THE FEDERAL COMMON LAW OF UNIVERSAL, OBLIGATORY, AND DEFINABLE HUMAN RIGHTS NORMS

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International law is part of United States law. Indeed, international law — or the "law of nations" in eighteenth century parlance — has been considered part of United States law since the founding. The Judiciary Act of 1789, the enabling legislation of Article III, establishes federal court jurisdiction over torts committed in violation of the law of nations. This provision, the Alien Tort Claims Act (ATCA), provides: "[D]istrict 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 treaty of the United States." Given the paucity of potential claims arising under eighteenth-century "law of nations," this provision predictably generated

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   [The Constitution was framed in firm reliance upon the premise, frequently articulated, that . . . the Law of nations in all its aspects familiar to men of learning in the eighteenth century was accepted by the framers, expressly or implicitly, as a constituent part of the national law of the United States . . . .]


few suits through the early years of the republic. The shockwaves of Nazi Germany, the “final solution,” and Nuremberg would, however, fundamentally alter the landscape of international law. Since the end of World War II, international law has regulated not only relations between states, but also relations between states and their citizens. Individual human rights are now indisputably part of the transnational legal system. This development created the juridical space necessary to revive the ATCA. Given the ever-widening consensus on the legal status of an inviolable core of international human rights, renewed interest in the ATCA was arguably inevitable.

*Filartiga v. Pena-Irala* was the breakthrough case. In *Filartiga* — aptly termed the “*Brown v. Board of Education* of domestic human rights litigation” — the Second Circuit Court of Appeals held that official torture violates the law of nations, and, therefore, gives rise to an actionable claim under the ATCA. Confronted with a constitutional challenge to the ATCA, the *Filartiga* court also held that Article III permitted such jurisdiction since the “law of nations,” as part of the federal common law, arises under the laws of the United States. *Filartiga* has since met with near uniform approval in the academy and federal courts. Only Judge

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9. *Filartiga*, 630 F.2d at 876.

10. *Id.* at 887 n.20 (“International law has an existence in the federal courts independent of acts of Congress . . . .”); *Id.* at 885 (“[T]he law of nations . . . has always been part of the federal common law”) (citing *The Paquete Habana*, 175 U.S. 677, 700 (1900) and *The Neireide*, 13 U.S. 388, 423 (1815)).

Bork's now-repudiated concurrence in *Tel-Oren v. Libyan Arab Republic* challenged the *Filartiga* holding that the ATCA provided a federal cause of action for certain international human rights violations. In short, a veritable consensus emerged that some subset of CIL, including certain international human rights norms, is part of federal common law.

I. THE REVISIONIST CRITIQUE: WHAT IS THE STATUS OF INTERNATIONAL LAW IN UNITED STATES LAW?

The *Filartiga* line now faces a new challenge. This emergent challenge to the consensus view, which Ryan Goodman and I have called the "revisionist position," questions the foundations of the *Filartiga* holding. This critique claims that the consensus view "is the result of a combination of troubling developments, including mistaken interpretations of history, doctrinal bootstrapping by the Restatement (Third) of Foreign INT'L L. 1 (1981); Symposium: Federal Jurisdiction, Human Rights, and the Law of Nations: Essays on Filartiga v. Pena-Irala, 11 GA. J. INT'L & COMP. L. 305 (1981).


13. *Tel-Oren* 726 F.2d 774 (D.C. Cir. 1984) (Bork, J., concurring). See also Michael Ratner & Beth Stephens, *Tyrrants, Terrorists and Torturers Brought to Justice; United States Courts Provide Compensation for Victim*, NEW YORK L.J., May 15, 1995, at S5. ("Judge Bork's opinion is the only judicial opinion calling *Filartiga* into question. Since then every decision has supported the result reached in *Filartiga*; most have awarded substantial damages.").


Relations Law, and academic fiat.” Professors Curtis Bradley and Jack Goldsmith suggest that — contrary to Filartiga’s holding — CIL is not federal law absent political branch authorization and, as a consequence, federal courts should have limited, if any, jurisdiction over claims arising under CIL. Furthermore, the revisionists argue that if CIL is not part of federal common law, ATCA suits between non-citizens would be unconstitutional for failure to fit under any of Article III’s provisions. Indeed, the doctrinal consequences of the revisionist critique are potentially crippling for the Filartiga line.

The normative force of the revisionist position rests on two related concerns. First, the revisionists suggest that international law increasingly regulates “many areas that were formerly of exclusive domestic concern.” Second, the revisionists decry the “new CIL,” which governs a broad range of juridical relationships, emerges quickly, and is less consent-based than traditional CIL. Thus, the revisionists conclude that the “new CIL” has many potentially troubling doctrinal implications: federal CIL might preempt an unacceptably broad range of state laws; and federal CIL might involve federal courts in issues best left to the political branches; and federal CIL might potentially invalidate inconsistent, democratically-produced United States political branch action. Under the revisionist view, these concerns counsel against the wholesale incorporation of CIL

17. A word on the parameters of my analysis is in order. First, in this short presentation, I will not provide an in-depth explication of Bradley and Goldsmith’s position. For a summary of their argument, see Goodman & Jinks, supra note 15, at 470-79. The steps of the argument are far more nuanced than I will discuss, however, the objections I raise here center on the applicability of this critique to ongoing ATCA litigation. Second, I will not discuss the implications of the Torture Victim Protection Act. For an excellent, succinct discussion of the TVPA’s relevance to this debate, see Ryan Goodman, Congressional Support for Customary International Human Rights Law as Federal Common Law: Lessons of the Torture Victim Protection Act, 4 ILSA J. COMP. & INT’L L. (forthcoming 1998). This short Article draws on a more extended piece I co-authored with Ryan Goodman, supra note 15. Article written by Ryan Goodman and I. See Ryan Goodman & Derek P. Jinks, Filartiga’s Firm Footing: Federal Common Law and International Human Rights, 66 FORDHAM L. REV. (forthcoming 1997). This piece summarizes one of the arguments we advance in that Article.
19. See id. at 838-42.
20. See id. at 839-40.
21. See id. at 840-41.
22. See id. at 841-42.
23. See id. at 846-47.
24. See Bradley & Goldsmith, supra note 12, at 844-46.
25. Id. at 857-58, 868-69.
into federal common law. Bradley and Goldsmith thus conclude that absent political branch authorization, CIL is not federal law.26

Although the revisionist position can, and has been, discredited along many fronts, I focus here on one argument.27 My claim is that close examination of actual judicial practice deprives the revisionist critique of all normative force. Federal courts do not incorporate the “new CIL” without a searching inquiry that satisfies the revisionist concerns over democracy, separation of powers, and federalism. Thus, the actual nature of judicial inquiries and the resultant findings merit further inspection.

II. INTERNATIONAL HUMAN RIGHTS LAW IN UNITED STATES COURTS: THE STRUCTURE OF ATCA LITIGATION

The structure of controlling case law lends little support to the revisionist critique. Indeed, the revisionist critique cautions against the wholesale incorporation of CIL into federal common law without ever analyzing the categories of CIL norms that courts actually deem judicially cognizable. The structure of current ATCA litigation supports two related conclusions. First, federal courts have developed a rigorous analytical framework delimiting the application of international law in United States courts; and second, this framework has, in practice, recognized a set of wholly unobjectionable CIL claims. In short, the Filartiga line of cases appropriately fashions a federal common law of universal human rights norms.

Federal courts utilize a stringent tripartite test for assessing whether an alleged act constitutes an actionable CIL claim. Filartiga established that, under the ATCA, judicially cognizable CIL must be 1) universal; 2) obligatory (as opposed to hortatory or aspirational); and 3) definable.28 This tripartite test effectively limits the range of actionable

26. See id. at 868, 870; Bradley & Goldsmith, supra note 15, at 1.
28. Filartiga, 630 F.2d at 885-87; see also In re Estate of Ferdinand Marcos, Human Rights Litigation II, 25 F.3d 1467, 1475 (9th Cir. 1994) (citing Filartiga, 630 F.2d at 885-87) (“We thus join the Second Circuit in concluding that the Alien Tort Act, 28 U.S.C. § 1350 (1982), creates a cause of action for violations of specific, universal and obligatory international human rights standards . . . ”); Forti v. Suarez-Mason I, 672 F. Supp. 1531, 1539-40 (N.D. Cal. 1987) (citing Filartiga, 630 F.2d at 881) (other citations omitted) (“The contours of the requirement have been delineated by the Filartiga court and by Judge Edwards in Tel-Oren . . . . “)
claims to a small subset of CIL, namely, *jus cogens* (or “compelling law”) norms. Therefore, successful ATCA plaintiffs must raise claims based on *jus cogens* norms,29 a short list of settled, peremptory norms.30 Accordingly, the three prongs of the ATCA’s “*jus cogens* test”31 enable a delimited but fundamentally important category of legal norms to succeed.

Discernible patterns have emerged in ATCA litigation. Utilizing the “*jus cogens* test,” federal courts have identified some clearly actionable CIL norms including: genocide,32 official torture,33 extra-judicial killing,34

This ‘international tort’ must be one which is definable, obligatory (rather then hortatory), and universally condemned.”); Xuncax v. Gramajo, 886 F. Supp. 162, 184 (1995).


30. The notion of *jus cogens* employed in ATCA litigation closely tracks, but does not mirror, the conventional understanding of this term in public international law. *See*, e.g., Xuncax v. Gramajo, 886 F. Supp. 162, 184 (1995) (drawing on notion of non-derogability in holding that “the prohibition against [the action] is non-derogable and therefore binding at all times upon all actors.”); Doe v. Unocal, 1997 U.S. Dist. LEXIS 5094, *27 (C.D. Cal. March 25, 1997) ("[U]nder the ATCA, jurisdiction may be based on a violation of a *jus cogens* norm which enjoys the highest status within international law.") (citations omitted); *In re Estate of Ferdinand Marcos, Human Rights Litigation I*, 978 F.2d 493, 503 (9th Cir. 1992) (invoking suit of wrongful death “by official torture in violation of *jus cogens* norm of international law, properly invokes the subject-matter jurisdiction of the federal courts under § 1350”); Siderman v. Argentina, 965 F.2d 699, 717 (9th Cir. 1992) (“In *Filartiga*, though the court was not explicitly considering *jus cogens*, Judge Kaufman’s survey of the universal condemnation of torture provides much support for the view that torture violates *jus cogens*.”).

31. Ryan Goodman and I have elsewhere described the contours of the “*jus cogens* test” in some detail. *See* Goodman & Jinks, supra note 15, at 494-511.


33. *See*, e.g., *Filartiga*, 630 F.2d 876, 881 (2nd Cir, 1980) (“[T]here are few, if any, issues in international law today on which opinion seems to be so united as the limitations on a state’s power to torture persons held in its custody.”); Cabiri v. Assasie-Gyimah, 921 F.Supp. 1189,1196 (S.D.N.Y. 1996) (alleging acts of the defendant violated “a fundamental principle of the law of nations: the human right to be free from torture”); *In re Estate of Ferdinand Marcos*, 978 F.2d 493, 498 (citing Siderman v. Argentina, 965 F.2d 699, 717 (9th Cir. 1992)) (explaining that it is “unthinkable” to hold that official torture does not violate customary international law); *Forti*, 672 F.Supp. 1531, 1541 (expressing “no doubt” that official torture is cognizable §1350 violation of law of nations).

disappearances, and prolonged arbitrary detention. Likewise the federal courts have uniformly rejected a (much broader) range of CIL. Note that many of these norms are arguably CIL, but they fail to meet the "jus cogens test." The list of unsuccessful claims includes: expropriation of property, fraud, negligence in aircraft crashes and mismanaged sea


36. See, e.g., Forti, 672 F. Supp. 1531, 1541-42 (holding that prolonged arbitrary detention has "sufficient consensus . . . is obligatory, and is readily definable."

37. See, e.g., Jafari v. Islamic Republic of Iran, 539 F.Supp 209, 214-15 (N.D. Ill. 1982); Guinto v. Marcos, 654 F. Supp. 276 n.1 (S.D. Cal. 1986) ("While there is no consensus on what constitutes a violation of the 'law of nations,' in one area there appears to be a consensus. A taking or expropriation of a foreign national's property by his government is not cognizable under § 1350.")


39. See Benjamin v. British Europena Airways, 572 F.2d 913, 916 (2nd Cir. 1978) (finding that no evidence supports the claim that negligence constitutes law of nations violation).
vessels, free speech, libel, child custody law, and financial misconduct.

The degree of consensus in ATCA litigation is remarkable. Indeed, federal courts are divided on the status of only one CIL norm: the prohibition of cruel, inhuman, or degrading treatment. While the norm clearly satisfies the requirements of universal condemnation and obligatory prohibition, federal courts have disagreed about the definability of the norm.

Significantly, federal courts have closely guarded against any unwarranted expansion of the jus cogens category. The range of potential jus cogens violations are, of course, not a fixed set. Other norms may at some point assume the character of a universal, obligatory norm, and

40. See Damaskinos v. Societa Navigacion Interamericana, S.A., Pan., 255 F. Supp. 919, 923 (S.D.N.Y. 1966) ("Negligence in providing a seaman with a safe place in which to work, and unseaworthiness of a vessel in that respect, are not violations of the law of nations."); Lopes v. Reederei Richard Schroder, 225 F.Supp. 292, 294-95 (E.D. Pa. 1963) (stating doctrine of unseaworthiness that allowed compensation for seamen beyond maintenance and cure was particular American principle not found under law of nations); see also Khedivial Line, S.A.E. v. Seafarers’ Int’l Union, 278 F.2d 49, 51-52 (2nd Cir. 1960) (per curiam) (denying ATCA jurisdiction because unrestricted right of access to harbors by vessels of all nations not a part of law of nations).

41. See Guinto, 654 F. Supp. 276, 280 ("However dearly our country holds First Amendment rights . . . a violation of the First Amendment right of free speech does not rise to the level of such universally recognized rights and so does not constitute a ‘law of nations.’").

42. See Akbar v. New York Magazine Co., 490 F.Supp 60, 63 (D.C.C. 1980) ("No treaty concerning libel has been noted nor allegedly violated, and plaintiffs have not alleged any violation of “t.u.e law of nations” as the term has been interpreted by the courts.").

43. See, e.g., Huynh Thi Anh v. Levi, 586 F.2d 625, 630 (6th Cir. 1978) ("[T]he ‘law of nations,’ to the extent that it speaks on the subject, does not demand a particular substantive rule regarding custody of alien children.").

44. See Valanga v. Metropolitan Life Insurance Co., 259 F.Supp 324, 328 (E.D.Pa. 1966) (refusal of life insurance company to pay proceeds is not law of nations violation nor approaches the calibre of cases legitimately found under § 1350); cf. Cohen v. Hartman 634 F.2d 318, 319 (5th Cir. 1981) (holding that converted funds between employer and employee does not involve: a) internal relations nor; b) affect national sovereignty and thus in no way a law of nations violation).

45. One court has rejected such claims. See Forti v. Suarez-Mason I, 672 F. Supp. 1531, 1539-40 (N.D. Cal. 1987) ("Because this right lacks readily ascertainable parameters, it is unclear what behavior falls within the proscription . . . . Lacking the requisite elements of universality and definability, this proposed tort cannot qualify as a violation of the law of nations."). Conversely, one federal court, after considering the reasoning of the Forti court, allowed the claim. See Xuncax, 886 F. Supp. 162, 187.

46. See, e.g., Xuncax, 886 F. Supp. 162, 189 ("[C]aution is required in identifying new violations of jus cogens."); Forti I, 672 F.Supp, at 1542-43 ("Before this Court may adjudicate a court claim under §1350, it must be satisfied that the legal standard it is to apply his one with universal acceptance and definition; on no other bases may the Court exercise jurisdiction over a claimed violation of the law of nations.").
definable. This is the nature of an evolving legal order. Nevertheless, federal courts have clearly exercised great caution in determining whether an alleged offense constitutes such a violation.

III. RETHINKING REVISIONISM: THE LESSONS OF THE ATCA LITIGATION

Several lessons can be gleaned from the Filartiga case line. First, the structure of the litigation underscores the distinction between CIL, in general, and actionable CIL. The potentially troubling features of the new CIL, while thought-provoking, are largely irrelevant to the ATCA line. Second, prevailing judicial practice demonstrates the systematicity of the Filartiga line. The uniform results in the case law eviscerate the importance of the revisionist charge that CIL is “often unwritten . . . unsettled . . . difficult to verify;”47 the “contours [of which] are often uncertain.”48 At worst, such characterizations might be relevant to borderline inquires. However, these characteristics cannot be fairly attributed to justiciable or jus cogens CIL. Components of CIL that are “difficult to verify” or “uncertain” simply do not survive the rigorous standard articulated by federal courts.

Finally, the specific norms that federal courts have incorporated — genocide and torture for example — are decidedly unobjectionable. Bradley and Goldsmith refer only to deeply disputed norms, such as the death penalty, when articulating the dangers of the Filartiga line. Their critique, however, is not persuasive when applied to genocide, torture, or summary executions. The illegal character of these actions is beyond reproach. With respect to this category of CIL, it seems absurd to suggest that the incorporation of such norms produces anti-democratic outcomes frustrating the legitimate ambitions of states or the electorate.

The structural concerns that animate the revisionist critique simply do not implicate the current international human rights litigation. In this sense, Bradley and Goldsmith are tilting at windmills. The incorporation of CIL takes place against the backdrop of many jurisprudential and institutional safeguards designed to frustrate the wholesale incorporation of CIL. At a minimum, the revisionist challenge loses all persuasive appeal when applied to the ATCA litigation. Indeed, the Filartiga line has appropriately fashioned a federal common law of universal, obligatory, and definable human rights norms.

47. Bradley & Goldsmith, supra note 12, at 855.
48. Id. at 858.