

## ARTICLE

### Customary International Law and Private Rights of Action

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It has been twenty years since the US Court of Appeals for the Second Circuit issued its landmark decision in *Filartiga v Pena-Irala*.<sup>1</sup> In upholding federal court jurisdiction over a suit between aliens concerning violations of international human rights standards in a foreign country, the court in *Filartiga* paved the way for modern international human rights litigation. As Professor David Bederman has observed, “[i]n a sense, all current human rights litigation owes its fortune to *Filartiga*.”<sup>2</sup>

Since *Filartiga*, US courts have been confronted with two waves of international human rights litigation. The first wave has primarily involved suits, like *Filartiga* itself, between aliens concerning alleged human rights abuses occurring outside the United States. This wave has been moderately successful. While enforcement of judgments is often a problem in these cases, many courts have at least been receptive to hearing the plaintiffs’ claims. In recent years, litigants have increasingly attempted to apply the principles developed in this first wave litigation to suits against domestic defendants. This “second wave” litigation has been much less successful than the first wave. More importantly, the failure of this litigation—especially in cases involving US plaintiffs—has the potential to unravel some of the successes achieved in the first wave. To understand this point, some background is necessary.

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1. 630 F2d 876 (2d Cir 1980).

2. David J. Bederman, *Dead Man’s Hand: Reshuffling Foreign Sovereign Immunities in Human Rights Litigation*, 25 Ga J Intl & Comp L 255, 256 (1995).

## I. STATUS OF CUSTOMARY INTERNATIONAL LAW

There are two principal types of international law—treaties and customary international law. International human rights litigation has not primarily involved treaty claims. There are of course many treaties today that govern human rights, but the United States either has not ratified these treaties, or it has declared them to be non-self-executing—that is, not enforceable in US courts until implemented by Congress. Consequently, international human rights litigation in the United States is primarily based on claims under customary international law—the law that “results from a general and consistent practice of states followed by them from a sense of legal obligation.”<sup>3</sup>

The text of the Constitution says little about the domestic status of customary international law. It says a number of things about the status of treaties—in particular, it tells us that they are part of the supreme law of the land and that federal courts may hear cases arising under them.<sup>4</sup> The only reference in the Constitution to customary international law, however, is a grant of statutory power to Congress to define and punish offenses against customary international law (referred to at the time of the founding as part of the “law of nations”).<sup>5</sup>

In several decisions in the 19th and early 20th centuries, the Supreme Court referred to the law of nations as “part of our law” or “part of the law of the land.”<sup>6</sup> In practice, courts treated customary international law as general common law—a background source of law for federal and state courts in the absence of any federal or state legislation to the contrary. Federal court interpretations of this general common law were not binding on the state courts, and claims arising under this general common law did not fall within the federal question jurisdiction of the federal courts.<sup>7</sup>

In *Erie Railroad v Tompkins*,<sup>8</sup> the Supreme Court held that federal courts were no longer free to apply general common law—the choice was either federal law or state law.<sup>9</sup> On the same day it decided *Erie*, however, the Court held that for some issues it is appropriate for federal courts to create federal common law—common law that is truly federal in that it is binding on the states and provides a basis for federal question

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3. 1 Restatement (Third) of Foreign Relations § 102(2) (1987).

4. See US Const Art VI, cl 2 (“[A]ll Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land.”); US Const Art III, § 2, cl 1 (“The judicial Power shall extend to all Cases, in Law and Equity, arising under . . . Treaties.”).

5. See US Const Art I, § 8, cl 10 (“The Congress shall have Power . . . [t]o define and punish . . . Offences against the Law of Nations.”).

6. See *The Paquete Habana*, 175 US 677, 700 (1900); *Hilton v Guyot*, 159 US 113, 163 (1895); *The Nereide*, 13 US (9 Cranch) 388, 423 (1815).

7. See, for example, *Ker v Illinois*, 119 US 436, 444 (1886); *New York Life Ins Co v Hendren*, 92 US (2 Otto) 286, 286–87 (1875).

8. 304 US 64 (1938).

9. *Id* at 78.

jurisdiction.<sup>10</sup> The Supreme Court has not had occasion since *Erie* to resolve the status of customary international law. There is dicta in the Supreme Court's *Sabbatino* decision<sup>11</sup> that could be read as endorsing a federal common law status for customary international law,<sup>12</sup> but that was not the holding of the Court; indeed, the Court in *Sabbatino* refused to apply in that case customary international law governing expropriation of foreign citizen property.

In 1980, however, the Second Circuit held in *Filartiga* that customary international law has the status of post-*Erie* federal common law.<sup>13</sup> As such, cases arising under customary international law, the court said, fell within the federal court jurisdiction allowed by Article III for cases "arising under . . . the Laws of the United States."<sup>14</sup> On that basis, the court held that it was constitutional for federal courts to exercise jurisdiction over tort claims based on customary international law even when the parties are not diverse.<sup>15</sup> A number of other lower federal courts have since agreed with *Filartiga* on this point, and several of these courts have even described the proposition that customary international law has the status of federal common law as "settled."<sup>16</sup>

This conclusion can be challenged on a number of grounds,<sup>17</sup> but that is not my focus here. My focus is instead on whether customary international law confers an individual right to sue in US courts, also known as a "private right of action." It is worth noting, however, that some of the arguments that have been made against federal common law status for customary international law—such as the argument that the federalization of such law is properly a task for the elected political branches rather than the courts, and the argument that the political branches have implicitly precluded such federalization in the human rights area by virtue of the limitations they have imposed on human rights treaties—turn out to be relevant to the private right of action issue as well.

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10. See *Hinderlider v La Plata River & Cherry Creek Ditch Co*, 304 US 92, 110 (1938).

11. See *Banco Nacional de Cuba v Sabbatino*, 376 US 398 (1964).

12. *Id.* at 425–26.

13. See *Filartiga*, 630 F2d at 886.

14. US Const Art III, § 2.

15. *Filartiga*, 630 F2d at 886. The court based statutory jurisdiction on the Alien Tort Statute, 28 USC § 1350 (1994), which is discussed below. See text accompanying notes 25–28.

16. See, for example, *Kadic v Karadzic*, 70 F3d 232, 246 (2d Cir 1995); *In re Estate of Marcos, Human Rights Litigation*, 25 F3d 1467, 1473 (9th Cir 1994); *Xuncax v Gramajo*, 886 F Supp 162, 193 (D Mass 1995).

17. See Curtis A. Bradley and Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 Harv L Rev 815 (1997); Curtis A. Bradley and Jack L. Goldsmith, *Federal Courts and the Incorporation of International Law*, 111 Harv L Rev 2260 (1998).

## II. THE PRIVATE RIGHT OF ACTION ISSUE

Even if customary international law is federal law, this does not mean that it necessarily confers a private right of action. Not all federal law, even federal constitutional law, carries with it a private right to sue.<sup>18</sup> Former Judge Bork was the first to highlight this potential limitation on the *Filartiga* approach. In a concurrence in a 1984 DC Circuit decision, *Tel-Oren v Libyan Arab Republic*,<sup>19</sup> he noted that according federal common law status to customary international law does not establish that, “like the common law of contract and tort, for example . . . individuals [have] the right to ask for judicial relief.”<sup>20</sup> For a variety of separation of powers and international law reasons, Bork argued that it was in fact inappropriate for courts to imply such a private cause of action under customary international law. Among other things, he noted that the political branches rather than the courts have principal responsibility for foreign relations issues, that the domestic implementation of international law is generally governed by domestic rather than international law, and that even the international law governing human rights does not generally purport to require private civil remedies.

Judge Bork’s argument generated substantial concern in the human rights community, and it was heavily criticized by international law commentators.<sup>21</sup> There was sufficient concern about the argument that in 1991 Congress was persuaded to enact the Torture Victim Protection Act (“TVPA”).<sup>22</sup> By its terms, this statute creates a private right to sue in US courts for claims of torture and extrajudicial killing, subject to a statute of limitations, an exhaustion requirement, and other provisions. The legislative history of the statute makes clear that it was in part a response to Judge Bork’s concurrence in *Tel-Oren*.<sup>23</sup> The TVPA covers only torture and extrajudicial killing committed under “actual or apparent authority, or color of law, of any *foreign nation*,” and thus does not apply to actions by US officials. Importantly, however, its cause of action is available to both domestic and foreign plaintiffs. As noted in the legislative history, the TVPA was designed to provide “a clear and specific remedy, *not limited to aliens*, for torture and extrajudicial killing.”<sup>24</sup>

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18. Consider Erwin Chemerinsky, *Federal Jurisdiction* §§ 6.3.3, 9.1 (Little, Brown 3d ed 1999).

19. 726 F2d 774 (DC Cir 1984).

20. *Id* at 811 (Bork concurring).

21. For criticism of Judge Bork’s reasoning, see, for example, Anthony D’Amato, *What Does Tel-Oren Tell Lawyers? Judge Bork’s Concept of the Law of Nations is Seriously Mistaken*, 79 Am J Intl L 92 (1985); Harold Hongju Koh, *Transnational Public Law Litigation*, 100 Yale L J 2347, 2382–86 (1991); Kenneth C. Randall, *Federal Questions and the Human Rights Paradigm*, 73 Minn L Rev 349, 397–99 (1988).

22. See Torture Victims Protection Act, Pub L No 102-256, 106 Stat 73 (1991), codified at 28 USC § 1350 (1994).

23. See HR Rep No 102-367, 102d Congress, 1st Sess 4 (1991).

24. *Id* at 3 (emphasis added).

The TVPA does not apply to claims based on conduct other than torture or extrajudicial killing. As a result, the problem highlighted by Judge Bork is still relevant to cases not involving such conduct. Some courts have addressed this problem by holding that another statute, the Alien Tort Statute ("ATS"), creates a private right of action.<sup>25</sup> This statute, which was enacted in 1789 as part of the first Judiciary Act, states that "[t]he 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."<sup>26</sup> There are many reasons to question the conclusion that this statute creates a cause of action, including the statute's plain language, which is phrased in purely jurisdictional terms; the historical context in which the statute was enacted, which long predated modern notions of both international human rights law and federal common law; and the failure of any court to read it this way for approximately two hundred years.<sup>27</sup> In addition, reading the ATS as creating a cause of action would mean that claims could be brought under non-self-executing treaties, since the statute refers not only to the law of nations but also to treaties of the United States. It is well-settled in US law, however, that individuals do *not* have the right to sue under non-self-executing treaties.<sup>28</sup> While Congress can certainly enact legislation implementing a non-self-executing treaty, it would be difficult to construe the ATS as implementing non-self-executing treaties ratified hundreds of years after the ATS's enactment.

In any event, the ATS has a major limitation built into its scope: it applies only to suits by alien plaintiffs and thus cannot be relied upon to create a right to sue in cases brought by US plaintiffs. As noted, most of the initial cases brought under the *Filartiga* precedent were alien-against-alien suits. In recent years, however, a number of international human rights suits have been brought against domestic defendants. This "second wave" litigation can itself be divided into two categories: suits by alien plaintiffs and suits by domestic plaintiffs. Although the ATS can potentially be invoked in the first category of second wave cases, the plaintiffs in those cases often have encountered other barriers to suit. Plaintiffs have encountered even greater difficulties in the second category of second wave cases. In those cases, plaintiffs cannot rely on the ATS, so they must look elsewhere for their cause of action.

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25. See, for example, *Abebe-Jira v Negewo*, 72 F3d 844, 847 (11th Cir 1996); *In re Marcos*, 25 F3d at 1474-75; *Xuncax*, 886 F Supp at 179; see also *Tel-Oren*, 726 F2d at 779 (Edwards concurring).

26. 28 USC § 1350.

27. See Curtis A. Bradley and Jack L. Goldsmith, *The Current Illegitimacy of International Human Rights Litigation*, 66 *Fordham L Rev* 319, 357-63 (1997).

28. See, for example, *Foster v Neilson*, 27 US (2 Pet) 253, 313-14 (1829); *Goldstar (Panama) SA v United States*, 967 F2d 965, 968-69 (4th Cir 1992); *US v Postal*, 589 F2d 862, 875-76 (5th Cir 1979). Judge Bork pointed out this anomaly in his concurrence in *Tel-Oren*. See 726 F2d at 820. At least one court has attempted to avoid this anomaly by implying the cause of action from foreign tort law rather than from the ATS. See *In re Estate of Marcos, Human Rights Litigation*, 978 F2d 493, 503 (9th Cir 1992).

### III. CATEGORY A: SUITS BY ALIEN PLAINTIFFS

There have been a number of cases in recent years in which alien plaintiffs have sued domestic defendants for violations of international human rights law, including several cases brought against US corporations. In this category of second wave cases, the plaintiffs can invoke the Alien Tort Statute, which, as noted above, has been held by some courts not only to confer statutory jurisdiction but also to create a cause of action. One might assume, therefore, that these suits would be as successful as the alien-versus-alien cases described above. In fact, with rare exceptions,<sup>29</sup> these suits have failed.

These suits have encountered a variety of doctrinal and procedural barriers. As in first wave litigation, the plaintiffs are generally disallowed in these cases from bringing claims directly under human rights treaties because the United States either has not ratified them or has declared them to be non-self-executing.<sup>30</sup> In addition, courts have held that customary international law cannot be applied by US courts when there is a controlling executive or legislative act to the contrary.<sup>31</sup> Courts also have been strict about the requirements for pleading and proving the international law violations.<sup>32</sup> Furthermore, they have applied domestic law restrictions, such as statutes of limitation and the act of state doctrine, to bar the international law claims.<sup>33</sup>

In sum, although there are a variety of specific reasons why courts have rejected claims in this context, it appears that, in general, courts are more resistant to allowing international human rights claims when they are brought against domestic defendants. As discussed below, this resistance has been most pronounced when the suits have been brought by domestic plaintiffs. In that context, Judge Bork's arguments in *Tel-Oren*—although they have had little purchase in first wave litigation—are proving to be influential.

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29. See, for example, *Jama v INS*, 22 F Supp 2d 353 (D NJ 1998) (allowing ATS suit to proceed against federal immigration officials in their individual capacities).

30. Non-self-executing treaties may still have some relevance in these cases, most notably through the *Charming Betsy* canon of construction, pursuant to which courts are to construe federal statutes, where reasonably possible, to avoid conflicts with international law. See, for example, *Ma v Reno*, 208 F3d 815 (9th Cir 2000); *Maria v McElroy*, 68 F Supp 2d 206, 231 (E D NY 1999); *Mojica v Reno*, 970 F Supp 130 (E D NY 1997). See also *Murray v The Schooner Charming Betsy*, 6 US 64, 118 (1804) (stating that “an act of congress ought never to be construed to violate the law of nations, if any other possible construction remains”).

31. See, for example, *Gisbert v United States Attorney General*, 988 F2d 1437, 1447 (5th Cir 1993); *Garcia-Mir v Meese*, 788 F2d 1446, 1453 (11th Cir 1986). See also *The Paquete Habana*, 175 US at 700.

32. See, for example, *Beanal v Freeport-McMoran, Inc*, 197 F3d 161 (5th Cir 1999); *Ralk v Lincoln County*, 81 F Supp 2d 1372, 1379–83 (S D Ga 2000).

33. See, for example, *Roe v Unocal Corp*, 70 F Supp 2d 1073 (C D Cal 1999) (dismissing based on act of state doctrine); *Iwanowa v Ford Motor Co*, 67 F Supp 2d 424 (D NJ 1999) (dismissing because of statute of limitations).

## IV. CATEGORY B: SUITS BY DOMESTIC PLAINTIFFS

There have been several recent international human rights cases brought by US citizens against domestic defendants. These cases have involved claims concerning unauthorized medical experiments conducted on state prisoners and patients,<sup>34</sup> and the improper use of force to restrain a state criminal defendant.<sup>35</sup> Because the plaintiffs in these cases were not aliens, they could not invoke the ATS as a basis for their cause of action. And, in each of these cases, courts have held that there is no private right of action under customary international law. In other words, they have in effect accepted Judge Bork's argument in *Tel-Oren*. These courts have offered several reasons for their conclusion.

First, the Supreme Court has held that private rights of action should not be implied under *domestic law* when there are "special factors counseling hesitation"—for example, if the right of action issue raises difficult policy questions best left for Congress in the first instance.<sup>36</sup> Courts have reasoned that, if anything, this separation of powers concern is higher with respect to cases involving international law issues, since foreign affairs matters are particularly the province of the legislative and executive branches of government. It is these branches, the courts have said, that should determine how international law should be enforced within the United States. As one court explained (and other courts have quoted), "To imply a cause of action from the law of nations would completely defeat the critical right of the sovereign to determine whether and how international rights should be enforced in that municipality."<sup>37</sup>

Second, courts have noted that there are extensive domestic remedies available for abusive actions by federal and state officials—such as the remedies available under the civil rights statute, 42 USC § 1983; under the Federal Tort Claims Act; and under state tort law. Indeed, US officials have themselves referred to these remedies as a reason for not enacting legislation to implement the International Covenant on Civil and Political Rights ("ICCPR").<sup>38</sup> Such domestic remedies similarly reduce the need, courts have reasoned, for implying private rights of action under customary international law.

Third, courts have reasoned that Congress already looked at the issue of a right to sue under customary international law when it enacted the TVPA, and it codified

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34. See *Heinrich v Sweet*, 49 F Supp 2d 27, 43–44 (D Mass 1999); *White v Paulsen*, 997 F Supp 1380, 1386 (E D Wash 1996).

35. See *Hawkins v Comparet-Cassani*, 33 F Supp 2d 1244 (CD Cal 1999).

36. See, for example, *Schweiker v Chilicky*, 487 US 412, 421 (1988) (quoting *Bivens v Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 US 388, 396 (1971)).

37. *Handel v Artukovic*, 601 F Supp 1421, 1428 (CD Cal 1985). This statement is quoted in two of the recent second wave decisions, *Hawkins*, 33 F Supp 2d at 1256 and *White*, 997 F Supp at 1385.

38. See S Exec Rep 102-23, 102d Cong 14–15 (1992).

only torture and extrajudicial killing, not other customary international law claims. By implication, the courts have said, Congress has not approved private rights of action under other customary international law claims. As one court explained, “the fact that the relief authorized by Congress is not coextensive with the right at issue does not mean this Court should not show deference to Congress’s balancing of the policy considerations underlying its action.”<sup>39</sup>

Fourth, courts have sought to avoid allowing litigants to circumvent limitations imposed by the US treaty makers. Many of the customary international law rights asserted in US courts are also reflected in human rights treaties, either because the treaties codified customary international law or because the customary international law has been derived in part from the treaties. To the extent that the United States has ratified these treaties, it has consistently declared their substantive provisions to be non-self-executing—that is, not enforceable in court unless and until Congress passes implementing legislation.<sup>40</sup> As a result, courts consistently have disallowed private claims under these treaties.<sup>41</sup> If courts concluded that customary international law conferred a private right of action, litigants would be able to do an end run around this case law and, more importantly, the actions of the US treaty makers.

In my view, these arguments against implied rights of action under customary international human rights law are persuasive. I would add one additional, somewhat technical argument: the lack of a private right of action under customary international law helps explain why almost no court has allowed customary international law to serve as the basis for jurisdiction under the general federal question jurisdiction statute.<sup>42</sup> As noted above, courts have said that customary international law has the status of federal common law. In addition, the Supreme Court has held that claims arising under federal common law can fall within the “laws . . . of the United States” referred to in the federal question jurisdiction statute.<sup>43</sup> Yet almost no court has based its jurisdiction over customary international law claims on this statute; instead, they

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39. *White*, 997 F Supp at 1384.

40. For a discussion of the validity of this and other limitations placed by the President and Senate on US ratification of human rights treaties, see Curtis A. Bradley and Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U Pa L Rev (forthcoming 2000).

41. See, for example, *Iguarta de la Rosa v US*, 32 F3d 8, 10 n1 (1st Cir 1994) (voting rights under the ICCPR); *Sandhu v Burke*, 2000 US Dist LEXIS 3584 (SDNY 2000) (extradition under the Convention Against Torture); *Ralk*, 81 F Supp 2d at 1380–83 (prison treatment under the ICCPR); *Calderon v Reno*, 39 F Supp 2d 943, 956 (ND Ill 1998) (extradition under the Convention Against Torture); *Jama*, 22 F Supp 2d at 362 (asylum under the ICCPR); *White*, 997 F Supp at 1387 (prison medical experiments under the ICCPR and the Convention Against Torture); *In re Cheung*, 968 F Supp 791, 803 n17 (D Conn 1997) (extradition under the ICCPR and the Convention Against Torture); *Domingues v Nevada*, 961 P2d 1279 (Nev Sup Ct 1998) (juvenile’s death penalty under the ICCPR).

42. See 28 USC § 1331 (1994) (“The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.”).

43. See *Illinois v Milwaukee*, 406 US 91, 98–100 (1972).



have based jurisdiction, if at all, on the ATS. Moreover, several courts have expressly rejected the argument that customary international law creates a basis for jurisdiction under the federal question jurisdiction statute.<sup>44</sup> One potential explanation for this rejection is that customary international law does not have the status of federal law. To date, however, most courts have held that it does. An alternate answer is that, as the recent second wave cases have held, customary international law does not create a private right of action. The Supreme Court has held that a federal law issue in a case generally will not be enough to satisfy the federal question jurisdiction statute unless the federal law creates a cause of action.<sup>45</sup>

## V. CONCLUSION

In sum, there have been two waves of international human rights litigation. The first wave, inspired by *Filartiga*, has involved suits between aliens concerning conduct outside the United States. This litigation has been moderately successful. The second, more recent wave has involved suits against US defendants. This wave has been extremely unsuccessful, especially when the plaintiffs have been US citizens. These conflicting results may not sit well together. Among other things, it is likely to seem anomalous to courts that alien plaintiffs have substantially greater rights than domestic plaintiffs to invoke international law in the United States—and to utilize the resources of the backlogged federal court system—just as it seemed anomalous to Congress when it enacted the TVPA. In addition, some of the reasons courts are giving for rejecting an implied right of action in cases brought under the second wave, such as the desirability of leaving these issues for Congress in the first instance, the negative implications of the TVPA, and the concerns about litigants doing an end-run around the actions of the US treatymakers, are also reasons to question the allowance of cases under the first wave.<sup>46</sup> Thus, ironically, by bringing international human rights litigation “home,” its proponents may in fact be undermining it.

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44. See, for example, *Princz v Federal Republic of Germany*, 26 F3d 1166, 1176 (DC Cir 1994); *Xuncax*, 886 F Supp at 193–94; *Handel*, 601 F Supp at 1426. Other courts have delicately avoided the issue. See, for example, *Kadic*, 70 F3d at 246; *Filartiga*, 630 F2d at 887 n22; *Burger-Fischer v Degussa AG*, 65 F Supp 2d 248, 273 (D NJ 1999).

45. See *Merrell Dow Pharmaceuticals v Thompson*, 478 US 804, 812 (1986).

46. See discussion above and Bradley and Goldsmith, 66 *Fordham L Rev* at 367–68 (cited in note 27).

