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# The Role of International Law in Domestic Courts: Will the Legal Procrastination End?

Margaret Hartka

## NOTE

# THE ROLE OF INTERNATIONAL LAW IN DOMESTIC COURTS: WILL THE LEGAL PROCRASTINATION END?

In its recent decision, *American Baptist Churches in the U.S.A. v. Meese*,[1] the U.S. District Court of the Northern District of California addressed two important issues bearing on the applicability of international law in domestic courts. These are the role of treaty obligations in creating justiciable rights for individuals, and the applicability of customary international law in the face of a conflicting federal statute.

On a motion to dismiss the plaintiffs' international law claims, the court held that Article 1 of the Geneva Convention does not provide a right of temporary refuge to Salvadorans and Guatemalans entering the United States to avoid armed conflict in their home countries.[2] The court further found that customary rules of international law do not override duly enacted federal statutes and that, therefore, a showing that temporary refuge has become a customary norm will not provide a right to refuge where federal statutory law denies this right.[3]

This note will argue that, while the court's reasoning regarding the applicability of treaties in domestic courts is sound, its rationale for denying the plaintiffs' customary international law claim is flawed. Though the court relies on legitimate case law, it will be shown that several early judicial misconstructions have resulted in a series of cases that perhaps fail to accord customary international law its proper place in the domestic arena. It will be argued that, rather than being a settled matter, this question is one which requires further clarification from the highest Court.

## I. STATEMENT OF THE CASE

For many years, both El Salvador and Guatemala have suffered the tragedy of internal armed conflict.[4] As a result, large numbers of

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1. 712 F.Supp. 756 (N.D. Cal. 1989).
2. *Id.* at 770.
3. *Id.* at 771.
4. For over a decade, Guatemalans have been caught in the cross-fire between the Guatemalan Army and counter-insurgents. Between 1978 and 1983, 440 villages were destroyed, 50,000 to 75,000 people either disappeared or were killed, and as many

Salvadorans and Guatemalans have been both internally and externally displaced through efforts to escape the political turmoil in their homelands.[5] Many of them have attempted to seek refuge in the United States. Of the refugees seeking political asylum in the United States, fewer than three percent of the Salvadorans and fewer than one percent of the Guatemalans have been granted asylum.[6]

In response to these circumstances, a number of organizations have formed to assist Central American refugees in this country. In addition, what has come to be known as the "sanctuary movement" (a group who, under religious auspices, functions in a manner similar to the nineteenth century's Underground Railroad) has arisen to aid this same group in entering and remaining in the United States.[7]

*American Baptist Churches in the U.S.A. v. Meese*[8] (hereinafter referred to as *American Baptist Churches*) involved a suit brought by several refugee organizations, two individual undocumented aliens and four religious organizations participating in the sanctuary movement. The plaintiffs sought an injunction barring the arrest and deportation of Salvadoran and Guatemalan refugees; and an injunction against the prosecution of workers in the sanctuary movement whose acts were performed prior to November 6, 1986.[9] The grounds upon which relief was sought included infringement of the free exercise of religion, violation of international law and the discriminatory application of immigration laws in violation of the Equal Protection Clause of the Constitution.[10]

The plaintiffs' international law claim was based on two arguments, namely, that a failure to grant temporary refuge was a violation

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as 200,000 children were orphaned. Schirmer, *Waging War To Prevent War*, THE NATION, Apr. 10, 1989, at 478, 479. In El Salvador, more than 60,000 people have been killed during nine years of fighting between guerrillas and government forces. In the first half of 1988, 39 civilians were executed by right-wing death squads. In the first half of 1989, this number rose to 55. During the first six months of 1988, guerrillas killed a reported 27 civilians (not including casualties resulting from land mines placed by the guerrilla forces). Lane, *Death's Democracy*, THE ATLANTIC MONTHLY, Jan. 1989, at 18.

5. *See* Hartman and Perluss, *Temporary Refuge: Emergence of a Customary Norm*, 26 VA. J. INT'L L. 551, 567(1986).

6. 712 F.Supp. 756 (N.D. Cal. 1989).

7. *See, e.g.*, A. CRITTENDEN, SANCTUARY: A STORY OF AMERICAN CONSCIENCE AND THE LAW IN COLLUSION (1988).

8. 712 F.Supp. 756 (N.D. Cal. 1989).

9. On this date, Congress amended 8 U.S.C. § 1324(a) (1982), the criminal harboring and transporting statute. Under the amended statute, employers rather than sanctuaries are targeted for prosecution and, in fact, since the new law was enacted, no sanctuaries or members of sanctuary movements have been prosecuted. *Id.* at 761.

10. *American Baptist Churches*, 712 F.Supp. at 759.

of the Geneva Convention and that such a failure was a violation of customary international law.[11] In adjudicating the defendants' motion for summary judgment, the court held that the Geneva Convention provided no basis for the relief sought by the plaintiffs.[12] Further, the court held that customary international law was not applicable since the Refugee Act of 1980[13] rejects a right of temporary refuge and this explicit legislative act overrides customary international law.[14]

The court, however, declined to dismiss the plaintiffs' claim that discriminatory application of immigration laws governing the granting of political asylum and the withholding of deportation could constitute a violation of the Equal Protection Clause of the Constitution.[15]

## II. SUMMARY OF REASONING

The Supremacy Clause of the United States Constitution provides that the "Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land. . . ."[16] Thus, treaties are accepted as being equivalent, hierarchically, to a federal legislative act.[17] A distinction has long been made, however, between treaty provisions which confer rights directly and those which require that implementing legislation be enacted domestically before rights are created.[18] The courts have held that these latter, non-self-executing treaties do not, in the absence of the required implementing legislation, provide a basis for a private lawsuit.[19]

In determining whether a treaty is self-executing, the courts have relied on a number of factors set forth in previous case law.[20] These

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11. *Id.* at 767.
12. *Id.* at 769-770.
13. Pub. L. No. 96-212, 94 Stat. 102 (1980).
14. 712 F.Supp. at 767-68.
15. *Id.* at 773-74.
16. U.S. CONST. art. VI, § 2.
17. *See, e.g.*, Foster v. Neilson, 27 U.S.(2 Pet.) 253 (1829).
18. 27 U.S.(2 Pet.) at 314.
19. *See, e.g.*, Frolova v. Union of Soviet Socialist Republics, 761 F.2d 370, 373 (7th Cir. 1985).
20. Factors to be considered in determining the intent of the parties to the treaty include:

(1) the language and purpose of the agreement as a whole; (2) the circumstances surrounding its execution; (3) the nature of the obligations imposed by the agreement; (4) the availability and feasibility of enforcement mechanisms; (5) the implications of permitting a private right of action; and (6) the capacity of the judici-

factors essentially look to the language, circumstances and nature of the obligations agreed to in characterizing the treaty.[21] The court in *American Baptist Churches*, by applying these factors, determined that Article 1 of the Geneva Convention,[22] on which the plaintiffs relied, is not self-executing and that, therefore, no rights can arise from this provision unless authorized by an implementing federal statute.[23]

The plaintiffs' claim that a right to temporary refuge is mandated by customary international law[24] was examined by the court in light of the leading Supreme Court case, *The Paquete Habana*.[25] In an oft-quoted passage, the Court, in that case, stated that "[i]nternational law is part of our law, and. . .where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations. . . ."[26]

The district court, in *American Baptist Churches*, found that the enactment of the Refugee Act of 1980 was intended to bring the United States into full compliance with its obligations under international law.[27] Relying on *The Paquete Habana*, the court held that the Refugee Act constituted a "controlling legislative act" and that, thus, customary international law was inapplicable.[28] The claim based on customary international law, therefore, was dismissed. The issue of

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ary to resolve the dispute.

*Id. See also* Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 808-810 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985); United States v. Postal, 589 F.2d 862, 876-77 (5th Cir.), *cert. denied*, 444 U.S. 832 (1979). In addition, if the intent of the parties is clear from the language of the treaty, it has been held that the reviewing court need not consider additional factors. Cardenas v. Smith, 733 F.2d 909, 918 (D.C. Cir. 1984).

21. 761 F.2d at 373.

22. Article 1 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949 states that, "The High Contracting Parties undertake to respect and to insure respect for the present Convention in all circumstances." The plaintiffs relied on this Article by arguing that the deportation of Salvadorans and Guatemalans to countries where violations of other, non-applicable Articles are taking place is itself a violation of Article 1. Specifically, they argued that Article 3, which provides that certain protections be afforded to civilians during non-international conflicts, is being continually violated in El Salvador and Guatemala. Article 3, however, only governs the behavior of parties to the armed conflict and thus does not implicate the actions of the United States directly. American Baptist Churches, 712 F.Supp. 756, 769 (N.D. Cal. 1989).

23. 712 F.Supp. at 770.

24. *Id.* at 770-71.

25. 175 U.S. 677 (1900).

26. *Id.* at 700.

27. 712 F.Supp. at 771.

28. *Id.*

whether a right of temporary refuge exists as a customary norm was not addressed since the court considered the point moot.[29]

Finally, the plaintiffs argued that the Equal Protection Clause was violated by the defendants' discriminatory application of the Refugee Act.[30] The court divided its discussion of this claim into two distinct issues. The first issue was the defendants' failure to grant extended voluntary departure (EVD) -an extra-statutory grant by the Attorney General which temporarily suspends the deportation of all aliens of a particular nationality.[31] A number of cases in the circuit courts were cited by this court supporting the implication that "a governmental policy that makes nationality-based distinctions should at least be reviewed for equal protection violations."[32] In denying the defendants' motion to dismiss this claim, the court held that a determination must be made as to the defendants' motive in denying EVD.[33] If this motive stemmed from a "discriminatory animus" rather than from foreign policy considerations, the court indicated that the action should be reviewed by a more stringent standard than the traditional rational relationship review.[34]

The second equal protection issue considered by the court was the defendants' failure to grant either political asylum or the withholding of deportation to individual Salvadorans or Guatemalans.[35] The Refugee Act allows a grant of asylum if an alien can prove a "well-founded fear of persecution".[36] Alternatively, an alien may be eligible for with-

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29. *Id.* at 770-71.

30. The court quoted the plaintiffs' complaint as follows:

> Defendants engage in a practice of generally granting asylum, refugee status, extended voluntary departure or other relief providing refuge to persons who are fleeing unrest or disorder in countries they consider "Communist" or dominated by the Soviet Union. . . .At the same time, persons fleeing El Salvador and Guatemala are denied the right to even temporary refuge in the United States because the governments of those countries are considered to be political allies of the United States.

*Id.* at 772.

31. *Id.* at 768. Granting extended voluntary departure is entirely within the discretion of the Attorney General. No codified standards exist for the granting or withholding of this protection.

32. *Id.* at 772. The court cited as precedent Shahla v. Immigration and Naturalization Service, 749 F.2d 561, 563 (9th Cir. 1984); Ghajar v. Immigration and Naturalization Service, 652 F.2d 1347, 1349 n. 1 (9th Cir. 1981); Yassini v. Crosland, 618 F.2d 1356, 1362-63 n. 7 (9th Cir. 1980). *See* 712 F.Supp. at 772-73.

33. 712 F.Supp. at 773.

34. *Id.*

35. *Id.*

36. 8 U.S.C. § 1158(a) (1982) authorizes the granting of asylum to those who

holding of deportation on the showing of a "clear probability of persecution" upon his or her return to the country of origin.[37] In reviewing the statutory standards for both forms of relief, the court concluded that:

[I]t would appear [that]. . .Congress has instructed the Executive that nationality may not be considered when applying section 208(a) of the Refugee Act and section 243(h) of the Immigration and Nationality Act. The Executive's allegedly chronic failure to abide by its Congressional mandate could constitute a denial of the equal protection of the laws.[38]

The motion to dismiss this claim, therefore, was denied.

The court also addressed claims that the defendants' actions constituted infringement of religious freedoms with respect to the sanctuary movement[39], and that deportation to a dangerous locale constituted reckless endangerment[40]. Both of these claims were dismissed by the court.[41] The court's reasoning in arriving at these conclusions will not be discussed as these issues do not bear directly on the topic of international law.

## III. LEGAL CONTEXT

### *A. General History*

A discussion of the role of international law in United States courts must begin with a review of the nature and development of the international legal system.

International law is defined as "the law which regulates the relationships of nations to each other."[42] Its roots grew from the inevitable need for a method of settling disputes among independent nation-states. By the 1600's, when such states began to emerge, a burgeoning flow of trade between states and improvements in navigation had led to a need to systematize the growing body of custom, usage and practice governing inter-state relations.

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meet the "well-founded fear" standard articulated in 8 U.S.C. § 1101(a)(42)(A) (1982).

37. Immigration and Naturalization Service v. Stevic, 467 U.S. 407, 430 (1984). Withholding of deportation is codified in 8 U.S.C. § 1253(h)(1) (1982).

38. 712 F.Supp. at 774.

39. *Id.* at 762-64.

40. *Id.* at 774-75.

41. *Id.* at 764, 774-75.

42. BLACK'S LAW DICTIONARY 419 (5th ed. 1983).

One of the earliest definitive attempts to characterize international law was made by Hugo Grotius in his treatise entitled *De Jure Belli Ac Pacis.*[43] It was in this important work that Grotius proposed the theory that international customs, treaties and practice were subject to review against the tenets of natural law.[44] The natural law philosophy teaches that principles of natural law are derived from universal reason and, therefore, must govern any legal system.[45]

By the end of the eighteenth century, the theory of natural law had been at least partially supplanted by a positivist philosophy.[46] The positivist view, rather than assuming that reason should dictate law, held that the practice of nations should principally define international legal obligations.[47] Natural law was relegated to a secondary role.

The modern era of international law was ushered in first by the post-World War I League of Nations and then by the post-World War II United Nations. Both institutions represented a trend away from the concept of international law as a set of rules respecting the sovereignty of nations, and toward a philosophy embodying an organized effort at imposing mutual obligations for the betterment of all.[48] One very important result of this effort was the establishment of the International Court of Justice (ICJ) as a neutral forum for the judicial resolution of disputes between States.[49] The ICJ represents the current, definitive authority on issues of international law in the international forum. In keeping with the evolution of the natural law and positivist theories of

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43. L. HENKIN, R.C. PUGH, O. SCHACHTER & H. SMIT, INTERNATIONAL LAW CASES AND MATERIALS, at xxxvi (2nd ed. 1987).

44. *Id.* at xxxvii.

45. *Id.*

46. *Id.* at xxxviii.

47. *Id.*

48. U.N. CHARTER, art. 1, par. 1-3. The Purposes of the United Nations are:

1. To maintain international peace and security, and . . .to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means . . .adjustment or settlement of international disputes. . .
2. To develop friendly relations among nations. . .
3. To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character and in promoting and encouraging respect for human rights and for fundamental freedoms. . .

49. U.N. CHARTER art. 92. Prior to the establishment of the ICJ and its predecessor, the Permanent Court of International Justice, international law had been applied by national courts in actions arising from disputes of an international nature. *See, e.g.*, Chisolm v. Georgia, 2 U.S.(2 Dall.) 419 (1793); Ware v. Hylton, 3 U.S.(3 Dall.) 199 (1796).

international law, the ICJ determines applicable law by looking for authority to:

(a)international conventions. . .establishing rules expressly recognized by the contesting states;

(b)international custom, as evidence of a general practice accepted as law;

(c)the general principles of law recognized by civilized nations;

(d). . .judicial decisions and the teachings of the most highly qualified publicists of the various nations as subsidiary means for the determination of rules of law.[50]

### *B. International Law in U.S. Courts*

At the time of the American Revolution, increased international trade and colonization of the New World had made international law and its application an issue of obvious daily importance. The Founding Fathers recognized this fact by including treaties along with the Constitution and federal laws as "the supreme Law of the Land".[51] The Constitution is silent, however, as to the role of customary international law and the hierarchy of application between treaties and the other elements listed in the Supremacy Clause. These issues have largely been left to the discretion of the federal courts.

#### *1. The Role of Treaties*

The issue of priority of application where a treaty and a subsequent statute conflict has been resolved by the adoption of what is known as the "last in time" doctrine. This theory derives from the fact that the Supremacy Clause, by its wording, affords equal weight to both treaties and federal statutes.[52] As the Supreme Court stated in *Whitney v. Robertson*,

> Congress may modify such provisions so far as they bind the United States, or supersede them altogether. By the Constitution, a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other. When the two relate to the same subject, the

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50. Statute of the International Court of Justice, 59 Stat. 1055, T.S. 993, 3 Bevans 1179, Art. 38.

51. U.S. CONST. art. VI, § 2.

52. *Id.* The full text of the Supremacy Clause appears in text accompanying n. 16.

> courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; but if the two are inconsistent, the one last in time will control the other. . . .[53]

Thus, the Court provided what is essentially a two-part test for the applicability of this doctrine. The first part requires that the judiciary determine whether a conflict actually exists when the two provisions are read in their most consistent light. Only if the two cannot be reconciled should the court apply the last in time doctrine.

A further requirement which has been imposed by the Court is that the treaty must be self-executing. This was rationalized by the Court in *Chae Chan Ping v. United States (The Chinese Exclusion Case)* as follows:

> A treaty, it is true, is in its nature a contract between nations and is often merely promissory in its character, requiring legislation to carry its stipulations into effect. Such legislation will be open to future repeal or amendment. If the treaty operates by its own force, and relates to a subject within the power of Congress, it can be deemed in that particular only the equivalent of a legislative act, to be repealed or modified at the pleasure of Congress. In either case the last expression of the sovereign will must control.[54]

Clarification of the factors to be used in determining whether a treaty is self-executing has been provided by the Seventh Circuit Court in *Frolova v. Union of Soviet Socialist Republics.*[55] The essential element of the test is a determination of the parties' intent to provide specific, discernible rights and obligations as a result of the conclusion of the instrument. Where this element is lacking and the treaty is, in the words of the Court, "merely promissory"[56], the treaty is non-self-executing.

In summary, the current standard for determining the applicability of a treaty which appears to conflict with a federal statute requires that the last in time doctrine be given force. The court, however, must first determine that the two conflicting provisions cannot reasonably be interpreted as consistent, and that the treaty provision is self-executing.

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53. 124 U.S. 190, 194 (1888).
54. 130 U.S. 581, 600 (1889).
55. *See supra* notes 19, 20.
56. *See supra* note 54 and accompanying text.

*2. The Role of Customary International Law*

The role of customary international law in United States courts has likewise evolved through federal court decisions. As was discussed previously, custom, from the inception of a body of international law, played a role in defining the duties and obligations of nations.[57] References to the United States' duty to uphold customary international law (or the law of nations), can be found in cases dating as early as 1793 at which time the Supreme Court stated that

> . . .the United States had, by taking a place among the nations of the earth, become amenable to the law of nations; and it was their interest as well as their duty to provide, that those laws should be respected and obeyed; in their national character and capacity, the United States were responsible to foreign nations for the conduct of each State, relative to the laws of nations and the performance of treaties. . . .[58]

In 1796, the Court reiterated this position in *Ware v. Hylton.*[59] There, the Court stated that "when the United States declared their independence, they were bound to receive the law of nations, in its modern state of purity and refinement."[60] The importance of customary international law was further underscored by the Court in *Brown v. United States* when it asked the question, "[d]oes it comport with the interest and character of this government, to reject principles and usages, calculated to ameliorate and mitigate the state of war and to promote the interest of commerce, which it appears have been cheerfully adopted by all the monarchies of Europe?"[61]

Later still, in 1886, the Court, in a counterfeiting case, explained that

> The law of nations requires every national government to use "due

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57. For a general discussion of the role of custom as a source of law in the international arena, *see supra* pp. 7-9. On the international plane, it is conceded that customary law, defined as customs accepted by all or a majority of nations as legally binding, is enforceable subject to one exception. That exception is where a State, during the formation of the custom unambiguously and persistently objected to the recognition of the practice as law. *See* HENKIN, PUGH, SCHACHTER & SMIT, *supra* note 43, at 64.

58. Chisolm v. Georgia, 2 U.S. (2 Dall.) 419, 474 (1793).

59. 3 U.S. (3 Dall.) 199 (1796).

60. *Id.* at 281.

61. 12 U.S.(8 Cranch) 109, 112 (1814).

> diligence" to prevent a wrong from being done within its own dominion to another nation with which it is at peace, or to the people thereof; and because of this the obligation of one nation to punish those who within its own jurisdiction counterfeit the money of another nation has long been recognized.[62]

By the end of the nineteenth century, therefore, the courts had repeatedly indicated that customary international law was binding upon the federal government. The limits of its applicability, however, were not explored until the Supreme Court addressed the issue in the watershed case, *The Paquete Habana*.[63] Here, the Court stated

> International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations. . . .[64]

In arriving at this conclusion, the Court relied upon the holding of a previous case, *Hilton v. Guyot* (hereinafter referred to as *Hilton*).[65] In *Hilton*, the Court held that, in cases requiring the ascertainment of applicable international law,

> The most certain guide, no doubt, for the decision of such questions is a treaty or a statute of this country. But when, as is the case here, there is no written law upon the subject, the duty still rests upon the judicial tribunals of ascertaining and declaring what the law is. . . .In doing this, the courts must obtain such aid as they can from judicial decisions [and]. . .the acts and usages of civilized nations.[66]

Since the *Paquete Habana* decision, a number of courts have cited the quoted passage as precedent for the proposition that customary international law is subservient in domestic courts to treaties and federal statutes. For example, in *Tag v. Rogers* the Court of Appeals stated that "it has long been settled. . .that the federal courts are bound to

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62. United States v. Arjona, 120 U.S. 479, 484 (1886).
63. 175 U.S. 677 (1900).
64. *Id.* at 700.
65. 159 U.S. 113 (1894).
66. *Id.* at 163.

recognize [applicable treaties, statutes, or constitutional provisions] as superior to canons of international law."[67]

A further judicially imposed limitation on the applicability of customary international law came with the Supreme Court's decision in *Banco Nacional de Cuba v. Sabbatino*.[68] Although the Court cautioned that its holding was to be narrowly construed, its conclusion that the Act of State doctrine superseded customary international law in cases involving the taking of property within the United States by a foreign sovereign nonetheless represented a further judicial narrowing of the role of customary law.[69] The significance of this holding, however, was negated by the passage of the Second Hickenlooper Amendment which effectively overturned the Court's holding.[70]

Though the general trend with regard to customary international law has been to reduce the scope of its applicability in U.S. courts, two recent cases have demonstrated that it is still a viable source of law in certain circumstances. In *Filartiga v. Pena-Irala*[71] the court allowed a suit to be brought against a Paraguayan police officer for the torture and murder of a young Paraguayan. Jurisdiction for the suit was derived from the Alien Tort Statute which provides a cause of action in district courts for torts committed "in violation of the law of nations or a treaty of the United States".[72] The court held that "an act of torture committed by a state official against one held in detention violates established norms of the international law of human rights, and hence the law of nations."[73] In making this determination, the court looked to such sources as the United Nations' Universal Declaration of Human

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67. 267 F.2d 664, 666 (1959), *cert. denied*, 362 U.S. 904 (1960).

68. 376 U.S. 398 (1964).

69. *Id.* at 428. The Act of State doctrine is described as follows:

> Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.

*Id.* at 416, *quoting* Underhill v. Hernandez, 168 U.S. 250, 258 (1897).

70. *See* 22 U.S.C. § 2370(e)(2)(1964). The Second Hickenlooper Amendment forbids U.S. courts from declining to hear cases involving confiscation of property by foreign sovereigns unless either the act of that sovereign is not in violation of international law, or the Executive requests the application of the Act of State doctrine for foreign policy reasons.

71. 630 F.2d 876 (2nd Cir. 1980).

72. 28 U.S.C. § 1350 (1980) which provides in full that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."

73. 630 F.2d at 880.

Rights[74], the prohibition of torture in numerous treaties, and the prohibition of torture in State constitutions.

Yet another case in which customary international law has been applied by a federal court is *Fernandez v. Wilkinson.*[75] Here, the court held that "indeterminate detention in a maximum security prison of excluded aliens who have not been convicted of a crime in this country or found to be a security risk is arbitrary. . . ."[76] Citing many of the same sources as the court had in *Filartiga*, this court determined that "international law secures to petitioner the right to be free of arbitrary detention and that his right is being violated."[77] Because the court concluded that "perpetuating a state of affairs which results in the violation of. . .fundamental human rights is clearly an abuse of discretion", it ordered the release of the petitioner.[78] Resort was had to international law in this instance because both Constitutional protections and existing statutes were held to be inapplicable to the circumstances.[79]

### *C. Immigration Statutes*

Since customary international law has been judged to fill gaps left by statutes and treaties, it is important at this juncture to review existing statutes governing immigration, and the cases which have interpreted this law.

A person seeking statutorily granted refuge in the United States may do so either by applying for political asylum or by seeking the withholding of deportation. Political asylum may be granted "in the discretion of the Attorney General if the Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42)(A) of [the statute]."[80] A refugee is therein defined in ac-

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74. G.A. Res. 217 (III)(A)(1948).

75. 505 F.Supp. 787 (D. Kan. 1980).

76. *Id.* at 794.

77. *Id.* at 795.

78. *Id.* at 799.

79. Previous federal court decisions have held that the 5th and 8th Amendments do not extend protection to excluded or excludable aliens. *See, e.g.*, Mir, et al v. Wilkinson, 80-3139 (D. Kan., Sept. 2, 1980, unpublished); Kwong Hai Chew v. Colding, 344 U.S. 590 (1953), *citing* Bridges v. Wixon, 326 U.S. 135 (1945 concurring opinion); Kleindienst v. Mandel, 408 U.S. 753 (1972). In addition, the existing statutes govern only the exclusion and temporary detention of aliens who have applied for admission. *See* 8 U.S.C. §§ 1182(a); 1182(d)(5); 1225(b); 1227 (1982). Since the issue in Fernandez v. Wilkinson is indefinite detention of a convicted criminal awaiting deportation rather than temporary detention of applicants for admission, the petitioner falls into what is essentially a legal abyss.

80. 8 U.S.C. § 1158(a) (1982).

cordance with the United Nations Protocol Relating to the Status of Refugees as

> any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. . . ."[81]

The withholding of deportation, on the other hand, must be granted to any alien (with certain statutorily defined exceptions) "if the Attorney General determines that such alien's life or freedom would be threatened in [the country to which the alien would be deported] on account of race, religion, nationality, membership in a particular social group, or political opinion."[82] The withholding of deportation, then, differs from the granting of political asylum in that the former, unlike the latter, is granted where the defined standard is met. It is not a discretionary grant. As is illustrated by the case law which has interpreted this statute, however, the level of proof required for withholding of deportation is greater than that required for a grant of political asylum.

### *D. Case Law Interpreting the Immigration Statutes*

The definitive case setting the standard for review of an application for withholding of deportation is *Immigration and Naturalization Service v. Stevic* (hereinafter referred to as *Stevic*).[83] Prior to the enactment of the Refugee Act of 1980,[84] the Attorney General was authorized to withhold deportation of an otherwise deportable alien if the alien would be subject to persecution upon deportation.[85] In addition, the Attorney General was authorized to permit conditional entry of refugees specifically from Communist-dominated states and the Middle

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81. 8 U.S.C. § 1101(42)(A) (1982). The U.N. Protocol, to which the U.S. acceded in 1968, bound all parties to comply with the substantive provisions of Articles 2 through 34 of the United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150.

82. 8 U.S.C. § 1253(h)(1) (1982). Exceptions to § 1253(h)(1) are listed in § 1253(h)(2). These include aliens who have committed serious non-political crimes ((2)(c)) and aliens who present a danger to security ((2)(d)).

83. 467 U.S. 407(1983).

84. *See supra* note 13.

85. 467 U.S. at 414.

East if racial, religious or political persecution was likely.[86] In the withholding of deportation, the standard for reviewing such cases was the showing of "a clear probability of persecution" or a "likelihood of persecution."[87] For conditional entry, the standard was a "good reason to fear persecution."[88]

The Supreme Court, in *Stevic*, found the Refugee Act of 1980 to be designed primarily "to revise and regularize the procedures governing the admission of refugees."[89] The adoption of the United Nations definition of the term "refugee" and the elimination of the geographic and ideological distinctions made in the previous statute were intended to bring United States practice into line with the United Nations Protocol.[90] In the Court's view, the intent of Congress was not that every alien meeting the definition of "refugee" was entitled to withholding of deportation, but rather that "the alien had to satisfy the standard under 243(h)."[91] This standard, as had been determined by previous case law, was proof of a clear probability of persecution which the Court defined as "more likely than not that the alien would be subject to persecution on one of the specified grounds."[92] Thus, the Refugee Act did not change the standard of proof required.

As is explicitly required by the previously quoted statute,[93] for an applicant to be eligible for political asylum, he or she must prove a well-founded fear of persecution. This standard has been accepted as more liberal than the clear probability test.[94] A precise definition of "well-founded fear" has eluded the courts. Several cases, however, provide guidance on the level of proof required.

In one case, the Fifth Circuit held that "[a]n alien possesses a well-founded fear of persecution if a reasonable person in her circumstances would fear persecution if she were to be returned to her native country."[95] The Seventh Circuit addressed the issue by requiring that the petitioner provide "specific facts establishing that he or she has actually been the victim of persecution or has some other good reason to

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86. *Id.* at 415, *citing* 8 U.S.C. § 1153(a)(7)(A)(i)(1976 ed.).

87. *See, e.g.*, Cheng Kai Fu v. INS, 386 F.2d 750, 753 (2nd Cir. 1967), *cert. denied*, 390 U.S. 1003 (1968); Lena v. INS, 379 F.2d 536, 538 (7th Cir. 1967).

88. *See* In re Tan, 12 I. & N. Dec. 564, 569-570 (BIA 1967).

89. 467 U.S. at 425.

90. *Id.* at 426-427.

91. *Id.* at 428.

92. *Id.* at 429-430.

93. *See supra* note 81 and accompanying text.

94. *See e.g.* 467 U.S. at 425; Vides-Vides v. INS, 783 F.2d 1463, 1468 (9th Cir. 1986); Bolanos-Hernandez v. INS, 749 F.2d 1316, 1321 (9th Cir. 1984).

95. Guevara-Flores v. INS, 786 F.2d 1242, 1249 (5th Cir. 1986).

fear that he or she will be *singled out* for persecution. . . ."[96] A two-tier subjective/objective approach is used in applying these definitions. The alien must first demonstrate a subjective fear, and then prove that an adequate basis existed for the fear to be "well-founded."[97]

In contrast, proving a "clear probability" requires that there be a "greater-than-fifty-percent chance of persecution."[98] Generalized evidence of wide-spread violence will not suffice as proof. Evidence must be provided showing that "(1) the applicant or those similarly situated are at greater risk than the general population, and (2) that the threat to the applicant is a serious one."[99]

Agency action of this kind has been held to be subject to a narrow standard of review. In *Burlington Truck Lines v. United States*, the Supreme Court indicated that "a court is not to substitute its judgment for that of the agency. Nonetheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a "rational connection between the facts found and the choice made."[100]

In addition to the granting of political asylum or the withholding of deportation, a third type of relief is available to aliens under certain circumstances. Extended Voluntary Departure (EVD) may be granted to all aliens of a particular nationality if the Attorney General so chooses.[101] Since this is, however, an extra-statutory form of relief which is purely within the discretion of the Attorney General, any review of a decision to grant or deny EVD is only subject to limited review. As the court indicated in *Narenji v. Civiletti*, "[d]istinctions on the basis of nationality may be drawn in the immigration field by the Congress or the Executive. So long as such distinctions are not wholly irrational they must be sustained."[102] Thus, any challenge to such a decision on the grounds of violation of the Equal Protection Clause must meet an extremely high threshold of proof.

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96. Carvajal-Munoz v. INS, 743 F.2d 562, 574 (7th Cir. 1984)(emphasis in original).

97. Cardoza-Fonseca v. INS, 767 F.2d 1448, 1453 (9th Cir. 1985).

98. *Id.* at 1452.

99. *Id. citing* Bolanos-Hernandez v. INS, 767 F.2d 1277, 1284-85 (9th Cir. 1984).

100. 371 U.S. 156, 168 (1962). This holding is cited in Ishtyaq v. Nelson, 627 F.Supp. 13, 19 (E.D.N.Y. 1983).

101. *See supra* note 31.

102. 617 F.2d 745, 747 (D.C. Cir. 1979).

## IV. *Analysis*

As is clear from the reading of any number of early Supreme Court cases, international law played a crucial role in the early development of domestic law in the U.S. Having no other source of law from which to glean guidance, the early U.S. courts would naturally look to the law of nations and the law of various European nations.[103] The Supreme Court, in fact, expressly embraced international law as part of U.S. jurisprudence in two early decisions - *Ware v. Hylton*[104] and *Chisolm v. Georgia*[105] In both cases, the Court argued that, by virtue of having become an independent nation, the United States was bound to accept and administer the law of nations.[106] Likewise, the incorporation of treaties into the Supremacy Clause of the Constitution points to the intent of the Founding Fathers to give international law an important place in U.S. law.

Later cases reinforced the view that international law was considered a viable and important part of domestic law at least as late as the first part of the twentieth century. For example, in the case of *Kansas v. Colorado*, the Supreme Court stated that

> The clear language of the Constitution vests in this court the power to settle [disputes between States]. . . Nor is our jurisdiction ousted, even if, because Kansas and Colorado are States sovereign and independent in local matters, the relations between them depend in any respect upon principles of international law. International law is no alien in this tribunal.[107]

A late nineteenth century case provides insight into the reason for this broad acceptance. The Supreme Court held that the United States was obligated to prosecute those who counterfeit the currency of another country within its borders and explained

> But if the United States can require this of another, that other may

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103. *See, e.g.*, Alexander Murray, Esq. v. The Schooner Charming Betsy ("The Charming Betsy"), 6 U.S.(2 Cranch) 64 (1804), citing British court decisions and the law of nations in deciding a case concerning seizure of a commercial ship by a U.S. ship of war.

104. 3 U.S.(3 Dall.) 199 (1796).

105. 2 U.S.(2 Dall.) 419 (1793).

106. *See supra* notes 58, 59 and accompanying text.

107. 206 U.S. 46, 97 (1906). *See also* Tucker v. Alexandroff, 183 U.S. 424 (1901), citing British and international law to determine duties of the U.S. regarding a deserting Russian soldier.

> require it of them, because international obligations are of necessity reciprocal in their nature. The right, if it exists at all, is given by the law of nations, and what is law for one is, under the same circumstances, law for the other. A right secured by the law of nations to a nation, or its people, is one the United States as the representatives of this nation are bound to protect.[108]

It is an obligation of reciprocity, then, which early jurists felt required the United States to embrace international law. This is fully in accord with the treatment which treaties have historically been afforded. A treaty, like a contract, is entered into when two or more parties wish to secure certain promised behavior (or lack thereof) and are willing to reciprocate for the promise by offering something of relatively equal value.

Thus, the place of treaties as a hallowed part of our laws is understandable. The nation's reputation rests in large part on its ability and desire to fulfill specific obligations which it has, arguably, contracted to undertake. To the Founding Fathers, presiding nervously over a fledgling nation with an uncertain future, the need to build and maintain that reputation would have seemed quite urgent.

Viewed in this context, the last in time doctrine also makes sense. By the time the Supreme Court espoused this principle in 1888,[109] the independence of the nation was well-established so that the attention of the courts could be turned more toward resolving internal legal conflicts. More than 100 years had passed since the nation began - more than enough time for the problems of outdated treaty obligations and changing international circumstances to have come to the fore. The Court's pronouncement on this point was unequivocal and its holding was reasonable. If treaties, federal statutes and the Constitution are of equal weight and the latter two can be amended through federal action, then a mechanism must exist for amending a treaty at least with respect to its application domestically.

Similarly, the line of cases explicating the principle that treaties must be self-executing to override previous, conflicting legislation is reasonable. If a treaty is "merely promissory" in nature, then, like a contract provision which is too vague to define the rights and duties of the contracting parties, it cannot be enforceable until its elements are better defined. When non-self-executing treaties are viewed in this light, it seems rational to consider that implementing legislation defines

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108. United States v. Arjona, 120 U.S. 479, 487 (1886).

109. *See supra* n. 53 and accompanying text.

the rights and obligations owed by the national government. Since this legislation would not in any way differ from other federal enactments, this latter statute (and not the treaty itself) would simply override the previously enacted law.

By the foregoing reasoning, the holding of the court in *American Baptist Churches* with regard to the applicability of the Geneva Convention is sound.[110] Article 1 of the Convention reads, "The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances."[111] This language is clearly not explicit enough to define any rights or obligations in a meaningful manner; and thus cannot constitute a self-executing treaty provision.

The role of customary international law has evolved in a similar, but less precise manner than that of treaties. As has been discussed previously, the watershed case defining the role of customary international law in domestic courts is *The Paquete Habana.*[112] In this case, the Supreme Court held that "where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations. . . ."[113] The Court indicated that it was relying for precedent on a previous case, *Hilton v. Guyot.*[114] Its holding differs from that of *Hilton*, however, in several significant aspects.

The Court in *Hilton* rather pointedly indicated that international law applies not only to controversies between nations, "but also [to] questions arising under what is usually called private international law. . .and concerning the rights of persons within the territory and dominion of one nation. . . ."[115] This emphasis on applicability to private rights among individuals is missing in *The Paquete Habana.*

Additionally, the Court in *Hilton* indicated that where no treaty or statute exists, the court must resort to judicial decisions and the acts and usages of nations.[116] Thus, this Court places judicial decisions on par with custom rather than on par with treaties and statutes, as *The Paquete Habana* does. More importantly, however, the Court in *Hilton* interjected its discussion with the statement, "[b]ut when, as is the case

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110. 712 F.Supp. 756, 770 (N.D. Cal. 1989).

111. The Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949, art. I, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287.

112. 175 U.S. 677 (1900).

113. *Id.* at 700.

114. 159 U.S. 113 (1894).

115. *Id.* at 163.

116. *Id.*

here, there is no written law upon the subject, *the duty still rests* upon the judicial tribunals of ascertaining and declaring what the law is. . . ."[117] No such language appears in *The Paquete Habana*. The clear implication of this phraseology is that courts are being instructed not to find an issue nonjusticiable merely because no "written law" can be found on the subject. To assume, however, that a hierarchy of application is being established, as has been argued by scholars with regard to the language of *The Paquete Habana*, is unwarranted.

Subsequent to the decision in *The Paquete Habana*, several courts accepted this hierarchical interpretation and held that customary international law was superseded by a conflicting treaty or statute.[118] This raises two important questions, however. The first is whether *The Paquete Habana* was intended to relegate customary law to a secondary role; the second is the significance of the "judicial decisions" alluded to in both *The Paquete Habana* and *Hilton v. Guyot*.

Although the court in *American Baptist Churches* apparently feels otherwise,[119] the language of *The Paquete Habana* decision is by no means entirely unambiguous. *The Paquete Habana* could be interpreted as giving treaties and statutes precedence over customary law; however, it could just as easily be read as a narrow holding based on the specific facts of the case - namely an instance where an issue of international law had arisen but no treaty or statute addressing the question existed. This second interpretation is all the more reasonable when *The Paquete Habana* is viewed in light of the earlier *Hilton v. Guyot* opinion which exhorted courts to fulfill their duty to adjudicate an issue where precisely such a void exists. Furthermore, although the holding requires the application of customary law under the circumstances existing in *The Paquete Habana*, this does not necessarily imply that the Court intended to preclude its application under other circumstances (e.g. where a conflicting treaty does exist). In any event, the Court did not *expressly* hold that where a conflict exists between a customary international norm and a treaty or statute, the custom must yield; and because the Supreme Court has not subsequently addressed the issue, the question remains open.

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117. *Id.* (emphasis added).

118. *See, e.g., supra* note 67. *See also* Committee of U.S. Citizens In Nicaragua v. Reagan, 859 F.2d 929 (D.C. Cir. 1988).

119. American Baptist Churches in the U.S.A. v. Meese, 712 F.Supp. 756, 771 (N.D. Cal. 1989). Citing The Paquete Habana, the court said, "The Supreme Court's early cases involving the concept of customary international law make clear that 'it applies only in the absence of any treaty or other public act. . .in relation to the matter.' "

As to the role of judicial decisions in these instances, this has not been clarified by subsequent case law and, thus, remains something of a mystery. In any court, past precedent will have some persuasive value, so why did the authors of *The Paquete Habana* and *Hilton v. Guyot* trouble themselves to include this obvious source of law? Especially troublesome is the question of why it was included in the former opinion on what appeared to be the same plane as treaties and statutes. This surely was not intended to imply that past precedent was to be interpreted as of equivalent stature with these other two sources. One theory which makes sense in this context is that, as was previously postulated, the authors in these cases intended that future courts, when faced with questions of international law, should look to whichever of the enumerated sources was able to provide guidance. It may well be that the authors meant to say no more than the literal meaning of their words, namely that customary international law was to be regarded as a legitimate source of law along with treaties, statutes and judicial precedent.

The theory that customary international law may not be automatically superseded by statutes or treaties also is leant credence when viewed in the overall context of international wrongs and the necessity to provide a forum for the relief of such injuries. As was stated in *Hilton v. Guyot*, international law must be viewed, not as limited to relations between nations, but as encompassing wrongs between parties of different nationalities.[120] Examined from this perspective, it seems clear that a wrong stemming from a violation of customary law must be allowed a forum just as a wrong stemming from the violation of a treaty is. If the federal judiciary chooses to ignore treaties in domestic courts, this does not preclude a cause of action on the part of the contracting party. A forum exists to redress such a grievance (the International Court of Justice). Since the ICJ only entertains suits brought between nations, a private individual would have no forum for his suit in the event that a statute precluded a cause of action based on a violation of customary law.[121]

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120. *See supra* note 114 and accompanying text.

121. While the U.S. government could, if it chose to do so, represent an individual before the ICJ, this is far less likely in the event of a violation of custom than in the event of the violation of a treaty. Since a treaty is concluded between nations, a violation of a treaty in force is a wrong against the nation itself. On the other hand, a wrong resulting from a violation of custom may well be an injury solely to an individual. In the case of a treaty, the injured nation, by having concluded the treaty, has made a public policy statement regarding the substance of the agreement. If an individual citizen has been wronged as a result of a violation of custom, however, his or her country

From a public policy point of view, it is desirable that federal courts entertain suits deriving from violations of customary international law for precisely the reason set forth by the Court in *United States v. Arjona*[122] - namely that reciprocity among nations requires it. The old maxim that in order to demand equity one must do equity summarizes this argument. If one nation wishes to secure a forum for its grievances and those of its citizens, it must supply a forum in appropriate circumstances to other nations. This is in keeping too with the spirit of those very early Supreme Court cases which so readily embraced international law as part of our jurisprudence.[123]

Moreover, a review of cases which have cited *The Paquete Habana* illustrates that judicial interpretations of the Court's words differ considerably. Although several of the lower federal courts have embraced the theory that customary international law must bow to an inconsistent federal statute,[124] the reasoning of these courts in arriving at this conclusion varies.

The D.C. Circuit in *Tag v. Rogers* accepts the constructionist view that treaties, statutes and constitutional provisions are superior to custom because the syntactical structure of *The Paquete Habana* dictates so.[125] In supporting its finding, the court indicated that the last in time doctrine dictates applicability where conflicting treaties and statutes are concerned and that, further, "[w]hen. . .a constitutional agency adopts a policy contrary to a trend in international law or to a treaty or prior statute, the courts must accept the latest act of that agency."[126] This view, however, ignores the very basic difference between these sources of law. A treaty or statute is essentially a policy statement or promise made by a sovereign at a particular point in time. In contrast, customary law is a principle which has evolved over time among the nations of the world. By its nature, it is self-rejuvenating insofar as a finding that a practice has risen to the level of custom is a finding that, at this time, the consensus among nations is of a continuing, binding

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may wish, for political reasons or for reasons of economic expediency, not to press the issue.

122. *See supra* note 62 and accompanying text.

123. *See supra* notes 58-59 and accompanying text.

124. *See, e.g.*, Tag v. Rogers, 267 F.2d 664 (D.C. Cir. 1959); Committee of U.S. Citizens in Nicaragua v. Reagan, 859 F.2d 929 (D.C. Cir. 1988); U.S. v. Bell, 248 F.2d 992 (2nd Cir. 1918); The Over the Top, 5 F.2d 838 (2nd Cir. 1925); Zenith Radio Corporation v. Matsushita, 494 F.Supp. 1161 (E.D. Pa. 1980); U.S. v. Howard-Arias, 679 F.2d 363 (4th Cir. 1982); U.S. v James-Robinson, 515 F.Supp. 1340 (S.D. Fla. 1981).

125. 267 F.2d 664 at 666.

126. *Id.* at 668.

norm. Attempting to apply a last in time doctrine, therefore, would lead to the conclusion that as long as a given practice remained a custom, it would always be the last in time.

This issue was neatly circumvented by the Second Circuit in *The Over the Top* where the court argued that custom is only binding "in so far as we adopt it, and like all common or statute law it bends to the will of Congress."[127] This argument, however, misstates the law. The binding nature of customary law is not frustrated by a lack of active acceptance. Rather, it is inapplicable only to those nations who *during the development* of the custom, specifically and repeatedly opposed the practice as a legally binding norm.[128] An overt rejection of the custom after it had become widely accepted, therefore, would not suffice to free a state from an obligation imposed by customary law.

Yet another rationale for the superiority of treaties and statutes over customary international law has been proposed by the D.C. Circuit in *Committee of U.S. Citizens in Nicaragua v. Reagan.*[129] Here, the court argued that such a hierarchy of application is implied by the fact that statutes may override treaties, since abrogation of a treaty violates customary international law.[130] Such reasoning is circuitous at best. Abrogation of a treaty certainly does far greater violence to accepted treaty law than to customary law. In addition, the passage of a statute whose provisions are contrary to those of a treaty does not necessarily constitute an abrogation of that treaty. While such an act might be sufficient to prove an anticipatory breach, a breach per se would not occur until the government actually failed to fulfil the provisions of the treaty when called upon to do so. Such a circumstance might not arise for many years while, in the interim, additional legislation could be enacted which would bring the government back into compliance.

The Supreme Court also has had occasion to quote *The Paquete Habana* in cases involving questions of international law. In *Banco Nacional de Cuba v. Sabbatino*, the Court, in a very narrow ruling, held that the Act of State doctrine precluded adjudication of suits involving the taking of property by a recognized sovereign nation within its own borders even if the taking violates customary international law.[131] Al-

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127. 5 F.2d 838, 842 (2nd Cir. 1925). This view has also been adopted by a Pennsylvania district court in Zenith Radio Corp. v. Matsushita, 494 F.Supp. 1161 (E.D. Pa. 1980).

128. *See supra* note 57.

129. 859 F.2d 929 (D.C. Cir. 1988).

130. *Id.* at 939.

131. 376 U.S. 398, 428 (1963). This holding was subsequently overturned by

though this holding seems to narrow the applicability of customary international law in U.S. courts, the Court's reasoning provides insight into the issue implicated in *American Baptist Churches*. In its opinion, the Court states that ". . .[international law] establishes substantive principles for determining whether one country has wronged another. . .[however] 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."[132] Thus, the Court was concerned with a very different set of circumstances than that of refugees seeking political asylum or the withholding of deportation. In the latter case, the injured party is not the country in whose forum relief is sought. Presumably, this implies that the Court might be less likely to narrow the application of custom where the injury was borne by an outside party; perhaps because such a party would have had no opportunity to effect a remedy through legislative or executive action.

The continuing vitality of international law as a legitimate source for domestic application was reiterated by the Supreme Court in *First National City Bank v. Banco Para El Comercio*, a case involving a set-off claimed by a U.S. bank against a Cuban quasi-governmental credit institution.[133] Here, although no overt conflict existed between international law and federal law, the Court nonetheless stated that ". . .international law. . .as we have frequently reiterated, 'is part of our law'. . . .[T]he principles governing this case are common to both international law and federal common law, which in these circumstances is necessarily informed both by international law principles and by articulated congressional policies."[134] This language, and the Court's subsequent citations to U.S. law, British law and an opinion of the International Court of Justice[135] indicate the desire of the Court to integrate the various sources of law rather than impose a strict hierarchy of application. This harkens back to the principle set forth by the Court in 1804 that "an act of congress ought never to be construed to violate the law of nations, if any other possible construction remains, and consequently, can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations. . . ."[136]

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statute. *See supra* note 70 and accompanying text.

132. *Id.* at 422-423.

133. 462 U.S. 611 (1982).

134. *Id.* at 623, *quoting* The Paquete Habana, 175 U.S. 677, 700 (1900).

135. *Id.* at 624-28 and *supra* notes 22, 26.

136. Alexander Murray, Esq. v. The Schooner Charming Betsy (The Charming Betsy), 6 U.S.(2 Cranch) 64, 118 (1804).

In summary, while various federal district and circuit courts have actively embraced a hierarchical approach which places customary law beneath treaties and statutes, the Supreme Court has not specifically adopted this point of view. In fact, the Supreme Court has reemphasized the role of customary international law in recent years. Thus, a reasonable argument can be made for the proposition that the role of customary international law in domestic courts remains an issue in dispute; and that a larger role than is presently afforded it may be appropriate and more in keeping with original intent. There is, however, one further issue with regard to *American Baptist Churches* which must be addressed.

The court indicated that the aliens who had petitioned for an injunction barring their deportation were entitled to a hearing on their claim of discriminatory application of immigration laws. Whether the administrative action at issue was a discretionary grant of political asylum or extended voluntary departure, or was a non-discretionary grant of withholding of deportation, such action is reviewable on equal protection grounds.[137] Said the court with regard to the applications for political asylum and withholding of deportation, "Because the statutory standards are wholly neutral, however, it is far from certain that the Attorney General can consider the applicant's nationality in determining his or her eligibility for relief."[138]

The plaintiffs contend that customary international law requires the granting of temporary refuge to those seeking to escape widespread armed conflict in Guatemala and El Salvador. The respondents argue that the Refugee Act of 1980 was intended to bring the United States into full compliance with its obligations under international law,[139] and that, therefore, no additional relief is available. If, however, as the court indicated, the Attorney General may not discriminate in the application of immigration laws based on nationality, and if the Refugee Act did impose an obligation to withhold deportation where the alien would be subjected to persecution upon return to his country, does this not in fact constitute a back-door acceptance of the norm of temporary refuge? If the United Nations protocol from which the Refugee Act definition of "refugee" derives is accepted as itself a codification of customary international law, then the United States has, in fact, adopted this customary norm both through its accession to the U.N. Protocol and through its adoption of the Refugee Act. And the *American Bap-*

137. American Baptist Churches in the U.S.A. v. Meese, 712 F.Supp. 756, 773-74 (N.D. Cal. 1989).

138. *Id.*

139. *Id.* at 771.

*tist Churches* case reduces to the question of whether the standard used to apply this definition is in keeping with international custom.

The flaw in this argument is, of course, the fact that those who qualify as refugees are eligible for a *discretionary* grant of political asylum. The withholding of deportation (which is essentially temporary refuge), as is discussed elsewhere, requires a stronger evidentiary showing (clear probability of deportation) than that for political asylum (well-founded fear of persecution).[140] As was explained earlier, however, even a discretionary grant is subject to review for discrimination in application. More to the point, though, this raises the issue of whether the Refugee Act can be interpreted as consistent with customary international law. If it can, then political asylum or the withholding of deportation should be granted. It is incumbent on the court, however, to determine whether the applicable federal statute can be construed as consistent with a customary norm, not (as the court seems to have done here) to determine whether the custom can be construed as consistent with the law.

## V. CONCLUSION

It is clear from the foregoing discussion that the role of international law in our domestic courts has evolved from a major force at the time of the Revolution, to a source of law of far more limited application. The issue raised by the *American Baptist Churches* case is whether the limitations which have come to pass have outstripped the intentions of the Supreme Court and the requirements of an increasingly interdependent international community.

The court in *American Baptist Churches* concluded that neither the Geneva Convention nor customary international law provides a basis for the plaintiff Salvadoran and Guatemalan refugees' request for temporary refuge. Although the court's holding that a non-self-executing treaty confers no justiciable rights is reasonable, its conclusion that customary international law likewise confers no rights in the face of a conflicting statute is not as firmly grounded in previous case law. A review of prior Supreme Court cases indicates that while it has spoken authoritatively on the treaty issue, it has not squarely addressed the customary international law issue. And in addition, a review of the early cases leading to *The Paquete Habana* casts some doubt on the intentions of the Court with regard to the role of international law.

As increased international trade and international relations become more common in our ever-shrinking world, the role of interna-

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140. *See supra* note 94 and accompanying text.

tional law will certainly grow. The hierarchy of application of various sources of law must be clarified to provide for consistent legal findings. Therefore, the question presented by the present case is one which should be definitively addressed by the Supreme Court. A final determination of this issue must be made both to forestall future confusion among the lower federal courts and to provide judicial guidance as to the importance of international law in our domestic courts.

*Margaret Hartka*