The “Unsatisfactory Condition” of Customary International Law in the United States

By Julian G. Ku

A. Introduction

At the time that Harvard Professor Manley O. Hudson delivered his lectures compiled in the volume *Progress in International Organization*, the domestic status of customary international law (CIL) in the United States was not considered an important doctrinal question. In his lecture on the “Current Development of International Law,” Hudson does discuss the role of custom in the formation of international law. But his discussion largely expresses a general dissatisfaction with the condition of this type of international law, especially the lack of consensus and certainty about many important and basic rules of customary international law. Indeed, the bulk of his lecture on this subject is devoted to the promise of a “legislative” movement to codify international law through treaties and international agreements.

Indeed, from a contemporary perspective, it is striking that Hudson, perhaps the leading U.S. international law advocate of his generation, appears to dismiss the utility or importance of asking national courts to interpret, apply, and develop rules of CIL. In contrast, the invocation and application of CIL by U.S. federal and state courts has been a central and primary topic of debate among international legal scholars in the United States as well as advocates for the development of international legal norms. In recent years, this debate has reached the U.S.

3 Hudson, supra note 1, at 82–83.
4 See Guzman & Meyer, in this volume.
5 Hudson, supra note 1, at 72–88.
Supreme Court resulting in two of the most important decisions on CIL ever delivered by that court: *Sosa v. Alvarez Machain* and *Hamdan v. Rumsfeld*.

This chapter reviews the contemporary debate over the proper status of CIL in the U.S. legal system. Scholars and judges today disagree sharply over whether CIL is part of federal or state law, its relationship with federal statutory law, and its impact on the duties and powers of the U.S. President. While the U.S. Supreme Court has intervened, it has generally failed to directly resolve most of these disagreements over the proper domestic status of CIL. The Court’s unwillingness to do so leaves the domestic status of CIL deeply uncertain and hotly contested in the United States.

**B. The Domestic Status of Customary International Law**

Courts in the United States have a long history of using CIL as a rule of decision, although such cases were neither frequent nor significant. Still, CIL’s long historical pedigree as a rule of decision in the United States seems at odds with continuing uncertainty over its precise legal status in the domestic legal system. This part reviews understandings of the legal relationship of CIL with each branch of the federal government. Despite a recent decision by the Supreme Court announcing that CIL can be invoked in the context of lawsuits by foreign nationals substantial uncertainty over the domestic legal status of CIL remains.

**I. CIL and the Constitution’s Text**

The text of the U.S. Constitution provides little guidance for determining the domestic status of CIL. The Constitution explicitly mentions CIL only once – allocating to Congress the power to “Define and Punish off enses against the Law of Nations.” Few scholars dispute that this provision grants Congress the right

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