with a Congressional power (i.e., Article I, Section 8, clause 10). It would be too simplistic to assume, however, that incorporation of customary international law has no other adequate constitutional base. Moreover, it is too simplistic to argue that customary international law is incorporable merely as some sort of "common law," the latter view ignoring even the ex-

nonetheless true that use in the last 45 years is markedly more frequent (in the circuit and district courts) than in the first 45 years of this century.

33. Such is the concurrent power of Congress to define and punish offenses against the law of nations. U.S. CONST., art. I, § 8, cl. 10. For an early draft of another constitutional provision containing the phrase "Law of Nations" and its implications, see Paust, supra note 32, at 622-23 n.501; see also Jay, supra note 14, at 829-33.

34. That customary international law was thought to be not merely "common" law or "general law" but much more and of a higher transnational status (despite general rhetoric that customary international law was also "part of" the common law), see, e.g., Henkin, International Law as Law in the United States, 82 Mich. L. Rev. 1555, 1561-62, 1564-65 (1984); Paust, supra note 1, at 441 n.91. See also First National City Bank v. Banco Para el Comercio Exterior de Cuba, 462 U.S. 611, 622-23 (1983) (one party contends international law governs, other party contends federal common law governs, but relevant principles "are common to both international and federal common law" and the latter is "necessarily informed... by international law principles" — implication: they are not exactly the same); Guessefeldt v. McGarth, 342 U.S. 299, 318 (1952) (“at common and international law”—implication: same as above); Johnson v. Eisentrager, 339 U.S. 763, 776 (1950) (“rule of the common law and the law of nations”—implication: same as above); Ex parte Quirin, 317 U.S. 1, 7 (1942) (argument of counsel: “international law analogous to common law”—implication: same as above); New Jersey v. Delaware, 291 U.S. 361, 383 (1934) (“International law... like the common law within states”—implication: same as above); Wisconsin v. Illinois, 278 U.S. 367, 393 (1929) (argument of counsel: “The doctrines of international law... and not the common law doctrine... is the governing law of this case”—implication: they are not the same); Terrace v. Thompson, 263 U.S. 197, 207 (1923) (argument of counsel: “common law rule was in accord with the law of nations”—implication: same as above); Southern Pacific Co. v. Jensen, 244 U.S. 205, 231 (1917) (Pinch., J., dissenting) (“the law of nations, the law of admiralty and maritime, the common law, including commercial law... Upon these foundations the Constitution was erected.” — implication: these sorts of law are not exactly the same); Mackenzie v. Hare, 239 U.S. 299, 308 (1915) (“principles of the common law and international law”—implication: same as above); Herrera v. United States, 222 U.S. 558, 560 (1912) (argument of counsel: “both under the common law and the law of nations”—implication: same as above); Pettibone v. Nichols, 203 U.S. 192, 213 (1906) (“as a question of common law or of the law of nations”—implication: same as above); National Council U.A.M. v. State Council of Virginia, 203 U.S. 151, 153 (1906) (argument of counsel: “what by common law and the law of nations”—implication: same as above); Cook v. Hart, 146 U.S. 183, 192 (1892) (“as a question of common law or of the law of nations”—implication: they are not the same); Ker v. Illinois, 119 U.S. 436, 444 (1886) (“as a question of common law, or of the law of nations”—implication: same as above); New Orleans, M. & T. Railroad Co. v. Mississippi, 102 U.S. 135, 137 (1880) (“by the common law and the law of nations”—implication: same as above); Sprott v. United States, 87 U.S. (20 Wall.) 459, 471 (1874) (Field, J., dissenting) (not on common law doctrines but "on higher ground... international law"); United States v. Guthrie, 58 U.S. (17 How.) 284, 290-91 (1854) (argument of counsel: “there are no common law offices, ... [a]ll... are created, either by the law of nations... or by the constitution and the statutes”—implication: common law is not the same as law of nations); Prigg v. Commonwealth of Pennsylvania, 41 U.S. (16 Pet.) 539, 670 (1842) (McLean, J., dissenting) (“sanctioned neither by the common law nor the law of nations”—implication: they are not the same); Martin v. Lessee of Waddell, 41 U.S. (16 Pet.) 367, 393 (1842) (argument of counsel: “must be judged of, not by the common law, but according to the law of nations”—implication: same as above); United States v. The Schooner Amistad, 40 U.S. (15 Pet.) 518, 553 (1841) (argument of counsel: “of the common law, or of the law of nations”—implication: same as above); Shanks v. Dupont, 28 U.S. (3 Pet.) 242, 248 (1830) (Story, J.) (“common law... civil rights... [are] not... political rights [which]... stand upon the more general principles of the law of nations.”) (quoted in United
Customary International Law


Oliver v. United States, 230 F. 971, 973 (9th Cir. 1916) ("a name known to the law of nations or to the common law... not less clearly ascertained than it would be by using the definition as found in the treatises of the common law, or in the law of nations" — implication: they are not exactly the same); Canada-Atlantic & Plant S.S. Co. v. Flanders, 145 F. 875, 880 (1st Cir. 1906) ("The same rule applies at common law... although not so under the international law" — implication: they are not the same); Pacific Gas Improvement Co. v. Ellert, 64 F. 421, 432 (C.C.N.D. Cal. 1894) ("by the law of nations, and the common and civil law," (quoting Eldridge v. Cowell, 4 Cal. 80, 87 (1854)) — implication: none are the same); In re Ezeta, 62 F. 964, 968 (N.D. Cal. 1894) (quoting Kerr v. Illinois, 119 U.S. 436, 444 (1886)); Murray v. Chicago & N.W. Ry. Co., 62 F. 24, 29, 31, 33, 41-42 (C.C.D. Iowa 1894) ("the several branches of the law, such as the law of nations, the common law, the admiralty and maritime law..."), aff'd 92 F. 868 (8th Cir. 1899); United States v. Tully, 28 F. Cas. 226, 229 (C.C.D. Mass. 1812) (No. 16,545) (piracy "by the law of nations" is different than piracy "by the common law"); United States v. O'Sullivan, 27 F. Cas. 367, 374 (S.D.N.Y. 1851) (No. 15,974) ("local or common law" treated as different than "law of nations"); United States v. Jones, 26 F. Cas. 653, 655, 657 (C.C.D. Pa. 1813) (No. 15,494) ("not to be found in the... act of congress, nor in the common law, or law of nations..."); United States v. Hand, 26 F. Cas. 103, 104 (C.C.D. Pa. 1810) (No. 15,297) (regarding evidence and charge of "infracting the law of nations. ...upon common law principles, such evidence would seem inapplicable to such a charge. But the act of congress refers us to the law of nations for our test. ...")

Rundle v. Delaware & R. Canal, 21 F. Cas. 6, 11 (C.C.E.D. Pa. 1849) (No. 12,139) ("not by any principles of international law, but by the common law...")

Giltner v. Gorham, 10 F. Cas. 424, 425 (C.C.D. Mi. 1848) (No. 5,453) ("no principle of the common law, or of the law of nations..."); The Emulous, 8 F. Cas. 697, 700 (C.C.D. Mass. 1813) (No. 4, 479) ("if the law of nations does not, the common law does"); id. at 703 ("by the rigour of the law of nations, and of the common law... Such is also the rule of the common law"); Driskill v. Parrish, 7 F. Cas. 1100, 1101 (C.C.D. Ohio 1845) (No. 4,089) ("neither the laws of nations nor the common law..."); Crawford v. The William Penn, 6 F. Cas. 778, 780 (C.C.D. N.J. 1815) (No. 3,372) ("rigid rule of the common law" does not "apply in all its rigor, to courts acting under the general law of nations, and proceeding according to the civil law"); Coolidge v. Guthrie, 6 F. Cas. 461, 463 (C.C.S.D. Ohio 1868) (No. 3,185) ("not trespasses by the common law... only by the law of nations..."); Baglab Ltd. v. Johnson Matthey Bankers Ltd., 665 F Supp. 289, 294 (S.D.N.Y. 1987) (quoting First National City Bank v. Banco Para el Comercio Exterior de Cuba, 462 U.S. 611, 622-23 (1983)); Marlow v. Argentine Naval Commission, 604 F.Supp. 703, 705 (D.D.C. 1985) (same); Hadden v. Rumsey Products, Inc., 96 F.Supp. 988, 992 (W.D.N.Y. 1951) (quoting Williamson v. Berry, 49 U.S. (8 How.) 495, 540-41 (1850) wherein admiralty was related to "laws of nations" and "court of common law" was related to "the municipal laws of the states") rev'd, 196 F.2d 92 (2d Cir. 1952); In re Reid, 6 F.Supp. 800, 805 (D. Ore. 1934) ("both common and international law" — implication: they are not exactly the same); C. van Bynkershoek, A TREATISE ON THE LAW OF WAR 128-29 (F. DuFoncque trans. 1810) (important question occurs "whether an act of piracy, clearly considered as such by the law of nations, may be inquired of, and punished... although it should not be piracy at common law, nor be expressly provided for by statute? The learned Wooddeson is in favor of the affirmative" (quoting 1 WOODES 140)); Charney, supra note 15, at 918 n.14; Jay, supra note 14, at 843-45; Paust, supra note 1, at 416-21, 419 n.55, 442; supra note 14; infra notes 56-57; cf. Goodwin, International Law in the Federal Courts, 20 CAL. W. INT'L L. 157, 158 ("federal international common law"), 161 (1990); but see The Over the Top, 5 F.2d 838, 842 (D. Conn.,
press Congressional power to include such law in a statutory scheme or, more particularly (as the Supreme Court has recognized in certain instances), to incorporate such law "by reference." In contradistinction to both such assertions, it is evident that several of the amendments to the U.S. Constitution (especially the ninth amendment) have a purpose to serve human rights based in customary international law and, therefore, that incorporation of several customary rights is

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35. See supra note 33. Potentially any congressional power could be implicated, including the necessary and proper clause (U.S. Const. art. I, § 8, cl. 18). See infra note 43.


possible through the use of certain constitutional amendments. Thus, in these instances there are both different constitutional bases for incorporation and a status far different than that of mere common law or even an implementing statute.

Further, is was recognized early that customary international law in general is also a part of the laws of the United States. As such, customary international law is relevant both with respect to the duty and the power of the Executive under Article II, section 3 to "take care that the Laws be faithfully executed." Supreme Court and


38. See infra note 44 and accompanying text; The Nereide, 13 U.S. (9 Cranch) 388, 423 (1815); Talbot v. Janson, 3 U.S. (3 Dall.) 133, 156 (Paterson, J.), 159-61 (Iredell, J.) (1795); 1 Op. Att'y Gen. 566, 570-71 (1822); 1 Op. Att'y Gen. 68, 69 (1797); 1 Op. Att'y Gen. 26, 27 (1792); supra notes 14, 17, 32; see also Rose v. Himely, 8 U.S. (4 Cranch) 241, 276-77 (1808) (Marshall, C.J.) ("the law of nations is the law of all tribunals in the society of nations"); United States v. La Jeune Eugenie, 26 F. Cas. 832, 846 (C.C.D. Mass. 1822) (No. 15,551) ("may be enforced by a court of justice, whenever it arises in judgment"); Glass v. The Sloop Betsy, 3 U.S. (3 Dall.) 6, 16 (1794) (district court is "competent to enquire, and to decide, whether . . . restitution can be made consistently with the law of nations"); Miller v. The Ship Resolution, 2 U.S. (2 Dall.) 1, 4 (1781) ("by the law of nations" a private person has the right to "pursue and recover" property taken in violation of such law); THE FEDERALIST No. 80, at 589 (A. Hamilton) (J.C. Hamilton ed. 1868) ("cases arising upon . . . the laws of nations" are appropriate); THE FEDERALIST No. 3, at 62 (J. Jay) (J.C. Hamilton ed. 1868) ("law of nations," in federal system, "will always be expounded in one sense and executed in the same manner. . ."); infra notes 44-45, 50, 56.

39. See E. CORWIN, THE CONSTITUTION AND WHAT IT MEANS TODAY 125 (1973); E. CORWIN, THE PRESIDENT 177 (1984); A. MILLER, PRESIDENTIAL POWER IN A NUTSHElL 105-06 (1977); Henkin, supra note 34, at 1567 ("There can be little doubt that the President has the duty, as well as the authority, to take care that international law . . . is faithfully executed. The President does that regularly . . ."); Jay, supra note 14, at 833-35, 847-48; Miller, The President and Faithful Execution of the Laws, 40 VAND. L. REV. 389, 403, 405 (1987); Paust, supra note 15; De Lima v. Bidwell, 182 U.S. 1, 22 (1901) (argument of counsel); Brown v. United States, 12 U.S. (8 Cranch) 110, 145-47, 149, 153 (1814) (Story, J., dissenting); 1 Op. Att'y Gen. 566, 569-71 (1822) (duty and power); see also J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 191, 193 (3d ed. 1986); United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 318-20 (1936); Ex parte Quirin, 317 U.S. 1, 26 (1942) ("The Constitution thus invests the President . . . with the power . . . to carry into effect . . . all laws defining and punishing offenses against the law of nations."); In re Neagle, 135 U.S. 1, 63-64 (1890) (does this duty "include the rights, duties, and obligations growing out of . . . our international relations. . ."); In re The Nuestra Señora de Regla, 108 U.S. 92, 102 (1882) ("It is objected, however, that the executive department of the Government had no power. . . . It was the duty of the United States, under the
other opinions have also recognized that while exercising Presidential war powers, the Executive is bound by customary international law.\footnote{40} Additionally, judicial opinions and the opinions of Attorneys General

have recognized that customary international law can limit the exercise of an otherwise appropriate Congressional power and thus can function partly as an aid for interpreting the extent of constitutional grants of power.\footnote{See Paust, supra note 1, at 416-43, and references cited (also recognizing that in the case of an unavoidable clash between a federal statute and customary international law, especially customary jus cogens, the more widely shared and authoritative preference is that customary international law prevails); Tyler v. Defrees, 78 U.S. (11 Wall.) 331, 354-55 (1871) (Field, J., dissenting); Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382, 1388 (10th Cir. 1981); United States ex rel. Schlueter v. Watkins, 67 F.Supp. 556, 564 (S.D.N.Y. 1946) (quoting Albert Gallatin in 1798: “By virtue of...[the war power], Congress could...[act], provided it be according to the laws of nations and to treaties”); but see (since the cited article, but without awareness or analysis of the conflicting line of cases and opinions) United States v. Davis, 905 F.2d 245, 248 n.1 (9th Cir. 1990) (dictum) (citing United States v. Thomas, 893 F.2d 1066, 1069 (9th Cir. 1990) (dictum); and Committee of U.S. Citizens in Nicaragua v. Reagan, 859 F.2d 929, 935, 938-39 (D.C. Cir. 1988) (reading dictum in The Paquete Habana too broadly but adding nonetheless that peremptory norms of customary international law “may well” prevail over any inconsistent federal statute (see id. at 935, 940-41), a preference explored in Paust, supra note 1, at 442-43 & n.104)); Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519, 537 (1839) (argument of counsel); United States v. Sien, 299 F. 582, 583 (9th Cir. 1924) (“[I]nternational law is not in itself binding upon Congress.” — no authorities cited for such); American Baptist Churches in the U.S.A. v. Meese, 712 F.Supp. 756, 770-71 (N.D. Cal. 1989) (also since the cited article but without references to the conflicting cases and opinions); Paust, supra note 1, at 425-27 (re: contrary cases analyzed therein); Steinhardt, supra note 10, at 1163, 1167-68, 1170, 1173-74, 1185; infra note 52 (dictum). See also Antolok v. United States, 873 F.2d 369, 393 n.17 (D.C. Cir. 1989) (Wald, J., concurring) (“The court in [Committee of U.S.Citizens in Nicaragua] distinguished between “customary” and “peremptory” norms of international law, and left open the possibility that “peremptory” norms might supersede domestic law. “Peremptory” norms are those principles of international law deemed so fundamental that no deviation from them is permitted.”); Lillig, supra note 19, at 70 (custom “perhaps may supersede”); Lobel, The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law, 71 VA. L. REV. 1071, 1134-47 (1985); Note, The Role of International Law in Domestic Courts: Will the Legal Procrastination End?, 14 MD. J. INT’L L. & TRADE 99, 117-23 (1990) (judicial opinions preferring federal statutes over international customary law are poorly reasoned and are not preferable); supra notes 10, 14. Several lower court opinions have also quoted or paraphrased United States v. Macintosh, 283 U.S. 605, 622 (1931) (analyzed in Paust, supra note 1, at 417, with respect to language recognizing “limitations” to the war power “found...in applicable principles of international law”), rev’d on other grounds, Girouard v. United States, 328 U.S. 61, 69 (1945). See Taylor v. Brown, 137 F.2d 654, 657 (Emer. Ct. App.), cert. denied, 320 U.S. 877 (1943); Kovach v. Middendorf, 424 F.Supp. 72, 79 (D. Del. 1976); United States v. Seeger, 216 F.Supp. 516, 521-22 (S.D.N.Y. 1963), rev’d, 326 F.2d 846 (2d Cir. 1964), aff’d, 380 U.S. 163 (1965); United States v. Steinel, 70 F.Supp. 966, 968 (D. Conn. 1946); Commers v. United States, 66 F.Supp. 943, 947 (D. Mont. 1946), aff’d, 159 F.2d 248 (9th Cir.), cert. denied, 331 U.S. 807 (1947); Gray v. Commodity Credit Corp., 63 F.Supp. 386, 388 (S.D. Cal. 1945), aff’d, 159 F.2d 243 (9th Cir.), cert. denied, 331 U.S. 842 (1947); Ex parte Yost, 55 F.Supp. 768, 770 (S.D. Cal. 1944); United States v. Hutchinson, 55 F.Supp. 648, 650 (D. Colo.), aff’d sub nom., Roodenko v. United States, 147 F.2d 752 (10th Cir. 1944), cert. denied, 324 U.S. 860 (1945); United States ex rel. Zucker v. Osborne, 54 F.Supp. 984, 986 (W.D.N.Y. 1944), aff’d, 147 F.2d 135, cert. denied, 325 U.S. 881 (1945); Ebel v. Drum, 52 F.Supp. 189, 194 (D. Mass. 1943); United States v. Beit Bros., 50 F.Supp. 590, 591 (D. Conn. 1943); Henderson v. Kimmel, 47 F.Supp. 635, 641 n.7 (D. Kan. 1942). See also Miller v. Kalierweke Aschersleben Aktien-Gesellschaft, 283 F. 746, 751 (2d Cir. 1922) (quoting Justice Field’s dissent in Miller v. United States, 78 U.S. (11 Wall.) 268, 314 (1870) (re: “war powers of the government,” “the only limitation to which their exercise is subject is the law of nations”).) And, of course, customary international law may be relevant to an adequate interpretation of various sorts of Congres-}
sional power in order functionally to enhance such powers.\textsuperscript{42} Significantly, the latter process of incorporation might include an enhancement of the power of Congress under Article I, section 8, clause 18 to enact legislation “necessary and proper for carrying into Execution... all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”\textsuperscript{43}

Though not widely understood, the judicial power to identify, clarify and apply customary international law in cases otherwise properly before the courts is also constitutionally based. Under Article III, section 2, clause 1 of the Constitution not only might matters involving customary international law arise under other parts of the Constitution as such (as noted above) or treaties, but they can also arise under “the Laws of the United States.” Indeed, as recognized by the first Chief Justice of the U.S. Supreme Court, the phrase “the laws of the United States” includes the customary “law of nations.”\textsuperscript{44} Thus,

\begin{itemize}
  \item \textsuperscript{42} See Kleindienst v. Mandel, 408 U.S. 753, 765-67 (1972); United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 318 (1936); Fong Yue Ting v. United States, 149 U.S. 698, 705-14 (1893); Lord v. Steamship Co., 102 U.S. (12 Otto) 541, 545 (1880); Tyler v. Defrees, 78 U.S. (11 Wall.) 331, 354-55 (1871) (Field, J., dissenting); Miller v. United States, 78 U.S. (11 Wall.) 268, 316 (1871) (Field, J., dissenting) (“Whatever any independent civilized nation may do in the prosecution of war, according to the law of nations, Congress, under the Constitution, may authorize to be done...”);
  \item Finzer v. Barry, 798 F.2d 1450, 1454-57, 1460, 1463 (D.C. Cir. 1986);
  \item See United States v. Arjona, 120 U.S. 479, 483-85, 487-88 (1877) (“right... given by the law of nations... the United States... are bound to protect. Consequently, a law which is necessary and proper to afford this protection is one that Congress may enact, because it is one that is needed to carry into execution a power conferred by the Constitution on the Government of the United States...”). Importantly, it is neither necessary “for carrying into execution” the constitutional powers of the government nor proper for Congress to pass legislation violative of rights or duties under customary international law. See supra note 41; see also supra note 14; infra notes 56, 57; Frend v. United States, 100 F.2d 691, 692, 694 (D.C. Cir. 1938).
  \item See Henfield’s Case, 11 F. Cas. 1099, 1101 (C.C.D. Pa. 1793) (No. 6,360) (Jay, C.J.). See also id. at 1103-04, 1112, 1115; Chief Justice Jay, Charge to the Grand Jury for the District of Virginia (May 22, 1793) (“The Constitution, the statutes of Congress, the laws of nations, and treaties constitutionally made compose the laws of the United States”), in 3 THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 479 (H. Johnston ed. 1891); New York Life Insurance Co. v. Hendren, 92 U.S. 286, 287-88 (1875) (Bradley, J., dissenting) (“unwritten international law” is among the “laws of the United States”) (cf. id. at 286-87); Caperton v. Bowyer, 81 U.S. (14 Wall.) 216, 226 (1872) (argument of counsel: “law of nations, part of the law of the United States.”); Demjanjuk v. Petrovsky, 776 F.2d 571, 582 (6th Cir. 1985), cert. denied,
although treaties have an express constitutional base in Article III, a primary base for judicial incorporation of customary international law also exists in the phrase “Laws of the United States” found in the same Article. The same point can be made with respect to Article VI, clause 2 of the Constitution, which affirms that both treaties and “the Laws of the United States” are “the supreme Law of the Land.”

As the Restatement (Third) of the Foreign Relations Law of the United States recognizes: “Matters arising under customary interna-

tional law also arise under 'the laws of the United States,' since international law is 'part of our law'. . . and is federal law.' 45 Thus, cases "arising under customary international law" are "within the Judicial Power of the United States under Article III, section 2 of the Constitution;" 46 and such law, "while not mentioned explicitly in the Supremacy Clause," is supreme federal law within the meaning of Article VI, clause 2. 47 For these reasons, the phrase "laws. . . of the United States," contained in 28 U.S.C. § 1331 gives the district courts


46. Restatement, supra note 7, § 111 Comment e. See also id., Reporter's Note 4; id., § 702 Comment c; Goodwin, supra note 34, at 161; Henkin, supra note 34, at 1566; Preyer, Jurisdiction to Punish: Federal Authority, Federalism and the Common Law of Crimes in the Early Republic, 4 Law & Hist. Rev. 223, 232 (1986) ("law of nations" was "within the federal judicial power. . . within the language of Article III. . ."); Palmer, The Federal Common Law of Crime, 4 Law & Hist. Rev. at 276-78; Schneebaum, The Enforceability of Customary Norms of Public International Law, 8 Brooklyn J. Int'l L. 289, 290-91, 302 (1982); Steinhardt, supra note 10, at 1135 n.134, 1175; Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 133 (1810) (Marshall, C.J.) (our judicial tribunals "are established. . . to decide on human rights"); Filartiga v. Pena-Irala, 630 F.2d 876, 885-87 (2d. Cir. 1980); United States v. Buck, 690 F.Supp. at 1297; Gibbons v. Udaras na Gaeltachta, 549 F.Supp. 1094, 1116 (S.D.N.Y. 1982); Letter from George Masson to Arthur Lee (May 21, 1787), 3 The Records of the Federal Convention of 1787, 24 (M. Farrand ed. 1911) ("The most prevalent idea [was] to establish. . . a judiciary system with cognizance of all such matters as depend upon the law of nations. . ."); supra note 44; but see Trimbly, supra note 28, at 838, 840 (citing Trimbly, supra note 7, at 717-23).

47. Restatement, supra note 7, § 111 Comment d. See also F. Boyle, supra note 24, at 31-32; Henkin, supra note 34, at 1566 ("fits comfortably" within the phrase "the laws of the United States. ."); Hartman, supra note 14, at 662; Jay, supra note 14, at 830-33; Filartiga v. Pena-Irala, 630 F.2d at 886-87; cf. Cook v. Hart, 146 U.S. 183, 192 (1892); Ker v. Illinois, 119 U.S. 436, 444 (1886); state court opinions cited in Paut, supra note 32, at 618-20.
original jurisdiction over all civil cases arising under customary international law, whether or not other statutes, such as the Alien Tort Statute, refer expressly to the “law of nations” or to customary international law.

For these reasons also, customary international law has been directly incorporable, at least for civil sanction purposes, without the need for some other (or any) statutory base. Indeed, direct incorporation by the Supreme Court, at least while exercising its original jurisdiction, can rest on Articles III and VI alone. While customary international law had also been directly incorporable for criminal sanctions and such is still theoretically possible, the matter is not beyond dispute. Another form of direct incorporation has also recog-

48. See Restatement, supra note 7, § 111 Comment e. See also 13B C. Wright, A. Miller & E. Cooper, Federal Practice & Procedure § 3563 (2d ed. 1984); Randall, supra note 37; Schneebaum, supra note 46, at 303; Steinhardt, supra note 10, at 1174 n.303; supra notes 38, 44, 46.


nizably enhanced and/or limited the jurisdiction of courts under customary principles of jurisdictional competence because such competencies and requirements under international law, being also law of the United States, are relevant to full inquiry about federal court jurisdiction.\textsuperscript{52}

Since international law is law of the United States in several senses

Land Warfare 180-81, para. 505(e) (1956). \textit{See also} United States v. Smith, 18 U.S. (5 Wheat.) 153, 159 (1820) ("But supposing Congress were bound in all cases...to define" — implication: Congress may not have to do so); Jay, \textit{supra} note 14, at 829 & n.53, 843-44. Interestingly, since offenses under customary international laws are among the "laws of the United States" (see \textit{supra} notes 44-46), federal courts have been granted jurisdiction over "all [such] offenses" in 18 U.S.C. § 3231.

noted above, the judiciary also has the power to take judicial notice of and, thus, to identify and clarify customary international law. More importantly, such points compel recognition that the judiciary is bound to identify, clarify and apply customary international law in cases or controversies otherwise properly before the courts. As Justice Gray recognized in *The Paquete Habana*:

International 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.54

Similarly, in *Hilton v. Guyot*, he affirmed:

International law in its widest and most comprehensive sense. . . is part of our law, and *must* be ascertained and administered by the courts of justice, as often as such questions are presented in litigation between man and man, duly submitted to their determination.

The most certain guide, no doubt, for the decision of such questions is a treaty or a statute of this country. But when, as is the case here, there is no written law upon the subject, the duty still rests upon the judicial tribunals of ascertaining and declaring what the law is, whenever it becomes necessary to do so in order to determine the rights of parties to suits regularly brought before them.55

Other recognitions of such a judicial obligation have existed throughout our early history,56 and have found expression in more recent fed-

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53. See, e.g., Municipality of Ponce v. Roman Catholic Church, 210 U.S. 296, 318 (1908) ("international law... courts must take judicial notice"); *The Paquete Habana*, 175 U.S. 677, 708 (1899) ("bound to take judicial notice of, and to give effect to, [even] in the absence of any treaty or other public act of their own government. "); Ker v. Illinois, 119 U.S. 436, 444 (1886) ("bound to take notice"); Brown v. Piper, 91 U.S. (1 Otto) 37, 42 (1875); *The Scotia*, 81 U.S. (14 Wall.) 170, 187-88 (1871) ("we may take judicial notice... of the law of nations"); *The Kaiser Wilhelm II*, 230 F. at 723 ("International law is something of which courts will take notice"); *Ocean Ins. Co. v. Francis*, 2 Wend. 64, 69 (N.Y. 1828); *Restatement*, supra note 7, § 113(1) and Comment b. See also *Ex parte Quirin*, 317 U.S. 1, 27 (1942) ("[f]rom the very beginning of its history this Court has recognized and applied the law of war. . ."); *Hilton v. Guyot*, 159 U.S. 113, 163 (1894); *Crosby v. Pacific S.S. Lines*, 133 F.2d 470, 475 (9th Cir. 1943) ("It is clear... that the federal courts would have applied any rule of international law bearing on the point, or the provisions of a treaty."); 1 J. Moore, supra note 19, at 11; supra notes 14, 38; cf. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428, 430 n.34 (1964) (adding: "the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it, since the courts can then focus on the application of an agreed principle"). On the meaning of *Sabbatino*, compare *Rabinowitz, Viva Sabbatino*, 17 VA. J. INT'L L. 697 (1977) with *Paust*, supra note 4.

54. The *Paquete Habana*, 175 U.S. 677, 700 (1899) (Gray, J., opinion) (emphasis added). See also id. at 708 ("bound to take judicial notice of, and to give effect to... " (emphasis added)). For further exposition, see *Paust*, supra note 1, at 435-39, and references cited; *United States v. Buck*, 690 F.Supp. 1291, 1301 (S.D.N.Y. 1988).

55. *Hilton v. Guyot*, 159 U.S. 113, 163 (1894) (Gray, J., opinion) (emphasis added).

56. See, e.g., *Wildenhus's Case*, 120 U.S. 1, 6 (1886) (argument of counsel: "is obligatory upon the courts of the United States."); Ker v. Illinois, 119 U.S. 436, 444 (1886) ("bound to take notice"); *Caperton v. Bowyer*, 81 U.S. (14 Wall.) 216, 228 (quoted in note 44 supra); *Bank of
eral opinions.57 Indeed, because of such a judicial duty and responsibility, based as it is in the Constitution,58 a court that refuses for some specious reason to apply international law denies its own validity.59

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58. See text at notes 37, 44-47 supra and accompanying notes.

59. See also Paust, supra note 45, at 777 & n.101. The identification and clarification of extant law is precisely and necessarily part of the judicial function in this and any other free society.
CONCLUSION

In conclusion, there are several important recognitions in U.S. judicial opinions concerning the nature, sources and status of customary international law. Indeed, there are several constitutional bases which are relevant to an adequate incorporation of customary international law, and such law has been incorporated both directly and indirectly for several purposes, including the recognition and/or conditioning of rights, duties and powers.

As "law of the United States" within the meaning of several constitutional provisions, customary international law is relevant both to the restraint and to the enhancement of executive, congressional and judicial powers. Indeed, under Article III, section 2, clause 1 and Article VI, clause 2 of the Constitution, the judiciary is recognizably bound to identify, clarify and apply customary international law in cases otherwise properly before the courts, assuming that no unavoidable clash with some other constitutional requirement otherwise exists.60

Finally, it is realistic to note that we are merely participants in the creation and shaping of such law, but what glory and greatness participants can make!

You,
In whose sight,
I see

You,
In whose might,
Are we.

You,
_Erga Omes_,
Be.

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60. See also Paust, _supra_ note 1, at 394 n.1 (U.S. Constitution should apply domestically in the case of an unavoidable clash with custom).