Michigan Journal of International Law

Volume 10 | Issue 2

1989

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## I. INTRODUCTION

The late Professor Elliott Cheatham[1] was fond of saying that it was impossible to have any meaningful discussion about the relative status of various rules of law within a legal system unless careful attention was paid to the sources of those rules.[2] This statement is especially accurate when applied to academic and governmental efforts to describe the role of public international law in governmental decision making in the United States. Many of these discussions have not been models of analytical clarity. This article attempts to avoid these pitfalls by suggesting an analytical framework to clarify some of the conceptual interrelationships between the various forms of legal decision making implicated in that process.

In this discussion, I distinguish the authoritative source of law from the substantial source of law. The authoritative source of law is the political body that confers authority on the decision maker to select and interpret the rule. By doing this that body politic creates the authority that gives the rule status as a rule of law in the forum of decision. The substantial source of a legal rule is that body of law in which the rule's original policy bases and the verbal form that describes the effect to be given to that policy are found. The substantial

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I wish to express my great appreciation to Ms. Michelle Behaylo, J.D. '90, for her excellent research assistance.

Preparation of this article was supported by a grant from Vanderbilt University School of Law.

1. Cheatham, a professor of law at Columbia University Law School during most of his life, finished his career at Vanderbilt Law School in 1972. He was, of course, a conflict of laws scholar. His preference for clear and precise analysis as well as his fundamental courtesy and willingness to evaluate even contrary opinions objectively and on the merits make his work a useful model, not only for its substance but for its scholarly tone as well. This was an attribute that he shared with his good friend Professor William Bishop. Professor Bishop once told me that he and Cheatham met most often, together with their wives, "accidentally" at the local art museum in whichever city was hosting the annual meeting of the Association of American Law Schools. "Playing hookey," Bishop called it — a tribute, in my view, rather to Bishop's and Cheatham's good taste and sense of the order of things.

2. *See, e.g.*, Cheatham & Maier, *Private International Law and Its Sources*, 22 VAND. L. REV. 27 (1968).

source of the rule is not necessarily the same political body or unit that is its authoritative source. I distinguish both these sources from the energizing forces that stimulate the legal dynamic. Those forces are the combined felt community needs that give life to every rule of law and justify its continued use as a guide to authoritative decision making.

I also address the question, if international law is "part of the law of the United States," what must that statement necessarily mean about the status of international legal rules in United States courts in the light of the conclusions reached about the authoritative source of those rules. In this discussion, I have attempted to avoid both the unhelpful abstractions and the not so glittering generalities that sometimes characterize scholarly discussion of these questions. This essay inquires about the role of customary international law in providing authoritative limits on the internal exercise of governmental authority otherwise conferred upon United States officials, including courts, by the United States Constitution.

That question contains many subsidiary questions. One is whether the customary practice of nations accepted as law by the world community is, of itself, also evidence of federal law in the United States. If customary international law is evidence of authoritative federal norms, where do those norms fall within the federal hierarchy and what room does this leave for the policy input of the national decision maker in making use of those norms? In other words, is customary international law subject to modification for internal purposes in the same manner that federal statutes, federal common law and even international treaties are subject to modification? Or is it, because of its special origin, truly "a mystic overlaw to which even the United States must bow"?[3]

If customary international law is not an evidence of federal law but has legal force of its own without the need for specific incorporation, does it have an exalted place in the hierarchy of United States law? In other words, is it the law of the United States over all matters to which it applies other than provisions of the United States Constitution? If the answer to this last question is,"yes," are customary international legal rules nonetheless subject to modification or supersession for internal purposes by the exercise of the powers conferred on the branches of the national government by the Constitution? Or, does

3. The Western Maid, 257 U.S. 419, 432-33 (1922) (Holmes, J.). In this admiralty case, Holmes answered the question realistically. "When a case is said to be governed by foreign law or by general maritime law that is only a short way of saying that for this purpose the sovereign power takes up a rule suggested from without and makes it part of its own rules." *Id.* at 432. *See infra* text accompanying notes 16-20.

the Constitution contemplate that customary international law holds a special and higher position than other forms of federal law, making it not subject to modification by means of ordinary law-creating processes of the federal government?

Lastly, is customary international law *itself* an authoritative source of law in the United States, superior in U.S. courts to domestic authority conferred on the political and judicial branches by the United States Constitution as to those matters to which it applies?

To address all of these questions adequately would require discussion beyond the scope of the present analysis. Many of these questions have been addressed, although often without great clarity, in the literature. This article seeks to provide an analytical framework for dealing with these questions by addressing the more encompassing question, what is the authoritative source of customary international law in the United States?[4]

## II. THE SOURCES OF LAW DISTINGUISHED

Before beginning this analysis, a more precise definition of the terms "authoritative sources", "substantial sources" and "energizing forces" as used here is necessary.[5] The authoritative source of a rule of law is that body politic that confers authority on the decision maker to "apply" the rule as a guide to decision and thereby gives the rule its status as "law" in that body politic. By conferring such authority, that body politic legitimates the use of the rule by its government officials, including courts, as a guide to deciding the rights of the populace or the scope of government authority.

In the United States, for example, the authoritative source for a decision may be one of many bodies politic: a city or county, a state, or the entire nation. One important role of the United States Constitution is to designate these authoritative sources and to determine, in the event of a conflict between decision makers, whose policies shall control.[6] The Constitution explicitly provides that the authority of state

4. The authoritative role of treaties in United States law is directly confirmed by the Supremacy Clause of Article VI of the United States Constitution. I do not, therefore, discuss the theoretical source of international treaty law in the United States. For an excellent discussion of the relationship between treaties and customary international law in the international context, see Weisburd, *Customary International Law: The Problem of Treaties*, 21 VAND. J. TRANS. L. 1 (1988).

5. These concepts have a rough parallel in Aristotle's classification of sources. Under that classification (material, formal, efficient, final) the authoritative sources would be the "formal" sources, the substantial sources would be the "material" sources and the "energizing forces" would be the "efficient" sources. *See* Cheatham & Maier, *supra* note 2, at 95 n.267.

6. In fact, it was the conflict of authority between the states and the nation and among the several states themselves under the Articles of Confederation that led to the Constitutional Con-

law can always be displaced when the central government has acted appropriately within its power.[7] Thus, the authoritative source of federal law is the national body politic. The same analytical framework can be used to describe the divisions of power among the federal branches. The Constitution is, however, less explicit about those interbranch divisions of power, especially in the area of foreign affairs.[8] Nonetheless, the national body politic is the authoritative source of that law. It speaks through the federal Constitution.

A more functional way of putting the question about the authoritative source of a given rule of law is as follows. Does the decision-making body, authorized to make the decision by a given body politic, have the authority to change or reinterpret the content of the rule to give effect to the policies of that body politic when it adopts that rule as a guide to decision? In the United States, these decision makers may be officials of the executive, the legislature, or the courts. When dealing with international law, if the answer to the above question is "yes," then it is the law of the United States, the same law that empowers the institution to make the law selection and thereby gives authority to its decisions. Thus, the national body politic, not the world community, is the authoritative source of the result arrived at and thus, of the law in that situation.

On the other hand, if an institution in the United States does not have authority in its own forum by virtue of its constitutionally conferred powers to interpret the international legal rule in question for domestic application in the light of United States policies, then the authoritative source of that rule is the international community. In that situation, any change in the substantive content and, therefore, of the result to be reached under the guidance of the rule would have to be brought about by action of that community, not by the act of a domestic decision-maker.[9]

Put another way, it is clear that the world community is the au-

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vention of 1787. When it became clear that these questions of authority could not be addressed adequately within the framework of the Articles, the Convention addressed itself to the development of a new structure to deal with them directly. 1 THE RECORDS OF THE FEDERAL CONVENTION 18-27 (M. Farrand ed. 1937); *See* J. STORY, COMMENTARIES ON THE CONSTITUTION SECS. 259-60 (2d ed. 1851); C. WARREN, THE MAKING OF THE CONSTITUTION 567 (1928).

7. U.S. CONST. art. VI.

8. Banco Nacionale de Cuba v. Sabbatino, 376 U.S. 398, 424 (1964); *See* E. CORWIN, THE PRESIDENT, OFFICE AND POWERS, 1787-1957 171 (1957). *But see* Henkin, *The Foreign Affairs Power of the Federal Courts: Sabbatino*, 64 COLUM. L. REV. 805, 811-19 (1964).

9. "It is not of course the unilateral claims but rather the reciprocal tolerance of the external decision-makers which create the expectations of pattern and uniformity in decision, of practice in accord with rule, commonly regarded as law." McDougal, *The Hydrogen Bomb Tests and the International Law of the Sea*, 49 AM. J. INT'L L. 356, 358 n.7 (1955).

thoritative source of the rules of international law when they are applied in world community fora because those fora can interpret and vary the content of those rules in their search for community consent.[10] Those fora, especially the forum of diplomacy, can incrementally change the content of those rules by authoritative interpretation or by the demand-response accommodation process that characterizes customary law-formation.[11] International adjudicators, although theoretically acting only as conduits to give effect to community consent, also necessarily exercise influence over the content of international law by the emphasis that they give to various indicia of that consent in the process of arriving at a decision about what the law "is." Conversely, it is the domestic law that determines whether a given internal decision maker has the authority to decide that the municipal body politic will violate its legal duties to other members of the world community.

A more practical form of the question, what is the authoritative source of a rule of law, is, "In what set of books is the lawyer most likely to find accurate guidance to predict the acts of a given decision maker?" Should the lawyer search the prior case reports of the domestic court, or the opinions of international scholars and the prior case reports of international tribunals to determine which result a domestic court will likely reach in a given case? If prior domestic decisions provide the most accurate guidance, then the authoritative source of the decision and, hence, of the rules that are its guides is domestic law. If customary acts of the world community, especially as identified and characterized by international tribunals, provide the most accurate guidance to the likely domestic decision, then the authoritative source of the law is international law.[12]

10. This analysis avoids the fallacy that treats rules of international law as if their application were in some sense mechanically "determined" by community consent, ignoring the influence of the decision maker's values on the result in the individual case. Although such a metaphysical view of law may be of some utility in hortatory discussions, lawyers who deal with law as a practical tool must recognize that the use of any rule by a decision maker as a guide to decision necessarily includes some reflection of that decision maker's values in the result achieved under that rule's guidance. *Cf.* Erie R.R. v.Tompkins, 304 U.S. 64, 78-80 (1938).

To the extent that the decision maker has authority, the decision is authoritative. The rule of law is therefore a strong guide to, but not the sole influence on, the result achieved. Failure to recognize this fundamental truth about rules of law, including rules of international law, leads to some of the unfocused discussion that characterizes many of the colloquies about the role of international law in national decision making. *See, e.g., Panel Discussion, The Authority of the United States Executive to Interpret, Articulate or Violate the Norms of International Law*, 1986 PROC. AM. SOC'Y INT'L L. 297-308, *passim.*

11. McDougal, *supra* note 9, at 357.

12. In the United States, of course, courts, when interpreting an unclear piece of federal legislation will attempt to interpret it in a way that will not violate international law. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 114 (1987). This is a rule of legislative construction whose purpose is to insure that courts do not accidentally, by

This essay concludes that both the governmental structure of the United States and the functional nature of international law itself compel the conclusion that the authoritative source of public international law in the United States is the will of the United States body politic as reflected in federal law — common law, statutory law or constitutional law[13] — not the will of the world community of nations. There is no doubt that the United States is obligated in the world community to comply with public international law. It is equally clear that each individual nation in that community, including the United States, must have the power (but not the international authority) to violate international law. This proposition is fundamental to the concept of absolute territorial sovereignty; and territorial sovereignty is, itself, a *sine qua non* for a consentual legal system and for fixing practical responsibility for compliance with the norms created by that community consent.[14]

Part of nationhood in such a system must be possession of the internal authority to decide whether to violate international obligations. Whether a nation has elected to exercise that power is determined by reviewing the validity of its internal decision-making processes under municipal law. To suggest that the rule of international law that a nation is deciding to violate controls the internal legitimacy of the process by which that decision is reached is fundamentally nonsensical. It is this functional reality, as much as any language of the courts or of the Constitution, that supports the proposition that United States decision makers are not bound by the Constitution to apply rules of customary international law in domestic fora.[15]

The ensuing analysis also requires that the authoritative source of a legal rule be carefully distinguished from its "substantial source."

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exercising the judicial power, put the United States in violation of its international obligations when that result was not intended by the political branches. Under this rule of construction, however, it is clear that the court's search of international authorities is carried out to serve the domestic constitutional principle of separation of powers, not to give effect to substantive international community policy for its own sake.

13. The problem is not, of course, one faced solely by the United States, and the solution is different in the internal law of other nations. *See, e.g.*, Bundesverfassungsgesetz art. 25 (Constitution of the Federal Republic of Germany), making international law supreme in internal German decision making.

14. *See* Maier, *Interest Balancing and Extraterritorial Jurisdiction*, 31 AM. J. COMP. L. 579, 584-85 (1983).

15. Professor Stewart Jay puts it nicely: "The obligations of the United States to foreign states and their citizens mainly are defined principally in the international arena; the extent to which American law acknowledges the law of nations is largely irrelevant. Domestically . . . the issue [of whether to apply international law domestically] always revolves around an initial decision of whether to constrain our own institutions. This judgment turns on deciding which branch of government should have the power to interpret the law of nations, or to depart from it. . . ." Jay, *The Status of the Law of Nations in Early American Law*, 42 VAND. L. REV. 819, 848 (1989). *See also* Weisburd, *The Executive Branch and International Law*, 41 VAND L. REV. 1205 (1988).

The substantial source, as I use the term, is the body of law to which we look to determine the content of the rule — its verbal form and the meaning of those words for that body politic's decision makers. The body of law that is the substantial source of the rule is not necessarily created by the same body politic that makes the rule authoritative for purposes of the case or situation before the local decision maker.

An excellent illustration is drawn from the field of conflict of laws. When the forum elects to "apply" the law of a foreign jurisdiction, it uses that jurisdiction's rule as a model for its own decision — as the substantial source of the law applied. Its decision does not become law for the body politic from which the rule was copied. The body politic of the forum remains the authoritative source of the law in that situation because it is only by virtue of the forum's decision-making authority that the substance of the foreign rule can have any legal effect in the forum's territory. In other words, it is solely the *forum's* authority that permits the content of the foreign rule to function as law in the forum in the first place.[16] Conversely, the forum's decision does not create precedent in the foreign system from which the rule was taken. The forum's decision has only whatever persuasive effect in the foreign system that the decision makers in that system may decide to give it. In other words, the borrowing sovereign's "application" of the borrowed rule is not an authoritative source of the content of that rule for the body politic from whose law it was borrowed.

This analysis is no less accurate when forum courts "apply" customary international law.[17] The very consentual nature of international legal rules makes it clear that they can have no applicability within a nation's legal system without the active affirmative participation of that nation's authoritative decision-makers.[18]

This principle of forum authority derives from the public international law concept of absolute territorial sovereignty on which the fundamental principle of territorial jurisdiction — thus, the very existence of a body of law governing relationships between nation-states — depends.[19] There is no doubt, however, that public international law is

16. *See generally, e.g.*, W. COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS (1924).

17. *See,* The Schooner Exchange v. McFadden, 11 U.S. (7 Cranch) 116, 135 (1812). *Cf. Comments by Rubin and Crawford*, 1982 PROC. AM. SOC'Y INT'L L. 267.

18. This analysis presumes a dualist system. It is clear that if customary international law is at the apex of a hierarchy of domestic law, then it is really a super law in the forum, like a constitution, not a set of rules that national decision makers use as models for domestic decisions. Evidence that the framers of the Constitution intended this result is weak at best. *See* Jay, *supra* note 15, at 843-48.

19. The principle of absolute territorial authority of the local decision maker was the basis for the concept of comity that described how it was possible for the law of one jurisdiction to be

the substantial source of the norms that it contains when those norms are invoked by United States decision makers to support internal law decisions that the decision maker believes should be guided by international legal principles.[20] When those international norms are used in this way, their substantial source is the body of law called international law but their authoritative source — the governmental power that gives them authority for purposes of the local decision and which has the authority to determine how they will be used as guides in a particular case — is the law of the United States.

Sources of law should not be confused with evidences of the law's normative content. Within each body politic, evidence of the content of legal rules takes various forms. In the United States, for example, the United States Constitution identifies the various forms that federal law may take: the Constitution itself, treaties (and, by customary constitutional practice, other international agreements[21]), and other federal law in all its variousness.[22] The Constitution also designates the institutions that create those evidences: the legislature,[23] the executive,[24] and the courts.[25] These institutions create law, respectively, by federal legislation, federal executive acts, and federal common law.[26] Taken together, these types of law contain the verbal forms that manifest the national legal norms of conduct.

One of the principal roadblocks to effective analysis is the tendency

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applied in another without diminishing the second nation's authority. HUBER, DE CONFLICTU LEGUM, *translated and reprinted in* DAVIES, THE INFLUENCE OF HUBER'S DE CONFLICTU LEGUM ON ENGLISH PRIVATE INTERNATIONAL LAW 49, 64-78 (1937).

20. A somewhat analogous situation is found in United States Constitutional law in those cases where a state cites Supreme Court decisions concerning the federal Constitution as persuasive authority for the interpretation of parallel provisions in the state constitution. In such a circumstance, unlike the situation in the international field, the federal Constitution provides a limit by means of the Supremacy Clause in Article VI to what the state may do. *See* Michigan v. Long, 463 U.S. 1032, 1037-44 (1983). That the analogy breaks down here is significant. The principal difference between the status of federal law in this circumstance and public international law in the situation addressed in this article is that the United States Constitution contains a Supremacy Clause; and public international law does not, except as applied to the external relationships of states.

21. *See generally* McDougal & Lans, *Treaties and Congressional, Executive or Presidential Agreements: Interchangeable Instruments of National Policy*, 54 YALE L.J. 181 (1945).

22. *Cf.* Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. PA. L. REV. 797 (1957).

23. U.S. CONST. art. I.

24. U.S. CONST. art. II.

25. U.S. CONST. art. III. In fact, these are not truly separated powers; rather, the United States federal branches are separate institutions exercising shared powers. *See* A.S. MILLER, THE MODERN CORPORATE STATE: PRIVATE GOVERNMENTS AND THE AMERICAN CONSTITUTION 209 (1976).

26. *See* Maier, *The Three Faces of Zapata: Maritime Law, Federal Common Law, Federal Courts Law*, 6 VAND. J. TRANS. L. 387, 387-91 (1973); Cheatham & Maier, *supra* note 2, at 54-61. A parallel law-making structure is found within each of the states.

of analysts to speak and write of law as if that term were synonymous with "rules." Generally there is no particular harm in speaking and writing as if written legal rules were themselves "the law." For analytical purposes, however, it is essential to keep in mind that, at least for the lawyer, rules of law are useful in direct proportion to the extent that they serve as reliable evidence of the decisions likely to be made by future authoritative decision makers. A rule of law is not, therefore, in any realistic sense, the law itself. Rather, it is a guide for use both by future decision makers and those subject to their decisions to help predict how those authorities will act in given situations. Thus, it is the acts of decision makers that are functional law for the lawyer, international and domestic alike, whether he or she be advising a government or a private client.[27] This reality is made clear by Professors McDougal and Reisman in the introduction to their international law casebook. They wrote:

> The scholar as well as the lawyer advising a client can do no more than explain what relevant decisions were made in the past and what relevant decisions are likely, under different conditions, to be made in the future, to aid in the clarification of goals and then devise strategy tooled toward goal realization.[28]

Other uses of the term "law" project wishful thinking by writers whose personal notions of how the universe ought to look is not matched by the realities of the practice that surrounds them.[29] Thought of in this way, the law is not a body of rules but a process of decision making the results of which are described by those rules. The late Professor Hardy Dillard, who closed his career as a Judge on the International Court of Justice, put it accurately and well:

> Rules of law do not 'exist' in the sense in which a tree or a stone or the planet Mars might be said to exist. True, they may be articulated and put on paper and in that form they exist, but, whatever their form, they are expressed in words which are merely signs mediating human subjectivities. They represent and arouse expectations that are capable of being explored scientifically. The "law" is thus not a 'something' impelling obedience; it is a constantly evolving process of decision making and the way it evolves will depend on the knowledge and insights of the decision makers. So viewed, norms of law should be considered less as compulsive commands than as tools of thought or instruments of analysis. Their impelling quality will vary greatly depending on the context of application, and, since the need for stability is recognized, the norms

27. *See* Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897).

28. M. MCDOUGAL & W.M. REISMAN, INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE: THE PUBLIC ORDER OF THE WORLD COMMUNITY, CASES AND MATERIALS xviii (1981).

29. For criticism of the work of several scholars on this ground, see Jay, *supra* note 15, at 824-25.

> may frequently provide a high order of predictability. But this is referable back to the expectations entertained and is not attributable to some existential quality attaching to the norms themselves. In other words, our concept of 'law' needs to be liberated from the cramping assumption that it 'exists' as a kind of 'entity' imposing restraints on the decision maker.[30]

Thus, when a court or other decision maker "applies law" it selects a set of social policies to guide its decision on the issue before it. It is the authority of the decision maker to decide that makes the decision, the policies it reflects and, hence, the rules that describe those policies, authoritative; not some metaphysical characteristic of the rules themselves. Consequently, as long as a decision maker in the United States is given authority to decide by the Constitution and laws of the United States, the authoritative source of the decision and, thus, of the "law" that is "applied" can be attributable solely to the body politic that conferred that decision making authority upon the decision maker. Put another way, if the Constitution and laws of the United States confer upon a judge or other official the authority to make a decision, the authoritative source of that decision must be the law of the United States regardless of the body of rules from which the verbal formula and the policies it describes may be borrowed.

Insofar as international law is concerned, the United States decision maker may very well treat customary international law as the substantial source of the rule that the decision maker applies, but the act of selecting the rule, interpreting it and applying it is the authoritative act in that domestic forum, not the acts of the international community that create the custom. Conversely, when an international forum — the forum of diplomacy or of adjudication — uses an international legal rule as its guide to decision, the authoritative source of that decision is that forum, empowered and authorized by processes legitimated by the international community, not some abstract overlaw that in some sense compels a particular result.

Domestic decision makers in international cases are not automatons, making decisions mechanically by applying international legal rules, any more than they are automatons when they decide purely domestic issues. The content of customary international law is even more amorphous and, therefore, even more subject to interpretations reflecting the policy preferences of the decision makers who use it as a guide to authoritative decision than is domestic law. The multiple opinions handed down by the International Court of Justice in virtually every case dispel any suggestion that customary international law

30. Dillard, *The Policy Oriented Approach to Law*, 40 VA. Q. REV. 626, 629 (1964).

is either easily determined or may be mechanically applied without reference to the policy preferences of the decision maker. To suggest otherwise is to ignore the accuracy of Professor Myers McDougal's famous dictum, not yet successfully challenged in the literature after more than 30 years. Referring to the international law of the sea, but clearly not limiting the scope of his comments to that subject mattter, he wrote:

> From the perspective of realistic description, the international law of the sea is not a mere static body of rules but is rather a whole decision-making process, a public order which includes a structure of authorized decision-makers as well as a body of highly flexible, inherited prescriptions. It is, in other words, a process of continuous interaction, of continuous demand and response, in which the decision-makers of particular nation states unilaterally put forward claims of the most diverse and conflicting character to the use of the world's seas, and in which other decision-makers, external to the demanding state and including both national and international officials, weigh and appraise these competing claims in terms of the interests of the world community and of the rival claimants, and ultimately accept or reject them.[31]

Some writers suggest that international law ought to be authoritative in the United States and therefore that any constitutionally created power of the United States courts, the Congress and the Executive Branch must be exercised in accordance with it as a matter of jurisprudential fiat.[32] No scholar has yet successfully demonstrated that the United States' government's decision-making authority, or that of any of its branches, was conferred by the people subject to the limitations created by an international legal regime.[33] Such a result could only be achieved in a system in which international law stood at the apex of a normative hierarchy. That cannot be true as long as the authority of domestic decision makers derives from the judgment of the domestic body politic as reflected in the Constitution, not from the international community.[34] Whenever there is a conflict between the will of the people, reflected by the act of their governmental institu-

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31. McDougal, *supra* note 9, at 356-57. Professor Bishop was a great admirer of Professor McDougal's work. A few years before his death he said that he wished that the law-science-policy school of jurisprudence that McDougal founded had not adopted a special vocabulary for its work because difficulties in accurate translation had made Professor McDougal's analyses less accessible to non-English speaking scholars. Conversation between Professor Bishop and this writer while walking to an art museum in Washington, D.C. in 1982.

32. *See, e.g.* Lobel, *The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law*, 71 VA. L. REV. 1071, 1130-34 (1985).

33. For analysis demonstrating precisely the opposite conclusion, see generally Jay, *supra* note 15.

34. Weisburd, *supra* note 15, at 1205, is an excellent article demonstrating that 18th and 19th Century cases and other authorities do not support the conclusion that international law is part of the hierarchy of United States law although it is a source of reference for judicial decision.

tions, and the will of the international community reflected in customary international law, the muncipal will must necessarily control the internal content of the institutional decisions made.

The principal question is, therefore, whether the United States Constitution has incorporated the entire international legal regime into the hierarchy of United States law. Evidence suggests that such incorporation was not intended by the framers.[35] The little U.S. case law that exists on the subject suggests that such an incorporation has not taken place.[36] The authority of domestic decision makers is not subject to limitation in domestic fora by an international community rule until that rule is incorporated into United States law. Once it is so incorporated, the rule has whatever authority is attributable to the decisions of the institution of government that accomplished the incorporation — the legislative, the judicial or the executive branch. Under the Constitution, it can have neither more nor less. As Professor Louis Henkin has put it: "[C]ustomary international law is law for the Executive and the court to apply, but the Constitution does not forbid the President (or the Congress) to violate international law, and the courts will give effect to acts within the constitutional powers of the political branches without regard to international law."[37]

## III. Two Important Cases

Two well-known cases are illustrative, *The Paquete Habana*[38] and *Banco Nacional de Cuba v. Sabbatino*.[39] In *The Paquete Habana*, the President of the United States ordered a naval blockade of the Cuban coast "in pursuance of the laws of the United States, and the law of nations applicable in such cases."[40] While the blockade was in progress, the commander of the U.S. naval forces off Cuba sought permission from the Navy Department to take Spanish vessels returning to Cuba from Florida fishing grounds and to detain their crews as prisoners of war. The Navy responded that any such vessel "attempting to violate the blockade" was subject to capture.[41] The commander cap-

35. *See generally* Jay, *supra* note 15.

36. *See generally* Weisburd, *supra* note 15, at 1205; *cf.* Testimony of Professor Louis Henkin, *infra* text accompanying note 120.

37. L. Henkin, Foreign Affairs and the Constitution 221-22 (1972). *Accord*, Henkin, *Testimony on Cross Examination in Garcia-Mir v. Smith*, Civ. Acts: C81-938A, C81-1084A, C81-1350A, N.D. Georgia, Trial Transcript, at 56 (1986) (copy in the author's files) [hereinafter Henkin Testimony].

38. 175 U.S. 677 (1900).

39. 376 U.S. 398, 424 (1964).

40. 175 U.S. at 712.

41. *Id.* at 713.

tured two coastal fishing vessels which were sold as prize. In this suit by the former owners, the U.S. Supreme Court, sitting as a prize court, found that the vessels had been captured in violation of international law and that therefore the proceeds from their sale had to be returned to plaintiffs.

It was in this context that the Supreme Court made its famous statement that international law is part of the law of the United States and that courts when called upon to apply it would do so where there was "no controlling executive or legislative act or judicial decision."[42] Since the President had ordered the blockade to be conducted in accordance with international law, there was no conflict between the "controlling executive act" which was the President's order and the Court's version of the international law of prize. Any seizure in violation of international law was unauthorized as a matter of domestic law because the President, as Commander-in-Chief, had incorporated by reference the limitations found in international law into the authority he conferred on United States naval forces.[43] The opinion is clear that had the President ordered naval forces to carry out the blockade in accordance with practices that would violate international law, the Court would have nevertheless recognized the legal validity of such an order.[44]

In *Sabbatino*, the Cuban central bank sued the receiver of a United States corporation to recover the proceeds from the sale of sugar that the Cubans claimed to have expropriated while it was on board ship in a Cuban harbor. The plaintiffs relied on the act of state doctrine, the rule that a United States court will not question the validity of an act of a foreign nation done within its own territory.[45] Defendant argued that the doctrine did not apply because the expropriation had been without compensation and therefore violated international law. The Court ruled that the doctrine was one of federal common law, derived from the principle of separation of powers.[46]

First, the Court found that the act of state doctrine was not required by rules of public international law. Then the Court refused to apply the international law rule that private parties with claims against foreign governments must exhaust local remedies; then, if un-

42. *Id.* at 700.

43. *See* Garcia-Mir v. Meese, 788 F.2d 1446, 1454 (11th Cir. 1986).

44. *See supra* text accompanying note 40.

45. 376 U.S. at 416 (*quoting* Underhill v. Hernandez, 168 U.S. 250, 252 (1897)); *see* Hatch v. Baez, 14 N.Y. Sup. Ct. 596, 599-600 (N.Y. App. Div. 1876).

46. 376 U.S. at 425-27. *See* Maier, *The Bases and Range of Federal Common Law in Private International Matters*, 5 VAND. J. TRANS. L. 133, 159-61 (1971). *Cf.* Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1559-60 (1984).

successful, seek redress through government to government negotiation. The Court wrote: "Although it is of course true that United States courts apply international law as a part of our own in appropriate circumstances . . ., the public law of nations can hardly dictate to a country which is in theory wronged how to treat that wrong within its domestic borders.[47]

The Court then refused to determine whether the uncompensated taking violated international law. The Court made it clear that it did not consider international law to be part of the law of the United States in the sense that United States courts must find and apply it as they would have to do if international legal rules had the same status as other forms of United States law.[48] Rather, the court's refusal to decide was grounded firmly on federal separation of powers considerations. Taken together, these cases make it clear that, whatever may have been the case in 1789, modern decisions by United States courts based on principles of customary international law derive their authority from the United States body politic, even though their substantial source may be the rules of customary international law.[49] No modern Supreme Court cases suggest otherwise. In other words, the international legal regime is not incorporated into United States law.[50]

Both the authoritative sources and the substantial sources of law must be further distinguished from what Chief Justice Harlan Stone called the law's "energizing forces."[51] These forces are the felt needs of national or international society that are the raison d'etre for the norms that the rules of law describe. It is these forces that encourage the creation of, or changes in, legal norms and that inform the interpretation of the rules that embody those norms. It is the perception of these forces and their evaluation by an authoritative decision maker that molds and changes the law as it is applied. To suggest that the rules of any legal system can be given effect without careful attention to these forces by the institution charged to decide is to misunderstand the nature of legal decision making.

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47. 376 U.S. at 423 (citations omitted).

48. *Id.* at 431-32.

49. *See* Jay, *supra* note 15, at 830-833.

50. The above discussion reflects, of course, a baldly utilitarian approach to legal decision making. The alternative is a recourse to natural law whose heavy reliance on revealed truth provides less than effective guidance for the solution of real world problems. *See* Epstein, *The Utilitarian Foundations of Natural Law*, 12 HARV. J.L. & PUB. POL'Y — (1989) (forthcoming). Professor Epstein points out that the conclusions suggested by natural law theory are equally accountable under utilitarian analysis without the need to rely upon the analyst's intuition as an authoritative determinant.

51. Stone, *The Future of Legal Education*, 10 A.B.A. J. 233, 234 (1924).

## IV. INTERNATIONAL LAW IN U.S. LAW

The remainder of this discussion focuses on two recent legal events that demonstrate the difficulties which arise when analysts fail to identify clearly the authoritative sources of the international legal rules that they urge upon United States decision makers. One of these events was the American Law Institute's ("ALI") preparation and publication of the *Restatement (Third) of Foreign Relations Law of the United States* from 1979 through 1987. The other event is the series of domestic court cases dealing with the applicability of the international law of human rights in United States courts to the incarceration of the Mariel boatlift Cubans in federal prisons pursuant to executive regulations.

## V. THE RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW

The development of the *Restatement (Third) of Foreign Relations Law of the United States*[52] was extremely contentious, both within the American Law Institute and, especially, between the Institute and the United States Departments of Justice and State.[53] Ambiguity in identifying the authoritative source of public international legal rules in United States law, especially in the early drafts, led to serious misgivings on the part of the U.S. Government and ultimately to an unprecedented intervention by those departments into the ALI's decision making process.[54]

Tentative Draft No. 1[55] was an early signal that the issue of authoritative sources would not be addressed with clarity when it de-

52. American Law Institute, RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES (1987). Professor Louis Henkin of Columbia University Law School was the Chief Reporter. Associate Reporters were Professor Andreas Lowenfeld, New York University Law School; Professor Louis Sohn, University of Georgia Law School; and Professor Detlev Vagts, Harvard University Law School. These Reporters first prepared five tentative drafts of the Restatement, approximately one a year. These drafts were each first submitted for discussion to a group of Advisors consisting of other academicians, practitioners and present and former United States Legal Advisers appointed for that purpose, then to the Council of the American Law Institute, and finally to the membership as a whole for discussion, debate and tentative acceptance.

53. This writer served as a representative of the Office of the Legal Adviser, U.S. Department of State, in connection with matters related to the Restatement from August, 1983 through May, 1986, first as the Office's Counselor on International Law, then as a special consultant.

54. For a summary discussion of some of the problems involved in preparing the document, see Maier, *Introduction to Panel, Restatement of U.S. Foreign Relations Law: How Were the Controversies Resolved?*, 1987 PROC. AM. SOC'Y INT'L L. — (1987) (forthcoming).

55. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (Tent. Draft No. 1, 1980). Each of the first five Tentative Drafts dealt with different aspects of the Restatement. Ultimately, the Reporters prepared a Tentative Final Draft containing across-the-board revisions, then a Tentative Draft No. 7 dealing with certain especially controversial issues. Despite its title, Tentative Draft No. 7 was actually the draft on these issues penultimate to the final bound volume. The title, Restatement (Third) of Foreign Relations Law, was

scribed the relationship between international law and the law of the United States as a "mixed" monist-dualist system. The Introductory Note to Chapter 2, Status of International Law and Agreements in United States Law, in Tentative Draft No. 1,[56] began by characterizing international law and the law of the United States as two "discrete legal systems."[57] After describing both the "monist"[58] and "dualist"[59] theories of the relationship between international and domestic legal systems, the draft appeared to retreat from its earlier statement by describing the United States system as "mixed," suggesting that in some instances international law was authoritative of its own force; in others, solely because it had been "incorporated" into U.S. law. The draft never directly addressed the nature or degree of the mixture. Later sections and the accompanying commentary seemed to be undecided about the nature and extent of authority to be accorded customary international law by United States decision makers as well as about the appropriate places to search out its content. This lack of clarity manifested itself in several sections of the early drafts. Two of the most controversial were the sections dealing with jurisdiction, especially Section 403,[60] and Section 135,[61] dealing with the status of customary international law in the hierarchy of United States law.

Section 403 represented a departure from earlier legal theory about the role of the customary international legal limitations in decisions by United States courts dealing with cases in which the United States and other nations had concurrent jurisdiction under principles of international law. Under Section 40 of the earlier *Restatement (Second) of the Foreign Relations Law of the United States*,[62] courts resolved jurisdictional conflicts in concurrent jurisdiction cases by employing the principle of comity.[63] Under that analysis, the interests of the competing states were examined to determine whether, in the light of the util-

adopted by the ALI while the book was being prepared for final publication. All drafts are, therefore, referred to as drafts of the Restatement (Revised).

56. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (Tent. Draft No. 1, 1980) [hereinafter T.D. No. 1].

57. *Id.* at 39.

58. "Monists" argue that international law is supreme in the hierarchy of law in the United States, even as the Constitution is supreme over other domestic law.

59. "Dualists" treat international law and United States law as being entirely independent but congruent systems.

60. Restatement (Third) of the Foreign Relations Law of the United States (Tent. Draft No. 2, 1981) [hereinafter T.D. No. 2].

61. T.D. No. 1, *supra* note 56, at 64.

62. RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 40 (1965).

63. *See, e.g.*, Timberlane Lumber Co. v. Bank of America, 549 F.2d 597 (9th Cir. 1976); Mannington Mills v. Congoleum Corp., 595 F.2d 1287 (3d Cir. 1979).

ity of encouraging similar reciprocal treatment in a later case, the United States court should elect not to exercise jurisdiction that it could otherwise exercise under one or more of the traditional international law rules.[64] International legal rules were used by United States courts under the maxim of statutory interpretation that, where the intent of Congress was unclear, a court would interpret the jurisdictional reach of a statute to comply with the requirements of customary international law.

This approach prevented the court from an interpretation that would put the United States in violation of international law when that was not intended by the political branches.[65] The maxim was based on separation of powers considerations, not on international legal principles. When, however, Congress made its intent clear, the courts would give effect to that intent, even if to do so would result in a violation of international law.[66]

The new section 403 took a different position. It provided that, even though the United States (or another country) might have jurisdiction under any of the traditional international tests, it could not exercise such jurisdiction *as a matter of international law* if it would be otherwise unreasonable to do so. Furthermore, when two or more nations had concurrent jurisdiction under traditional tests, the nation whose exercise of jurisdiction was less reasonable in the light of the considerations set forth in Section 403(2), had to give way, not as a matter of comity but as a matter of international law. The effect of this provision was to make the international law of jurisdiction as interpreted by United States courts superior to Congressional enactments. That effect became even more pronounced when the Reporters dropped Section 403(4) that explicitly recognized the primacy in domestic courts of clear Congressional enactments over customary international legal prohibitions. The new Section 403 amounted to a declaration that customary international law, not Congressional enactments, would henceforth be the authoritative source of law for decisions by United States courts trying to resolve concurrent jurisdiction cases.

This proposed result created serious potential problems for the United States government. First, under the *Restatement (Second)* approach, any decision by a United States court that refused to apply United States law on grounds of comity raised no inferences about the

64. *See* Maier, *Extraterritorial Jurisdiction at a Crossroads: An Intersection between Public and Private International Law*, 76 AM. J. INT'L L. 280, 293-96 (1982).

65. *See, e.g.*, United States v. Aluminum Co. of America, 148 F.2d 416, 443 (2d Cir. 1945).

66. *Id.*

content of the international customary rules limiting the exercise of jurisdiction. Under the new proposal, every United States judicial decision in a concurrent jurisdiction case would necessarily be viewed by the international community as a decision applying an international legal rule, citable as secondary authority in international tribunals and, more importantly, in international negotiations, as evidence of the content of customary international law. In these circumstances, it would become necessary for the Departments of State and Justice to take an *amicus* position in every United States case involving concurrent jurisdiction to attempt to avoid the creation of an unfavorable international legal precedent. Not only was such a task onerous but it would often force the U.S. government to take public positions on issues that might be better handled through quiet diplomacy. Furthermore, information that such a case was before a district court is not automatically available to the concerned government agencies in time to intervene.

Second, since the new drafts concluded that decisions of international tribunals should be given great weight in determining the content of international law, the U.S. government ran the risk that an international tribunal's interpretation of jurisdictional law, even in a case in which the United States government was not a party, might be treated as controlling precedent in a United States court attempting to resolve a similar issue. The *Restatement* did, of course, note the importance of U.S. government interpretations, but the "great weight" rule for international adjudications would seriously undermine the U.S. government's influence.

Third, unlike domestic conflict of laws cases, where U.S. courts balance governmental interests or determine reasonableness under the Due Process Clause, reasonableness determinations by international tribunals would be far too infrequent to build a reliable body of definitive international case law on the topic — thus leading to substantial uncertainty for a prolonged period of time.

All in all, the proposed Section 403 contained the seeds of a major redefinition of the authoritative sources of international jurisdiction law as applied in United States courts. As Judge Malcolm Wilkey pointed out in *Laker Airways, Ltd. v. Belgian Sabena World Airlines*,[67] United States courts owe allegiance to the United States Congress. Once Congressional intent is clear, it is that intent, not the intent of the world community, that is authoritative in those courts. Section

67. 731 F.2d 909 (D.C. Cir. 1984).

403 appeared to challenge that truism.[68]

Ultimately, after a great deal of discussion between the U.S. government representatives and the Reporters, Section 403 was changed to make it clear that United States courts are required to evaluate relative interests but are not required to defer the exercise of jurisdiction to a state having greater interests. The new section provided in part:

> When it would not be unreasonable for each of two states to exercise jurisdiction over a person or activity, but the prescriptions by the two states are in conflict, each state has an obligation to evaluate its own as well as the other state's interests in exercising jurisdiction, in light of all the relevant factors; Subsection (2) a state should defer to the other state if that state's interest is clearly greater.[69]

Floor debate at the closing session made it clear that the word "should" in the last clause was intended to be hortatory, not mandatory. In effect, the ALI returned to a functional comity principle without using the name.[70] The long and acrimonious debate over the content of section 403 could have been in large part avoided, had the issues been analyzed initially in terms of an effort to identify the authoritative source of the law to govern the resolution of concurrent jurisdiction cases in U.S. courts.

But Section 403 did, in its original form, reflect other provisions in the *Restatement* that overtly sought to characterize international law as the authoritative source of decision in U.S. courts in certain relevant cases. The most direct and controversial reference to the domestic authority of customary international law appeared in section 135 (1), Tentative Draft No. 1.[71] That section provided: "[a] rule of international law . . . that becomes effective as law in the United States supersedes any . . . inconsistent preexisting provision of the law of the United States."[72] This was so, according to the Reporters, not because international law had this effect of its own force, but because it had been part of English common law and was therefore one of the "laws of the United States" that were incorporated under the Supremacy Clause of the Constitution.[73] The draft went on to argue that because, in the international community, customary law would supersede a prior inconsistent treaty, "[b]y the same principle a rule of customary

68. *See* Maier, *Resolving Extraterritorial Conflicts or "There and Back Again"*, 25 VA. J. INT'L L. 7, 43-48 (1984), reproducing a letter from Judge Wilkey to Professor Henkin discussing the thrust of the *Laker* decision.

69. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 (1987).

70. *See generally* Maier, *supra* note 68; especially at 40-41.

71. T. D. No. 1, *supra* note 56.

72. *Id.* at § 135(1).

73. *Id.* at 39.

international law which developed after and is inconsistent with, an earlier statute or international agreement of the United States should prevail as the law of the United States."[74]

At another place, the Draft referred United States courts[75] to the traditional international sources for determining the norms of customary international law,[76] with the admonition that particular attention was to be paid to the decisions of international tribunals.[77] The draft conceded that lower courts were required to follow decisions of the Supreme Court of the United States, presumably even if these decisions did not reflect the most recent holdings of an international tribunal.[78] No such concession was made for decisions of the federal appellate courts, presumably freeing the federal district courts to determine the content of customary international law on their own, even in the face of contrary appellate precedent, in all instances where the U.S. Supreme Court had not spoken.[79] The draft did provide that United States courts should give "particular weight" to positions on the content of international law taken by the United States government "*vis-a-vis* other governments," but it did not suggest similar deference to positions taken by the United States government in *amicus* briefs on those same issues.

Taken together, these provisions of the *Restatement (Revised)* implied that the international legal regime was accorded a much more independent role in United States law than existing judicial decisions had ever seriously suggested. More importantly, the heavy emphasis on the added weight to be given to international adjudication in determining the content of international law impliedly undercut the role of traditional judicial techniques of common law development and diluted the important safeguards of the common law principles of precedent and *stare decisis*. The extent of that effect was unclear, principally because the *Restatement* reporters failed to address directly the authoritative source of international customary rules when they

74. *Id.* at § 135, comment (b). The Reporters acknowledged in the Draft that this had never been authoritatively determined. *Cf.* testimony of Professor Louis Henkin, *infra* text accompanying note 120.

75. T.D. No. 1, *supra* note 56, at § 132.

76. *Id.* at § 102.

77. *Id.* at § 132(1).

78. *Id.* at § 132(2). It was not clear whether that rule would apply if the lower court found that those Supreme Court decisions had been "superceded" by the interim development of a new rule of customary international law in the international community. The Draft did not, however, suggest a reason why more respect should be given to prior opinions of the United States Supreme Court than was recommended for prior acts of Congress under these circumstances.

79. *But see* Henkin Testimony, *supra* note 37, at 57-58.

are used as rules of decision by United States courts.[80]

More importantly, Section 135, by arguing that customary international law would supersede Congressional acts, placed older Congressional statutes in a kind of legal limbo. Henceforth, they would be subject always to the uncertainty of a judicial determination that customary international law had changed after the statutory enactment. Additionally, older and well-established customary rules would never have primacy over conflicting Congressional enactments while newly developed custom would supersede Congressional statutes. If the court found a change in customary international law to have occurred after the enactment of the statute, then the presumption of international legal validity that normally guides the interpretation of Congressional statutes dealing with international matters would be taken away.

It is exceedingly difficult to determine the precise moment in time when a rule of customary international law changes or initially emerges. The transformation of custom into customary law is really a function of a changing state of mind in the community. It is for this reason that the proposition that a state must violate international law in order to change it is inaccurate.[81] Whether an international customary rule prohibits a state act is a question that the lawyer must answer at the time that the act is contemplated. If the state decides to act and no other nation protests on legal grounds, the most that can be said is that sometime between the last similar act and the current one, community attitudes have changed and the legal force of the prior custom had disappeared. In such a situation, the inferences drawn about community expectations by writers or courts that the act is legally prohibited are proven wrong.

Conversely, if other states protest the act on legal grounds and the acting state desists from its activity, the continued existence of the prior customary legal prohibition is reaffirmed. The only time when it can accurately be said that a state violates international law is when it acts contrary to what the evidence suggests is a preexisting rule and continues to act in the face of legal protests from other community members. This is so, not because of some metaphysical quality of the

80. The Reporters sought to avoid the problem by a kind of bootstrap analysis which ran as follows: The Supremacy Clause of the Constitution made both laws of the United States and treaties "the supreme law of the land." If treaties were supreme by virtue of their inclusion in this clause, then customary international law was supreme because it was "law of the United States." This was so because customary international law was part of the "common law" of England and the common law of England was part of the law of the United States.

81. *See* discussion in 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 (1986).

law, but because the protests reaffirm that the state acts contrary to the legitimate expectations of the community. In other words, there is a demand and response, but no accommodation.[82] Then and only then can the acting state be accurately said to have violated restrictions created by the consent of nations. In all other instances, those restrictions will have been modified — a new version of the rule created — by the demand-response-accommodation process that describes customary law formation. State practice is still of fundamental relevance in determining the existence of a rule of customary international law.[83] The contemporary legal standing of a customary rule is a function of community opinion whose current state can be inferred only from the contemporaneous interaction of community members.

Given the difficulties inherent in determining the exact moment in time when a new customary rule had come into being and faced with a suddenly increased reliance upon international adjudications to determine both the content of the customary norm and its temporal incidence, the United States government faced a potential problem of considerable scope and importance. Again, that problem was caused by the failure of the *Draft Restatement* clearly to identify the authoritative sources of the international legal rules as employed in U.S. law. Section 135 was removed from the *Restatement* after considerable controversy.

One of the continuing issues concerning the status of customary international law in the law of the United States is whether international law is part of federal common law or, in some sense, a separate body of custom whose rules are identified and articulated by the common law method. The latter position appears to have been the one adopted in the early drafts of the *Restatement (Revised)*.[84]

Professor Louis Henkin, Chief Reporter for the *Restatement* addressed this issue directly in an article, *International Law as Law in the United States*,[85] prepared and published while the *Restatement* was still in preparation.[86] Acknowledging that international law is incorporated into the law of the United States by the Constitution, he ar-

82. *See* McDougal, *supra* note 9, at 356.

83. For an excellent discussion of this point, see Charney, *Customary International Law in the Nicaragua Case: Judgment on the Merits*, 1988 HAGUE Y.B. INT'L L. 16.

84. *See, e.g.*, T.D. No. 1, *supra* note 56 *Introductory Note*, ch. 1 at 17; *compare, id. Introductory Note*, ch. 2.

85. Henkin, *supra* note 46.

86. Professor Henkin has written more extensively on this issue than any other single United States scholar and his earlier theoretical work was fundamental to the development of these *Restatement* sections. It is for this reason that this article focuses principally on Professor Henkin's writing, since it reflects the most significant and useful scholarly contributions to date in this field.

gued that it is not properly characterized as federal common law because it is not "made" by judges:

> Unlike federal common law, customary international law is not made and developed by the federal courts independently and in the exercise of their own law-making judgment. In a real sense federal courts find international law rather than make it, as was not true when the courts were applying the "common law," and as is clearly not the case when federal judges make federal common law pursuant to constitutional or legislative delegation. . . . In principle, the courts interpret law that exists independently of them, law that is "legislated" through the political actions of the governments of the world's states. . . .[87]

Consequently, he concludes, customary international law is not subordinate to existing treaties and United States statutes, as would be the case if it were federal common law.[88] Rather, he concludes that customary international law is incorporated as such into the law of the United States:

> We have also accepted customary international law as "laws of the United States" for purposes of article III. Indeed, it is only by including international law in "laws of the United States" that one can find a firm basis for the supremacy of federal interpretations of international law, or for federal jurisdiction over cases arising under international law.[89]

Two years later, Professor Henkin continued the same theme.[90] He directly attacked the dictum by the United States Supreme Court in *The Paquete Habana* that customary international law provided a rule of decision for United States courts only when there was "no treaty and no controlling executive or legislative act or judicial decision."[91] Citing historic precedent he went on to argue that customary international law should have at least the same status as treaties and should, therefore, have the benefit of the later in time rule with refer-

87. Henkin, *supra* note 46, at 1561-62.

88. *Id.* at 1563.

89. *Id.* at 1566. Expanding on similar conclusions, other writers have argued that customary international law is part of the law of the United States that must be "faithfully executed" and that therefore the President has no constitutional authority to violate customary international law. *See, e.g.*, Paust, *The President Is Bound by International Law*, 81 AM. J. INT'L L. 377 (1987); *But see* Weisburd, *supra* note 15. Under this view, the only basis for federal jurisdiction over cases arising under international law is that the international legal regime is "law of the United States." But federal common law-making authority is called into play when clear national interests are not addressed by legislative or other acts. Consequently, the very fact that international law rules deal with international affairs makes whatever international rules the courts may apply "law of the United States" whether they accurately reflect the consent of the international community or not. In other words, customary international law rules articulated and applied by United States courts need not find their authoritative source in the international body politic in order to raise federal questions. For the proposition that the framers never intended a broad role for customary international law in United States law, see Jay, *supra* note 15, at 847-49.

90. Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and its Progeny*, 100 HARV. L. REV. 853 (1987).

91. 175 U.S. 677, 700 (1899).

ence to acts of Congress.[92] He concludes that the international legal regime is the authoritative source for the content of customary international law in the United States:

> International law as part of the law of the United States indeed is frequently described as common law but only because of a tendency to define all law that is not legislative in origin as common law. . . .
>
> . . . [C]ourts do not *create* but rather find international law, generally by examining the practices and attitudes of foreign states. Even the practices and attitudes of the United States that contribute to international law do not emanate from and respond to life in this society, as does the common law. . . .
>
> Above all, the reasons that the common law bows to legislation are inapplicable to international law. Common law is "inferior" to legislation because, under prevailing theories of government . . . the legislature is the principal lawmaking body; the courts, if they are to make law at all, do so only temporarily and interstitially. But when courts determine international law, they do not act as surrogates for the national legislature.[93]

## VI. The Nature of Federal Common Law

The passage above misses the point because it misconceives the role of the courts as "creators" of common law. Professor Henkin is correct when he argues that common law rules are subject to supersession by legislation. But that is true because of the nature of those rules, not because adjudication holds a status necessarily inferior to legislation. The fallacy is in treating federal common law or, for that matter, state common law, as if it were merely another body of rules like legislation, but made by courts instead of by the legislature.

This error has its origins in early jurisprudential theory that in fact perceived "The Common Law" as a "brooding omnipresence,"[94] a set of Platonic norms discoverable by right reason but not affected by any act of the adjudicator. Under that concept, courts "found" principles of common law from natural law, a kind of "heaven of legal concepts."[95] By the early nineteenth century, however, a much more realistic view of the judicial role in common law "creation" had emerged. Jurists no longer perceived law as "an eternal set of principles ex-

92. Treaties and Congressional enactments are of equal status under the Constitution. Therefore, in case of a conflict, the later in time prevails. Whitney v. Robertson, 124 U.S. 190, 194 (1988). *See* L. Henkin, *supra* note 37, at 163-64.

93. Henkin, *supra* note 90, at 875-76.

94. The phrase, used pejoratively, is from Southern Pacific RR. v. Jenson, 244 U.S. 205, 222 (1917) (Holmes, J.).

95. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 Colum. L. Rev. 809 (1935).

pressed in custom and derived from natural law."[96] Judges, rather, came to realize that they, on their own authority, actually made common law,[97] not by writing rules but by deciding cases. Those decisions were based, not on abstract individual notions of justice, but in large part on the answer to the question whether the result reached made objective sense for situations of the type in question.[98]

The common law is not, in any sense useful to the modern lawyer, solely or even primarily a body of rules; it is a decision-making process. The rules describe the results of that process, they are not themselves the law.[99] In exercising its common "law-making" power, a court applies general principles to specific fact situations to arrive at a legal result. Common law rules describe a series of such past judicial decisions.

Common law rules do not, of their own force, have legislative effect. It is the principle of precedent that makes them applicable to future cases. The rules help the common law court to reach the same result in similar cases in the future that it has in the past or, if it wishes to deviate from prior results, to do so consciously by distinguishing or "overruling" its prior decisions. The court uses the rule as a guide to its future acts because the rule describes in the abstract the conglomerate of past judicial decisions. Usually the court is faced with more than one rule that describe the results in cases similar to the one before it. Then, it selects among competing principles embodied in those lines of decision; and applies the principle or rule selected to the case at bar. This selection process is inherent in common law decision-making. Courts are not slaves to "existing" common law rules; the judge plays a policy-selecting role.[100]

Common law rules inform the public, the bar and the court itself about what the court has done in the past. It is not the past *opinions* that the rules describe, but the legal results arrived at. Thus, the court may either repeat the same result in a similar case or, if it finds the earlier results that the rule describes to be incorrect, it may consciously change that result.[101] The future effect of common law rules

96. Horwitz, *The Emergence of an Instrumental Conception of American Law, 1780-1820*, in V PERSPECTIVES IN AMERICAN HISTORY 287, 336 (1971).

97. *See generally id.*

98. *See* K. LLEWELLYN, HOW APPELLATE COURTS DECIDE CASES 1-28 (1951).

99. *See supra* text accompanying note 30.

100. *See* Erie R.R. v. Tompkins, 304 U.S. 64, 78-80 (1938).

101. *Compare:* "[T]he common law is an internal communication medium among judges, presented to them by lawyers representing opposing parties, which permits the judge to select among competing rules that version of the law which he wishes to apply to the given case." J. SIGLER, AN INTRODUCTION TO THE LEGAL SYSTEM 24 (1968).

derives from the principle of precedent, not from any legislative force attributable to the judicial power.[102]

Because the authority of the common law rule derives principally from its accuracy in describing past judicial decisions and the policy selections that inform those prior decisions, it is clear that the legislature can substitute a legislative rule for the common law rule, directing the court to decide differently in the future. The authority of that legislation does not derive from some inherent superiority of legislation to the common law. Rather, the superiority derives from the inherent difference between the nature of the legislature's authority to announce social policies to be followed in future cases and the courts' common law authority to decide individual cases by applying broad principles to specific facts to arrive at a legal result.[103]

Common law decision making is legitimate in the first instance only when there is no legislation to indicate how the relevant policies shall be applied.[104] Naturally, therefore, common law rules describing past decisions have no legislative base and must give way in the future after the legislature speaks. As Justice Cardozo put it:

> The rule that fits the case may be supplied by the constitution or by statute. If that is so, the judge looks no farther . . . , his duty is to obey. The constitution overrides a statute, but a statute, if consistent with the constitution, overrides the law of judges. *In this sense*, judge-made law is secondary and subordinate to law that is made by legislators.[105]

Federal common law is no different in nature from other common law. It is made by federal courts applying principles derived from the constitutional structure, from the logic inherent in the federal system, or from uniquely federal interests that the legislature has not addressed. The authority to decide cases in this manner and, thus, to create the raw material from which federal common law rules can be fashioned is part of the judicial power conferred in Article III of the United States Constitution.

The principles of international law are accessible to the federal courts when they decide cases by the common law method because such decisions engage the foreign relations power of the United States,[106] not because the authority of the international legal regime

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102. Of course, courts sometimes do, in the purported exercise of common law power, write rules that do not describe past results but that are intended to have *in futuro* effect. When acting thus, the court does not exercise its judicial powers but functions, instead, as a legislature, projecting a policy for hypothetical future cases, not describing one from specific past decisions.

103. B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 30-34 (1921).

104. *See* K. LLEWELLYN, THE BRAMBLE BUSH 78-79 (1951).

105. B. CARDOZO, *supra* note 103, at 14. (emphasis added)

106. Jessup, *The Doctrine of Erie R.R. v. Tompkins Applied to International Law*," 33 AM. J. INT'L L. 740, 743 (1939); *cf. supra* text accompanying notes 38-44.

has somehow magically been incorporated into United States law. Of course, courts find international legal principles by examining the practice of states. Once the appropriate principles are identified, however, those principles are given domestic legal effect by the authority of the court applying them in its traditional common law process, not by some metaphysical omnipresence of the international legal regime. Unless one denies the practical reality of territorial sovereignty, it cannot be otherwise.

## VI. THE MARIELITOS

The authoritative status of customary international law in United States courts was a central issue in the cases involving efforts by the American Civil Liberties Union to free some of the Mariel boatlift Cubans from incarceration in federal prisons.[107] Although the issues were before the Eleventh Circuit Court of Appeals and the Federal District Court for the Northern District of Georgia for almost five years, it is the last incarnation of the case that is most relevant for purposes of this discussion.

In 1980 approximately 125,000 Cubans left Mariel Harbor in a "Freedom Flotilla," bound for the United States. Although most of those involved sought to leave Cuba voluntarily, many were mental incompetents or criminals whom Fidel Castro had taken out of Cuban jails and asylums and sent along with the others. Few of the "Marielitos" had proper immigration documents. They were nonetheless permitted to enter the country by U.S. immigration authorities as "excludable aliens," treated constructively as being still outside the borders. Almost all were paroled into U.S. society after an interviewing process. At the time of this case,[108] some 1800 were being held in a Federal prison in Atlanta, Georgia: one group of approximately 400 who had never been paroled because they were mental defectives or dangerous criminals, a second group because they had violated the conditions of their paroles. The Atlanta Legal Aid Office and the Columbia University Law School Immigration Clinic, with the later assistance of the American Civil Liberties Union, represented the detainees in a class action for *habeas corpus*.

In 1981 the Federal District Court for the Northern District of

107. Garcia Mir v. Meese, 788 F.2d 1446, 1454 (11th Cir. 1986); Garcia Mir v. Meese, 781 F.2d 1450 (11th Cir. 1986); Fernandez-Roque v. Smith, 766 F.2d 1478 (11th Cir. 1985); Fernandez-Roque v. Smith, 734 F.2d 576 (11th Cir. 1984); Fernandez-Roque v. Smith, 671 F.2d 426 (11th Cir. 1982).

108. Fernandez-Roque v. Smith, 622 F. Supp. 887 (N.D. Ga. 1985), *sub nom* Garcia Mir v. Meese, 788 F.2d 1446 (11th Cir. 1986).

Georgia began to review the legality of the incarcerations. The Attorney General of the United States initiated a "Status Review Plan and Procedures"[109] to determine the necessity of continued detention for each member of the class.

The plaintiffs first argued that the continued detention violated the U.S. Constitution. The 11th Circuit, reversing Judge Marvin Schoob of the Northern District of Georgia, found that the Cubans were excludable aliens subject therefore to detention if they were not immediately excluded. Furthermore, since parole of excludable aliens was part of the admissions process, denying it, revoking it or restricting its terms was not an abuse of discretion and did not violate the Cuban detainees' constitutional rights.[110] In a second case, the Eleventh Circuit held that because they were excludable aliens and therefore still seeking legal admission to the United States, they had no Constitutional rights with regard to their application nor to the procedures, such as the Attorney General's review, incident to their seeking admission.[111]

Having failed to establish a Constitutional ground for release, plaintiffs turned to the customary international law of human rights, arguing that their continued detention violated that customary law because it was prolonged and arbitrary.[112] This argument raised two questions: whether the detention actually violated international human rights law and, if it did, whether such a finding could support an order directed to the executive branch to release the detainees.

The only evidence submitted at the trial level dealt with the content and applicability of the international law of human rights.[113] Judge Shoop found for the government on the international law issue.[114] He concluded that although he believed that the international

109. For a description and review of this plan, see Garcia Mir v. Smith, 766 F.2d 1478 (11th Cir. 1985), *cert. denied sub nom.* Marquez-Medina v. Meese, 475 U.S. 1022 (1986).

110. Fernandez-Roque v. Smith, 734 U.S. 576 (1984).

111. Garcia-Mir v. Smith, 766 F.2d 1478, 1484 (11th Cir. 1984); *cf.* Garcia-Mir v. Meese, 781 F.2d 1450 (11th Cir. 1986).

112. In the meantime, the Attorney General's Status Review Plan had ceased to operate because of an agreement by the Castro government that Cuba would accept the return of more than 2500 of the incarcerated Marielitos. The Cuban Government later refused to carry out the agreement in retaliation for the anti-Castro broadcasts of a U.S. radio station that began operations, with the blessings of the Reagan administration, in early 1985.

113. Professor Henkin testified for the plaintiff concerning the content and effect of international human rights law; the author did the same as a witness for the defendant United States Government.

114. Fernandez-Roque v. Smith, 622 F. Supp. 887, 903 (N.D. Ga. 1985). He ruled also, however, that most of the detainees had a constitutionally protected "liberty interest," created by an "invitation" extended to the Marielitos and other "refugees" by President Carter when he publicly pledged to continue "to provide an open heart and open arms to refugees seeking freedom from Communist domination. . . ." *Id.* at 896-901.

norm prohibiting arbitrary and prolonged detention had been violated, the acts of the Attorney General in detaining the Cubans were "controlling executive acts" within the meaning of that language as used by the Supreme Court in *The Paquete Habana*.[115] Therefore, he concluded:

> . . . the President has the authority to ignore our country's obligations arising under customary international law, and plaintiffs have failed to establish that the Attorney General does not share in that power when he directs the detention of unadmitted aliens. Accordingly, customary international law offers plaintiffs no relief in this forum. Any relief in this area must come from the President, the Attorney General, or Congress.[116]

On appeal, plaintiffs argued as they had in the District Court that only an act by the President himself or, at least, an act pursuant to his direct order, qualified as a controlling executive act, citing Section 131, comment (c), and Section 135, Tentative Draft No. 1, *Restatement (Revised)*. The Court of Appeals rejected this argument on the grounds that neither *The Paquete Habana* nor the *Restatement (Revised)* supported it.[117] It pointed out that the supporting language had been taken out of subsequent *Restatement* drafts. The court further concluded that international law could be interdicted in the United States by a controlling judicial opinion. It found such an opinion in Jean v. Nelson,[118] a similar case to that at bar involving Haitian detainees, where the court had concluded that even an indefinitely incarcerated alien "could not challenge his continued detention without a hearing."[119]

It is clear that in this case, the court explicitly rejected the view that customary international law is at the apex of an authoritative hierarchy of law in the United States. When any of the branches of the government acts pursuant to a law-making power conferred on it by the United States Constitution, the legal rules that result are authoritative domestically whether or not they contravene customary international law.

Only if the international legal community is treated for purposes of United States internal law as a super-domestic legislature can customary international law be correctly argued to supersede prior inconsis-

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115. *See supra* text accompanying note 40.

116. 622 F. Supp. 903-04.

117. Garcia-Mir v. Meese, 788 F.2d 1446, 1454-55 (11th Cir. 1986). The court of appeals reversed the district court on the liberty interest issue as well as on grounds not relevant here.

118. 727 F. 2d 961 (11th Cir. 1984); remanded to the District Court for further consideration at 472 U.S. 846 (1985).

119. 727 F.2d at 975.

tent domestic legislation or otherwise Consitutionally-valid executive acts. Neither United States courts, nor the *Restatement* sections discussed above,[120] nor Professor Henkin claim this status for the world community. In fact, during the District Court trial, Professor Henkin appeared to modify, substantially, his endorsement of the proposition that customary international law was authoritative within the United States over prior congressional legislation. During cross examination at the trial in the district court, the following colloquy took place during Professor Henkin's cross examination by Ms. Barbara Tinsley, U.S. Attorney:

> Q. You have a particular opinion, I believe, if I can state it correctly, that later in time customary rules of international law can supercede prior statutes and executive acts; is that a correct statement of your theory or your belief?
>
> A. I have written on the subject and have said that I'm not sure why our law should not be to that effect, but I have always considered it a hypothetical question, and I can't say that I have reached a very firm decision on that.
>
> [Here the witness agreed that that conclusion had been included in the blackletter statement of Section 135, Tentative Draft 1, RESTATEMENT REVISED.]
>
> Q. And then, after much discussion among your colleagues [in the ALI], and I guess they didn't like it, and you reduced it to a comment and labeled it as mere theory, is that correct?
>
> A. Well, I stated both perspectives, the point being that the reason why I took it out of the black letter is that the black letter has to get the approval of the American Law Institute, and there were not enough people in the Institute who wanted to take a position on it, so I withdrew that from the context and I put it in essentially the Reporter's Notes which are our own statement, where I state the argument on both sides.
>
> Q. So that . . . .
>
> A. It would probably be my view that if it came to — if that issue arose in the United States, it is very likely to arise only in connection with an older statute and a recent principle of law, and the only consequence of my theory is it would mean that Congress would have to turn around and tell us whether it really meant that old statute in light of the change in international law, and that's why I think that is a plausible position. But, as I said, I never had any occasion to really take it except when I was trying to draft that.[121]

120. *See supra* text accompanying notes 60 and 61.

121. Transcript of Proceedings in *Garcia-Mir v. Smith* (July 1, 1985), at 51-53. Professor Henkin went on to reaffirm his belief that the position had not yet been determined but that there was at least some United States practice to support it. *Id.* at 53-56.

## VII. CONCLUSION

It seems clear, that, whatever may be the merits of the argument that customary international law ought to be authoritative in the United States, there is little if any evidence to support the proposition that courts or other decision makers in this country are required to give it primacy over otherwise lawfully created domestic legal norms or otherwise constitutionally authorized executive acts. Therefore, customary international law is no more a brooding omnipresence hanging over the head of a United States decision maker than was the Common Law to which Justice Holmes referred when he used that famous characterization.[122]

In other words, the government decision maker is *always* both a decision maker and an advocate about the current content of a customary international legal rule.[123] To treat customary international law as if it somehow exerts a force of its own to "bind" those who participate in making it presents a logical conundrum that misconstrues the role of the national decision maker in the international law-formation process. To treat the United States Constitution as if its Framers intended, by inference, to permit the supersession of directly conferred domestic law-making authority by the necessarily amorphous customary law-formation process of the world community makes even less sense. It is fortunate that there is no discernible trend toward that result in United States Constitutional decision making.

International law is nothing if it is not pragmatic. An international legal system exists only to serve the perceived self-interests of those groups of human beings who live within defined geographic borders and call themselves nation-states. Those perceived self-interests include a recognition of the utility of accepting the short-term detriments of complying with community norms in return for the long-term benefit of maintaining a regularized and reasonably predictable community system under law.[124] Any other choice is anarchy under which even the strongest must suffer.

When scholars or statesmen claim more for this consentual international legal system than it can practically deliver at this relatively early stage of its development, they do it a distinct disservice by lending credence to those who scoff at international law as a never-never land peopled by impractical dreamers who are blinded to reality by

122. Southern Pacific Co. v. Jensen, 244 U.S. 205, 222 (1917).

123. McDougal, *supra* note 9, at 357.

124. "To know the law is helpful, even when the law is bad." K. LLEWELLYN, *supra* note 104, at 66.

wishful thinking. If compliance with a given international community rule is perceived by national decision makers as likely to damage seriously a national self-interest and that damage is perceived to be more threatening to that state than the danger created by possible instability in the community legal system, then that norm will not be treated as authoritative within that nation state. Put another way, members of a consentual legal system cannot logically consent to accept system-imposed detriments that they perceive will result in their own destruction or serious injury. In those circumstances, the long term benefits of preserving the system become meaningless. The detriment of the trade-off required to support stability in the international system would be just too great.

Encouraging the incremental acceptance of international law into the domestic legal system is the best and surest way to strengthen its role and to maintain its stability. Claiming too much for it or seeking to endow it with too much authority too quickly can only be detrimental to the achievement of the goals that we all seek to serve.[125]

125. *See* Bishop, *International Law, 1906-1981*, 75 PROC. AM. SOC'Y INT'L L. 1, 6 (1981).