A Theory for the Application of the Customary International Law of Human Rights by Domestic Courts

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Introduction

The emergence of an international law of human rights has substantially complicated the application of international law by U.S. courts. In the past, when international rules were thought only to affect relations between sovereigns, domestic courts could limit their application to situations involving one nation’s infringement of another’s rights. Such sovereign rights were well-established by practice, conventions, treaties, and scholarly writings. The recognition, following the genocides of this century, of human rights as a subject of international law has made the protection of international law available to numerous non-sovereign parties that did not enjoy it before. At the same time, however, it has

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complicated the task of discovering and applying international law in domestic settings. The utopian promise of a global law protecting all peoples has been brought within reach, but a cohesive theoretical framework for its application by domestic courts is still lacking. This Comment attempts to provide the outlines of such a framework.

The domestic applicability of international legal norms by private parties depends primarily on whether such norms are "self-executing." A principle is self-executing if it is enforceable in domestic courts by its own terms, without recourse to specific implementing legislation. The Supremacy Clause of the U.S. Constitution explicitly incorporates ratified treaties into the supreme law of the land. However, while the Supremacy Clause automatically executes treaties into law, it says nothing about international legal principles not backed by treaty. The Alien Tort Statute grants district courts "original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of

legal principles in actions brought by domestic citizens against their own or foreign governments, by aliens against a domestic government, or even by aliens against a foreign government. See Koh, Civil Remedies for Uncivil Wrongs: Combatting Terrorism Through Transnational Public Law Litigation, 22 Tex. Int'l L.J. 169, 194-99 (1987).

4. The role advocated for domestic courts depends largely on the existence of judicial review, a concept often foreign to jurisdictions that accord the judiciary a more administrative role. In some civil law countries, for example, judicial review does not exist. See R. Schlesinger, Comparative Law 357-58 & n.62j (4th ed. 1980). Moreover, it may be difficult for domestic courts to identify rights of such international scope and universal acceptance that their legal pedigree cannot credibly be challenged. Even if such rights were identified, however, it would be difficult to show that, as customary principles rather than the creatures of self-executing treaties, they are domestically applicable. Claims based on such rights also often run afoul of domestic and foreign sovereignty defenses, like the "political question" and "act of state" doctrines. See generally Baker v. Carr, 369 U.S. 186, 217 (1962) (political question); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964) (act of state).

Questions about the identification and domestication of rights address their threshold validity as sources of an action in any court, and specifically in national courts. They relate directly to the existence and definition of the rights themselves, and to whether they are endorsed by any global or domestic rule of recognition. The political question and act of state doctrines, by contrast, are affirmative defenses against the taking of jurisdiction to adjudicate rights that would otherwise inhere in the plaintiff.

5. Not all treaties, by their terms, mandate domestic applications that affect private parties. Such treaties, therefore, are not self-executing, even though they are ratified and become part of the law of the land in accordance with the Supremacy Clause. It would take additional legislation to grant individuals private rights pursuant to such treaties. See Note, Self-Executing Treaties and the Human Rights Provisions of the United Nations Charter: A Separation of Powers Problem, 25 Buff. L. Rev. 773, 773 (1976) ("Traditionally, a self-executing treaty gives rise to rights enforceable in domestic courts upon ratification."). Schneebaum argues that the content of international treaties and norms themselves is sufficient to create a right of action under international law, since the right of action is the logical correlative of the right to be free of injury from certain conduct. See Schneebaum, supra note 3, at 293. However, whether a norm rises to the level of a private right is largely contingent on the existence of a right of action. It may be argued that a domestic jurisdiction reneges on an obligation to enforce an international right by failing to provide an appropriate jurisdictional base for its enforcement. See infra text accompanying note 116.

6. U.S. Const. art VI, cl. 2.
It may be argued, however, that this statute does not execute international legal principles into domestic law, but is rather jurisdictional by its terms, providing a forum for claims already recognized under U.S. law. Thus, to give international principles domestic effect once jurisdiction over specific cases has been obtained, a theory must be articulated locating their binding force and defining the substantive prerequisites for their application.

This Comment emphasizes the common law nature of international legal principles, and distinguishes them from positive rules articulated in treaties. It argues that these principles derive their self-executing character from the universal recognition of the rights they articulate, and not merely from domestic statutes purporting to execute them. Thus, the jurisdiction of common law courts to hear claims arising under customary international law does not depend on domestic statutory authority to hear such claims. Such statutory authority merely regulates domestic courts’ existing jurisdiction. Courts applying international law must interpret customary international law principles just as they determine other common law rules, not by examining statutory materials, but by exploring past practices and precedents. For this purpose, conventions, treaties, policy statements, and resolutions should not necessarily be regarded as sources of customary international law, but rather, as evidence that it exists.

Part I of this Comment reviews the historical development of customary international law and its emergent application in domestic courts. It explores the conflicts of opinion evinced by contemporary case law, and it develops the arguments for and against the recognition of private customary international law claims by domestic courts. Part II offers a theoretical foundation for the domestic recognition of customary international law principles, based on longstanding distinctions within international law itself and on a theory of the common law that incorporates international law into domestic practice. It argues that internationally recognized human rights belong to a class of norms—jus cogens—that cannot be abrogated by domestic legislation or by other action on the national level. Within the constraints imposed by existing jurisdictional statutes, federal district courts may legitimately apply these human rights norms as part of domestic common law. Finally, Part III briefly discusses doctrines affirmatively barring domestic court jurisdiction in cases arising under customary international law, and suggests possible responses to these doctrines.

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I. The Evolution of Customary International Norms As a Source of Domestic Law

The domestic applicability of international law is the product of domestic and international legal requirements. The constitutional pedigree of extra-national sources of law and their amenability to domestic application comprise the central issues of the current debate.

A. The Constitutional Framework for International Law Actions

The Constitution gives little guidance to domestic courts applying international law. The Supremacy Clause makes "all Treaties made, or which shall be made, under the Authority of the United States ... the supreme Law of the Land," and binds every state regardless of its own constitution or laws. It says nothing, however, about rules of international law not contained in the treaties of the United States. Article I empowers Congress to "define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations." By giving Congress the power to "define" these offenses, the clause implicitly recognizes that the law of nations is not limited to treaty law. It does not, however, explicitly provide for a judicial remedy without previous legislative action.

The absence of such a provision is the source of the "self-executing" problem. States incorporate treaties and norms into their domestic laws by specific "transformational" devices. The automatic incorporation of ratified treaties by constitutional provision, which has been called "general transformation," mandates domestic enforcement without legislative action beyond ratification. A second method, "special transformation," requires legislation in order to give treaties domestic effect. The United States has been called a "general transformation" jurisdiction because the Supremacy Clause often gives valid treaties domestic effect without the requirement of specific legislation. Since the Supremacy

8. U.S. Const. art. VI, cl. 2.
9. Id. art. I, § 8, cl. 10.
11. Id. at 221. This method of treaty transformation is used by the United States, France, the Netherlands, and West Germany. Id.
12. Id. This method of treaty transformation is used by Great Britain and Canada. Id.
13. Id. The Supremacy Clause does not transform ratified treaties that do not indicate which specific actions each signatory has bound itself to undertake. See supra note 5. For example, the U.S. and the Soviet Union might hypothetically agree "to encourage mutual understanding by promoting cultural exchange and dialogue." A court would be unlikely to hold that such an agreement gave rise to domestically enforceable private rights. If, however, the treaty provided for specific exchange programs involving certain U.S. organizations or

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Clause makes no specific reference to customary international norms, however, Congress’ power to “define and punish” violations of the law of nations suggests facially that, with respect to these norms, the United States is a “special transformation” jurisdiction.

In the absence of a constitutionally-mandated transformation, litigants seeking to bring domestic claims based on customary international law have often relied on the Alien Tort Statute. The statute, passed as part of the original Judiciary Act of 1789, gives domestic courts jurisdiction to hear tort claims arising under U.S. treaties or the law of nations. By referring to “the law of nations” as distinct from treaties, such litigants imply that the Alien Tort Statute is an effective congressional ratification of customary international law, and that it therefore constitutes a special transformation of customary international law. The problem with this interpretation is that the statute, by its own terms, is a jurisdictional device, and that it lacks a legislative history that might suggest congressional intent to vest courts with extra-jurisdictional powers. Even if Congress had never passed a specific special transformation

individuals, it would create specific domestic rights enforceable in domestic courts. In the United Kingdom and other countries without a Supremacy Clause or its analogue, even specific treaty provisions do not become domestic law without the passage of requisite implementing legislation. See supra note 12.

14. See supra note 7 and accompanying text. For example, the plaintiffs in Filartiga make this argument. See Filartiga v. Pena-Irala, 630 F.2d 876, 887 (2d Cir. 1980) (“The Filartigas urge that 28 U.S.C. § 1350 be treated as an exercise of Congress’ power to define offenses against the law of nations.”).

15. Judiciary Act of 1789, ch. 20, § 9(b), 1 Stat. 73, 77.

16. In discussing what the Alien Tort Statute is, one often has recourse to what it is not. Although it is a jurisdictional statute, it only permits courts to hear claims already part of federal common law. On this interpretation it might therefore be regarded as duplicative. But, in effect, it does much more than the common law specifies. Specifically, it limits jurisdiction to cases sounding in tort; it specifies that district courts shall hear such cases; and it emphasizes federal jurisdiction in an area of common law which, as later confusion indicates, might otherwise be attributed to individual states.

17. The identity of international law and the “law of nations” has been disputed. See, e.g., Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 812-14 (D.C. Cir. 1984) (Bork, J., concurring) (international law is broader than “law of nations.”). But as Professor Henkin points out, “The law of nations seems to have encompassed more than is comprehended by ‘international law’ today, apparently including admiralty and general principles of the ‘law merchant’ applicable to transnational transactions.” Henkin, International Law as Law in the United States, 82 Mich. L. Rev. 1555, 1555 n.1 (1984); see also Dickinson, The Law of Nations as Part of the National Law of the United States, 101 U. Pa. L. Rev. 26, 26-27 (1952).


19. But see Textile Workers v. Lincoln Mills, 353 U.S. 448, 450-51 (1957) (jurisdictional statute may give rise to a cause of action). Lincoln Mills is sometimes cited, but not relied upon, to find a cause of action under the Alien Tort Statute. See, e.g., Filartiga, 630 F.2d at 887. It should also be noted that the Alien Tort Statute specifies not only jurisdiction, but also the mode of enforcing international legal claims, namely, through tort liability. See supra notes 7 & 16 and accompanying text.
under the Define and Punish Clause, the Alien Tort Statute would make sense as a prospective grant of jurisdiction over international rules transformed into domestic law by future legislation, particularly in its context as part of a general act defining the structure of the federal judiciary. In and of itself, however, the Alien Tort Statute remains a suspect conduit for the transformation of international legal principles into domestic law.

Notwithstanding the above, I will argue that U.S. courts may hear claims based on customary international law, regardless of whether Congress has “defined” such law under Article I, section 8. I will suggest that certain international legal norms are, by their nature, part of U.S. common law, and may therefore be applied directly by federal courts.

B. The Historical Applicability of Customary International Law

Two hundred years ago, the domestic applicability of customary international law was taken for granted. Later, however, such applicability came to be regarded with skepticism, and today the question of whether or not international customary law is “self-executing” remains unsettled.

In 1783, Blackstone described the law of nations as “a system of rules, deducible by natural reason and established by universal consent among the civilized inhabitants of the world... adopted [in England] in its full extent by the common law, and... held to be a part of the law of the land.” Customary international law was therefore part of British common law. Both, Blackstone stated, were founded on natural reason, and legislation enforcing customary international law was therefore “not... introductive of any new rule, but merely... declaratory of the old fundamental constitutions of the kingdom.”

20. 4 W. BLACKSTONE, COMMENTARIES *66-67 (reprint 1978); see also Trimble, A Revisionist View of Customary International Law, 33 UCLA L. REV. 665, 669 (1986) (“Customary international law consists of obligations inferred from the general ‘practice of states’—what is habitually done by most members of the international community out of a sense of legal obligation.”).

21. 1 W. BLACKSTONE, supra note 20, at 70 (“[O]ur lawyers are with justice so copious in their encomiums on the reason of the common law; that they tell us, that the law is the perfection of reason, that it always intends to conform thereto, and that what is not reason is not law.”). It is not necessary to give up legal positivism in reading Blackstone’s account of common law. This Comment’s emphasis is on the common law’s intention to conform to reason, not its full identification with it. Practicing judges, in making common law, engage in a rational inquiry into what is “right.” Where there is a lack of agreement evincing proof that an act is right or wrong, no legal right is usually created. But there is substantial agreement that actions such as torture and genocide are wrong, see supra note 1, and any common-sense understanding of these acts merely confirms this view. Under these circumstances, common law judges may with reason infer an underlying human right against torture.

22. 4 W. BLACKSTONE, supra note 20, at 67. The identity of customary international law and domestic common law has also been asserted in scholarly writing throughout the twentieth century. See e.g., P. WRIGHT, THE ENFORCEMENT OF INTERNATIONAL LAW THROUGH MUNICIPAL LAW IN THE UNITED STATES 225-26 n.10 (1916); Dickinson, supra note 17, at 337.
The early U.S. Supreme Court preserved Blackstone's account and applied international law as it would domestic law. In Ware v. Hylton, the Court held that the United States had been bound to receive the law of nations upon declaring its independence. Thus, when all other nations appeared to recognize a particular international norm (in that case, the unlawfulness of confiscating foreign debts) the United States was required to do likewise. This principle gave rise to private causes of action under international law. In The Scotia, the Court awarded damages against a British vessel for the accidental sinking of an American ship, noting that "no single nation can change the law of the sea." The Court went further in United States v. Arona, stating that international law imposed a positive obligation upon the United States to punish the counterfeiting of foreign notes.

Despite these early monistic readings of customary international law, the Court had already begun to signal some resistance to its domestic application. In The Lottawanna, the Court conceded the common law nature of international norms, but observed that common law "is the basis of all the State laws; but is modified as each sees fit." It further upheld the sovereign's right to follow its own policy in adopting or rejecting usages generally prevailing among nations, arguing that "each state adopts the maritime law, not as a code having any independent or inherent force, proprio vigore, but as its own law, with such modifications and qualifications as it sees fit." The Court made no attempt to explain the contradiction between this ruling and its more rigid interpretation in The Scotia, and thus left unexplored the possibility of the existence of peremptory norms of customary international law. In practice, however,
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this inconsistency undermined the very basis of private claims arising under customary international law, since an international law that could not always bind states was not, by definition, self-executing.

Twenty-six years later the Court reaffirmed the domestic status of customary international law in *The Paquete Habana*. This case, brought in the aftermath of the Spanish-American War, involved the seizure of coastal fishing vessels by U.S. warships. Relying on scholarly sources, the Court acknowledged a long-held customary norm against seizing the coastal fishing vessels of a belligerent. It held that “[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination.” *The Paquete Habana* thus buttressed the rule that *The Lottawanna* had called into question.

The issue, however, was still far from resolved. In 1938, *Erie Railroad v. Tompkins* presented an indirect challenge to the application of customary international law as federal common law. *Erie* required federal courts sitting in diversity to apply the common law of the states in which they sat, rejecting the idea that there was a transcendent common law pertaining equally to state, federal, and international jurisdictions. Thus, *Erie* undermined the notion that customary international law could be coextensive with a unitary common law and implied that, to the extent that it was common law, customary international law was the province of state, not federal, courts. But *Erie* did not preclude the existence of all federal common law; it merely prevented federal common law from superseding state common law in diversity cases. As Professor Henkin has noted, where federal courts have a jurisdictional basis

30. 175 U.S. 677 (1900).
31. Id. at 700. The Court went on to qualify the principle by reference to the possibility of controlling treaties, executive or legislative acts, or judicial decisions. This reading was recently reaffirmed in Garcia-Mir v. Meese, No. 86-8010 (11th Cir., Apr. 23, 1986) (citing *The Paquete Habana*), in which the court also acknowledged the common law status of international law, but held that treaties, executive or legislative acts, and judicial decisions could block the application of customary international law. See also *Restatement of the Foreign Relations Law of the United States (Revised)* § 131 comment d (Tent. Draft No. 6, 1985) (international law incorporated into common law).
32. 304 U.S. 64 (1938).
33. Id. at 73, 78.
34. Id. at 78-79.
35. See Henkin, supra note 17, at 1558.
36. Id. at 1559; Glennon, *Can the President Do No Wrong?*, 80 AM. J. INT’L L. 923, 925-26 (1986). In *Banco Nacional de Cuba v. Sabbatino*, the Court applied the common law act of state doctrine, and thereby set aside a realm of common law still subject to federal jurisdiction. Because of the uniquely federal nature of international questions, the decision effectively carved out an important exception to the *Erie* doctrine. See Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383 (1964); cf. Jessup, *The Doctrine of
other than diversity, they can apply international law independently and differently from the states. Since cases between foreign parties where the alleged tort occurred outside the United States do not involve diversity jurisdiction, they may remain the province of the federal courts. Indeed, federal jurisdiction in such cases is more proper, since federal courts are “the relevant national enti[ies] for international purposes.”

Important developments came on the heels of World War II. After the Holocaust, the victorious allies felt morally obligated to punish the perpetrators of crimes against humanity. At the Nuremberg trials, however, they confronted a serious difficulty: Could they prosecute Nazi war criminals for crimes that had no legal status before the war? After all, offenses against persons had never been announced as part of the law of nations. Thus the Nuremberg Tribunal’s reluctance as a standard bearer of liberalism to pass an *ex post facto* law came into sharp conflict with its conscientious desire to punish atrocity.

Ultimately, the Nuremberg prosecutors urged, and the Tribunal agreed, that the Nazi atrocities had violated preexisting international norms implicit in the values actually understood and accepted by the international community. Long before Hitler came to power, the international community had been unanimous in considering acts such as those perpetrated by the Nazis to be criminal. The Tribunal held that

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41. See W. BOSCH, JUDGMENT ON NUREMBERG 49 (1970).
43. Although nations have violated these norms many times, they usually feel compelled to deny having done so. Thus, Turkey denies that genocide occurred in Armenia, Tempelkian, *Today’s Turkey and the Armenian Tragedy*, N.Y. Times, May 10, 1985, at A30, col. 6 (letter to the editor), and the Soviet Union denies its violations of human rights in the gulag. *Reporter’s Notebook: A Rights Parley in Ottawa*, N.Y. Times, May 25, 1985, sec. 1, at 2, col. 3 (Soviet diplomats call charges of human rights violations by the Soviet Union “lies, slander and disinformation”). Neo-Nazis also typically deny that the Holocaust ever occurred, or disclaim
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this previously unarticulated consensus of values was discoverable by courts in much the same manner that the principles of common law or other principles of international law are susceptible of discovery.44

Postwar case law in the United States has been unsettled. In Adra v. Clift,45 an alien plaintiff sued his former wife for the “unlawful taking or withholding of a minor child from the custody of the parent or parents entitled to such custody.”46 The plaintiff argued, successfully, that his wife, by illegally including their child on a foreign passport, had violated the law of nations.47 The district court took jurisdiction and granted relief under the Alien Tort Statute. In Banco Nacional de Cuba v. Sabbatino,48 the Court barred suit on an alleged violation of customary international law after finding that the violation was an act of state.49 Finally, in Dreyfus v. von Finck50 and IIT v. Vencap51 the Second Circuit insisted that the law of nations applied only to relations involving states. Thus, going into the 1970s and 1980s, it was unclear what rights foreign plaintiffs could hope to vindicate against foreign defendants in U.S. courts, and under what circumstances.

C. The Current Judicial Impasse

The most important tests of the domestic enforceability of customary international law have come in the 1980s. In Filartiga v. Pena-Irala,52 agreement with this “aspect” of Hitler’s policies. Rosenberg, Neo-Nazis Cloud the Utah Air; “Aryan Nations” to Debut over Tiny Salt Lake City Station, L.A. Times, Nov. 24, 1987, Part 6, at 1, col. 2 (Neo-Nazi radio show host preaches “the Holocaust was a hoax”).

44. The subsequent decades saw the enshrinement of international human rights principles in the U.N. Charter and in other important international accords. See supra note 1.

46. Id. at 864.
47. Id.
49. See infra notes 119-120 and accompanying text.
51. 519 F.2d 1001, 1015 (2d Cir. 1975).

However, other courts have limited jurisdiction to the exception clauses in the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1300, 1602-11 (1986), implying that that statute effectively repealed the Alien Tort Statute and replaced it with a jurisdiction of much narrower scope; see, e.g., Frolova v. U.S.S.R., 761 F.2d 370, 372 (7th Cir. 1985) (FSIA is exclusive means by which foreign countries may be sued in U.S. courts); Ruggiero v. Compania Peruana
the Second Circuit awarded damages under the Alien Tort Statute for acts of torture committed outside of the United States and involving only foreign parties. After an extensive review of the literature, conventions, and case law describing torture as a violation of international law, Judge Kaufman summed up for the court:

In the twentieth century the international community has come to recognize the common danger posed by the flagrant disregard of basic human rights. . . . In the modern age, humanitarian and practical considerations have combined to lead the nations of the world to recognize that respect for fundamental human rights is in their individual and collective interest. . . . Indeed, for purposes of civil liability, the torturer has become—like the pirate and slave trader before him—hostis humani generis, an enemy of all mankind.53

The underlying argument in Filartiga can be reduced to four fundamental legal principles. First, customary international law is a matter of universal jurisdiction,54 so that any national court with a common law or statutory jurisdictional grant may hear even extra-territorial claims brought under international law. Second, the Alien Tort Statute constitutes a jurisdictional grant allowing U.S. district courts to hear such claims.55 Third, domestic courts may discover international legal principles by consulting executive, legislative, and judicial precedents, international agreements, the recorded expertise of jurists and commentators, and other sources reflecting the actual acquiescence of the international community to such principles.56 Finally, a defendant accused of using torture under color of state authority may not always use the affirmative
de Vapores, 639 F.2d 872, 875-78 (2d Cir. 1981) (FSIA is exclusive means by which foreign government may be sued).

53. Filartiga, 630 F.2d at 890.

54. Universal jurisdiction is an international legal principle that "provides for jurisdiction to enforce sanctions against crimes that have an independent basis in international law." Paust, Federal Jurisdiction Over Extraterritorial Acts of Terrorism and Nonimmunity for Foreign Violators of International Law Under the FSIA and the Act of State Doctrine, 23 VA. J. INT'L L. 191, 211 (1983); see also M. McDougal & W. Reisman, International Law in Contemporary Perspective: The Public Order of the World Community 1419-34 (1981); 1 L. Oppenheim, International Law § 272 (1905) (pirate who commits "international crime" is enemy of all mankind and thus of every state). The Restatement of the Foreign Relations Law of the United States (Revised) § 702 (Tent. Draft No. 6, 1985) enumerates the following objects of universal jurisdiction among state-practiced, -encouraged, or -condoned acts: "(a) genocide, (b) slavery or slavetrade, (c) the murder or causing the disappearance of individuals, (d) torture or other cruel, inhuman or degrading treatment or punishment, (e) prolonged arbitrary detention, (f) systematic racial discrimination, or (g) consistent patterns of gross violations of internationally recognized human rights." See Tel-Oren, 726 F.2d at 781 (Edwards, J., concurring) (Restatement enumeration comprises universally justiciable offenses).

55. Filartiga, 630 F.2d at 885, 887-88.

56. Id. at 880-81; see also The Paquete Habana, 175 U.S. 677, 700 (1900); United States v. Smith, 18 U.S. (5 Wheat.) 153, 160-61 (1820).
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defenses usually available to sovereigns and their agents. Although the
defendants in Filartiga were accused of violations of international law, which generally require a state actor, the defense of act of state\textsuperscript{57} was not available to these defendants because their actions were \textit{ultra vires}—in violation of the laws of their own country.\textsuperscript{58}

The D.C. Circuit, in \textit{Tel-Oren v. Libyan Arab Republic},\textsuperscript{59} further confused the issue in its opinion that acts of international terrorism are not justiciable in U.S. courts under the Alien Tort Statute. Judges Robb, Edwards, and Bork employed radically different analyses in their respective concurrences. Judge Edwards endorsed the logic of Filartiga, but concluded that acts of terrorism, unlike universally recognized human rights violations, were not so unequivocally condemned by the international community as to warrant inclusion among the proscriptions of international law.\textsuperscript{60} Judge Robb held that the case raised a nonjusticiable "political question" and that it was thus properly dismissed.\textsuperscript{61} Finally, Judge Bork held to a narrower reading of the Alien Tort Statute. Emphasizing the statute's origin in an era of limited international law, he contended that it had never been meant to apply either to human rights violations or to acts of terrorism.\textsuperscript{62}

It is helpful to review the conflicting reasons advanced by each judge in support of his position. Judge Edwards argued that the Alien Tort Statute allowed district courts to hear alien tort claims alleging international law violations regardless of the absence of a "right to sue" independently granted by domestic or international law.\textsuperscript{63} His opinion suggested that the Statute is not merely an open jurisdictional door, but also the basis for converting a substantive claim under international law into a ground for recovery. In this view, the statute acts as a transformational device, executing international principles into domestic tort law and thus creating a private cause of action that may not have existed independently under international law.

Judge Robb's opinion did not explicitly reject the Alien Tort Statute's status as a conduit for the domestic transformation of international legal principles, but undid the effects of such a transformation by applying the

\textsuperscript{57} \textit{See infra} text accompanying notes 120-35.
\textsuperscript{58} Filartiga, 630 F.2d at 890.
\textsuperscript{59} 726 F.2d 774 (D.C. Cir. 1984) (per curiam).
\textsuperscript{60} \textit{Id.} at 795-96 (Edwards, J., concurring).
\textsuperscript{61} \textit{Id.} at 823 (Robb, J., concurring).
\textsuperscript{62} \textit{Id.} at 813 (Bork, J., concurring) ("It is important to remember that in 1789 there was no concept of international human rights ... ."); \textit{see also} Brief for the United States as Amicus Curiae, Trajano v. Marcos, No. 86-2448 (9th Cir., filed Aug. 20, 1986) (endorsing Bork opinion in \textit{Tel-Oren}).
\textsuperscript{63} Filartiga, 726 F.2d at 780 (Edwards, J., concurring).
political question doctrine to bar claims arising outside of the United States as more properly addressed by the political branches. Because the political question doctrine is an affirmative defense to claims arising under the Alien Tort Statute, its use to defeat a claim otherwise legitimately brought under the statute does not amount to a rejection of the interpretation of the statute that would allow transformation of international law against foreign defendants. Yet it is difficult to imagine how the doctrine, as it was broadly applied by Judge Robb, would ever permit adjudication of cases arising from acts committed outside of the United States.

The most fundamental challenge to the justiciability of customary international legal claims in U.S. courts was put forward by Judge Bork, who would, in effect, deny the efficacy of the Alien Tort Statute as a transformational device, regardless of extrinsic defenses. In his opinion, Bork argued that a broad interpretation of the statute would violate the principle of separation of powers by giving the courts a greater role than that envisioned for them by the law of nations. He argued that the Alien Tort Statute was properly understood only in the context of its passage in 1789, when the law of nations was still encompassed within the universe described by Blackstone: “1. Violation of safe-conducts; 2. Infringement of the rights of embassadors [sic]; and 3. Piracy.” By eliminating the Alien Tort Statute as a transformational device for torts that were not a part of international law in 1789, Bork would therefore preclude its adaptation to the growing field of modern international law. This logic would effectively foreclose most of the actions authorized by Filartiga.

One of the primary intended effects of the Bork opinion was to constrain the notion of universal jurisdiction. Unlike Judges Kaufman and Edwards, Judge Bork does not appear to regard international law as either self-executing qua international law or as capable of execution through the Alien Tort Statute. While Kaufman and Edwards recommend an inquiry into the status of a principle and the taking of jurisdiction upon a showing that it is international law, Bork would require a much stricter inquiry into both the degree of the principle’s international acceptance and codification, and the availability of terms that would

64. Id. at 823 (Robb, J., concurring); see also infra notes 153-56 and accompanying text.
65. By contrast, Robb’s political question defense suggests that the courts would be given a greater role than that envisioned by the law of the United States. Id. at 825-26 (Robb, J., concurring).
66. Id. at 813 (Bork, J., concurring) (citing 4 W. BLACKSTONE, supra note 20, at 68).
render it self-executing.\footnote{6} These approaches may appear similar, in that the *Filartiga* analysis of the international legal status of customary principles resembles that recommended by Bork for the taking of jurisdiction,\footnote{68} but Bork's *Tel-Oren* test appears to have a more severe and inhibitive application.\footnote{69} Since he is prepared to acknowledge customary international principles but to deny their binding effect on local courts, Bork must also deny that such principles can ordinarily be self-executing or that domestic courts are independently empowered to apply them.

Legal scholars and practitioners today therefore confront two conflicting visions of universal jurisdiction. On the one hand, *Filartiga* argues for a cause of action based solely on a jurisdictional grant, without reference to a separate transformational statute, and so implies that customary international law is self-executing. This view of universal jurisdiction would allow national courts to decide a broad range of claims arising under international law. By contrast, Judge Bork's *Tel-Oren* opinion gives little weight to emergent international legal principles, narrowing the scope of domestically justiciable claims to those either contemporary with the statutory grant of 1789 or satisfying the highest standards of proof. According to this view, international laws are self-executing only when explicitly agreed to by all relevant parties in language leaving no room for debate about the parties' intent to implement domestic judicial remedies for their violation.\footnote{70} Bork's logic therefore radically limits the role of customary international law in the domestic context.

\footnote{6} *Id.* at 804 (Bork, J., concurring) (citing Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964)).

\footnote{68} Under Bork's test, international law must be either incorporated into U.S. law under the narrow reading of the Alien Tort Statute, or self-executing by its terms. Bork argued that since customary law is unwritten, it cannot be self-executing. *Id.* at 813. For an international law claim to be applied under *Filartiga*, it must allege a violation of the law of nations and be self-executing under a standard that takes into account judicial precedent, scholarly interpretation, and other sources of authority. 630 F.2d at 880-81.

\footnote{69} See also Koh, *supra* note 3, at 202 (Bork's opinion "fail[s] to offer a principle for construing the Alien Tort Statute that would permit judges to balance ... policy objectives."). By limiting the reach of the Alien Tort Statute to the narrow sphere of international law that had existed prior to 1789, Bork implied either that jurisdiction under such law would not violate the separation of powers (thereby contradicting his stated view that jurisdiction would encroach on the domain of the political branches, 726 F.2d at 799) or that even that limited sphere of cases could not be heard, reducing the statute to a facsimile of 28 U.S.C. § 1331 (1982) (providing jurisdiction pursuant to self-executing treaties). Koh, *supra* note 3, at 202-03 n.111. It might be argued that an interpretation that so diminishes a standing statute would comprise a more tangible judicial encroachment on political power than a more expansive reading of the Alien Tort Statute could ever achieve. *Id.*

\footnote{70} Bork admits that states may agree to ratify legally enforceable human rights principles by treaty. *Tel-Oren*, 726 F.2d at 819 & n.26.
The current status of the law thus remains unsettled. Some courts have aggressively taken jurisdiction under evolving principles of international law. Others have appealed to principles of sovereign immunity, political question, state action, *forum non conveniens*, and other affirmative defenses in order to reject individual claims brought pursuant to customary international law. Finally, a few have refused altogether to accept changes in international law that would give effect to individual rights arising under any source other than national authority.

The remainder of this Comment proposes a theory to explain why judges should accept jurisdiction under customary international law. According to this theory, a monolithic view of customary law is inadequate to describe the relation between the obligations of nations and the rights of individuals. Instead, customary international law must be understood to include not only standards of international conduct agreed upon by states, but also peremptory norms based on normative and rational principles. These peremptory norms, called *jus cogens*, include principles protecting human rights. I argue that *jus cogens* has historically been part of U.S. common law, and remains so today. Thus, within the constraints of governing statutes, such as the Alien Tort Statute and the Foreign Sovereign Immunities Act (FSIA), domestic courts are empowered to hear private claims based on the peremptory norms of customary international law.

II. A Theory of National Court Jurisdiction Under International Law

The notion of a self-executing international law of human rights derived from custom and agreements among sovereigns requires a theory that binds domestic institutions to respect external law. This section presents a general theory purporting to show how U.S. law is amenable

71. In addition to the cases discussed above, the Supreme Court will hear appeal from Amerada Hess Shipping Corp. v. Argentine Republic, 830 F.2d 421 (2nd Cir. 1987), cert. granted, 56 U.S.L.W. 3718 (Apr. 18, 1988) (upholding domestic jurisdiction), which involved an action by a foreign neutral shipper whose vessel was destroyed by a belligerent in the Falklands War. Argument will be heard in the Ninth Circuit in Trajano v. Marcos, No. 86-2448 (9th Cir. filed Aug. 20, 1986), involving acts of torture by the former Philippine government. Litigation continues in a California district court concerning human rights violations by the Argentine Government in Forti v. Suarez-Mason, 672 F. Supp. 1531 (N.D. Cal. 1987); see also Martinez-Baca v. Suarez-Mason, No. 87-2057, slip op. (N.D. Cal. Apr. 22, 1988) ($21 million default judgment in favor of torture victim). Meanwhile, De Negri v. Republic of Chile, No. 86-3085 (D.D.C. filed Nov. 10, 1986), brought by a foreign national against her government for torture and human rights violations perpetrated against her son, has been docketed in the District Court for the District of Columbia, and has attracted considerable press attention; see, e.g., *Sixty Minutes: The Burned Ones* (CBS television broadcast, Aug. 9, 1987) (transcript on file with CBS News, Inc.).
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to this end. It argues that there exists a subclass of customary
ternational law, *jus cogens*, that has peremptory force and cannot be
abrogated by domestic law or treaty. While other customary interna-
tional laws are the product of expediency and exist by virtue of universal
acquiescence alone, *jus cogens* is a body of rules universally accepted on
independent, principled grounds mandating the compliance of all na-
tions. Domestic courts, sitting as common law courts of international
law, must apply *jus cogens* whenever issues arising under it are submitted
for their consideration. As a recognized subject of universal jurisdiction,
any such peremptory norm may be heard by any court with a proper
jurisdictional base. In the United States, such a base is defined by com-
mon law, the Alien Tort Statute, and other applicable statutory
provisions.

A. Customary International Law and the Status of National Courts As
Enforcing Fora

The common law nature of international law has already been dis-
cussed. Like common law, customary international law is supported by
precedent, although such precedent takes the form of an inferential gloss
on the prevalent practice of nations. Both common law and customary
international law, as Blackstone argued, are rooted in the relevant fo-
rum's interpretation of what is *reasonable.*

73. See *The Paquete Habana*, 175 U.S. 677, 677 (1900).
74. See cases cited *supra* note 2.

The nature of precedent within international law is very different from
that in U.S. common law. There are many different kinds of precedent
and other evidence concerning what is customary in the law of nations.
These include decisions of national and international courts, interna-
tional conventions and treaties supplying information about international
practice, articles and treatises by learned authors on the subject, and,
most important, history.

A more precise understanding of the classifications within interna-
tional law helps to explain the appropriate application of these prece-
dents and historical materials in determining when domestic court
jurisdiction is appropriate. By rediscovering and applying these classifi-
cations, it is possible to distinguish between customary laws that, because
of their normative status, are considered peremptory, and those that are merely convenient rules of conduct among nations. Rules appealing to normative values, such as human rights principles, do not depend on the will of the governing executive or legislative authority for their legality; they are part of the common law because they satisfy the common law requirement that they be discoverable by reason. Thus, common law courts, striving to establish rules conforming with commonly accepted, common-sense principles of "right," would feel obligated to observe and enforce these norms even against contrary political demands.75 In contrast, rules that are mere conveniences among states, such as conventionally observed limitations on territorial waters, do not usually command such normative force, and may often be rejected by the states that would be affected by them. It is impossible to sue under such rules at common law because they are not peremptory and therefore cannot confer individual rights, only revocable benefits. The distinction among normative rules, which are always binding, binding non-normative rules, and non-binding non-normative rules is elaborated below. First, however, I analyze and reject two criticisms of the theory that customary international law forms a part of U.S. common law.

Professor Charney contends that customary international law differs from domestic common law and should not be treated as part of it. He notes that the political branches can change customary international law only by breaking it and by attempting to get other countries to break it.76 In order to engage effectively in the customary lawmaking process, Charney suggests, the United States must break customary international law.77 Consequently, the political branches should not be restrained from doing so by domestic courts simultaneously trying to enforce customary international law.78 Charney also claims that the Supreme Court has never held that customary international law is part of federal common law, distinguishing The Paquete Habana because it had held customary international law to be subject to controlling executive acts.79

Charney thus seems unwilling to accept distinctions within customary international law that might allow strategic violations of that law by the political branches, while preserving a sphere of important, inviolable norms. I will argue below that certain principles of customary international law are based on normative rules commanding moral force, such

75. See supra note 21.
76. Charney, supra note 26, at 914.
77. Id. at 919.
78. Id.
79. Id. at 918 n.14. But see supra notes 23-25 and 30-31 and accompanying text (early Supreme Court holdings that customary international law is part of federal common law).
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as the rule against genocide, and that they may in no event be violated at
the unchecked discretion of local governments. On the other hand, rules
based merely on exigency, such as the twelve-mile limit on territorial
waters formerly observed by custom, may be violated without impinging
on powerful moral standards. Thus, a quasi-legislative effort to undo
moral norms that have received legal or juridical sanction must fail
where the effort to undo merely practical rules would be permitted by
domestic courts. Only in the latter case may courts protect the preroga-
tive of the political branches by applying the political question doctrine.
Charney himself acknowledges that “the authority of the executive
branch to participate in legitimate customary lawmaking activities
should not be so broad that, in fact, it is not bound by customary law in
the domestic legal system.”80 This admission is inconsistent with his
overall argument, and suggests the existence of the peremptory norms he
denies.

Professor Henkin has argued on the basis of *Erie Railroad v. Tompkins* 81 that domestic common law and customary international law are not the same.82 *Erie,* Henkin says, “ended the myth that there was
an independent ‘common law,’ broodingly omnipresent, which the fed-
eral courts could determine as well as, and independently of, the courts
of the states.”83 But it is wrong to argue from this that there is simply no
federal common law. Rather, federal common law is a judge-made law
limited in its application to certain areas not belonging to the jurisdiction
of the state courts.84 It incorporates nondiversity cases requiring the ju-
dicial determination of international legal norms, as such norms have
been understood by federal courts.

Henkin also argues that judges do not “make,” but rather “find,” in-
ternational law, and that the determinants of their judgments are not
judicial precedents.85 But indeed, these determinants do include judicial
precedents, and common law courts confronting unprecedented cases are
likely to consult the same kinds of historical, factual, and scholarly re-

80. *Id.* at 919.
81. 304 U.S. 64 (1938). The facts of *Erie* are well known. The case was an interstate
diversity action allegedly brought under “federal common law” by an individual against a
railroad company for personal injury. The Supreme Court reversed the lower court’s holding
because it had applied “general” federal common law. *Id.* at 80. It held that, in diversity,
federal courts must apply the common law of the relevant state jurisdiction. *Id.* at 78.
82. Henkin, *supra* note 17, at 1557-59. But Professor Henkin suggests common law and
customary international law may not be different in respects that are important for purposes of
establishing federal jurisdiction. *Id.* at 1562.
83. *Id.* at 1558.
84. *See supra* notes 36-37 and accompanying text.
sources required to determine customary international law. The difference is one of available precedent, not of general approach. Henkin says that characterizing customary international law as part of federal common law has led some lawyers to treat custom as subordinate to treaties and statutes, and as the object of state common law.86 Except for peremptory norms, however, it may be just and desirable to subordinate customary norms in this fashion. Peremptory norms will resist subordination in the same way as the common law norm against murder87: contrary statute would simply lack practical authority. As we have seen, existing ideas about federalism refute the notion that customary international law falls within state, and not federal, common law.88

B. Jus Cogens and Jus Dispositivum: The Sources of Legal Obligation in International Law

The Restatement of Foreign Relations Law locates customary international law in the “general and consistent practice of states followed by them from a sense of legal obligation.”89 This description is consistent with Blackstone’s description of the law of nations as a custom complying with “natural reason,”90 but it is more extensive. Legal obligation may spring from either ethical or prudential considerations. Thus, we have different reasons for observing anti-homicide laws and traffic laws; we view the former as right and the latter as necessary. Some laws spring from our sense of justice and others from the confluence of needs that make up our economic and social environment.91

This distinction has long been recognized in international law. Eighteenth-century theorists divided the law of nations into two classes, jus cogens and jus dispositivum.92 Jus cogens embraces customary laws

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86. Id. at 1562.
87. While most jurisdictions define murder by statute, it is also a crime at common law. See 2 Wharton’s Criminal Law § 137 (14th ed. 1979).
88. See supra note 39 and accompanying text.
90. 4 W. Blackstone, supra note 20, at 66.
91. Professor Trimble distinguishes customary international law from domestic common law on the ground that while common law is “principled,” i.e., based on rational precepts, customary international law is largely the result of states’ pursuit of economic objectives and interests, and as such, is not constrained by principle. Trimble, supra note 20, at 708-09. This reasoning is flawed because it ignores the existence of two different sorts of customary international law. Some customs are founded on internationally acknowledged principles of justice while others are convenient practices generally adopted by the international community for the self-interested purposes of individual states.
92. See E. Vattel, Le Droit des Gens ou Principes de la Loi Naturelle 9-10 (1758); C. Wolff, Jus Gentium 5 (1764); see also L. Brownlie, Principles of Public International Law 512-15 (1979) (jus cogens and jus dispositivum distinguished); H. Kel-
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considered binding on all nations, and cannot be preempted by treaty.\textsuperscript{93} \textit{Jus dispositivum} consists of norms derived from the consent of states, whose force is dependent on continued state acquiescence. Its applicability is limited to those states consenting to be governed by it. States may attempt to change \textit{jus dispositivum} by violating it and encouraging other states to follow their lead.\textsuperscript{94} Although such action would be contrary to a country's international obligations, it would still be controlling as domestic law. \textit{Jus dispositivum} may also legally be abrogated by treaty.\textsuperscript{95}

"[T]he \textit{jus cogens}," writes Professor Brudner, "is customary law that is ordered to a transcendent good of the international community, while the \textit{jus dispositivum} is customary law that embodies a fusion of self-regarding national interests."\textsuperscript{96} This suggests that \textit{jus cogens} is based on a rational ideal of the good \textit{per se}, in contrast to \textit{jus dispositivum}, which is based merely on the self-interest of the participating states.\textsuperscript{97} An international law based on a rational notion of basic moral norms must apply as much to sovereign acts against persons as it does to such acts among nations. Furthermore, such a law is derived from values taken to be fundamental by the international community, rather than from the fortuitous or self-interested choices of nations.\textsuperscript{98} The rational foundation of \textit{jus cogens} gives it moral force, while satisfying Blackstone's criterion that it be susceptible to common law adjudication.\textsuperscript{99}

This description comes close to an international natural law theory. But since nations do observe \textit{jus cogens}, seek to enforce it upon each other, and deny their own violations of it, they pay homage to its moral force and informally ratify and authorize its application.\textsuperscript{100} The act of
ratifying and authorizing is, for the positivist, a rule of recognition\(^\text{101}\)—but here the recognition is more literal, since the world community professes to recognize rather than to formulate the norms created.\(^\text{102}\)

The best example of this was found at Nuremberg, where unprecedented historical events forced the world to acknowledge that, even absent formal expressions of certain international principles in the past, the rule of reason required the conviction of Nazi war criminals.\(^\text{103}\) To call the Nuremberg Tribunal’s action an international \textit{ex post facto} law would be as absurd as to describe a common law court’s novel approach to an unprecedented set of facts as an \textit{ex post facto} decision. As the International Court of Justice held in \textit{Barcelona Traction,}\(^\text{104}\) there are two kinds of obligations in customary international law: those toward other states, and those “toward the international community as a whole.” The latter include “principles and rules concerning the basic rights of the human person.”\(^\text{105}\) Such principles can only be derived from a rational inquiry into what the world community considers just,

\(^{101}\) H.L.A. Hart, \textit{The Concept of Law} 92 (1961) (“In a developed legal system the rules of recognition . . . may be the fact of their having been enacted by a specific body, or their long customary practice, or their relation to judicial decisions.”).

\(^{102}\) Professor Carlos Nino argues that the fight between positivism and natural law theory is semantic. A positivist according to Nino is willing to accept the existence of abstract principles of right but demands that such principles be recognized by authoritative organs before they are called law. Thus, a positivist is willing to admit that a law can be wrong. C. Nino, \textit{Consideraciones Sobre La Dogmática Jurídica} 19-21 (1971). By clothing the law of natural reason in the practice of states, customary international law satisfies the positivist demand for acknowledgement according to a rule of recognition. See Chow, \textit{Rethinking the Act of State Doctrine: An Analysis in Terms of Jurisdiction to Prescribe}, 62 WASH. L. REV. 397, 407 n.53 (1987) (“[P]ositivism holds . . . [that] law, however it might be influenced by morals, is conceptually distinct from morals.”).

Trimble has contended that customary international law lacks “legitimacy” on positivistic grounds, suggesting that “the search for an adequate general theory of international law should focus on the processes through which law is made in national political systems rather than on universal principles.” Trimble, \textit{supra} note 20, at 672-73. This kind of argument ignores the role of states in the formation of customary international law—the “practice of states” alluded to by Blackstone. See \textit{supra} note 20 and accompanying text. The acquiescence of nations in a customary norm constitutes a satisfactory source of authority even for a positivist like Hart. See generally \textit{supra} note 101. The “natural reason” element of customary norms explains why states have willingly lent authority to them.

Trimble also suggests that customary norms lack “coherence” in domestic courts, like a judge releasing a prisoner because he “saw three crows cross the full moon the night before he made the decision,” rather than on legally recognized grounds. Trimble, \textit{supra} note 20, at 718. But customary norms must derive their force either from the national interest (\textit{jus dispositivum}) or a concept of right (\textit{jus cogens}). Both of these sources of the law are coherent in our culture; universal practice shows the commonality of their coherence to all cultures.

\(^{103}\) \textit{See supra} note 42.


\(^{105}\) \textit{Id. at} 32.
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not into what is in the best interests of particular states or even of a majority of states.

Therefore, while *jus dispositivum* is good international law, it is only a law of honor, under which violators are reproached only for having failed to live up to the expectations that they themselves have created. States are not bound to *jus dispositivum*; it is good only as long as they agree to it. Once they have manifested their consent to *jus dispositivum*, it derives its force from that consent and from the reliance of other parties affected by it. But while consent gives authority to *jus dispositivum*, *jus cogens* is founded on a deeper moral consensus, and is merely illustrated by such acquiescence. Consent is a necessary but insufficient condition for the finding that *jus cogens* governs.

C. The Relevance of Classifications of Customary International Law to Domestic Jurisdiction

In this subsection, I argue that the classifications of customary international law described above can help distinguish those cases and claims that may be heard by domestic courts sitting in common law from those that are properly the domain of the political branches. I argue that *jus cogens* is self-executing, so that its infringement places the offender in violation of domestic law. *Jus dispositivum*, on the other hand, is not necessarily binding domestically, although its infringement may place the offender in violation of international law as applied by international fora.

The distinction between *jus dispositivum* and *jus cogens* helps to explain the self-executing nature of some customary principles of international law and the non-self-executing nature of others. When domestic courts apply treaty law and other rights established by express accord, they usually look to the language and legislative history of the norms involved to locate the intent to enforce them locally. If such an intent exists, these agreements are regarded as self-executing, whether or not they are backed by rational or moral principles. They do not have to be identified as either *jus dispositivum* or *jus cogens* to mandate their domestic enforcement.

For laws establishing the rights of nations toward one another, proof of the nations' consent will be enough to establish the existence of norms,

106. Brudner, supra note 10, at 250.
107. Id. at 251.
108. In People of Saipan v. U.S. Dep't of Interior, 502 F.2d 90, 99 (9th Cir. 1974), the court held that domestically enforceable treaty obligations could arise when the parties to the treaty expressed their will that domestic means of enforcement be available.
and *jus dispositivum* will be found to exist.\textsuperscript{109} But since the rights involved are those of nations rather than of individuals, they will not always be self-executing or engender individual rights of action (unless, of course, they are also guaranteed by a self-executing agreement).\textsuperscript{110} Indeed, this is why laws affecting only sovereign nations cannot be interpreted as giving rise to individual rights. If it were in the nations' interests to give rights to individuals, they could do so by express language, and thus make further exploration of the nature of the legal principles involved unnecessary.

By contrast, principles asserting the fundamental rights of persons are self-executing precisely because they vest personal rights, and because they express normative principles embraced generally by the world community.\textsuperscript{111} These are always *jus cogens*. They are common law in the sense that Blackstone intended, and may be accepted as principles by all rational people. Of course, like domestic common law, they must be demonstrated by reference to international precedent in order to be executed into domestic law. Specifically, it must be shown that the domestic application itself is backed by past application, scholarly support, and other measures of the general recognition of the right asserted.\textsuperscript{112} It also seems that a substantial body of positive law, such as treaties, lends credence to claims based upon peremptory customary norms.\textsuperscript{113} If this theory of the self-executing value of *jus cogens* is accepted, application of such law in a domestic court would require only a finding of jurisdiction.\textsuperscript{114}

\textsuperscript{109} Brudner, *supra* note 10, at 250-51.

\textsuperscript{110} See *supra* note 5.

\textsuperscript{111} See Brudner, *supra* note 10, at 249 (*jus cogens* defined). Fundamental human rights should be distinguished from rights granted by the constitutions or laws of particular nations. The former are rules that are so basic that they are universally recognized, as evidenced by international conventions and practices. The field occupied by such rights is therefore extremely narrow. For example, the right to free speech, if it is not taken to command universal respect, may not qualify as a fundamental human right, while freedom from torture seems firmly entrenched in international agreements. All rights that have achieved universal recognition may be taken to be *jus cogens*.

\textsuperscript{112} See *Filartiga* v. Pena-Irala, 630 F.2d 876, 880-81 (2d Cir. 1980); The Paquete Habana, 175 U.S. 677, 700 (1900).

\textsuperscript{113} See *Filartiga*, 630 F.2d at 881-84.

\textsuperscript{114} In 1952, the California Supreme Court overturned a lower court decision invalidating a state alien land law that was based on the local law's violation of the U.N. Charter. The court held that the Charter only "expresses the universal desire of thinking men for peace and for equality of rights and opportunities," and does not constitute a norm superseding domestic legislation. *Sei Fujii* v. State, 38 Cal. 2d 718, 242 P.2d 617 (1952). To the extent that the lower court had attempted to apply the Charter like a statute, the decision was correct, for the Charter can only comprise evidence of a customary norm. But to the extent that *Sei Fujii* rejected the general force of peremptory international legal norms, rather than the evidence of a particular norm's existence, the case was wrongly decided. See *Filartiga*, 630 F.2d at 882 n.9 (citing U.N. Charter as evidence of a peremptory norm of international law).
While *jus cogens* is easy to define, it is more difficult to identify. International law has recognized many rules of *jus cogens* in practice. These include the offenses covered by universal jurisdiction.\(^\text{115}\) However, where *jus cogens* has not already been clearly articulated, courts should be careful to construe it narrowly. Unless consistent custom, precedent, and scholarly opinion evince convincing proof that a normative standard is being observed, courts should refrain from treating the standard as *jus cogens*. Substantive determinants of *jus cogens* include the content and intended beneficiaries of the rule invoked.

But in addition to the authority of law, there must be authority to decide the law. Forceful as the law itself may be in principle, there must exist a forum to enforce it if it is to have any practical effect. It is thus necessary to determine how both the international and U.S. domestic legal systems distribute this authority. There is support for the argument that international law imposes on domestic courts a duty to enforce and punish. In the *Arjona* case, for example, the Supreme Court held that the United States was obligated under customary international law to punish persons counterfeiting foreign notes.\(^\text{116}\) However, international law does not mandate that local jurisdictions discharge the obligations of substantive international law in any particular way. Thus, the authority to enforce remains largely in the hands of states to distribute as they see fit, and to provide remedies consistent with their national laws.\(^\text{117}\) When a state undertakes to enforce international law, the choice of legal consequences will be the outcome of local processes, based on practical and cultural factors.

That there is a substantive law defined by international norms does not imply that there is also an obvious judicial response. The Alien Tort Statute specifies the remedy available in U.S. district courts. It authorizes these courts to exercise original jurisdiction over substantive claims arising under international law, and it mandates that those claims be cognizable in tort. Indeed, as Judge Bork urges, the Alien Tort Statute is not the source of such claims, but gives form to substantive law existing outside of, but permeating, domestic law. And as Judge Kaufman pointed out in *Filartiga*, the statute gives the national government "control over international affairs" by specifying the means of

\(^{115}\) See supra note 54.

\(^{116}\) United States v. Arjona, 120 U.S. 479, 488 (1887). The duty to punish is also implied by Judge Kaufman in *Filartiga*, 630 F.2d at 887 (citing The Nereide, 13 U.S. (9 Cranch) 388, 423 (1815), and The Paquete Habana, 175 U.S. at 700).

\(^{117}\) Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 778 (D.C. Cir. 1984) (Edwards, J., concurring) ("The law of nations thus permits countries to meet their international duties as they will." (citation omitted)).
enforcement.\textsuperscript{118} It ensures both federal control of litigation arising under international law and a consistent judicial interpretation of the law.

The grant of authority to exercise jurisdiction under the Alien Tort Statute, however, is not absolute. The FSIA and the various doctrines of sovereignty and immunity recognized in our courts provide external limits to rights arising under customary law, and thereby give them shape. The discussion below examines the effect of these statutes and other principles limiting the adjudication of customary international law by domestic courts.

III. Use of Customary International Law by Domestic Courts: Bars and Limitations

Two issues control the domestic transformability of customary international law in the United States. One, discussed above, is the ability of domestic law to assimilate international law.\textsuperscript{119} The other is the existence of domestic legal bars to this assimilation. In this section, I will discuss the shape given to the enforcement of customary international law rights by the FSIA and by the various doctrines of sovereignty and immunity applied by U.S. courts to limit the domestic transformation of international law. I will show that objections to the transformation of customary international law based on the political question and separation of powers doctrines are unwarranted. Finally, I will suggest that the application of customary international law by domestic courts will not upset the balance of power between the different branches of government in the administration of foreign affairs, since sufficient jurisdictional barriers remain to minimize judicial interference in this area. While it is beyond the scope of this comment to treat these issues exhaustively, my intention here is to suggest possible responses to the affirmative defenses to jurisdiction that a plaintiff invoking customary international law is likely to encounter.

A. Domestic Court Interpretation of Foreign Sovereign Immunity

The act of state doctrine and the FSIA comprise rules drawn from the general notion of state sovereignty. The earliest formulation of the act of state doctrine is found in \textit{Underhill v. Hernandez}, in which the Supreme Court held that "[e]very sovereign State is bound to respect the independence of every other sovereign State," and that an act of state by one country should therefore generally be beyond the jurisdiction of the

\begin{footnotesize}
\begin{itemize}
\item[118.] 630 F.2d at 887.
\item[119.] \textit{See generally supra} notes 80-85 and accompanying text.
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courts of other countries. However, an act of state that violates international law is not necessarily protected by the doctrine. As Justice White wrote in his dissent in *Banco Nacional de Cuba v. Sabbatino*,

"[T]he reasons for nonreview, based as they are on traditional concepts of territorial sovereignty, lose much of their force when the foreign act of state is shown to be a violation of international law. All legitimate exercises of sovereign power... should be exercised consistently with the rules of international law." 

In *Alfred Dunhill of London, Inc. v. Cuba*, the Court held that an act of state is the "public act of those with authority to exercise foreign sovereign powers." Therefore, to qualify as an act of state within the meaning of *Dunhill*, an act must be within the competency and sovereignty of the actor. Acts that violate peremptory international law, however, exceed the scope of any constituted authority, and are therefore neither legitimate nor authoritative. In such cases, the act of state defense may be inapplicable. Moreover, many violations of the rights of individuals are private and not public acts, and thus do not fit within the act of state exception. Therefore, courts considering whether to take jurisdiction

120. 168 U.S. 250, 254 (1897).
121. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 457 (White, J., dissenting). The majority held that the act of state doctrine even applied in cases involving actual violations of international law. *Id.* at 427-37. However, Justice White's position appears to have been adopted in subsequent case law. *See* Ramirez de Arellano v. Weinberger, 745 F.2d 1500, 1540 (D.C. Cir 1984) ("[W]hen there are generally accepted tenets of international law... the danger of improper judicial interference with the Executive's responsibilities to foreign affairs... is greatly reduced."); Von Dardel v. U.S.S.R., 623 F. Supp. 246, 253-59 (D.D.C. 1985) (citing, *inter alia*, Justice White's dissent in *Sabbatino*) (violations of international law are not legitimate acts of sovereignty and do not qualify as state action).
122. 425 U.S. 682, 694 (1976). In contemporary jurisprudence, however, separation of powers concerns constitute the basis of the doctrine. *See* First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 775-76 (1972) (Powell, J., concurring); *Ramirez de Arellano*, 745 F.2d at 1534; *see also* Chow, *supra* note 102, at 415 (*Sabbatino* grounds act of state doctrine in separation of powers).
123. *See* Letelier v. Republic of Chile, 488 F. Supp. 665, 674 (D.D.C. 1980) ("Although the acts allegedly undertaken directly by the Republic of Chile to obtain the death of Orlando Letelier may well have been carried out entirely within that country, that circumstance alone will not allow it to absolve itself under the act of state doctrine... ").
124. *Id.* The status of a foreign sovereign's private acts is confirmed in the legislative history of the FSIA. The House Judiciary Committee, in its report on the bill, stated:

'The immunity of a foreign state is 'restricted' to suits involving a foreign state's public acts (jure imperii) and does not extend to suits based on its commercial or private acts (jure gestionis). This principle was adopted by the Department of State in 1952 and has been followed by the courts and the executive branch ever since. Moreover, it is regularly applied against the U.S. Government in foreign courts.

against foreign sovereigns must decide whether the plaintiff has stated a claim properly based on peremptory principles of international law.

The FSIA codifies the broad international legal doctrine of sovereign immunity, which applies principles of comity and respect for state action to shield one country from suit in another country’s courts.\textsuperscript{125} The act excepts commercial activity, waivers by the sovereign, and other explicitly prescribed events from its general bar of jurisdiction.\textsuperscript{126} Sovereign immunity was first recognized as a defense by U.S. courts in \textit{The Schooner Exchange},\textsuperscript{127} but has always been regarded as “a matter of grace and comity”\textsuperscript{128} subject to reservation by the forum state. The FSIA was passed to remove the executive branch from the process of determining sovereign immunity and to place that determination squarely in the hands of the courts.\textsuperscript{129} The FSIA was also intended to function as a means of imposing consistency on sovereign immunity rulings by domestic courts.\textsuperscript{130}

It has been argued that the FSIA replaces the Alien Tort Statute as the jurisdictional law governing international torts.\textsuperscript{131} However, the FSIA contains no explicit repeal of the Alien Tort Statute. Indeed, there exists a strong presumption against implied repeal unless two statutes are in

\textsuperscript{126} 28 U.S.C. § 1604 (1986). This section provides that immunity is subject to international agreements to which the United States was a party at the time of the act’s enactment. Therefore, prior agreements preempt FSIA provisions that would disrupt their operation. Section 1605 provides for waiver of sovereign immunity “explicitly or by implication.” Waiver may be implied when a country enters a treaty obligation or agreement to arbitrate claims in another country, or when it appears in a domestic court whose jurisdiction would otherwise be blocked by sovereign immunity. There are other exceptions for commercial activity, noncommercial torts, and for torts committed on the soil of a foreign state. \textit{See generally} 28 U.S.C. §§ 1602, 1603, 1606-1611 (1986).
\textsuperscript{127} 11 U.S. (7 Cranch) 116 (1812).
\textsuperscript{128} \textit{Verlinden}, 461 U.S. at 486.
\textsuperscript{129} \textit{Von Dardel} v. U.S.S.R., 623 F. Supp. 246, 251, 253 (D.D.C. 1985); \textit{see also} House Report on FSIA, \textit{supra} note 124, at 6604, 6605-6:

[T]he bill would insure that this restrictive principle of immunity is applied in litigation before U.S. courts. At present, this is not always the case. Today, when a sovereign state wishes to assert immunity, it will often request the Department of State to make a formal suggestion of immunity to the court. . . . A principal purpose of this bill is to transfer the determination of sovereign immunity from the executive branch to the judicial branch, thereby reducing the foreign policy implications of immunity determinations and assuring litigants that these often crucial decisions are made on purely legal grounds and under procedures that insure due process. The Department of State would be freed from pressures from foreign governments to recognize their immunity from suit and any adverse consequences resulting from an unwillingness of the Department to support that immunity.

\textsuperscript{130} \textit{Id.} at 251.
\textsuperscript{131} \textit{See Von Dardel}, 623 F. Supp. at 254. 
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such conflict that it is impossible for both to continue to be applied.\textsuperscript{132} Furthermore, the exceptions within the FSIA appear to leave room for jurisdiction over foreign defendants under the Alien Tort Statute.\textsuperscript{133} The FSIA is essentially a regulation of suits involving commercial activities, and as such, it is more akin to \textit{jus dispositivum} than to \textit{jus cogens}. Its legislative history is devoid of references to human rights. Thus far, courts that have upheld their tort jurisdiction over foreign defendants under international legal principles have not found the FSIA to be an obstacle.\textsuperscript{134} Even the opinions of Judges Bork and Robb in \textit{Tel-Oren} do not dwell on the FSIA, but rely on the merits of the claim in light of their limited readings of the Alien Tort Statute.\textsuperscript{135}

B. The Separation of Powers and Political Question Doctrines: Domestic Rules of Judicial Competence

There is a close relationship between the separation of powers and political question doctrines typically invoked against domestic court jurisdiction in cases involving foreign affairs. Both presuppose that international relations are properly the domain of the executive and legislative branches of government and outside of the legitimate reach of courts. Separation of powers theorists base this assumption on a principled commitment to the exclusive right of the political branches to handle foreign affairs, and on a belief that the importation of law from nondomestic sources violates the principle of lawmaking by elected officials.\textsuperscript{136}

\textsuperscript{132} This rule of statutory construction is quite old. See Wood v. United States, 41 U.S. (16 Pet.) 342, 362-63 (1842) (repeal only implied when there is “positive repugnancy” between statutes). The standard modern formula is found in Kremer v. Chemical Construction Corp., 456 U.S. 461, 468 (1982) (“irreconcilable conflict” must be shown to justify implied repeal).

\textsuperscript{133} See \textit{Von Dardel}, 623 F. Supp. at 254.

\textsuperscript{134} See, e.g., \textit{Filartiga}, 630 F.2d 876 (2d Cir. 1980) and \textit{Von Dardel}, 623 F. Supp. 246 (D.D.C. 1985). Logically, the FSIA could not have been a bar in any case in which a foreign plaintiff won.

\textsuperscript{135} See supra text accompanying notes 64-69.

\textsuperscript{136} Professor Trimble worries about the effects of judicial activity in international law on the separation of powers. See \textit{generally infra} notes 141-50 and accompanying text. Judge Bork’s philosophy of judicial restraint relies on a similar concern generalized to include judicial intervention in all areas ordinarily consigned to the political branches. See Bork, \textit{Neutral Principles and Some First Amendment Problems}, 47 IND. L.J. 1, 2 (1971) (discussing the “anomaly of judicial supremacy in a democratic society”). It is a philosophy that seems to owe much to Bork’s former Yale colleague, Alexander Bickel, who formulated the idea of the “countermajoritarian difficulty” posed by judicial review conducted by unelected common law courts in a democratic society. A. BICKEL, THE LEAST DANGEROUS BRANCH 16-23 (1962); see also \textit{infra} note 146 and accompanying text.

But the complaint is also much older. The existence of a “federal common law” was challenged in the early history of the Republic on the grounds that common law was inconsistent with the notion of laws made by the people. See, e.g., Kamper v. Hawkins, 1 Va. Cas. 20 (Gen. Ct. 1793) (Nelson, J.) (overruling legislation and affirming power of judicial review); \textit{id.} at 47 (Henry, J., concurring in part) (“The judiciary . . . could never be designed to determine
Political question theorists, on the other hand, reach the same conclusion because of their pragmatic concern that judicial activism may have inconsistent and disruptive effects on the foreign policy of the United States.137

The separation of powers argument may be answered partly by considering two aspects of domestic jurisdiction over international legal questions. First, if customary international law, as incorporated into common law, violates the separation of powers, then the same must be true of all federal common law. Common law is not made by elected legislatures, but by courts through the interpretation and establishment of precedent. If the exercise of domestic common law jurisdiction is constitutional, then the exercise of a common law jurisdiction originating substantially in the law of nations may be constitutional as well. Moreover, it cannot be argued that there is no applicable federal common law. As the Sabbatino holding implied, such law does exist for actions that are particularly federal in nature, such as claims arising under international law.138 The Sabbatino Court ultimately rejected the plaintiff's international law claim by applying the act of state doctrine. Since the act of state doctrine is a principle of federal common law, the Sabbatino Court indicated its agreement with the threshold validity of a common law action substantively based on customary international law, for it accepted jurisdiction to hear the case—a disposition logically prior to the entertainment of affirmative defenses such as act of state.

Second, the potential scope of judicial action remains extremely limited. It is true, of course, that courts can frustrate national policy. But their province is finding and declaring legal norms, and seeing to it that upon [matters] that would amount to an express interfering with the legislative branch.""); see also Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798) (Chase, J.) ("An Act of the Legislature . . . contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority.") (emphasis omitted); id. at 399 (Iredell, J., concurring) (unconstitutional acts of Congress void, but the court will avoid exercising its authority to declare them void except "in a clear and urgent case."). These cases were won by the exponents of a federal common law. For further review of the early debate surrounding judicial review, see G. GuntHER, CONSTITUTIONAL LAW 29-39 (11th ed. 1985).

This century has seen the repudiation of a federally-made common law that would override state common law, on the grounds that a state's judicial sovereignty to decide its own common law must be respected. See generally Erie Railroad v. Tompkins, 304 U.S. 64 (1938); see also supra notes 32-39 and accompanying text. But this does not go to the question of a "countermajoritarian" incursion by the judiciary into the domain of elected institutions.

Professor Glennon, however, points out that domestic legal institutions participate directly in the formation of customary international law. For example, Article 38(1) of the Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1055, T.S. No. 993, provides that the Court shall apply "general principles of law recognized by civilized nations" and "judicial decisions . . . of the various nations." See Glennon, supra note 36, at 929.

137. See Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 826-27 (Robb, J., concurring).
138. See supra note 36 and accompanying text.
such norms are duly executed.\textsuperscript{139} Courts cannot make treaties or covenants, declare or execute policy, or legislate for the government. Should they declare rights that frustrate government policy, it is within the power of the political branches to pass legislation limiting or even eliminating such rights, provided, of course, that they are not \textit{jus cogens}.\textsuperscript{140} To the extent that courts "discover" laws—that is, flag the existence of norms that are already binding—they do not actually interfere with political authority at all, since such authority could never have existed in opposition to the rule of law. If anything, they frustrate designs carried out in a manner contrary to the law. Moreover, the jurisdiction of domestic courts is particularly circumscribed by the still limited scope of international law itself, by doctrines and statutes that limit jurisdiction over claims that are not \textit{jus cogens}, and by the necessity of establishing personal jurisdiction over the defendant.

"Elevating customary international law to the status of treaties," writes Professor Trimble, "entails a significant redistribution of political power and law-making authority . . . ."\textsuperscript{141} Although the domestic transformation of customary international law can broaden the role that courts play in state conduct, this does not necessarily mean that this role would be either significant in scale or inappropriate. For the purposes of this discussion, Trimble's critique provides a useful summary of the pragmatic argument against such a transformation.

First, Trimble argues that emerging customary international legal norms could supersede earlier treaties, placing authority to modify a treaty in the hands of "an amorphous group of states" distinct from the signatories.\textsuperscript{142} This is analogous to supposing that common law could generally supersede statute.\textsuperscript{143} While it is possible for positive law to become obsolete and to be displaced by practice, our basic understanding is that vital statutes supersede common law, and not vice-versa.\textsuperscript{144} Thus,

\textsuperscript{139} It may, of course, be beyond a court's power to grant relief. International law remedies remain more primitive than the system of norms authorizing recovery. See Koh, \textit{supra} note 3, at 172-73.

\textsuperscript{140} It is of course my contention that a domestic court should strike down a statute that violated peremptory norms.

\textsuperscript{141} Trimble, \textit{supra} note 20, at 678.

\textsuperscript{142} \textit{Id}. at 681-82.

\textsuperscript{143} Professor Trimble distinguishes between customary international law and domestic common law, arguing, \textit{inter alia}, that common law is not anti-democratic in the way that customary international law supposedly must be. \textit{Id}. at 707-13. Yet, implying that customary international law and common law bear the same relationship to positive law, he proceeds to state, "Even the consistency of normal common law adjudication with 'popular sovereignty' was debated in the late eighteenth century." \textit{Id}. at 718 n.188 (citing M. Horwitz, \textit{The Transformation of American Law} 19-23 (1977)).

\textsuperscript{144} It must be conceded that some scholars maintain that customary international law and treaty law have the same authority. See, \textit{e.g.}, L. Henkin, R. Pugh, O. Schachter & H.
legislatures enact laws to replace older, customary rules. Trimble’s mistake is in supposing that customary law, if given any domestic transformation, must have a force equal to that of treaties; clearly, positive law would continue to override the vast realm of custom which is properly *jus dispositivum*.

Second, Trimble argues that the enforcement of customary international law might shift congressional power to the President by enabling him to make custom, or to the judiciary by allowing courts to declare it. 145 This harks back to a more fundamental concern about preserving popular sovereignty as the source of law. 146 But it is hard to see how the application of customary international law would redistribute this power any more than common law adjudications already do. It is within the power of Congress, if it so chooses, to nullify most established practices by enacting positive law. 147 Of course, it is my contention that it would be contrary to fundamental principles of law for Congress to attempt to legislate in violation of the narrow field of *jus cogens*. As Trimble rightly observes, the domestic application of customary international law augments the presidential and judicial roles in foreign affairs by placing the onus on Congress to undo customary law, but this does not change the scope of Congress’ ultimate power to do so. 148 Further, to the extent that Trimble’s argument is descriptive, not prescriptive, he may be protesting against what is, increasingly, the *status quo*. The burden is to show that congressional authority has in fact undergone erosion because of this development. Yet Trimble introduces no such evidence.

Finally, Trimble argues that the application of customary international law would give courts another tool with which to strike down

Smit, International Law 36 (1980); J. Brierly, The Law of Nations 56-65 (H. Waldo ed. 1936); Gamble, The Treaty/Custom Dichotomy: An Overview, 16 Texas Int’l L.J. 305 (1981); Akhurst, The Hierarchy of the Sources of International Law, 47 Brit. Y.B. Int’l L. 273 (1974-75). But this is authority that Professor Trimble himself has rejected. See Trimble, supra note 20, at 669 (“[Customary and treaty law] rest on different political foundations and should not be regarded as equally authoritative.”); see also C. Parry, The Sources and Evidences of International Law 33-37 (1965) (treaty law more authoritative than customary law). It seems more appropriate to call customary law and treaty law equally valid, but also to recognize the superseding effect of treaty law, which is positive law, over most customary law. See Glennon, supra note 36, at 923 (“Congress can . . . create a different rule . . . because federal common law is interstitial; it fills in gaps between statutes and gives way when an inconsistent law is enacted.”).

145. Trimble, supra note 20, at 682.
146. See id. at 707 (“In this analysis the first and most basic question is how to justify the lawmaking authority of unelected judges in a ‘democratic’ society.”); see also A. Bickel, supra note 136, at 16-23 (judicial review inconsistent with ideal of popular sovereignty).
147. See Garcia-Mir v. Meese, No. 86-8010 (11th Cir., Apr. 23, 1986) (domestic legal instrumentalities can interdict international law); see also supra note 31.
148. Trimble, supra note 20, at 682.
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congressional acts. 149 This argument again relies on a misconstruction of the relationship between positive law and customary or common law. Most customary international law cannot bar statutes from taking effect. By far the larger part of customary international law is jus dispositivum, which, because it depends on the compliance of the sovereign, becomes a nullity for domestic purposes in the face of contrary legislation. Congress has never had authority to violate jus cogens, and the mere acknowledgement of this fact does not amount to a redistribution of congressional authority.

The domestic application of customary international law need not run afoul of the political question defense. According to this doctrine, the political branches are better equipped than the courts to speak with a single voice on certain policy questions. An underlying concern in political question disputes is the possible inhibiting effect of judicial rulings on the flexibility of the political branches in foreign affairs. 150 The classic test in this area was formulated in Baker v. Carr, 151 which required inquiry into whether judicial disposition of a proposed action would: (1) interfere with a “textually demonstrable constitutional commitment of the issue” to another political branch; (2) constitute a “policy determination of a kind clearly for nonjudicial discretion”; or (3) present the potential for “embarrassment from multifarious pronouncements by various departments on one question.” 152

As discussed above, in refusing to accept jurisdiction in Tel Oren, Judge Robb held that responses to terrorism were properly left to the political branches, since any overt judicial reaction would amount to the de facto recognition of the terrorist group responsible for the offense. 153

149. Id. at 684. Professor Trimble compares the hypothesized relationship with Dean Calabresi’s “novel” proposal that common law adjudication be allowed to modify statutes that are out of tune with contemporary jurisprudence. Id.; see generally G. CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982). But the very novelty of the proposal demonstrates the strangeness of the notion that customary law could supersede positive law. The fact is that most common law does not supersede statutes, and with the exception of peremptory norms, customary international law could not do so. But it would be desirable for customary international law to supersede statutes that conflict with peremptory norms.


151. 369 U.S. 186 (1962).

152. Id. at 217. In his concurring opinion in Goldwater v. Carter, 444 U.S. 996, 998 (1979), Justice Powell formulated the following test:

(i) Does the issue involve resolution of questions committed by the text of the Constitution to a coordinate branch of Government? (ii) Would resolution of the question demand that a court move beyond areas of judicial expertise? (iii) Do prudential considerations counsel against judicial intervention?

See also Ramirez de Arellano v. Weinberger, 745 F.2d 1500, 1511 (D.C. Cir. 1984) (citing Goldwater).

153. Tel-Oren, 726 F.2d at 824-25 (Robb, J. concurring).
Unlike the acts of sovereigns recognized by the United States, terrorist acts require a political rather than a judicial response, since the latter would have unintended political repercussions. The doctrine may be summed up as barring otherwise legitimate claims on prudential grounds arising from the realities of international relations. Such realities include the need to tread lightly with political allies and to deal with unrecognized enemies by nonpublic, noninstitutionalized means. As this discussion suggests, there are times when the application of the political question doctrine would be appropriate, although its use should probably be limited to unusually urgent matters. In any event, there is growing authority for the proposition that the doctrine lacks vitality, and that what courts term a "political question" is actually a perfectly constitutional exercise of executive or legislative authority.  

C. Other Limitations

Even if the act of state, foreign sovereign immunity, and political question defenses apply, the activity of domestic courts in cases involving foreign parties will be constrained by the usual prerequisites of jurisdiction. The *Filartiga* court implied that the violation of international law gives a trial court every authority to hear the case except *in personam* jurisdiction.  

155 With the exception of the passing reference to subject matter jurisdiction in *Filartiga*, courts deciding customary international law cases have said little about personal jurisdiction. A U.S. court must, of course, have personal jurisdiction over the defendant before it can hear a claim. *Forum non conveniens*, a common rule of venue giving courts discretion to decline to take jurisdiction where the plaintiff’s choice of forum would impose undue hardship on the defendant, may also apply.  

All these jurisdictional prerequisites make the prospect of over-activity by the courts in this area remote.

154. See, e.g., *Ramirez de Arellano*, 745 F.2d at 1514 ("Recent cases raise doubts about the contours and vitality of the political question doctrine, which continues to be the subject of scathing scholarly attack."); *Tel-Oren*, 726 F.2d at 796-98 (Edwards, J., concurring); id. at 803 n.8 (Bork, J., concurring); *Vander Jagt v. O'Neill*, 699 F.2d 1166, 1173-74 (D.C. Cir.), cert. denied, 464 U.S. 823 (1983); see also *McGowan, Congressmen in Court: The New Plaintiffs*, 15 GA. L. REV. 241, 256-60 (1981) (political question doctrine lacks vitality and is inappropriate for resolving problems between political branches); *Henkin, Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597 (1976) (cases refusing jurisdiction reinterpreted as determinations that the challenged political acts were actually constitutional).


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Conclusion

Common law courts have jurisdiction to hear common law claims. Among these are claims arising under the law of nations. When substantive violations occur under that law, claims for redress may be adjudicated pursuant to both common law rules and domestic statutes defining jurisdiction and specifying available forms of relief. It is within the right of domestic jurisdictions to prescribe the remedy for substantive violations of international law, and it may also be their duty to provide some legal redress, whether it be penal- or tort-based. In the United States, remedies for violations of customary international law, like the jurisdiction to apply it, are provided by the Alien Tort Statute.

Customary international law is not self-executing in the strict sense, since it does not contain within itself the terms of its application. However, where a particular domestic jurisdiction has expressly bound itself to respect that law, or where the law constitutes *jus cogens* subject to universal jurisdiction, it is peremptory and therefore domestically binding as U.S. common law. The shape of customary international law, as domestically applied, is then determined by the statutory provisions and legislative or judicial traditions of the local jurisdiction.