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American Judges and International Law

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American Judges and International Law

A. Mark Weisburd*

ABSTRACT

This article addresses an issue with which federal courts have been forced to deal with increasing frequency: How ought a judge go about determining the content of customary international law? The article seeks to demonstrate, using the example of the treatment of the concept of jus cogens by the courts of appeals, that federal courts have come to rely on doubtful sources in addressing questions of international law. More specifically, it sets out to show that courts frequently do not rely on the actual practice of governments to determine the content of customary international law, which would seem to be required both by the nature of customary international law and by Supreme Court authority. Rather, they have come to place weight on the works of writers whose conclusions are based on questionable authority, on the Restatement of Foreign Relations Law, on the views of other domestic courts, and on the decisions of international courts. The article explains the problems with relying on such sources, and briefly describes an alternative method of proceeding for cases involving an area of customary international law most frequently before American courts, the law of human rights.

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TABLE OF CONTENTS

I.	INTRODUCTION	1476
II.	THE NATURE OF CUSTOMARY INTERNATIONAL LAW	1478
III.	THE TRADITIONAL U.S. APPROACH TO CUSTOMARY INTERNATIONAL LAW.....	1485
IV.	CURRENT U.S. APPROACHES TO DETERMINING THE CONTENT OF CUSTOMARY INTERNATIONAL LAW.....	1488
A.	<i>The Concept of Jus Cogens</i>	1488
B.	<i>The Courts of Appeals and Jus Cogens</i>	1494
C.	<i>Critique of the Jus Cogens Decisions of the Courts of Appeals</i>	1500
	1. Articles Basing Legal Rules on Sources Other than State Practice.....	1505
	2. <i>The Restatement</i>	1513
	3. Decisions of U.S. Courts.....	1518
	4. Decisions of International Courts	1520
V.	A SUGGESTED ALTERNATIVE	1528
VI.	CONCLUSION.....	1530

I. INTRODUCTION

More and more frequently, U.S. courts find themselves dealing with cases that raise issues of public international law. These cases may involve claims against foreign governments,¹ claims based on acts by foreign individuals,² or claims against corporations alleged to have cooperated with foreign governments.³ While such claims may depend substantively on treaties or on federal statutes, often they also rely on customary international law (CIL). Claims so based raise a problem.⁴

1. *E.g.*, *Siderman de Blake v. Repub. of Arg.*, 965 F.2d 699, 703 (9th Cir. 1992) (alleging eighteen causes of action against defendant Argentina).

2. *E.g.*, *Hilao v. Estate of Marcos*, 103 F.3d 767, 771 (9th Cir. 1996) (alleging abuse under the Philippine ruler's regime).

3. *E.g.*, *Doe v. Unocal Corp.*, 110 F. Supp. 2d 1294, 1295-96 (C.D. Cal. 2000) (alleging a joint venture with a foreign government resulting in human rights violations).

4. Actually, they raise a whole host of problems. Perhaps the most basic involves the place of customary international law in U.S. law. There is considerable judicial and scholarly authority for the proposition that customary international law is part of "the law of the United States" as that phrase is used in Article III of the Constitution. See *In re Estate of Marcos Human Rights Litig.*, 978 F.2d 493, 502 (9th Cir. 1992), *cert. denied sub nom. Marcos-Manotoc v. Trajano*, 508 U.S. 972 (1993);

To understand the difficulty, it is helpful to start with the concept of CIL. The *Restatement (Third) of Foreign Relations Law* describes customary international law as resulting “from a general and consistent practice of states followed by them from a sense of legal obligation.”⁵ Although this article will take issue with a number of assertions made in the *Restatement*, this definition raises little controversy. It does, however, illustrate the considerable difficulty facing a court forced to address an issue of CIL. How does a court determine, at the most basic level, what the various governments of the world have done regarding a particular matter? What counts as “practice”? How does one determine whether a practice is “general”?

Federal courts have sought to escape this morass by relying primarily on academic writings, the *Restatement*, and decisions by U.S. and international courts—and herein lies the difficulty. For, with respect to some areas of CIL (particularly the law of human rights, the aspect of CIL most frequently considered in U.S. courts) neither modern academic writing nor the *Restatement* nor most judicial decisions purport to derive CIL from evidence of what governments actually do. Rather, they rely on other academic writings, other decisions of international courts, non-binding resolutions of international bodies, and hazy notions of natural law to justify their assertions regarding this CIL.

Filartiga v. Peña-Irala, 630 F.2d 876, 886-87 (2d Cir. 1980); Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824, 1825-26 (1998) (arguing that international law should be treated as federal law); Gerald L. Neuman, *Sense and Nonsense About Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 FORDHAM L. REV. 371, 371-72 (1997); Beth Stephens, *The Law of Our Land: Customary International Law as Federal Law After Erie*, 66 FORDHAM L. REV. 393, 393 (1997). A number of writers, however, have challenged this position. See Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 816 (1997) (concluding that in the absence of authorization by the federal political branches, customary international law should not have the status of federal law); Daniel J. Meltzer, *Customary International Law, Foreign Affairs, and Federal Common Law*, 42 VA. J. INT'L L. 513, 519 (2002); see generally Phillip R. Trimble, *A Revisionist View of Customary International Law*, 33 UCLA L. REV. 665 (1986) (suggesting that the theory of international law should focus on national political systems rather than on universal principles); A.M. Weisburd, *State Courts, Federal Courts and International Cases*, 20 YALE J. INT'L L. 1 (1995) (analogizing customary international law to the law of a foreign sovereign); Arthur M. Weisburd, *The Executive Branch and International Law*, 41 VAND. L. REV. 1205, 1207 (1988) (arguing that customary international law is not binding on the President of the United States); Ernest A. Young, *Sorting Out the Debate Over Customary International Law*, 42 VA. J. INT'L L. 365, 462-63 (2002). At least one court has taken note of the controversy. See *Sampson v. F.R.G.*, 250 F.3d 1145, 1153 n.4 (7th Cir. 2001). In any event, this dispute does not bear on the matters discussed in this article, and is therefore not addressed.

5. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987) [hereinafter RESTATEMENT]. In this article, the term “state” will be applied in the sense in which it is normally employed in international law, that is, as referring to independent countries.

This article will demonstrate that the approach U.S. courts have taken in determining the content of international law is fundamentally flawed. This approach leads courts to treat as law norms whose legal basis is either more circumscribed than the courts assert or, in some cases, non-existent. More fundamentally, it essentially converts law professors into philosopher kings, imposing their ideas of what the law should be under the guise of describing the law's content.

Section II will explain just how strange CIL is when viewed from the perspective of the U.S. legal system, and discuss the difficulties of determining the content of CIL. Section III will describe the traditional approach taken by U.S. courts in dealing with these difficulties. Section IV will illustrate the contemporary approach to such matters by discussing the treatment of the concept of *jus cogens* by the federal courts of appeals. The article will show that courts have relied on doubtful authorities when forced to deal with this concept and that some doubtful results have, not surprisingly, followed. The final substantive section will suggest an alternative approach for the element of CIL most frequently before U.S. courts: international human rights law.

II. THE NATURE OF CUSTOMARY INTERNATIONAL LAW

The more a lawyer trained in U.S. law reflects upon the concept of CIL, the more peculiar that concept appears. CIL differs from domestic law in a number of important respects. First, in the CIL system, there is no sovereign with authority to control independent states; while states are free to subordinate themselves to such an authority, they have rarely done so.⁶ Likewise, there is no court with compulsory jurisdiction over states.⁷ Instead of proceeding from a sovereign, the law that controls the actions of states proceeds from the group of entities that are the law's primary subjects—that is, governments. Not only are the subjects of the law also the law makers; they are also the law enforcers. In the U.S. system, in contrast, law proceeds either from specific basic documents (constitutions), or more commonly from the actions of relatively small groups of designated individuals, legislators, administrators, or judges, who have the legal capacity to constrain everyone in society. Likewise, in the United States, law enforcement is a specialized function carried out by a limited number of people.

6. See generally RESTATEMENT, *supra* note 5, § 206.

7. See John A. Perkins, *The Changing Foundations of International Law: From State Consent to State Responsibility*, 15 B.U. INT'L L. J. 433, 442 (1997).

A second difference between CIL and domestic law lies in the formality of the domestic law-making process. A legislature acts only when it is formally in session and according to the limitations of the relevant constitution and its own rules. Informal actions by legislators acting as individuals thus have no impact on the law—if, by coincidence, every member of the legislature of, for example, North Carolina happened to be simultaneously exceeding the speed limit, no one would argue that North Carolina's traffic laws had been altered.

CIL, however, is derived from the individual actions of governments which may be undertaken in any type of setting and for reasons having little to do with the impact of those actions on international law. For example, when the U.S. Supreme Court upheld the constitutionality of sentencing a person to death for a crime committed prior to that person's seventeenth birthday,⁸ that action amounted to an instance of state practice which weakened any argument that CIL forbids governments to impose the death penalty for crimes committed when the perpetrator is as young as sixteen. However, nothing in the opinion of the Court suggested any concern with or even awareness of the impact of its decision on CIL.⁹

A third, and especially important, difference between CIL and domestic law in the United States is that violations of CIL may lead, not only to some form of legal sanction, but also to a change in the content of the law.¹⁰ Such a result is so contrary to that which would be obtained under a domestic legal system that it requires careful explication. It must be stressed that this outcome is a necessary consequence of the way in which CIL is made. As pointed out above, CIL derives from the practice of states, even when that practice is not, in the first instance, undertaken because of its legal implications. Hence, any act by a government may simultaneously be analyzed under existing CIL and as what amounts to a legislative act. Thus, acts conforming to existing rules are not simply unremarkable instances of obedience to law; they are examples of practice reinforcing that law. Similarly, acts contrary to existing law can be characterized as violations of that law, but can also be seen as what amount to votes either to "repeal" the existing rule or to modify that

8. *Stanford v. Kentucky*, 492 U.S. 361, 380 (1989).

9. Both the opinion of the court and the dissent in *Stanford* take note of the practice of other countries with respect to execution of juveniles, with the court characterizing such practice as irrelevant. *Id.* at 369, n.1. The dissent gives weight to that practice. *Id.* at 389-90 (Brennan, J., dissenting). Neither opinion, however, speaks in terms of CIL.

10. Professor D'Amato has also discussed this phenomenon. See Anthony D'Amato, *The Concept of Human Rights in International Law*, 82 COLUM. L. REV. 1110, 1112-27 (1982); ANTHONY D'AMATO, *THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW* 93-94 (1971) [hereinafter *CONCEPT OF CUSTOM*] (proposing that the only way customary international law can change is by giving legal effect to departures from preceding customary norms).

rule in some way. It is frequently asserted that violations of CIL have no effect on the content of that law, just as domestic law is unaffected by acts violating it.¹¹ Such assertions, however, rely on a false analogy. Private persons violating domestic law do not act as legislators when they act; with regard to CIL, however, states are *always* acting as legislators. Hence, acts contrary to law at the time they are done may, if emulated by other states, lead to a change in the law.

An example of this phenomenon is provided by the law of the sea. The 1958 Convention on the High Seas¹² described itself as codifying CIL.¹³ It defined the "high seas" as including all waters seaward of a state's territorial sea, and guaranteed freedom of fishing in this area to all states.¹⁴ Yet this rule of CIL, even though codified in a treaty, was altered by state practice within about thirty years. By the end of that period, so many states had proclaimed their right to deny freedom of fishing in zones extending far beyond their territorial seas that it became impossible to deny that CIL had been altered. That is, actions violating CIL (and, for that matter, a treaty) cumulated to change the law.¹⁵

In addition to these differences, CIL is supposed to derive from a general and consistent practice of states followed by them from a sense of legal obligation. This concept of state practice raises its own problems. For example, what counts as state practice? What is the consequence if some types of behavior engaged in by one state are inconsistent with other behavior of that same state?

One way to address these issues is to ask why a customary practice *ought* to be law. That is, is there some non-arbitrary justification for ascribing binding effect to a general and consistent practice? Perhaps the most plausible answer to this question is Professor Starke's:

Recurrence of the . . . practice tends to develop an expectation that, in similar future situations, the same conduct or the abstention therefrom will be repeated. When this expectation evolves further into a general acknowledgment by states that the conduct or the abstention therefrom

11. *Filartiga v. Peña-Irala*, 630 F.2d 876, 884 n.15 (2d Cir. 1980); Louis B. Sohn, *The International Law of Human Rights: A Reply to Recent Criticism*, 9 HOFSTRA L. REV. 347, 350 (1981) (asserting that the number of violations of international rules is not greater than the number of violations of domestic laws in major U.S. cities).

12. Convention on the High Seas, Apr. 29, 1958, 13 U.S.T. 2312, T.I.A.S. 5200, 450 U.N.T.S. 82 (entered into force Sept. 30, 1962).

13. *Id.* pmb1.

14. *Id.* arts. 1, 2.

15. For a fuller discussion of changes in the law of the sea regarding fishing, see Arthur M. Weisburd, *Customary International Law: The Problem of Treaties*, 21 VAND. J. TRANSNAT'L L. 1, 17-19. (1988) (providing an example of customary law developing in a manner contrary to what a relevant treaty would suggest).

is a matter both of right and of obligation, the transition . . . to custom may be regarded as consummated.¹⁶

If, then, the rationale for treating custom as law is that states ought to be able to rely on the assumption that other states will behave in the future as they have in the past, it would seem to follow that behavior would count as practice if it is of a sort as would give rise to reasonable expectations that it would be followed in future similar situations. Further, if an act which would, other things being equal, give rise to such expectations, is inconsistent with a subsequent act which is a better predictor of future action, it would be unreasonable to expect that future conduct would conform to the first act rather than to the second.

These considerations facilitate addressing a particularly important issue in connection with CIL: What effect should actions that may be seen as proxies for behavior have on that body of law? For example, suppose State A announces that it feels constrained by CIL to behave in accord with Rule X. Standing alone, that announcement may well support a reasonable expectation that State A will abide by Rule X in the future, and should count as an item of practice supporting the existence of Rule X. However, if it is clear that State A in fact systematically violates Rule X, it would seem that the net effect of State A's actions is to undermine the rule. That is, if State A's policy is to violate Rule X, one could not *reasonably* expect it to conform to the rule simply because it made a dishonest statement.

To be sure, the International Court of Justice (ICJ) in *Military and Paramilitary Activities (Nicaragua v. United States)* stated that:

If a State acts in a way *prima facie* incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than weaken the rule.¹⁷

As will be discussed below, the ICJ's assertions regarding legal principles in its judgments are not binding on states generally,¹⁸ but even if the quoted language is considered simply on its merits, it is hard to defend. Why do hypocritical statements confirm a legal principle if the law-making process is one in which legal principles derive from conduct creating reasonable expectations? Surely, if it is known that a given state says one thing but does another, it would hardly be reasonable to rely on what the state says when forming expectations.

16. J.G. STARKE, *INTRODUCTION TO INTERNATIONAL LAW* 38-39 (10th ed. 1989).

17. *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 98 (June 27).

18. See discussion *infra* at notes 284-316.

Suppose, however, that the proxy for behavior is not simply a statement but an adherence to a treaty requiring certain behavior—how should this affect CIL? Regardless of its status as CIL, a rule established in a treaty is binding on states parties to the treaty. The question here is whether such a rule's inclusion in a treaty should count as practice establishing a CIL obligation. In fact, it has long been established that states often rely on treaties as evidence of state practice for purposes of determining the content of CIL.¹⁹ This makes sense; it is at least as reasonable to expect that a state's future behavior will conform to its treaty obligations as to form a similar expectation based on a non-binding statement. However, if a state's behavior does not conform to its treaty obligations, it would be unreasonable to rely on the fact of treaty adherence in forming expectations as to future actions; hence, the weight to be given to treaty adherence as an item of state practice supporting a rule of CIL would depend on a state's actual performance under the treaty.²⁰

19. D'AMATO, *CONCEPT OF CUSTOM*, *supra* note 10, at 113-38; R. R. Baxter, *Multilateral Treaties as Evidence of Customary International Law*, 41 BRIT. Y.B. INT'L L. 275, 275-76 (1968).

20. These points are only the beginning of the consideration of treaties and their relationship to CIL. First, it often happens that at least some provisions of a treaty are intended to codify previously existing CIL, though an assertion to that effect in the treaty itself can hardly be taken at face value. Second, even a treaty clearly representing a departure from CIL may give rise to a new CIL rule, at least if states behave as the treaty would require in situations not covered by the treaty—for example, in transactions in which all participating states are not parties to a given treaty. D'AMATO, *CONCEPT OF CUSTOM*, *supra* note 10, at 104-66 and authorities cited therein. Professor D'Amato takes the position that generalizable rules in any treaty give rise to rules of CIL that are binding upon all states, even if the treaty in question is bilateral. *Id.* The foregoing statement is therefore more conservative than Professor D'Amato's position; presumably, he would disagree with it only in that, in his view, it does not go far enough. Third, all other things equal, the more states that are parties to a treaty, the easier it is to make the case that practice embodied in a treaty is CIL. Fourth, a treaty may itself negate the argument that it has any effect on CIL. Leaving aside the question of the effect of specific statements in the treaty denying that it is intended to embody CIL, *id.* at 150-62, treaties may include provisions inconsistent with the argument that the rules of the treaty would bind the parties outside the treaty context. For example, a treaty may limit states parties to particular types of remedies against one another for violating the treaty; if those remedies are more limited than those available for violations of CIL obligations, the implication of the treaty limitation is that obligations imposed by the treaty are not duplicated by CIL obligations. See RESTATEMENT, *supra* note 5, at § 901 rptr.'s note 8 (discussing the practice of the United States regarding claims by and against foreign states). Otherwise, the treaty's limitation on remedies could be circumvented simply by making a claim based on CIL rather than on the treaty.

The International Covenant on Civil and Political Rights provides an example of a treaty with remedial limits having implications for CIL. The International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 (1976) [hereinafter *Covenant*]. This treaty imposes numerous substantive obligations on parties to it to protect the human rights of individuals. *Id.* arts. 1, 6-27. It establishes a Human Rights Committee to perform various functions, but permits a state party to the

If the foregoing discussion does not make clear that dealing with CIL is difficult, perhaps that point can be made if one recalls that the *Restatement's* definition of CIL calls, not only for a general and consistent practice of states, but for practice "followed . . . from a sense of legal obligation."²¹ That is, it is not enough to know what states have done; it is also necessary to know why they have acted. More precisely, even if a state's acts suggest that it sees itself as constrained in some fashion, evidence of the state's motive for restraining itself is very important. If the state does not see itself as legally obliged to take the action it has taken, the practice in question simply does not support the argument that CIL imposes an obligation to behave as the state in question has done. It is important to note, however, that it is *constraint* that must be explained, not the absence of constraint. As in domestic law, there is no need to explain why an

Covenant to complain to this committee of another state party's violations only if that state party has consented to the Committee's hearing such complaints, and only if the complaining state has agreed to the Committee's authority to hear similar complaints against itself. *Id.* arts. 28, 41. Further, the only actions the Committee may take in response to such a complaint are making its good offices available to the states in question with a view toward resolving the dispute, or, with the consent of the parties, appointing a conciliation commission for the same purpose. *Id.* arts. 41, 42. Further, Article 44 of the Covenant provides:

The provisions for the implementation of the present Covenant shall apply without prejudice to the procedures prescribed in the field of human rights by or under the constituent instruments and the conventions of the United Nations and of the specialized agencies and shall not prevent the States Parties to the present Covenant from having recourse to other procedures for settling a dispute in accordance with general or special international agreements in force between them.

Id. art. 44. The clear implication of these provisions is that states would have no right under the Covenant to make claims against one another for violating its provisions outside the framework provided by Articles 41 and 42. Otherwise, the elaborate provisions of those articles would be pointless; if one state party may make a claim against another regardless of the second state's willingness to be subjected to such claims, what sense would it make to require such a consent for claims made to the Human Rights Committee, especially when claims made under the Covenant's dispute settlement provisions can lead only to non-binding procedures? Of course, Article 44 preserves any rights states have accorded one another under other international agreements; but that language underlines the lack of recourse in the absence of such an agreement.

All of this is significant because it implies that the parties to the Covenant did not see that instrument as merely codifying CIL. If CIL imposed on states an obligation to other states to refrain from *any* violations of human rights, breaches of that CIL obligation would entitle other states to claim reparation from offenders. But if such rights existed under CIL, the Covenant's limitations on remedies would be ineffective. The existence of those limitations on treaty remedies therefore implies an assumption that no remedies would be available under CIL for acts which would violate the Covenant—and the absence of CIL remedies for acts that would constitute violations of the Covenant implies that the obligations created by the Covenant have no CIL counterparts.

21. RESTATEMENT, *supra* note 5, § 102(2).

actor is free to act, since there is no presumption that every act must be authorized. Rather, explanation is required for limitations on freedom, whether they take the form of prohibitions or of duties to act.

A U.S. judge facing a case in which CIL plays a role therefore faces a complex task. That judge must seek to determine whether a "general and consistent" state practice exists on the matter, while keeping in mind the practice investigated can take many forms, and that proof that a practice was general ten years earlier cannot eliminate the possibility that any rule thereby established has subsequently been undermined by contrary practice. The judge must, furthermore, not only investigate the behavior of governments, but must also seek to determine the motives for that behavior.²² The question thus becomes, how have judges sought to carry out this task? The next section will seek to answer this question.²³

22. *Id.*

23. This discussion assumes that the concept of CIL has some meaning. If it does not, then judges would never have a basis for deciding a case in reliance on CIL, whether derived from the types of authorities criticized in this article or in some other manner. Some recent scholarship even questions the concept of CIL itself.

Professors Goldsmith and Posner have argued that any behavioral regularities in state practice can be explained as the result of coincidence of interest among states, coercion of weaker states by stronger states, bilateral cooperation resulting from a repeating prisoner's dilemma, or bilateral coordination. See Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 U. CHI. L. REV. 1113, 1120-31 (1999). Behavioral regularities coming about for such reasons do not fit the traditional definition of CIL, they argue, because states are in such cases shaping their actions either out of self-interest or fear, rather than out of a sense of legal obligation. *Id.* at 1131-33.

This view assumes that states motivated by self-interest or fear are, by definition, not acting from a sense of legal obligation. This assumption reflects a very narrow concept of what it means to act from a sense of legal obligation, according to which actions taken from any motive other than a disinterested desire to comply with the law do not count. But surely, in common practice, many individuals obey legal rules out of fear (refraining from speeding to avoid being ticketed) or out of self-interest (making sure that their contracts are in writing so that they will be enforceable). At least with respect to coercion, Goldsmith and Posner would further need to show that states that conform their actions to the demands of more powerful states do so without regard to the legal basis for such demands. It is possible that demands seen as having a plausible legal basis are less costly to the more powerful state than are demands with no such basis. This could be because they attract less negative reaction from other powerful states, or because the weaker state is less inclined to offer such resistance as it could. In short, the argument is provocative but leaves some questions unanswered.

Professor Kelly offers an even more fundamental criticism of the concept of CIL. See J. Patrick Kelly, *The Twilight of Customary International Law*, 40 VA. J. INT'L L. 449, 472-73, 475-76 (2000). He asserts that most norms characterized as rules of CIL derive not from the general practice of states, but from the practice of a small number of states and/or deductions by writers from sources other than the practice of states. *Id.* While he acknowledges that there is considerable empirical support for certain structural norms of CIL, he insists that there is no such empirical support for norms imposing liabilities on states. *Id.* at 479-84. That is, the problem lies not in states'

III. THE TRADITIONAL U.S. APPROACH TO CUSTOMARY INTERNATIONAL LAW

The Supreme Court has seldom had occasion to consider the proper method for determining the content of CIL, and last did so more than a century ago.²⁴ Still, with caveats to be addressed below, surely the Court's approach to the subject should carry weight with U.S. judges.

The earliest case in which the Supreme Court appears to have addressed the question of the manner of determining the content of CIL was *United States v. Smith*.²⁵ The defendant in that case had been tried under a federal statute which imposed the death penalty upon persons convicted of "the crime of piracy, as defined by the law of nations."²⁶ The defendant argued that the statute was unconstitutional in that it failed to define the offense of piracy other than by reference to the law of nations.²⁷ The Court held that the statute was not unconstitutional simply because its meaning depended upon the interpretation of a term not itself defined in the statute, stating that "Congress may as well define by using a term of a known and determinate meaning, as by an express enumeration of all the particulars included in that term."²⁸ The Court then addressed the question whether the law of nations provided a reasonably certain meaning for the term "piracy."²⁹ In this connection the Court stated that, "What the law of nations on this subject is, may be ascertained by consulting the works of jurists, writing professedly on public law; by the general usage and practice of nations; or by judicial decisions recognising [sic] and enforcing that law."³⁰ The Court proceeded to demonstrate that the listed sources provided a clear definition of piracy,³¹ relying upon the opinions of well known jurists (including

motives for adhering to certain apparent behavioral regularities, but in doubt as to the very existence of such regularities.

The only way to refute Professor Kelly's argument is to demonstrate that particular CIL rules purporting to limit states' freedom of action have strong empirical support. Rather than attempt to make such a demonstration in a footnote, it is enough here to note that, if his argument is accepted, it is at least clear that U.S. courts ought not to base decisions on purported CIL rules derived from any source other than an actual showing of the existence of a general practice conforming to the alleged rule.

24. *The Paquete Habana*, 175 U.S. 677 (1900).

25. *United States v. Smith*, 18 U.S. (5 Wheat.) 153 (1820).

26. *Id.* at 153-54.

27. *Id.* at 158.

28. *Id.* at 159.

29. *Id.* at 160.

30. *Id.* at 160-61.

31. *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 161-62 (1820).

Grotius, Bynkershoek and Bacon),³² charges to juries by English judges, and the practice of states in punishing all persons committing the offense.³³

In consideration of *Smith*, it should first be remembered that there were no international courts in 1820; the court's reference to "judicial decisions" necessarily referred to decisions of domestic courts.³⁴ Second, in context, judicial decisions were a form of state practice; the question, after all, was how "piracy" was defined, and one circumstance under which states would necessarily engage in practice on the subject would have been court proceedings against alleged pirates.³⁵ Finally, all of the sources on which the court relied in *Smith* were consistent with one another; this was not a situation, in other words, in which state practice on a subject differed from jurists' opinions as to the proper interpretation of the law.³⁶ Indeed, it seems doubtful that there was at that time much controversy as to the proper definition of piracy in international law.

The Supreme Court's next discussion of the method of determining the content of CIL came in *The Paquete Habana*.³⁷ This famous case arose when, during the U.S. blockade of Cuba during the Spanish-American War, U.S. naval vessels captured two small coastal fishing boats operating out of Havana.³⁸ The captured boats were adjudged by a lower federal court sitting in admiralty to be prizes of war; they were sold, and the subsequent appeal concerned the disposition of the sale proceeds.³⁹ The original owners sought to recover the proceeds, arguing that small coastal fishing vessels could not lawfully be treated as prizes of war under CIL.⁴⁰ In addressing this argument, the Court was obliged to explain how it determined the content of CIL on this subject. The Court stated:

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; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the

32. *Id.* at 163 n.8.

33. *Id.* at 162-63.

34. *Id.* at 160-61.

35. *Id.*

36. *Id.*

37. *The Paquete Habana*, 175 U.S. 677 (1900).

38. *Id.* at 678-79.

39. *Id.* at 680.

40. *Id.* at 678-79, 686.

law ought to be, but for trustworthy evidence of what the law really is.⁴¹

The Court then provided a fourteen-page review of state practice, followed by an eight-page discussion of the views of prominent writers,⁴² concluding that, as a matter of international law, vessels of the type in issue could not lawfully be taken as prizes.⁴³

There are several points to emphasize about this case. First, the heart of the Court's opinion as to the content of international law was its recital of state practice.⁴⁴ It appears that writers were quoted primarily to demonstrate the correctness of the Court's narrative. The language quoted above reinforces this conclusion. Jurists and commentators, according to the Court, serve the function of providing evidence of the customs and usages of nations because of their knowledge of their subject.⁴⁵ In other words, writers are important in addressing matters of international law, not because their views as to what the law should be carry any weight, but because they provide a convenient catalog of the crucial element of the analysis, that is, state practice.

Second, it seems that the method of determining the content of CIL employed in *The Paquete Habana* is consistent with that employed in *Smith*. To be sure, the later case stressed that the works of publicists were relied upon only as evidence of state practice, while the earlier case appears to treat scholarly opinion and state practice as equally authoritative sources of law.⁴⁶ But the *Smith* court was not faced with any divergence between the parties regarding the weight to be given to the opinions of writers in determining the content of CIL (though the parties did disagree as to the substance of scholarly opinion).⁴⁷ It was not, therefore, obliged to address the question of the relative importance of the writers' views in determining the content of CIL. In contrast, in *Paquete Habana*, appellants took the position that the writings of publicists weighed equally with the practice of states in determining the relevant rule of CIL.⁴⁸ The captors of the vessels in question, however, asserted that the views of writers were entitled to no weight in the matter.⁴⁹ The United States, arguing for the legality of the capture, asserted as follows:

Reference has been made in the brief to the fact that the writers on international law, and especially the continental writers, are far in

41. *Id.* at 700.

42. *The Paquete Habana*, 175 U.S. 677, 686-700, 701-08 (1900).

43. *Id.* at 719-20.

44. *Id.* at 686-700.

45. *Id.* at 700.

46. *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160-61 (1820).

47. *Id.* at 157-58.

48. Brief for Appellants at 8-10, *The Paquete Habana*, 175 U.S. 677.

49. Brief for Captors at 7-8, *Paquete Habana*, 175 U.S. 677.

advance of the law as determined by legislation or decisions, or by the plain consensus of agreement on the part of the nations, and that they indulge in speculations which are not justified. We are contending that the court will regard principles fairly settled, but will not be influenced by hypothetical views or considerations of what the law ought to be or may be in the future rather than what it is.⁵⁰

The language from the Court's opinion quoted above was apparently a response to disagreement among the parties as to the weight to be given to the opinions of writers. In essence, the Court split the difference—writers' opinions would be given weight, said the Court, not as sources equivalent to the practice of states in determining the content of law, but because they describe that practice.⁵¹

Finally, and most important, the approach taken by the Court in *Paquete Habana* in determining the content of CIL fits easily with the nature of that body of law as discussed above.⁵² That is, the opinion insisted that the source of international law was "custom", that is, actual practice which, it could reasonably be assumed, would be followed in the future.⁵³ U.S. courts therefore have two reasons for focusing on the actual practice of states in determining the content of CIL. First, such an approach best comports with the nature of that body of law. Second, the Supreme Court has held that approach to be correct.

IV. CURRENT U.S. APPROACHES TO DETERMINING THE CONTENT OF CUSTOMARY INTERNATIONAL LAW

In order to provide an example of the problem this article seeks to address, the following discussion will recount the approach U.S. federal courts of appeals have taken to a particular international legal problem: dealing with the concept of *jus cogens*. The discussion will first explain that concept and spell out some of the difficulties it presents, and then describe the treatment that courts have given it.

A. *The Concept of Jus Cogens*

There is authority for the proposition that there is a class of rules of international law from which states are not permitted to

50. Brief for the United States at 19, *Paquette Habana*, 175 U.S. 677.

51. *Paquette Habana*, 175 U.S. at 700-01.

52. See *supra* text accompanying notes 6-23.

53. *Id.*

derogate.⁵⁴ The term *jus cogens* is applied to this class of rules. The idea that such a class exists raises a number of problems. One way to evaluate the current approach taken by U.S. courts to CIL is to examine the approach taken by the courts in addressing these problems. This section of the article provides some background on the subject; the sections following describe and critique the decisions of the federal appellate courts dealing with *jus cogens*.

One difficulty is basic: what reason is there for a U.S. court to accept the existence of such a category of rules? To be sure, the concept is expressly embodied in the Vienna Convention on the Law of Treaties,⁵⁵ but the United States is not a party to that treaty.⁵⁶ Further, only 91 other states are parties.⁵⁷ By comparison, 189 states are members of the United Nations.⁵⁸ That is, fewer than half the states in the world have bound themselves to the Vienna Convention, and thus to a treaty obligation to accept the *jus cogens* concept. If U.S. courts are to treat the concept as a part of international law, then they must justify their action by relying on some source of law other than either a treaty obligation of the United States or near universal acceptance by states through a multilateral treaty.

One might hope to gain some insight into the legal basis for *jus cogens* by examining the history of the idea; unfortunately, that inquiry only complicates the question. The proposition that such a class of norms exists began to receive systematic attention from scholars of international law following World War I.⁵⁹ Initially, the proposition was discussed in connection with the law of treaties; proponents of the concept argued that treaties purporting to achieve certain forbidden objectives were void and unenforceable by international tribunals, analogizing to the rule that, in domestic legal systems, contracts seeking to attain objectives contrary to public policy are similarly unenforceable.⁶⁰ Those taking this position appeared to identify forbidden objectives by referring to moral principles, rather than by focusing on positive acts of states.⁶¹ In 1953, the concept was relied upon when the International Law Commission of the United Nations (ILC) began to consider the

54. See, e.g., Vienna Convention on the Law of Treaties, May 23, 1969, pt. V § 2, art. 53, 1155 U.N.T.S. 331, 344; 8 I.L.M. 679, 698-99 [hereinafter Vienna Convention].

55. *Id.*

56. Treaties and Other International Agreements: the Role of the Senate, S. Comm. Print No. 106-71, at 43 (2001) [hereinafter Role of the Senate].

57. *Id.*

58. THE STATESMAN'S YEARBOOK: THE POLITICS, CULTURES AND ECONOMIES OF THE WORLD 2002 6 (Barry Turner ed., 2001).

59. A. Mark Weisburd, *The Emptiness of the Concept of Jus Cogens, As Illustrated by the War in Bosnia-Herzegovina*, 17 MICH. J. INT'L L. 1, 10-14. (1995).

60. *Id.* at 11.

61. *Id.*

codification of the law of treaties.⁶² The first special *rapporteur* of the ILC on this subject, then-Professor Hersch Lauterpacht, prepared a draft Convention on the Law of Treaties which included an article embodying the concept of *jus cogens*.⁶³ He and his successor *rapporteurs* continued the approach of relying on moral principles as at least a partial basis for claiming *jus cogens* principles existed.⁶⁴

By the time of the Vienna Conference on the Law of Treaties in 1968 and 1969, however, this concept had been modified.⁶⁵ The ILC, in the comments to its draft convention, took the position that a rule of *jus cogens* could be modified by a general multilateral treaty—that is, that governments had the authority to change the rules.⁶⁶ This view was reinforced at the Conference itself. The ILC's draft article on *jus cogens* provided: "A treaty is void if it conflicts with a peremptory norm of general international law from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."⁶⁷ As finally adopted by the representatives of the governments involved, however, the article on *jus cogens* read as follows:

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.⁶⁸

As modified, the article clearly sees the test of a rule's *jus cogens* status as its acceptance as such by states, not its derivation from moral rules. In other words, a concept that originated in the belief that moral principles impose *legal* limits on state authority—in effect, applying a natural law approach—was codified in a form that grounded limitations on states' freedom solely on acceptance of those limits by states, that is, in a form shaped to satisfy positivist conceptions of the nature of law.

Since 1969, this doctrinal confusion has not abated. A number of writers since that time have continued to argue that *jus cogens*

62. *Id.* at 12-13.

63. *Id.*

64. *Id.* at 10-14.

65. *Id.* at 14-15.

66. *Report of the International Law Commission on the Work of Its Eighteenth Session*, U.N. GAOR, 21st Sess., Supp. No. 9, U.N. Doc. A/6309/Rev. 1 (1966), reprinted in 2 Y.B. INT'L L. COMM'N 169, 248 (1966), U.N. Doc. A/CN.4/SER.A/1966/Add.1.

67. *Id.* at 247.

68. *See, e.g.,* Vienna Convention, *supra* note 54, at 344.

should be understood as a natural law doctrine.⁶⁹ This group even includes scholars who normally do not rely on natural law concepts in their expositions of international law.⁷⁰ Professor Reisman has observed that the *jus cogens* concept has come to be used, in the human rights context, in a way quite different from its use in the Vienna Convention.⁷¹ As he has observed:

In the [Vienna] Convention, a *jus cogens* deprives of putative legal effect other, inconsistent treaty obligations. In human rights discourse, *jus cogens* has acquired a much more radical meaning, evolving into a type of super-custom, based on trans-empirical sources and hence not requiring demonstration of practice as proof of its validity.⁷²

In short, the phrase *jus cogens* is currently applied to two radically different concepts, the legal bases and implications of which fundamentally diverge.

State practice since 1969 has not made the matter any clearer. The only examples of state practice apparently embodying the *jus cogens* concept are rhetorical. Delegates to international organizations and conferences occasionally label particular norms as *jus cogens*, and the General Assembly adopted a resolution declaring the 1978 Camp David accords between Israel and Egypt to "have no effect in so far as they purport to determine the future of the Palestinian people and the Palestinian territories occupied by Israel since 1967,"⁷³ apparently applying the concept of *jus cogens* if not the term itself. The General Assembly also adopted numerous resolutions labeling "void" various unilateral acts of states that arguably violated the principle of self-determination of peoples, particularly acts by South Africa with respect to its treatment of Namibia and the institution of apartheid.⁷⁴ But these declarations had little effect on the actual behavior of states with respect to the issues in question. For example, despite condemnation of its occupation of Namibia by U.N. organs, South Africa gave up its control of Namibia only when it received a quid pro quo in the form of Cuba's agreement to withdraw its troops from Angola.⁷⁵ That is, South Africa's occupation was ended

69. See, e.g., INGRID DETTER, *THE INTERNATIONAL LEGAL ORDER* 174-76 (1994); Mark W. Janis, *The Nature of Jus Cogens*, 3 *CONN. J. INT'L L.* 359, 360-63 (1988); Karen Parker & Lyn Beth Neylon, *Jus Cogens: Compelling the Law of Human Rights*, 12 *HASTINGS INT'L & COMP. L. REV.* 411, 419-22 (1989).

70. Compare MYRES S. MCDUGAL, HAROLD D. LASSWELL & LUNG-CHU CHEN, *HUMAN RIGHTS AND WORLD PUBLIC ORDER: THE BASIC POLICIES OF AN INTERNATIONAL LAW OF HUMAN DIGNITY* 68-71 (1980) with *id.* at 339-42.

71. W. Michael Reisman, *Unilateral Action and the Transformations of the World Constitutive Process: The Special Problem of Humanitarian Intervention*, 11 *EUR. J. INT'L L.* 3, 15 (2000).

72. *Id.* at 15 n.29.

73. G.A. Res. 34/65 B, ¶ 4, A/RES/34/65 (Nov. 29, 1979).

74. LAURI HANNIKAINEN, *PEREMPTORY NORMS (JUS COGENS) IN INTERNATIONAL LAW: HISTORICAL DEVELOPMENT, CRITERIA, PRESENT STATUS* 302-03 (1988).

75. CHESTER A. CROCKER, *HIGH NOON IN SOUTHERN AFRICA* 392-446 (1992).

by an arrangement in which its interests were taken into account rather than treated as illegitimate, even in connection with a situation in which it had, if the implications of the General Assembly's resolutions are taken seriously, derogated from a norm from which no derogation was permitted. Indeed, in 1988, Hannikainen concluded, after an exhaustive survey of state practice, that:

[W]ith the exception of punitive action against pirates and with the possible exception of enforcement action against the gravest forms of racial discrimination, the international community of States as a whole has not engaged with any consistency in enforcement or punitive action against grave violations of the basic norms of the international legal order.⁷⁶

Nothing has happened since 1988 to alter the conclusion Hannikainen reached in that year.

While U.S. courts might hope for some guidance in dealing with *jus cogens* from the political branches of the federal government, the executive branch and the Congress have taken different views. The Vienna Convention, including, of course, its provision regarding *jus cogens*, was submitted to the Senate for consent to ratification in 1971.⁷⁷ The Senate last held hearings on the Convention in 1986, and it remains in committee.⁷⁸ While the executive branch has consistently favored the United States' becoming a party to the Vienna Convention,⁷⁹ concerns in the Senate have blocked further action. The primary disagreement involves the effect of the Vienna Convention on executive agreements into which the President enters without Senate action.⁸⁰ However, concerns about *jus cogens* are also important. Specifically, the Senate appears to be concerned "by whom and how" *jus cogens* norms would be established⁸¹ and about the Vienna Convention's requirement of compulsory adjudication by the ICJ of unresolved disputes over *jus cogens*.⁸² Thus, concerns about the scope of the obligation that would be assumed with respect to *jus cogens* are one of the reasons why the United States has never become a party to the Vienna Convention.

This last point illustrates a further problem with the concept of *jus cogens*: what *are* the peremptory norms from which no derogation is permitted? In the commentary to its draft Convention on the Law of Treaties respecting the article setting out the *jus cogens* concept,

76. HANNIKAINEN, *supra* note 74, at 302.
 77. Role of the Senate, *supra* note 56, at 45.
 78. *Id.* at 45.
 79. *Id.* at 45-49.
 80. *Id.* at 20-21.
 81. *Id.* at 21.
 82. *Id.*

the ILC gave only one example of a rule of that class: the provision of the U.N. Charter prohibiting the use of force between states.⁸³ At the subsequent conference on the law of treaties, however, the various states' representatives offered widely differing lists of rules meeting the requirements of *jus cogens*; of the twenty-six delegations that offered examples of peremptory norms, no more than thirteen agreed with respect to any one rule.⁸⁴ Moreover, the mutability of the lists of such norms is surprising. For example, six delegations at the Vienna Conference took the position that respect for the right of self-determination of peoples was a *jus cogens* norm,⁸⁵ as did some members of the ILC.⁸⁶ Yet by 1992, an arbitration commission established by the European Community's Conference on Yugoslavia could assert that "international law as it currently stands does not spell out all the implications of the right to self-determination,"⁸⁷ and went on to subordinate that right to the principle that "whatever the circumstances, the right to self-determination must not involve changes to existing frontiers at the time of independence (*uti possidetis juris*) except where the States concerned agree otherwise."⁸⁸ Again, as noted above, the prohibitions on the use of force provided in the U.N. Charter was the one rule which even the ILC was prepared to label as *jus cogens*.⁸⁹ Yet, as Professor Glennon has demonstrated, it seems impossible now to classify the full scope of that prohibition even as a matter of CIL, let alone as a peremptory norm.⁹⁰ And a number of scholars seem prepared to entertain the possibility that international law permits violation of the relevant Charter prohibitions if necessary to prevent massive human rights violations.⁹¹ In short, the status of the concept of *jus cogens* as an element of international law is quite confused. In the next section of the article, we will see what U.S. federal appellate courts have made of this confusion.

83. *Reports of the Commission to the General Assembly*, U.N. Doc. A/CN.4/SER.A/1966/Add.1 (1966) reprinted in 2 Y.B. INT'L L. COMM'N 169, 247-48 (1966) [hereinafter ILC Reports].

84. JERZY SZTUCKI, *JUS COGENS AND THE VIENNA CONVENTION ON THE LAW OF TREATIES: A CRITICAL APPRAISAL* 119-20 (1974).

85. *Id.* at 119.

86. ILC Reports, *supra* note 83, at 248.

87. *See* Opinion no. 2, Conference on Yugoslavia Arbitration Commission, Jan. 11, 1992, 31 I.L.M. 1497, 1498 (1992).

88. *Id.*

89. ILC Reports, *supra* note 83, at 247-48.

90. MICHAEL J. GLENNON, *LIMITS OF LAW, PREROGATIVES OF POWER: INTERVENTIONISM AFTER KOSOVO* 37-89 (2001).

91. *See, e.g.*, sources cited in A. Mark Weisburd, *International Law and the Problem of Evil*, 34 VAND. J. TRANSNAT'L L. 225, 233-37 (2001).

B. *The Courts of Appeals and Jus Cogens*

Since the Vienna Convention was signed in 1969, the concept of *jus cogens* has figured in nineteen decisions of the federal courts of appeals.⁹² This section describes the approaches to that concept taken in those cases. The following section critiques those decisions.

The first of these cases to deal with *jus cogens* was *Committee of United States Citizens Living in Nicaragua v. Reagan*, in which the plaintiffs sought injunctive and declaratory relief to prevent the United States from funding the Nicaraguan *contras*.⁹³ They based their claim, among other grounds, on the argument that *jus cogens* obliged states which have submitted to an international court's jurisdiction to abide by that court's judgment, and that the failure of the United States to abide by the judgment of the ICJ in *Nicaragua v. United States* therefore entitled them to relief.⁹⁴

In rejecting that argument, the court held that the norm upon which plaintiffs relied did not satisfy any definition of *jus cogens*—either that in the Vienna Convention or any other.⁹⁵ Relying on the language of the Vienna Convention⁹⁶ and on one scholarly article,⁹⁷ the court asserted that a norm achieved *jus cogens* status only when a rule of CIL was recognized as *jus cogens* by the international community as a whole.⁹⁸ The court then held that the rule for which plaintiffs contended did not satisfy this definition, citing state practice as collected by various writers for its conclusion.⁹⁹ In dictum,

92. See generally *Hwang Geum Joo v. Japan*, 332 F.3d 357 (D.C. Cir. 2003); *Alvarez-Machain v. United States*, 331 F.3d 604 (9th Cir. 2003); *United States v. Yousef*, 327 F.3d 56 (2d Cir. 2003); *Hain v. Gibson*, 287 F.3d 1224 (10th Cir. 2002); *Buell v. Mitchell*, 274 F.3d 337 (6th Cir. 2001); *Alvarez-Machain v. United States*, 266 F.3d 1045 (9th Cir. 2001); *Sampson v. F.R.G.*, 250 F.3d 1145 (7th Cir. 2001); *Cornejo-Barreto v. Seifert*, 218 F.3d 1004 (9th Cir. 2000); *Cabiri v. Gov't of Repub. of Ghana*, 165 F.3d 193 (2d Cir. 1999); *Hilao v. Estate of Marcos*, 103 F.3d 767 (9th Cir. 1996); *Hilao v. Estate of Marcos*, 103 F.3d 789 (9th Cir. 1996); *Smith v. Socialist People's Libyan Arab Jamahiriya*, 101 F.3d 239 (2d Cir. 1996); *United States v. Matta-Ballesteros*, 71 F.3d 754 (9th Cir. 1995); *Princz v. F.R.G.*, 26 F.3d 1166 (D.C. Cir. 1994); *Hilao v. Marcos (In re Estate of Ferdinand Marcos, Human Rights Litig.)*, 25 F.3d 1467 (9th Cir. 1994); *Gisbert v. U.S. Att'y Gen.*, 988 F.2d 1437 (5th Cir. 1993); *In re Estate of Marcos Human Rights Litig.*, 978 F.2d 493 (9th Cir. 1992); *Siderman de Blake v. Repub. of Arg.*, 965 F.2d 699 (9th Cir. 1992); *Comm. of U.S. Citizens Living in Nicar. v. Reagan*, 859 F.2d 929 (D.C. Cir. 1988).

93. *Citizens in Nicaragua*, 859 F.2d at 932.

94. *Id.* at 929, 939-40.

95. *Id.* at 953.

96. *Id.* at 940 (citing Vienna Convention, *supra* note 54, art. 53).

97. Giorgio Gaja, *Jus Cogens Beyond the Vienna Convention*, 172 HAGUE ACAD. RECUEIL DES COURS 271, 283-87 (1982).

98. *Citizens in Nicaragua*, 859 F.2d at 940.

99. *Id.* at 941.

the court went on to list rules that “arguably” satisfied the test for *jus cogens*, mentioning the U.N. Charter’s prohibition on the use of force, and prohibitions on genocide, slavery, murder, torture, prolonged arbitrary detention, and racial discrimination, relying on the *Restatement* (specifically Comment k to Section 102, Section 702, and Comment n to that section)¹⁰⁰ and on law review articles by Professor Randall¹⁰¹ and Assistant Legal Advisor Whiteman.¹⁰² The court also quoted the *Restatement* to the effect that the scope of *jus cogens* is so uncertain that a domestic court should not refuse to enforce an agreement on the ground that it violates *jus cogens*.¹⁰³

The next case dealing with *jus cogens* was *Siderman de Blake v. Republic of Argentina* in which the plaintiffs made claims for, among other things, acts of torture carried out by Argentina.¹⁰⁴ Argentina raised the defense of sovereign immunity, and the plaintiffs offered several arguments against the availability of that defense.¹⁰⁵ One of these arguments was that state torture was a violation of a *jus cogens* rule and that the defense of sovereign immunity was not available in suits alleging *jus cogens* violations.¹⁰⁶ The court ultimately rejected this argument, but not before discussing *jus cogens* at length.¹⁰⁷

The court defined *jus cogens* in reference to the definition in the Vienna Convention.¹⁰⁸ It distinguished *jus cogens* norms from CIL, however, asserting that, “[w]hereas customary international law derives solely from the consent of states, the fundamental and universal norms constituting *jus cogens* transcend such consent;”¹⁰⁹ in reaching this conclusion, the court relied on two student law review comments,¹¹⁰ a student law review note,¹¹¹ and a quotation from the ICJ decision in *Barcelona Traction, Power & Light Co.*

100. *Id.*

101. Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785 (1988).

102. Marjorie M. Whiteman, *Jus Cogens in International Law, with a Projected List*, 7 GA. J. INT’L & COMP. L. 609 (1977).

103. *Citizens in Nicaragua*, 859 F. 2d at 941 (citing RESTATEMENT, *supra* note 5, § 331 cmt. e).

104. *Siderman de Blake v. Repub. of Arg.*, 965 F.2d 699, 702 (9th Cir. 1992), *cert. denied*, 507 U.S. 1017 (1993).

105. *Id.* at 704.

106. *Id.* at 713-14.

107. *Id.* at 718-19. The court ultimately held that Argentina had waived its immunity defense. *See id.* at 720-22.

108. *Siderman de Blake v. Repub. of Arg.*, 965 F. 2d 699, 714 (9th Cir. 1992).

109. *Id.* at 715.

110. Adam C. Belsky et al., Comment, *Implied Waiver Under the FSIA: A Proposed Exception to Immunity for Violations of Peremptory Norms of International Law*, 77 CAL. L. REV. 365 (1989); David F. Klein, Comment, *A Theory for the Application of the Customary International Law of Human Rights by Domestic Courts*, 13 YALE J. INT’L L. 362 (1988).

111. Note, *The Nuremberg Legacy: An Unfulfilled Promise*, 63 S. CAL. L. REV. 833 (1990) [hereinafter *Legacy*].

(*Belgium v. Spain*).¹¹² The court also quoted Comment k to Section 102 of the *Restatement* to the effect that *jus cogens* norms “prevail over and invalidate international agreements and other rules of international law in conflict with them.”¹¹³ The court went on to hold that torture violates CIL, relying on *Filartiga v. Peña-Irala*,¹¹⁴ *Forti v. Suarez-Mason*,¹¹⁵ two opinions from *Tel-Oren v. Libyan Arab Republic*,¹¹⁶ Section 702(d) of the *Restatement*, on the existence of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, (Torture Convention)¹¹⁷ and on the fact of the U.S. Senate’s having consented to the ratification of that treaty.¹¹⁸ Finally, relying on *Filartiga*’s characterization of the degree of international condemnation of torture, as well as on the article by Professor Randall which is cited in *Citizens in Nicaragua*,¹¹⁹ on two of the student comments on which it had previously relied,¹²⁰ and on an article by Karen Parker and Lyn Beth Neylon,¹²¹ the *Siderman* court concluded that the prohibition of torture was a *jus cogens* norm.¹²²

The first three appellate decisions dealing with *jus cogens* after *Siderman* did not analyze that concept, simply citing to one or both of *Citizens in Nicaragua* and *Siderman*.¹²³ *Princz v. Federal Republic of Germany* went slightly further, defining *jus cogens* and specifying its content by reference to Comment k to Section 102 of the *Restatement*, Section 702 of the *Restatement* and Comment n thereto, and the law review note cited in *Siderman*, also relying on *Citizens in Nicaragua* and *Siderman*.¹²⁴ *Princz* was followed by five more decisions that did

112. *Barcelona Traction, Light & Power Co. (Belg. v. Spain)*, 1970 I.C.J. 3 (Feb. 5).

113. *Siderman*, 965 F.2d at 716.

114. *Filartiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980).

115. *Forti v. Suarez-Mason*, 672 F. Supp. 1531 (N.D. Cal. 1987).

116. *See Tel-Oren v. Libyan Arab Repub.*, 726 F.2d 774, 781 (D.C. Cir. 1984) (Edwards, J., concurring), *cert. denied*, 470 U.S. 1003 (1985); *id.* at 820 (Bork, J., concurring).

117. *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 39 U.N. GAOR, 39th Sess. Supp. No. 51, U.N. Doc. E/CN.4/1884/72, 23 I.L.M. 1027 (1984).

118. *Siderman*, 965 F.2d at 716-17.

119. Randall, *supra* note 101.

120. Belsky et al., *supra* note 110; Klein, *supra* note 110.

121. Parker & Neylon, *supra* note 69.

122. *Siderman*, 965 F.2d at 717.

123. *In re Estate of Marcos, Human Rights Litig.*, 978 F.2d 493, 500 (9th Cir. 1992) (citing *Siderman* and *Citizens in Nicaragua* for the concept of *jus cogens* and *Siderman* for the proposition that prohibition of torture is a *jus cogens* norm); *Gisbert v. U.S. Att’y Gen.*, 988 F.2d 1437, 1448 n.22 (5th Cir. 1993) (citing *Citizens in Nicaragua* for the definition of *jus cogens*); *Hilao v. Marcos (In re Estate of Marcos, Human Rights Litig.)*, 25 F.3d 1467, 1471 n.6, 1475 (1994) (citing *Siderman* for the definition of *jus cogens* and for the proposition that the prohibition on torture is a *jus cogens* norm).

124. *Princz v. F.R.G.*, 26 F.3d 1166, 1173-74 (D.C. Cir. 1994).

no more than either cite earlier cases for their treatment of *jus cogens* or else cite, without qualification, authorities cited in those earlier cases.¹²⁵ The next case that varied its analysis even slightly was *Cornejo-Barretto v. Seifert*,¹²⁶ relying on Section 702 of the *Restatement, In re Estate of Marcos, Human Rights Litigation*,¹²⁷ and on an article by Professors Dugard and Van den Wyngaert,¹²⁸ to support its characterization of the right to be free from torture as a *jus cogens* norm.¹²⁹

*Sampson v. Federal Republic of Germany*¹³⁰ differed from all of the foregoing cases in that it did not accept the concept of *jus cogens* uncritically.¹³¹ The case was a suit by a Holocaust survivor against the German government, seeking damages for his enslavement in Germany during the Nazi period.¹³² Germany relied on the defense of sovereign immunity.¹³³ The plaintiff sought to defeat that defense by arguing that Germany's commission of acts violating *jus cogens* norms amounted to an implicit waiver of sovereign immunity.¹³⁴ While the court in that case relied on *Siderman* and *Citizens in Nicaragua* for its definition of *jus cogens*,¹³⁵ it also quoted Oppenheim's treatise¹³⁶ and Professor D'Amato¹³⁷ to establish the

125. *United States v. Matta-Ballesteros*, 71 F.3d 754, 764 n.5 (9th Cir. 1995) (citing *Citizens in Nicaragua* and *Siderman* for the definition and content of *jus cogens*); *Smith v. Socialist Peoples' Libyan Arab Jamahiriya*, 101 F.3d 239, 242 (2d Cir. 1996) (citing Belsky et al., *supra* note 110); *Hilao v. Estate of Marcos*, 103 F.3d 767, 778 (9th Cir. 1996) (citing *Siderman*); *Hilao v. Estate of Marcos*, 103 F.3d 789, 795 (9th Cir. 1996) (citing *Siderman* for content of *jus cogens*); *Cabiri v. Gov't of the Repub. of Ghana*, 165 F.3d 193, 201 (2d Cir. 1999) (using term *jus cogens* without discussing or defining it).

126. *Cornejo-Barretto v. Seifert*, 218 F.3d 1004 (9th Cir. 2000).

127. *In re Estate of Marcos, Human Rights Litig.*, 25 F.3d 1467 (9th Cir. 1994).

128. John Dugard & Christine Van den Wyngaert, *Reconciling Extradition with Human Rights*, 92 AM. J. INT'L L. 187, 198 (1998) ("If any human rights norm enjoys the status of *jus cogens*, it is the prohibition on torture.").

129. *Cornejo-Barretto*, 218 F.3d at 1016. The court also relied on *Filartiga v. Peña-Irala*, 630 F.2d 876, 885 (2d Cir. 1980) (holding that the right to be free from torture is a fundamental right); *In re Estate of Marcos, Human Rights Litig.*, 978 F.2d 493, 500 (9th Cir. 1992), *cert. denied sub nom.*, *Marcos-Manotoc v. Trajano*, 508 U.S. 972 (1993) (holding that prohibition against torture is a *jus cogens* norm). *See also* *Kadic v. Karadzic*, 70 F.3d 232, 240 (2d Cir. 1995) (holding that official torture violates CIL).

130. *Sampson v. F.R.G.*, 250 F.3d 1145 (7th Cir. 2001).

131. *Id.* at 1150.

132. *Id.*

133. *Id.* at 1148.

134. *Id.* at 1146-49.

135. *Id.* at 1149-50.

136. OPPENHEIM'S INTERNATIONAL LAW (Robert Jennings & Arthur Watts eds., 9th ed. 1992).

137. Anthony D'Amato, *Human Rights as Part of Customary International Law: A Plea for a Change of Paradigms*, 25 GA. J. INT'L & COMP. L. 47 (1995-96).

vast disagreement among scholars as to the content of *jus cogens*.¹³⁸ The court went on to observe:

Domestic courts (and for that matter the other two branches of our government), do not determine the content of the *jus cogens* doctrine. Instead, it emanates from academic commentary and multilateral treaties, even when unsigned by the United States. Only as a last resort should United States courts infer jurisdiction over foreign sovereigns through this loosely woven subject matter. See also *Tel-Oren v. Libyan Arab Republic*, 233 U.S. App. D.C. 384, 726 F.2d 774, 827 (D.C. Cir. 1984) (Robb, J., concurring) ("Courts ought not to serve as debating clubs for professors willing to argue over what is or what is not an accepted violation of the law of nations"). Absent congressional direction, such overactive involvement by our judiciary would challenge the consent-based structure of our constitutional system.¹³⁹

The court went on to reject plaintiff's implied waiver argument and held his claims against Germany were barred by sovereign immunity.¹⁴⁰

Six federal appellate courts have dealt with the concept of *jus cogens* since *Sampson*.¹⁴¹ Four of these decisions relied on earlier decided cases or authorities cited therein in its treatment of that subject,¹⁴² but the other two resembled *Sampson* in considering factors not addressed in the earlier cases.¹⁴³ *Buell v. Mitchell*¹⁴⁴ was an appeal from the denial of a petition for a writ of habeas corpus brought by a person convicted by a state court of aggravated murder and sentenced to death.¹⁴⁵ Among many other grounds, the petitioner argued that a prohibition on the death penalty was not simply CIL, but a matter of *jus cogens*.¹⁴⁶ The court relied on the Vienna Convention, *In re Estate of Marcos, Human Rights Litigation*, and *Citizens in Nicaragua* for the definition of *jus cogens*.¹⁴⁷ However, it

138. *Sampson*, 250 F.3d at 1155.

139. *Id.* at 1155.

140. *Id.* at 1150-56.

141. *United States v. Yousef*, 327 F.3d 56 (2d Cir. 2003); *Alvarez-Machain v. United States*, 331 F.3d 604 (9th Cir. 2004); *Hwang Geum Joo v. Japan*, 332 F.3d 357 (D.C. 2003); *Hain v. Gibson*, 287 F.3d 1224 (10th Cir. 2002); *Alvarez-Machain v. United States*, 266 F.3d 1045 (9th Cir. 2001); *Buell v. Mitchell*, 274 F.3d 337 (6th Cir. 2001).

142. *Alvarez-Machain*, 266 F.3d at 1050 (defining *jus cogens* by citing RESTATEMENT, *supra* note 5, § 102 cmt. k); *Yousef*, 327 F.3d at 93-94 (citing *Matta-Ballasteros*, *Citizens in Nicaragua*, and the Vienna Convention). *Yousef* also cites one authority not previously discussed, IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 627 (5th ed. 1998), but only for the uncontroversial proposition that, under the Vienna Convention, treaties violating a norm of *jus cogens* are void. See also *Alvarez-Machain*, 331 F.3d at 613 (citing *Siderman*); *Hwang Geum Joo*, 332 F.3d at 686 (citing *Princz*).

143. See generally *Hain*, 287 F.3d 1224; *Buell*, 274 F.3d 337.

144. *Buell*, 274 F.3d 337.

145. *Id.* at 344.

146. *Id.* at 370.

147. *Id.*

stressed language of Section 102 of the *Restatement* and Comments b and c to that section, to the effect that for a putative rule to be considered a norm of CIL, it must amount to "a general and consistent practice of states followed by them from a sense of legal obligation,"¹⁴⁸ that the practice "should reflect wide acceptance among the states particularly involved in the relevant activity,"¹⁴⁹ and that "a practice which is generally followed, but which states feel legally free to disregard, does not contribute to customary law."¹⁵⁰ The court also relied on Comment k and Reporter's Note 6 to Section 102 for the proposition that *jus cogens* rules are CIL rules of "higher status."¹⁵¹ The court further stressed language from *Citizens in Nicaragua* underlining that a CIL norm became a *jus cogens* norm only upon its acceptance as *jus cogens* by the international community as a whole.¹⁵² The court then examined the problem before it.¹⁵³ It noted that a large number of states retain the death penalty, relying on an article by Professor Schabas presenting relevant data,¹⁵⁴ and on the fact that a great many states were parties to the International Covenant on Civil and Political Rights (Covenant),¹⁵⁵ which permits the death penalty.¹⁵⁶ The court further observed that there was no indication that states abolishing the death penalty had done so because they felt they were legally obliged to take that step, and concluded that, since CIL could not be understood as requiring the end of the death penalty, such a requirement could not have risen to the level of *jus cogens*.¹⁵⁷

The last case in this group of sixteen was *Hain v. Gibson*.¹⁵⁸ Like *Buell*, *Hain* was an appeal from a denial of a petition for a writ of habeas corpus filed by a person sentenced to death.¹⁵⁹ The petitioner raised, among other grounds, the argument that because he was seventeen at the time he committed the murders for which he had received the death sentence, executing him would violate a *jus cogens*

148. *Id.* at 372 (quoting RESTATEMENT, *supra* note 5, § 102).

149. *Id.* (quoting RESTATEMENT, *supra* note 5, § 102 cmt. b).

150. *Buell v. Mitchell*, 274 F.3d 337, 372-73 (6th Cir. 2001) (quoting RESTATEMENT, *supra* note 5, § 102 cmt. k and rpt'r.'s note 6).

151. *Id.*

152. *Id.* at 373.

153. *Id.*

154. William A. Schabas, *International Law and the Abolition of the Death Penalty*, 55 WASH. & LEE L. REV. 797, 799 (1998).

155. Covenant, *supra* note 20.

156. *Buell*, 274 F.3d at 373.

157. *Id.* The court went on to hold that, even if it was wrong and the prohibition of the death penalty was a *jus cogens* norm, the fact that the petitioner sought to rely on that norm against a U.S. official rather than as a basis for a civil claim against a foreign official made the matter a question to be answered by the political departments of the federal government. *Id.* at 373-76.

158. *Hain v. Gibson*, 287 F.3d 1224 (10th Cir. 2002).

159. *Id.* at 1226-27.

norm.¹⁶⁰ The court cited *Buell* for the proposition that a *jus cogens* norm was one “that has ‘risen to the level that the international community as a whole recognizes it as . . . a norm from which no derogation is permitted.’”¹⁶¹ Without reviewing state practice but relying on *Buell*, the court concluded that the rule against the imposition of the death penalty on a person for crimes committed prior to the person’s eighteenth birthday had not been adopted from a sense of legal obligation.¹⁶² For this reason, the court held that the rule was not a rule of CIL and therefore not a rule of *jus cogens*.¹⁶³ These cases, then, illustrate the federal appellate courts’ approach to issues of international law not turning on treaties. In the next section, we turn to the question of how well this approach withstands analysis.

C. Critique of the Jus Cogens Decisions of the Courts of Appeals

Of the foregoing cases, only five appear to have engaged in any significant analysis of the concept of *jus cogens*: *Citizens in Nicaragua*, *Siderman*, *Sampson*, *Buell*, and *Hain*.¹⁶⁴ The other cases simply cite one or more of these five, or authorities cited in those cases, with no real independent consideration of the question.¹⁶⁵ Each of these five courts was obliged to address two related issues: first, it was necessary to decide whether the concept of *jus cogens* is a part of international law; assuming an affirmative answer to the first question, the court then had to address whether the particular activity involved in the case before it violated a rule with *jus cogens* status.¹⁶⁶ What would be a fair evaluation of the treatment of the *jus cogens* issue in these decisions?

First, it will be helpful to recall briefly how each court dealt with these two issues. *Citizens in Nicaragua* relied on the Vienna Convention and one writer to define *jus cogens* and on state practice as reported in scholarly articles to conclude that the activity at issue

160. *Id.* at 1242-43.

161. *Id.* at 1243 (citing *Buell*, 274 F.3d at 373).

162. *Id.*

163. *Hain*, 287 F.3d at 1243-44. This court also relied on *Buell* for the proposition that, even if the rule against executing persons for crimes committed prior to the eighteenth birthday was *jus cogens*, the issue of how to respond to that rule was one properly left to the political branches of the federal government. *Id.* at 1244.

164. *Comm. of U.S. Citizens Living in Nicar. v. Reagan*, 859 F.2d 929, 929 (D.C. Cir. 1988); *Siderman de Blake v. Repub. of Arg.*, 965 F.2d 699, 699 (9th Cir. 1992); *Sampson v. F.R.G.*, 250 F.3d 1145, 1145 (7th Cir. 2001); *Buell*, 274 F.3d at 337; *Hain*, 283 F.3d at 1224.

165. *See supra* note 92.

166. *Citizens in Nicaragua*, 859 F.2d at 929; *Siderman*, 965 F.2d at 699; *Sampson*, 250 F.3d at 1145; *Buell*, 274 F.3d at 337; *Hain*, 283 F.3d at 1224.

was not a violation of a *jus cogens* norm. The court in that case listed in dictum certain norms which it suggested would have *jus cogens* status, relying on the *Restatement* and two articles,¹⁶⁷ neither of which purported to base its conclusions on state practice.¹⁶⁸ Though the court in *Citizens in Nicaragua* did not acknowledge the confusion as to the manner by which a particular rule becomes *jus cogens*, its reliance on the Vienna Convention and its focus on the actual practice of states amounts to an acceptance of the idea of *jus cogens* as a product of state acceptance, rather than as deriving simply from moral principles.

Siderman took an approach somewhat different from that of *Citizens in Nicaragua*. *Siderman* purported to rely on the Vienna Convention to define *jus cogens*, but its description of that body of norms as transcending state consent¹⁶⁹ is difficult to reconcile with the treaty's focus on state acceptance as the hallmark of *jus cogens* norms. The *Siderman* court derived its view of a transcendental *jus cogens* from the *Restatement*, from three student law review pieces, and by reference to an ICJ opinion.¹⁷⁰ The student pieces on which the court relied all based their "*jus cogens* as moral principles" approach on scholarly writing,¹⁷¹ though two of the three relied on the implications of the Nuremberg trials as well.¹⁷² With respect to the issue before it, the court concluded that state-sponsored torture was a violation of CIL in reliance on three decisions by other federal courts, on the *Restatement*, and on the existence of and Senate consent to ratification of the Torture Convention.¹⁷³ Its conclusion that torture was also a violation of a *jus cogens* norm was based on one of the federal cases that it believed supported the CIL status of the prohibition on torture, on *Citizens in Nicaragua*, on the *Restatement*, on Professor Randall's article, on two of the student pieces on which it had earlier relied, and on an article by Lyn Beth Neylon and Karen Parker.¹⁷⁴ Among the articles, Professor Randall supported his claim that torture violates a *jus cogens* norm by reference to academic writing;¹⁷⁵ one of the two student pieces offered no support for the assertion;¹⁷⁶ the other student piece relied on unnamed international conventions;¹⁷⁷ and Parker and Neylon relied

167. *Citizens in Nicaragua*, 589 F.2d, at 939-41.

168. Whiteman, *supra* note 102, at 609-26; Randall, *supra* note 101, at 830.

169. *Siderman*, 965 F.2d at 715.

170. *Id.*

171. Belsky et al., *supra* note 110, at 385-86; Klein, *supra* note 110, at 350-52; *Legacy*, *supra* note 111, at 868.

172. Klein, *supra* note 110, at 352; *Legacy*, *supra* note 111, at 868.

173. *Siderman*, 965 F.2d at 716.

174. *Id.* at 716-17.

175. Randall, *supra* note 101, at 830.

176. Belsky et al., *supra* note 110, at 393-94.

177. *Legacy*, *supra* note 111, at 847 n.111.

on the existence of various conventions and resolutions by the U.N. General Assembly, on a statement by a U.N. special *rapporteur*, and on scholarly opinion.¹⁷⁸

The *Sampson* court differed from all the others discussed here in acknowledging the confused character of the concept of *jus cogens*, relying on academic commentary for the proposition that academics disagreed on the issue.¹⁷⁹ The character of slavery as a violation of *jus cogens* was not contested in that case.¹⁸⁰

The *Buell* court relied on familiar authorities to define *jus cogens*, but put particular weight on its characterization as a higher degree of CIL.¹⁸¹ It relied on state practice, collected in a scholarly article, as a basis for concluding that the practice under consideration—imposition of the death penalty—did not violate CIL, and therefore could not violate *jus cogens*.¹⁸² It likewise relied on the absence of evidence that those states which had abolished the death penalty had done so from a sense of legal obligation.¹⁸³ It thus follows *Citizens in Nicaragua* rather than *Siderman* in treating *jus cogens* as a product of state acceptance rather than of the application of transcendental values.

Finally, *Hain* essentially relied on *Buell* for its *jus cogens* analysis, even concluding, in reliance on *Buell*, that states that had abolished the death penalty for crimes committed prior to the offender's eighteenth birthday had not acted out of a sense of legal obligation.¹⁸⁴ This analysis is questionable, since *Buell* dealt with the very different issue of whether CIL required the complete abolition of the death penalty; the analysis may reflect the *Hain* court's ultimate conclusion that the international law issues did not really matter in any event, since the question was one that should be left to the political branches, whatever the state of international law.

What do these cases tell us about the methods U.S. courts currently use to determine the content of CIL? First, what is perhaps most striking about these decisions is their generally uncritical acceptance of the *jus cogens* concept itself. As noted above, the idea that such a doctrine is part of international law seems mired in confusion and is certainly not supported by the actual practice of states.¹⁸⁵ Further, the fact that the Vienna Convention includes the

178. Parker & Neylon, *supra* note 69, at 437-39.

179. *Sampson v. F.R.G.*, 250 F.3d 1145, 1155 (7th Cir. 2001).

180. *Id.*

181. *Buell v. Mitchell*, 274 F.3d 337, 372-76 (6th Cir. 2001).

182. *Id.* at 373-77.

183. *Id.*

184. *Hain v. Gibson*, 287 F.3d 1224, 1243-44 (10th Cir. 2002).

185. See discussion *supra* notes 54-91.

concept is part of the reason the Senate rejected that treaty.¹⁸⁶ Yet none of the decisions discussed simply rejected the existence of the concept.¹⁸⁷ Only *Sampson* hesitated to take it at face value, and the court's concern was apparently more a matter of the difficulty of determining which rules had *jus cogens* status than of the status of the concept itself.¹⁸⁸ In other words, according to the standards set out in *The Paquete Habana* for assessing the content of CIL, there is at least considerable doubt as to whether the *jus cogens* concept is anything other than a club with which academics beat each other. Yet most of the decisions discussed here accept that doctrine without even hinting that its standing is at all doubtful.¹⁸⁹

To be sure, the decisions are much less questionable in their outcomes. *Citizens in Nicaragua*, *Buell*, and *Hain* all held that the international norms alleged to have been violated in those cases were not of *jus cogens* status.¹⁹⁰ While *Siderman* accepted the *jus cogens* status of the rule against torture and the status of the prohibition on slavery was not challenged in *Sampson*, both cases rejected the argument that violations of *jus cogens* operated to eliminate the protections of sovereign immunity.

Nonetheless, the decisions discussed here treat *jus cogens* as a category of international legal norms despite the absence of any evidence from which they could infer that states' behavior would lead to the reasonable expectation that this doctrine would be applied by governments in their relations with one another.¹⁹¹ Since these decisions reach their conclusions regarding the existence of *jus cogens* without such evidence, they are doubtful as a matter of international law. Further, and for the same reason, they simply flout the teaching of *The Paquete Habana* as to the proper method of determining international law in the absence of a treaty.¹⁹²

How then do we account for this fundamental mistake by a number of courts? I would suggest that their problems developed because of the way in which they set out to determine the content of the law. Rather than looking to state practice to determine the status of *jus cogens* as a doctrine of international law, they based their legal conclusions on sources that cannot generate legal rules, and which, in this case, misstated the content of state practice.

186. *Id.*

187. *Id.*

188. *Sampson v. F.R.G.*, 250 F.3d 1145, 1149-55 (7th Cir. 2001).

189. *See, e.g.*, *Comm. of U.S. Citizens Living in Nicar. v. Reagan*, 859 F.2d 929, 953 (D.C. Cir. 1988); *Buell v. Mitchell*, 274 F.3d 337, 366-68 (6th Cir. 2001); *Hain v. Gibson*, 287 F.3d 1224, 1242-45 (10th Cir. 2002).

190. *Id.*

191. *See supra* notes 164-84 and accompanying text.

192. *The Paquete Habana*, 175 U.S. 677, 708 (1900).

More specifically, the sources upon which the courts relied included: (1) scholarly articles cataloging state practice; (2) scholarly articles, including student pieces, basing assertions as to the content of law on moral principles derived from the writings of other scholars and from international treaties and General Assembly resolutions; (3) the *Restatement*; (4) decisions by other federal courts; and (5) decisions by the ICJ. Recall that the focus in *The Paquete Habana* was on the practice of states, with the Court relying on scholarly writings as convenient collections of practice.¹⁹³ The reliance of the courts in *Siderman* and *Buell* on similar articles thus is consistent with the traditional U.S. approach on this subject. But what about the other types of authority upon which these courts relied?

It will be recalled that the rationale for relying on state practice as the source for CIL is based upon expectations.¹⁹⁴ Consistent practice can give rise to rules of law, according to this theory, because states may reasonably expect that other states will in the future continue to behave as they consistently have in the past.¹⁹⁵ Courts determining the content of non-treaty international law by relying on articles that collect state practice, then, can justify their approach, not merely as sanctioned by the authority of *The Paquete Habana*, but as consistent with the basis for treating CIL as law in the first place. The only function of the writers of the articles is to spare the judges the necessity of doing the drudge work of collecting state practice regarding a particular subject. In fact, the courts in *Citizens in Nicaragua* and *Buell* rejected very weak arguments that certain rules had attained *jus cogens* status precisely because these collections of state practice showed just how weak the arguments were.¹⁹⁶

Each of the other sources on which the courts relied, however, seems doubtful. This is not because reliance on these sources is not expressly permitted by *The Paquete Habana*, but because they are unreliable guides to state practice. Certainly, in these cases, they did not alert the courts to the uncertain status of the doctrine of *jus cogens*. But the problem with these sources was not that, somehow, they misunderstood state practice. The problem is much more fundamental: they simply treated state practice as irrelevant.¹⁹⁷ That is, they purported to find law in sources which could not give rise to reasonable expectations as to the course of future behavior by

193. *Id.* at 703-10.

194. *See supra* note 16 and accompanying text.

195. *Id.*

196. *Comm. of U.S. Citizens Living in Nicar. v. Reagan*, 859 F.2d 929, 953 (D.C. Cir. 1988); *Buell v. Mitchell*, 274 F.3d 337, 366-68 (6th Cir. 2001).

197. *See, e.g., Belsky et al., supra* note 110, at 388-89.

governments.¹⁹⁸ The following discussions in this section examine non-practice based scholarly articles, the *Restatement*, and domestic and international judicial decisions, explaining why reliance on these sources amounts to conferring legislative authority on entities that simply have no claim to it.

1. Articles Basing Legal Rules on Sources Other than State Practice

When a legal writer asserts a proposition to be law, one of the obvious responses to the assertion is, why do you think so? Such a response necessarily assumes that the proposition is not law simply because the writer makes the assertion; it is assumed that a writer looks to some source authorized to generate legal rules and must explain how the proposition put forward flows from the authorized source. The dilemma posed by articles purporting to describe CIL without relying on state practice is thus obvious. If CIL derives from state practice, but a writer claims to be able to discern a rule of CIL without considering state practice, the claim would appear to be a contradiction in terms.

Examining some of the articles on which the courts relied demonstrates the weak bases for the conclusions the articles' authors reached.¹⁹⁹ Consider the articles by Assistant Legal Advisor Whiteman and Professor Randall, upon which the court in *Citizens in Nicaragua* relied to support the conclusion that acts such as genocide and torture were violations of *jus cogens* norms.²⁰⁰ In both articles, the authors did indeed list norms which might have *jus cogens* status, including those mentioned by the court.²⁰¹ Yet Assistant Legal Advisor Whiteman apparently relied solely on her own judgment as to what rules ought to fall within the *jus cogens* category, citing no authority to support her conclusions.²⁰² Professor Randall, on the other hand, cited two articles written by Professor Schwelb,²⁰³ but neither of them even purported to rely on state practice,²⁰⁴ and neither seemed to support the propositions for which Professor

198. *Id.*

199. *Cornejo-Barreto v. Seifert*, 218 F.3d 1004, 1016 n.15 (9th Cir. 2000) (citing John Dugard and Christine van den Wyngaert, *supra* note 128, at 198, for the proposition that the right to be free from torture is a *jus cogens* norm. This article is not discussed in the text because the authors simply assert their conclusion without explaining it).

200. *See supra* notes 101-02.

201. Whiteman, *supra* note 102, at 625-26; Randall, *supra* note 101, at 830.

202. Whiteman, *supra* note 102, at 625-26.

203. Randall, *supra* note 101, at 830.

204. Egon Schwelb, *Some Aspects of International Jus Cogens as Formulated by the International Law Commission*, 61 A.J.I.L. 946, 955 (1967) [hereinafter *Aspects of Jus Cogens*]; Egon Schwelb, *The Actio Popularis and International Law*, 2 ISR. Y.B. ON HUM. RTS. 46, 56 (1972) [hereinafter *Actio Popularis*].

Randall cited them.²⁰⁵ In short, the analyses of both Assistant Legal Advisor Whiteman and Professor Randall with respect to the points for which they were cited in *Citizens in Nicaragua* are rather doubtful, and neither, in any event, examined state practice to support her or his conclusions regarding *jus cogens*.

Siderman provides other examples. That case relied on the article by Professor Randall, just discussed, and also on an article by Karen Parker and Lyn Beth Neylon,²⁰⁶ for the proposition that torture violates a *jus cogens* rule.²⁰⁷ That article addressed the question as follows:

Torture is widely recognized as contravening *jus cogens*. All major human rights agreements and instruments contain a prohibition against torture. In the relevant treaties, the prohibition is non-derogable. Torture in time of war is a grave breach of humanitarian law. To reinforce the prohibitions against torture, the United Nations General Assembly promulgated the Torture Convention. Because of the universal concern about the widespread occurrence of torture, the United Nations Commission on Human Rights appointed a special rapporteur on torture, Peter Kooijmans, to 'promote the full implementation of the prohibition under international and national law of the practice of torture and other cruel, inhuman, or degrading treatment or punishment.' In Mr. Kooijmans' 1986 report, he emphasized the *jus cogens* nature of the prohibition against torture:

Torture is now absolutely and without any reservation prohibited under international law whether in time of peace or of war. In all human rights instruments the prohibition of torture belongs to the group of rights from which no derogation can be made. The

205. Professor Randall in the text of his article characterizes "norms against hijacking, hostage-taking, crimes against internationally protected persons, apartheid, and torture" as likely to be included in any list of *jus cogens* norms. Randall, *supra* note 101, at 830. His only support for this characterization is a footnote in which he claims that Schwelb, in *Actio Popularis*, "assert[s] that states have an obligation to outlaw acts of aggression, genocide, slavery and racial discrimination." Randall, *supra* note 101, at 830, n.255. In fact, the page Randall cites from *Actio Popularis* consists solely of language Schwelb quotes from the ICJ's opinion in *Barcelona Traction*, in which the court characterized aggression, genocide, slavery and racial discrimination as outlawed by international law, and as acts to which any state is permitted to object; the cited language contains no assertion by Schwelb at all and no assertion that individual states have the obligation to outlaw the acts which Randall mentions. Schwelb, *Actio Popularis*, at 56; *Case Concerning the Barcelona Traction, Light & Power Co.*, 1970 I.C.J. 3. Randall also asserts that Schwelb, in *Aspects of Jus Cogens*, "recogniz[es] [the] principles underlying the Genocide Convention as among those that civilized nations regard as binding." Randall, *supra* note 101, at 830, n.255; *Aspects of Jus Cogens*, *supra* note 204. In fact, at the page Randall cites, Schwelb is characterizing a holding of the ICJ, rather than recognizing anything himself. Schwelb, *Aspects of Jus Cogens*, *supra* note 204, at 955. Nowhere in the language Randall cites from Schwelb's articles is there any reference to hijacking, hostage-taking, crimes against internationally protected persons, or torture—acts which he asserts are "likely" violations of *jus cogens* norms in purported reliance on those articles.

206. Parker & Neylon, *supra* note 69, at 437-39.

207. *Siderman de Blake v. Repub. of Arg.*, 965 F.2d 699, 717 (9th Cir. 1992).

International Court of Justice has qualified the obligation to respect the basic human rights, to which the right not to be tortured belongs beyond any doubt, as obligations *erga omnes* . . . which every State has a legal interest [to implement]. The International Law Commission . . . has labelled serious violations of these basic human rights as 'international crimes,' giving rise to the specific responsibility of the States concerned. In view of these qualifications the prohibition of torture can be considered to belong to the rules of *jus cogens*. If ever a phenomenon was outlawed unreservedly and unequivocally it is torture.²⁰⁸

The first sentence in the foregoing quotation is supported by a citation to an article in which then-Professor Higgins asserted that, with respect to human rights conventions, "[t]here certainly exists a consensus that certain rights—the rights to life and to freedom from slavery or torture—are so fundamental that no derogation may be made."²⁰⁹ However, this assertion is supported only in part, and then only by reference to the opinions of two other scholars and to a decision by the ICJ.²¹⁰ All of the other assertions made by Parker and Neylon are supported solely by reference to treaties and non-binding resolutions of various international organizations.²¹¹

This point raises the issue of the value to be accorded such sources in determining the content of CIL. First, consider the reliance on the authority of a noted scholar to support the assertion that a particular proposition is a legal rule. This would seem justified only so long as the scholar's opinion flows reasonably from a consideration of some rule whose legal character is undisputed. If we ignore the source of the scholar's view and rely on that opinion solely on the basis of the scholar's reputation, we effectively treat the scholar as a legislator.

In fact, as Professor Kelly has noted, it is not uncommon for international law scholars to view themselves in this fashion.²¹² Professor Sohn has asserted, with respect to the CIL of human rights, that "states really never make international law on the subject of human rights. It is made by the people that care; the professors, the writers of textbooks and casebooks, and the authors of articles in leading international law journals."²¹³ But it is by no means clear that because law professors are pleased to see themselves as legislators anyone else should take the same view. As the court asserted in *United States v. Yousef*,

208. Parker & Neylon, *supra* note 69, at 437-39 (footnotes omitted).

209. Rosalyn Higgins, *Derogations Under Human Rights Treaties*, 48 BRIT. Y.B. INT'L L. 281, 282 (1977).

210. *Id.* at 282.

211. Parker & Neylon, *supra* note 69, at 437-39, nn.165-70.

212. Kelly, *supra* note 23, at 478, 492.

213. Louis B. Sohn, *Sources of International Law*, 25 GA. J. INT'L & COMP. L. 399 (1995-96).

This notion—that professors of international law enjoy a special competence to prescribe the nature of customary international law wholly unmoored from legitimating territorial or national responsibilities, the interests and practices of States, or (in countries such as ours) the processes of democratic consent—may not be unique, but it is certainly without merit.

Put simply, and despite protestations to the contrary by some scholars (or “publicists” or “jurists”), a statement by the most highly qualified scholars that international law is *x* cannot trump evidence that the treaty practice or customary practices of States is otherwise, much less trump a statute or constitutional provision of the United States at variance with *x*. This is only to emphasize the point that scholars do not *make* law, and that it would be profoundly inconsistent with the law-making processes within and between States for courts to permit scholars to do so by relying upon their statements, standing alone, as sources of international law. In a system governed by the rule of law, no private person—or group of men and women such as comprise the body of international law scholars—*creates* the law. Accordingly, instead of relying primarily on the works of scholars for a statement of customary international law, we look primarily to the formal lawmaking and official actions of States and only secondarily to the works of scholars as evidence of the established practice of States.²¹⁴

The views of then-Professor Higgins upon which Parker and Neylon relied seem to have been only weakly supported.²¹⁵ It appears that they are assuming that her assertion is true, simply because she said it.²¹⁶

It is also necessary to consider the reliance by Parker and Neylon on the language of various treaties and non-binding declarations to support their conclusion regarding the *jus cogens* status of torture. As noted above, it would appear that treaties and non-binding declarations are useful evidence of state intentions, absent better evidence.²¹⁷ If a government binds itself legally to behave in a particular way, it is hardly unreasonable to assume that the government’s future behavior will conform to its legal obligation, all other things being equal. Likewise, if a government simply announces that it will adhere to a certain pattern of behavior, without assuming any legal obligation to do so, the most likely assumption is that the government will behave as it has said it would behave, all other things being equal.

But now suppose that all other things are *not* equal. Suppose that it quickly becomes apparent that the government is not conforming its behavior to its treaty commitment or to its non-binding announcement, as the case may be. Since the crucial issue is

214. United States v. Yousef, 327 F.3d 56, 102-03 (2d Cir. 2003) (footnotes omitted).

215. Higgins, *supra* note 209, at 281-82.

216. Parker & Neylon, *supra* note 69, at 437.

217. See *supra* text accompanying note 19.

how the government will actually behave, its behavior is the best evidence on that issue. If the behavior contradicts the government's undertakings, it seems unreasonable to insist that the undertakings are the only relevant basis upon which to form expectations and to argue further that the behavior can be disregarded.

This last situation seems to be the case for the instruments on which Parker and Neylon rely.²¹⁸ For example, one of the treaties on which they base their assertion is the Covenant.²¹⁹ But a very large minority of parties to that treaty violate its provisions relating to torture.²²⁰ More generally, Professor Hathaway's careful research suggests:

[T]hat not only is treaty ratification not associated with better human rights practices than otherwise expected, but it is often associated with worse practices. Countries that ratify human rights treaties often appear less likely, rather than more likely, to conform to the requirements of the treaties than countries that do not ratify these treaties.²²¹

Treating a state's ratification of human rights treaties as evidence that the state protects human rights is simply not justified by the evidence. Therefore, whatever positive expectations regarding protection of human rights might be generated by the fact that many states have ratified human rights treaties, if that fact is considered in isolation, an account of the actual behavior of states in this area makes it unreasonable to maintain such expectations.

However doubtful a given treaty may be as a source of CIL, it does at least create legal obligations in its own right. This may offer some excuse for the reliance of Parker and Neylon on widely-ignored human rights treaties as sources of *jus cogens*.²²² But neither the ILC, nor the U.N. Commission on Human Rights, nor any special *rapporteurs* of that Commission, have any capacity whatever to create law. Why then do Parker and Neylon rely on such sources to support their arguments? Either those entities correctly state the content of international law or they do not. In neither case are the entities' conclusions themselves particularly helpful. This is perhaps obvious in the case where they misstate the content of the law. But even if their views of the law are correct, presumably what ought to count are the sources from which they were able to form their opinions—and if those sources are what is crucial, why not cite them directly?

218. Parker & Neylon, *supra* note 69, at 437-56.

219. *Id.* at 437 n.165.

220. A.M. Weisburd, *Implications of International Relations Theory for the International Law of Human Rights*, 38 COLUM. J. TRANSNAT'L L. 45, 55-60 (1999).

221. Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935, 1989 (2002).

222. See generally Parker & Neylon, *supra* note 69.

One is forced to conclude that Parker and Neylon simply do not care about state practice, about behavior that gives rise to reasonable expectations regarding future behavior. They cite treaties whose language contains the rule which they wish to label as legally binding, ignoring completely the question of compliance with those treaties.²²³ They cite statements from entities without law-creating authority which agree with their views, but do not indicate any basis for concluding that those entities' views of the law are correct.²²⁴ They are simply citing authorities that lend whatever color they have to the conclusion they wish to reach. Their result is therefore suspect.

The court in *Siderman* also relied for its conclusion on three comments by law students. One may question whether law students fall within *The Paquete Habana's* reference to "jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat,"²²⁵ but these articles have their flaws in any event. One was cited for the proposition that *jus cogens* rules bind states regardless of their consent, and also for the proposition that "there is widespread agreement among scholars that the prohibition against official torture has achieved the status of a *jus cogens* norm."²²⁶ The student author based his assertion that state consent is irrelevant to *jus cogens* on a scholarly article and on a treatise.²²⁷ The treatise contains language, not supported by references to state practice,²²⁸ that may support the student author's point if taken in isolation,²²⁹ but which comes from a discussion that treats the issue of *jus cogens* quite cautiously. This discussion also notes that the firmest support for the concept of *jus cogens* is provided by the Vienna Convention, which grounds that concept in state consent.²³⁰ The article cited by the student author does not purport to base its conclusions on state practice, but instead offers a theoretical justification for the doubtful assertion that human rights treaties are inherently self-executing.²³¹ To be sure, the student author asserts that "nations do observe *jus*

223. See Parker & Neylon, *supra* note 69, at 437 n.165 (citing treaties).

224. *Id.* at 428-29 nn. 94, 102 (citing statements made by the International Law Commission).

225. *The Paquete Habana*, 175 U.S. 677, 700 (1900).

226. See *Siderman de Blake v. Repub. of Arg.*, 965 F.2d 699, 715-17 (9th Cir. 1992) (citing Klein, *supra* note 110, for both propositions).

227. Klein, *supra* note 110, at 351 n.98.

228. IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 514 (3d ed. 1979).

229. See *id.* ("[T]he specific content of norms of [*jus cogens*] involves the irrelevance of protest, recognition, and acquiescence: prescription cannot purge this type of illegality.").

230. See *id.* at 512-15; see also *supra* text accompanying notes 65-68.

231. Alan Brudner, *The Domestic Enforcement of International Covenants on Human Rights: A Theoretical Framework*, 35 U. TORONTO L.J. 219, 231 (1985).

cogens, seek to enforce it upon each other, and deny their own violations of it,"²³² showing that the author understood the importance of grounding his argument in state practice. However, he supports his assertions regarding state behavior only by mentioning the fact that states have entered into numerous treaties purporting to protect human rights, without addressing the poor human rights performance even of parties to those treaties.²³³ He offers no examples, for instance, of an effort to enforce *jus cogens*, presumably because he could find none.²³⁴ His assertion that the prohibition against torture is a *jus cogens* norm is entirely unsupported.²³⁵ By citing him for this proposition, the court in *Siderman* was essentially treating his assertion as true simply because he made it.

A second student piece²³⁶ is also cited in *Siderman* for the proposition that the obligations created by *jus cogens* norms transcend state consent.²³⁷ That note, however, bases its argument that such a transcendental concept of *jus cogens* has entered international law solely upon references to the Vienna Convention and the *Restatement*.²³⁸ As noted above, the Vienna Convention in fact rejects this approach to *jus cogens*.²³⁹ In any event, the student writer does not support his argument by references to state practice.²⁴⁰

The court in *Siderman* also relied on yet another student piece to support its conclusion that the concept of *jus cogens* is part of international law.²⁴¹ In their discussion of the basis for the concept, the student authors observed that, during the sixteenth century, natural law was an important basis for international law.²⁴² They then asserted that *jus cogens* "has revived the natural law idea of a law binding irrespective of the will of the sovereign states."²⁴³ Nowhere in their articles have the students betrayed any awareness of the tremendous difficulties presented by the concept of natural law,

232. Klein, *supra* note 110, at 351.

233. See Hathaway, *supra* note 221, at 1989 ("[N]ot only is treaty ratification not associated with better human rights practices . . . it is often associated with worse practices.").

234. See HANNIKAINEN, *supra* note 74, at 302 ("[T]he international community of states as a whole has not engaged with any consistency in enforcement . . . of the basic norms of the international legal order.").

235. Klein, *supra* note 110, at 354 n.111. Although the author states, "freedom from torture seems firmly entrenched in international agreements," he does not specifically identify any such agreements.

236. *Legacy*, *supra* note 111.

237. *Siderman de Blake v. Repub. of Arg.*, 965 F.2d 699, 715 (9th Cir. 1992).

238. *Legacy*, *supra* note 111, at 868 n.261.

239. See *supra* text accompanying notes 54-58.

240. See *Legacy*, *supra* note 111.

241. *Siderman*, 965 F.2d at 715 (citing Belsky et al., *supra* note 110).

242. Belsky et al., *supra* note 110.

243. *Id.* at 386.

much less sought to justify their reliance on that concept.²⁴⁴ Surely an article that deals so superficially with an idea fundamental to its thesis is a weak basis for the opinion of a court.

The *Siderman* court relied on this last student article, among others, for the proposition that torture is a violation of a *jus cogens* norm.²⁴⁵ The article addresses that issue by asserting, "The most fundamental individual rights are embodied in the concept of *jus cogens*. For example, a state policy of genocide, torture, or slavery, some of the worst violations of individual rights, is generally accepted as violating *jus cogens* norms."²⁴⁶ The only support given for this assertion is a footnote, inserted after the first of the two sentences just quoted, which reads as follows:

The suggestion has been made that the Universal Declaration of Human Rights, G.A. Res. 217A, U.N. Doc. A/180 at 71 (1948), reprinted in INTERNATIONAL HUMAN RIGHTS INSTRUMENTS, . . . at § 440.1, has 'the attributes of *jus cogens*.' M. MCDUGAL, H. LASSWELL & L. CHEN, HUMAN RIGHTS AND WORLD PUBLIC ORDER 274 (1980).²⁴⁷

In essence, what this article offers is *ipse dixit* from a group of law students.²⁴⁸ To be sure, they cite to a famous treatise on international law, but that work is characterized only as making a suggestion.²⁴⁹ The language to which reference is made in the cited work is itself supported only by an internal citation to another part of the same work;²⁵⁰ that other part argues that the Universal Declaration of Human Rights has become CIL, but does not support the *jus cogens* characterization to which reference is made in the quoted footnote.²⁵¹ All in all, these students' writing seems a weak basis for a court's assertion that a particular rule amounts to non-derogable international law.

The foregoing discussion shows that at least some courts have decided questions of international law by relying on articles that are doubtful in their reasoning and weakly supported by authority. This

244. For a discussion of the philosophical weaknesses of arguments contending that all human beings possess equal rights simply by virtue of their status as human beings, see JOEL FEINBERG, SOCIAL PHILOSOPHY 88-94 (1973).

245. *Siderman*, 965 F.2d at 716.

246. Belsky et al., *supra* note 110, at 393-94.

247. *Id.* at 393 n.152 (omitting only a cross-reference).

248. *Ipse dixit* is latin for "he himself said it." The term is defined as "something asserted but not proved." BLACK'S LAW DICTIONARY 833 (7th ed. 1999).

249. See *supra* text accompanying note 247 ("The *suggestion* has been made . . .") (emphasis added).

250. MYRES S. MCDUGAL ET AL., *supra* note 70, at 274 n.366 (1980).

251. *Id.* at 320-32. It should be noted that the argument regarding the CIL status of the Universal Declaration is based solely on statements by scholars, resolutions of the General Assembly, and assertions that that Declaration has been frequently "invoked"—not on assertions, let alone on evidence, that it has been put into practice.

is not to say that courts should ignore articles in dealing with CIL, but only that the mere fact that an assertion about international law appears between the covers of a respected legal periodical does not necessarily mean that the assertion should be given any weight. Indeed, given the tendency of some scholars of international law to see themselves as legislators, it would seem that a particularly high degree of caution is appropriate in relying on academic writing in this field.

2. The *Restatement*

Several of the cases discussed herein relied heavily on the *Restatement* in their discussions of *jus cogens*.²⁵² While this might be seen as another instance of reliance upon academic authority, that is a bit of an over-simplification. Indeed, given the eminence of the American Law Institute, taking its views seriously is understandable. Unfortunately, however, a number of the assertions the *Restatement* makes regarding the content of international law seem weakly supported and, indeed, not to “restate” anything.

For example, several courts relied on Comment k to Section 102 in their discussions of *jus cogens*. That comment reads:

Peremptory norms of international law (*jus cogens*). Some rules of international law are recognized by the international community of states as peremptory, permitting no derogation. These rules prevail over and invalidate international agreements and *other rules of international law in conflict with them*. Such a peremptory norm is subject to modification only by a subsequent norm of international law having the same character. It is generally accepted that the principles of the United Nations Charter prohibiting the use of force (Comment h) have the character of *jus cogens*. See §331(2) and Comment e to that section.²⁵³

The emphasized language in this quotation goes beyond the Vienna Convention in its approach to *jus cogens*, since the comment asserts that *jus cogens* can invalidate “other rules of international law,” presumably referring to rules of CIL, while the Convention deals only with international agreements.²⁵⁴ The *Restatement’s* formulation appears inconsistent with the Convention’s derivation of *jus cogens* from state acceptance. This follows when one considers the possible forms of a conflict between a *jus cogens* rule and a rule of CIL. If a CIL rule were derived from state practice, but state practice subsequently changed, such that the new practice was accepted as *jus cogens*, there would be no conflict between the rules. Rather, the old

252. See, e.g., *Siderman de Blake v. Repub. of Arg.*, 965 F.2d 699, 714-18 (9th Cir. 1992).

253. RESTATEMENT, *supra* note 5, §102 cmt. k (emphasis added).

254. See *supra* note 68 and accompanying text.

CIL rule would simply not be a rule any longer—it would no longer correspond to state practice. Indeed, this would be true whether or not a rule embodying the new state practice was labeled *jus cogens*. The conflict envisaged in the *Restatement* comment, therefore, must refer to a conflict between a *jus cogens* rule and a rule of CIL. However, if *jus cogens* is defined as a rule accepted by the international community as a whole as one from which no derogation is permitted (as the Vienna Convention states) then such a conflict could not arise, since actual acceptance of the *jus cogens* character of the rule is logically inconsistent with the assertion that there could exist a CIL rule—that is a rule derived from a general practice of states—in conflict with the *jus cogens* rule. If, however, *jus cogens* is seen as deriving from trans-empirical sources, as Professor Reisman suggests some have argued,²⁵⁵ such a conflict is much easier to envision. Obviously, actual practice can differ from some rule based on something other than actual practice. But it hardly seems reasonable to characterize a rule based on something other than actual practice as a rule accepted by the international community as a whole as one from which no derogation is permitted, which is the Vienna Convention's definition of *jus cogens*.²⁵⁶

How then does the *Restatement* explain its characterizing *jus cogens* in a way inconsistent with the Vienna Convention? Its explanation for Comment k is set out in Reporter's Note 6 to Section 102:

Peremptory norms (jus cogens). The concept of *jus cogens* is of relatively recent origin. See Schwelb, "Some Aspects of International Jus Cogens as Formulated by the International Law Commission," 61 [*American Journal of International Law*] 946 (1967). It is now widely accepted, however, as a principle of customary law (albeit of higher status). It is incorporated in the Vienna Convention on the Law of Treaties, Articles 53 and 64. See § 331(2) and Comment e to that section. Comment k to this section adopts the definition of *jus cogens* found in Article 53 of the Vienna Convention. The Vienna Convention requires that the norm (and its peremptory character) must be "accepted and recognized by the international community of States as a whole" (Art. 53). Apparently that means by "a very large majority" of states, even if over dissent by "a very small number" of states. See Report of the Proceedings of the Committee of the Whole, May 21, 1968, U.N. Doc. A/Conf. 39/11 at 471-72. ²⁵⁷

Preliminarily, it should be stressed that, as Professor McCaffrey noted years ago, the American Law Institute does not approve the content of the reporter's notes, which reflect the views of the

255. Reisman, *supra* note 71, at 15 n.29.

256. See *supra* note 68 and accompanying text.

257. RESTATEMENT, *supra* note 5, § 102, rpt.'s note 6.

reporters only.²⁵⁸ These notes have no more authority than any other scholarly assertion. In the case of this note, moreover, not only does this discussion fail to explain why Comment k's definition of *jus cogens* departs from that of the Vienna Convention, it even asserts, inaccurately, that Comment k adopts the definition of the Vienna Convention.²⁵⁹ Further, that comment characterizes the concept of *jus cogens* as "widely accepted" without identifying the entities that accept it.²⁶⁰ In particular, it offers no evidence of acceptance by states generally or by the United States in particular. In essence, readers of the *Restatement* are to accept its assertions on faith.

Reporter's Note 6 cross-references Comment n of Section 702.²⁶¹ That comment provides that, "[n]ot all human rights norms are peremptory norms (*jus cogens*), but those in clauses (a) to (f) of this section are, and an international agreement that violates them is void. See § 331(2)."²⁶² This comment is supported by Reporter's Note 11, which provides:

Human rights law and jus cogens. Not all human rights norms are *jus cogens*, but [the prohibitions on genocide, slavery or slave trade, the murder or causing the disappearance of individuals, torture or other cruel, inhuman, or degrading treatment or punishment, prolonged arbitrary detention, and systematic racial discrimination],²⁶³ have that quality. It has been suggested that a human rights norm cannot be deemed *jus cogens* if it is subject to derogation in time of public emergency; see, for example, [Article] 4 of the Covenant on Civil and Political Rights, § 701, Reporters' Note 6. Nonderogability in emergency and *jus cogens* are different principles, responding to different concerns, and they are not necessarily congruent. In any event, the rights recognized in clauses (a) to (f) of this section are not subject to derogation in emergency under the Covenant. Article 4 of the Covenant explicitly excludes from derogation the right to life and freedom from slavery and from torture, as well as from racial discrimination. Freedom from arbitrary detention is not included among the nonderogable provisions, but since derogation is permitted only "in time of public emergency which threatens the life of the nation," and only "to the extent strictly required by the exigencies of the situation," detentions that meet those standards presumably would not be arbitrary. See, generally, McDougal, Lasswell and Chen, [*Human Rights and World Public Order*] 338-50 (1980).²⁶⁴

258. Stephen C. McCaffrey, *The Restatement's Treatment of Sources and Evidence of International Law*, 25 INT'L LAW 311, 317 n.27 (1991).

259. *Id.* § 102, cmt. k ("Comment k to this section adopts the definition of *jus cogens* found in Article 53 of the Vienna Convention").

260. *Id.* ("[*Jus cogens*] is now widely accepted, however as a principle of customary law (albeit of higher status).").

261. *Id.*

262. *Id.* § 702, cmt. n.

263. *Id.* § 702, rprtr.'s note 11 (referring to prohibitions listed in RESTATEMENT, *supra* note 5, § 702(a)-(f)).

264. *Id.*

The *Restatement* thus offers *no* support from state practice for its assertions. To be sure, it cites to a treatise, but that treatise justifies its characterization of certain rules as *jus cogens* norms solely by reference to statements made by delegates at the conference which produced the Vienna Convention, to scholarly opinion, and to certain decisions of the ICJ.²⁶⁵ It too makes no reference to state practice.²⁶⁶

In short, the sections of the *Restatement* upon which the courts relied in the cases discussed above are not reliable guides to state practice. To be fair, the *Restatement* does not claim otherwise:

[T]he universal acceptance of human rights in principle, and active international concern with human rights, has led to some readiness to conclude that states have assumed human rights obligations. There is a disposition to find legal obligation in indeterminate language about human rights in international agreements, e.g., the United Nations Charter There is some willingness to find that the practice of states, perhaps under constitutional, political, or moral impetus, is practice with a sense of international legal obligation creating a customary international law of human rights, even though many states sometimes violate these rights Absorption into international law of principles common to national legal systems generally is only a secondary source of international law . . . , but there is a willingness to conclude that prohibitions common to the constitutions or laws of many states are general principles that have been absorbed into international law.²⁶⁷

The *Restatement* does not pretend to rely on the actual practice of states regarding human rights in its discussion of the CIL or, we may assume, the *jus cogens* norms of human rights.²⁶⁸ It justifies this approach by reference to “a disposition to find legal obligation in indeterminate language about human rights in international agreements,” without identifying the entities so disposed.²⁶⁹ It also refers to “some willingness to find that the practice of states, perhaps under constitutional, political, or moral impetus, is practice with a sense of international legal obligation creating a customary international law of human rights,” without indicating who is willing to make this leap.²⁷⁰ More fundamentally, the *Restatement* does not explain why such an approach is justified. It is as though the drafters of the *Restatement* have determined that human rights rules ought to be treated as exceptions to the normal processes of international law

265. MCDUGAL ET AL., *supra* note 70, at 338-50.

266. *See id.*

267. RESTATEMENT, *supra* note 5, § 701, rptr.'s note 1.

268. *See id.* (containing no reference to actual state practice).

269. *Id.*

270. *Id.*

formation, even though nothing in those normal processes would indicate that such rules have any special status.²⁷¹

To sum up, the *Restatement of Foreign Relations Law* should be treated with great caution as, indeed, one court has held.²⁷² It does not even purport to justify its assertions regarding the subjects discussed in this article, except by inaccurate citations to the Vienna Convention and by relying on scholarly opinion. If CIL is supposed to be created by the practice of states rather than by law professors, it would seem the *Restatement* is a poor guide to CIL. As noted above,²⁷³ Judge Robb once asserted that, “[c]ourts ought not to serve as debating clubs for professors willing to argue over what is, or what is not, an accepted violation of the law of nations.”²⁷⁴ Unfortunately, the *Restatement* appears to be a collection of the arguments of only one side in a professorial debate.

271. Accounting for the approach the *Restatement* takes on these matters is difficult. Professor Henkin, Chief Reporter, rejected the argument that scholars' opinions should be considered a source of international law. 57 A.L.I. PROC. 79 (1980). Nonetheless, the American Law Institute's debates on these subjects make little reference to state practice, as distinct from actions by international organizations and the language of treaties. See *id.* at 123-26, 128-30; 59 A.L.I. PROC. 204-26 (1982); 62 A.L.I. PROC. 395-400, 539-44 (1985). Some comments made in the course of the debates support the argument that actual state practice was not really controlling in drafting the *Restatement*. See, e.g., 59 A.L.I. PROC. 204-26 (1982). In one of the debates on the *Restatement*, Professor Henkin characterized Section 702 as including in its lists of prohibited behaviors “that which no state admits it practices, brags about practicing, or asserts the right to practice.” *Id.* That is, the list consisted, not of actions from which states refrained, but of actions states were unwilling to claim the right to take. But it is not clear why a state's refusal to admit to a practice would create an expectation that the state would refrain from the practice. Further, with respect to the content of *jus cogens*, Professor McDougal, one of the advisers to the Reporters, defended his conclusion that certain human rights protections were *jus cogens* norms by reference to the views of one hundred writers, not by reference to the practice of states. 57 A.L.I. PROC. 128 (1980). In debate, Professor Lillich characterized section 702 as “very revolutionary,” as going “very, very far” and as “rather radical.” 59 A.L.I. PROC. 219-20 (1982). Such statements suggest some awareness that the positions taken in the *Restatement* were not uncontroversial. It should also be noted that a notewriter in the *Yale Journal of International Law* pointed out a few years ago that, with respect to another element of the *Restatement*, the reporters appear to have chosen to “restate” the law according to their notions of good policy, aware of the fact that their views did not, in fact, reflect the state of the law as of the time of their drafting efforts. David B. Massey, Note, *How the American Law Institute Influences Customary Law: The Reasonableness Requirement of the Restatement of Foreign Relations Law*, 22 YALE J. INT'L L. 419, 441-42 (1997). Such a thing would not seem impossible with respect to the issues addressed in this article, especially given the strong views on the subject of the Chief Reporter, Professor Henkin. See Louis Henkin, *Human Rights and State “Sovereignty”*, 25 GA. J. INT'L. & COMP. L. 31, 37-39 (1995-96).

272. *United States v. Yousef*, 327 F.3d 56, 99-103 (2d Cir. 2003) (holding that the district court erred in relying on the *Restatement* to support its conclusion regarding the content of CIL).

273. See quotation *supra* note 139.

274. *Tel-Oren v. Libyan Arab Repub.*, 726 F.2d 774, 827 (D.C. Cir. 1984) (Robb, J., concurring).

3. Decisions of U.S. Courts

Several of the decisions described above relied on the decisions of other U.S. courts when addressing the content of CIL. While it might seem unremarkable for a court to rely on a sister court's decision when addressing a question of law, this approach is in fact problematic in the situation addressed in this article. This is so for two reasons.

First, decisions by U.S. federal courts regarding CIL are necessarily less authoritative than are their decisions regarding either the Constitution or federal statutes. Those courts are the only judicial bodies whose constructions of the Constitution and federal statutes can be considered binding. When the federal courts construe the Constitution or an act of Congress, they are addressing legal instruments adopted by the very sovereignty of which they are themselves an arm. In essence, when federal courts construe federal law, the United States government is announcing what its own law means.

In contrast, whatever the status of CIL *vis à vis* federal law,²⁷⁵ no one maintains that CIL is created solely by actions of the various parts of the government of the United States. When federal courts construe CIL, their task is more akin to that of addressing the law of a foreign country than to that of interpreting a federal statute, and their conclusions should be treated with appropriate caution. After all, if a federal court found itself forced to interpret, for example, a Canadian statute, it would presumably rely, in the first instance, on Canadian readings of the statute, whether those of a Canadian court or of some other entity considered authoritative in Canada. This would be true, I suggest, even if another federal court had recently addressed the same statute. Canada's law is determined by Canada, and a U.S. court's understanding of that law cannot be controlling in the same way such a court's view of U.S. law can be controlling. Similarly, with respect to CIL, the focus for U.S. courts should be on CIL itself, which is to say on the state practice that creates that body of law. Those courts are, in essence, relying on what amounts to secondary sources of CIL if, when faced with a CIL issue, they rely on U.S. judicial interpretations of CIL rather than on the substance of CIL itself.

The second reason for caution in relying on U.S. court decisions to determine the content of CIL is that such a determination is heavily fact-specific.²⁷⁶ In addressing questions of U.S. law, a U.S. court can look to the language of the Constitution, of statutes, or of

275. See *supra* note 4.

276. *Id.*

administrative regulations, and can read relevant judicial opinions. While interpreting these resources may be difficult, there is typically no difficulty in determining their content. It is seldom a problem to determine what words the legislature uttered, even if it may be difficult to determine what those words mean.

With respect to CIL, however, a court must engage in a factual inquiry to determine the content of the relevant state practice. The problem is not simply that an earlier decision may have found the facts of state practice incorrectly, although that is of course a concern. It is also that the interactions between governments that create CIL are never-ending. Even if a court's conclusion regarding a particular CIL issue in 1999 was defensible in light of state practice at that time, a court addressing the same issue in 2004 cannot simply assume that state practice in the intervening five years has had no effect on the law. Nor is it necessarily safe to infer that because state practice on one subject takes one form it necessarily takes the same form with respect to a related subject.

The cases discussed above offer an example of the problems that can arise when one U.S. court relies on another to support a conclusion regarding the content of CIL. *Buell v. Mitchell*²⁷⁷ found that the death penalty was not contrary to the general practice of states, relying in part on the fact that the Covenant permits the death penalty.²⁷⁸ *Hain v. Gibson*²⁷⁹ relied on *Buell* to support the conclusion that states that have abolished the death penalty for persons who committed crimes before their eighteenth birthdays have not necessarily done so from a sense of legal obligation.²⁸⁰ But the issues in the two cases were not the same; *Buell* dealt with the complete elimination of the death penalty, *Hain* with partial abolition.²⁸¹ Further, to the extent that the result in *Buell* depended on the Covenant's approach to the death penalty, reliance on *Buell*'s method of analysis should have led the *Hain* court to a result opposite to that which it reached. This follows because the Covenant forbids imposition of the death penalty for crimes committed prior to a defendant's eighteenth birthday.²⁸²

The foregoing is not meant to suggest that a careful discussion of a point of CIL should be ignored simply because it is found in the opinion of a U.S. court. It is rather to say that, however helpful a court decision may be in providing insight into a question of CIL, it

277. *Buell v. Mitchell*, 274 F.3d 337, 371-72 (6th Cir. 2001).

278. *Id.* at 371-72.

279. *Hain v. Gibson*, 287 F.3d 1224, 1244 (10th Cir. 2002).

280. *Id.* at 1243-44.

281. *Buell*, 274 F.3d at 373-74; *Hain*, 287 F.3d at 1242-44.

282. Covenant, *supra* note 20, art. 6.

cannot take the place of an examination of the fundamental sources of that body of law.²⁸³

4. Decisions of International Courts

If a judge seeking to determine the content of a rule of international law can rely on the decisions of U.S. courts only with great caution, it would not be surprising for that judge to assume that more confidence could be reposed in the decisions of international tribunals. Such tribunals deal only with questions of international law; their judges are, in many cases, expert in that field. Reliance on such tribunals, therefore, would seem to be a reasonable way for a busy judge to deal with a complex and possibly unfamiliar body of law.

Nonetheless, the decisions of international tribunals must also be treated with caution by U.S. judges. At least two factors support this conclusion. First, the legal instruments establishing the court in question may indicate questions as to the scope of authority conferred upon it. Second, even if a court's authority seems unambiguous, the inevitable delay in states' correcting a judicial decision they see as incorrect means that too quick an embrace of controversial decisions by an international tribunal may result in a U.S. judge treating as established a judicial construction of a legal rule which states ultimately reject.

An example of a tribunal of limited authority is provided by the best-known of these bodies, the ICJ.²⁸⁴ Its basic document indicates that its decisions are not to be treated as having precedential value.²⁸⁵ That document, read with the U.N. Charter, also shows that states even limited the ICJ's capacity to finally resolve individual

283. It might be objected that, if this argument is correct, then this article's stress on the method of determining CIL employed in *The Paquete Habana* makes no sense; there is no reason to assume that the Supreme Court is any more authoritative regarding CIL than is any other U.S. court, so arguments criticizing contemporary methods of determining CIL for departing from the approach of *The Paquete Habana* make no sense. While this argument has some plausibility, it depends on the assumption that *The Paquete Habana* is either controlling or irrelevant. Surely, however, the views of the Supreme Court ought to carry some weight with lower federal courts, even if those views are not controlling. At minimum, the lower courts ought to acknowledge any departures they make from an approach taken by the Supreme Court, and explain why they believe the Supreme Court was wrong. The point in citations to *The Paquete Habana* is not that the lower courts should have adhered slavishly to that decision's method of determining the content of CIL, but rather that those courts' decisions show no awareness that they are departing from the Supreme Court's approach to this issue, and provide no justification for their actions.

284. See Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1055, T.S. 993 [hereinafter ICJ STATUTE].

285. *Id.* art. 59.

disputes.²⁸⁶ The Statute of the ICJ²⁸⁷ includes three articles, which taken together with Article 94 of the U.N. Charter,²⁸⁸ indicate both that the decisions of the ICJ were not intended to create law and that states were quite conservative in the scope of authority they were willing to grant to the court. A consideration of Articles 38(1)(d) and 59 of the Statute demonstrates the first point. Article 38(1)(d) provides:

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: . . .
 - d. subject to the provisions of Article 59, 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.²⁸⁹

Article 59 provides that “[t]he decision of the Court has no binding force except between the parties and in respect of that particular case.”²⁹⁰

The most natural reading of these two articles is that judicial decisions are solely a subsidiary means determining the content of international law. Article 38(1)(d) states this position expressly. Article 59 negates the existence of any legal effect of a judgment of the ICJ except as between the parties to a case, with respect to that case; the phrase in Article 38(1)(d) making the application of that paragraph subject to Article 59 can most easily be seen as meaning that the designation of judicial decisions as subsidiary means for determining the content of law is not intended somehow to qualify the limiting effects on the ICJ’s judgments imposed by Article 59.²⁹¹

The drafting history of these provisions reinforces this conclusion.²⁹² Article 36 of the Statute reinforces the conclusion that

286. *Id.* art. 62; U.N. CHARTER art. 94.

287. *Id.*

288. U.N. CHARTER art. 94.

289. ICJ STATUTE, *supra* note 284, art. 38(d).

290. *Id.* art. 59.

291. *Id.* arts. 38, 59.

292. The portions of the ICJ Statute here in question are all drawn from the correspondingly numbered articles of the Statute of the Permanent Court of International Justice (PCIJ), which was established in 1921. Statute of the Permanent Court of International Justice, Dec. 16, 1920, 6 L.N.T.S. 390. An advisory committee of jurists prepared the initial draft of that statute. As finally adopted, that committee’s version of the language which became article 38(1)(d) read, “The Court shall . . . apply . . . 4. 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.” Permanent Court of International Justice, Advisory Committee of Jurists, Annex 1, 32d Meeting, PROCÈS-VERBAUX OF THE PROCEEDINGS OF THE COMMITTEE JUNE 16TH-JULY 24th 1920 WITH ANNEXES 673, 680 (1920). The committee’s intention to make clear that the PCIJ would lack law-making authority is shown by its continual adjustment of the language that became Article 38(1)(d) in the direction of emphasizing that meaning. Its first version provided, “the following rules are to be applied by the judge in the solution of international disputes; . . . 4. International jurisprudence as a

means for the application and development of law." Annex No. 3, 13th Meeting, *id.* at 281, 306. This language provoked considerable debate, with its proponent, Baron Descamps, asserting that

[Doctrine] could only be of a subsidiary nature; the judge should only use it in a supplementary way to clarify the rules of international law. Doctrine and jurisprudence no doubt do not create law; but they assist in determining rules which exist. A judge should make use of both jurisprudence and doctrine, but they should serve only as elucidation.

Annex No. 3, 15th Meeting, *id.* at 336. A drafting committee altered the proposed language to read, "The Court . . . shall . . . apply . . . 4. Rules of law derived from judicial decisions and the teachings of the most highly qualified publicists of the various nations." Annex 2, 25th Meeting, *id.* at 561, 567. This was later modified by the addition of the phrase, "as a subsidiary means for the determination of rules of law" after the word "nations." Annex 2, 29th Meeting, *id.* at 629, 636. Apparently, controversy continued on the subject, as Baron Descamps subsequently proposed altered language "as a compromise." 30th Meeting, *id.* at 617, 620. The final version is set out in the text.

The matter then moved to the Council of the League of Nations. The language ultimately adopted by that body for Articles 38(4) (now Article 38(1)(d)) and 59 is identical to that of those articles in their current form. *Compare* Statute for the Permanent Court of International Justice Provided for by Article 13 of the Covenant of the League of Nations arts. 38(4), 59, LEAGUE OF NATIONS, Permanent Court of International Justice, Documents Concerning the action taken by the Council of the League of Nations under Article 14 of the Covenant and the Adoption by the Assembly of the Statute of the Permanent Court 258, 264, 266 [hereinafter PCIJ Documents] with ICJ STATUTE, *supra* note 284, arts. 38(1)(d), 59. The adoption of the wording that became these articles was preceded by the submission of a memorandum by the British delegate observing that the PCIJ's decisions must necessarily have the effect of "moulding and modifying international law." PCIJ Documents, *supra*, at 42, 44; *Note on the Permanent Court of International Justice*, *id.* at 38 (expressing the opinion that this development was not contemplated by the Covenant of the League of Nations). The memorandum went on to suggest that there ought to be a mechanism whereby a state could make a protest against changes in international law that might flow from a particular decision. *Id.* The memorandum described such a mechanism as particularly necessary because non-members of the League of Nations, including the United States, Germany, and the Soviet Union, could "not be expected to take their views on international law from the court's decision." *Id.* A report prepared by the French representative to the Council of the League, and adopted by that body, makes clear that the adoption of what became Article 59 was seen as a response to the concern that states not parties to a case could nonetheless be affected by the decision of that case if the PCIJ's decisions were seen as a source of law generally. *Id.* at 45. More specifically, that report indicates that Article 59 was intended to make explicit that states not parties to a given case were not bound by the PCIJ's legal pronouncements in that case. *Id.* at 50. It is true that a subcommittee of the Third Committee of the Assembly of the League rejected an Argentine amendment to what became Article 38 that would have limited "the power of the court to attribute the character of precedents to judicial decisions" because the subcommittee "considered that it would be one of the Court's important tasks to contribute, through its jurisprudence, to the development of international law." *Report and Draft Scheme Presented to the Assembly by the Third Committee id.* at 206, 211. But it goes too far to say that the rejection of this amendment should be seen as indicating that the PCIJ was intended to have the capacity, through its decisions, to make law. As indicated above, the language of Articles 38(4) and 59 was clearly drafted to preclude that result, and the subcommittee

the ICJ was not intended to have the capacity to make law through its decisions:

1. The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.
2. The states parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:
 - a. the interpretation of a treaty;
 - b. any question of international law;
 - c. the existence of any fact which, if established, would constitute a breach of an international obligation;
 - d. the nature or extent of the reparation to be made for the breach of an international obligation.
3. The declarations referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain states, or for a certain time. . . .
6. In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court.²⁹³

The effect of this article is to limit the ICJ's jurisdiction to states that have voluntarily accepted its authority, either by recognizing its "compulsory" jurisdiction prior to the development of a dispute or by referring a case to the court after the dispute has arisen.²⁹⁴ States did not afford the ICJ the authority to compel an unwilling litigant state to appear before it. The court, in other words, is not intended to be able to impose its views on the international community. But if the ICJ's decisions are seen as sources of law, then states unwilling to appear before the court are indirectly subjected to its authority, strongly curtailing the protection for state autonomy created in Article 36.

Article 94 of the Charter supports the same conclusion. That article provides:

1. Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party.

did not alter that language. Further, the Argentine amendment would have limited the PCIJ to applying only national judicial decisions, and those only against the state of the court delivering the decision. *Id.* at 68. That is, the amendment would have had the effect of forbidding the PCIJ to look to its own decisions even as subsidiary means for determining rules of law. Given the highly restrictive character of the amendment, its rejection hardly implies the intention to adopt a very expansive view of the effect of the PCIJ's decisions.

293. ICJ STATUTE, *supra* note 284, art. 36.

294. *Id.*

2. If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.²⁹⁵

In other words, a state prevailing before the ICJ has no legal right to execution of the judgment in its favor.²⁹⁶ On the contrary, whether to enforce the judgment is entirely a matter of the discretion of the Security Council.²⁹⁷ If the ICJ's decisions were understood to be sources of law, binding on the international community, such discretion would be meaningless. This follows, since the states composing the Security Council would presumably be as obliged to accept the view of the law taken by the court as any other non-parties to a case in which a particular rule was established. Yet if they were so bound, how could they lawfully elect to reject the application of a binding legal rule in the case in which execution was sought? If, however, Article 94 actually confers discretion on the Security Council, it must follow that the Council's members not parties to a particular case decided by the ICJ are not bound by any legal rules the court purports to enunciate in that case. If they are not bound, neither are any other non-parties. In short, Article 94 is inconsistent with the argument that the ICJ's decisions are sources of law.

It is true that the court itself puts considerable weight on its own prior decisions, and some of its judges have defended this practice.²⁹⁸

295. U.N. CHARTER art. 94.

296. *Id.*

297. *Id.*

298. See generally Iain Scobbie, *Res Judicata, Precedent and the International Court: A Preliminary Sketch*, 20 AUSTL. Y. B. INT'L L. 299 (1999); Mohammed Bedjaoui, *Expediency in the Decisions of the International Court of Justice*, 71 BRIT. Y.B. INT'L L. 1 (2001). In particular, Judge Shahabuddeen of the ICJ has argued that ICJ decisions may properly be considered a precedent, at least when that body decides cases. MOHAMED SHAHABUDEEN, *PRECEDENT IN THE WORLD COURT* 238-39 (1996). However, the heart of his argument is that the members of the Council of the League of Nations who produced the final draft of the PCIJ's statute were aware that the Court's decisions would create precedents, but adopted the statute anyway. *Id.* at 56-63. More specifically, he argues that Article 59 means only that a judgment can be enforced only against a state which was a party to the litigation which produced the judgment. *Id.* This conclusion is hard to square with the drafting history of the statute (which Judge Shahabuddeen describes at length). Article 59 was added after the British note asserted the undesirability of states not parties to litigation before the PCIJ being held bound by rules of law developed by that court, and was characterized by the French representative as dispositive of that concern. Again, if that article was intended only to indicate that non-parties to a case were not affected by the judgment, it would have been unnecessary to add to Article 59 the phrase "and only in respect of that particular case," since, according to Judge Shahabuddeen, all the article purports to address is the effect of individual judgments. However, that phrase makes sense if the article is intended to emphasize the non-precedential character of the Court's decisions, since parties to a case would be as vulnerable to its use as a precedent as would other states.

Scholars, too, frequently cite decisions of the ICJ as though they were, in themselves, authority for particular propositions of law.²⁹⁹ Additionally, as noted above, at least one U.S. court has relied on an ICJ judgment as authority supporting its holding.³⁰⁰ However, not only do the ICJ's basic documents cast great doubt on the authority of its decisions, but at least one other international tribunal has repeatedly held that it is not bound by the ICJ's view of international law.³⁰¹

It was the International Criminal Tribunal for the Former Yugoslavia (ICTY) which took this position in the following context. In *Prosecutor v. Duško Tadić*, the appeals chamber of the ICTY was faced with a case in which, among other issues, the prosecution appealed the trial chamber's apparent conclusion that certain of the crimes of which the defendant was accused were not covered by the relevant treaty because the conflict in Bosnia-Herzegovina was not international.³⁰² Whether that determination was correct depended on whether the acts of Bosnian Serb forces could be attributed to Yugoslavia, which in turn depended on the degree of control Yugoslavia was required to maintain over those forces in order to satisfy the international legal requirements for such attribution.³⁰³

Further, as Judge Shahabuddeen does not note, the phrase "[s]ubject to the provisions of Article 59" was added to what is now Article 38(1)(d) at the same time that Article 59 was added to the statute. PCIJ Documents, *supra* note 292, at 42, 44. That phrase makes sense in context only if it is intended to emphasize that reliance on the court's judicial decisions, as subsidiary means for the determination of rules of law, is subject to the limitation that its decisions bind only the parties to a case, and only for that case.

Judge Shahabuddeen observes that one might distinguish between the law-making capacity of municipal courts and that of the ICJ on the ground that municipal courts are invested with the sovereignty of the states which establish them. SHAHABUDEEN, *supra*, at 93. He argues that the states of the world can be seen as having delegated law-making authority to the ICJ as a function of establishing that court. *Id.* That assertion, however, overlooks the implications of the ICJ's lack of compulsory jurisdiction and the fact that its judgments are enforceable only at the discretion of the Security Council. In contrast, municipal courts can compel the appearance of litigants and executive authorities have no discretion not to execute their judgments. That is, municipal courts themselves possess the essence of sovereignty, the power to coerce obedience. In contrast, the ICJ was denied any coercive powers by governments—surely an indication that they intended that it not exercise anything like sovereign power.

299. For examples of scholarly reliance on ICJ decisions as establishing rules of CIL see, e.g., J.G. STARKE, *INTRODUCTION TO INTERNATIONAL LAW passim* (10th ed. 1989); MALCOLM N. SHAW, *INTERNATIONAL LAW passim* (4th ed. 1997); Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 A.J.I.L. 757 (2001).

300. *Siderman de Blake v. Repub. of Arg.*, 965 F.2d 699, 715 (5th Cir. 1992), *cert. denied* 507 U.S. 1017 (1993).

301. See generally *Prosecutor v. Duško Tadić*, 38 I.L.M. 1518 (Int'l Crim. Trib. Former Yugo.-App. Chamber 1999).

302. *Id.* ¶ 22, at 1523-24, ¶¶ 68-74, at 1533-34, ¶¶ 80-82, at 1535, ¶ 86, at 1535.

303. *Id.* ¶ 97, at 1537.

According to the prosecution, the trial chamber had erred by drawing the legal standards for attribution from the *Nicaragua v. United States* case.³⁰⁴ The appeals chamber agreed, holding that the test drawn from that case was not persuasive.³⁰⁵ It based this conclusion on its determination that the result in *Nicaragua v. United States* was consistent neither with the bases of the law of state responsibility nor with the practice of states and international and national tribunals.³⁰⁶

In *Prosecutor v. Delalić*,³⁰⁷ the appeals chamber faced the same legal issue, with the defendants in that case arguing that the *Tadić* court had erred in refusing to follow the ICJ's holding in the *Nicaragua* case because the appeals chamber was "bound by the ICJ's precedent."³⁰⁸ The appeals chamber did not accept that argument, stating that:

[T]his Tribunal is an autonomous international judicial body, and although the ICJ is the "principal judicial organ" within the United Nations system to which the Tribunal belongs, there is no hierarchical relationship between the two courts. Although the Appeals Chamber will necessarily take into consideration other decisions of international courts, it may, after careful consideration, come to a different conclusion.³⁰⁹

The ICTY, in short, has flatly rejected the argument that ICJ decisions give rise to binding legal rules. Rather, it has held that the ICJ is to be followed only to the extent its decisions make sense and correspond to the practice of states. This treatment of the ICJ contrasts sharply with the scholarly practice of treating ICJ decisions as establishing legal rules without regard to their coherence and correspondence to practice.³¹⁰

The authority of the ICTY is, if anything, less doubtful than that of the ICJ. While it has had limited success in actually obtaining custody over persons it has indicted, its jurisdiction does not depend on consent, either from defendants before it or from their home states. Formally, at least, its jurisdiction is compulsory.³¹¹

304. *Id.* ¶¶ 99-101, at 1537-38.

305. *Id.* ¶ 115, at 1540.

306. *Id.* ¶¶ 116-45, at 1540-46.

307. *Prosecutor v. Delalić*, 40 I.L.M. 630 (Int'l Crim. Trib. Former Yugo.-App. Chamber 2001).

308. *Id.* ¶ 21, at 635.

309. *Id.* ¶ 24, at 636 (footnote omitted).

310. *See supra* note 299.

311. Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, arts. 1, 6, 9, 29, U.N. Doc. S/25704 at 36, annex (1993) and S/25704/Add.1 (1993), adopted by Security Council on May 25, 1993, U.N. SCOR, 48th year., U.N. Doc. S/RES/827 (1993), as amended by S.C. Res. 1166, U.N. SCOR, 53d year, U.N. Doc. S/RES/1166 (1998); S.C. Res. 1329, U.N. SCOR,

Furthermore, the ICTY is empowered by its statute to impose sentences and to select the facility in which the sentences are to be served.³¹² That is, the carrying out of its judgments is not subject to the discretion of any political body, and its authority actually to resolve the cases brought before it is thus unquestioned.³¹³ When such a court explains the law guiding its decisions, it would be unreasonable simply to ignore that explanation.

Yet, if these ICTY rulings are taken seriously, they necessarily cast doubt on any reliance on ICJ decisions simply because they are ICJ decisions. Rather, however inconvenient it may be for scholars and domestic courts, the holdings in these ICTY cases seriously weaken any argument that those ICJ decisions on CIL that are poorly reasoned or contrary to state practice are entitled to any deference.

We see, then, that limitations on the authority of particular international tribunals cast doubt on arguments that the decisions of all such tribunals are a source of international law. But that is not the only factor counseling caution in dealing with the law-creating effect of decisions of international tribunals. Another is the problem of legal mistakes. This is not to say that judges of international tribunals are somehow more prone to error than are judges of domestic courts. It is to say that correcting such errors is so much more difficult in the international system than in a domestic system that formal action to change a rule relied upon in a doubtful decision may take a long time, even if the decision is understood to be questionable as soon as it is announced. A U.S. judge who seizes upon that decision without examining the reaction of states may thus find itself applying an incorrect legal standard.

This difficulty follows from the nature of the international legal system. As a practical matter, the only way to alter a rule of international law is to create a treaty regime, the rules of which will supersede any pre-existing rule. But a treaty binds only the states accepting it. Thus, if the rule to be changed is one that affects a large number of states, the group of states which must reach consensus on a rule-changing treaty will be correspondingly large. But convening a diplomatic conference and negotiating agreement among a large number of governments is a very complicated process. It is

55th year, U.N. Doc. S/RES/1329 (2000); S.C. Res. 1411, U.N. SCOR, 57th year, U.N. Doc. S/RES/1411 (2002).

312. *Id.* arts. 23, 24, 27.

313. The ICTY is not the only international tribunal whose judgments are actually enforceable. For example, money judgments against a state rendered by the Inter-American Court of Human Rights are enforceable in the courts of the state against which the judgment was rendered. American Convention on Human Rights, Nov. 22, 1969, arts. 62, 68, 1144 U.N.T.S. 123. In other words, U.S. judges should not assume that all international tribunals have been kept on a leash as short as that attached to the ICJ. Rather, it is necessary to examine the situation of each such judicial body in order to determine the scope of authority of the entity in question.

necessarily more difficult than amending a domestic statute which a court has interpreted in a way contrary to the legislature's views on the subject because the legislature can act by majority vote; unanimity is not required.

Obviously, before states will undertake the effort of convening such a conference, they must be convinced that the effort is necessary. A decision by an international court, even if perceived as incorrect, will by no means necessarily be seen as a sufficient reason to take on the burden of convening a conference. States may simply ignore the decision.³¹⁴ After all, and as noted above, the ICJ has limited means for compelling states to follow the rules it lays down, and cannot even insure the execution of its judgments. So, for example, when the ICJ concluded that it had jurisdiction to hear the claim brought against the United States by Nicaragua with respect to the activities of the contras,³¹⁵ the United States simply withdrew from the proceedings, arguing that the Court's conclusion that it had jurisdiction was entirely wrong.³¹⁶ In summary, both because of limitations in their authority imposed by the instruments establishing them, and because any errors they make may not be formally corrected, U.S. courts should react cautiously to suggestions that they rely on the opinions of international tribunals as sources of rules of CIL.

V. A SUGGESTED ALTERNATIVE

The foregoing discussion underlines the problems with the reliance by U.S. courts on many of the sources to which they might expect to turn, when confronted with a case involving international law. It might reasonably be asked, what is a judge supposed to do when faced with such a case? The judge cannot simply refuse to decide, and if much scholarly writing, the *Restatement*, and domestic

314. Indeed, the reaction of the European Union to a degree of perceived overreaching by the European Court of Justice is a contrary example which proves the point in the text. The judgments of that court interpreting the various legal instruments of the European Union are enforceable in the domestic legal systems of the member states of the Union. Treaty Establishing the European Economic Community, Mar. 25, 1957, arts. 187, 192, 298 U.N.T.S. 3, 78, 79. Thus, when that court handed down rulings seen as encroaching on national prerogatives, the member states had no alternative to adopting various substantive and procedural measures in order to rein in that court. See Karen J. Alter, *The European Union's Legal System and Domestic Policy: Spillover or Backlash?*, 54 INT'L ORG. 489, 512-15 (2000).

315. Military and Paramilitary Activities (Nicar. v. U.S.), 1984 I.C.J. 392 (Nov. 26).

316. *Statement on the U.S. Withdrawal from the Proceedings Initiated by Nicaragua in the International Court of Justice*, 24 I.L.M. 246, 247 (1985).

and international court decisions, are unavailable to instruct the judge in the law to apply, it would seem that the judge is in an impossible position.

Fortunately, that need not be true, at least with respect to human rights issues, the international legal questions that come before U.S. courts most frequently. In matters involving CIL, the court in *The Paquete Habana* held that if a U.S. court must decide a case involving international law, but has no treaty, statute, or controlling executive or judicial act upon which to rely, "resort must be had to the customs and usages of civilized nations."³¹⁷ We now have available extensive collections of the actual practice of states regarding human rights, published frequently by trustworthy organizations. For example, Professor Hathaway was able to rely on four sources of information regarding states' human rights practices in her study of the effectiveness of human rights treaties: "the Center for International Development and Conflict Management at the University of Maryland, College Park, the United States Department of State *Country Reports on Human Rights*, Freedom House's *Annual Survey of Political Rights and Civil Liberties*, and the Inter-Parliamentary Union."³¹⁸ From data drawn from these sources, she was able to reach conclusions regarding the performance of 166 states with respect to genocide, torture, civil liberty, fair and public trials, and the political rights of women.³¹⁹ In other words, the lack of collections of state practice which forced Justice Gray to look to scholarly writings to determine the customs and usages of civilized nations has, with respect to human rights matters, been remedied.

Thus, the data judges need to address questions of state practice regarding human rights is available. This is not to say that using such information is easy; indeed, so much material may be available that sorting through it may be difficult. However, judges are able to deal with other types of voluminous material with the assistance of counsel, and there is no reason to think that counsel could not similarly guide a court through, for example, the State Department's annual report on human rights. That is, judges facing the need to decide questions involving the international law of human rights can ignore the materials which this article suggests are questionable without losing the basis for a reasoned decision.

317. *The Paquete Habana*, 175 U.S. 677, 700 (1900).

318. Hathaway, *supra* note 221, at 1967.

319. *Id.* at 1965, 1967.

VI. CONCLUSION

As the foregoing discussion has shown, a U.S. judge faced with a question of CIL is in an unenviable position when it comes to determining the content of the law. While he will presumably understand that CIL is created by state behavior, he may be tempted to treat CIL as he would other bodies of uncodified law. Normally, in such cases, the judge can look for guidance to decisions by other judges. As demonstrated above, however, judicial decisions are questionable sources of international legal rules. If decisions of international tribunals are in question, the authority of their precedents is uncertain; if U.S. decisions are the focus, the judge must accept that the earlier decision was probably made by someone just as unfamiliar with CIL.

A judge who seeks guidance from scholars, or from compilations such as the *Restatement*, is also running a risk. Both scholars and the *Restatement* have an unsettling tendency to blur the lines between rules accepted as binding by governments and rules which, it could be argued, ought to be imposed on governments. Thus, the judge will find that the only way to determine the state behavior that creates CIL is by examining that behavior—and that will involve a difficult and time-consuming factual inquiry.

But the judge's frustrations are likely to be compounded by the facts of the case. Most CIL cases in U.S. courts involve human rights matters; they involve allegations that the defendant(s) has engaged in behavior most Americans would find reprehensible. The judge's effort to determine the content of the law, therefore, will be an attempt to find out whether the defendant's alleged horrible act is not merely morally repugnant, but unlawful. There will be a natural tendency to strain to find illegal that which the judge is likely to believe is clearly wrong.

Cases involving the *jus cogens* concept will be particularly difficult. Since the acts purportedly forbidden by rules alleged to be of *jus cogens* status are especially heinous, the judge is likely to want to be able to conclude that such acts are illegal. Further, to the extent the *jus cogens* concept is treated as including rules whose binding character does not depend on state practice, the judge will face the temptation to avoid the complicated factual inquiry otherwise necessary in a CIL case by embracing the *jus cogens* concept.

This paper is an attempt to defend the proposition that, despite all this, the judge should insist that litigants contending for the existence of a particular rule of CIL show that their rule is reflected by a general *practice* of states. Ultimately, the argument comes down to a question of legitimacy. Almost inevitably in a CIL case, a U.S.

judge will be asked to evaluate the legality of acts taken in other countries by the officials of those countries. The methods of determining the content of CIL, employed by most of the courts discussed in this paper, share one basic defect: they make it easy to apply the label "international law" to rules the actual international standing of which is most uncertain. For a court to stigmatize foreign acts as contrary to international standards when those standards are not clear does not simply pose the risk of creating foreign policy difficulties for the United States. More fundamentally, by relying on sources other than state behavior to determine the content of CIL, a court effectively transfers legislative power to groups with little right to claim it—such as judges of international tribunals whose authority is carefully circumscribed in their founding instruments—or no right at all—such as legal academics. The court is doing so, moreover, when the question involves not rules governing persons normally subject to the judge's authority, but rules used to evaluate the conduct of persons who would not in most circumstances be subject to control by a U.S. court.

The framing of rules of law is necessarily a political act. The ultimate problem with efforts to shift the focus in CIL determinations from state practice to something else is that the something else, whatever it is, will lack any sort of political legitimacy. Surely rules deriving from illegitimate sources are a shaky basis for any body of law; they are especially undesirable when a court in one country claims to be speaking for the world.

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