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International Law and Agreements: Their Effect Upon U.S. Law

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Summary

This report provides an introduction as to the roles that international law and agreements play in the United States. International law is derived from two primary sources — international agreement and customary practice. Under the U.S. legal system, international agreements can be entered into either pursuant to a treaty or via executive agreement. The United States Constitution allocates primary responsibility for entering such agreements to the Executive branch, but Congress also plays an essential role. First, in order for a treaty (but not an executive agreement) to become binding upon the United States, the Senate must provide its advice and consent to treaty ratification by a two-thirds majority. Secondly, Congress may authorize congressional-executive agreements. Thirdly, many treaties and executive agreements are not self-executing, meaning that in order to take effect domestically, implementing legislation is required to provide U.S. bodies with the authority necessary to enforce and comply with an international agreement's provisions.

The status of an international agreement within the United States is dependant upon a variety of factors. Self-executing treaties have a status equal to federal statute, superior to state law, and inferior to the Constitution. Depending upon the nature of executive agreements, they may or may not have a status equal to federal statute. In any case, self-executing executive agreements have a status that is superior to state law and inferior to the Constitution. Treaties or executive agreements which are not self-executing have been understood by the courts to have limited status domestically; rather, the legislation or regulations implementing these agreements are controlling domestically.

The effects of the second source of international law, customary international practice, upon the United States are more ambiguous and controversial. While there is some Supreme Court jurisprudence finding that customary international law is part of U.S. law, conflicting U.S. statutes remain controlling. Customary international law is most clearly recognized under U.S. law via the Alien Tort Claims Act (ATCA), which establishes federal court jurisdiction over tort claims brought by aliens for violations of "the law of nations." The scope of this statute was recently clarified by the Supreme Court in *Sosa v. Alvarez-Machain*.

Recently, there has been some controversy concerning references made by U.S. courts to foreign laws or jurisprudence when interpreting domestic statutes. Historically, U.S. courts have on occasion looked to foreign jurisprudence for persuasive value, but foreign jurisprudence never appears to have been thought of as binding. Though U.S. courts will likely continue to refer to foreign jurisprudence, where, when, and how significantly they will rely upon it is difficult to predict.

Contents

Introduction	1
Forms of International Agreements	3
Treaties	3
Executive Agreements	4
Effects of International Agreements on U.S. Law	5
Self-Executing vs. Non-Self-Executing Agreements	5
Conflict of Laws	6
Customary International Law	7
The Alien Tort Claims Act	9
Reference to Foreign Law by U.S. Courts	11

International Law and Agreements: Their Effect Upon U.S. Law

Introduction

International law consists of “rules and principles of general application dealing with the conduct of states and of international organizations and with their relations *inter se*, as well as with some of their relations with persons, whether natural or juridical.”¹ Rules of international law can be established in three main ways: (1) by international, formal agreement, usually between States, (2) in the form of international custom, and (3) by derivation of principles common to major world legal systems (hereinafter referred to as foreign law).²

Since its inception, the United States has understood international legal commitments to be binding upon it both internationally and domestically.³ The

¹ RESTATEMENT (THIRD) OF FOREIGN RELATIONS, § 101 (1987). Recorded international law dates back to agreements between Mesopotamian rulers five thousand years ago, but international law as we understand it began with the Roman Empire, whose scholars formulated a *jus gentium* (law of nations) they believed universally derivable through reason. See generally DAVID J. BEDERMAN, INTERNATIONAL LAW IN ANTIQUITY (2001). The term “international law” was coined by Jeremy Bentham in 1789. JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 326 n. 1 (Hafner Publ’g Co. 1948) (1789). Although originally governing State-to-State relations, the scope of international law has grown, beginning in the latter half of the 20th century with the emerging fields of human rights law and international criminal law, to regulate the treatment and conduct of individuals in certain circumstances. See, e.g., Universal Declaration on Human Rights, UN GAOR, Supp. No. 16, UN Doc. A/6316 (1948); Geneva Convention (Third) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention (Fourth) Relative to the Protection of Civilian Persons in Times of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; International Covenant on Civil and Political Rights, G.A. Res. 2200A, U.N. GAOR, 3rd Comm., 21st Sess., 1496th plen. mtg., U.N. Doc. A/RES/2200A (XXI) (1966). See also U.S. STATE DEPT. PUB. NO. 3080, REPORT OF ROBERT H. JACKSON, INTERNATIONAL CONFERENCE ON MILITARY TRIALS 437 (1949) (arguing that crimes against humanity were “implicitly” in violation of international law even before Nuremberg).

² RESTATEMENT, *supra* note 1, § 102.

³ See, e.g., *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 281 (1796) (“[w]hen the United States declared their independence, they were bound to receive the law of nations, in its modern state of purity and refinement”); *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793) (“the United States had, by taking a place among the nations of the earth, become amenable to the law of nations”); see also Letter from Thomas Jefferson, Secretary of State, to M. Genet, French Minister (June 5, 1793) (construing the law of nations as an “integral part” of (continued...))

United States assumes international obligations most frequently when it makes agreements with other States or international bodies that are intended to be legally binding upon the parties involved. Such legal agreements are made through treaty or executive agreement. The United States Constitution allocates primary responsibility for such agreements to the Executive, but Congress also plays an essential role. First, in order for a treaty (but not an executive agreement) to become binding upon the United States, the Senate must provide its advice and consent to treaty ratification by a two-thirds majority.⁴ Secondly, Congress may authorize congressional-executive agreements. Thirdly, in order to take effect domestically, many treaties and executive agreements require implementing legislation that provides U.S. bodies with the authority necessary to enforce and comply with an international agreement's provisions.⁵

The effects of customary international law and foreign law upon the United States are more ambiguous and controversial. There is some Supreme Court jurisprudence finding that customary international law is incorporated into domestic law, but this incorporation is only to the extent that "there is no treaty, and no controlling executive or legislative act or judicial decision" in conflict.⁶ Though foreign law has long been seen as persuasive by American courts, its recent use in certain regards (particularly with respect to interpreting the Constitution) has prompted some criticism by a number of law-makers and scholars. This report provides an introduction to the role that international law and agreements play in the United States.

³ (...continued)
domestic law).

⁴ U.S. CONST. art. II, § 2 (providing that the President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur").

⁵ See, e.g., *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1828) (Marshall, J.) (finding that international agreements entered into by the United States are "to be regarded in courts of justice as equivalent to an act of the legislature, wherever it operates of itself, without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the [agreement] addresses itself to the political, not the judicial department; and the legislature must execute the contract, before it can become a rule for the court"). CONGRESSIONAL RESEARCH SERVICE, TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE, A STUDY PREPARED FOR THE SENATE COMM. ON FOREIGN RELATIONS 4 (Comm. Print 2001); RESTATEMENT, *supra* note 1, § 111(3).

⁶ *The Paquete Habana*, 175 U.S. 677, 700 (1900). See also, e.g., *United States v. Yousef*, 327 F.3d 56 (2nd Cir. 2003); *Galo-Garcia v. I.N.S.*, 86 F.3d 916 (9th Cir. 1996) ("where a controlling executive or legislative act...exist[s], customary international law is inapplicable"); *Committee of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 939 (D.C. Cir.1988); *Garcia-Mir v. Meese*, 788 F.2d 1446, 1453 (11th Cir.), cert. denied, 479 U.S. 889 (1986). But see *Sosa v. Alvarez-Machain*, 124 S.Ct. 2739 (U.S. 2004) (holding that the Alien Tort Claims Act, 28 U.S.C.A. § 1350, recognized an individual cause of action for some egregious violations of the law of nations).

Forms of International Agreements

As previously mentioned, the United States regularly enters into international agreements with other States or international organizations that are legally binding. This section briefly describes the form that these agreements may take under domestic practice. In this regard, it is important to distinguish “treaty” in the context of international law, in which “treaty” and “international agreement” are synonymous terms for all binding agreements,⁷ and “treaty” in the context of domestic American law, in which “treaty” more narrowly refers to a particular subcategory of binding international agreements.

Treaties. Under U.S. law, a treaty is an agreement negotiated and signed⁸ by the Executive branch that enters into force if it is approved by a two-thirds majority of the Senate and is subsequently ratified by the President. In some cases, such as in many bilateral treaties, ratification occurs through Presidential signature. In the case of certain multilateral treaties, ratification may occur only after the treaty’s instruments of ratification are submitted to the appropriate body in accordance with the terms of the agreement.

The Senate may, in considering a treaty, condition its consent on certain reservations,⁹ declarations¹⁰ and understandings¹¹ concerning treaty application. If accepted, these reservations, declarations, and understandings may limit and/or define U.S. obligations under the treaty.¹²

⁷ Vienna Convention on the Law of Treaties, entered into force Jan. 27, 1980, 1155 U.N.T.S. 331 [hereinafter “Vienna Convention”], art.2. Although the United States has not ratified the Vienna Convention, it recognizes it as generally signifying customary international law. See, e.g., *Fujitsu Ltd. v. Federal Exp. Corp.*, 247 F.3d 423 (2nd Cir. 2001) (“we rely upon the Vienna Convention here as an authoritative guide to the customary international law of treaties...[b]ecause the United States recognizes the Vienna Convention as a codification of customary international law...and [it] acknowledges the Vienna Convention as, in large part, the authoritative guide to current treaty law and practice”) (internal citations omitted).

⁸ Under international law, States that have signed but not ratified treaties have the obligation to refrain from acts that would defeat the object or purpose of the treaty. See Vienna Convention, art. 18.

⁹ A “reservation” is “a unilateral statement... made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.” *Id.* art.2(1)(d). In practice, “[r]eservations change U.S. obligations without necessarily changing the text, and they require the acceptance of the other party.” TREATIES AND OTHER INTERNATIONAL AGREEMENTS, *supra* note 5, at 11; Vienna Convention, arts. 19-23.

¹⁰ Declarations are “statements expressing the Senate’s position or opinion on matters relating to issues raised by the treaty rather than to specific provisions.” TREATIES AND OTHER INTERNATIONAL AGREEMENTS, *supra* note 5, at 11.

¹¹ Understandings are “interpretive statements that clarify or elaborate provisions but do not alter them.” *Id.*

¹² As a matter of customary international law, States are “obliged to refrain from acts which would defeat the object and purpose of a treaty,” including entering reservations that are
(continued...)

Executive Agreements. The great majority of international agreements that the United States enters into are not treaties but executive agreements¹³ — agreements entered into by the Executive branch that are not submitted to the Senate for its advice and consent. Congress generally requires notification upon the entry of such an agreement.¹⁴ There are three types of *prima facie* legal executive agreements: (1) *congressional-executive agreements*, in which Congress has previously or retroactively authorized an international agreement entered into by the Executive; (2) *executive agreements made pursuant to an earlier treaty*, in which the agreement is authorized by a ratified treaty; and (3) *sole executive agreements*, in which an agreement is made pursuant to the President’s constitutional authority without further congressional authorization. The Executive’s authority to promulgate the agreement is different in each case.

In the case of *congressional-executive agreements*, the “constitutionality...seems well established.”¹⁵ Unlike in the case of treaties, where only the Senate plays a role in authorizing the agreement, both houses of Congress will be involved in the authorizing process for congressional-executive agreements. Congressional authorization of such agreements takes the form of a statute which must pass both houses of Congress. Historically, congressional-executive agreements have been made for a wide variety of topics, ranging from postal conventions to bilateral trade to military assistance.¹⁶ The North American Free Trade Agreement and the General Agreement on Tariffs and Trade are notable examples of congressional-executive agreements.

Agreements made pursuant to treaties are also well-established as legitimate, though controversy occasionally arises as to whether the agreement was actually imputed by the treaty in question.¹⁷ Since the earlier treaty is the “Law of the Land,”¹⁸ the power to enter into an agreement required or contemplated by the treaty lies fairly clearly within the President’s executive function.

Sole executive agreements rely on neither treaty nor congressional authority to provide for their legal basis. There are a number of provisions in the Constitution that may confer limited authority upon the President to promulgate such agreements on the

¹² (...continued)

incompatible with a treaty’s purposes. Vienna Convention, arts. 18-19.

¹³ LOUIS HENKIN, *FOREIGN AFFAIRS AND THE U.S. CONSTITUTION* 215 (2nd ed. 1996).

¹⁴ See 1 U.S.C. § 112b (requiring text of executive agreements to be transmitted to Congress within 60 days, subject to certain exceptions).

¹⁵ *TREATIES AND OTHER INTERNATIONAL AGREEMENTS*, supra note 5, at 5. See also CRS Report 97-896, *Why Certain Trade Agreements Are Approved as Congressional-Executive Agreements Rather than as Treaties*; HENKIN, supra note 13, at 215-18.

¹⁶ *TREATIES AND OTHER INTERNATIONAL AGREEMENTS*, supra note 5, at 5.

¹⁷ *Id.*

¹⁸ U.S. CONST. art. VI, § 2 (“the laws of the United States...[and] all treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the Land”).

basis of his foreign affairs power.¹⁹ If the President enters into an executive agreement pursuant to and dealing with an area where he has clear, exclusive constitutional authority — such as an agreement to recognize a particular State for diplomatic purposes — the agreement is legally permissible regardless of Congress’s opinion on the matter.²⁰ If, however, the President enters into an agreement and his constitutional authority over the agreement’s subject matter is unclear, a reviewing court may consider Congress’s position in determining whether the agreement is legitimate.²¹ If Congress has given its implicit approval to the President entering the agreement, or is silent on the matter, it is more likely that the agreement will be deemed valid. When Congress opposes the agreement and the President’s constitutional authority to enter the agreement is ambiguous, it is unclear if or when such an agreement would be given effect. The Atlantic Charter, which President Franklin Roosevelt and British Prime Minister Winston Churchill agreed to in 1941 to delineate Anglo-American war aims, is an example of a sole executive agreement.

Effects of International Agreements on U.S. Law

The effects that international agreements entered into by the United States have upon U.S. domestic law are dependent upon the nature of the agreement — whether the agreement is self-executing or non-self-executing, and possibly whether it was made pursuant to a treaty or an executive agreement.

Self-Executing vs. Non-Self-Executing Agreements. Certain international treaties or executive agreements are considered “self-executing,” meaning that they have the force of law without the need for subsequent congressional action. However, many other treaties and agreements are not considered self-executing, and are understood to require implementing legislation to take effect, as enforcing U.S. agencies otherwise lack authority to conduct the actions required to ensure compliance with the international agreement.²² Treaties have been found to be non-self-executing for at least three reasons: (1) the agreement manifests an intention that it shall not become effective as domestic law without the enactment of implementing legislation, (2) the Senate in giving consent to a treaty, or Congress by resolution, requires

¹⁹ See TREATIES AND OTHER INTERNATIONAL AGREEMENTS, *supra* note 5, at 5, citing U.S. CONST. arts. II, § 1 (executive power), § 2 (commander in chief power, treaty power), § 3 (receiving ambassadors). Courts have recognized foreign affairs as an area of very strong executive authority. See *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

²⁰ See RESTATEMENT, *supra* note 1, § 303 (4).

²¹ See *Dames & Moore v. Regan*, 453 U.S. 654 (1981) (establishing that Congress’s implicit approval of Executive action, such as a historical practice of yielding authority in a particular area, may legitimize an agreement); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (“When the President acts pursuant to an express or implied authorization of Congress, his powers are at their maximum.... Congressional inertia, indifference or quiescence may... invite, measures of independent Presidential responsibility.... When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter”) (Jackson, J., concurring).

²² See generally RESTATEMENT, *supra* note 1, § 111(4)(a) & cmt. h.

implementing legislation,²³ or (3) implementing legislation is constitutionally required.²⁴ There is significant scholarly debate regarding the distinction between self-executing and non-self-executing agreements, including the ability of U.S. courts to apply and enforce them.²⁵

Until implementing legislation is enacted, existing domestic law concerning a matter covered by an international agreement that is not self-executing remains unchanged and controlling law in the United States. However, when a treaty is ratified or an executive agreement is entered, the United States acquires obligations under international law and may be in default of those obligations unless implementing legislation is enacted.²⁶

Conflict of Laws. Sometimes, a treaty or executive agreement will conflict with one of the three main tiers of domestic law — state law, federal law, or the Constitution. For domestic purposes, a ratified, self-executing treaty is the law of the land equal to federal law²⁷ and superior to state law,²⁸ but inferior to the Constitution.²⁹ A self-executing executive agreement is likely superior to state law,³⁰ but sole executive agreements may be inferior to conflicting federal law in certain circumstances (congressional — executive agreements or executive agreements pursuant to treaties are equivalent to federal law),³¹ and all executive agreements are

²³ For example, in the case of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, Annex, 39 U.N. GAOR Supp. No. 51, U.N. Doc. A/39/51 (1984), the Senate gave advice and consent subject to a declaration that the treaty was not self-executing. U.S. Reservations, Declarations, and Understandings to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 136 CONG. REC. S17486-01 (daily ed., Oct. 27, 1990).

²⁴ RESTATEMENT, supra note 1, § 111(4)(a) & reporters' n. 5-6.

²⁵ See, e.g., John H. Jackson, *Status of Treaties in Domestic Legal Systems: A Policy Analysis*, 86 AM. J. INT'L L. 310 (1992); Jordan J. Paust, *Self-Executing Treaties*, 82 AM. J. INT'L L. 760 (1988); Carlos Manuel Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L. 695 (1995); John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955 (1999).

²⁶ See RESTATEMENT, supra note 1, § 111, cmt. h.

²⁷ See *Whitney v. Robertson*, 124 U.S. 190 (1888).

²⁸ See *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796).

²⁹ See *Reid v. Covert*, 354 U.S. 1 (1957); *Doe v. Braden*, 57 U.S. 635, 657 (1853) (“[t]he treaty is therefore a law made by the proper authority, and the courts of justice have no right to annul or disregard any of its provisions, unless they violate the Constitution of the United States”). See generally RESTATEMENT, supra note 1, § 115.

³⁰ *United States v. Belmont*, 301 U.S. 324 (1937); *United States v. Pink*, 315 U.S. 203. (1942).

³¹ Executive agreements have been held to be inferior to conflicting federal law when the agreement concerns matters expressly within the constitutional authority of Congress. See, e.g., *United States v. Guy W. Capps, Inc.*, 204 F.2d 655 (4th Cir. 1953) (finding that

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inferior to the Constitution.³² In cases where ratified treaties or certain executive agreements are equivalent to federal law, the “last in time” rule establishes that a more recent statute will trump an earlier, inconsistent international agreement, while a more recent self-executing agreement will trump an earlier, inconsistent statute.³³ In the case of treaties and executive agreements that are not self-executing, it is the implementing legislation that is controlling domestically, not the agreements or treaties themselves.³⁴

Customary International Law

Customary international law is defined as resulting from “a general and consistent practice of States followed by them from a sense of legal obligation.”³⁵ This means that all, or nearly all, States consistently follow the practice in question and they must do so because they believe themselves legally bound, a concept often referred to as *opinio juris sive necitatis (opinio juris)*. If States generally follow a particular practice but do not feel bound by it, it does not constitute customary international law.³⁶ Further, there are ways for States to avoid being subject to customary international law. First, a State which is a persistent objector to a particular requirement of customary

³¹ (...continued)

executive agreement contravening provisions of import statute was unenforceable); RESTATEMENT, supra note 1, § 115 reporters’ n.5. However, an executive agreement may trump pre-existing federal law if it concerns an enumerated or inherent Executive power under the Constitution, or if Congress has historically acquiesced to the President entering agreements in the relevant area. See *Pink*, 315 U.S. at 230 (“[a]ll Constitutional acts of power, whether in the executive or in the judicial department, have as much legal validity and obligation as if they proceeded from the legislature”) (quoting THE FEDERALIST NO. 64 (John Jay)); *Dames & Moore*, 453 U.S. at 654 (upholding sole executive agreement concerning the handling of Iranian assets in the United States, despite the existence of a potentially conflicting statute, given Congress’s historical acquiescence to these types of agreements).

³² See generally RESTATEMENT, supra note 1, § 115.

³³ *Whitney v. Robertson*, 124 U.S. 190 (1888).

³⁴ Congress may enact legislation in order to comply with U.S. treaty obligations that would otherwise intrude upon a state’s traditional rights under the 10th Amendment. In the 1920 case of *Missouri v. Holland*, 252 U.S. 416 (1920), the Supreme Court upheld a federal law regulating the killing of migratory birds that had been adopted pursuant to a treaty between the United States and Great Britain, notwithstanding the fact that a similar statute enacted in the absence of a treaty had been ruled unconstitutional on 10th Amendment grounds. The extent to which Congress may intrude upon traditional state authority through treaty-implementing legislation remains unclear, though there is reason to believe that it could not enact legislation that infringed upon the essential character of states, such as through legislation that commandeered state executive and legislative authorities. See *Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144 (1992); see generally Edward T. Swaine, *Does Federalism Constrain the Treaty Power?*, 103 COLUM. L. REV. 403 (2003).

³⁵ RESTATEMENT, supra note 1, § 102(2).

³⁶ *Id.* § 102 cmt. c.

international law is exempt from it.³⁷ Second, under American law, the United States can exempt itself from customary international law requirements by passing a contradictory statute under the “last in time” rule.³⁸ As a result, while customary international law may be incorporated, its impact when in conflict with other domestic law appears limited.

In examining State behavior to determine whether *opinio juris* is present, courts might look to a variety of sources, including, *inter alia*, relevant treaties, unanimous or near-unanimous declarations by the United Nations General Assembly concerning international law,³⁹ and whether noncompliance with an espoused universal rule is treated as a breach of that rule.⁴⁰

In 1900, the Supreme Court stated that customary international law “is our law,” but only when there is not already a controlling executive or legislative act.⁴¹ There does not appear to be a case where the Court has ever struck down a U.S. statute on the ground that it violated customary international law. However, customary international law can potentially affect how domestic law is construed. If two constructions of an ambiguous statute are possible, one of which is consistent with international legal obligations and one of which is not, courts will often construe the statute so as not to violate international law, presuming such a statutory reading is reasonable.⁴²

³⁷ Id. § 102, reporters’ n. 2. The philosophy underlying the consistent objector exemption is that States are bound by customary international law because they have at least tacitly consented to it. Binding them to abide to customary practices despite their explicit rejection of these norms would violate their sovereign rights — though States are likely still bound in the case of peremptory, *jus cogens* norms which are thought to permit no State derogation, such as the international prohibition against genocide or slavery. See *Colom v. Peru*, 1950 I.C.J. 266 (Nov. 20); *U.K. v. Norway*, 1951 I.C.J. 116 (Dec. 18). For a discussion of one instance of the consistent objector rule, see Curtis A. Bradley, *The Juvenile Death Penalty and International Law*, 52 DUKE L.J. 485 (2002). See also *Stanford v. Kentucky*, 492 U.S. 361 (1989) (allowing the death penalty for sixteen year olds despite international norms to the contrary).

³⁸ *Whitney v. Robertson*, 124 U.S. 190 (1888).

³⁹ RESTATEMENT, *supra* note 1, § 102 (2) cmt. c. For a discussion of potential difficulties in relying U.N. General Assembly Resolutions as evidence of customary international law, see Oscar Schachter, *International Law in Theory and Practice: General Course in Public International Law*, 178 REC. DES COURS 111-121 (1982-V).

⁴⁰ See *Sosa v. Alvarez-Machain*, 124 S.Ct. 2739, 2767 (2004) (declining to apply protections espoused by the Universal Declaration of Human Rights because it “does not of its own force impose obligations as a matter of international law”).

⁴¹ *The Paquete Habana*, 175 U.S. at 700. As a result, it is the opinion of some commentators that “no enactment of Congress may be challenged on the grounds that it violates customary international law.” Wade Estey, *The Five Bases of Extraterritorial Jurisdiction and the Failure of the Presumption Against Extraterritoriality*, 21 HASTINGS INT’L. & COMP. L. REV. 177, 180 (1997). See also *Committee of U.S. Citizens Living in Nicaragua*, 859 F.2d at 940.

⁴² *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (Marshall, J.) (“an act of Congress ought never to be construed to violate the law of nations if any other

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Some particularly prevalent rules of customary international law can acquire the status of *jus cogens* norms — peremptory rules which permit no derogation, such as the international prohibition against slavery or genocide.⁴³ For a particular area of customary international law to constitute a *jus cogens* norm, State practice must be extensive and virtually uniform.⁴⁴

The Alien Tort Claims Act. Perhaps the clearest example of U.S. law incorporating customary international law is via the Alien Tort Claims Act (ATCA).⁴⁵ The ATCA originated as part of the Judiciary Act of 1789, and establishes federal court jurisdiction over tort claims brought by aliens for violations of “the law of nations.”⁴⁶ Until 1980, this statute was rarely used, but in *Filartiga v. Pena-Irala*, the Second Circuit relied upon it to award a civil judgment against a former Paraguayan police official who had allegedly tortured the plaintiffs while still in Paraguay. In doing so, the *Filartiga* Court concluded that torture constitutes a violation of the law of nations and gives rise to a cognizable claim under the ATCA.⁴⁷ Since that time, the ATCA has been used by aliens on a number of occasions to pursue civil judgments against persons or entities for alleged human rights violations.⁴⁸

Until recently the Supreme Court had not addressed the scope of the causes of action available to aliens under the ATCA. In 2004, however, the Supreme Court heard *Sosa v. Alvarez-Machain*,⁴⁹ a case in which the plaintiff attempted to derive from the Alien Tort Claims Act a cause of action for violation of rules of customary

⁴² (...continued)

possible construction remains...”). But see *Sampson v. Federal Republic of Germany*, 250 F.3d 1145, 1151-54 (7th Cir. 2001) (suggesting that given the “present uncertainty about the precise domestic role of customary international law,” application of this canon of construction to resolve differences between ambiguous congressional statutes and customary international law should be used sparingly).

⁴³ RESTATEMENT, *supra* note 1, § 702, cmt. n.

⁴⁴ *Buell v. Mitchell*, 274 F.3d 337 (6th Cir. 2001), citing *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/The Netherlands)* 1969 I.C.J. 51/52 (Feb. 20) & RESTATEMENT, *supra* note 1, § 102 (2) cmt. k. & reporters’ n. 6.

⁴⁵ 28 U.S.C. § 1350.

⁴⁶ For additional background on the ATCA, see CRS Report RL32118, *The Alien Tort Statute: Legislative History and Executive Branch Views*.

⁴⁷ 630 F.2d 876 (2nd Cir. 1980). The court based its conclusion that torture was prohibited under international law upon sources including, *inter alia*, U.N. resolutions, the U.N. Charter, and the Universal Declaration of Human Rights.

⁴⁸ See, *eg.*, *Flores v. Southern Peru Copper Corp.*, 343 F.3d 140 (2nd Cir. 2003) (Peruvian plaintiffs brought personal injury claims under ATCA against American mining company, alleging that pollution from mining company’s Peruvian operations had caused severe lung disease); *Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir.1996) (former prisoners in Ethiopia filed lawsuit under ATCA against former Ethiopian official for torture); *Kadic v. Karadzic*, 70 F.3d 232 (2nd Cir.1995) (Bosnian plaintiffs brought suit against the self-proclaimed leader of unrecognized Bosnian-Serbian entity under the ATCA for war crimes).

⁴⁹ 124 S.Ct. at 2739.

international law. The case arose from the 1985 seizure of a Mexican national, Humberto Alvarez-Machain, on suspicion of assisting in the torture of a Drug Enforcement Agency (DEA) agent. When extradition attempts failed, the DEA contracted with Mexican nationals, including Jose Francisco Sosa, to abduct Alvarez-Machain from his home and bring him to the United States so he could be arrested by federal officers.⁵⁰ After a lengthy procedural challenge,⁵¹ Alvarez-Machain was acquitted by the District Court. In 1993, he returned to Mexico and commenced a civil suit against the United States and Sosa for his allegedly arbitrary arrest and detention. The holding in *Sosa* clarifies when and whether the ATCA provides for a cause of action on the basis of an alleged violation of customary international law.

The Supreme Court held that “some, but few” torts in violation of international law are recognized under the ATCA.⁵² The Court stated that a legitimate ATCA claim should “rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th century paradigms we have recognized [i.e., violations of safe conducts, infringement of the rights of ambassadors, and piracy],” explaining that these norms are part of federal common law.⁵³ The Court declined to provide examples of other offenses that might provide grounds for an ATCA, and counseled restraint in finding them,⁵⁴ though the majority opinion cites to *Filartiga* on a number of occasions, including citing in dicta to the *Filartiga* Court’s finding that “for purposes of civil liability, the torturer has become — like the pirate and slave trader before him — *hostis humani generis*, an enemy of all mankind.”⁵⁵ The Court did, however, conclude that two international agreements that the United States is a party to that have been widely recognized as sources of jurisprudence regarding customary international law — the Universal Declaration of Human Rights and the International Convention on Civil and Political Rights — did not *in themselves* constitute an international norm comparable to those fulfilling the 18th century-paradigm test.⁵⁶ The application of customary international law in U.S. courts, at least with respect to providing grounds for aliens to pursue civil claims under the ATCA, appears quite limited in scope.⁵⁷

⁵⁰ Alvarez-Machain v. United States, 331 F.3d 604, 609 (9th Cir. 2003) (en banc).

⁵¹ See United States v. Alvarez-Machain, 504 U.S. 655 (1992).

⁵² Sosa, 124 S.Ct. at 2759.

⁵³ Id. at 2761-62. See generally Beth Stephens, *The Law of Our Land: Customary International Law as Federal Law After Erie*, 66 FORDHAM L. REV. 393, 402 (1997) (the Framers were concerned with following international law to avoid creating *causus belli* for a European power).

⁵⁴ Sosa, 124 S.Ct. at 2761.

⁵⁵ Id. at 2766.

⁵⁶ Id. at 2767.

⁵⁷ Id. The ATCA is a jurisdictional statute, providing federal courts with the authority to entertain claims but not creating a statutory cause of action for aliens. Accordingly, whether or not the ATCA provides federal jurisdiction over alien claims is dependant upon whether the alleged offense of customary international law is recognized under federal common law. See id. at 2758-65.

Reference to Foreign Law by U.S. Courts

In recent years, foreign or international legal sources have increasingly been cited by the Supreme Court when resolving domestic legal issues.⁵⁸ While these sources have been looked to for persuasive value, they have not been treated as binding precedent upon U.S. courts. Reference to foreign law or jurisprudence is not a new occurrence. For example, in 1815, the Supreme Court noted that “decisions of the Courts of every country, so far as they are founded upon a law common to every country, will be received, not as authority, but with respect.”⁵⁹ With respect to international law and treaty interpretation, at least, foreign practice and understanding have always been considered to have persuasive value.⁶⁰ However, domestic court reference upon foreign law and practice has become increasingly controversial. There is some dispute among scholars and policymakers over the extent to which American courts can and should rely on foreign practices in making decisions interpreting U.S. statutes and the Constitution, particularly following recent Supreme Court rulings that referred to foreign jurisprudence.⁶¹

Possibly the most notable recent reference to foreign law by a U.S. court occurred in the Supreme Court’s majority opinion in the 2003 case of *Lawrence v. Texas*, which held that a Texas statute outlawing same-sex sodomy violated the Due Process Clause of the 14th Amendment.⁶² In an earlier Court decision upholding anti-sodomy laws, *Bowers v. Hardwick*, Chief Justice Burger had written that practices akin to those in question in *Lawrence* had been prohibited throughout Western history.⁶³ Writing for the majority in *Lawrence*, Justice Kennedy responded to this claim by noting that decisions by other nations and the European Court of Human Rights within the past few decades conflicted with the reasoning and holding of *Bowers*. The Court’s opinion

⁵⁸ See Vicki Jackson, *Yes, Please, I’d Love to Talk With You*, LEGAL AFFAIRS (Aug. 2004), at 40 (“[o]f the current nine justices, at least six — Chief Justice Rehnquist, and Justices John Paul Stevens, Antonin Scalia, Anthony Kennedy, Ruth Bader Ginsburg, and Stephen Breyer — have...[cited to foreign law] since 1992”).

⁵⁹ *Thirty Hogsheads of Sugar v. Boyle*, 13 U.S. (9 Cranch) 191 (1815).

⁶⁰ See, e.g., *Zicherman v. Korean Air Lines Co., Ltd.*, 516 U.S. 217 (1996) (Court interpretation of international agreement aided by examining negotiating and drafting history and the post-ratification understanding by contracting parties); *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 439 n.22 (1987) (using U.N. interpretative materials to “provide significant guidance in construing” the 1967 United Nations Protocol Relating to the Status of Refugees); *Air France v. Saks*, 470 U.S. 392, 404 (1985) (finding that “the opinions of our sister signatories to be entitled to considerable weight” when interpreting agreement provisions); *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 184 n.10 (1981) (position of Japanese government entitled to great weight when interpreting provisions of U.S.-Japan treaty); *Jordan v. Tashiro*, 278 U.S. 123, 127 (1928) (finding that provisions of treaties “should be liberally construed so as to effect the apparent intention of the parties to secure equality and reciprocity between them”).

⁶¹ Compare Jackson, *supra* note 58, with Richard Posner, *No Thanks, We Already Have Our Own Laws*, LEGAL AFFAIRS (Aug. 2004), at 43.

⁶² 123 S.Ct. 2472 (2003).

⁶³ 478 U.S. 186, 192 (1986).

went on to imply in dicta that trends in other countries' understandings of "human freedom" can inform our own, though the anti-sodomy statute was struck down on separate grounds.⁶⁴

It is not yet clear how persuasive foreign law is considered to be, or whether the Court's decision in *Lawrence* and other recent cases evidences a growing practice of looking to foreign jurisprudence to inform domestic decisions.⁶⁵ Thus far, it does not appear that an American court has based its holding on a question of statutory or Constitutional interpretation solely on foreign law. Although foreign law and practice have historically had a role in American jurisprudence and courts will likely continue to refer to it, where, when, and how significantly they will rely upon it is difficult to predict.

⁶⁴ *Lawrence*, 123 S.Ct. at 2483. In dissent, Justice Scalia referred to the majority's discussion of foreign law as "meaningless...[d]angerous dicta." *Id.* at 2495 (Scalia, J., dissenting).

⁶⁵ For a more detailed discussion on this subject, see Janet Koven Levit, *Going Public with Transnational Law: The 2002-2003 Supreme Court Term*, 39 TULSA L. REV. 155 (2003).