

INTERNATIONAL HUMAN RIGHTS IN AMERICAN COURTS

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I thank Dean Jeffries for his gracious introduction. It was much more generous and more interesting than I deserve. My usual introduction these days is “All rise.” I also thank the students of the University of Virginia for their invitation to deliver this year’s Ola B. Smith lecture. I will do my best to honor the lectureship and this great law school by what I have to say.

My topic is international human rights in American courts, prompted by the Supreme Court’s recent decision in *Sosa v. Alvarez-Machain*.¹ *Sosa*, in turn, may have been prompted at least in part by law review articles written by two professors with strong ties to this law school, Professors Bradley and Goldsmith, to whose work I will return in a moment. But let me begin at the beginning.

Immediately after the ratification of the Constitution, the First Congress got down to a matter of urgent business, the creation of a federal judicial system. The Judiciary Act of 1789,² passed in September of that year, did two things of interest to us. It established lower federal courts, both circuit and district,³ and it authorized those courts to exercise some of the subject matter jurisdiction described in Section 2 of Article III of the Constitution. For example, under Section 11 of the Act, the circuit courts were given original jurisdiction over controversies between citizens of different states in which the amount in controversy exceeded \$500.⁴ Under Section

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¹ 542 U.S. 692 (2004).

² Judiciary Act of 1789, 1 Stat. 73 (codified as amended at 28 U.S.C. § 1332 (2000)).

³ *Id.* §§ 3, 4, at 73–74.

⁴ *Id.* § 11, at 78 (“[T]he circuit courts shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five

9 of the Act, the district courts were given original jurisdiction over admiralty cases and some criminal cases.⁵

Most important for our purposes, Section 9 also gave the district court original jurisdiction over tort suits brought by aliens under the law of nations. The section was prompted by the Marbois affair, in which a French diplomat was attacked by another French citizen.⁶ This section could have been written narrowly to authorize jurisdiction only when “Ambassadors, other public Ministers and Consuls” were affected.⁷ So written, the section would have taken care of specific problems posed by the Marbois affair—the lack of state court jurisdiction over suits brought by foreign diplomats against other aliens. But the section was instead written more broadly to authorize party-based alienage jurisdiction, without restriction to cases affecting foreign diplomats.

hundred dollars, and . . . the suit is between a citizen of the State where the suit is brought, and a citizen of another State.”).

⁵ Id. § 9, at 76–77 (“[T]he district courts shall have, exclusively of the courts of the several States, cognizance of all crimes and offences that shall be cognizable under the authority of the United States, committed within their respective districts, or upon the high seas; where no other punishment than whipping, not exceeding thirty stripes, a fine not exceeding one hundred dollars, or a term of imprisonment not exceeding six months, is to be inflicted; and shall also have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction . . . where the seizures are made, on waters which are navigable from the sea by vessels of ten or more tons burthen, within their respective districts as well as upon the high seas; . . . and shall also have exclusive original cognizance of all seizures on land, or other waters than as aforesaid, made, and of all suits for penalties and forfeitures incurred, under the laws of the United States.”) (footnotes omitted).

⁶ See William R. Casto, *The Federal Courts’ Protective Jurisdiction Over Torts Committed in Violation of the Law of Nations*, 18 *Conn. L. Rev.* 467, 491–93 (1986) (“[I]n May, 1784, a cause celebre arose in Philadelphia that made the Congress rue the states’ inaction [in providing protection to ambassadors and other public ministers]. The Chevalier de Longchamps, a French adventurer of ‘obscure and worthless character,’ committed an assault and technical battery upon Mr. Marbois, the Secretary of the French legation.”) (internal citations omitted); William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the “Originalists,”* 19 *Hastings Int’l & Comp. L. Rev.* 221, 229–30 (1996) (“[A]n assault on the French Consul General in Philadelphia in 1784 must have added a sense of urgency to the issue [of most states’ failure to provide protection to ambassadors and other public ministers].”).

⁷ U.S. Const. art. III, § 2, cl. 2; see also id. § 2, cl.1 (“The judicial Power shall extend . . . to all Cases affecting Ambassadors, other public Ministers and Consuls.”).

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Section 9 provided:

[T]he district courts shall . . . have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States.⁸

Section 9 is now codified at 28 U.S.C. § 1350. The modern text is little changed from the original. It reads:

The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.⁹

There are two jurisdictionally interesting things about Section 9. First, Section 9 was designed to provide easy access to federal court, authorizing jurisdiction in district courts staffed by resident district judges, with no amount-in-controversy requirement. By contrast, Section 11 made access difficult, authorizing jurisdiction in circuit courts largely staffed by itinerant circuit justices, with a very high amount-in-controversy requirement. Second, although Section 9 premised jurisdiction on the presence of an alien as a party, it limited the exercise of that jurisdiction to only two specified sources of substantive right. By contrast, Section 11 premised jurisdiction on the presence of certain parties but in no way restricted the source of substantive right.

The two sources of substantive right in Section 9 were violations of United States treaties and torts in violation of the law of nations. There was no difficulty with subject matter jurisdiction over suits based on treaty violations. Such suits clearly came within the “arising under” jurisdiction of Section 2 of Article III,¹⁰ and I will not be concerned today with those suits.

Instead, my concern is tort suits for violations of the law of nations. There is no indication that the adopters of Section 9 thought at the time that subject matter jurisdiction was questionable in such suits. Oliver Ellsworth, the drafter of Section 9 (and later our third

⁸ Judiciary Act of 1789, § 9, 1 Stat. 73, 76–77 (1789).

⁹ 28 U.S.C. § 1350 (2000).

¹⁰ U.S. Const. art. III, § 2, cl. 1 (“The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . .”).

Chief Justice), may have believed that the mere presence of an alien was a sufficient basis for party-based alienage jurisdiction.¹¹ But the Supreme Court's 1800 decision in *Mossman v. Higginson* made clear that alienage jurisdiction was authorized under Article III only in suits between an alien and a nonalien, and thus that there was no jurisdiction over suits *between* aliens.¹²

As an alternative basis for subject matter jurisdiction, Ellsworth may also have believed that the law of nations was federal law in the jurisdiction-conferring sense.¹³ I could illustrate this point in various ways, but in honor of this state and its law school, I cite the work of an eminent Virginian, St. George Tucker. In 1803, Tucker wrote disapprovingly that Ellsworth and other federalists contended that the general law in noncriminal cases, including the law of nations, was federal law.¹⁴ But, whatever might have been believed in 1789, the debate over the character of general law was soon resolved in favor of Tucker and against Ellsworth and his fellow federalists. By the early nineteenth century, it was clear that the general law, including the law of nations, was not federal law in either the jurisdiction-conferring or supremacy-clause sense.¹⁵ When the Supreme Court squarely held in *Wheaton v. Peters* that there was no federal common law of copyright, declaring in 1834 that "there can be no common law of the United States,"¹⁶ it had been clear for at least a generation that the general law was not federal common law.

Perhaps in part because of doubts about subject matter jurisdiction, Section 9 essentially disappeared for almost 200 years. It reappeared in 1980, now codified at 28 U.S.C. § 1350. The case was

¹¹ See Casto, *supra* note 6, at 498, 515 n.273.

¹² 4 U.S. (4 Dall.) 12, 14 (1800); see also *Hodgson v. Bowerbank*, 9 U.S. (5 Cranch) 303, 304 (1809) (same).

¹³ See William S. Dodge, *The Constitutionality of the Alien Tort Statute: Some Observations on Text and Context*, 42 Va. J. Int'l L. 687, 710–11 (2002).

¹⁴ St. George Tucker, *Appendix to William Blackstone*, 1 Commentaries at note E, 430 (S. Tucker ed. & comm. 1803). Professor Dodge makes a version of this point, but he focuses on the parallel dispute about the nature of the common law of crimes. See Dodge, *supra* note 13, at 710–11.

¹⁵ See William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 Harv. L. Rev. 1513, 1523–25 (1984); Stewart Jay, *Origins of Federal Common Law: Part Two*, 133 U. Pa. L. Rev. 1231, 1263–66 (1985).

¹⁶ 33 U.S. (8 Pet.) 591, 658 (1834).

Filartiga v. Pena-Irala, decided by the United States Court of Appeals for the Second Circuit.¹⁷ The Paraguayan survivors of a Paraguayan national who had been tortured to death in Paraguay found the Paraguayan torturer in New York. They served process on the torturer and brought suit in federal district court under Section 1350, alleging a tortious violation of the law of nations. Relying in part on Justice Gray's famous statement in *The Paquete Habana* in 1900 that "[i]nternational law is part of our law,"¹⁸ Judge Irving Kaufman held for a unanimous panel of the Second Circuit that the basis for subject matter jurisdiction was "the law of nations, which has always been part of the federal common law."¹⁹ On the merits, the court held that "an act of torture committed by a state official against one held in detention violates established norms of the international law of human rights, and hence the law of nations."²⁰

Filartiga's holding that customary international law is federal common law accomplished two things. First, it solved the problem of subject matter jurisdiction. If customary international law is federal common law, a suit to enforce a right under that law is a suit "arising under" federal law within the meaning of Article III. Second, it instructed American courts that established norms of international human rights under customary international law were binding on all American courts as federal common law—including the state courts under the Supremacy Clause. That is, it held that customary international law is federal law in both the jurisdiction-conferring and supremacy-clause senses.

Filartiga was the beginning of a consistent line of cases in which the lower federal courts held that established norms of international human rights based on customary international law are part of the "law of nations" under Section 1350 and are part of the federal common law.²¹ But *Filartiga* was based on an ahistorical prem-

¹⁷ 630 F.2d 876 (2d Cir. 1980).

¹⁸ 175 U.S. 677, 700 (1900).

¹⁹ *Filartiga*, 630 F.2d at 885.

²⁰ *Id.* at 880.

²¹ See, e.g., *Jogi v. Voges*, 425 F.3d 367, 372 (7th Cir. 2005); *Aldana v. Del Monte Fresh Produce*, 416 F.3d 1242, 1246 (11th Cir. 2005); *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 247 (2d Cir. 2003); *Alvarez-Machain v. United States*, 331 F.3d 604, 611–612 (9th Cir. 2003) (en banc), rev'd sub nom. *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004); *United States v. Yousef*, 327 F.3d 56, 92–94 (2d Cir. 2003); *Doe v. Unocal Corp.*, 395 F.3d 932, 948 (9th Cir. 2002); *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d

ise. When Justice Gray wrote in *The Paquete Habana* that “international law is part of our law,” he did not mean that international law was federal law in the jurisdiction-conferring and supremacy-clause sense. Rather, he meant what such statements had meant ever since it had been settled that the general law was not federal common law.

Justice Gray meant that international law was “part of our law” in the sense that it was applied by American courts. In 1900, this law was still general law rather than federal law. As had been explained by St. George Tucker, almost 100 years earlier:

[A]s the matters cognizable in the federal courts, belong . . . partly to the law of nations, partly to the common law of England; partly to the civil law; partly to the maritime law . . . ; and partly to the general law and customs of merchants; and partly to the municipal laws of any foreign nation, or of any state in the union, where the cause of action may happen to arise, or where the suit may be instituted; so, the law of nations, the common law of England, the civil law, the law maritime, the law merchant, or the *lex loci*, or law of the foreign nation, or state, in which the cause of action may arise, or shall be decided, must in their turn be resorted to as the rule of decision, according to the nature and circumstances of each case, respectively.²²

In 1997, Bradley and Goldsmith challenged what had become the conventional wisdom under *Filartiga*, contending that under the concept of general law that prevailed at the time of the framing, international law was not federal law in either the jurisdiction-conferring or supremacy-clause sense.²³ I generally agree with their historical thesis. The dispute over the character of the general law had been quickly resolved in favor of the view, favored by St.

161, 164–65 (5th Cir. 1999); *Abebe-Jira v. Negewo*, 72 F.3d 844, 847 (11th Cir. 1996); *Kadic v. Karadzic*, 70 F.3d 232, 238–39 (2d Cir. 1995); *In re Estate of Ferdinand E. Marcos Human Rights Litig.*, 978 F.2d 493, 498–500 (9th Cir. 1992); *Amerada Hess Shipping Corp. v. Argentine Republic*, 830 F.2d 421, 425 (2d Cir. 1987), *rev'd on other grounds*, 488 U.S. 428 (1989); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 775–79 (D.C. Cir. 1984) (Edwards, J., concurring).

²² Tucker, *supra* note 14, at 430.

²³ Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 Harv. L. Rev. 815, 849–52 (1997).

George Tucker, that such law was not federal law. As soon as this was settled, there was no possibility that international law could have been considered federal common law. It was simply general law.

Bradley and Goldsmith's historical thesis was not new. It had already been articulated in various ways by international law experts such as Judge Jessup²⁴ and Professors Dickinson,²⁵ Trimble,²⁶ and Weisburd.²⁷ But Bradley and Goldsmith presented their thesis in a particularly forceful way as a direct challenge to human rights litigation in the American courts,²⁸ to the incorporation of *Filartiga's* holding into the Third Restatement of the Foreign Relations Law,²⁹ and to the unbroken line of lower court cases following *Filartiga*.³⁰

Four years after the Second Circuit's decision in *Filartiga*, the D.C. Circuit affirmed the district court's dismissal of an international human rights case in *Tel-Oren v. Libyan Arab Republic*.³¹ The court wrote a short per curiam opinion, with Judges Edwards, Bork and Robb each writing longer separate concurrences. Judge Edwards read *Filartiga* quite broadly,³² Judge Bork read *Filartiga* very narrowly,³³ and Judge Robb disagreed emphatically with *Filartiga*.³⁴ In the first sentence of his opinion, Judge Edwards wrote, "This case deals with an area of the law that cries out for clarification by the Supreme Court."³⁵ Now, twenty years later, the Su-

²⁴ Philip C. Jessup, *The Doctrine of Erie Railroad v. Tompkins Applied to International Law*, 33 *Am. J. Int'l L.* 740, 742-43 (1939).

²⁵ Edwin D. Dickinson, *The Law of Nations as Part of the National Law of the United States*, 101 *U. Pa. L. Rev.* 26, 49 (1952).

²⁶ Phillip R. Trimble, *A Revisionist View of Customary International Law*, 33 *UCLA L. Rev.* 665, 671 (1986).

²⁷ A.M. Weisburd, *State Courts, Federal Courts, and International Cases*, 20 *Yale J. Int'l L.* 1, 62-64 (1995).

²⁸ See also Curtis A. Bradley & Jack L. Goldsmith, III, *The Current Illegitimacy of International Human Rights Litigation*, 66 *Fordham L. Rev.* 319, 320 (1997).

²⁹ Restatement (Third) of the Foreign Relations Law of the United States §§ 111, 115 (1987).

³⁰ But cf. Harold Hongju Koh, *Is International Law Really State Law?*, 111 *Harv. L. Rev.* 1824, 1827 (1998) (challenging the thesis of Bradley and Goldsmith).

³¹ 726 F.2d 774 (D.C. Cir. 1984).

³² *Id.* at 777 (Edwards, J., concurring).

³³ *Id.* at 801 (Bork, J., concurring).

³⁴ *Id.* at 826 (Robb, J., concurring).

³⁵ *Id.* at 775 (Edwards, J., concurring).

preme Court has finally spoken in *Sosa v. Alvarez-Machain*.³⁶ What, if anything, has the Court clarified?

The facts of *Sosa* are as follows: A Mexican agent of the United States Drug Enforcement Administration (“DEA”) was interrogated and tortured, and then murdered, in Mexico. DEA officials believed that Alvarez-Machain (“Alvarez”), a Mexican doctor, had acted to prolong the DEA agent’s life in order to extend the interrogation and torture. At the behest of the DEA, a group of Mexican citizens including Sosa abducted Alvarez from his house in Mexico, held him overnight in a motel in Mexico, and transported him by private plane to the United States where he was arrested by federal officers. Alvarez was then tried in federal court for torture and murder.³⁷ The district court granted Alvarez’s motion for acquittal at the close of the government’s case. After the acquittal, Alvarez returned to Mexico and brought a civil suit against the United States under the Federal Tort Claims Act, and against Sosa under Section 1350, the Alien Tort Statute (“ATS”).³⁸ I am today concerned only with Alvarez’s suit against Sosa under the ATS.

If we put to one side Alvarez’s Federal Tort Claims Act suit against the United States, his ATS suit against Sosa was jurisdictionally identical to the suit in *Filartiga*. In both suits, an alien sued an alien for an alleged ATS tortious violation of customary international law outside the United States. Following *Filartiga*, the Ninth Circuit dealt with Alvarez’s claims by first stating what had become black-letter law: well established norms of customary international law are federal common law, enforceable in federal court under the ATS.³⁹ Going beyond *Filartiga* but following its own precedent, the Ninth Circuit next stated that the ATS authorizes federal courts to create federal common law by “creat[ing] a cause of action for an alleged violation of the law of nations.”⁴⁰ On the merits, the Ninth Circuit held that there is “a clear and universally recognized norm prohibiting arbitrary arrest and detention,”

³⁶ 542 U.S. 692 (2004), reversing *Alvarez-Machain v. United States*, 331 F.3d 604, 612 (9th Cir. 2003) (en banc).

³⁷ Alvarez unsuccessfully sought dismissal of the indictment based on an argument that his forcible abduction violated Mexico’s extradition treaty with the United States. See *United States v. Alvarez-Machain*, 504 U.S. 655 (1992).

³⁸ *Sosa*, 542 U.S. at 698–99.

³⁹ *Alvarez-Machain v. United States*, 331 F.3d at 612.

⁴⁰ *Id.*

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and that Alvarez had therefore stated a claim under federal common law.⁴¹

On certiorari to the Supreme Court, the government argued that the ATS was a bare jurisdictional statute, authorizing federal courts to hear suits within its jurisdictional grant but not directing the courts to create federal common law based on customary international law.⁴² The government argued further that customary international law is not federal common law.⁴³ Finally, the government directly attacked the entire line of lower court cases following *Filartiga* as an unwarranted interference with the prerogatives of the political branches. It wrote:

[T]he Section 1350-driven litigation that has spread in the federal courts since *Filartiga* illustrates the manner—and extent—to which permitting courts to recognize private rights of action based on their own assessment of customary international law is incompatible with the textual commitment of the control over international relations to the political branches.⁴⁴

Justice Souter wrote the majority opinion. Agreeing with the government, he concluded for the Court that the adopters of Section 9 of the Judiciary Act intended that the ATS be a bare grant of jurisdiction, without an accompanying direction to the court to create law.⁴⁵ But, disagreeing with the government, he concluded that at least part of the customary international law of human rights is federal common law. He wrote that the “jurisdictional grant is best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time.”⁴⁶ According to Justice Souter, there were three such violations under customary international law when the ATS was adopted—“violation of safe conducts, infringement of the

⁴¹ Id. at 620.

⁴² Brief for the United States as Respondent Supporting Petitioner at 12–28, *Sosa*, 542 U.S. 692 (No. 03-339); Reply Brief for the United States as Respondent Supporting Petitioner at 2–7, *Sosa*, 542 U.S. 692 (No. 03-339).

⁴³ Brief for the United States as Respondent Supporting Petitioner, *supra* note 42, at 28–46.

⁴⁴ Id. at 40.

⁴⁵ *Sosa*, 542 U.S. at 712–14.

⁴⁶ Id. at 724.

rights of ambassadors, and piracy.”⁴⁷ Justice Souter did not limit modern courts to enforcing only those three rights under customary international law, but he required that they be defined with comparable specificity: “we think courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized.”⁴⁸

Justice Souter counseled caution in finding federal common law based on customary international law. First, he wrote, the “prevailing conception of the common law has changed since 1789,” and “a judge deciding in reliance on an international norm will find a substantial element of discretionary judgment in the decision.”⁴⁹ Second, after the Court’s decision in *Erie Railroad Co. v. Tompkins*,⁵⁰ federal courts have sharply reduced their law-making role: “although we have even assumed competence to make judicial rules of decision of particular importance to foreign relations, such as the act of state doctrine, the general practice has been to look for legislative guidance before exercising innovative authority over substantive law.”⁵¹ Third, the creation of private causes of action generally should be left to the legislative branch.⁵² Fourth, federal courts should be particularly cautious in finding federal common law causes of action based on customary international law because of the “potential implications for the foreign relations of the United States of recognizing such causes.”⁵³ Finally, the federal courts “have no congressional mandate to seek out and define new and debatable violations of the law of nations.”⁵⁴

On the merits of Alvarez’s claim, Justice Souter concluded that no norm of customary international law, defined with sufficient clarity to qualify as federal common law, had been violated:

⁴⁷ Id. at 715.

⁴⁸ Id. at 725.

⁴⁹ Id. at 725–26.

⁵⁰ 304 U.S. 64 (1938).

⁵¹ *Sosa*, 542 U.S. at 726 (citation omitted).

⁵² Id. at 727.

⁵³ Id.

⁵⁴ Id. at 728.

Any credible invocation of a principle against arbitrary detention that the civilized world accepts as binding customary international law requires a factual basis beyond relatively brief detention in excess of positive authority. . . . It is enough to hold that a single illegal detention of less than a day, followed by the transfer of custody to lawful authorities and a prompt arraignment, violates no norm of customary international law so well defined as to support the creation of a federal remedy.⁵⁵

Justice Breyer concurred in the majority opinion, and wrote an intriguing separate opinion. In his view, judicially enforceable norms of customary international law should depend on the common practice and agreement among the courts of many nations:

Since enforcement of an international norm by one nation's courts implies that other nations' courts may do the same, I would ask whether the exercise of jurisdiction under the ATS is consistent with those notions of comity that lead each nation to respect the sovereign rights of other nations by limiting the reach of its laws and their enforcement.

. . . .

Today international law will sometimes similarly reflect not only substantive agreement as to certain universally condemned behavior but also procedural agreement that universal jurisdiction exists to prosecute a subset of that behavior. . . . That subset includes torture, genocide, crimes against humanity, and war crimes.⁵⁶

Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, objected to the entire enterprise. He agreed with the Court that the ATS was a bare jurisdictional statute, containing no direction to the federal courts to create federal common law.⁵⁷ But he argued vigorously that customary international law could never be federal common law enforceable under the ATS. Citing Bradley and Goldsmith, Justice Scalia wrote:

The notion that a law of nations, redefined to mean the consensus of states on *any* subject, can be used by a private citizen to

⁵⁵ Id. at 737–38.

⁵⁶ Id. at 761–62 (Breyer, J., concurring in part and concurring in the judgment).

⁵⁷ Id. at 743 (Scalia, J., concurring in part and concurring in the judgment).

control a sovereign's treatment of *its own citizens* within *its own territory* is a 20th-century invention of internationalist law professors and human-rights advocates. The Framers would, I am confident, be appalled by the proposition that, for example, the American peoples' democratic adoption of the death penalty could be judicially nullified because of the disapproving views of foreigners.⁵⁸

So, here we are, twenty-four years after the Second Circuit's decision in *Filartiga*, and twenty years after Judge Edwards' plea for clarification in *Tel-Oren*. We now know two things that perhaps we did not know before.

First, we know—because the Supreme Court has told us—that there is a federal common law of international human rights based on customary international law. We do not know very much about the precise content of that law, for the Court has refused to give us any modern examples of such rights. Rather, the Court has told us only that the rights must be defined with comparable clarity to the definitions of safe conducts, rights of ambassadors, and piracy in 1789. Justice Breyer suggested in his separate opinion that the list of such cognizable international human rights might include at least torture, genocide, crimes against humanity, and war crimes, but at this point we can only guess whether a majority of the Court will agree with any or all of the rights on Justice Breyer's list.

Second, we also know—though *not* because the Court has told us—that the federal common law of customary international law is federal law in both the jurisdiction-conferring and the supremacy-clause sense. I am somewhat surprised, given the lead-up to *Sosa*, that Justice Souter did not discuss the subject matter jurisdiction problem that has haunted the ATS from the beginning.⁵⁹ But despite its lack of discussion, the Court's decision necessarily implies that the federal common law of customary international law is jurisdiction conferring. Alvarez, a citizen of Mexico, sued Sosa, another citizen of Mexico, under the ATS. As we learned in 1800 in

⁵⁸ Id. at 749–50 (citations omitted).

⁵⁹ The only allusion to subject matter jurisdiction is a somewhat opaque footnote in which Justice Souter suggests that the ability of federal courts to “develop common law” in suits brought under the ATS, 28 U.S.C. § 1350, would not extend to suits brought under the general federal question jurisdiction statute, 28 U.S.C. § 1331. *Sosa*, 542 U.S. at 731 n.19.

Mossman v. Higginson, there can be no party-based jurisdiction when there are aliens on both sides of the case.⁶⁰ Thus, the only basis for the federal court to hear an alien versus alien suit under the ATS is the federal nature of the substantive claim.⁶¹ The jurisdiction-conferring nature of the federal common law under the ATS is similar, but not identical, to the federal common law under Section 301(a) of the Taft-Hartley Act in *Textile Workers Union v. Lincoln Mills*.⁶² The only difference is that under the Court's analysis in *Lincoln Mills*, the federal courts were authorized by Congress to develop a domestic common law of contracts. By contrast, under *Sosa* the federal courts are authorized to apply customary international law which, by definition, has largely been developed by other entities—by other countries and by the political branches of our government.

The Court's decision also necessarily implies that the federal common law of customary international law is federal law in the supremacy-clause sense. Supremacy is an inherent characteristic of any federal law, whether constitutional law, treaty law, statute law, or common law.⁶³ However, to say that the federal common law of customary international law is federal law in the supremacy-clause sense is not to say in which circumstances it will apply, or to say what preemptive force it might have. The difficulty of preemption issues is suggested by the number of recent cases in which the Supreme Court has dealt with preemption in a wholly domestic setting.⁶⁴ There is no reason to think that preemption issues posed by

⁶⁰ See supra note 12 and accompanying text.

⁶¹ Another basis for subject matter jurisdiction over Alvarez's ATS claim would have been supplemental jurisdiction under 28 U.S.C. § 1367(a), based on Alvarez's federal claim against the United States under the Federal Tort Claims Act, but the Court gave no hint that its jurisdiction over Alvarez's ATS claim was based on supplemental jurisdiction.

⁶² 353 U.S. 448, 450–51 (1957). See generally Alexander M. Bickel & Harry H. Wellington, Legislative Purpose and the Judicial Process: The Lincoln Mills Case, 71 Harv. L. Rev. 1 (1957).

⁶³ See *Tex. Indus. v. Radcliff Materials*, 451 U.S. 630, 641 (1981) (“[Where court-formulated federal common law applies], our federal system does not permit the controversy to be resolved under state law, either because the authority and duties of the United States as sovereign are intimately involved or because the interstate or international nature of the controversy makes it inappropriate for state law to control.”).

⁶⁴ See, e.g., *Empire Healthchoice Assurance, Inc. v. McVeigh*, 126 S. Ct. 2121 (2006) (Federal Employees Health Benefits Act of 1959); *Bates v. Dow Agrosciences LLC*, 544 U.S. 431 (2005) (Federal Insecticide, Fungicide, and Rodenticide Act); *Nixon v.*

the new federal common law of customary international law of human rights will be any easier. Indeed, I think they are likely to be harder.

I will address three types of cases in which such preemption issues will arise. They hardly exhaust the universe of possibilities, but they give a sense of the nature and range of the questions presented. The first is the paradigm *Filartiga* case—an entirely foreign case in which an alien, acting outside the United States, is alleged to have violated the human rights of another alien. The second is a hybrid case in which an American corporation, acting outside the United States, is alleged to have violated the human rights of an alien. The third is an entirely domestic case in which an American, acting in the United States, is alleged to have violated the human rights of another American.

First, the paradigm *Filartiga* case. I will not consider under this heading the behavior at issue in *Filartiga* itself, for torture is now governed by a modern federal statute, the Torture Victim Protection Act of 1991.⁶⁵ Instead, I will consider behavior constituting cruel, inhumane, and degrading treatment (“inhumane treatment”). Assume that the inhumane treatment took place in a foreign country, and that the victim as well as the perpetrator are citizens of that country. Further, assume that we have federal case law (which, of course, at the moment we do not) that tells us clearly that inhumane treatment does not violate a norm of customary international law established with sufficient clarity to satisfy the criteria of *Sosa*. That is, assume that under *Sosa* inhumane treatment does not violate the federal common law of international human rights cognizable in federal district court under the ATS.

Mo. Mun. League, 541 U.S. 125 (2004) (Telecommunications Act of 1996); Beneficial Nat'l Bank v. Anderson, 539 U.S. 1 (2003) (National Bank Act); Rush Prudential HMO v. Moran, 536 U.S. 355 (2002) (Employee Retirement Income Security Act); Buckman Co. v. Plaintiffs' Legal Comm., 531 U.S. 341 (2001) (Food, Drug, and Cosmetic Act); Geier v. American Honda Motor Co., 529 U.S. 861 (2000) (National Traffic and Motor Vehicle Safety Act of 1966).

⁶⁵ Pub. L. No. 102-256, § 2(a), 106 Stat. 73, 73 (1992) (codified at 28 U.S.C. § 1350 (2000)) (“An individual who, under actual or apparent authority, or color of law, of any foreign nation . . . subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or . . . [who] subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual’s legal representative, or to any person who may be a claimant in an action for wrongful death.”).

The victim learns that the perpetrator is in the United States, files suit in state court, and serves process on him in that state. To what degree, if any, is the state court constrained by the federal courts' conclusion that the behavior of the perpetrator has not violated federal common law? It is at least clear that the state court cannot apply the norm of customary international law against inhumane treatment as a matter of federal law. But what about two other possibilities: (1) Can the state court apply the norm simply as a matter of customary international law? (2) Can the state court incorporate the norm of customary international law into state law, and then apply that norm as a matter of state law?⁶⁶ Does the federal common law of international human rights—which does not recognize this norm—preempt the application by the state court of customary international law under either (1) or (2)? In other words, does the federal common law of international human rights operate not only as a floor (requiring state courts to enforce a federal common law norm) but also as a ceiling (preventing state courts from enforcing anything that is not a federal common law norm)?

At this early point in our understanding of the implications of *Sosa*, we cannot really answer these questions. But we can at least say this: at some point, an expansive definition and enthusiastic enforcement of international human rights by a state court—whether as a matter of pure international law, or of international law incorporated into state law—may well be preempted by the dormant implied international relations clause of the Constitution. Of course, there is no international relations clause; so the clause is only implied. And in the case we are imagining there is no federal legislation based on the implied international relations clause; so the implied clause is only dormant. But we know from such cases as *Zschernig v. Miller* that state laws can be preempted by this dormant implied clause.⁶⁷ To the degree that a state court decision

⁶⁶ These possibilities are explored in Ernest A. Young, *Sorting Out the Debate Over Customary International Law*, 42 Va. J. Int'l L. 365, 470–72 (2002); see also Daniel J. Meltzer, *Customary International Law, Foreign Affairs, and Federal Common Law*, 42 Va. J. Int'l L. 513 (2002); Michael D. Ramsey, *International Law as Non-preemptive Federal Law*, 42 Va. J. Int'l L. 555 (2002); Weisburd, *supra* note 27.

⁶⁷ 389 U.S. 429, 440–41 (1968); see also *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 413 (2003); *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373–74 (2000).

is preempted by the federal common law of international human rights, this part of human rights law would be, of course, controlled by federal law. Indeed, it would not be a misuse of language to say that such preemption is therefore also part of federal common law.

Second, the hybrid case. Assume that an American corporation engages in actions that result in the inhumane treatment of aliens. For example, assume that the American corporation is building a gas pipeline across a country with which the corporation is in a commercial partnership. Assume that the country, with the knowledge of its American corporate business partner, mistreats its own citizens to help build the pipeline. Further, assume, as above, that there is federal court case law telling us that the inhumane treatment in this case does not violate a norm of federal common law under the *Sosa* analysis. Finally, assume that the corporation is incorporated in California and has its principal place of business in California.

Several of the mistreated aliens file suit in state court in California against the American corporation, alleging violation of a norm of customary international law against inhumane treatment.⁶⁸ As above, we assume that no norm of federal common law has been violated. The same two possibilities as above remain: (1) Can the state court apply customary international law? (2) Can the state court incorporate customary international law into state law? But the preemption analysis has to be different in this case, for the state

⁶⁸ Compare the facts in this hypothetical with those in *Doe v. Unocal Corp.*, 395 F.3d 932, 939–40 (9th Cir. 2002), reh'g en banc granted, 395 F.3d 978 (9th Cir. 2003), vacated, 403 F.3d 708 (9th Cir. 2005). This case concerned allegations of forced labor. The court granted the parties' stipulated motion to dismiss and unopposed motion to vacate the district court's opinion. The parties settled after the Ninth Circuit had heard argument en banc and taken the case under submission pending the Supreme Court's decision in *Sosa*. See also *Aldana v. Del Monte Fresh Produce, N.A.*, 416 F.3d 1242, 1245 (11th Cir. 2005) (torture); *Abdullahi v. Pfizer, Inc.*, 77 F. App'x 48, 51 (2d Cir. 2003) (human medical experimentation); *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 237 (2d Cir. 2003) (pollution); *Deutsch v. Turner Corp.*, 324 F.3d 692, 704 (9th Cir. 2003) (slave labor); *Aguinda v. Texaco, Inc.*, 303 F.3d 470, 473 (2d Cir. 2002) (pollution); *Bano v. Union Carbide Corp.*, 273 F.3d 120, 122 (2d Cir. 2001) (toxic gas leak); *Bigio v. Coca-Cola Co.*, 239 F.3d 440, 443 (2d Cir. 2001) (property seizure); *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 92 (2d Cir. 2000) (torture); *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161, 163 (5th Cir. 1999) (environmental abuses, human rights violations, and cultural genocide); *Carmichael v. United Techs. Corp.*, 835 F.2d 109, 111 (5th Cir. 1988) (torture); *Abiodun v. Martin Oil Serv.*, 475 F.2d 142, 144 (7th Cir. 1973) (involuntary servitude).

court is applying either international law, or state law incorporating international law, to a corporation of that state. Whatever interest the national government may have in the uniform application of international human rights law in courts in the United States, that interest must be counterbalanced, to some degree, by the interest of the State of California in regulating the behavior of its own corporation.

Third, the entirely domestic case. Here, I take as my example capital cases in which the defendant contends that customary international law forbids the death penalty. The Supreme Court has recently, as a matter of federal constitutional law, limited the application of the death penalty for juveniles and the mentally retarded (and has received, incidentally, some criticism for indicating that it might have had some awareness of foreign law),⁶⁹ so for my purposes those cases are off the table. My concern is with death penalty cases in which defendants contend, based on customary international law, that capital punishment cannot be imposed under any circumstances.

In numerous federal and state cases, defendants have sought to use customary international law as a defense against any imposition of the death penalty. The defense failed in all of these cases.⁷⁰ There is nothing in *Sosa* indicating that a different answer will ever be compelled as a matter of federal common law. Justice Scalia need not be afraid that customary international law, incorporated into federal common law, will invalidate the death penalty in the

⁶⁹ See *Roper v. Simmons*, 543 U.S. 551, 574–78 (2005) (juveniles); *Atkins v. Virginia*, 536 U.S. 304, 317 n.21 (2002) (mentally retarded). For the criticism, see *Roper*, 543 U.S. at 624 (Scalia, J., dissenting) (“More fundamentally, however, the basic premise of the Court’s argument—that American law should conform to the laws of the rest of the world—ought to be rejected out of hand.”); Constitution Restoration Act of 2004, S. 2082, 108th Cong. § 201 (2004) (prohibiting federal courts from relying on “any constitution, law, administrative rule, Executive order, directive, policy, judicial decision, or any other action of any foreign state or international organization or agency, other than English constitutional and common law.”); Roger P. Alford, *Misusing International Sources to Interpret the Constitution*, 98 *Am. J. Int’l L.* 57 (2004).

⁷⁰ See, e.g., *Buell v. Mitchell*, 274 F.3d 337, 370–76 (6th Cir. 2001); *United States v. Bin Laden*, 126 F. Supp. 2d 290, 294 (S.D.N.Y. 2001); *People v. Brown*, 93 P.3d 244, 258–59 (Cal. 2004); *Booker v. State*, 773 So. 2d 1079, 1096 (Fla. 2000); *People v. Caballero*, 794 N.E.2d 251, 271–75 (Ill. 2002); *State v. Thompson*, 604 S.E.2d 850, 883 (N.C. 2004); *State v. Smith*, 532 S.E.2d 773, 795 (N.C. 2000); *State v. Phillips*, 656 N.E.2d 643, 671 (Ohio 1995); *State v. Odom*, 137 S.W.3d 572, 597–600 (Tenn. 2004); *Hinojosa v. State*, 4 S.W.3d 240, 251–52 (Tex. Crim. App. 1999).

United States. But the absence of a federal common law prohibition against the imposition of the death penalty almost certainly does not have any preemptive force. If a state court decides that the death penalty should be forbidden in prosecutions brought under state law, such a decision is entirely that state's business. Whether the state court so decides as a matter of customary international law, as a matter of state law that incorporates customary international law, or entirely as a matter of state law should make no difference. The federal government simply has no interest that would justify telling the state that it must impose the death penalty for state-law crimes.

So far, I have discussed these three types of cases only as they might be litigated in state court. But the federal courts will see such cases, too. Of the greatest interest are the first two types.

The first—the paradigm *Filartiga* case—cannot come into federal court on its own if there is no federal common law right that satisfies the criteria of *Sosa*. But such a case is cognizable in federal court based on supplemental jurisdiction under 28 U.S.C. § 1367(a).⁷¹ Indeed, in *Sosa* itself, Alvarez's claim against Sosa could have come into federal court under Section 1367(a) because of Alvarez's claim, in the same case, against the United States under the Federal Tort Claims Act. In other *Filartiga*-type cases, all that would be required would be a nonfrivolous (though ultimately losing) claim against an alien based on a federal common law right that satisfies the *Sosa* criteria.⁷² Once such a nonfrivolous common law claim is brought, the federal district court would have supplemental jurisdiction over all other human rights claims, whether those claims are based directly on customary international law or on state law that incorporates customary international law, so long as those claims meet the relatedness requirement of Section 1367(a).

⁷¹ 28 U.S.C. § 1367(a) (2000) (“[I]n any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.”).

⁷² See *Bell v. Hood*, 327 U.S. 678, 682–83 (1946).

The second can come into federal district court under alienage jurisdiction. The Supreme Court held in *Mossman v. Higginson* in 1800 that there was no subject matter jurisdiction over an alien-alien suit, but that holding does not extend to an alien-citizen suit.⁷³ Thus, there is subject matter jurisdiction when an alien sues an American corporation for violation of human rights under customary international law even where the right asserted does not satisfy the *Sosa* criteria.⁷⁴

In these cases, state court decisions on the role of customary international law may affect litigation in federal court. If the state court directly applies customary international human rights law that does not satisfy the *Sosa* criteria for federal common law, the federal court may choose to follow the state court's decision as a matter of general law, though I see nothing in *Erie* that would require it to do so. Further, if the federal court does not choose to follow the lead of the state court, I see nothing in *Sosa* to prevent the federal court from directly applying customary international law entirely on its own, just as the state court has done. Finally, if the state court incorporates customary international law into state law, a federal court sitting in that state will have no choice. It will be required by *Erie* to follow the state court's interpretation of its own state law, which, in this instance, has incorporated customary international law.⁷⁵

It is obvious from the foregoing that the Court's opinion in *Sosa* has only begun to tell us what we need to know. To paraphrase Judge Edwards in *Tel-Oren*: this case deals with an area of law that *still* cries out for clarification from the Supreme Court.⁷⁶

I close by quoting Professor Henkin, who has observed that "the nominal continuity in our jurisprudence masks radical development, much of it in our time."⁷⁷ It is true, as Bradley and Goldsmith have pointed out, that customary international law in the nineteenth century was general rather than federal law. It is also true

⁷³ 4 U.S. (4 Dall.) 12, 14 (1800).

⁷⁴ U.S. Const. art. III, § 2, cl. 1.

⁷⁵ See Young, *supra* note 66, at 470–74, for a discussion of the use of customary international law by federal courts in diversity cases.

⁷⁶ *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 775 (D.C. Cir. 1984) (Edwards, J., concurring).

⁷⁷ Louis Henkin, *International Law as Law in the United States*, 82 Mich. L. Rev. 1555, 1569 (1984).

that admiralty law during that period was general rather than federal law.⁷⁸ And it is also true that there was no such thing as federal common law during that period.

But, as Henkin has pointed out, our jurisprudential categories have changed radically in the last ninety years even while retaining a nominal continuity. General law, as a category of domestic law, disappeared in 1938 in *Erie Railroad Co. v. Tompkins*.⁷⁹ Admiralty law became federal law in 1917 in *Southern Pacific Co. v. Jensen*.⁸⁰ The act of state doctrine became federal common law in 1964 in *Banco Nacional de Cuba v. Sabbatino*.⁸¹ And part of the customary international law of human rights became federal common law in *Sosa* in 2004.

Given these changes, it is hard to argue that customary international law cannot be federal common law today simply on the ground that it was general law in the nineteenth century. It is equally hard to argue that customary international law should cease to be general law simply because domestic general law disappeared in 1938. If we are to be true to nineteenth century jurisprudential categories, customary international law should remain general law, unless and until specifically incorporated into state or federal law. If it remains general law, it is potentially applicable in the courts of the United States, both state and federal, just as it was in *The Paquete Habana*.⁸² But, of course, there is no necessary reason that this jurisprudential category should remain constant, any more than the other categories have done.

International human rights, as we understand them today, are a recent creation, and the Court's decision in *Sosa* is but a way station in what promises to be a long journey. To some slight degree *Sosa* has clarified the law of human rights in American courts, but it has left us with more questions than answers. The answers to those questions may be suggested by nineteenth century jurisprudential categories. But those questions can be fully and properly answered only by adapting our jurisprudence to the modern world,

⁷⁸ See Fletcher, *supra* note 15, at 1550–51.

⁷⁹ 304 U.S. 64, 78 (1938). But see Caleb Nelson, *The Persistence of General Law*, 106 *Colum. L. Rev.* 503 (2006).

⁸⁰ 244 U.S. 205, 215 (1917).

⁸¹ 376 U.S. 398, 425–26 (1964).

⁸² 175 U.S. 677 (1900).

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just as those who came before us adapted their jurisprudence to what was, for them, their modern world.