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DOMESTIC INFLUENCE OF THE INTERNATIONAL COURT OF JUSTICE

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Over fifty years ago, the International Court of Justice (I.C.J.) was created to provide advisory opinions for various U.N. entities and to decide certain state-to-state disputes.[1] Advisory opinions, as the phrase suggests, were to be merely advisory;[2] and under Article 59 of the Statute of the I.C.J., even a decision of the Court concerning state-to-state complaints was to have "no binding force except between the parties and in respect of that particular case."[3] As text-writers affirm, the formal preclusion of *stare decisis* with respect to decisions of the Court "and the relegation of judicial decisions generally to a 'subsidiary status' [concerning the sources and evidences of international law[4]] reflect the reluctance of states to accord courts. . .a law-making role."[5]

Nonetheless, decisions and advisory opinions of the International Court of Justice have generally been widely received as authoritative explications of international law.[6] Buttressed by cautious attention to

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1. *See* STATUTE OF THE I.C.J. arts. 34, 36, 59-60, 65; U.N. CHARTER art. 96; RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 903.1 & 903.2 cmts. a & h, reporters' notes 10 & 12 (1987) [hereinafter RESTATEMENT].

2. *See* STATUTE OF THE I.C.J. art. 65; U.N. CHARTER art. 96; RESTATEMENT, *supra* note 1, § 903.2 cmt. h, reporters' note 12; MYRES S. MCDOUGAL & W. MICHAEL REISMAN, INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE—THE PUBLIC ORDER OF THE WORLD COMMUNITY 128 (1981) (*quoting* Certain Expenses of the United Nations, 1962 I.C.J. 150); FRANK NEWMAN & DAVID WEISSBRODT, INTERNATIONAL HUMAN RIGHTS 721 (1990); COVEY T. OLIVER ET AL., THE INTERNATIONAL LEGAL SYSTEM 70 (4th ed. 1995); DANIEL G. PARTAN, THE INTERNATIONAL LAW PROCESS 247-48 (1992).

3. *See* STATUTE OF THE I.C.J. art. 59; *see also* MCDOUGAL & REISMAN, *supra* note 2, at 1536-38 (indicating that some national courts do not automatically enforce I.C.J. judgments, but treat them like foreign judgments); U.N. CHARTER art. 94 (noting that there is a duty "to comply with the decision of the International Court of Justice in any case to which it is a party"); President of the I.C.J. Mohammed Bedjaoui, *The Reception by National Courts of Decisions of International Tribunals*, *in* INTERNATIONAL LAW DECISIONS IN NATIONAL COURTS 21, 25-26 (Thomas M. Franck & Gregory H. Fox eds., 1996) [hereinafter INTERNATIONAL LAW DECISIONS IN NATIONAL COURTS].

4. *See* STATUTE OF THE I.C.J. art. 38.1(d).

5. *See* LOUIS HENKIN ET AL., INTERNATIONAL LAW 120 (1993); NEWMAN ET AL., *supra* note 2, at 722.

6. *See, e.g.*, HENKIN ET AL., *supra* note 5, at 120-21; NEWMAN ET AL., *supra* note 2, at 722; PARTAN, *supra* note 2, at 3; Bedjaoui, *supra* note 3, at 26-35 (regarding effects and "reception" of I.C.J. decisions and opinions); Thomas M. Franck & Gregory H. Fox,

the Court's authority and patterns of *opinio juris* they help to shape, decisions and advisory opinions have acquired a functional significance far beyond what printed constitutive articles might have allowed. Indeed, despite formal abhorrence of *stare decisis*, the Court, as nearly any other, has dared to cite itself and has often incorporated the reasoning from other cases by reference.[7]

This growth in authority and influence is generally recognized,[8] but the decision of the United States in 1985 to withdraw from the general jurisdictional competence of the Court[9] must partly hamper such developments. Also inhibiting the development are a series of U.S. reservations to human rights treaties. With respect to I.C.J. adjudication of issues arising out of such a treaty, a typical U.S. reservation declares that the U.S. will agree to I.C.J. jurisdiction if, at some future time, the U.S. actually does agree.[10] Such a reservation relegates the role of the Court to an ad hoc adjudicatory process whenever the United States is involved, and it is partly self-defeating for the United States. Given the decision of the Court in the *Case of Certain Norwegian Loans*,[11] the U.S. reservations may preclude use of

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Introduction: Transnational Judicial Synergy, *in* INTERNATIONAL LAW DECISIONS IN NATIONAL COURTS, *supra* note 3, at 6-7; Sarita Ordonez & David Reilly, *Effect of the Jurisprudence of the International Court of Justice on National Courts*, *in* INTERNATIONAL LAW DECISIONS IN NATIONAL COURTS, *supra* note 3, at 338, 343, 345-69; Christoph Schreuer, *The Authority of International Judicial Practice in Domestic Courts*, 23 INT'L & COMP. L.Q. 681 (1974); Egon Schwelb, *The International Court of Justice and the Human Rights Clauses of the Charter*, 66 AM. J. INT'L L. 337, 350-51 (1972). For use of I.C.J. decisions in other countries, *see, e.g.*, Bedjaoui, *supra* note 3, at 30-35; Jochen Frowein, remarks, panel on International Law in Domestic Legal Orders: A Comparative Perspective, 91 AM. SOC. INT'L L., 56 (1997); Yuji Iwasawa, remarks, *id. Cf.* MCDOUGAL & REISMAN, *supra* note 2, at 78 & n.* (stating that Article 38 of the STATUTE OF THE I.C.J. does not fully portray realistic roles), 103 (identifying the actual authority of U.N. entities), 142-44 (indicating the growth of the expansive authority of I.C.J.).

7. *See* RESTATEMENT, *supra* note 1, § 903, reporters' note 8; BARRY E. CARTER & PHILLIP R. TRIMBLE, INTERNATIONAL LAW 297 (2d ed. 1995); HENKIN ET AL., *supra* note 5, at 121; NEWMAN ET AL.., *supra* note 6, at 722; Ordonez & Reilly, *supra* note 6, at 338, 343.

8. *See supra* note 6; *see also* RESTATEMENT, *supra* note 1, § 903, reporters' note 11 ("The judgments of the Court have been generally complied with. . . ."); *cf.* OLIVER ET AL., *supra* note 2, at 78-79 (indicating noncompliance by some states); HENRY J. STEINER ET AL., TRANSNATIONAL LEGAL PROBLEMS 182-86 (4th ed. 1994) (same).

9. *See* 24 I.L.M. 246 (1985); RESTATEMENT, *supra* note 1, § 903 cmt. c, reporters' note 3.

10. *See* RICHARD B. LILLICH, HURST HANNUM, INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW, POLICY, AND PRACTICE 268-69 (3d ed. 1995) (indicating reservations to Genocide Convention and International Convention on the Elimination of all Forms of Race Discrimination); NEWMAN ET AL., *supra* note 2, at 404; PARTAN, *supra* note 2, at 528-29. This sort of reservation has been objected to by other states. *See, e.g.*, LILLICH & HANNUM, *supra* at 269; Bedjaoui, *supra* note 6, at 27 (stating the consequences of the Vandenberg Reservation).

11. Certain Norwegian Loans (Fr. v. Nor.), 1957 I.C.J. 9 (July 6). Therein, the general principle recognized was that reciprocal use of limitations of acceptance of the jurisdictional competence of the Court should pertain by analogy to limitations placed in a

the I.C.J. by the United States to redress human rights claims of U.S. nationals against foreign governments. Nevertheless, the United States is also a signatory to over seventy multilateral treaties and thirty bilateral treaties that contain special declarations of acceptance of I.C.J. jurisdiction that do not require additional consent to competence.[12] Thus, the prospect of increased U.S. participation in litigation before the Court remains, even if such participation is likely to be treaty or subject-specific.

Has the general growth of authority and influence of the International Court, despite certain inhibiting practices of the U.S. political branches, had any impact domestically within U.S. judicial processes? Despite the lack of any direct relevance domestically of I.C.J. opinions advising U.N. entities, the rarity of state-to-state disputes appearing directly or obliquely in U.S. courts, a formally proclaimed lack of "binding force" of I.C.J. decisions outside the parties to a dispute, and the embarrassing fact that most U.S. lawyers and judges have never taken a course in international law, have I.C.J. decisions and opinions had any influence within our domestic legal processes? Perhaps surprisingly, ineluctably, they have.

In sharp contrast to the general influence of I.C.J. decisions and advisory opinions within the United States, however, is the severely limited role for I.C.J. judgments recognized by the United States Court of Appeals for the District of Columbia Circuit in *Committee of United States Citizens Living in Nicaragua v. Reagan*.[13] In its 1988 opinion, the D.C. Circuit nearly slammed the door on any direct enforcement of I.C.J. judgments in U.S. courts. Still, general use of I.C.J. decisions and opinions as authoritative indicia of identifiable international law remains strong.

Plaintiffs had been various private parties seeking, however indirectly, the enforcement of the 1986 decision of the I.C.J. against the United States with respect to U.S. activities in Nicaragua and support of the Contras. Such plaintiffs, the Circuit Court declared, lacked standing concerning the claims alleged and Article 94 of the U.N. Charter, which allows a party to a case "recourse to the Security Council" for enforcement of a judgment,[14] "simply does not confer rights

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reservation to an I.C.J. clause contained within a multilateral or bilateral treaty. *Id.*

12. See RESTATEMENT, *supra* note 1, § 903 cmt. c; *See* Louis Henkin *ET AL.*, *supra* note 5, at 809-10; Sarita Ordonez & David Reilly, *supra* note 6, at 341 & n.37 (stating that U.S. is a signatory to approximately 60% of more than 260 such treaties); *see also* OLIVER ET AL.., *supra* note 2, at 46 (over 250 treaties provide special acceptance); PARTAN, *supra* note 2, at 10.

13. Committee of United States Citizens Living in Nicar. v. Reagan, 859 F.2d 929 (D.C. Cir. 1988).

14. U.N. CHARTER art. 94(2).

on private individuals."[15] "Because only nations can be parties before the ICJ," the court added, the plaintiff-appellants "are not 'parties' within the meaning" of paragraph 2 of Article 94, since it clearly "does not contemplate that individuals having no relationship to the ICJ case should enjoy a private right to enforce the ICJ's decision."[16] The court continued:

> Our interpretation of Article 94 is buttressed by a related provision in the Statute of the ICJ, which. . .provides that "[t]he decision of the Court has no binding force except between the parties and in respect of th[e] particular case.". . . Taken together, these Charter clauses make clear that the purpose of establishing the ICJ was to resolve disputes *between national governments.* We find in these clauses no intent to vest citizens who reside in a U.N. member nation with authority to enforce an ICJ decision against their own government.[17]

Its conclusion was that "[n]either individuals nor organizations have a cause of action in an American court to enforce ICJ judgments."[18]

Thus, direct enforcement of a state-to-state judgment by private individuals might seemingly be precluded.[19] Yet, the court did not address the possibility of a suit brought by a foreign state to enforce an I.C.J. judgment, which would present different issues concerning immunity[20] and the enforcement of non-U.S. judgments in U.S. courts.[21]

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15. *Comm. of United States Citizens,* 859 F.2d at 937.

16. *Id.* at 938.

17. *Id.* (emphasis added).

18. *Id.* at 934 ("The ICJ is a creation of national governments, working through the U.N.; its decisions operate between and among such governments and are not enforceable by individuals having no relation to the claim that the ICJ has adjudicated—in this case, a claim brought by the government of Nicaragua."). The Circuit Court also found that, under the last-in-time rule, subsequent congressional legislation could override U.N. Charter obligations domestically. *Id.* at 936-37. It stated that federal statutes could also override customary norms. *Id.* at 938-39. There is a split in authority over this controversial point, with the preference for the primacy of custom having the edge. *See, e.g.,* JORDAN J. PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES 89-95 *passim* (1996). It also decided that a U.S. obligation to comply with an I.C.J. judgment is not *jus cogens. Comm. of United States Citizens,* 859 F.2d at 939-41.

19. Although the Court stressed that it was dealing with plaintiffs "having no relation to the claim" before the ICJ, *supra* note 18, at 934, "no relationship to the ICJ case," *see supra* text accompanying note 16, and with plaintiffs having merely some related claims "against their own government," *see supra* text accompanying note 17, the primary focus of the rationale was on a distinction between state claimants before the ICJ and private individuals or groups. *Comm. of United States Citizens,* 859 F.2d. at 938-941.

20. These could include issues with respect to immunity of the United States, the President of the United States, other federal officials, or a foreign government or entity. Concerning the latter, see the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602-1611 (1998). With respect to a sitting President, *see, e.g.,* Nixon v. Fitzgerald, 457 U.S. 731 (1982). With respect to nonimmunity for violations of international law, *see, e.g.,* PAUST, *supra* note 18, at 8, 105, 205, 208, 210-11, 215, 232, 276-79, 283-84, 291-92, 348,

The Court, although stressing that the private plaintiffs before it had "no relationship to the ICJ case," seemed unaware of the fact that in some instances the underlying claims before an international tribunal are ultimately those of private parties who are being represented at the international level by their government. In the latter case, the Supreme Court has already recognized that, even though claims before an international tribunal are technically those of governments, private litigants can have a claim of right under relevant international law and the "award" of the tribunal, and such a right is undoubtedly "susceptible of judicial determination."[22] It seems logical, then, that if an I.C.J. decision is favorable with respect to underlying claims of private parties, the private parties should have an opportunity to utilize the judgment in domestic legal processes.

Far more significant have been the many indirect U.S. judicial uses of I.C.J. decisions and advisory opinions in order to identify and clarify relevant international law. Since the creation of the International Court, forty-two cases in federal courts[23] have applied fifteen I.C.J.

405-09, 413, 416-18, 471-72; Jordan J. Paust, *It's No Defense: Nullum Crimen, International Crime and the Gingerbread Man,* 60 ALB. L. REV. 657, 658-62 (1997). Concerning suits against the United States, *see, e.g.,* 28 U.S.C. §§ 1346 (a) & (b), 1491, 2671-2680 (1998). Concerning suits in U.S. courts brought by foreign states, *see, e.g.,* U.S. CONST. art. III, sec. 2, cl. 1 (arising under), cl. 2 (federal question jurisdiction); 28 U.S.C. §§ 1332 (a)(4) (1998) (diversity), 1607 (1998) (counterclaims against a foreign state plaintiff).

21. Concerning enforcement of foreign judgments, *see, e.g.,* Hilton v. Guyot, 159 U.S. 113 (1895); Ramirez v. United States, 36 Fed. Cl. 467(1996) (28 U.S.C. § 1491 does not provide Court of Federal Claims with jurisdiction over claim seeking recognition and enforcement of foreign judgment against the U.S.); 28 U.S.C. § 1782 (assistance to foreign and international tribunals, which does not include enforcement of judgments). *See, e.g.,* Tacul, S.A. v. Hartford National Bank & Trust Co., 693 F. Supp. 1399 (D. Conn. 1988); *In re* Civil Rogatory Letters Filed by Consulate, 640 F. Supp. 243 (S.D. Tex. 1986); 28 U.S.C. § 2414 (enforcement of judgments against the U.S. and discretion of the U.S. Attorney General); FED. R. CIV. P. 9(e) (pleading of foreign judgment); RESTATEMENT, *supra* note 1, §§ 481-482 & chpt. 8, introductory n. at 591-93; STEINER ET AL., *supra* note 8, at 713-15, 740-41; Uniform Foreign Money - Judgments Recognition Act, 13 U.L. ANN. 263 (Master ed. 1986), *reprinted in* STEINER ET AL., *supra* note 8, at 727-28. Alien plaintiffs may have a claim utilizing an I.C.J. judgment as evidence of international law and its breach under the Alien Tort Claims Act (ATCA), 28 U.S.C. § 1350 (1994).

22. La Abra Silver Mining Co. v. United States, 175 U.S. 423, 457-58 (1899). *See also* 26 Op. Att'y Gen. 250, 252-53 (1907) (indicating that the International Boundary Commission decision applies directly to disputes between governments but can be utilized in domestic litigation involving private parties); PAUST, *supra* note 18, at 274-75 n.541 (describing that claims before the I.C.J. can ultimately be those of individuals), 290-91 n.604 (showing that the same general points evidenced even in P.C.I.J. decisions); THORPE, INTERNATIONAL CLAIMS 58-60 (1924); *see supra* notes 31, 41 and accompanying text.

23. The cases are cited *infra* notes 27-28, 31-34, 36-45, 47-48. Not listed among the forty-two is a Court of Claims decision addressing the need to interpret a treaty by using the ordinary meaning of terms used in the text of a treaty. *See* Coplin v. United States, 6 Cl. Ct. 115, 126 n.12 (1984), *citing* 1950 Advisory Opinion on the Competence of the

decisions or advisory opinions as evidence of international normative content.[24] Within the federal judiciary, such uses have appeared somewhat more frequently in U.S. circuit courts. There have in fact been six relevant uses in the Supreme Court,[25] nineteen uses in the circuit courts,[26] sixteen uses in the district courts, and one citation in the Court of Trade. Utilization of I.C.J. decisions or opinions appears most often in the text of a judicial opinion, and they appear far less frequently merely in a footnote. Further, utilization has most often appeared in main opinions, with use in only four dissenting opinions[27] (or in some ten per cent of the cases). Citations to two I.C.J. decisions or opinions appear in only two federal cases,[28] the rest of the federal cases contain just one citation. With respect to frequencies of use in given decades, most significant uses appear during the 1980's. There were five cases in the 1990's, twenty-four in the 1980's, four in the 1970's, seven in the 1960's, and only two in the 1950's. Thus, trends in frequency of use demonstrate a greater use of I.C.J. decisions and opinions for normative guidance in the last two decades.

The types of I.C.J. decisions and opinions utilized include ten state-to-state cases and five advisory opinions ranging in dates from 1949 to 1988.[29] Most of these did not directly involve actions or responsibilities of the United States, although nearly half did. This is not surprising given the general use of I.C.J. decisions and opinions to identify and clarify international law, especially customary international law, that is relevant to a case or controversy brought before a U.S. court.[30] The types of international norms addressed have been varied, demonstrating a general relevance of I.C.J. decisions and opinions and a lack of special or peculiar patterns of use with respect to subject matter.

General Assembly for the Admission of a State to the United Nations, 1950 I.C.J. 4, 8 (Mar. 3).

24. The fifteen I.C.J. decisions or advisory opinions are listed in Appendix I.

25. *See* notes 31, 33, 45, 48 *infra*. The Justices were: Black, Blackmun, Harlan, O'Connor, Stevens, and Stewart.

26. More frequent use appears in the D.C. Circuit (8 cases), followed by the Ninth (5 cases), Fifth (2 cases), Seventh (2 cases), First (1 case), and Eighth (1 case) Circuits.

27. *See* Princz v. F.R.G., 26 F.3d 1166, 1180, 1184 (D.C. Cir. 1994) (Wald, J., dissenting); Spiess v. C. Itoh & Co., 643 F.2d 353, 365 (5th Cir. 1981) (Reavley, J., dissenting); Agee v. Muskie, 629 F.2d 80, 90 (D.C. Cir. 1980) (MacKinnon, J., dissenting); Rogers v. Societe Internationale pour Participations Industrielles et Commerciales, S.A., 278 F.2d 268 (1960) (Fahy, J., dissenting). All of the dissents are in circuit court cases.

28. *See* Princz v. F.R.G., 26 F.3d at 1180, 1184 (Wald, J., dissenting) (*Advisory Opinion on Reservations to the Genocide Convention* and *Barcelona Traction*); Trelles Cruz v. Zapata Ocean Resources, 695 F.2d 428, 433 & ns. 8-9 (9th Cir. 1982) (*Nottebohm* and *U.N. Reparations*).

29. See Appendix I.

30. *See* PAUST, *supra* note 18, at 1-50 (showing the nature, proof, and utilization of customary international law as law of the United States).

A favorite cite in the federal courts is the 1970 *Barcelona Traction Light & Power Company* case, cited in seven federal cases. Next in apparent attraction is the 1951 *Anglo-Norwegian Fisheries* case, with citations in six cases, and the *Case Concerning United States Diplomatic and Consular Staff in Tehran*, with four citations to the decision on the merits and two cites to the Order for Provisional Measures. Two advisory opinions, the *Advisory Opinion on Reparations for Injuries Suffered in the Service of the United Nations* and the *Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia*, are tied for fourth with four citations each. The *Interhandel Case* (Switzerland v. United States) has citations in three federal cases, and the rest of the I.C.J. decisions or opinions have either two or merely one citation.

Barcelona Traction is actually cited with respect to two general clusters of international prescription: (1) international rules concerning corporations (*e.g.*, that the nationality of a corporation is the state where incorporation takes place, that only the state of nationality can represent the corporation at the international level, and that corporate form can be disregarded in some cases or does not obviate relevant liability of a state),[31] and (2) *obligatio erga omnes* (especially with respect to basic human rights and the prohibition of genocide) and the fact that they are the concern of all states and can sometimes be related to peremptory norms *jus cogens*.[32] *Anglo-Norwegian Fisheries*, the next most frequently cited case, is cited with respect to the nature and delimitations of the territorial sea and other sea areas.[33] The *Case Concerning United States Diplomatic and Consular Staff in Tehran* is cited in recognition of the fact that Iran's actions in connection with the continued occupation of the U.S. embassy and hostage-taking violated international law and that treaties between the two countries

31. *See* First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba, 462 U.S. 611, 628 n.20 (1983) (O'Connor, J.) ("separate status of an incorporated entity may be disregarded in certain exceptional circumstances"); McKesson Corp. v. Islamic Republic of Iran, 52 F.3d 346, 352 (D.C. Cir. 1995) ("separate corporate existence does not shield the state from liability"); Spiess v. C. Itoh & Co., 643 F.2d 353, 365 & n.6 (5th Cir. 1981) (Reavley, J., dissenting) (international law uses place of incorporation for the nationality of a corporation); Looper v. Morgan, 1995 WL 499816, at 50-51 (S.D. Tex. 1995) (only the state of nationality of a corporation can represent it at the international level).

32. Two cases: Princz v. F.R.G., 26 F.3d at 1180, 1184 (Wald, J., dissenting); Siderman De Blake v. Republic of Arg., 965 F.2d 699, 715 (9th Cir. 1992). Also *see generally* Ordonez & Reilly, *supra* note 6, at 367.

33. See United States v. Maine, *et al.*, 475 U.S. 89, 98 (1986) (Stevens, J.) (use of strait baselines upheld in part because of historic claim and occupation); United States v. Louisiana, 470 U.S. 93, 107 n.10 (1985) (Blackmun, J.) (delimitation of baselines, especially with reference to island fringes); United States v. Louisiana, 394 U.S. 11, 43 n.55, 69-70 (1969) (Stewart, J.) (same); United States v. Postal, 589 F.2d 862, 869 (5th Cir. 1979) (limits of extension of the territorial sea); Island Airlines, Inc. v. CAB, 352 F.2d 735, 741 (9th Cir. 1965) (historic waters acquired partly by control); CAB v. Island Airlines, Inc., 235 F. Supp. 990, 1003-04 & ns.23-24, 1005 & n.27 (D. Hawaii 1964) (same).

nevertheless remained in force.[34] The *Namibia Advisory Opinion* is cited in U.S. courts either concerning the consequences of the opinion in southern Africa or to demonstrate that human rights are of international concern and that the Universal Declaration of Human Rights[35] is an authoritative aid for the identification and clarification of basic human rights.[36] The *U.N. Reparations Advisory Opinion*, tied for fourth place in frequency of citations, is cited concerning the legal personality of the United Nations as well as for the proposition that, although a general norm proclaims that a state may not present a claim on behalf of another state, there are exceptions to the rule.[37] The *Interhandel Case*, weighing in with three citations, is cited concerning the need to exhaust local remedies and exceptions to such a rule where local remedies would be unfair or futile.[38]

The 1986 I.C.J. decision in *Nicaragua v. United States* is cited concerning the decision of the Court and the attempt by private groups to assure enforcement, and for the general point that widely accepted treaties often reflect customary international law.[39] The 1984 *Gulf of*

34. See Persinger v. Islamic Republic of Iran, 729 F.2d 835, 837, 843 (D.C. Cir. 1984) (violation and crimes); McKeel v. Islamic Republic of Iran, 722 F.2d 582, 585 (9th Cir. 1983) (violation); United States v. Central Corp., 1987 WL 20129, at 8 (N.D. Ill. 1987) ("treaty remained in effect during the 1979-80 Iran-United States 'hostage crisis'"); National Airmotive v. Government and State of Iran, 491 F. Supp. 555, 556 (D. D.C. 1980) (violation). Arising from the same controversy between the United States and Iran, the 1979 Order of the I.C.J. granting Provisional Measures was cited in Agee v. Muskie, 629 F.2d 80, 90, 116 n.79 (appendix) (D.C. Cir. 1980) (MacKinnon, J., dissenting) and Narenji v. Civiletti, 617 F.2d 745, 748 (D.C. Cir. 1979) ("lawlessness of this conduct of the Iranian government was recognized by the decision of the World Court"). *See generally* Ordonez & Reilly, *supra* note 6, at 353-55.

35. G.A. Res. 217A III, 3 U.N. GAOR, at 71, U.N. Doc. A/810 (1948).

36. See Diggs v. Richardson, 555 F.2d 848, 849 (D.C. Cir. 1976) (consequences); United States-South West Africa/Namibia Trade & Cultural Council v. United States Dept. of State, 90 F.R.D. 695, 696 n.2 (D. D.C. 1981) (consequences); Rodriguez Fernandez v. Wilkinson, 505 F. Supp. 787, 797 (D. Kan. 1980) ("Declaration has evolved into an important source of international human rights law"); *In re* Alien, MDL No. 398, 501 F. Supp. 544, 591 (S.D. Tex. 1980) (human rights are of international concern).

37. *See* Trelles Cruz v. Zapata Ocean Resources, 695 F.2d 428, 433 & n.9 (9th Cir. 1982) (exceptions to the rule of nonrepresentation); Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 505 F. Supp. 1125, 1187 (E.D. Pa. 1980) (re: U.N. legal personality); United States v. Melekh, 190 F. Supp. 67, 81, 89 (S.D.N.Y. 1960) (same); Balfour, Guthrie & Co. v. United States, 90 F. Supp. 831, 834 n.1 (N.D. Cal. 1950) (U.N. is separate legal entity). *See generally* Ordonez & Reilly, *supra* note 6, at 364 & n.164.

38. *See* Rogers v. Societe Internationale pour Participations Industrielles et Commerciales, S.A., 278 F.2d 268, 273 n.3 (D.C. Cir. 1960) (Fahy, J., dissenting) (merely cited as part of the history of the case); Greenpeace, Inc. v. France, 946 F. Supp. 773, 783 (C.D. Cal. 1996); American Int'l Group v. Islamic Republic of Iran, 493 F. Supp. 522, 525 (D. D.C. 1980).

39. *See* Committee of United States Citizens Living in Nicar. v. Reagan, 859 F.2d 929, 932, 935 (D.C. Cir. 1987); Arcoren v. Peters, 811 F.2d 392, 397 n.11 (8th Cir. 1987) ("widely accepted treaty obligations often reflect the requirements of customary international law").

Maine decision is cited in recognition of the decision of the International Court concerning allocation of sea areas and various points in pleadings before the Court.[40] The *Nottebohm Case* is cited concerning appropriate tests of nationality under international law and the general rule that a state cannot rightly present a claim at the international level on behalf of non-nationals.[41] The 1959 *Advisory Opinion on South West Africa* is cited concerning limitations extant with respect to state sovereignty in connection with a League of Nations mandate or U.N. trusteeship system, especially regarding human rights of the inhabitants.[42]

The remaining five I.C.J. decisions or opinions, with only one citation each, address an array of legal precepts. The 1988 *Advisory Opinion on Applicability of the Obligation to Arbitrate* is cited in order to distinguish a case addressed by the federal judiciary from those disputes that must proceed to arbitration under the U.N. Headquarters Agreement.[43] The *French Nuclear Test Cases* are cited concerning the nature of the Exclusive Economic Zone and coastal state competence therein merely to exercise limited control for the purpose of exploring and exploiting, conserving and managing the natural resources.[44] The 1952 decision in *France v. United States* is cited for the proposition that "[t]he word 'disputes' has been interpreted by the International Court of Justice to comprehend criminal as well as civil disputes."[45] The *Advisory Opinion on Reservations to the Genocide Convention* was cited as evidence of the fact that the principles underlying the Genocide Convention[46] are customary international law.[47] Finally, the 1949 *Corfu Channel Case* is cited for the rule that a coastal state cannot

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40. See Conservation Law Found. of New Eng. v. Secretary of the Interior, 790 F.2d 965, 967 (1st Cir. 1986) (decision); Massachusetts v. Clark, 594 F. Supp. 1373, 1387-88 n.8 (D. Mass. 1984) (points in pleadings).

41. *See* Trelles Cruz, 695 F.2d at 433 & n.8 (general rule concerning representation at international levels); Sadat v. Mertes, 615 F.2d 1176, 1188 n.14 (7th Cir. 1980) (residence is not controlling re: nationality—in fact, one needs a stronger nexus with the state).

42. *See* McComish v. Commissioner of Internal Revenue, 580 F.2d 1323, 1329 (9th Cir. 1978); Morgan Guar. Trust Co. v. Republic of Palau, 639 F. Supp. 706, 715 (S.D.N.Y. 1986).

43. *See* United States v. PLO, 695 F. Supp. 1456, 1461-62, 1467 (S.D.N.Y. 1988). *See generally* Ordonez & Reilly, *supra* note 6, at 357-58.

44. *See* Koru North America v. United States, 701 F. Supp. 229, 232 (Ct. Int'l Trade 1988). The Court of International Trade was in error, however, when it considered that the EEZ involves "nothing more than a preferential fishing zone." *Id.*

45. Reid v. Covert, 354 U.S. 1, 61 (1957) (Black, J.).

46. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277; G.A. Res. 2670, U.N. Doc. A/810 (1948)). On the reach of the Genocide Convention and customary aspects, *see, e.g.*, JORDAN J. PAUST ET. AL., INTERNATIONAL CRIMINAL LAW 1081-1112 (1996).

47. *See* Princz v. F.R.G., 26 F.3d 1166, 1180 (D.C. Cir. 1994) (Wald, J., dissenting). Actually, the entire proscription of genocide is customary international law, as well as a prohibition *jus cogens*, *see, e.g.*, PAUST, *supra* note 18, at 293, 300-05; RESTATEMENT, *supra* note 1, § 702 cmt. n, reporters' note 3.

"claim a strait as inland water if, in its natural state, it served as a useful" international highway.[48]

Also of interest is the fact that the precursor to the I.C.J., the Permanent Court of International Justice (P.C.I.J.) under the League of Nations, has been cited in eighteen federal cases from the 1930s to the 1990s. Like references to the I.C.J., most utilization of the P.C.I.J. decisions involves the identification and clarification of customary international law. During this period, there have been citations to eight P.C.I.J. decisions.[49] Not unlike the general pattern of use of I.C.J. decisions and opinions, most of the federal cases citing the P.C.I.J. appear in the 1980s (nine cases)[50] and only one cite appears in the 1990s. P.C.I.J. citations occur in two Supreme Court cases, twelve circuit court cases,[51] and four district court cases. Like I.C.J. citations, most P.C.I.J. cites are in opinions of the court—with only one in a dissenting opinion, and that in a federal case citing the same P.C.I.J. decision in the opinion of the federal court.[52] Two cases involved citations in argument by counsel.[53]

The P.C.I.J. case most frequently cited is the *S.S. Lotus*. It is cited in eleven cases with respect to customary international legal principles concerning jurisdiction.[54] The *S.S. Wimbleton* is cited in one case

48. United States v. California, 381 U.S. 139, 172 (1965) (Harlan, J.).

49. See Appendix II.

50. Use in various time periods are: 1990's (one case), 1980's (nine cases), 1970's (one case), 1960's (four cases), 1950's (one case), 1940's (no cases), 1930's (two cases, arguments of counsel—see *infra* note 50).

51. These appear in fairly equal numbers in the Second, Fifth, Eleventh, and D.C. Circuits (in 4, 3, 2, and 3 cases respectively).

52. *See* First Fidelity Bank, N.A. v. Government of Ant. & Barb., 877 F.2d 189, 192 (2d Cir. 1989); *id.* at 198 n.1 (Newman, J., dissenting). Both opinions cited Legal Status of Eastern Greenland (Denmark v. Norway), 1933 P.C.I.J. (Ser. A/B) No. 53, for the proposition that, in certain circumstances, a state can be bound by its officials' unauthorized actions.

53. *See* Smyth v. United States, 302 U.S. 329, 343 (1937) (citing *Serbian Loans*); Norman v. Baltimore & Ohio R.R. Co., 294 U.S. 240, 249, 277 (1935) (citing *The Serbian Loans* and *The Brazilian Loans*).

54. *See* Kreimerman v. Veerkamp, 22 F.3d 634, 639 nn.17-18 (5th Cir. 1994) (jurisdiction and international restrictions on states); Laker Airways Lyd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 922 n.26 (D.C. Cir. 1984) (same); In re Marc Rich & Co. v. United States, 707 F.2d 663, 666 (2d Cir. 1983) (same); United States v. Marino-Garcia, 679 F.2d 1373, 1380 (11th Cir. 1982) (jurisdiction and law of the sea); United States v. Riker, 670 F.2d 987, 988 (11th Cir. 1982) (same); FTC v. Compagnie de Saint-Gobain-Pont-A-Mousson, 636 F.2d 1300, 1314 n.67 (D.C. Cir. 1980) (jurisdiction); United States v. Postal, 589 F.2d 862, 878 (5th Cir. 1979) (jurisdiction and law of the sea); Pacific Seafarers, Inc. v. Pacific Far East Line, Inc., 404 F.2d 804, 814 n.31 (D.C. Cir. 1968) (jurisdiction), *cert. denied*, 393 U.S. 1093 (1969); Rivard v. United States, 375 F.2d 882, 885 n.4 (5th Cir. 1967) (holding that no jurisdiction to enforce exists unless there is jurisdiction to prescribe under international law; on this point, *see, e.g.*, RESTATEMENT, *supra* note 1, § 431); *In re* Demjanjuk, 612 F. Supp. 544, 555 (N.D. Ohio 1985) (extraterritorial jurisdiction); United States v. Rodriguez, 182 F. Supp. 479, 489 (S.D. Cal.

concerning the same principles.[55] *The Factory at Chorzow* is cited in three cases with respect to the valuation of and remedies for expropriated property of aliens,[56] as is the *Polish Upper Silesia* case, cited in one federal opinion.[57] Both the *Serbian Loans* and *Brazilian Loans* cases were cited concerning "gold value" clauses or obligations;[58] and *The Oscar Chinn Case* was cited in two federal cases for two points: (1) that there should be no national origin discrimination or discrimination against aliens with respect to expropriation of property, and (2) that the valuation of and payment concerning expropriated property should involve fair, prompt, and adequate compensation.[59] Finally, use of the *Eastern Greenland* case involved recognition that in certain circumstances a state can be bound by representations of its officials where their lack of authority is not obvious.[60]

A few state court opinions have also used I.C.J. decisions or opinions on points of international law.[61] In one case, the Supreme Court of New York of New York County noted that in 1980 the I.C.J. had confirmed the continued validity of the Treaty of Amity with Iran.[62] The same court noted earlier that the I.C.J. had decided that an oil company's contract with Saudi Arabia "cannot be given the status of a treaty."[63] Additionally, an advisory opinion of the Court was cited by a dissenting opinion in the Supreme Court of Pennsylvania in recognition

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1960) (same). Also *see generally* Ordonez & Reilly, *supra* note 6, at 366. On international law concerning jurisdiction to prescribe and to enforce, *see, e.g.*, PAUST, *supra* note 18, at 387-412.

55. *See* Kreimerman v. Veerkamp, 22 F.3d 634, 639 nn.17-18 (5th Cir. 1994).

56. *See* Banco Nacional de Cuba v. Chase Manhattan Bank, 658 F.2d 875, 888 (2d Cir. 1981); Banco Nacional de Cuba v. Sabbatino, 307 F.2d 845, 863 n.11 (2d Cir. 1962); Banco Nacional de Cuba v. Chase Manhattan Bank, 505 F. Supp. 412, 431, 446 (S.D.N.Y. 1980).

57. *See* Banco Nacional de Cuba, 307 F.2d at 863 n.11.

58. *See* Smyth v. United States, 302 U.S. 329, 343 (1937) (argument of U.S. Solicitor General); Norman v. Baltimore & Ohio R.R. Co., 294 U.S. 240, 249, 277 (1935) (arguments of counsel); Lemaire v. Kentucky & Indiana Terminal R.R. Co., 140 F. Supp. 82, 86 (S.D.N.Y. 1956).

59. *See* Banco Nacional de Cuba, 307 F.2d at 867 (holding that international law does not permit national origin or alienage discrimination); Banco Nacional de Cuba, 505 F. Supp. at 431 (discussing the value of expropriated property).

60. *See* First Fidelity Bank, N.A. v. Gov't of Ant. & Barb., 877 F.2d 189, 192 (2d Cir. 1989); *id.* at 198 n.1 (Newman, J., dissenting).

61. *See* Raji v. Bank Sepah-Iran, 139 Misc. 2d 1026, 1028, 529 N.Y.S.2d 420, 421 (N.Y. Sup. Ct. 1988); American Jewish Congress v. Carter, 23 Misc. 2d 446, 451; 190 N.Y.S.2d 218, 223-24 (N.Y. Sup. Ct. 1959); Navios Corp. v. Nat'l Maritime Union, 402 Pa. 325, 347-48, 350; 166 A.2d 625, 636 (1960) (Bell, J., dissenting). For two other cases merely mentioning that the United Nations has an I.C.J, *see* People v. Wright, 12 Misc. 2d 961, 964, 173 N.Y.S.2d 160, 164 (N.Y. Ct. Spec. Sess. 1958); Beley v. Pennsylvania Mutual Life Ins. Co., 373 Pa. 231, 251, 95 A.2d 202, 218 (1953) (Musmanno,J., concurring).

62. *See* Bank Sepah-Iran, 139 Misc. 2d at 1028.

63. *See* American Jewish Congress, 23 Misc. 2d at 451 (citing Anglo-Iranian Oil Co. (U.K. v. Iran), 1952 I.C.J. 93 (July 22)).

that "the registry and flag of Liberia are entitled to the same national status accorded the registry and flag of any other nation" concerning the registry of vessels.[64] One state court, the Third District Court of Appeal of Florida, cited the P.C.I.J. while quoting the so-called Tate Letter of an Acting Legal Adviser of the U.S. Department of State. The P.C.I.J. case cited was the *S.S. Lotus*. It was cited for the proposition that customary international law does not recognize "immunity when the foreign government engages in commerce. . . ."[65]

The general patterns of use of I.C.J. and P.C.I.J. decisions are informing. Despite a supposed lack of *stare decisis* and the U.S. withdrawal from a general jurisdictional competence of the International Court, international judicial decisions play a significant role in United States courts. They are often used as authoritative evidence of the content of customary international law and, at times, are used as authoritative interpretation of international agreements. In both instances, there has been attention to international decisions addressing a wide array of normative subjects; and in no federal case has there been any questioning of such an authority.

For a few people, these patterns must be fairly disturbing. If one is an enemy of customary international law (a choice that, in my view, will not inure to one's benefit in the history of humanity), this growing influence of the International Court must be frightening. Such influence occurs without complete control by the Executive and, like the influence of much of international law for more than 200 years, with seeming indifference to the House of Representatives. More generally, some complain that customary international law, highly valued by our Founders[66] and the most democratic form of international law, is somehow antidemocratic.[67] Exactly which customary laws are

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64. *See* Navios Corp. v. National Maritime Union, 402 Pa. at 347-48, 350 (citing Advisory Opinion on Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization, 1960 I.C.J. 150 (June 8)).

65. See Harris & Co. Advertising v. Republic of Cuba, 127 So. 2d 687, 690-91 (Fla. Dist. Ct. App. 1961), quoting The Tate Letter, May 19, 1952, 26 U.S. DEP'T STATE BULL. 984 (1952), citing S.S. Lotus, P.C.I.J. (Ser. A) No. 10, at 29.

66. *See, e.g.*, PAUST, *supra* note 18, at vii, 1, 5-6, 8, 10 n.1, 15-17, 34-37, 47-50, 120-23 n.55, 139 n.96, 144-45, 154-55 nn.1-13, 170-76, 182-83, 214-24 *passim*. *Cf. id.* at 132-33 n.81.

67. *Compare* PAUST, *supra* note 18, at 2-3, 11 n.4, 13-14 nn.*10-13*, *with* Curtis A. Bradley, Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 821, 857-59, 868, 871 (1997), *and* Phillip R. Trimble, *A Revisionist View of Customary International Law*, 33 U.C.L.A. L. REV. 665, 707-09, 713-16, 721-23, 731 (1986). Despite the title, Professor Trimble's "revisionist" view would actually involve a radical departure from historic use of customary international law, views of the Founders, and predominant expectations since the formation of the United States. It also seeks acceptance of illegality, apparently any illegality, under a euphemistic phrase "accommodating change" and a compliant judiciary abdicating its constitutional role under Articles III and VI of the U.S. Constitution.

supposedly threatening to our democracy, however, have not been identified[68]—certainly none of those utilized by our courts for more than 200 years. Such laws have been many and have addressed numerous subjects, involving rights, competencies and duties, and both private and public actors here and abroad.[69] Given the primary constitutional bases for incorporation of customary international law in the phrase "laws of the United States" found in Articles III and VI of the U.S. Constitution[70] and prevailing expectations since the Founders that customary international law is both directly and indirectly incorporable,[71] such patterns and trends in use of international law are

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Compare Trimble, *supra* at 707-11, 713-16, 721-23 *with* PAUST, *supra* note 18, at 6-8, 18-19, 46-48, 143-46, 154-60. *See also* CARTER & TRIMBLE, *supra* note 7, at 82-83 (demonstrating that Professor Trimble prefers overturning the preferences of the Founders, as well as changing the traditional methods of incorporation of customary international law, and substituting what appears to have been a British system or direct incorporation only through legislation. Even the British have abandoned transformation (which, contrary even to Professor Trimble's preference, had allowed adoption by judicial decision). *See, e.g.*, Trendtex Trading Corporation v. Central Bank of Nigeria, 1 Q.B. 529, 553-54 (1978)). Such a revisionist denial of the judicial role in our domestic legal process is antithetical to a balance and separation of powers conceived by the Founders and involving the law of nations, *see* PAUST, *supra* note 66; PAUST, *supra* note 18, at 7-8, 34-48, 201-02, 264-70 *passim*. This denial is sought by some as an ideologic weapon against the efficacy of human rights and, thus inevitably, the preferred consequences of democracy. Judicial power is an integral part of the constitutional design for the separation of powers and reflects, in part, "the profound conviction of the Framers that the powers conferred on Congress were the powers to be most carefully circumscribed," *see* I.N.S. v. Chadha, 462 U.S. 919, 947, 951 (1983). With respect to democratic values, it is worth emphasizing that no single institutional arrangement necessarily represents authority of guarantees a democratic functioning or outcome, see PAUST, *supra* at 462-63; *see also* James A.R. Nafziger, *Political Dispute Resolution by the World Court, With Reference to United States Courts*, 26 DENV. J. INT'L L. & POL.'Y 775 (1998). At any given time, legislative bodies may merely represent special interests.

68. The closest to a claim concerning specific customary norms is implicit in the proclaimed worry of Professors Bradley and Goldsmith over, of all things, "a large body of . . . human rights" and related prohibitions of genocide and slavery, *see* Bradley & Goldsmith, *supra* note 67, at 832, 841. Despite their concerns (and their use of a number of historical inaccuracies and fallacies, *see infra* note 71), there has been significant attention to a rich and wide array of human rights ever since the formation of the United States, *see, e.g.*, PAUST, *supra* note 18, at 8, 169-203, 214-72, 323-25, *passim*. Importantly, Chief Justice Marshall had recognized in 1810 that our judicial tribunals "are established . . . to decide on human rights . . . ." Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 133 (1810). Federal courts had been using human right precepts prior to his affirmation of judicial authority and responsibility, and have done so ever since.

69. For merely a partial listing of earliest subjects, including human rights, *see, e.g.*, PAUST, *supra* note 18, at 8, 48-50 nn.60-88.

70. *See* U.S. CONST. art. III, § 2, cl. 1; U.S. CONST. art. VI, cl. 2; PAUST, *supra* note 18, at 6-8, 34-48.

71. *See, e.g.*, PAUST, *supra* note 18, at 5-50 *passim*; *see also* Justice Sandra Day O'Connor, *Federalism of Free Nations*, *in* INTERNATIONAL LAW DECISIONS IN NATIONAL COURTS, *supra* note 3, at 16 ("[t]he law of nations is an integral part of. . .['our'] jurisprudence."). Given my disagreement with much of the recent work by Professors Bradley and Goldsmith, and Professor Bradley's participation in this symposium, it is

worth highlighting some nineteen points of disagreement and concern. Much of their reasoning rests on an erroneous premise that customary international law was and is merely "general common law." *See* Bradley & Goldsmith, *supra* note 67, at 820, 823-24, 827, 844, 849. *But see* PAUST, *supra* note 18, at 5, 30-33, 176 *passim*. Because customary international law is not mere "common law," but part of the "law of the land" and "laws of the United States" within constitutionally-based judicial authority and responsibility, *see* PAUST, *supra* note 18, at 5-8, 30-50, 176, their nearly obsessive focus on Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938) and Swift v. Tyson, 41 U.S. (14 Pet.) 1 (1842), neither of which addresses international law or has had any demonstrated impact on actual patterns of federal court use of customary international law, is significantly flawed and misleading. Additionally, use of what are merely "common law," "law merchant," or "maritime" and "admiralty" cases and arguments of others who rely on such cases is seriously misplaced. *Compare* Bradley & Goldsmith, *supra* note 67, at 822, 824, 850 n.222, 851 & nn.230-231, 852-56, 859 *with* PAUST, *supra* note 18, at 30-33. The reference to United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32, 32-33 (1812), a case addressing mere "common law" and making no mention of the law of nations or international law, is but one example. *Compare* Bradley & Goldsmith, *supra* note 67, at 851 & n.231 (and other cases cited therein) *with* PAUST, *supra* note 18, at 32-33, 44-45; *Ex parte* Quirin, 317 U.S. 1, 27-28 (1942) ("From the very beginning of its history this Court has recognized and applied the law of war as including that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of enemy nations as well as of enemy individuals."). Indeed, actual patterns of use of customary international law throughout our history demonstrate that what they term the "modern position," *see* Bradley & Goldsmith, *supra* note 67, at 816-17, 834, 837, 868, was generally endorsed long ago and has been evidenced fairly consistently in the continuous use of customary international law by federal courts for more than 200 years. *See* PAUST, *supra* note 18, at 1, 5-50, 201-02, 264-70; *supra* note 68; *see also* Bradley & Goldsmith, *supra* note 67, at 822-23, 834 n.125, 850-51 & nn.223 & 229-230. Further, what Professor Bradley considers "new" law regulating "a state's treatment of its own citizens," *see* Curtis A. Bradley, *The Status of Customary International Law in U.S. Courts—Before and After Erie*, 26 DENV. J. INT'L L. & POL.'Y 807 (1998), is not new and is partly what our nation, and much of the Bill of Rights, was founded upon. *See, e.g.*, PAUST, *supra* note 18, at 5, 8, 34, 95, 142, 169-75, 192-94, 216-23, 248, 324-25, 330-32 *passim*.

Their disfavored theory requires that "*all* law applied by federal courts. . .be either federal law or state law," Bradley & Goldsmith, *supra* note 67, at 852, and recognition that "if CIL [customary international law] is not federal law, then there is no basis for the federal judiciary to enforce CIL. . ." Bradley & Goldsmith, *supra* note 67, at 846. This is their real preference. *See* Bradley & Goldsmith, *supra* note 67, at 817. If so, the inescapable fact of continued use of customary international law in the federal courts and overwhelming patterns of supportive expectation, regardless of CIL's domesticated name or classification (which clearly has not been merely state law), speak loudly with respect to the general validity of their theory. Moreover, this use continued after *Erie* and its supposedly relevant reasoning. Additionally, if *Erie*, which is not on point, requires that mere "common law" have some sort of authorization, *see* Bradley & Goldsmith, *supra* note 67, at 852 & n.243 (or, if "governed by the Federal Constitution"), 855-56 & n.263, that need is met with respect to customary international law and its constitutional bases in Articles III and VI of the U.S. Constitution, as well as in other constitutional provisions and various federal statutes (also providing subject matter jurisdiction). *See* PAUST, *supra* note 18, at 5-8, 30-50, 174-75, 186, 192-94, 222, 246-48. An early case had also expressly related to the duty to incorporate CIL to the Constitution: "courts. . . .[i]n this country. . . .are bound, by the Constitution of the United States, to determine according to treaties and the law of nations, wherever they apply." Waite v. The Antelope, 28 F. Cas. 1341, 1341 (D.C.D. S. Car. 1807) (No. 17,045).

Other fallacies or errors include statements that customary international law

lacks supremacy consequences, *compare* Bradley & Goldsmith, *supra* note 67, at 821, 824-25, 851 *with* PAUST, *supra* note 18, at 6-7, 15-16, 36, 42-43, 44 (stating that in all tribunals CIL is universally binding), 92, 97, 121-22 (indicating that the view of the Continental Congress noted therein had been similar to Jessup's policy argument, mentioned in Bradley & Goldsmith, *supra* note 67, at 859), 131, 134, 139-40, 179, 182-83, 187, 229, 248 n.391, 333-34, 352, lacked jurisdictional consequences. *Compare* Bradley & Goldsmith, *supra* note 67, at 821 *with* PAUST, *supra* note 18 at 8, 34, 42, 45-46, 201-02, 264-70; *supra* note 68; Hudson v. Guestier, 8 U.S. (4 Cranch) 293, 294 (1808); Church v. Hubbart, 6 U.S. (2 Cranch) 187 (1804); United States v. Peters, District Judge, 3 U.S. (3 Dall.) 121, 129-32 (1795), and lacked "other consequences of federal law," *compare* Bradley & Goldsmith, *supra* note 67, at 821 *with* PAUST, *supra* note 18, at 5-8, 29-50, 143-46, 154-60, 201-02, 264-70; *supra* notes 66 (describing views of Founders), 68. A more informative quotation from THE FEDERALIST No. 3 than that contained in PAUST, *supra* note 18, at 34 n.38, is: "Under the national government. . .the laws of nations, will always be expounded in one sense. . .[and there is] wisdom. . .in committing such questions to the jurisdiction and judgment of courts appointed by and responsible only to one national government." THE FEDERALIST No. 3, at 62 (J. Jay) (J.C. Hamilton ed. 1868). If general common law lacked such consequences and did not bind the states, uses of the law of nations mentioned in material cited above also stand in opposition to claims that customary international law was mere common law. Similarly, if "general common law" "was not considered part of the 'Laws of the United States,'" it is telling that customary international law certainly was. *Compare* Bradley & Goldsmith, *supra* note 67, at —n.32] *with* PAUST, supra note 18, at 6, 40. One case that they cite, actually declares that a state court "is bound to take notice" of the law of nations, "as. . .is. . .the courts of the United States." *See* Bradley & Goldsmith, *supra* note 67, at 824 n.53, Ker v. Illinois, 119 U.S. 436, 444 (1886). Another case cited, actually recognizes that questions of international law involve concurrent duties since they "must be determined in the first instance by the court, state or nation, in which the suit is brought," adding that such questions can be brought in federal courts and the federal court "must decide for itself, uncontrolled by local decisions." *See* Bradley & Goldsmith, *supra* note 67, at 824 n.48, Huntington v. Attrill, 146 U.S. 657, 683 (1892). Concerning New York Life Ins. Co. v. Hendren, 92 U.S. 286 (1875), *see* PAUST, *supra* note 18, at 33, 40. In my opinion, Justice Bradley's dissent was correct that CIL is "law of the United States" for purposes of review, *see* 92 U.S. at 287-88 (Bradley, J., dissenting); *see also* Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 474 (1793); RESTATEMENT, *supra* note 1, § 111, reporters' notes 2-3 & 115, cmt. e. In Oliver American Trading Co. v. Mexico, 264 U.S. 440 (1924), the Court actually ruled that the question was one of "general law applicable alike" and "as fully" to "suits in state courts as to those prosecuted in the courts of the United States" and should be "transferred to the [federal] Circuit Court of Appeals." *Id.* at 442-43. *Ker*, *Huntington*, and *Oliver American Trading* actually reaffirm that state courts are "bound to take notice" of and "as fully" to apply CIL. Not one of the cases declares that CIL is not part of the law to be applied in lower federal courts. Indeed, each recognizes that federal courts have the same duties as states with respect to cases that originate in federal courts. For additional recognition that states were bound by the law of nations, *see, e.g.*, Manchester v. Massachusetts, 139 U.S. 240, 264 (1891) (ruling that states are bound by law of nations in defining their boundaries); Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 560 (1856) (McLean, J., dissenting) ("Our States. . .are independent,. . .subject only to international laws."); United States *ex rel.* Wheeler v. Williamson, 28 F. Cas. 686, 692 (D.C.E.D. Pa. 1855) (No. 16, 726) (each state "is bound by. . .the 'law of nations.' What it could not do if freed from federative restrictions, it cannot do now; every restraint upon its policy. . .binds it still. . . ."); Thompson v. Doaksum, 68 Cal. 593, 596, 10 P. 199, 201 (1886) (noting that the obligation to protect private rights under the law of nations "passed to the new government"); Territory *ex rel.* Wade v. Ashenfelter, 4 N.M. 93, 148, 12 P. 879 (1887) (holding that New Mexico had a judicial duty "to maintain only those principles of

law. . .proper for the protection of human rights. . . ."); Republic of Arg. v. New York, 25 N.Y.2d 252, 259, 250 N.E.2d 698, 701, 303 N.Y.S.2d 644, 647 (1969) (stating that action "in this case is mandated by the rules of international law. It is settled that. . .all domestic courts must give effect to customary international law."); De Simone v. Transportes Maritimos do Estado, 200 A.D. 82, 89, 192 N.Y.S. 815 (N.Y. App. Div. 1922) (". . .the court has no jurisdiction and could not disregard the protest and overrule the objection by a claim. . .[under] the municipal law of this State. . ., for by the law of nations an adjudication. . .could not be made. . . ."); Stanley v. Ohio, 24 Ohio St. 166, 174 (1873) (noting that the state has concern "to discharge such duties as are imposed upon it by the law of nations"); Peters v. McKay, 195 Ore. 412, 424, 426, 238 P.2d 225, 230-31 (Ore. 1951) (". . .the rule is firmly established and uniformly recognized that "International law is part of our law and as such is the law of all States of the Union. . . .The rule has been briefly stated as follows:. . .the law of nations is to be treated as part of the law of the land. The courts of all nations judicially notice this law, and it must be ascertained and administered by the courts of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. . . .' 30 AM. JUR., *International Law*, p. 178, at 7. . . .In essence, the rule appears to be that international law is part of the law of every state which is enforced by its courts without any constitutional or statutory act of incorporation by reference, and. . .relevant provisions of the law of nations are legally paramount whenever international rights and duties are involved before a court having jurisdiction to enforce them."); *see also Ex parte* Bushnell, 9 OHIO ST. 77, 189 (1859) ("The constitution of the United States was framed. . .subordinate to, and without violating the fundamental law of nations. . . ."); Siplyak v. Davis, 276 Pa. 49, 52, 119 A. 745, 746 (1923) (". . .where the general law of nations and those of foreign commerce say the contrary. . .I very much question the power or authority of any state or nation. . .to pass such a law. . .," *quoting* Hanger v. Abbott, 73 U.S. (6 Wall.) 532, 536 (1867)). Further, their references to cases and opinions using phrases "laws of the United States," "law of the land," and "our law" are incomplete and potentially misleading. *Compare* Bradley & Goldsmith, *supra* note 67, at 823, 834 n.125, 850-51 *with* PAUST, *supra* note,18, at 6, 34-36, 40-43, 47; United States v. Ravara, 2 U.S. (2 Dall.) 297, 299 n.*, 27 F. Cas. 713 (No. 16,122) (C.C.D. Pa. 1793) ("law of nations is part of the law of the United States"); *id.* at 298 (Wilson, J., declaring that the Supreme Court has original jurisdiction "in cases like the present" and Congress can nevertheless provide a concurrent jurisdiction in lower federal courts). Concerning the language "in Pursuance thereof" in Article VI of the Constitution, *compare* Bradley, *supra* note 18, at 43.

With respect to the nature of customary international law, they state incorrectly that the dissenter view is the "prevailing view," *compare* Bradley & Goldsmith, *supra* note 67, at 857 n.275 *with* PAUST, *supra* note 18, at 14-18, that the only participants concerning its formation and meaning are states, *compare* Bradley & Goldsmith, *supra* note 67, at 838 *with* PAUST, supra note 18, at 1-3, 10-14, that state "consent" is the basis of customary law, *compare* Bradley & Goldsmith, *supra* note 67, at 838 *with* PAUST, *supra* note 18, at 10-17, 28; J.L. BRIERLY, THE LAW OF NATIONS 51-52 (6th ed. 1963), that it does not specify how obligations must be treated within domestic legal processes, *compare* Bradley & Goldsmith, *supra* note 67, at 819 n.19 *with* PAUST, *supra* note 18, at 198-203, 212, 256, 259-64 *passim*, and that it was antithetical for customary legal rights of individuals, especially human rights, to obtain against states, especially against one's own state, *compare* Bradley & Goldsmith, *supra* note 67, at 822 (quoting incorrect and incomplete list of alleged categories of customary international laws), 831 & n.106, 828, 839-42 *with* PAUST, *supra* note 18, at 8, 44, 198-203, 209-10, 256-70, 288-91, 323-25, 329 *passim*; *see also supra* note 22. Others have also recently confused the supposed lack of direct remedies of individuals at the international level prior to World War II (they existed, but were rare—*see* PAUST, *supra* note 18, at 290-91; *see also* PAUST, *supra* note 18, at 274-75; *supra* note 22), with a lack of individual rights under international law. *See, e.g.*, David P. Kunstle, Kadic v. Karadzic: *Do Private Individuals Have Enforceable*

not surprising.

With increasing interdependence currently thrust upon us and a predictable growth in international adjudication of disputes, domestic

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Rights and Obligations Under the Alien Tort Claims Act?, 6 DUKE J. COMP. & INT'L L. 319, 321-23, 337 (1995); *cf. id.* at 339-41. Concerning several of the points made in this paragraph, *see also* Jordan J. Paust, *The Complex Nature, Sources and Evidences of Customary Human Rights*, 25 GA. J. INT'L & COMP. L.147 (1995/96).

Additional errors include their statement that the only appropriate "sovereigns" are either the federal government or the states, *compare* Bradley & Goldsmith, *supra* note 67, at 852 *with* PAUST, *supra* note 18, at 171-72, 194, 328-31, 347-49, 353, 469-70, that only one court of appeal ever addressed whether the President is bound, *compare* Bradley & Goldsmith, *supra* note 67, at 845 & n.199 *with* PAUST, *supra* note 18, at 155 nn.8-9 & 13-14, 158-59 nn.28 & 31 & 36-37, 161 n.61, 164 n.68, and that Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964) "actually denied that all of CIL was enforceable federal law" and "did not consider international law to be part of the law of the United States" *compare* Bradley & Goldsmith, *supra* note 67, at 860 *with* 376 U.S. at 425, 428, 430 n.34; Jordan J. Paust, letter, 18 VA. J. INT'L L. 601 (1978). Finally, The Paquete Habana, 175 U.S. 677, 700 (1900), was interpreted improperly (especially with respect to the actual position of the United States before the Court and the ruling that the Executive actions were in violation of the law of nations, invalidated, and redressable in our courts, *compare* Bradley & Goldsmith, *supra* note 67, at 842-43 & n.177, 845 n.199, 849 *with* PAUST, *supra* note 18, at 92-95, 146, 148-50, 161-64, and the split in authorities concerning the primacy of custom over a federal statue was not adequately addressed. Concerning the split and authorities, *compare* Bradley & Goldsmith, *supra* note 67, at 843 *with* PAUST, *supra* note 18, at 38-39, 88-95, 120-23, 138-41. Concerning The Nereide, 13 U.S. (9 Cranch) 388 (1815), addressed in Bradley, *supra*, *see* PAUST, *supra* note 18, at 128-29. Concerning Brown v. United States, 12 U.S. (8 Cranch) 110 (1814), addressed in Bradley, *supra*, *see* PAUST, *supra* note 18, at 123-24, 144-45, 156. 5 Op. Att'y Gen. 691, 692 (1802) addressed only the issue whether CIL should be directly incorporable for criminal sanctions ("doubt the competence. . ., there being no statute recognizing the offence. . . ."). On this issue, *see* PAUST, *supra* note 18, at 7, 44-45.

Professor Bradley states that there are no 19th Century cases actually invalidating a presidential or congressional act. Bradley, *supra* —his text near n.56—. *But see* PAUST, *supra* note 18, at 138 n.96 (1892 case). This would not be surprising, since it seems that well into the 20th Century, no one expected that the President or Congress could even authorize a violation of CIL and nothing in the text or structure of the Constitution would permit such a result. Actually, it is more telling that there were no cases holding that presidential or congressional acts prevail until the mid-1980s when a complete and unprofessional misreading of *Paquete Habana* occurred—all in cases concerning the mistreatment of aliens. There are no known federal cases ruling that states can violate CIL, but there are rare cases denying merely Supreme Court jurisdiction to review state rulings, a denial that is no longer authoritative. Further, in the 20th Century, there are cases allowing CIL to prevail against Executive acts, *see* PAUST, *supra* note 18, at 146, 149, 163-64, and congressional legislation, *see* PAUST, *supra* note 18, at 138-39, 141. As my treatise documents, with respect to presidential powers, rulings concerning similar claims (*e.g.*, concerning acts of lower officials and alleged orders or approval of the President) are near rulings, and overwhelming patterns of expectation have long supported these results, *see* Paust, *supra* note 18, at 88, 124-25, 143-46, 154-60. During discussions at the law school colloquium, Professor Bradley assured that he is no enemy of customary international law and indicated that he was not opposed to its use indirectly as an aid to interpret other laws, which happens to be the most common use of customary international law. See PAUST, *supra* note 18, at 62, 94, 193, 212-13 *passim*.

utilization of the decisions and advisory opinions of the International Court is likely to increase.[72] Not to be cute, but to provide appropriate recognition, law school curricula should reflect an increasing global interdependence in all sectors of public life, both civil and criminal.[73] In that regard, the University of Denver, with the guiding and always kind and enthusiastic participation of Professor Ved Nanda, is surely within the forefront.

Appendix I

I.C.J. Decisions and Advisory Opinions Cited in Federal Courts

1949 Corfu Channel Case (United Kingdom v. Albania), 1949 I.C.J. 4 (Apr. 9).

1949 Advisory Opinion on Reparations for Injuries Suffered in the Service of the United Nations, 1949 I.C.J. 174, 178-79, 181 (Apr. 11).

1950 Advisory Opinion on the International Status of South West Africa, 1950 I.C.J. 128 (Jul. 11).

1951 Advisory Opinion on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951 I.C.J. 15, 23 (May 28).

1951 Anglo-Norwegian Fisheries Case (United Kingdom v. Norway), 1951 I.C.J. 116, 132, 138-39 (Dec. 18).

1952 Rights of Nationals of the United States of America in Morocco (France v. United States), 1952 I.C.J. 176, 188-89 (Aug. 27).

1955 Nottebohm Case (Liechtenstein v. Guatemala), 1955 I.C.J. 4, 13, 22, 23-24, 26 (Apr. 6).

1959 Interhandel Case (Switzerland v. United States), 1959 I.C.J. 6, 26-27 (Mar. 21).

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72. *See also* Justice O'Connor, *supra* note 71, at 18 ("there is great potential for our Court to learn from the experience and logic of foreign courts and international tribunals. . . ."). I am surprised that there is apparently only one direct reference to the International Military Tribunal at Nuremberg (IMT). *See* United States v. Koreh, 59 F.3d 431, 440 (3d Cir. 1995) (referencing denaturalization); *see also* Hirota v. MacArthur, 338 U.S. 197, 212 n.12 (1948) (Douglas, J., concurring in 1949) (quoting "the Nuremberg Tribunal" with respect to the principle *nullum crimen sine lege*, and the fact that it does not obviate jurisdiction over, or prosecution of, crimes that were crimes under international law at the time of commission, as well as the fact that the principle was used similarly in the International Military Tribunal for the Far East); for references to the IMT for the Far East . . . ., *see also id.* at 199, 209, 211-15; Jordan J. Paust, *Nullum Crimen* and Related Crimes, 25 DENV. J. INT'L L. & POL'Y 321 (1997).

I expect that with increasing use of the ad hoc International Criminal Tribunals for Former Yugoslavia and Rwanda, and the long awaited creation of a permanent International Criminal Court, as well as several regional international criminal courts, citations to decisions of international criminal tribunals in U.S. cases will also increase.

73. *See, e.g.*, Jonathan I. Charney, INTERNATIONAL LAW DECISIONS IN NATIONAL COURTS, 91 AM. J. INT'L L. 394, 395-96 (1997) (book review).

1970 Barcelona Traction Light & Power Company, Limited (Belgium v. Spain), 1970 I.C.J. 3, 4, 32, 33, 38-39, 42 (Feb. 5).

1971 Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia, 1971 I.C.J. 16, 118-19, 124, 131 (June 21).; *id.* Separate Opinion of Judge Ammoun, at 76

1974 Nuclear Test Cases (Australia v. France) 1974 I.C.J. 253 (Dec. 20); (New Zealand v. France), 1974 I.C.J. 457 (Dec. 20).

1980 Case Concerning United States Diplomatic and Consular Staff in Tehran (United States v. Iran), 1980 I.C.J. 3, 28, 44, 200 (May 24); and *id.*1979 Provisional Measures Order (15 Dec. 1979), 1979 I.C.J. 7, 19

1984 Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States), 1984 I.C.J. 246 (Oct. 12).

1986 Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States), 1986 I.C.J. 4, 14, 146, 149, 183 (June 27).

1988 Advisory Opinion on Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, 1988 I.C.J. 3 (Mar. 9).

Appendix II

P.C.I.J. Decisions Cited in Federal Courts

S.S. Wimbleton, 1923 P.C.I.J. (Ser. A) No. 1, at 25.

German Interest in Polish Upper Silesia, 1926 P.C.I.J. (Ser. A) No. 7.

S.S. Lotus (France v. Turkey), 1927 P.C.I.J. (Ser. A) No. 10, at 18-19, 23, 25.

The Factory at Chorzow (Indemnity), 1928 P.C.I.J. (Ser. A) No. 17, at 46- 48.

Serbian Loans, P.C.I.J. (Ser. A) No. 14 and Nos. 20-21, at 32-41.

Brazilian Loans, P.C.I.J. (Ser. A) Nos. 15 and 20.

Legal Status of Eastern Greenland (Denmark v. Norway), 1933 P.C.I.J. (Ser. A/B) No. 53, at 71-73.

Oscar Chinn, 1934 P.C.I.J. (Ser. A/B) No. 63, at 87.