International Asylum Law in the U.S. Supreme Court

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Honors Thesis

INTERNATIONAL ASYLUM LAW
IN THE U.S. SUPREME COURT

by
Lorin Utsch

Submitted to Brigham Young University in partial fulfillment of graduation requirements for University Honors

Political Science Department
Brigham Young University
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ABSTRACT

INTERNATIONAL ASYLUM LAW
IN THE U.S. SUPREME COURT

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The role of international law within the United States legislative system is unclear and fluctuating. The extent to which the United States keeps its international commitments is informed by the application of international law in the country’s highest court, the Supreme Court. The Court’s use of international law varies by case, but consistently applies international law so as to maximize domestic interests. These interests may be of strategic, legal, or ideological value. The Supreme Court cites international asylum law in order to clarify domestic statutes, safeguard domestic sovereignty, and to reemphasize the Court’s preference for domestic statutes over international legal tools.
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Introduction

The interplay between international law and United States domestic law was defined by the Supreme Court in The Paquete Habana of 1900: “International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination.”¹ From the foundation of the country’s judicial branch, one of the purposes of the Supreme Court has been to internalize international law and thereby protect the sentiments expressed in the Declaration of Independence, to maintain “a decent respect to the opinions of mankind.”² Early Court cases cemented this aim of the judicial branch through opinions such as that of Chief Justice John Marshall who ruled that “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.”³ This foundational goal of the United States to uphold international law, both implicitly and explicitly, has carried over to contemporary Court rulings. However, the measure to which international law informs and influences all aspects of U.S. domestic law is unclear in application.⁴

The extent to which international law should be applied to the U.S. legal system is a matter of controversy and faces opposition from scholars and citizens alike. This belief is most prevalent amongst political and judicial conservatives who seek to safeguard U.S. sovereignty and limit foreign control of domestic actions.⁵ The differing perspectives on the role that international law ought to play affect its application as the Justices consider external pressures to legitimize the Court, political motivations to protect the United States, and ideological beliefs

¹ The Paquete Habana, 175 U.S. 677 (1900).
² The Declaration of Independence, para. 1 (U.S. 1776).
³ Murray v. The Schooner Charming Betsy, 6 U.S. 64, 118 (1804).
that elevate domestic law above international law. This paper will examine the extent to which the Supreme Court relies on and is influenced by international law in asylum cases. The United States’ application of international asylum law provides a glimpse at the nation’s overall attitude to the international legal system and suggests implications for how future international legislation will be used in U.S. courts.

The influential role that the U.S. plays means that the U.S. should be a leading example in the application of international law and should be intentional with upholding the treaties to which they are members. While it is expected for the Supreme Court to prioritize the use of domestic law, the commitment that the U.S. has made in becoming a party to international treaties on the topic suggests that the Supreme Court should also uphold the authority of international law and offer support for the legal system to which it is a part. This paper gives a glimpse into the U.S. stance towards international law through the lens of asylum law in the Supreme Court. I find that the United States uses international law as a secondary source of legal authority and is willing to restrict the extent of the law’s customary application in order to safeguard domestic interests.

To evaluate the extent to which the U.S. is fulfilling its international obligations and acting as a proponent for international law, I will analyze the prevalence and context in which international law is used in asylum cases of the U.S. Supreme Court. By categorizing the scenarios in which international law is used, I will seek a greater understanding of the Court’s motives for their use or lack of use of international law in their rulings. While the contextual categories are unique to this paper, the analysis of the judicial behaviors follows categories that are used within other papers analyzing reasonings for court rulings: strategic, ideological, and legal. These motivations help paint the larger picture of the United States’ stance towards
international law in general, though limitations exist in this methodology in that there is very little causal evidence that can be used to prove the true reasonings behind the Justices’ rulings. It is acknowledged that each case can arguably fit into multiple categories, however, the context in which international law is used is the impetus by which the cases will be sorted into each behavioral group.

While international law covers legal areas such as environmental law, foreign investment, and intellectual property, the focal point of this analysis is centered on asylum law in particular due to the salient nature of this topic in current events. Political instability, climate change, and violent inter-state conflict have caused the displacement of millions of people and led to an increase in the number of individuals seeking asylum at the U.S. border.\(^6\) At the end of 2023, more than two million people were awaiting an answer on their asylum cases.\(^7\) The influx of asylum seekers has created greater political tension over the issue of migration and has led to changes in migration policy.\(^8\) The Biden administration has arrested more people for illegal border crossings into the U.S. than any other administration since the government started tracking the number in 1960.\(^9\) Of voters in the upcoming 2024 election, 35% cited immigration as their number one policy concern.\(^10\) The state of immigration law in the United States is at the front of people’s minds and at the front page of the people’s newspapers. The dynamism of the issue makes the U.S. stance towards international immigration law even more poignant and

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timely than in past decades, as an understanding of the use of international law can inform the
future strategies the Supreme Court takes in interpreting domestic immigration policies.

**Background**

*Strength of International Law and Its Domestic Application*

International law includes rules that bind sovereign states with each other and has been a
foundational aspect of state relations since the beginning of recorded history.\(^{11}\) While over time
it has shifted bases from faith to reason, international law upholds the definition offered by
Henry Wheaton: “International law as understood among civilized … nations may be defined as
consisting in those rules of conduct which reason deduces, as consonant to justice, from the
nature of the society existing among independent nations.”\(^{12}\) As the world became increasingly
globalized through progress in technologies and transportation, a universalized set of standards
grew out of established norms and a necessity for codified “rules of conduct…among
independent nations”.\(^{13}\)

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\(^{11}\) Inter-state political relationships have existed for thousands of years, with alliances and embassies being described
in the Bible. Multilateral treaties existed as early as the Egyptian and Hittite Empires, with agreements detailing the
extradition of fugitives and the reach of imperial power, and the practice of dispute settlement through arbitration
can be traced back to ancient Greek city-states. The history of international law has influenced politics today, as the
influence of the Roman rule of law permeates contemporary legal codes, with an emphasis on universal principles of
behavior and justice as brought about by a universal and eternal natural law. Originally championed by Roman
thinkers and adopted by the Christian Church through people such as Saint Thomas Aquinas, the idea of a universal
set of rules aimed at supporting moral values gained both legitimacy and authority, giving it momentum to persist
over the course of centuries. See John W. Foster, *Evolution of International Law*, 18 Yale L. J. 149 (1909); DJ
history of international law*, 3 Int’l L. 3 (2003); Sheila L. Ager, *Interstate arbitrations in the Greek world, 337–90

\(^{12}\) Henry Wheaton, Elements of International Law 46 (1836). Cf. James Madison, supra note 2. As cited in Mortimer
N.S. Sellers, *The Purpose of International Law Is to Advance Justice—and International Law Has No Value Unless

International law has strong historical roots and is built on hundreds of years of custom, but the domestic application of the laws is largely left to the discretion of the participating states. In instances where the lack of compliance with international law leads to violations against other states, the affected state may seek claims for the violations and resort to violence as an enforcement measure for a breach in the multilateral agreement. Regarding domestic affairs, certain accountability measures are in place to monitor compliance, such as United Nations human rights treaty bodies, but there is not one overarching entity with the authority to force compliance or mete out punishments to ensure compliance with the treaties. Instead, accountability concerning human rights treaties is often established by third-party groups or peer-review evaluations. Decisions of the United Nations Human Rights Committee are such an example. Working specifically on the implementation of the International Covenant on Civil and Political Rights, the Human Rights Committee offers recommendations, observations, and general comments based on individual state reports of civil and political rights. However, it is

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14 While some laws of war were established in the Middle Ages, the fatal advancements in nuclear warfare and the use of bioweaponry led to a refined set of agreements between states in the 1929 and 1949 Geneva Conventions. Humanitarian interference is documented in cases such as world powers’ involvement in a Greek-Turkish dispute in Crete in 1897, and customary humanitarian treatment was included in the Lieber Code of 1863, upon which subsequent conferences built codified language, culminating in the formalization of treaties such as the International Convention for the Protection of All Persons from Enforced Disappearance and the Convention on the Rights of the Child. Whereas past agreements between states focused on inter-state conflict, the evolution of international law has grown to include topics from environmental protection to human rights. See 6 U.S.T. 3316; 75 U.N.T.S. 135; 6 U.S.T. 3516; 75 U.N.T.S. 287; Louise Doswald-Beck and Sylvain Vité, *International humanitarian law and human rights law*, 33 Int’l Rev. Red Cross (1961-1997) 293, 94-119 (1993); David Rodogno, *The Second Intervention in Crete (1896–1900)*, in Against Massacre: Humanitarian Interventions in the Ottoman Empire, 1815-1914, Princeton University Press, 212-228 (2012); UN General Assembly, *International Covenant on Civil and Political Rights*, 999 United Nations, Treaty Series, 171 (December, 16, 1966); Paris Agreement to the United Nations Framework Convention on Climate Change, T.I.A.S. No. 16-1104 (December 12, 2015).


up to the individual state party to determine whether to enact the remedies offered by the Committee.\(^{19}\)

Due to the voluntary nature of treaty compliance, the strength of international law is the subject of debate amongst many scholars and lawyers.\(^{20}\) While international law is binding once it is codified, this does not necessarily mean that states give it authority.\(^{21}\) Many states may choose to prioritize domestic law over international law, believing they will not face repercussions for breaking international commitments. While some states may place pressures on other states to improve human rights conditions within their borders, as in the case of U.S. sanctions against China in response to China’s treatment of the Uyghurs, such actions take place outside of the established legal instruments for enforcement and are not always effective.\(^{22}\) This places the status of international law in an ambiguous area: though binding and respected, it may not hold the power that the codification of such laws intended, especially when there is no perceived external threat that comes from non-compliance. In Mortimer Sellers’ words, “We

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20 Treaty compliance varies depending on the type of treaty. Military defense treaties and non-aggression treaties have higher rates of compliance. The multilateral nature of the treaty affects states’ reactions to breaches of the treaties. When the nature of the treaty implies a direct interaction between the two states, if one state fails to hold up their side of the agreement, it is more likely that the other state will take upon itself the role of enforcer of that treaty, placing either military or economic pressures on the uncompliant state. However, when referring to treaties that focus on domestic actions such as the treatment of its citizens, the incentive for other states to police the enforcement of the treaty provisions is not as high. See Olga Avdeyeva, *When do states comply with international treaties? Policies on violence against women in post-communist countries*, 51 Int’l Stud. Q. 4, 877-900 (2007); Jean Galbraith, *Treaty options: Towards a behavioral understanding of treaty design*, 53 Va. J. Int’l L. 309 (2012); James D. Morrow, *When do states follow the laws of war?*, 101 Am. Pol. Sci. Rev. 3, 559-572 (2007).


have no reason to obey or respect international law unless international law has some value or serves some useful purpose.”

In the examination of state application of international law, one is able to determine if international law is fulfilling its intended purpose—which Sellers says is justice. The importance of the United States’ application of international law stems from this ongoing question of the true purpose of international law. Identifying the extent to which the United States applies international law is a key indicator of how the U.S. views international law and how this view will in many ways become a self-fulfilling prophecy: if a state views international law to be of importance, the authority of that law grows, but the lack of implementation of international law following ratification can undermine the authority and integrity of the law and its provisions. This paper seeks to understand the extent to which the United States upholds international law and to what extent other pressures and priorities overshadow international law, as seen in asylum-specific cases. By understanding the narrative around international asylum law, it is easier to see how closely the United States’ domestic implementation of asylum law matches the intent of international asylum laws, and thus how authoritative international law is within the U.S. legal system. The question this paper seeks to answer is “What is the United States’ stance towards international law in asylum disputes and does it seek to uphold its international commitments?”

Since the start of the 2000s, the United States has become increasingly unilateral in its application of international law, resisting laws made outside of domestic processes. The Supreme Court has used international law as a tool to fulfill domestic interests such as constraining or legitimizing the executive branch. Overall, international and domestic statutes have existed in harmony due to intentional interpretation and legislation. In 1804, Chief Justice Marshall stated this goal when he said that Congressional acts should never be interpreted in violation of international law if possible.

Following the establishment of the Charming Betsy canon, the United States Supreme Court continued to apply international law in a way that clarified the conflict between international and domestic statutes. For example, the specification of property law surrounding the seizure of property by a hostile person in United States v. Padelford distinguishes the application of international law from that of domestic statutes. In Chew Heong v. United States, the Supreme Court again ruled that the Chinese Exclusion Act of 1882 was not in conflict with the United States’ international commitment to allow Chinese workers to travel as needed in and out of the country. By supporting the 1882 Act, the Supreme Court strengthened the federal legislation within the scope of the treaty. By narrowing the interpretation of a generalized international rule, the Supreme Court can balance both international and domestic statutes as a legitimate source of law. However, the authoritative balance between domestic and international

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27 Murray v. Schooner Charming Betsy, 6 U.S. 64, 118 (1804).
28 United States v. Padelford, 76 U.S. 9 Wall. 531 (1869).
law varies from treaty to treaty and from topic to topic. Because international law is approached differently based on the topic, it is necessary to look at a specific area of international law in order to determine the extent of legal authority that the Supreme Court gives to the particular treaties in question.

Self-executing treaties have greater authority in the Supreme Court, whereas non-self-executing treaties are not considered to be part of the “supreme Law of the Land” until they are established under domestic legislation. Chief Justice Marshall highlights the distinction between the two types of treaties:

[A treaty] is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court.31

When hearing cases that involve non-self-executing treaties, the Court has ruled that domestic legislation takes priority in the opinion of the Court since it is the domestic legislation that cements international rules as enforceable under domestic law. However, regardless of the domestic execution of treaties, once ratified, the United States is considered bound by the treaty in the international community.32 Often the court seeks to bridge the gap between the country’s

30 U.S. Const. Art. VI, cl. 2.
international obligations and domestic implementation of the treaty’s provisions. For example, when implementing international asylum law, the Supreme Court must weigh the economic cost of accepting migrants, the political costs of granting asylum to individuals of a certain country, the judicial costs of citing asylum law from outside of the country, and the social costs of the public’s reactions to Court’s decisions.

The balance between international law and domestic law brings with it a debate on which direction the scales should tip when the two legal systems are used together. A strong domestic legal system often leads to greater pushback from external interventions, thus it is unsurprising that resistance within the U.S. should arise.\textsuperscript{33} For example, a 2010 initiative in Oklahoma called “Save Our State” was established to amend the Oklahoma Constitution to explicitly prohibit the use of international law in judicial considerations.\textsuperscript{34} By participating in the international system and entering into international agreements, the United States accepts some level of constraint on its actions and accepts certain responsibilities to be met in return for supporting global democratic ideals. An isolationist or protectionist perspective places domestic incentives above global progress, leading to an aversion to entering into international agreements that may limit U.S. autonomy.\textsuperscript{35} Debates of international law within Congress differ from the state legislature in that they are mostly supportive, but these debates are thought to be a method by which the United States can strengthen the country’s credibility when it comes to international commitments.\textsuperscript{36}

\textsuperscript{33} Anne-Marie Slaughter and William Burke-White, \textit{The future of international law is domestic (or, the European way of law)}, 47 Harv. Int'l L J 327 (2006).
\textsuperscript{34} John T. Parry, \textit{Oklahoma's Save Our State Amendment and the Conflict of Laws}, 65 Okla. L. Rev. 1 (2012).
The core treaties that govern international asylum law are considered non-self-executing.\(^{37}\) As such, by examining the use of international law within asylum law cases of the Supreme Court, one can more clearly determine the level of authority that the United States gives to international statutes as compared to domestic ones. The frequency and context of citations of international law help paint a portion of the bigger picture of the United States’ stance towards the international legal system. The influential role that the United States plays in the global political sphere adds further importance to determining the authority that international agreements have within its domestic borders as this will likely affect other countries’ approach to international law generally, but international asylum law more specifically.

Asylum Law in the U.S.

The primary legal instrument in international asylum and refugee law is the 1951 Convention Relating to the Status of Refugees. The 1951 United Nations Convention Relating to the Status of Refugees established the foundations for international refugee and asylum rights, including defining what a refugee is: someone with a “well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.”\(^{38}\) Asylum is granted to individuals who meet this definition but who apply for protection at a port of entry or while already inside the borders of

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the host country, whereas refugees apply while still within the borders of a different country. In addition to defining the requirements of a refugee, the 1951 Convention also protects against deportation or the return of an individual to a country where he or she may face harm or punishment, establishing what is referred to as “nonrefoulement.” While not linked to a specific migrant status, this principle is a core part of international migration law. Nonrefoulement is therefore applicable to both migration cases, whether the individual is considered a refugee or asylum seeker.

Though not originally party to the 1951 Convention, the United States established its support of the 1951 Convention when it became party to the 1967 Protocol to the Refugee Convention. The 1967 Protocol was an additional instrument of international law used to widen the geographic scope of the original 1951 Convention and apply the principles of refugee status to those outside of the European migrants affected by World War II. The United States’ support for the 1967 Protocol was given with a reservation pertaining to the 1951 Convention that reserves the United States’ right to tax refugees who are not residents of the U.S. and to uphold provisions of the Social Security Act above Article 24 of the Convention. Aside from these reservations, the United States’ approval of this protocol signals support for the rights of refugees and asylum seekers and intent to uphold such provisions.

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The United States ratified the 1951 Refugee Convention in 1968, which bound the U.S. to adhere to and implement the provisions of the treaty. The delay in signing and ratifying the treaty stemmed from President Truman’s fear that it infringed on U.S. sovereignty at a time when the U.S. was experiencing a flood of refugees from the Soviet bloc. He instead focused on domestic controls to deal with the crisis. President Truman viewed the high numbers of displaced persons as a humanitarian and political problem, deeming it a “threat to the social and economic stability of a strategically crucial region… the solution required some form of international resettlement, which would necessarily involve admission to the United States.”

This policy was reversed by the signature of President Lyndon Johnson who signed the treaty and submitted it for Senate approval. He then ratified it in 1968. In his message to the Senate, President Johnson expressed the national interest in becoming party to the 1967 Protocol and the annexed 1951 Convention:

Given the American heritage of concern for the homeless and persecuted, and our traditional role of leadership in promoting assistance for refugees, accession by the United States to the Protocol would lend conspicuous support to the effort of the United Nations toward attaining the Protocol's objectives everywhere.


This statement suggests that the United States aims to support international law in an attempt to support the overarching goal of providing a safe place for displaced persons across the globe. In becoming party to the 1967 Protocol, the United States agreed to grant asylum to individuals with a “well-founded fear of persecution,” regardless of his or her country of origin. This commitment clashes with U.S. foreign policy in that it makes the U.S. legally obligated to accept asylees from its enemies, and this commitment also means that the U.S. has a legal responsibility not to place a cap on the number of asylum seekers it accepts. Another reason for the U.S. accession of the treaty is evident in President Johnson’s continuing comments:

This impetus would be enhanced by the fact that most refugees in this country already enjoy the protection and rights which the Protocol seeks to secure for refugees in all countries. Thus, United States accession should help advance acceptance of the Protocol and observance of its humane standards by States in which, presently, guarantees and practices relating to protection and other rights for refugees are less liberal than in our own country.45

This statement suggests that the United States ratified the treaty due to the fact that the U.S. was 1) already implementing the provisions of the treaty, and 2) wanted to set a standard that would pressure other countries to follow the actions of the treaty and of the United States. It also-offers insight into the intent of government officials during the ratification process which serves to enhance the understanding of the United States’ posture towards international law.

As the 1967 Convention is not self-executing, domestic legislation was needed in order to implement its provisions into the domestic legal system.\textsuperscript{46} To do so, the United States also passed the Refugee Act of 1980, binding the U.S. at the national and international levels.\textsuperscript{47}

The Refugee Act of 1980 built on earlier domestic policies including the Immigration and Nationality Act of 1965 and the Migration and Refugee Assistance Act of 1962. A hallmark principle of the Refugee Act of 1980 was the standardization of the definition of “refugee,” officially changing the definition in U.S. law to fit the definition proposed in the 1951 Convention. The Refugee Act of 1980 also established the annual ceilings for refugee resettlement and provided for the adjustment of that ceiling in the face of an emergency.\textsuperscript{48} One of the main purposes of this Act is to establish the procedural processes by which the United States can admit “refugees of special humanitarian concern to the United States and to provide comprehensive and uniform provisions for the effective resettlement and absorption of those refugees who are admitted.”\textsuperscript{49} While the quota on the number of resettled refugees does not take into account the number of asylum seekers, the ceiling on the number of migrants accepted through the country’s resettlement program allows the United States to place a constraint on its responsibilities.

\textsuperscript{46} The ratification process of international law is a dualist system that requires that the treaty be ratified in domestic law as well as at the international level. Under the U.S. Constitution, the president “shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur” (U.S. Const. Article II, § 2.). Therefore, while international treaties are considered legally binding, the U.S. judicial system requires that there be domestic action taken before the treaty becomes accepted as domestic law.

\textsuperscript{47} The passage of the Refugee Act of 1980 came in response to global criticism of the United States' practice of only allowing in refugees from communist countries. Before the standardization of the definition of “refugee,” U.S. refugee policy was used to support the U.S. foreign policy efforts and to weaken Soviet states. See more at Kathleen Newland, \textit{Impact of US Refugee Policies on US Foreign Policy: a case of the tail wagging the dog?} (1995); Charles B. Keely, \textit{The international refugee regime (s): The end of the Cold War matters}, 35 Int’l Migration Rev. 1, 303-314 (2001).

\textsuperscript{48} It is important to note that refugee resettlement quotas do not apply to asylum seekers. There is a limit on the number of individuals admitted into the U.S. through the Refugee Admissions Program, but this applies only to individuals and families who apply for resettlement outside of the United States and does not apply to individuals and families who apply for refuge while either at the border or within the U.S. already.

These legal instruments (the Refugee Act of 1980, the 1967 Protocol, and the 1951 Convention) provide the basis for Supreme Court proceedings regarding refugee and asylum disputes. While the Refugee Act of 1980 indicates the domestic implementation of international refugee law, the Supreme Court cases examined within this paper will focus on the specific application of international law. By so doing, this paper will differentiate the role that international law has in the practical application of federal courts. This paper focuses on the rulings of the Supreme Court as opposed to lower courts since the Supreme Court, as the highest court of the country, sets legal precedents on federal laws that will affect the decisions of the lower courts. Thus, by examining the Supreme Court’s application of international law, it will be evident what the U.S. narrative is surrounding international law.

Description of cases and use of international law

As the 1951 United Nations Convention Relating to the Status of Refugee is the main legal instrument used in international asylum law, this paper will focus on Supreme Court cases that specifically cite this treaty. Of the Supreme Court cases within the Westlaw database, seven cases pertaining to asylum specifically mention the 1951 Convention somewhere within the Court opinion. To ensure that cases mentioning other international asylum law instruments were not left out, I considered including mentions of the 1967 Protocol, however, no original cases matched this description. Thus, the analysis of this paper will focus on the seven cases of asylum law that cite the 1951 Convention. The seven cases can be grouped by three key issues and applications of international law: the use of international law to interpret a statute, the balancing

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50 The Supreme Court is able to directly cite treaties in its opinion, as the Court is obligated to root out violations to the “law of nations,” and application of foreign law merits a closer look by domestic courts, just as the court would do when interpreting meaning of a domestic law. See Stephen Yeazell, When and How US Courts Should Cite Foreign Law, 26 Const. Comment, 63 (2009).
of domestic versus international obligations and subsequent restraints, and cases lacking mention of international law in the majority Court opinion but including such a mention in a concurring or dissenting opinion.

Interpretation of Domestic Statutes

Three asylum cases focus on issues brought about by varying interpretations and applications of domestic statutes: *I.N.S. v. Stevic*, *I.N.S. v Cardoza-Fonesca*, and *Negusie v. Holder*. *I.N.S. v. Stevic* and *I.N.S. v Cardoza-Fonesca* both focus on issues regarding the burden of proof and the application of the “well-founded fear” principle, and *Negusie v. Holder* applies to issues regarding the application of the “persecutor bar” alongside the use of the 1951 Convention.

In 1984, the Supreme Court ruled on *I.N.S. v. Stevic*, the first asylum case in the Court which has reference to international asylum and migration law. Justice Stevens wrote an opinion to reverse the judgment of the Court of Appeals concerning the case of Predrag Stevic who had been denied a writ of habeas corpus and a reopening of his deportation hearing. Mr. Stevic was from Yugoslavia and had overstayed his original visitation visa and had agreed to be deported in February 1977. However, in January 1977 he married a U.S. citizen, allowing him to remain in the country. However, following his wife’s death in an automobile accident, I.N.S. revoked his visa and he was ordered to surrender again for deportation. Mr. Stevic had filed to have his hearing reopened under § 243(h) of the Immigration and Nationality Act of 1952 (INA) which required that there be a clear probability of persecution following deportation. Stevic’s

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involvement in an anti-Communist organization caused him to fear imprisonment should he return to Yugoslavia.53

After his case was dismissed due to not meeting the burden of proof, Mr. Stevic filed again for his case to be reopened. However, this time he did so under the amended wording in § 243(h) which had been changed by the 1980 Refugee Act to conform with the wording used in the 1967 Protocol. The new wording required that the asylum seeker show a “well-founded fear of persecution,” which the Court of Appeals concluded had changed the burden of proof.54 The Court held that an “alien seeking relief from deportation on grounds that he would be subject to persecution in the country to which he would be deported must establish a clear probability of persecution to avoid deportation.” Citing a previous ruling by the Board of Immigration Appeals (BIA) in the case of In re Dunar, 14 I. & N. Dec. 310 (1973), the Court emphasized the legal precedents that equate the burden of “well-founded fear of persecution” with that of “clear probability of persecution.”55 In this way, the Court ruled that international law reflects the same principles already implemented into domestic law prior to the accession of the 1967 Protocol. The amendments to domestic statutes to mirror the wording of international provisions do not reflect a fundamental change in the application of § 243(h), thus emphasizing the harmony between this domestic law and its international counterpart.56

A few years later on March 9, 1987, Justice Stevens expressed the majority opinion of the Supreme Court in favor of Cardoza-Fonesca in I.N.S. v. Cardoza-Fonesca, stating that the burden of proof for an asylum seeker need only meet the “well-founded fear of prosecution”

Luz Marina Cardoza-Fonesca arrived from Nicaragua on a tourist visa but remained past the time limit allotted to her. When faced with deportation proceedings, she claimed withholding of deportation on account of fear of persecution due to her political beliefs. Both she and her brother had fled after her brother had been tortured and imprisoned by the Sandinistas. While Ms. Cardoza-Fonesca had not actively participated in political activities, she feared that she would be interrogated and tortured about her brother’s whereabouts if she returned to her home country. At her deportation hearing, the Immigration Judge applied the proof standard of § 243(h) “more likely than not,” as opposed to the § 101(a)(42)(A) section of the Immigration and Nationality Act that requires a proof standard of “well-founded fear” of persecution. The Board of Immigration Appeals affirmed the ruling, but the Court of Appeals reversed it, citing the more generous use of “well-founded fear” as applicable in asylum cases. The Supreme Court affirmed the ruling of the Court of Appeals. The Court’s decision lowers the bar from the more strenuous burden of proof previously required under § 243(h). In the Court’s opinion, Justice Stevens relies on the reasoning of Congress used in the passage of the Refugee Act of 1980. He traces the intended purposes of the Act back to the 1951 Refugee Convention, stating that the Act was meant to bring domestic law into harmony with international law and practice. By extension, Congress and the Supreme Court have a responsibility to uphold the intent of the Act and apply domestic law as it is applied internationally. Informed by the 1951 Convention, the Court ruled that asylum seekers need only prove a “well-founded fear of persecution” in order to gain protection from deportation.

The use of international law in *I.N.S. v Cardoza-Fonesca* varies slightly from that in *I.N.S. v. Stevic*. In *I.N.S. v. Stevic*, international law was used in the context of Congress’ decision to standardize U.S. statutes to correspond with international law. In this case, international law was the foundation used to change wording in U.S. law, though the adjustment in wording did not change the substantive application of the law. However, in *I.N.S. v Cardoza-Fonesca*, international law, though also cited through its role in Congress’ decisions, was used to change the application of U.S. law and delineate rights to a subgroup that differed from other existing U.S. statutes. The use of international law in this case is less supplementary than it is complementary— if the influence of international law were to be removed from the U.S. legal code, *I.N.S. v. Stevic* would likely resort in the same outcome as international law was used to more fully support existing domestic statutes, whereas international law such as the 1951 Convention in *I.N.S. v Cardoza-Fonesca* plays a pivotal role in the Court’s decision, adding to the decision where domestic statutes could not. Despite these differences in application, both cases resulted in burdens of proof that coincided with the same standards used in international asylum law, further harmonizing domestic statutes with international ones.

*Negusie v. Holder* is another case in which the Supreme Court cites international law to clarify the meaning and application of a domestic statute. On March 9, 2009, the Supreme Court reversed and remanded the decision of the BIA and Fifth Circuit Court of Appeals, which had denied the petitioner, Daniel Girmai Negusie, entry based on the “persecutor bar” of the INS.63 The “persecutor bar” refers to immigrants who cannot be deemed refugees on account of their role as a persecutor of another individual based on a protected ground, but the immigrant can still seek protection under the Convention Against Torture and Other Cruel, Inhuman or Degrading

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Treatment or Punishment. The petitioner was a dual national of Eritrea and Ethiopia who had fled from Eritrea in a shipping container following his coerced participation in guarding prisoners at an Eritrean prison where he himself had been a prisoner for a time. He was originally incarcerated by the Eritrean Government after he refused to fight against Ethiopia when war broke out between the two countries in 1998. While he did not use physical force on prisoners within the Eritrean prison, he did carry out orders to the detriment of the prisoners. Due to his assistance in their persecution, the BIA held that he was ineligible for asylum.

In response, the Supreme Court ruled that the lower court’s ruling was based on an incorrect interpretation of the Fedorenko case, saying that it must be decided whether “coerced actions must be deemed assistance in persecution.” The use of Fedorenko fails to acknowledge the circumstances under which the case was meant to apply, and the Court held that the Refugee Act of 1980 had greater application to this petitioner. By extension of the Refugee Act, the Court reiterated the intent of Congress to implement the principles of the 1967 Protocol. The Court remanded in order to allow the agency to fill the statutory gap that existed in the application of the persecutor bar.

In response to the Court’s opinion on Negusie v. Holder, Justices Stevens and Breyer concurred in part and dissented in part. They cited the motive behind the passage of the Refugee Act of 1980 as the reason for the Courts to perpetuate the intent to apply international law as consistently as possible; since Congress passed the Refugee Act of 1980 in an attempt to codify international standards into domestic law, the Justices argue that the Court should cooperate with

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the same goal in their interpretation of law influenced by international standards. While the 1951 Convention excludes persons who commit a crime from the right to nonrefoulement, the Justices highlight that the United Nations Handbook and the Convention’s exception suggest that an action is not a crime if the individual is coerced or if the individual acts involuntarily. The Justices suggested that the BIA determine the standard for voluntariness and the definition of coercion. However, the Supreme Court noted that while the United Nations Handbook can provide useful guidance, it is not a binding legal instrument and thus should not have sway in the outcome of the case. The disagreement among the Justices illuminates the contrasting views of international law and the intricacies of its application, but the outcome of the case highlights the Court’s preference for upholding domestic laws rather than compromising them to satisfy all aspects of international law and custom.

Within these three cases, the Supreme Court uses international law to clarify domestic laws, through redefining domestic wording and making substantive changes to existing definitions. The use of international law to clarify existing legislation shows the application of Congress’s attempt at harmonizing domestic legislation to meet the international standard. While the Supreme Court places limitations on the use of specific international legal tools, such as the United Nations handbook, the Court’s willingness to adjust interpretations of domestic law to cooperate with international standards suggests a willingness to uphold U.S. obligations entered into in the 1951 Convention and 1967 Protocol.

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Balancing Domestic Interests versus International Obligations

Of the seven cases the Supreme Court has heard and within which they have cited international law, two contain instances in which the Court uses international law to show the explicit delineation between where international commitments end and domestic jurisdiction begins. While the Supreme Court upholds international law in both cases, the use of it is not to extend the United States’ obligations but rather to emphasize the constraints on the international provisions.

The first such case is Sale v. Haitian Centers Council, Inc., decided on June 8, 2009. Justice Stevens wrote the opinion that reversed the ruling of the Court of Appeals and ruled in favor of Chris Sale, Acting Commissioner, I.N.S., et. al.\(^{70}\) Following a violent military coup in Haiti, thousands of civilians fled or hid out of fear of punishment due to their political beliefs. The Coast Guard had implemented a preliminary screening process that included interdicting boats of Haitians arriving in the U.S. illegally, deporting those who did not meet the qualifications for a refugee, and allowing the rest to continue to the U.S. to apply for refuge.\(^{71}\) Following the ousting of the democratic regime in Haiti, the sudden influx of illegal immigrants to the U.S. proved greater than the immigration system could account for. Orders from the executive branch ceased responsibility for Haitian immigrants, claiming that the 1951 Convention does not apply extraterritorially. The petitioners of this case, made up of interdicted Haitians and Haitians temporarily held at Guantanamo, argued that the screenings done by the Coast Guard did not provide adequate protection for their statutory and treaty rights.\(^{72}\)

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In its opinion, the Court stated that while the Attorney General is prohibited from deporting or returning migrants who would face persecution upon their return, neither this principle nor the 1951 Convention applies to actions taken by the Coast Guard on high seas. In defense of the Court decision, the Court cited the text of the 1951 Convention and its negotiating history as it applies to nonrefoulement and found that it was not intended to have extraterritorial effect, but rather was meant for actions taken within the country’s borders. Through this opinion, the Court affirmed the principle that international law cannot hold countries responsible for applying treaties beyond their general humanitarian intent. The Court’s decision upheld the ruling of the District Court but reversed the ruling of the subsequent Court of Appeals which had claimed that § 243(h)(1) of the Immigration and Nationality Act and Article 33 of the United Nations Convention Relating to the Status of Refugees apply to all refugees, regardless of whether they are inside or outside of the United States. The Court’s decision of Sale v. Haitian Centers Council, Inc. expresses that, though the United States has incentives to uphold the liberal values within its domestic borders, it is not obligated nor has the intent to extend the application of the provisions to refugees beyond its borders. International law does not have authority over the Courts and is not meant as a prescriptive adoption of legal code but seems to be adopted on top of pre-established domestic intents and norms.

Further establishing constraints on the application of international law, the Supreme Court ruled on July 31, 2013, on I.N.S. v. Aguirre-Aguirre. Justice Kennedy reversed the ruling of the Ninth Circuit which had reviewed and reversed the Board of Immigration Appeals which had barred a withholding of deportation and asylum to an immigrant. Juan Anial Aguirre-

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Aguirre, a Guatemalan national, opposed the Guatemalan government in a political activist group that would incite chaos by breaking windows, burning buses, or attacking police. While violence was not the goal of the group, many people were harmed in the crossfire of the group’s actions. Mr. Aguirre-Aguirre, after conceding deportability, applied for withholding and asylum, despite his participation in the violent actions of the political group. While a well-founded fear of persecution is enough to secure his asylum, if an immigrant committed a “serious nonpolitical crime” before arriving in the U.S. then withholding is not available to the individual. The Guatemalan had confessed to crimes such as burning ten buses and assaulting passengers which the BIA categorized as being “serious nonpolitical crime[s],” thus refusing to grant asylum. In response to the Ninth Circuit’s opinion, the Court held that the BIA was not required to consider, *inter alia*, the balance between the migrant’s crimes against his threat of persecution.

The Court of Appeals, rather than relying on existing domestic statutes, relied on the United Nations High Commissioner of Refugees Handbook on Procedures and Criteria for Determining Refugee Status as a primary argument against BIA’s ruling in determining what the United States’ obligations are. The Supreme Court expressed the opinion that while the guidebook is helpful, it is not binding. The ruling upheld BIA’s reading of statute § 1253(h)(2)(C) and their conclusion that it does not require fear of persecution to be balanced against a nonpolitical crime. The BIA determined that the magnitude of the defendant’s criminal actions outweighed the political nature of the actions and thus were adequate grounds

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76 Withholding of removal or deportation differs from being granted asylum: “Whereas withholding of deportation only bars deporting an alien to a particular country or countries, a grant of asylum permits an alien to remain in the United States and to apply for permanent residency after one year. Immigration and Nationality Act. §§ 208, 241(b)(3), as amended, 8 U.S.C.A. §§ 1158, 1231(b)(3).
on which the government could bar him from entry. In this case, international law is secondary to domestic statutes and the Court expresses its definitive stance on this.

As compared with the first three cases in which the Supreme Court uses international as a guiding and supportive tool for harmonizing domestic asylum law with international asylum law, these two cases are instances when international law was cited as being subservient to domestic law. Rather than a guiding factor in these cases, the Supreme Court mentions international interests in the context of a clash between international commitments and domestic interests. In these two cases, it was in the Court’s interest to reestablish the preferential authority of domestic law over international law, establishing boundaries between domestic interests and international legal opinions and tools.

Asylum Cases in Which International Law is Cited Only in Concurring or Dissenting Opinion

To determine the true use of international law within the Supreme Court, it is necessary to examine cases in which international law is implicated though not used. While further study is needed on general asylum cases in the Supreme Court, two cases contain a reference to international law in places other than the majority opinion, which may hint that the Court’s lack of discussion of international law leaves gaps within its arguments or that the added references to international law were not deemed necessary by the Court.

Of the seven cases with references to international law, *U.S. Dept of State v. Ray* contains only a footnote with mention of an asylum treaty. On December 16, 1991, the Supreme Court reversed the decision of a Florida District Court that had ordered the State Department to disclose identifying information from redacted documents. The Haitian government had assured

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the U.S. government that any Haitians who tried to emigrate illegally and were interdicted and returned would not face prosecution or harassment.\(^82\) To ensure Haitian compliance, returnees were interviewed on their experiences upon return. A Floridian lawyer, Michael D. Rayhad, and three of his clients requested transcripts of the interviews along with identifying information that would allow them to personally question the returnees further, as the petitioners claimed a well-founded fear of persecution if they were returned to Haiti. However, the Court deemed the disclosure of redacted interviews as being an unwarranted invasion of privacy.\(^83\) The Court’s only mention of international law fell within the footnotes that defined “refugee.” The petitioners’ claim of asylum as political refugees was not the focus of the case. The Court did not engage with the petitioners’ legal status but chose instead to focus on the returnees’ right to privacy.

In *Johnson v. Guzman Chavez*, the majority opinion does not include a reference to international asylum law whether in the body or footnotes. However, the dissenting Justices use it in their argument. On September 8, 2023, the Supreme Court, Justice Alito, reversed the ruling of the Court of Appeals of the Fourth Circuit which had affirmed the District Court ruling in favor of the noncitizens who had sought release or bond hearings as they awaited implementation of their reinstated removal from the United States.\(^84\) Maria Angelica Guzman Chavez et. al. were immigrants who returned to the U.S. without authorization following their removal. When DHS reinstated their removal orders, each respondent expressed fear at returning to their country of origin. All respondents were eventually detained and applied for bond hearings.\(^85\) The Court

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ruled against them, saying that migrants who are detained on reinstated orders of removal do not have a right to a bond hearing under § 1231.86

However, in a dissenting opinion, Justices Breyer, Sotomayor, and Kagan argue that the noncitizens returned to the U.S. following their removal due to a fear of “persecution or torture in the country to which the Government sought to send them.”87 Emphasizing the U.S. commitment to uphold international law, the Justices reiterated the fact that the immigration authorities had been in the process of determining whether the Government should grant the immigrants withholding-only relief in response to their fears.88 Continuing, they said that due to the new conditions of the immigrants’ removal, they do not fall under the scope of § 1231 and therefore should be granted a bond hearing. International law is cited only in the dissenting opinion as an argument for the U.S.’s obligation not to return individuals to a country where they may be vulnerable to harm.

Analysis of Cases

The reasoning behind why the Supreme Court chose to apply international law in the ways it did throughout the seven cases can be categorized into three explanations: strategic, legal, or ideological. These three reasons are used throughout existing academic literature in an attempt to better understand the motivations of Court decisions.89 Strategic judicial decision-making suggests that the Justices’ decisions reflect a move towards a long-term goal, in this case...

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legitimizing the Court, setting aside personal preferences in favor of achieving a larger vision.\textsuperscript{90} Contrastingly, the legal model asserts that a judge decides a case using a strict interpretation of statutes and previous case rulings, choosing rational application of the law over personal preferences.\textsuperscript{91} Ideological or attitudinal behaviors acknowledge the personal and community factors that create a ‘frame’ by which a Justice views the case.\textsuperscript{92} Taken in the context of these seven cases, the ideological judicial decision-making will reflect the inherent valuation given to international law in comparison to domestic law. While the core motives of the individual Justices are undeterminable from the cases, by examining the possible driving forces in the logic of the Court, it is easier to uncover possible implications of the Court’s actions or determine the desired outcome.

While the three reasons for judicial behavior do not perfectly align with the general use of international law as described earlier in the paper, certain trends do arise. Both cases that cite international law in an attempt to delineate domestic and international obligations are also both considered to be examples of legal judicial decision-making. Additionally, two out of the three cases used in statutory interpretation reflect strategic Court behaviors.

\textit{Strategic}

Of the many strategic reasons for the Supreme Court’s rulings, the two focused on here will address the desire to legitimize the Court and to uphold Congressional actions. In \textit{I.N.S. v. Stevic}, the Court’s explanation of international law suggests that the U.S. support of international


law stems from the preexisting principles in line with international law, rather than a change in policy as a reaction to accession to the treaty. Rather than stating this as rationale only the Court holds, the Court also cited acts of the legislative and judicial branches:

The President and the Senate believed that the Protocol was largely consistent with existing law. There are many statements to that effect in the legislative history of the accession to the Protocol. E.g., S.Exec.Rep. No. 14, 90th Cong., 2d Sess., 4 (1968) (“refugees in the United States have long enjoyed the protection and the rights which the protocol calls for”); id., at 6, 7 (“the United States already meets the standards of the Protocol”).

By introducing international law as an extension of the will of other branches of the federal government, the Court cements its standing as a court with domestic interests, rather than international ones. This expression of support for domestic statutes is strategic in that it quells fears of some Americans who believe that the Supreme Court and other federal courts should refrain from relying on foreign or international law as a primary source of legal authority. The use of international asylum law in *I.N.S. v. Stevic* supplements the federal laws and provides a standardization of wording for the asylum process across the globe, but the Court’s opinion is that it does not change what the United States has already done. In the Court’s majority opinion, Justice Stevens expressed that, “The amendment made three changes in the text of § 243(h) [of

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the 1980 Refugee Act, but none of these three changes expressly governs the standard of proof an applicant must satisfy or implicitly changes that standard."

Does this mean that international law lacks the power to change the substantive application of United States law? The question may be restated as “Does United States law allow for international law to affect its application?” Both questions remain largely unanswered as the Court’s interpretation of international law does not ever bring domestic law into conflict with the ratified treaty. However, by citing international law within the confines of domestic statutes, this seems to suggest a hierarchy between the two legal systems, in which international law is informative to domestic law but ultimately submissive, thus the Court successfully establishes itself as a court with domestic priorities.

The balance between domestic and international statutes is again seen in *I.N.S. v. Cardoza-Fonesca*. The Court’s attempt at safeguarding Congress’s intent reveals a loyalty of the Court to domestic law, while the tracing of Congress’s actions suggests Congress’s valuation of international commitments. The Court’s strategic use of relevant international laws pivotal to its opinion legitimizes the United States’ membership to the 1967 Protocol and suggests the Court’s intent to apply the provisions of the treaty. By legitimizing the country’s membership in the international treaty, the country bolsters its credibility when entering into future treaties. The incentive for the judicial branch to legitimize the Supreme Court thus must balance the goals of the other branches in strengthening the U.S. global political role. The proportion of the argument devoted to a discussion on international law is a valuable addition to the United States judicial system as it helps clarify the hierarchy between international law and domestic law. The framing in which international law is referenced comes in response to Congress’s motives behind the

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Refugee Act of 1980 which places international law as a secondary, though informative, source of legal power. For example, the subsection of the Court’s opinion entitled “The United Nations Protocol” states:

If one thing is clear from the legislative history of the new definition of “refugee,” and indeed the entire 1980 Act, it is that one of Congress' primary purposes was to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees, 19 U.S.T. 6223, T.I.A.S. No. 6577, to which the United States acceded in 1968.96

The Court’s discussion is thus one step removed from supporting international law, though the rhetoric used in the opinion of the Court is evidence of the Court’s view of international law as a legitimate tool for statutory interpretation. The Court’s discussion on the rejection of S. 643, 96th Cong., 1st Sess. (1979) further highlights the Court’s goal of fulfilling Congress’ intended purpose behind the Refugee Act of 1980; the differences in standards of proof between the new § 208(a) and the amended § 243(h)– despite being drafted simultaneously– suggest a congressional intent that is supported by the 1967 Protocol.97 The Court acknowledges the United States’ binding commitment to the 1967 Protocol, but uses it as an interpretative tool, similar to how it uses the Handbook on Procedures and Criteria for Determining Refugee Status to be “further guided by the analysis outlined in the Office of the United Nations High Commissioner for Refugees.”98 In this way, the Supreme Court uses international law to apply domestic statutes to

be in harmony with Congress’ attempt at adopting international law. Rather than fulfilling Congress’ goal by simply citing international law as a legal authority within the case, the Court chooses to look at international law so far as it informs them of Congress’ intent behind the domestic law, leaving the 1967 Protocol on comparably applicable terms with that of the nonbinding Handbook so far as it is used in statutory interpretation. The use of international law is only predictable so far as it coincides with U.S. interests, varying from case to case.

Legal

An alternative reason behind the Supreme Court’s use of international law is considered to be a legal motivation, understood as a simple legal application of the law void of prescriptive actions or vested interests.

Such is the case in Sale v. Haitian Centers Council, Inc. in which the Court maintains a clear balance between fulfilling the United States commitment under the 1951 Convention without extending the scope of the obligations within the treaty. While the Convention typically is thought of as a means whereby refugees secure rights, the Court’s use of it as an exclusionary tool shows the Court’s intent to uphold the provisions of the Convention only up to the specified limit. This decision is justified in regard to legal validity as well as in regard to protecting the interests of the state. In a footnote to the Court’s opinion, this adequate fulfillment of obligations is posed by emphasizing the lack of extraterritorial expectations under the 1951 Convention:

Even the United Nations High Commissioner for Refugees has implicitly acknowledged that the Convention has no extraterritorial application. While conceding that the Convention does not mandate any specific procedures by which to determine whether an
immigrant qualifies as a refugee, the “basic requirements” his office has established impose an exclusively territorial burden and announce that any immigrant protected by the Convention (and by its promise of non-refoulement) will be found either ‘at the border or in the territory of a Contracting State.’

By defining the limits of international law, the Court expresses the United States’ intent to go no further than uphold the expectations of the treaty. The minimum satisfaction of its international commitments may undermine the sentiment that the U.S. desires to uphold the principles of the treaty rather than just the provisions of it, however, it also creates an important delineation whereby other states can continue to hold authority while being members of international treaties. Dangers may arise from a lack of fulfillment of international commitments, but other dangers may arise out of an overfulfillment of international commitments. A lack of fulfillment essentially nullifies the treaty and sends a message to the international community that international treaties do not have legal standing even after ratification. An overfulfillment of commitments undermines state sovereignty and imbues international treaties with an extraterritorial expectation that would supersede the autonomy of states and lead to a conflict of power between states’ expectations of how to apply international treaties and the norms that surround them. Thus, the “why” behind the Supreme Court’s decision in Sale v. Haitian Centers Council, Inc. is best understood through the legal lens.

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100 While the United States may not face a legal obligation to act outside of the commitments of the treaty, emerging custom relating to interdiction of migrants at sea suggests the United States’ humanitarian obligation to allow the migrants safe passage from wherever they are fleeing from. See Reuters, Returning Sea Migrants to Libya Is Illegal, Italy’s Top Court Says, Reuters (February 18, 2024). https://www.reuters.com/world/africa/returning-sea-migrants-libya-is-illegal-italys-top-court-says-2024-02-18/.
Further constraints on the obligations of international treaties are laid out in *I.N.S. v. Aguirre-Aguirre*. Though the Court cites the United Nations Handbook (see *I.N.S. v. Cardoza-Fonesca*) as a guiding tool for statutory interpretation, the Court states that the Handbook on Procedures is not binding to the United States. By reiterating the limitations on the power of international guidance, the Court creates a more distinct delineation between where international legal obligations stop and domestic obligations start. The Court references its past opinion in *INS v. Cardoza-Fonesca* and reiterates that “one of Congress’ primary purposes” in the passage of the Refugee Act was to implement provisions of the 1967 Protocol. In defending its decision to bar entry to the immigrant due to his crimes, the Court quotes the 1951 Convention which says that the prohibition of refoulement “shall not apply to any person with respect to whom there are serious reasons for considering that ... he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee.” While the use of international law in these cases upholds the binding treaties of the 1967 Protocol and the 1951 Convention, the Court’s opinion also stresses the nonbinding nature of other international documents such as the Handbook. The Court balances the power of United States sovereignty while not undermining the legal status of international treaties.

The Court does not rely on international law in places where domestic law suffices as legal authority on the ruling. This is seen again in *U.S. Dept of State v. Ray*: The facts of this case are not matters of international asylum law so much as matters of freedom of information. Similar to *Negusie v. Holder*, the focus of the case is one step removed from determining the petitioners’ rights under asylum law, and thus the lack of reference to international law is mostly

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justified. The inclusion of the footnote on the 1967 Protocol does give international law more legitimacy in that it explicitly states that the US accession of the Protocol “obligates the United States to comply with the substantive requirements of Articles 2 through 34 of the United Nations Convention Relating to the Status of Refugees.”

The Court does not make an intentional effort to include international asylum law in the text of its opinion, but an inclusion of this would have likely been unjustified and would have distracted from the reason of the case. However, the statement of the United States’ foreign obligations within the footnote seems to suggest the Supreme Court’s acknowledgment of international law as more than just a statutory interpretation tool.

_Ideological_

Ideological reasonings behind the Court’s actions are not so easily distinguished, as the many professional revisions of the opinion tend to cause ideological opinion to fade in favor of a legal-based perspective. However, dissenting opinions of the Court offer insights into the motivations and considerations behind the case that may illuminate alternative reasons as to why the Court rules in the way it did. Of all the cases mentioning international asylum law, Negusie v. Holder cites international law the least, with the Court relying on domestic law for legal authority within the majority opinion. This shift in the use of international law likely stems from the fact that the case focused less on the petitioner’s well-founded fear of persecution and more on his status under the persecutor bar. The legal implications of the facts of this case may warrant this case to be categorized under the “legal” reasoning, however the dissenting opinions regarding the use of international law hint at a deeper decision than one of plain legal

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interpretation. While the Court’s official opinion is strong without the use of international law, the lack of acknowledgment of exceptions within international law seems to paint the Court in opposition to nonrefoulement. By ignoring the ways in which international law supports the Court’s decision, there is a gap in the explanation that fails to address the United States’ participation in international asylum law. The focus on domestic case law is better understood as the Court’s decision to remand the case was founded primarily on the lower court’s incorrect application of a domestic case. However, the lack of acknowledgment of international law which it may have strengthened the Court’s argument suggests a preference against relying on foreign legal instruments when possible.

Justice Stevens also points to this discretion in his dissenting opinion: “Other states parties to the Convention and Protocol likewise read the Convention's exception as limited to culpable conduct. When we interpret treaties, we consider the interpretations of the courts of other nations, and we should do the same when Congress asks us to interpret a statute in light of a treaty's language.” While the omission of international law may not change the ruling of the case, it implicates international law as secondary to domestic.

In other cases, however, an omission of international asylum law may lead to a different interpretation of the facts, such as in *Johnson v. Guzman Chavez*. The Court’s failure to acknowledge the fear of persecution of the noncitizens is a failure to uphold international commitments that the U.S. is bound to under its ratification of the 1967 Protocol and its domestic implementation of international refugee law in the passage of the Refugee Act of 1980. By ignoring the facts of the migrants’ situation upon their reentry to the U.S., the Supreme Court is

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placing domestic asylum law and previous asylum rulings above that of international law. If the noncitizens do have a well-founded fear of persecution, the failure of the courts to uphold international law did not begin with this hearing but rather when they were originally deported, unless the fear of persecution is a newfound fear that is aimed at the country to which they are being deported rather than the country from whence they came. In their dissenting opinion, Justices Breyer, Sotomayor, and Kagan state:

This restriction on removal when an alien fears persecution or torture embodies an important international legal obligation that the United States has undertaken…The United States also follows a policy that withholds or defers removal “of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture.” (implementing the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100–20, 1465 U. N. T. S. 85). These policy commitments, embodied in § 1231’s restriction-on-removal provision, apply to any alien ordered removed, including respondents, who are entitled to ask for withholding-only relief.”¹⁰⁸

The Justices choose the 1951 Convention on which they build their argument in favor of granting the asylees a bond hearing. It is noteworthy that the Justices reference international law in more than just the asylum context, leveraging provisions of the Convention Against Torture treaty. This use of international law contrasts greatly with the majority opinion. With the three Justices dissenting in this way, their grievances due to the lack of consideration of international law by

the majority are worth acknowledging. The Court’s majority decision to avoid a discussion on international law reflects an important omission that undermines the legitimacy of the legal instrument within U.S. federal law, reflecting a political choice to limit the foreign influence on domestic authority and autonomy.

Conclusion

International asylum law within the United States has been given codified support, though it faces varied levels of authority when applied within the confines of the domestic legal system. The Supreme Court’s use of international asylum law reflects its desire to uphold the United States’ international commitments while maintaining a distinction between international law and federal statutes. The Court favors domestic law, using international law as a supplemental instrument and statutory interpretation tool. At times, international law is disregarded in the Court’s majority opinion, leaving the discussion with gaps on when international law should rather than could be used in judicial decisions. The Court’s preference for domestic law is expected in that it seeks to legitimize its role as the high court of the country and does not want to jeopardize that role by relying on other legal systems.

While such preferences are important to maintaining authority in the U.S. federal courts, aversion to international law adds another layer to the implications of the Court decisions. Favoring to cite international law only under the auspices of Congressional actions or failing to cite international law at all in an asylum case suggests that the Courts hold a strict hierarchy of legal valuation that diminishes the power of international law within the borders of the United States. If such an aversion does not lead to conflict between the two legal systems, the greatest consequence is likely to be the status quo where international obligations are agreed to so far as
they do not require domestic changes. However, if the aversion to international law corresponds with a lack of compliance with said laws, the United States stands to weaken its integrity within the international system and calls into question the legitimacy of international legal instruments as a means of eliciting multilateral cooperation and the proliferation of liberal rights.

Further study is needed on asylum cases within the Supreme Court that do not have any reference to international law as these are the cases in which a Court decision may ignore international law to the extent that it conflicts with current international commitments. Complete omission of international law within the majority opinion or dissenting opinions is unlikely if there is a substantial clash between the ruling and international law, and such concern was mitigated in *Johnson v. Guzman Chavez* and *U.S. Dept of State v. Ray*. While the Supreme Court reflects the highest law of the land and thus will demand the cooperation of lower courts to coincide with its rulings, the application of such rulings is also worth further examination, specifically within immigration courts.