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RESPONSE

FEDERAL SUITS AND GENERAL LAWS: A COMMENT ON JUDGE FLETCHER'S READING OF *SOSA V. ALVAREZ-MACHAIN*

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EVERY academic can name an article or two that they wish *they* had written, and for me the top of that list has always been occupied by Judge William Fletcher's "The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance."[1] Judge Fletcher's essay is the best thing we have on the phenomenon of "general common law"—the law applied by both state and federal courts to commercial disputes before the regime of *Swift v. Tyson*[2] gave way to that of *Erie Railroad Co. v. Tompkins*.[3] The general common law was a form of customary international law ("CIL"); hence, the nature of the general law regime and the precise sense in which *Erie* altered that regime lie at the heart of contemporary debates about enforcement of a dif-

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[1] 97 Harv. L. Rev. 1513 (1984).

[2] 41 U.S. (16 Pet.) 1, 18–19 (1842) (holding that federal courts sitting in diversity are not bound to follow state court interpretations of the general common law that then governed commercial disputes).

[3] 304 U.S. 64, 78 (1938) (overruling *Swift* and holding that federal courts must ordinarily apply state law in the absence of an applicable federal statute or constitutional provision).

ferent kind of customary law—international human rights principles—in U.S. courts.[4] Commenting upon Judge Fletcher's reading of *Sosa v. Alvarez-Machain*,[5] the leading recent case on human rights claims under CIL, is thus a task that I approach with both great honor and some trepidation. Fortunately, our differences are less important than our areas of common ground.

I will start with the apparent disagreement. Judge Fletcher reads *Sosa* to establish "two things that perhaps we did not know before": First, "there is a federal common law of international human rights based on customary international law." Second, "the federal common law of customary international law is federal law in both the jurisdiction-conferring and the supremacy-clause senses."[6] If these two propositions are correct, then *Sosa* embraced the "modern position" on CIL—that is, the doctrine propounded by internationalist scholars but never before embraced by the Supreme Court, that CIL is equivalent to federal common law, and that such law necessarily both confers federal question jurisdiction on the federal courts and preempts contrary state law.[7] The only difference would be that, while internationalists generally claim that *all* CIL has federal common law status, *Sosa* clearly limited that status to a subset of customary law that can be identified with a much higher degree of definiteness than is ordinarily required.

I think reading *Sosa* to federalize the CIL norms enforced in Alien Tort Statute ("ATS") cases is mistaken and, what's more, that Judge Fletcher's overall position works better if he does not insist on this point. It is crucial to distinguish between the law that

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[4] See, e.g., Curtis A. Bradley, Jack L. Goldsmith & David H. Moore, *Sosa*, Customary International Law, and the Continuing Relevance of *Erie*, 120 Harv. L. Rev. 869 (2007).

[5] 542 U.S. 692 (2004). Judge Fletcher's essay is entitled International Human Rights in American Courts, 93 Va. L. Rev. In Brief 1 (2007), http://www.virginialawreview.org/inbrief/2007/03/22/fletcher.pdf.

[6] Fletcher, supra note 5, at 7.

[7] Compare, e.g., Curtis A. Bradley & Jack L. Goldsmith, Customary International Law as Federal Common Law: A Critique of the Modern Position, 110 Harv. L. Rev. 815 (1997) (arguing that CIL does not have the status of federal common law), with Harold Hongju Koh, Is International Law Really State Law?, 111 Harv. L. Rev. 1824 (1998) (defending the internationalist view). For my own contribution, see Ernest A. Young, Sorting Out the Debate Over Customary International Law, 42 Va. J. Int'l L. 365 (2002).

provides the substantive rule of decision in a case and the law that confers a right upon the plaintiff to bring the lawsuit. Most of the time, the same law that provides the plaintiff's cause of action will also supply the rule of decision on the merits. But this is not always the case. State law, for instance, may provide a cause of action in tort, but the plaintiff may elect to establish fault on a negligence per se theory by showing that the defendant violated a federal regulatory standard. The Federal Tort Claims Act provides a federal cause of action against federal officers but specifies that state law will provide the rule of decision on liability. The best reading of *Sosa*, in my view, is that the ATS presupposes that federal common law creates an implied right of action for aliens who have suffered a tort in violation of international law, but that the international law rule of decision retains the status that it has always had in American law—that is, it remains the sort of "general law" that Judge Fletcher discussed in his seminal article on marine insurance.[8]

Justice Souter wrote for the majority in *Sosa* that:

> [A]lthough the ATS is a jurisdictional statute creating no new causes of action . . . [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.[9]

We know that this cause of action is a federal one, because Justice Souter invoked both Judge Henry Friendly's "new federal common law" and the Court's more recent cases on implied federal rights of action under federal statutes.[10] Recognition of a federal cause of action is enough to decide *Sosa*, because it both provides the plaintiff

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[8] I develop this reading in slightly more detail in Ernest A. Young, *Sosa* and the Retail Incorporation of International Law, 120 Harv. L. Rev. F. (forthcoming Mar. 2007). See also Bradley, Goldsmith & Moore, supra note 4 (offering yet another reading of *Sosa* that is more similar to than different from both Judge Fletcher's reading and my own).

[9] *Sosa*, 542 U.S. at 724.

[10] See id. at 726–27 (citing Henry J. Friendly, In Praise of *Erie*—And of the New Federal Common Law, 39 N.Y.U. L. Rev. 383 (1964), and Alexander v. Sandoval, 532 U.S. 275 (2001)).

with a right to sue and brings the ATS within Article III's provision for federal question suits; it is well established, after all, that "[a] suit arises under the law that creates the cause of action."[11]

Nothing in *Sosa* suggests the Court meant to take the further step of federalizing the CIL rules of decision that would be enforced through the federal private right of action. Each time that the majority referred to those rules of decision, it was careful to describe them as "international" in character; at one point, for example, Justice Souter spoke of "private rights of action under an international norm."[12] Nowhere did he refer to the underlying customary principles as themselves federal in character. Federalizing those principles would not only be unnecessary to the decision in *Sosa*, but also unnecessary to the ATS's core purpose as described by the Court. It would also be inconsistent with Justice Souter's prior account, in the Eleventh Amendment cases, of the Founding Generation's great caution about incorporating the common law in federal (rather than state) jurisprudence.[13]

Most of Judge Fletcher's discussion is perfectly consistent with this distinction between causes of action and rules of decision. In fact, his account of *state* court autonomy in determining the extent to incorporate CIL arguably depends on treating customary norms as something other than federal in character. Judge Fletcher suggests that state courts should be free to recognize CIL norms, through their own state law procedural vehicles, outside the narrow categories approved in *Sosa*.[14] But if we read *Sosa* as federalizing CIL rules of decision, then it is hard to see why federal decisions to *exclude* certain norms from the category should not be just as binding on the states as decisions to *include* certain norms. The Judge's position becomes considerably more plausible—indeed,

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[11] See Am. Well Works Co. v. Layne & Bowler Co., 241 U.S. 257, 260 (1916). *American Well Works* was construing the statutory reach of 28 U.S.C. § 1331, but its conclusion applies a fortiori to Article III itself. A federal right of action is not a *necessary* condition for arising under jurisdiction, even under § 1331, but it is certainly a *sufficient* one. See Richard H. Fallon, Jr., Daniel J. Meltzer & David L. Shapiro, Hart & Wechsler's The Federal Courts and the Federal System 864 (5th ed. 2003).

[12] *Sosa*, 542 U.S. at 727.

[13] See Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 101–16 (1996) (Souter, J., dissenting).

[14] See Fletcher, supra note 5, at 8–10.

surely correct—if we view *Sosa* determinations about the definiteness of a particular CIL norm as simply determinations about the extent to which federal law will provide a right of action to enforce norms existing at the international level. More fundamentally, Judge Fletcher recognizes that, "[i]f 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."[15] That would be consistent with the general thrust of Justice Souter's opinion in *Sosa*, which sought to keep faith with the ATS drafters' assumptions while translating those assumptions into modern terms.

In the short space remaining, I want to underscore Judge Fletcher's argument that state courts should be free to develop their own interpretations of CIL and their own procedural vehicle for enforcing CIL norms, except where they are forbidden to do so by federal positive law. In particular, federal courts should refrain from stifling such efforts either through a broad reading of *Zschernig v. Miller*[16] or through dubious doctrines of foreign affairs removal. The *Zschernig* doctrine lacks any grounding in the constitutional text—hence Judge Fletcher's inspired and damning reference to the "dormant implied international relations clause"[17]—and the Supreme Court has never again applied it in the absence of some positive federal enactment. It is, moreover, unworkable in a world of globalization in which much of what states do can be expected to impact foreign affairs, and international law bears on much of what states do.[18] Foreign affairs removal—under which some lower courts have allowed removal from state court on the ground that a suit implicates federal foreign affairs *interests*,

[15] Id. at 13.

[16] 389 U.S. 429 (1968) (striking down an Oregon probate statute on the ground that it interfered with the federal conduct of foreign relations).

[17] See Fletcher, supra note 5, at 9.

[18] See generally Jack L. Goldsmith, Federal Courts, Foreign Affairs, and Federalism, 83 Va. L. Rev. 1617 (1997).

even though there is no federal law element in the case[19]—is an equally unsanctioned and uncabined judicial creation.[20]

What I want to stress here, however, are the practical advantages of state court experimentation with CIL rules of decision. Americans have traditionally resisted broad human rights treaties and broad readings of customary rights on the ground that wholesale importation of international norms might have far-reaching and unanticipated consequences for the U.S. legal system and, in particular, for the autonomy of state and local governments. A regime of narrow federal enforcement of a limited and traditional class of CIL norms, under *Sosa*, combined with state-by-state experimentation with a somewhat broader class of evolving CIL principles, may offer the best response to this perennial concern. This sort of *incremental* incorporation of CIL into domestic law would also significantly expand the set of American courts participating in the ongoing international discussion of the content of CIL. That may well be a good thing in itself, as CIL is far more likely to evolve in ways that are compatible with American values and interests if domestic courts are part of the conversation.[21]

Sosa spells the end of the classic internationalist position on CIL—that is, of categorical claims that all norms of CIL somehow have the status of federal common law. As Judge Fletcher's essay makes clear, however, the debate is just beginning, not only about which CIL norms qualify for federal enforcement under *Sosa*, but also about opportunities to enforce CIL outside the federal courts. All of these debates will be more coherent and fruitful if we distinguish clearly between international rules of decision and the federal-law cause of action that *Sosa* recognizes to enforce them.

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[19] See, e.g., Torres v. S. Peru Copper Corp., 113 F.3d 540 (5th Cir. 1997); Republic of the Philippines v. Marcos, 806 F.2d 344 (2d Cir. 1986).

[20] See, e.g., Ernest A. Young, Stalking the Yeti: Protective Jurisdiction, Foreign Affairs Removal, and Complete Preemption, 95 Cal. L. Rev. (forthcoming 2007).

[21] See, e.g., Ernest A. Young, Institutional Settlement in a Globalizing Judicial System, 54 Duke L.J. 1143, 1221–29 (2005) (developing this point).

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