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F. Giba-Matthews*

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Abstract

This Note discusses how international common law should act as federal common law in U.S. courts. This Note also explores the constitutional challenges involved in incorporating customary international law into U.S. federal common law. Such challenges revolve around the institutions of representative democracy, federal jurisdiction, and the doctrine of separation of powers. Part I of this Note discusses federal common law and customary international law. Part II of this Note presents the negative and positive effects of incorporating customary international law into federal common law. This Note concludes that to preserve national honor among the community of nations, and to protect U.S. citizens from powerful national and international factions, the U.S. federal courts must continue their incorporation of customary international law as a part of federal common law. As in the days of Jonathan Smith, customary international law is the answer to reprehensible oppression.

CUSTOMARY INTERNATIONAL LAW ACTS AS FEDERAL COMMON LAW IN U.S. COURTS

*F. Giba-Matthews, O.F.M.**

> I have lived in a part of the country where I have known the worth of good government by the want of it. They would rob you of your property; threaten to burn your houses; oblige you to be on your guard night and day; alarms spread from town to town; families were broken up; the tender mother would cry, "O, my son is among them! What shall I do for my child?" Some were taken captive, children taken out of their schools, and carried away. Then we should hear of an action, and the prisoners were set in front, to be killed by their own friends. How dreadful, how distressing was this! Our distress was so great that we should have been glad to snatch at anything that looked like a government. . . . [N]ow, Mr. President, when I saw this Constitution, I found a cure for these disorders. It was just the thing.[1]

INTRODUCTION

Currently, in the southern United States, the threats to burn houses[2] have become the reality of burnt churches.[3] In the midwestern United States, a terrorist was convicted and sentenced to death for bombing a federal building[4] under the banner of States' rights, where the individual states have superior power

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* J.D. Candidate, 1999, Fordham University; friar minor in the Order of Friars Minor (Franciscan Catholic priest). I would like to thank Bienvenido P. Lee for his patience and Professors Martin Flaherty, Harold Koh, Peter Weis, Beth Stevens, and Lawerence Moore, S.J. for their comments on earlier drafts of this Note.

1. Jonathan Smith, *Speech in the Massachusetts Ratifying Convention*, Jan. 25, 1788, *in* RICHARD MORRIS, BASIC DOCUMENTS ON THE CONFEDERATION AND CONSTITUTION 229 (1970) (quoting Jonathan Smith, Virginia citizen, who supported ratification of U.S. Constitution at state convention).

2. *See id.* (speaking to Massachusetts Constitutional Convention, Jonathan Smith spoke of citizen's threat to burn people's houses).

3. *See* United States v. Pierce, 62 F.3d 818, 823 (6th Cir. 1995) (ruling that conviction of two Klu Klux Klan, white supremacist group members for conspiracy to burn pre-dominantly African-American Church was fundamentally fair); *see also* Bob Herbert, *A Church Destroyed by Hate*, N.Y. TIMES, May 24, 1996, at A1 (reporting on surge of Church burnings in South of United States).

4. Arthur Salm, *'58 Bombing Illuminates Story Of Racism, A Rabbi, His Temple*, SAN DIEGO UNION & TRIB., May 23, 1996, (book review) WL 2160627 (reporting that since 1950s National States Rights Party fought federal government intrusion).

over federal power.[5] Another terrorist repeatedly terrorized citizens across the country in an attempt to single-handedly control the development of technology.[6]

Parallel to these concerns of terrorism, the United States has not fully franchised African-American[7] or Native-American populations[8] or women.[9] Instead, the U.S. Government[10] and extremist segments of the nation's population[11] exclude these minorities from access to courts that protect their rights.[12]

Internationally, Jonathan Smith's plea for good govern-

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5. *See* Serge F. Kovaleski, *Oklahoma Bombing Conspiracy Theories Ripple Across the Nation*, WASH. POST, July 9, 1995, at A3 (reporting on states rights support as reason for Oklahoma City Federal building bombing).

6. *See* George Lardner, *To Unabomb Victims, A Deeper Mystery, Suspect Unknown to Survivors, Who Wonders Why They Were Picked*, WASH. POST, Apr. 14, 1996, at A1 (reporting on process of victim selection by unabomber).

7. *See, e.g.*, Laughlin McDonald, *The Quiet Revolution in Minority Voting Rights*, 42 VAND. L. REV. 1249, 1292 (1989) (discussing voting districts reshaping to better represent African-Americans); *see also* Floyd D. Weatherspoon, *The Devastating Impact of the Justice System on the Status of African-American Males: An Overview Perspective*, 23 CAP. U. L. REV. 23, 46 (noting African-Americans compose only 12% of nation's population but half of U.S.'s prison population and one third of all young African-American men were under supervision of criminal justice system in 1994).

8. *See* Raidza Torres, *The Rights of Indigenous Populations: The Emerging International Norm*, 16 YALE J. INT'L L. 127, 148-49 (1991) (discussing policy of neglect in addressing U.S. indigenous peoples' rights and how historically extreme measures were taken by U.S. government toward Native American populations).

9. *See* Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993) (ruling that under certain circumstances women are legally protected from working in abusive environments and over-ruling lower court's decision that standard abusive conduct was not severe); *see also* Diane L. Bridge, *The Glass Ceiling and Sexual Stereotyping: Historical and Legal Perspective on Women in the Workplace*, 4 VA. J. SOC. POL'Y & L. 518, 584-600 (1997) (presenting in depth historical perspective of disenfranchising of woman through-out U.S. history).

10. *See* Jonathan Drimmer, *The Nephews of Uncle Sam: The History, Evolution, and Application of Birthright Citizenship in the United States*, 9 GEO. IMMIGR. L.J. 667, 686 (1995) (reviewing exclusion of Asian, Native, and African-Americans through U.S. legal and social history); *see also* Sheri Lynn Johnson, *The Color of Truth: Race and the Assessment of Credibility*, 1 MICH. J. RACE & L. 261, 269 (1996) (outlining exclusion of African-Americans in former slave states).

11. *See* Hanrahan v. Hampton, 446 U.S. 754, 762 (1980) (defining extremist organizations as ones that are paramilitary, uniformed, and violent); *see also* Howard Rosenberg, *Neo-Nazis Cloud the Utah Air, "Aryan Nations" to Debut over Tiny Salt Lake City Station*, L.A. TIMES, Nov. 24, 1987, at 1 (reporting Neo-nazi radio host preaching "the Holocaust was a hoax" and reporting how Aryan Nation radio program describes Jews as satanic, and blacks and other minorities as subhuman).

12. *See* Drimmer, *supra* note 10, at 667 (discussing right of citizenship); *see also* Andrew G. Deiss, *A Brief History of Criminal Jury in United States*, 61 U. CHI. L. REV. 867, 878 (1994) (discussing laws forbidding unpropertied white men, African-Americans, women, and Jews from voting and concluding that currently, when these minorities finally did gain access to being part of juries, jury trials are rarely employed).

ment[13] is prophetic of the U.S. goal to provide world leadership in human rights protection.[14] The U.S. Government professes faith in Smith's concerns when it addresses the internal violence in Rwanda,[15] Burundi,[16] the former Yugoslavia,[17] and Guatemala,[18] and when the U.S. Government prosecutes an extra-territorially indicted defendant within its own borders.[19]

Prior to the founding of the United Nations,[20] customary international law[21] prohibiting such acts as torture, genocide, and slavery,[22] was a part of the law of nations.[23] 'Law of nations'

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13. *See* MORRIS, *supra* note 1 at 229 (pleading in favor of ratification of U.S. Constitution in order to prevent domestic violence).

14. *See* Theodore Sorensen, *The Star Spangled Shrug: Is America Shirking Its Leadership Role?*, WASH. POST, July 2, 1995, at C1 (discussing U.S. role as world leader and how such role is sought by world community and not found).

15. *See* Chege Mbitiru, *Fearing Home, Refugees Flee Zairian Camps; U.S. Condemns Expulsion of Rwandans, Burundians*, WASH. POST, Aug. 24, 1995, at A27 (reporting U.S. State Department's call for halt to immediate expulsions of Hutu-Rwandans who killed their neighbor Tutsi-Rwandans during ethnic upheaval in which militias of majority out of power Hutu Tribe killed estimated 500,000 people, mostly minority Tutsis, then in power); Smith, *supra* note 1, at 229 (arguing for strong Constitutional protection for U.S. citizens against factional violence).

16. *See* Mbitiru, *supra* note 15, at 27 (reporting on U.S. condemnation of expulsions of Rwandan and Burundian refugees from Zairian camps).

17. *See* John Goshko, *U.N. Moving Toward Creation of Criminal Court; But Advocates Fear Severe Limits, Backed by U.S., Will Be Imposed on Its Independence*, WASH. POST, Apr. 21, 1996, at A27 (reporting on dispute regarding criminal court's jurisdiction, with U.S. advocating limited jurisdiction of international humanitarian law).

18. *See* Pamela Constable & Jefferson Morley, *PR for a Pariah; How the Guatemalan Army Tried and Failed to Polish Its Image in Washington*, WASH. POST, Mar. 3, 1996, at C2 (reporting that U.S. President Clinton and other governmental leaders ordered government-wide investigations of human rights abuses in Guatemala).

19. *See* United States v. Noriega, 808 F. Supp. 791, 797 (S.D. Fla. 1992) (stating in dicta that Panamanian General Noriega was protected by self-executing provisions of Geneva Convention Relative to Treatment of Prisoners of War); Michael McKenzie, *Treaty Enforcement in U.S. Courts— United States v. Noriega*, 34 HARV. INT'L L. J. 596, 596 (1993) (arguing that *Noriega* discarded traditional conceptions of international law).

20. *See* BARRY E. CARTER & PHILLIP R. TRIMBLE, INTERNATIONAL LAW SELECTED DOCUMENTS AND NEW DEVELOPMENTS (3d ed. 1994) (explaining that according to U.N.'s Charter, U.N. was founded in 1945 to maintain international peace and security, to promote human rights and economic/social development); *see also* U.N. CHARTER art. 1 § 1 (establishing the U.N. to maintain international peace by conforming to international law).

21. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, [hereinafter RESTATEMENT (THIRD) FOREIGN RELATIONS LAW] note 4, § 102(2), at 30 (1987) (defining customary international law as "result[ing] from general and consistent practice of states followed by them from sense of legal obligation.").

22. *Id.* at 841.

23. Lawrence Lessig, *Erie Effects on Volume 110: An Essay on Context in Interpretive Theory*, 110 HARV. L. REV. 1785, 1795 (1997).

is the phrase used in the U.S. Constitution.[24] Until the early twentieth century, U.S. federal courts applied the law of nations as a part of U.S. common law.[25] This application of general common law[26] ceased with the *Erie Railroad Co. v. Tompkins*[27] decision.[28] After the Nuremberg and Tokyo trials,[29] an individual, and not just a nation, came under the jurisdiction of international law.[30] A nation is under the jurisdiction of customary international law when a nation officially acts against its own citizens in violation of customary international law.[31] The creation of an international permanent organization with authority to create, enforce, and interpret customary international law has not yet surpassed the planning stage.[32]

The United States' incorporation of customary interna-

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24. *See* U.S. CONST. art. I, §§ 1-10 (vesting treaties and law of nations with supreme power).

25. *See* Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1556-62 (1984) (arguing that international law became binding on all states in United States since U.S. independence because United States is one nation and not thirteen).

26. Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 533 (1928) (Holmes, J., dissenting) (defining general common law as "a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute.").

27. 304 U.S. 64 (1938).

28. *See* Stewart Jay, *Origins of Federal Common Law: Part Two*, 133 U. PA. L. REV. 1231, 1312 (1985) (noting that *Erie* was not repudiation of federal common law but of federal general common law).

29. *See* Duane W. Layton, *Forty Years After the Nuremberg and Tokyo Tribunals: The Impact of the War Crimes Trials on International and National Law*, 80 AM. SOC'Y INT'L L. PROC. 56, 62 (1986) (examining moral-ethical legacy and legal legacy of Nuremberg and Tokyo trials which tried key figures accused of violating customary international law after World War II).

30. *See* Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law As Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 839 (1997) (noting conceptual change after Nuremberg trials of international law applying to individuals and not merely states).

31. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW *supra* note 21, § 702 at 161 (listing "genocide, slavery or slave trade, murder or causing disappearance of individuals, torture or other cruel, inhuman, or degrading treatment or punishment, prolonged arbitrary detention, systematic racial discrimination, or consistent pattern of gross violations of internationally recognized human rights" as generally accepted violations of customary international law).

32. *See* MALCOLM N. SHAW, INTERNATIONAL LAW 58, 58 (3d ed. 1991) (noting international community lack of central law-making authority); *see also* U.N. DOC. A/RES/51/207 § 8 at 3 (1996) (deciding to hold international conference in 1998 to establish international criminal court).

tional law is a matter of national importance,[33] just as honor was important in the days of Jonathan Smith.[34] Historically, the United States has held that the protection of U.S. citizens as a matter of consequence and is necessary to govern its own citizens.[35] Indeed, the U.S. government is a government of laws and not of men.[36]

The central problem since the founding of the United States has been factions.[37] Factions occur when a powerful sector of the population oppresses a less powerful sector.[38] When a powerful faction threatens a U.S. citizen, the individual often seeks redress in the U.S. court system.[39] The U.S. federal courts provide guidance for the U.S. state courts when the substance of a federal rule is not clearly suggested by federal law[40] and in some cases U.S. federal courts[41] have original jurisdiction.[42] The aid of the federal courts is necessary because the federal

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33. *See* Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AM. J. INT'L L. 461, 486 (1989) (proposing that national honor not only promotes international trade, but also acts as check on U.S. Government's potential violation of customary international law).

34. *See* Alexander Hanson, *Remarks on the Proposed Plan of a Federal Government, in* FREDERICK MARKS, INDEPENDENCE ON TRIAL 96 (1984) (quoting Alexander Hanson, eighteenth century politician, "[t]o the man who shall say, "it is of no consequence to consult national honor, I only answer thus,—If thy soul be so narrow and depraved as to believe this, it were needless attempt to cure thee of thy error.").

35. *See* John Jay, *Letter to George Washington, reprinted in* MORRIS, *supra* note 1, at 160 (relating tumult in states after Shay's rebellion, riots in New York, Vermont, and Massachusetts "fear[ing] most . . . the loss of confidence in their [orderly people's] leaders").

36. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803); *see* James O'Fallon, *Marbury*, 44 STAN. L. REV. 219, 225 (1992) (reviewing factual background of *Marbury v. Madison* quoting from Delaware Senator Ross support for creation of federal judiciary because United States needs institution of "celestial fire . . . to administer justice" and avoid of factions problem).

37. *See, e.g.*, Timmons v. Twin Cities Area New Party, 117 S.Ct. 1364, 1375 (addressing efforts by minority factions to gain recognition in elections); *Marbury*, 5 U.S. at 163 (recognizing factions as central political problem).

38. *See* , THE FEDERALIST No. 10 (James Madison), *reprinted in* MORRIS, *supra* note 1, at 225-29 (discussing principles of majoritarian group behavior indicating that majority has tendency to control entire group and specifically act against interests of minorities).

39. *See* Robert Kaczorowski, *The Enforcement Provisions of the Civil Rights Act of 1866: A Legislative History in Light of Runyon v. McCrary*, 98 YALE L.J. 565, 582 (1989) (stating that it was U.S. Constitutional framers' understanding that there would be judicial enforcement of human rights protection).

40. *See* GEOFFREY STONE ET AL., CONSTITUTIONAL LAW 506 (3d ed. 1996) (describing effects of Civil War in expanding federal courts original jurisdiction over state matters in order for Emancipation Proclamation to take practical effect).

41. *See* LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW § 3-23, at 159 (2d ed. 1988) (stating that federal courts provide guidance through federal common law cases

courts were established to declare the nation's law.[43]

One scholar suggested that the federal courts are rightfully engaged when cases affecting the integrity of customary international law arise.[44] The federal courts extend the protection of federal common law to U.S. residents.[45] Federal common law protects U.S. citizens and residents from crimes such as genocide, slavery or slave trade, murder or causing the disappearance of individuals, torture or other cruel, inhuman, or degrading treatment or punishment, prolonged arbitrary detention, systematic racial discrimination, or a consistent pattern of gross violations of internationally recognized human rights.[46]

This Note discusses how international common law should act as federal common law in U.S. courts. This Note also explores the constitutional challenges involved in incorporating customary international law into U.S. federal common law. Such challenges revolve around the institutions of representative democracy, federal jurisdiction, and the doctrine of separation of powers. Part I of this Note discusses federal common law and customary international law. Part II of this Note presents the negative and positive effects of incorporating customary international law into federal common law. This Note concludes that to preserve national honor among the community of nations, and to protect U.S. citizens from powerful national and international factions, the U.S. federal courts must continue their incorporation of customary international law as a part of federal common law. As in the days of Jonathan Smith, customary international

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involving interstate boundary disputes, international law, and U.S. and Native-American proprietary interests).

42. *See* U.S. CONST. ART. III, § 2 (giving federal courts original jurisdiction for particular cases, principal ones being cases, arising under U.S. Constitution U.S. laws and treaties, intra-state controversies, U.S. controversies, and U.S. citizen's opposing foreign state); *see also* TRIBE, *supra* note 41, at 157 (explaining that federal courts have original jurisdiction in admiralty cases, cases of federal question, cases concerning constitutional issues, and cases with diversity jurisdiction, while in all other cases, original jurisdiction belongs to states).

43. *See* Marbury v. Madison, 5 U.S. 137, 177 (1803) (holding that federal judiciary's duty is to "say what the law is").

44. *See* ERWIN CHEMERINSKY, FEDERAL JURISDICTION 349 (1994) (stating that matters involving international law are justiciable and require federal common law).

45. *See* Philip Frickery, *Domesticating Federal Indian Law*, 81 MINN. L. REV. 31, 95 (1996) (arguing for establishment of international instruments for protection of indigenous peoples as part of federal jurisdiction).

46. *See* RESTATEMENT (THIRD) FOREIGN RELATIONS LAW, *supra* note 21, § 702 at 161 (listing customary international law of human rights as part of U.S. law).

law is the answer to reprehensible oppression.[47]

I. *PRINCIPLES UNDERLYING FEDERAL COMMON LAW, CUSTOMARY INTERNATIONAL LAW, AND THE U.S. CONSTITUTION*

The debate of customary international law acting as federal common law in U.S. courts is not one of definitions.[48] Rather it is whether *Erie*[49] requires U.S. jurisprudence not to employ customary international law as federal common law.[50] U.S. jurisprudence, with the support of a majority of scholars, has settled that customary international law acts as federal common law.[51] The debate, instead, is whether this conclusion has been established with sufficient historical and judicial scrutiny.[52]

A. *Federal Common Law*

Federal common law is explained in terms of the Judiciary

47. *See* Jonathan Smith, *Speech in the Massachusetts Ratifying Convention*, Jan. 25, 1788, *reprinted in* RICHARD MORRIS, BASIC DOCUMENTS ON THE CONFEDERATION AND CONSTITUTION 229 at 229-30 (1970) (referring to U.S. Constitution to insure rule of law for newly created United States and to cure nationwide violations of human rights).

48. *See* Bradley & Goldsmith, *supra* note 30, at 817-18 (providing background of sources of international law).

49. *See* 304 U.S. 64, 90 (1938) (divesting Congress of power to prescribe federal common law).

50. *See* Bradley & Goldsmith, *supra* note 30, at 855-59 (arguing that customary international law is not federal common law).

51. *See* Filartiga v. Pena-Irala, 630 F.2d 876, 877 (2d Cir. 1980) (stating that customary international law is part of federal common law); Radriguez-Fernandez v. Wilkinson, 505 F. Supp. 787, 798 (D. Kan. 1980) (holding that detention of Cuban refugee was in violation of international law), *aff'd on other grounds*, 654 F.2d 1382 (10th Cir. 1981); *cf.* Estate of Marcos, 978 F.2d 493, 502 (9th Cir. 1992) (reaching results on violations of customary international law identical to *Filartiga* but not citing that case in support); Kadic v. Karadzic, 70 F.3d 232, 236 (2d Cir. 1995) (holding that genocide and other acts confers federal subject-matter jurisdiction when alien sues for tort committed in violation of law of nations); Xuncax v. Gramajo, 886 F. Supp. 162, 185 (D. Mass. 1995) (awarding compensatory and punitive damages for acts of military forces in Guatemala against civilian population); *but see* Princz v. Federal Republic of Germany, 26 F.3d 1166, 1168 (D.C. Cir. 1994) (dismissing international human rights claim because of Foreign Sovereign Immunities Act of 1976 acting retroactively to events occurring in 1942-1945); RESTATEMENT (THIRD) FOREIGN RELATIONS LAW, §§ 111 cmt. d-e, *supra* note 21, at 45 (discussing international law and federal jurisdiction); Lea Brilmayer, *Federalism, State Authority, and the Preemptive Power of International Law*, 1994 SUP. CT. REV. 295, 302-04 (upholding proposition that international law is federal law); Henkin, supra note 25, at 1560-62 (arguing that international law is part of U.S. law now as it was at founding of United States).

52. Bradley & Goldsmith, *supra* note 30 at 816-17.

Act of 1789[53] which created common law and case law.[54] Case law has carved out a specific provision of federal common law in order to provide relief against federal officers for human rights abuse.[55] In recent years case law has established federal common law as a customary international law.[56]

1. Definitions

Federal common law is created by U.S. federal courts to protect federal interests,[57] to fulfill congressional intent in enforcing a federal statute, or to accomplish U.S. Congress' legislative purpose.[58] Federal common law is written by the federal courts and is binding on all the states.[59] Federal common law develops in various ways,[60] without any clearly defined principles.[61] To a limited degree, federal common law is also developed to provide

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53. 28 U.S.C. § 1652, 1 Stat. 92 (1789) (enacting Judiciary Act of 1789, Rules of Decision Act was identical except, "in trials at common law" read "civil actions").

54. *See* CHEMERINSKY, *supra* note 44, at 332 (introducing federal common law).

55. Bivens v. Six Unkown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971) (establishing private cause of action for money damages under Fourth Amendment).

56. *See, e.g.*, Kadic v. Karadzic, 70 F.3d 232, 246 (2d Cir. 1995) (referring to "settled proposition that federal common law incorporates international law"), *cert. denied*, 116 S. Ct. 2524 (1996); In re Estate of Ferdinand E. Marcos, 978 F.2d 493, 502 (9th Cir. 1992) ("it is . . . well settled that law of nations is part of federal common law."); Xuncax v. Gramajo, 886 F. Supp. 162, 193 (D. Mass. 1995) ("[I]t is well settled that body of principles that comprise customary international law is subsumed and incorporated by federal common law."); Bradley & Goldsmith, supra note 30, at 817-18.

57. *See* CHEMERINSKY, *supra* note 44, at 331-35 (listing federal interests as proprietary interests, protecting U.S. Government's interest in cases involving private parties, resolving conflict among states, and upholding international law). In addition, federal common law includes "federal question jurisdiction" for those cases arising under U.S. Constitution or U.S. laws. *Id.* at 252. Moreover, "diversity and alienage jurisdiction" gives federal courts original jurisdiction over all civil actions exceeding US$75,000 claim, and is between citizens of a state and citizens or subjects of a foreign state. *See* 28 U.S.C.A. §§1331-32(a) (2) (1997) (establishing district court's original jurisdiction).

58. *Id.* at 334 (providing some examples of when Congress expressly desires that courts create federal common law, when U.S. Supreme Court concludes that federal common law would best effectuate legislative purpose, or when federal common law would protect federal interest such as property).

59. *Id.* at 331-32.

60. *Id.* at 336.

61. *Id.* at 335; *see* Daniel Meltzer, *State Court Forfeitures of Federal Rights*, 99 HARV. L. REV. 1128, 1167 (1986) (arguing that absent clearly defined governing principles, federal common law should operate as background for state law except in cases of federal interest, and where statute does not specifically govern); *see also* Martha Field, *The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 889-95 (1986) (employing various definitions of federal common law without specific overarching principle).

relief from the human rights abuses perpetrated by federal officers.[62] In deciding whether to create federal common law, the U.S. federal courts determine whether the matter justifies creating federal law, and, if so, whether the federal law will copy state law or formulate a new rule.[63] In deciding to copy state law or formulate new rules, the federal courts apply a balancing test which weighs the need of federal uniformity to protect federal interests against the disruption which rule creation causes on other courts.[64] Generally, the federal courts have endorsed customary international law as a part of federal common law.[65]

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62. *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 393 (1971) (stating "[i]f Fourth Amendment reached only to conduct impermissible under law of State, Fourth Amendment would have had no application to case."). Where Fourth Amendment is applicable, state law is trumped. *Id.*; CHEMERINSKY, *supra* note 44, at 336 (referring to *Bivens* action, created under Fourth Amendment of U.S. Constitution against federal government officers who violate federal rights); *see also Bivens*, 403 U.S. at 394-95 (providing damages because Federal Bureau of Narcotics agents unreasonably searched and seized Bivens personal property).

63. CHEMERINSKY, *supra* note 44, at 334.

64. *See, e.g.*, Baltimore & O.R.R. v. Baugh, 149 U.S. 368, 401 (1893) (holding that decision by state's highest courts are not laws but rules of decision); *see also* Henry J. Friendly, *In Praise of Erie—and of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 410 (1964) (arguing in favor of *Erie* doctrine).

65. *See* Forti v. Suarez-Mason, 672 F. Supp. 1531, 1548 (N.D. Cal. 1987) (upholding damages judgment for torture, prolonged arbitrary detention, and summary execution by two Argentine citizens against former Argentine general acting under military government); Martinez-Baca v. Suarez-Mason, No. 87-2057, slip op. at 4-5 (N.D. Cal. Apr. 22, 1988) (awarding compensatory and punitive damages for prolonged arbitrary detention, torture, and cruel, inhuman, or degrading treatment under authority of Argentine general); Quiros de Rapaport v. Suarez-Mason No. C87-2266 (N.D. Cal. Apr. 22, 1988) (awarding compensatory and punitive damages of plaintiff's husband for deaths caused by injuries inflicted by Argentine General); Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 704 (9th Cir. 1992), *cert. denied*, 507 U.S. 1017 (1993) (ruling in favor of Siderman de Blake's claim of land expropriation and torture); Trajano v. Marcos, 878 F.2d 1439, 1439 (9th Cir. 1992), *cert. denied*, 508 U.S. 972 (1993) (remanding case against Ferdinand Marcos' Estate in favor of mother for damages resulting from kidnapping, torture and murder of her son); Hilao v. Marcos, 103 F.3d 767, 771 (9th Cir. 1994), *cert. denied*, 513 U.S. 1126 (1995) (affirming injunction freezing Marcos' bank account in Switzerland because of outstanding judgments in violation of Alien Tort Claim Act); Abebe-Jiri v. Negewo, 72 F.3d 844, 846 (11th Cir. 1996) (awarding three Ethiopian women US$1.5 million judgment against their torturer after bench trial); Forti v. Suarez-Mason, 672 F. Supp. 1531, 1541 (expanding customary international law to cover claims of summary execution, prolonged arbitrary detention, and disappearance); Paul v. Avril, 901 F. Supp. 330, 335 (S.D. Fla. 1994) (awarding US$41 million in damages for torture, cruel, inhuman or degrading treatment and arbitrary detention of six Haitians against former Haitian dictator); Xuncax v. Gramajo, 886 F. Supp. 162, 202 (D. Mass. 1995) (entering default judgment against Guatemalan General Gramajo for massive human rights violations, including summary execution, torture, and disappearances, committed by Guatemalan forces under defendant's control

Federal common law has its origins in the First Judiciary Act.[66] The First Judiciary Act codified the recommendations of the Continental Congress of 1781.[67] The First Judiciary Act gave the newly created federal courts federal common law jurisdiction.[68] Federal common law refers to the development of legally binding law by the federal courts in the absence of directly controlling constitutional or statutory provisions.[69] The First Judiciary Act also gave jurisdiction to federal courts over common law crimes in violation of the law of nations.[70] Although the federal courts soon lost their criminal jurisdiction over common law crimes violating the law of nations because the jurisdiction was not within U.S. Constitutional implied powers,[71] some tortious acts, generally referred to as those acts acknowledged by English common law,[72] still remained within federal jurisdiction.[73]

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against nine Guatemalans, as well as U.S. nun); Todd v. Panjaitan, No. 92-12255,-PBS 1994 WL 827111 (D. Mass. Oct. 26, 1994) (awarding plaintiff US$14 million for damages against Indonesian general for death of son of plaintiff killed in massacre in East Timor by armed militia); Mushikiwabo v. Barayagwiza, No. 94 Civ. 3627, 1996 U.S. Dist. LEXIS 4409 (S.D.N.Y. 1995) (awarding through default judgment US$105 million in damages against Rwandan paramilitary group to relatives of victims of genocide); *but see* Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 822 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985) (dismissing suit by survivors of attack on Israeli bus by members of Palestine Liberation Organization for lack of subject matter jurisdiction); Lafontant v. Aristide, 844 F. Supp. 128, 139 (E.D.N.Y. 1994) (dismissing claim for summary execution against Haitian president because of head-of-state doctrine); Bradley & Goldsmith, *supra* note 30, at 873 (arguing that customary international law as federal common law ". . . carries with it implications that are in tension with some our nation's most fundamental constitutional principles.").

66. Judiciary Act of Sept. 24, 1789, 1 Stat. 73, 77 (codified as amended at 28 U.S.C. § 1350 (1988)).

67. *See* Burley, *supra* note 33, at 477 (arguing that "[t]he Constitution and First Judiciary Act together enacted all of the recommendations in the 1781 session.").

68. *See* ch. 20 § 9(b) 1 Stat. 77 (1789) (giving concurrent jurisdiction to federal and state courts by U.S. Congress when alien sues for tort in violation of law of nations); *see also* Bolchos v. Darrel, 3 F. Cas. 810, 810 (D.C.C. 1795) (No. 1607) (employing Federal Judiciary Act as alternative to admiralty jurisdiction); Burley, *supra* note 33, at 477 (noting that First Judiciary Act gave jurisdiction to federal courts over violations of law of nations and to pronounce on additional offenses as they arose).

69. *See* CHEMERINSKY, *supra* note 44, at 331 (describing development of federal common law).

70. *See* Burley, *supra* note 33, at 464-93 (outlining legislative history of Alien Tort Claim Act beginning with First Judiciary Act).

71. *See* United States v. Hudson, 11 U.S. (7 Cranch) 32, 33 (1812) (holding that "[o]ur Courts no doubt possess powers not immediately derived from statute; but all exercise of criminal jurisdiction in common law cases we are of opinion is not within federal implied powers.").

72. *Id.* at 34 (providing contempt of court as English common law which has force in U.S. courts).

Thus, the federal district courts retain jurisdiction over areas of federal common law[74] and all tortious cases or causes in violation of the law of nations brought forward by an alien.[75]

2. Impact of *Erie* on Federal Jurisprudence

For nearly a century, federal courts made federal common law when deciding cases with parties from different states absent black letter law from the state's constitution or legislation.[76] With *Erie*,[77] federal courts were directed to use state law in deciding diversity cases.[78] The *Erie* decision did not end the use of federal common law but limited the federal courts use of federal common law to bridge gaps in the federal law,[79] resolve disputes between states,[80] fulfill congressional intent,[81] protect federal interests,[82] and in cases involving international law.[83]

a. Pre-Erie Common Law

The U.S. Supreme Court in *Swift v. Tyson*[84] decided that judicial decisions are not law but, at best, evidence of what the law is.[85] *Swift* held that federal courts need not apply unwritten state

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73. 28 U.S.C.A. § 1350 (1982) original version at ch. 20 § 9(b)1 Stat. 77 (1789) (establishing original jurisdiction for district courts for civil actions by alien for tort only committed in violation of law of nations or treaty of United States).

74. *See* D'Oench, Duhme & Co. v. Fed. Deposit Ins. Corp., 315 U.S. 447, 469-70 (1942) (holding that "were we bereft of the common law, our federal system would be impotent. This follows from recognized futility of attempting all-complete statutory codes, and is apparent from the terms of the Constitution itself.").

75. *See* BETH STEPHANS AND MICHAEL RATNER, INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS 50-58 (1996) (stating that torts committed in violation of law of nations "has no clearly recognized definition in modern law."); *id.* at 50.

76. *See* CHEMERINSKY, *supra* note 44, at 333 (outlining history of federal use of federal common law).

77. Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938).

78. CHEMERINSKY, *supra* note 44, at 301 (discussing use of federal common law in diversity cases).

79. *Id.* at 336.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* at 333-34 (listing international law cases necessitating federal jurisdiction).

84. 41 U.S. 1 (1842). *Swift* involved payment of bill of exchange. *Id.* at 1. Tyson was New York resident. *Id.* Swift brought action under bill of exchange from Maine. *Id.*

85. *See id.* at 19 (leaving federal judiciary to ensure that law is same through-out nation, "*non erit alia lex Roma, alia Athenis; alis nuncu, alia posthac; sed et apud omnes gentes, et omni temore un eademqu lex obtinebit.*") ("[T]here will not be one law for Rome, and

law when exercising diversity jurisdiction.[86] Rather, federal courts should apply general law,[87] which is common law.[88] That is, a federal judge may exercise independent judgment regarding what the common law of the state is, or what the state common law should be.[89]

Exigency requires the development of federal common law.[90] This exigency develops because of gaps in federal law or the need to develop legal rules when a dispute between states arises.[91] Federal common law is necessary for practical application of federal jurisdiction.[92] There is, however, no federal common law of crimes.[93] In *United States v. Hudson & Goodman*,[94] the court explained this lacuna.[95] The court stated that the powers of the U.S. government, including the federal courts, are conceded from the several states.[96] The powers that the states do not expressly extend, they reserve.[97] Criminal matters are not expressly extended by the states to the federal government and thus are reserved exclusively to the state.[98]

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another for Athens; one law now and another in future; but among all peoples and at all times, one and same law will be in force.") (Author's trans.).

86. *See id.* at 9 (recognizing diversity jurisdiction as case that involves citizen of one state against citizen of another).

87. *Id.* at 22; *see* William Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513, 1514 (1984) (explaining that general law was referred to as common law until the *Erie* decision).

88. *Swift*, 41 U.S. at 9.

89. *Erie*, 304 U.S. at 71 (citing *Swift* Doctrine as being that judge is "free to exercise independent judgment as to what common law of state is— or should be.").

90. *See* CHEMERINSKY, *supra* note 44, at 333 (discussing how federal common law is needed in order for federal law to be effective).

91. *Id.*

92. *Id.* at 333-34; *see, e.g.*, Illinois v. City of Milwaukee, Wis., 406 U.S. 91, 103 (1972) (applying federal jurisdiction in case concerning water pollution); Hinderliber v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 110 (1938) (applying federal jurisdiction in case concerning federal statute); Kansas v. Colorado, 206 U.S. 46, 98 (1907) (applying federal jurisdiction in because case concerned international law and interstate conflict).

93. CHEMERINSKY, *supra* note 44, at 333.

94. United States v. Hudson & Goodwin, 11 U.S. 32 (1812) (denying federal common law criminal enforcement).

95. 11 U.S. at 32.

96. *Id.* at 33.

97. *Id.*

98. *Id.*

b. Post-Erie Common Law

Erie[99] overruled *Swift*[100] The court in *Erie* overturned nearly a century of jurisprudence.[101] A commentator noted that the English political philosopher, John Austin, more than century earlier influenced the *Erie* decision.[102] Austin defined law as the mandate of the sovereign,[103] rather than the *Swift* understanding of law as transcendental and universal.[104] In diversity cases prior to *Erie*, U.S. judges had to first decide whether the sovereign was the state's highest court or the U.S. Supreme Court.[105] In *Erie*, the Court decided that each individual state has the authority to define its own laws through either its legislature or its highest court.[106] *Erie* recognized exclusive federal sovereignty over matters concerning treaties, federal statutes, and the U.S. Constitution.[107] Yet, the *Erie* doctrine maintains that local law should

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99. 304 U.S. 64, 69-70 (1938). Tompkins sued Erie Railroad because of injury that he sustained after being struck by open rail car door while walking next to railroad tracks. *Id.* Case was in federal court because parties were diverse (FED. R. CIV. P. 1208), in that Erie Railroad was New York corporation and Tompkins was citizen of Pennsylvania. *Id.* Federal common law permitted recovery for Erie's negligence. *Id.* Under Pennsylvania common law, trespassers, including those who use railway paths (like Tompkins), were not able to recover for negligence. *Id.*

100. 41 U.S. 1 (1842).

101. *Id.* at 77; *see* John Corr, *Thoughts on the Vitality of Erie*, 41 AM. U. L. REV. 1087, 1112 (1992) (stating "*Swift* was overturned and *Erie* was imposed, at least in part, to vindicate the needs of federal system.").

102. *See* Philip Soper, *Searching for Positivism*, 94 MICH. L. REV. 1739, 1745 (1996) (arguing that "Austin's simple statement [establishing positive law] indirectly explains the appeal of exclusive positivism.").

103. *See* Wilfred Rumble, *The Thought of John Austin: Jurisprudence, Colonial Reform, and British Constitution*, 100 HARV. L. REV. 1188, 1188 (1987) (book review) (presenting John Austin as highly respected eighteenth century legal philosopher from England that opined law is not transcendent rather mandate of sovereign with power of enforcement).

104. *Erie*, 304 U.S. at 79 (holding that *Swift* doctrine relied on impermissible, out of individual state, authority). The Court stated that

> [t]he doctrine [in *Swift*] rests upon assumption that there is 'transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute,' that federal courts have power to use their judgment as to what the rules of common law are, and that in federal courts 'parties are entitled to independent judgment on matters of general law.

Id.

105. *Id.*

106. *See id.* at 78 (holding that whether, ". . . the law of the state shall be declared by its legislature in statute or by its highest court in decision is not matter of federal concern.").

107. *See id.* at 71 (holding that "[t]he laws of the several states, except where the Constitution, treaties, or statutes of the United States otherwise require or provide,

apply to local matters such as contracts, tort law, or state statutes.[108]

The Court in *Erie* held that the use of general law as mandated by *Swift* led to discrimination,[109] injustice, and confusion.[110] Discrimination occurred when a plaintiff could bring a suit in one state and obtain a conflicting result in another state.[111] Injustice and confusion resulted because the law depended on what that particular judge thought the general law should be on a particular subject at that particular time.[112]

Despite dicta to the contrary, *Erie* did not abolish federal common law[113] and instead, the *Erie* court recognized federal common law.[114] *Clearfield Trust Co. v. United States*[115] is a post-*Erie* example of the creation of federal common law.[116] The Court in *Clearfield Trust* resolved whether a Pennsylvania requirement bound the U.S. Government to report a forged or stolen check without delay.[117] The Court ruled that *Erie* did not apply[118] and that federal common law, not state law, governed the rights and

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shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply.").

108. *See id.* at 78 (holding that "Congress has no power to declare substantive rules of common state law applicable in state whether they be local in their nature or 'general,' be they commercial law or part of the law of torts.").

109. *See id.* at 74 (observing that due to application of general law, "*Swift v. Tyson* introduced grave discrimination by non-citizens against citizens.").

110. *Id.* at 77 (holding that "[i]njustice and confusion incident to doctrine of *Swift v. Tyson* have been repeatedly urged as reasons for abolishing or limiting diversity of citizenship jurisdiction.").

111. *See id.* at 71 (citing Black & White Taxicab Co. v. Brown & Yellow Taxicab Co., 276 U.S. 518 (1928) to illustrate problem of inconsistent results). In *Black & White Taxicab Co.*, Black & White lost lawsuit in one state, taxicab company reincorporated in another to evade earlier ruling. *See* Black & White Taxicab Co. v. Brown & Yellow Taxicab Co., 15 F2d 509, 512 (1926) (holding suit was properly dismissed from federal court).

112. *Erie*, 304 U.S. at 77 (1938).

113. *Id.* at 78 (stating that "there is no federal general common law"); *see* CHEMERINSKY, *supra* note 44, at 299 (stating that scholars have been unable to find constitutional basis for *Erie's* decision).

114. *Erie* 304 U.S. at 80 (holding that "[i]n disapproving that doctrine [from *Swift*] we do not hold unconstitutional section 34 of Federal Judiciary Act of 1789 [establishing federal common law] or any other act of Congress.").

115. 318 U.S. 363 (1943).

116. *Id.*

117. *Id.* at 364.

118. *See id.* at 366 (stating that *Erie* did not apply because when U.S. disburses funds it exercises its constitutional power).

duties of U.S. commercial paper.[119] The Court's rationale was that on matters of federal concern the federal courts should create the law with their own standards and not those of the states.[120]

B. *Customary International Law*

The development of customary international law[121] occurs universally through the practice of states.[122] Customary international law becomes a part of U.S. law when applied in U.S. courts.[123] The United States has recognized customary international law as a part of its protection of minorities[124] and to maintain national honor.[125]

Customary international law is created when nations comply with a commonly accepted norm that grows out of a legal obliga-

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119. *Id.* at 366.

120. *See id.* at 367 (presenting that federal standards are derived from United States Constitution and United States federal statutes).

121. *See* Dale Beck Furnish, *Custom as Source of Law*, 30 AM. J. COMP. L. 31, 42-43 (1982) (providing example of customary law); reviewing M. SCHUMACH, THE DIAMOND PEOPLE 27-103 (1981). The New York diamond district is tight knit community encompassing approximately six blocks of Manhattan. *Id.* In New York diamond district, almost all of U.S. wholesale diamond trade is negotiated. *Id.* Individual may go to any merchant for particular stone. *Id.* at 43. If this particular stone is unavailable that merchant or seller may obtain stone from another merchant's stock and sell it to person and add on merchant or seller's commission to price. *Id.* Second merchant may not even know about the transfer or sale. *Id.* If the second merchant did know he would not object, nor make any attempt to notify the buyer about the stone being cheaper if bought directly from the second merchant. *Id.* Individual may find information about the sale independently, but (s)he would have to be secretive and resourceful shopper. *Id.* The forgoing example constitutes customary international law for diamond merchants. *Id.* This system benefits all merchants. *Id.* This customary law is effective because of close knit community of diamond merchants. *Id.* Diamond selling self-regulation is possible because of great value of diamonds given by relatively few merchants and thus self-regulation and monitoring occurs. *Id.*

122. *See* RESTATEMENT (THIRD) FOREIGN RELATIONS LAW *supra* note 21, § 102(2)at 30 (discussing how practice can build law).

123. *See* Henkin, supra note 25, at 1569 (concluding that continuity in U.S. jurisprudence preserves United States' place among community of nations).

124. *See* Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1498 (1988) (discussing historical foundations of U.S. republicanism's belief that inclusion of excluded groups enhances political freedom modifying strict republic stance that people should be ruled by sum of their own preferences).

125. *See* Burley, *supra* note 33, at 480-88 (defining national honor as intellectual imperative that acts like pillar of international order); *see also* Dmitry Feofanov, *Luna Law: The Libertarian Vision in Heinlein's The Moon is Harsh Mistress*, 63 TENN. L. REV. 71, 141 (1995) (discussing national honor and abolishment of slavery).

tion.[126] When a nation violates a commonly accepted human rights norm, for example by committing genocide, that nation has breached its obligation to the other states in regards to these norms.[127] If a state indicates its dissent regarding a custom or practice while the custom or practice is still in developing as customary international law, then that state is not bound by that law even after the law matures into customary international law.[128] Some rules, referred to as peremptory norms,[129] recognized by the international community of states, permit no derogation even with dissent during the formation of that rule.[130] The community of nations may only modify customary international rules by a subsequent norm of general international law having the same character.[131]

C. *Customary International Law in U.S. Courts*

A series of customary international law cases in U.S. courts gave precedents for the landmark case of *Filartiga v. Pena-Irala*[132] and its prodigy.[133] In the United States, customary international

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126. *See* STATUTE OF INTERNATIONAL COURT OF JUSTICE, art. 38(1), 59 Stat. 1055, 1060 (1945) (listing sources of international law including "international custom, as evidence of general practice accepted as law . . . .").

127. *See* RESTATEMENT (THIRD) FOREIGN RELATIONS LAW *supra* note 21, § 701, at 155 (listing human rights law as obligation among states).

128. *Id.* § 102 cmts. b-i, at 24-25 (outlining how practice creates customary law while state's dissent during formation of particular customary law relieves state from being bound by that particular law).

129. *Id.* cmt. K, at 28 (listing aggressive war as act that evoke peremptory norms); *id.* §702, at 161-67 (listing genocide, slavery, disappearance, torture, prolonged arbitrary detention, and systemic racial discrimination as peremptory norms).

130. RESTATEMENT (THIRD) FOREIGN RELATIONS LAW *supra* note 21 cmt k, § 102(2), at 28 (1987); *see, e.g.*, U.N. CHARTER, cmt. h (stating that "[i]n the event of conflict between the obligations of the members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.").

131. *See* Vienna Convention on the Law of Treaties, U.N. DOC. A/CONF. 39/27 § 2 art. 53 (1969) *in* CARTER & TRIMBLE, *supra* note 20, at 53 (defining peremptory norm as norm with no derogation permitted). The Convention stated that

> [f]or purposes of the present Convention, peremptory norm of general international law is norm accepted and recognized by the international community of States as whole as norm from which no derogation is permitted and which can be modified only by subsequent norm of general international law having the same character.

Id.

132. Filartiga v. Pena-Irala, 630 F.2d 876, 881 (2d Cir. 1980).

133. *See* Harold Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2366

law was first applied in maritime cases[134] and then expanded to human rights cases[135] as a proper element of customary international law.[136]

Applying international law in the United States, in *Hilton v. Guyot*,[137] the U.S. Supreme Court held that the courts of justice must ascertain and administer international law in its widest and most comprehensive understanding as presented in any litigation.[138] Four years later, the Court maintained its position in the prize case, *The Paquete Habana*.[139]

1. *The Paquete Habana*

After a discussion of the history and purpose of the law of nations,[140] the U.S. Supreme Court in *The Paquete Habana*, applied international law to the U.S. Navy's seizure of a private Spanish fishing vessel.[141] After taking judicial notice that international rules are obligatory by the historical fact of common

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(1991) (observing that *Filartiga* was inauguration of customary international law offering human rights protection).

134. *See* Hilton v. Guyot, 159 U.S. 113, 163 (1895) (holding that international law "is part of our law"); The Paquete Habana, 175 U.S. (5 Wall) 290, 299 (1900) (holding that "[t]he public law of nations was long incorporated into the common law of the United States . . . ."); Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 102, 118 (holding that Acts of Congress ought never to be construed to violate law of nations) (1804).

135. Abdul-Rahman Omar Adra v. Clift, 195 F. Supp. 857, 863-65 (D. Md. 1961) (holding that kidnapping of child from one country and bringing child to another violates international law).

136. *See* Koh, *supra* note 133, at 2396 (arguing that enforcing human rights law is proper because it is derived from consensus among civilized nations).

137. 159 U.S. 113 (1895).

138. *See id.* at 123 (relying on Fremont v. U.S., 58 United States 542 (1854) in resolving Californian land dispute case, ruling that official customs and forms and usage constitute "the common or unwritten law of every civilized country."); *see also The Amy Warwick* 67 U.S. (2 Black) 635, 655 (1863) (applying international law during Mexican-American war); The Peterhoff 72 U.S. (5 Wall) 28, 57 (1866) (applying international law as maritime law).

139. 175 U.S. 677, 700-21 (1900) (ordering compensation to original ship owners under international law because international law "is part of our law").

140. *See id.* at 691 (giving historical purpose of law of nations as protection of persons against hostile molestation).

141. *Id.* at 686-714; *see id.* at 677 (holding "[b]y an ancient usage among civilized nations, beginning centuries ago, and gradually ripening into rule of international law, coast fishing vessels, pursuing their vocation of catching and bringing in fresh fish, have been recognized as exempt, with their cargoes and crews, from capture as prize of war.").

consent of humanity,[142] the Court ruled that international law is a part of U.S. law, and that the courts must determine and administer international law.[143] Where there is no treaty or controlling legislation, customs and practice of civilized nations provide authority.[144] The sources of this law are the works of jurists and commentators.[145] If a motivation of simple justice, namely what is right,[146] is not enough, remedies in international law provides another more practical reason for *Habana's* decision, namely, avoidance of retaliation for not obeying customary international law.[147] If the United States violated the law of nations, other countries might retaliate by seizing U.S. fishing vessels.[148] Because the Court in *Habana* is implementing a foreign policy matter,[149] some scholars consider that applying international law in cases like *Habana* does not constitute federal common law but is implementing the sole power of the political branches.[150]

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142. *See id.* at 711 (holding that "[i]t is not treating [laws which became accepted as universal obligation] as general maritime laws; but it is recognition of historical fact that by common consent of mankind these rules have been acquiesced in as of general obligation.").

143. *See id.* at 700 (holding 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.").

144. *Id.*

145. *See id.* (holding that jurists and commentators provide source for international law). The Court stated that

> [f]or this purpose, where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators who by years of labor, research, and experience have made themselves peculiarly well acquainted with the subjects of which they treat.

Id.

146. *Id.*

147. *See* RESTATEMENT (THIRD) FOREIGN RELATIONS LAW *supra* note 21, § 905, at 380 (providing that ". . . a state victim of violation of an international obligation by another state may resort to countermeasures that might otherwise be unlawful . . . .").

148. *See* United States v. Ortega, 27 F. Cas. 359, 360 (C.C.E.D. Pa. 1825) No. 15, 971 (applying law of nations to foreign ambassadors), *aff'd*, 24 U.S. (11 Wheat) 467 (1826); *see also* Bradford Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245, 1340 (1996) (discussing application of international law in *Habana* as structural interpretation).

149. 175 U.S. 677, 714 (holding that it is U.S. Supreme Court's responsibility to administer law of nations).

150. *See* Clark, *supra* note 148, at 1340 (stating that "[t]he Paquete Habana do[es] not constitute federal common law [r]ather, federal courts apply such rules in order to implement the exclusive power of the political branches to conduct foreign relations.").

2. *The Charming Betsy*

Another maritime case, *Murray v. Schooner Charming Betsy*,[151] provides a U.S. decision that decided how to interpret international law with regard to a domestic legal issue.[152] The case arose under the Non-intercourse Act,[153] enacted in 1800 to suspend all commercial intercourse between the United States and France.[154] The Court in *Charming Betsy* held that in interpreting a Congressional statute, any possible construction that would not violate the law of nations should be given priority.[155] This construction was based upon the public value of international law *vis-à-vis* Acts of Congress.[156] The unique aspect of *Charming Betsy* is its application of an international diplomatic protection doctrine to determine the application of an embargo statute.[157] According to international law, if a person is within the diplomatic protection of the United States, that person is subject to the Non-intercourse Act.[158] *Charming Betsy* stands for the principle that international norms govern jurisdiction absent a Congressional override.[159] Although the *Charming Betsy* decision pre-

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151. Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64 (1804).

152. *See id.* at 118 (stating that "an act of Congress ought never to be construed to violate the law of nations.").

153. Act of Feb. 27, 1800, 2 Stat 7, 8, 6 Annals of Cong. 50-62, 524-25; 527-32, 557-58 (1800) (providing that "[a]ny ship or vessel, owned, hired, or employed wholly or in part by any person or persons, resident within United States, or any citizen or citizens, thereof resident elsewhere. . . shall be wholly forfeited, and may be seized and condemned."). Presidential decree was included in publication of Act, decreeing that

> [Y]ou are not only to do all that in your power lies, to prevent all intercourse whether direct or circuitous, between the ports of the United States, and those of France and her dependencies, in cases where the vessels or cargoes are apparently, as well as really American, and protected by American papers only, but you are to be vigilant that vessels or cargoes really American, but covered by Danish or other foreign papers, and bound to or from French ports do not escape you.

Id. at 7-8.

154. *Charming Betsy*, 6 U.S. (2 Cranch) 64 at 117.

155. *Id.* at 118.

156. *See* Ralph Steinhardt, *The Role of International Law as a Canon of Domestic Statutory Construction*, 43 VAND. L. REV. 1103, 1152 (1990) (discussing, in depth, *Charming Betsy's* canon of statutory construction to construe U.S. laws so as not to violate International Law).

157. *Id.* at 1138-39 (observing *Charming Betsy* serves as way to apply international law in interpreting unrelated embargo act).

158. *Id.*

159. *Id.* at 1143.

dates modern Federal common law, this rule still applies.[160]

3. *Ker v. Illinois*

In *Ker*,[161] a U.S. agent, acting as a private individual, kidnapped a Peruvian taking him from Peru to the United States with orders by the U.S. President, but, without the benefit of a treaty.[162] The U.S. Supreme Court in *Ker* held, without explanation, that the U.S. Constitution does not provide protection for Mr. Ker from abduction in another country.[163] The Court also noted, again without explanation, that it must take notice of common law and the law of nations.[164]

4. *Banco Nacional de Cuba v. Sabbatino*

The post-*Erie* question of applying customary international law arose in *Banco Nacional de Cuba v. Sabbatino*.[165] *Sabbatino* concerned the Cuban Government's expropriation of a shipment of sugar owned by a U.S. company.[166] Declining to apply international law to review the validity of the Cuban Act which authorized the expropriation,[167] the U.S. Supreme Court instead relied

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160. *See, e.g.*, Commodity Futures Trading Comm'n v. Nahas, 738 F.2d 487, 493-94 (D.C. Cir. 1984) (holding that federal courts do not have jurisdiction under Commodity Exchange Act, 7 U.S.C. § 15 (1982), to enforce investigatory subpoena served by Commodity Futures Trading Commission upon foreign citizen in foreign nation); FTC v. Compagnie de Saint-Gobain-Pont-A-Mousson, 636 F.2d 1300, 1323 n.130 (D.C. Cir. 1980) (finding FTC to be without jurisdiction to enforce investigatory subpoena served upon French corporation by registered mail).

161. *Ker v. Illinois*, 119 U.S. 436 (1886).

162. *Id.* at 438. Frederick M. Ker was forcibly returned to United States to serve his sentence for larceny and embezzlement to which defendant demurred and was convicted. *Id.* at 437.

163. *Id.* at 444 (holding that U.S. Constitution, U.S. treaties or U.S. laws do not provide extra-territorial non-U.S. citizens protection). The Court stated that

> [t]he question of how far his forcible seizure in another country, and transfer by violence, force, or fraud to this country, could be made available to resist trial in the State court for the offense now charged upon him, is one which we do not feel called upon to decide, for in that transaction we do not see that the Constitution, or laws, or treaties of the United States guarantee him any protection.

Id.

164. *See id.* (holding that "[h]owever this may be, the decision of that question is as much within the province of the State court, as question of common law, or the law of nations, of which that court is bound to take notice.").

165. 376 U.S. 398, 426 (1964).

166. *Id.* at 401-03.

167. *Id.* at 401.

upon the doctrine of separation of powers to review the validity of the Cuban Act.[168] The Court did not follow the older notion of separation of powers which guarantees that government officials act in accordance with the law in order that one governmental branch does not upset the balance of power over and against another governmental branch.[169] The *Sabbatino* Court instead viewed separation of powers as a judicial restraint in areas of acts of state.[170] Thus, the U.S. Supreme Court held in *Sabbatino* that the Act of State Doctrine[171] prevents U.S. courts from questioning the validity of a recognized foreign sovereign power's public acts committed within its own territory.[172] This federal court deference to the Act of State Doctrine is sometimes referred to as comity,[173] and has been influential to the U.S. Supreme Court's treatment of international law since U.S. Supreme Court Justice Story's[174] writings on the conflict of law.[175]

5. *Dunhill v. Republic of Cuba*

The U.S. Supreme Court in *Dunhill v. Republic of Cuba*,[176]

168. *See* Koh, *supra* note 133, at 2367 (providing analysis of federal court's decision not to rule upon Acts of State, which are decisions appropriate to executive or legislative branch).

169. *See id.* at 2363 (noting *Sabbatino*'s chilling affect on domestic courts' use of international law because separation of powers requires U.S. courts to abstain from over-stepping into foreign affair's power of executive branch).

170. *Sabbatino*, 376 U.S. at 436.

171. *See id.* at 416 (defining Act of State doctrine as when "the courts of one nation will not sit in judgment on acts of another nation within [the latter's public acts] own territory . . . .").

172. *Id.* at 447.

173. *See* Underhill v. Hernandez, 168 U.S. 250, 252 (1897) (noting "[e]very sovereign State is bound to respect independence of every other sovereign State"); Oetejen v. Central Leather Co., 246 U.S. 297, 303-04 (1918) (stating that Act of State doctrine "rests at last upon the highest considerations of international comity and expediency. To permit the validity of the acts of one sovereign state to be reexamined and perhaps condemned by the courts of another would very certainly imperil the amicable relations between governments and vex the peace of nations.").

174. *See* J. MCCLELLAN, JOSEPH STORY AND THE AMERICAN CONSTITUTION at 305-09 (1971) (describing Justice Story, early U.S. Justice, as author of modern U.S. political and constitutional system).

175. *See* JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS § 33 at 19 (1834) (defining comity as obligation of nations to give effect to foreign laws); *see also* Koh, *supra* note 133, at 2357 n. 59 (noting that if Story's research would require courts to refrain from independent determination of cases under law of nations, courts would instead defer to decisions of foreign sovereigns and courts).

176. 425 U.S. 682 (1976).

addresses the Act of State Doctrine.[177] The Court in *Dunhill* held that the judicial branch should not embarrass the political branch by assuming an antagonistic jurisdiction,[178] and that the concept of an act of state does not extend to foreign commercial instrumentalities.[179] After *Dunhill*, in *Kirkpatrick Co. v. Environmental Tectonics Corp.*,[180] the U.S. Supreme Court modified the Act of State Doctrine.[181] Under the *Kirkpatrick* decision, when a federal court applies the Act of State Doctrine it should not abstain from embarrassing the U.S. Government.[182] The Act of State Doctrine only applies as a federal choice-of-law rule when deciding between an act by a foreign sovereign and U.S. law.[183]

6. *Cliff v. Adra*

Individual responsibility for international torts lay dormant for almost a century until 1961 when a U.S. District Court decided *Adra v. Clift.*[184] *Adra* arose under the Alien Tort Claim Act[185] because the tort action was in violation of the law of nations.[186] Although the court was sitting in diversity,[187] the court

177. *See id.* at 693-04, 703 (addressing international and political questions and refusing apply Act of State Doctrine in respecting Cuban expropriations).

178. *Id.* at 699.

179. *Id.* at 695.

180. 493 U.S. 400 (1990); *see* Koh, *supra* note 133, at 2402 n.106 (noting *Kirkpatrick* narrowed Act of State Doctrine).

181. *Kirkpatrick*, 493 U.S. at 409.

182. *Id.*

183. *See id.* (stating that "[t]he act of state doctrine does not establish exception for cases and controversies that may embarrass foreign governments, but merely requires that, in the process of deciding, the acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid.").

184. 195 F. Supp. 857 (D. Md. 1961). *See id.* at 864 (noting that "evidence of [injunctions of international law] has long been reflected in the statutory laws of the U.S., which subjects to penalties one who in any manner 'offers violence to public minister, in violation of the law of nations, and which confers upon the U.S. district Courts original jurisdiction of all suits brought by any alien for tort only, in violation of the law of nations or of a treaty of the United States.").

185. 28 U.S.C.A. § 1350 (1993) (giving district courts original jurisdiction of any civil action by alien for tort only when committed in violation of the law of nations or treaty of United States).

186. *Adra*, 195 F. Supp. at 859-61. This tort violation involved the return of a child from her mother to her father. *Id.* A U.S. citizen sued his former wife, Lebanese citizen, for equitable relief, namely, custody of their daughter. *Id.* Defendant first violated the law of nations when she concealed the nationality of her daughter by including the daughter on her Lebanese passport. *Id.* She subsequently violated the law of nations by falsely obtaining an Iraqi passport for the child. *Id.* The defendant argued that international law may not subject an individual to punishment for private action. *Id.*

applied federal common law because the defendant's acts constituted violations of the law of nations.[188]

The Court ruled that violations of international law are within the jurisdiction of a U.S. federal district court because of the very fact that a violation of the injunctions of international law occurred.[189] Regardless of where the acts are committed, international law forbids the commission of some tortious acts.[190]

7. *Filartiga v. Pena-Irala*

The Alien Tort Claim Act developed new importance in 1980 with U.S. Court of Appeals for the Second Circuit's decision in *Filartiga v. Peña-Irala.*[191] The *Filartiga* decision defined the current era of transnational public law.[192] Transnational commercial litigation supplied the context for the issue in *Filartiga.*[193] The political climate which informed the importance of international protection of human rights was the bombing of My Lai[194] during the U.S. - Vietnam War.[195] *Filartiga* established that if a breach of contract violates international law, perpetrating

187. *See* FED. R. CIV. P. 1208 (mandating that when parties are from different states of the United States and amount in controversy is over US$50,000, then case may be heard in Federal Court).

188. *See id.* at 866 (stating that court had jurisdiction under Alien Tort Claim Act 28 U.S.C.A. 1350).

189. *See id.* (holding that "[t]he injunctions of international law that may be applicable to the private individual do not necessarily disappear when he enters the territory of his own or of any other State. He learns that there are acts of which that law itself forbids the commission by any one whomsoever.").

190. *See id.* (holding that internationally illegal acts under injunctions of international law "may be applicable to private individuals [and] do not necessarily disappear when he enters territory of his own or of any other state."); *see also* Lopes v. Schroder 225 F. Supp. 295 (E.D. Pa. 1963), and Dreyfus v. Von Finck 534 F. 2d 24 (2d Cir.), *cert. denied,* 429 U.S. 835 (1976) as examples of where customary international law was enforced.

191. 630 F.2d 876 (2d Cir. 1980) *rev'g* 577 F. Supp. 860, 864-67 (E.D.N.Y. 1984).

192. *See* Koh, *supra* note 133, at 2366 (noting that *Filartiga* "inaugurated the era of transnational public law litigation in which we now live.").

193. *See id.* at 235 (citing 600 cases utilizing Foreign Sovereign Immunities Act of 1976).

194. See U.S. v. Calley, WL 14570 (ACMR), 46 CMR 1131, 1165 (1973) (taking judicial notice of My Lai massacre of My Lai villagers by U.S. troops on September 6, 1969).

195. Private interview with Peter Weis, *Filartiga* attorney of record, April 15, 1997 at Center for Constitutional Rights (explaining that Center for Constitutional Rights, which represented Filartigas, first used Alien Tort Claims Act to file unsuccessful suit on behalf of My Lai bombing victim).

torture also violates international law.[196] *Filartiga* also held that the Alien Tort Act conferred federal jurisdiction over a suit by Paraguayans against a Paraguayan official.[197] The Court awarded punitive damages based on the U.S. Constitution alone.[198] On remand for damages, the federal district court ruled that co-plaintiffs were entitled to a judgment of nearly US$10.4 million as compensation for medical expenses and the disruption of family life which was the result of the torture and death of their relative.[199] Paraguayan law provided the basis for compensatory damages.[200] U.S. case law and international law provided the basis for the punitive damages.[201] With *Filartiga*, the Act of State Doctrine cited in *Sabbatino*[202] began to erode in so far as now violations of customary international law, even under the claim of an act of state, do not enjoy legal immunity.[203] The *Filartiga* court likened the torturer to a pirate and slave trader and noted that for purposes of civil liability, the torturer is an enemy of all humanity, *hostis humani generis*.[204] The Court, after reviewing the sources of law,[205] stated that international law establishes fundamental rights upon all people in regards to their own government[206] for both citizens and aliens.[207] *Filitarga*'s ruling on remand created a federal common law rem-

196. *See* Koh, *supra* note 133, at 2365 (arguing that if contracts are protected by international law, torture victims should also be protected by international law).

197. *Id.* at 861 (acting under color of law, Inspector General of Police in Asuncion, Paraguay, allegedly tortured and murdered Joelito Filartiga in retaliation for Joelito's father's opposition to government of Paraguayan President Alfredo Stroessner). This official tortured the claimants' relative to death in Paraguay while acting in governmental capacity. *Id.*

198. *Id.* at 865 (citing Carlson v. Green, 446 U.S. 14 (1980)).

199. *Id.*

200. *Id.*

201. *Id.*

202. *Sabbatino*, 376 U.S. at 398.

203. *See* RESTATEMENT (THIRD) FOREIGN RELATIONS LAW *supra* note 21, § 443, at 367-83 (explaining that Act of State Doctrine is now subject to judicial scrutiny).

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

205. *See The Paquete Habana*, 175 U.S. 677, 700; *Filartiga*, 630 F.2d at 876 (providing sources of international law being works of jurists and commentators).

206. *Filartiga*, 630 F.2d at 884-85 (stating that "[t]he treaties and accords cited above, as well as the express foreign policy of our own government, all makes clear that international law confers fundamental rights upon all peoples vis-à-vis their own government.").

207. *Id.* at 884 (concluding ". . . that official torture is now prohibited by the law of nations. The prohibition is clear and unambiguous, and admits no distinction between the treatment of aliens or citizens.").

edy against torture[208] and set a precedent for subsequent alien plaintiffs[209] to bring an Alien Tort Claims Act suit against foreign officials acting under the color of law. This Court's conclusions in *Filartiga* recognized that certain human rights which violate international law are protected by U.S. federal courts.[210]

8. *Doe v. Karadzic and Kadic v. Karadizic*

Doe v. Karadzic[211] and *Kadic v. Karadzic*[212] were consolidated[213] for decision in the U.S. District Court and the U.S. Court of Appeals for the Second Circuit. In *Doe*, two Bosnia-Herzegovinians representing a class,[214] sued for genocide, war crimes, crimes against humanity, rape and other torture, summary execution, and other abuses.[215] In *Kadic*, a Bosnia-Herezegovinian woman and two organizations sued Bosnia-Herezegovinia's political leader for genocide, rape, forced prostitu-

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208. *See* Koh, *supra* note 133, at 2367 (discussing federal remedy provided U.S. citizens for torture after *Filitarga*).

209. *See, e.g.*, Kadic v. Karadzic, 70 F.3d 232, 246 (2d Cir. 1995) (stating that it is "settled proposition that federal common law incorporates international law"), *cert. denied*, 116 S. Ct. 2524 (1996); *In re* Estate of Ferdinand E. Marcos, 978 F.2d 493, 502 (9th Cir. 1992) (stating that "[i]t is . . . well settled that the law of nations is part of federal common law."); Xumcax v. Gramajo, 866 F. Supp. 162, 193 (D. Mass. 1995) (stating that ". . . it is well settled body of principles that comprise customary international law is subsumed and incorporated by federal common law."); Tel-Oren v. Libyan-Arab Republic, 726 F.2d 774 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985) (involving Israeli citizen bringing suit against Palestine Liberation Organization); Forti v. Suarez-Mason, 672 F. Supp. 1531 (N.D. Cal. 1987), *modified*, 694 F. Supp. 707 (N.D. Cal. 1988) (involving Argentinean plaintiffs who suffered torture under former Argentinean general); Trajano v. Marcos, 878 F.2d 1438 (9th Cir. 1989) (involving Filipino plaintiff who suffered torture under former Philippine President); Paul v. Avril, 901 F. Supp. 330 (S.D. Fla. 1994) (discussing Haitian plaintiff who suffered torture against former Guatemalan Defense Minister); *see also* Kenneth Randall, *Federal Jurisdiction over International Law Claims: Inquiries into the Alien Tort Statute*, 18 N.Y.U. J. INT'L L. & POL. 1, 5-6 nn.17 & 19 (1985) (examining post-*Filartiga* Alien Tort Statute cases and concluding this jurisprudence is constitutional).

210. Koh, *supra* note 133, at 2367 (discussing that human rights may be protected by individual plaintiffs or by nation).

211. 866 F. Supp. 734 (S.D.N.Y. 1994)

212. Kadic v. Karadizc 64 USLW 2231 (2d Cir. Oct. 13, 1996) No. 94-9069, 1544; 70 F.3d 232.

213. *See* FED. R. CIV. P. 42(a) (allowing judge to consolidate cases if cases involve common question of law or fact).

214. *Id.* R. 23(A) (allowing judges to certify class if parties are so numerous as to make joinder impracticable, there are common questions of law or fact, there are typical claims or defenses, and representatives of class will protect interests of class).

215. *Id.* at 236.

tion, forced pregnancy, and other tortures and abuses.[216] The District Court dismissed both claims, ruling that the defendant was a private actor who did not act under color of law and therefore was not covered by international law.[217] The Second Circuit reversed, holding that genocide and war crimes do not require state action, and that Karadzic acted under color of law of a *de facto* state, and therefore met the state action requirement of the torture and summary execution claims.[218]

D. *U.S. Constitutional Principles of Representative Democracy and Separation of Powers*

Two political doctrines influence customary international law jurisprudence in the United States, namely, representative democracy, and separation of powers.[219] Representative democracy requires domestic authorization in order for a law to have effect in the United States.[220] Separation of governmental powers requires that a law concerning foreign affairs be from the political branch of the government and not the judiciary.[221] Customary international law, as federal common law, departs from the an understanding of representational democracy and separation of powers because it is the federal political branches who make foreign relations policy and not the courts.[222]

1. Representative Democracy

It is a basic tenet of representative democracy[223] that positive-written law cannot bind subjects governed by that law unless

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216. *Id.* at 237.

217. *See Doe*, 866 F. Supp. at 743 (holding that "[a]bsent a clear statute from Congress, or direction from higher Courts, this Court finds that actions based only on § 1331 without express right of action by Congress, must be dismissed for lack of subject-matter jurisdiction.").

218. *Kadic*, 70 F.3d 232 at 245.

219. *See* Bradley & Goldsmith, *supra* note 30, at 857-73 (critiquing Filartiga because it violates the Doctrine of Separation of Powers and the Federalist Doctrine of representative democracy).

220. *See id.* at 857 (arguing that customary international law's status as federal law violates *Erie* limitation that all law needs domestic authorization).

221. *See id.* at 861 (arguing that *Sabbatino's* decision shields federal courts from involvement in foreign affairs).

222. *See id.* (arguing that federal common law must accommodate and conform to the political branches of government).

223. *See id.* at 857 (noting that customary international law as part of federal common law is "inconsistent with basic notions of American representative democracy.").

the subjects have participated in its legislation and consented to its jurisdiction.[224] The primary transition in the United States from a monarchy to a republic occurred not by clever argument or force of arms, but primarily because the early settlers belief in their own freedom and equality.[225] The early settlers would not submit these virtues to any authority without consent.[226] Representative democracy hinges upon a belief in the Lockean[227] ideal of consent of the governed.[228] Such consent is reflected in Article One of the U.S. Constitution.[229]

2. Separation of Powers

The doctrine of separation of powers is as elusive as it is effective.[230] Throughout U.S. judicial history, courts have repeatedly interpreted the separation of powers doctrine in various ways.[231] Consequently, at least six schools of thought exist regarding the allocation of governmental power.[232] *Erie*[233] em-

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224. *See* Philip Trimble, *A Revisionist View of Customary International Law*, 33 U.C.L.A. L. REV. 665, 719 (1986) (discussing that law-making institutions rest on consent of governed).

225. *See* Joel Barlow, An Oration Delivered at the Meeting of the Cincinnati, (July 4, 1787) (Hartford, 1787) *in* GORDON WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787 at vii (1970) (arguing that equality is gained when people are mindful that they are equal). Barlow noted that

> [t]he mind of man is 'the only foundation' for any system of politics. Men never submitted to king because he was stronger or wiser than they were, but because they believed him born to govern. And likewise men have become free and equal when they have thought they were so.

Id.

226. *Id.*

227. *See* Trimble, *supra* note 225 at 719 (describing John Locke as eighteenth-century political Enlightenment philosopher who advocated limited government, natural rights, and strict representative democracy).

228. *See* BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION, 26-54 (1967) (describing U.S. Government organization as one of separation of powers).

229. *See* U.S. CONST. art. I, §§ 1-10, and Amend. XVII (outlining representational character of United States government).

230. *See* Paul Verkuil, *Separation of Powers, The Rule of Law and The Idea of Independence*, 30 WM. & MARY L. REV. 301, 313-19 (1989) (discussing that separation of powers is contextually shaped by contemporary understanding of shared powers); *see also* Elliot Richardson, *Checks and Balances in Foreign Relations*, *in* FOREIGN AFFAIRS AND THE U.S. CONSTITUTION 176-89 (Louis Henkin et. al. eds. 1990) (discussing division of powers).

231. *See* Verkuil, *supra* note 231, at 312 (arguing for limits to Separation of Powers doctrine because of encroaching state power on individual freedom).

232. *See* TRIBE, *supra* note 41, at 2-5 (outlining six schools of understanding of separation of powers). The six schools are the separate and divide school, the state protection school, the indirect enforcement school, the promotion of governmental

ployed the state shield model of separation of powers.[234] Justice Philip Jessup,[235] member of the International Court of Justice in 1960, raised the separation of powers question and an international law question, in asking, in light of the *Erie* doctrine, whether state courts interpret customary international law without Supreme Court review.[236] Justice Jessup's concern was that each state would be free to apply international law when and how it wished[237] and that each state could decide whether or not to apply customary international law.[238] As Justice Jessup noted, free interpretation of customary international law by states would result in divergent and perhaps regional applications of the law.[239]

II. *THE STATUS OF CUSTOMARY INTERNATIONAL LAW IN RELATION TO FEDERAL COMMON LAW*

Scholars have argued that customary international law is prohibited from acting as federal common law in U.S. courts because of three fundamental reasons, the Doctrine of Separation of Powers,[240] the law making principle of consent of the governed,[241] and the *Erie* Doctrine of state control of common law.[242] Alternatively, scholars have argued that customary inter-

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regularity school, the equal protection school, and the promotion of structural justice school. *Id.*

233. *See Erie*, 304 U.S. at 78-79 (holding that U.S. Constitution "recognizes and preserves the autonomy and independence of states in their judicial departments.").

234. *See id.* at 5 (explaining that state protection maintains that state retains political power over and against federal government).

235. Oscar Schachter, *Philip Jessup's Life and Ideas*, 80 AM. J. INT'L L. 878, 878 (1986) (discussing Justice Jessup's life as scholar, practitioner, teacher, administrator, diplomat, judge, justice, international judge, and writer beginning in 1920).

236. *See* Philip Jessup, *The Doctrine of Erie R. v. Tompkins Applied to International Law*, 33 AM. J. INT'L L. 740, 741 (1939) (cautioning against state interpretation of customary international law because of dangers of parochial interests and conflicting results).

237. *Id.* at 740.

238. *Id.*

239. *Id.*

240. *See* Bradley & Goldsmith, *supra* note 30, at 861 (arguing that federal courts are prohibited from lawmaking in the area of foreign affairs); *see also* Trimble, *supra* note 225, at 687 (arguing that federal courts give the political branches deference in making foreign policy decisions).

241. *See* Trimble, *supra* note 225, at 719 (arguing that law must be based on consent of governed); *see also* Bradley & Goldsmith, *supra* note 30, at 874 (arguing that customary international law's incorporation into U.S. law violates U.S. domestic law making process).

242. *See* Bradley & Goldsmith, *supra* note 30, at 855-58 (arguing that Erie prohibits

national law does act as federal common law because this has been the status of customary international law in U.S. courts since the founding of the United States,[243] and the U.S. Constitution confers to the federal courts jurisdiction to apply customary international law.[244]

A. *Commentary that Federal Common Law Does Not Include Customary International Law*

Post-*Erie* federal common law cannot incorporate customary international law because *Erie* requires authorization by the to incorporate customary international norms.[245] Furthermore, because of the absence of U.S. participation in the creation of customary international law, the United States is not bound by it.[246] Finally, because of the U.S. doctrine of the separation of executive power from judicial power, the federal courts are prohibited from initiating the application of customary international law.[247]

The federal judiciary, however, has accepted, with minimum scrutiny, customary international law into federal common law.[248] Most recently scholars have objected to incorporation of customary international law into federal common law, on the grounds that this incorporation violates the *Erie* Doctrine.[249] Scholars have also raised other arguments for blocking the Fed-

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the entry of customary international law into federal common law); *see also* Trimble, *supra* note 225, at 732 (arguing that federal courts lack legislative authority to apply customary international law).

243. See Henkin, *supra* note 25, at 1556 (arguing that U.S. followed English common law in accepting customary international law as U.S. law since founding of country); *see also* Brilmayer, *supra* note 51, at 343 n. 73 (observing that Lauritzen v Larsen, 345 US 571, 577 (1953) held that customary international law has been used as U.S. law since the founding of the nation).

244. *See* Brilmayer, supra note 51, at 301 (arguing that adoption of U.S. Constitution federalized customary international law as federal common law); see also RESTATEMENT (THIRD) FOREIGN RELATIONS LAW *supra* note 21, § 111, cmt. d, at 44 (recognizing that Article VI of U.S. Constitution gives customary international law supreme authority).

245. *See* Bradley & Goldsmith, *supra* note 30, at 857 (arguing that federal or state government must authorize all law applied in United States including customary international law).

246. A.M. Weisburd, *State Courts, Federal Courts and International Cases*, 20 YALE J. INT'L L. 1, 19-23 (1995).

247. *Id.* at 7-55.

248. See *id.* at 816-73 (arguing that customary international law's rise to federal common law has been accepted with minimum critical scrutiny); *see* Weisburd, *supra* note 247, at 40 (arguing that Filartiga's ruling should be accorded minimum authority).

249. Bradley & Goldsmith, *supra* note 30, at 849-55.

eral Courts from incorporating customary international law which cite U.S. non-participation in the creation of the particular governing rules of customary international law.[250] Finally, scholars have questioned whether the federal courts use of customary international law is a violation of various aspects of the separation of powers doctrine.[251]

1. *Erie* Mandates that State Law Governs

Erie[252] narrowed federal jurisdiction over state interests while providing the impetus for the creation of federal common law.[253] Some scholars argue that *Erie* narrowed federal jurisdiction to such an extent that federal courts may not apply customary international law without domestic authorization.[254] Some scholars assert that *Erie's* embrace of written law, referred to as positive law, precludes federal courts from using customary international law because customary international law is unwritten.[255] This is not to claim that the federal courts have no law making powers following *Erie*, rather, some scholars maintain that federal courts are not authorized to convert customary international law into federal law.[256]

2. U.S. Does Not Necessarily Participate in the Creation of Customary International Law

Customary international law is created through international participation,[257] so at times the United States does not participate in the creation of customary international law.[258]

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250. Weisburd, *supra* note 247, at 41 (arguing that customary international law should be rejected because United States did not create customary international law).

251. *See* Trimble, *supra* note 225, at 732 (arguing that modern cases prevent customary international law being applied in U.S. courts because of separation of powers).

252. 304 U.S. 64 (1968).

253. *See* Weisburd, *supra* note 247, at 41 (arguing that *Erie* narrowed federal jurisdiction to areas of law that federal judiciary had since 1789).

254. Bradley & Goldsmith, *supra* note 30, at 852 (arguing that *Erie's* new conception of law requires federal courts to apply state law).

255. *See* Weisburd, *supra* note 247, at 41 (arguing that *Erie's* positivistic thrust, requiring that law be written, precluded customary international law from being federal common law).

256. *See id.* at 47 (arguing that since federal courts can not enforce law against the federal government, international law being American law has little meaning).

257. *See* GENNADY M. DANILENKO, LAW MAKING IN THE INTERNATIONAL COMMUNITY at 235 (1993) (arguing international law, *jus cogens*, becomes law when international community accepts and recognizes it).

258. *See, e.g.*, RESTATEMENT (THIRD) FOREIGN RELATIONS LAW, *supra* note 21, § 404

Some scholars have argued that the United States should never incorporate customary international law into U.S. law.[259] These scholars argue that because the foreign governments create customary international law, customary international law is not considered part of U.S. law because U.S. law must be derived from U.S. representatives.[260]

Scholars have compared treaties with customary international law as sources of international law to illustrate the weakness of customary international law being a source of law because the U.S. practice[261] requires that the people of the United States grant authority to make law.[262] If the President negotiated a treaty with the consent of the Senate or Congressional legislation, it is enforceable domestic federal law.[263] In contrast, U.S. federal courts apply customary international law without enactment by Congress or proclamation by the President.[264] Because treaties must receive approval from the U.S. Congress and customary international law may be unknown to the U.S. legislature, customary international law violates the U.S. fundamental principle of law making.[265]

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at 254 (listing piracy as premiere international offense for which U.S. did not participate in criminalization); *see also* Ware v. Hylton, 199 U.S. (3 Dall.) 199, 281 (1796) (recognizing that "when the United States declared their independence, they were bound to receive the law of nations in its modern state of purity and refinement.").

259. Trimble, *supra* note 225, at 716.

260. *See* Trimble, *supra* note 225, at 718-23 (arguing that "[i]n this intellectual universe the idea of customary international law encounters substantial problems, because at least some of the potential lawmakers, such as foreign governments, are neither representative of the American political community nor responsive to it."); *see also* Weisburd, *supra* note 247, at 41 (noting that customary international law is not U.S. law ". . . because the United States did not create it.").

261. *See generally* RESTATEMENT (THIRD) FOREIGN RELATIONS LAW, *supra* note 21, § 111 cmt. h (discussing self-executing and non-self executing agreements).

262. *See* Bradley & Goldsmith, supra note 30, at 858 (arguing that because the legislative branch has only limited control over content of customary international law as compared to treaties, customary international law should not be given controlling authority); *see also* Trimble, *supra* note 225, at 672 (arguing that customary international law is less authoritative then treaty law because treaty law has legislative authorization).

263. RESTATEMENT (THIRD) FOREIGN RELATIONS LAW, *supra* note 21, § 111 cmt. 5 at 53.

264. *Id.* at § 111 cmt. c.

265. See Bradley & Goldsmith, supra note 30 at 817 (arguing that customary international law creation violates fundamental U.S. constitutional principles).

3. Customary International Law Violates U.S. Doctrine of Separation of Powers

Some scholars have objected to customary international law becoming a part of federal common law because of the idea of separation of powers[266] which holds that judicial power should not interfere with the executive power in matters involving international[267] or political questions.[268] Scholars maintain that if judges considered political philosophies in their judicial rulings, a broad spectrum of law would enter and impede the legislative and executive branches.[269] Some scholars regard the most questionable aspect of accepting customary international law as a part of U.S. law is the, sometimes hasty creation of customary international law which violates separation of powers.[270] Scholars assert that recent developments in customary international law have accepted various international decisions, including the Universal Declaration of Human Rights,[271] multilateral treaties,[272] and some other U.N. conventions on such matters as discrimination against women,[273] racial discrimination,[274] and reli-

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266. Bradley & Goldsmith, *supra* note 30, at 861 (arguing that federal judiciary is precluded from binding political branches in matters of foreign relations).

267. Dames & Moore v. Regan, 453 U.S. 654, 657 (1981) (holding that U.S. President has plenary power to settle takings claims against foreign governmental entities).

268. *See* Weisburd, *supra* note 247, at 44-46 (arguing that governmental powers over use of force and expropriation of property, are constitutionally delegated to political branches and not international law); *see also* TRIBE, *supra* note 41, at 96-106 (discussing that although Political Question Doctrine is unspecified, it requires federal courts to determine existence of constitutionally enforceable right).

269. *See also* Weisburd, *supra* note 247, at 27 (arguing that if customary international law became federal common law, it would displace broad areas of state law).

270. *See* Bradley & Goldsmith, *supra* note 30, at 841 (questioning possible rapid development of customary international law).

271. U.N. Declaration of Human Rights, G.A. Res. 217A, U.N. Doc. A/810 at 56 (1948); *see* Luis Sohn, *The New International Law: Protection of the Rights of Individuals Rather than States*, 32 AM. U. L. REV. 1, 11-12 (1982) (arguing that human rights treaties have controlling authority in U.S. courts).

272. *See, e.g.*, The Convention on the Prevention and Punishment of the Crime of Genocide, U.N. General Assembly Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277; The International Covenant on Economic, Social and Cultural Rights, S. Exec. Doc. E, 95-2, at 1 (1978), 999 U.N.T.S. 171; The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 23 I.L.M. 1027 (1988); and The Convention on the Rights of the Child, 28 I.L.M. 1448 (1989).

273. The Convention on the Elimination of All Forms of Discrimination Against Women, 1249 U.N.T.S. 13, 19 I.L.M. 33.

274. The International Convention on the Elimination of all Forms of Racial Discrimination, S. Exec. Doc. C, 95-2, at 1 (1978), 660 U.N.T.S. 195.

gious intolerance.[275] A scholar argues that because of the separation of powers problem, namely, the protection of executive power against making unauthorized law,[276] customary international law should be treated as foreign law in U.S. courts.[277] Meanwhile, other scholars argue for a prohibition of customary international law as a part of federal common law when there is no expressed agreement to enact the international law from the political branch.[278]

B. *Commentary that Customary International Law Acts as Federal Common Law in U.S. Courts*

Since the founding of the United States, international law has played an integral part in the U.S. legal system.[279] Since 1804, acts of Congress have been construed in order not to violate the law of nations.[280] Where there is no treaty, controlling executive or legislative act, or judicial decision, international law must be ascertained and administered by U.S. courts.[281] Scholars have commented that international law acts as federal common law in U.S. courts.[282] Indeed, scholars have indicated that

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275. *Id.*

276. TRIBE, note 41 at 631-32 (arguing in favor of limiting government in order to respect individuals).

277. *See* Weisburd, *supra* note 247, at 7-55 (arguing that treating customary international law as foreign law would not alter federal jurisprudence, but would avoid analytical confusion).

278. *See* Bradley & Goldsmith, *supra* note 30, at 868 (arguing that modern federalism jurisprudence requires plain statement by political branch, in order for customary international law to be federal common law).

279. *See* Ware v. Hylton, 3 U.S. 199, 281 (1796) (holding that "[w]hen the United States declared their independence, they were bound to receive law of nations, in its modern state of purity and refinement" which overrules Virginia law).

280. Charming Betsy, 6 U.S. 64, 118 (1804) (holding that "an act of congress ought never to be construed to violate the law of nations.").

281. The Paquete Habana, 175 U.S. 677, 700 (1900) (holding that "[i]nternational law is part of our law, and must be ascertained and administered by courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations.").

282. *See* Henkin, *supra* note 25, at 1557 (noting that "[n]evertheless, from our national beginnings both state and federal courts have treated customary international law as incorporated and have applied it to cases before them without express constitutional or legislative sanction."); Lea Brilmayer, *Federalism, State Authority, and the Preemptive Power of International Law*, 1994 SUP. CT. REV. 295, 343 (1994) (concluding that "[t]here is unlikely to be debate over the proposition that international law is federal law if it is American law at all."); William Aceves, *Affirming the Law of Nations in U.S.*

customary international law is supreme over the law of the fifty states.[283] This ancient usage of the law of nations is not limited to the interpretation of international law of 1789, rather the federal courts must interpret international law as it has evolved and exists today.[284]

A scholar has argued that the current debate concerning common law and representational democracy, arguing that all law must be derived from the people, is neither consistent with, nor an accurate depiction of U.S. history.[285] The place of common law in U.S. law is partly based on the eighteenth century debate concerning the role of the common law in resolving disputes during the founding of the nation.[286] The debate surrounded the application of English law including the law of nations[287] in U.S. Courts.[288] The necessity of applying the only available established law which was English Law, prevailed over any ideological argument.[289] In fact, U.S. records cite more English than U.S. cases during the first generation of U.S. legal his-

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Courts: The Karadzic Litigation and the Yugoslav Conflict, 14 BERKELEY J. INT'L L. 137, 171 (1996) (noting that "[i]ndeed, customary international law has been characterized as federal common law.").

283. *See* RESTATEMENT (THIRD) FOREIGN RELATIONS LAW *supra* note 21, §111 (1), at 42 (stating that "[i]nternational law and international agreements of the United States are law of the United States and supreme law over the law of the several states."); *see* also Brilmayer at 343 (arguing that customary international law is binding on states under supremacy clause of U.S. Constitution, US CONST, Art VI, cl 2); stating that

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Id.

284. *See Filartiga*, F.2d 881 (holding that it is established that courts "must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today.").

285. *See* Jay, *supra* note 28, at 1233 (observing that questions about federal common law asked today are different from questions of early U.S. history).

286. *See id.* at 1237 (relating that after war of independence some opponents of common law saw common law as "a palladium of liberty").

287. *See* Richard Bilder & Philip Trimble, *International Law as Law of the United States*, 90 AM. J. INT'L L. 693 (1996) (stating law of nations is precursor to customary international law).

288. *See id.* at 694 (discussing incorporation by constitutional framers of common law system into U.S. law after American Revolution, including law of nations).

289. *See* Jay, *supra* note 28, at 1238 (explaining early U.S. law's dependence on English law because there were no U.S. case reports available).

tory.[290] The judiciary accepted customary international law as U.S. law because the common law system was not set up for revolutionary change.[291] As a trade-off to the malleability of a system designed for great change, the common law system provided U.S. residents with basic liberties and economic stability.[292]

As former U.S. Vice President John Adams stated to the U.S. Senate, he would have refused to fight in the Revolutionary War if the common law had not become the nation's law.[293] Yet, James Madison, a Virginia State Representative at the Federal Convention of 1787,[294] maintained that the law of nations was too amorphous and argued against defining an offense without Congressional action.[295] This unwritten, pre-positivist understanding[296] of the common law powers of the U.S. federal courts was the accepted understanding of federal common law,[297] as stated clearly in *Swift*.[298] The acceptance of federal common law remained untouched until *Erie*.[299]

Some scholars maintain that Article III of the U.S. Constitution confers to federal courts jurisdiction to review the correct application of customary international law in state courts.[300] Federal district courts have utilized this authorization in apply-

290. *See id.*, at 1238 (stating that "[i]n the first generation, more English than American cases were cited in American reports that were published.").

291. *Id.* at 1239.

292. *See id.* (noting stable expectations that common law system provided).

293. *See id.* at 1236 (referring to legislative session when John Adams emphatically declared to U.S. Senate, that if he had ever imagined that common law by Revolution had not become law of United States under its new government, he never would have drawn sword in contest). This account was related to Joseph Story by Adam's private secretary. *Id.* at 1336 n. 18; *see also* Stewart Jay, *Origins of Federal Common Law: Part One*, 133 U. PA. L. REV. 1003, 1078 (referring to United States Senate debate about Alien and Sedition Act, 8 Annals of Cong. 2106 (1798) where Adams argued that "without common law there is no law, since virtually all statutes and the Constitution itself were predicated upon its existence.").

294. THE RECORDS OF THE FEDERAL CONVENTION OF 1787 614-15 (M. Ferrand ed. 1937).

295. *Id.*

296. *Swift* 41 U.S. at 9.

297. *See* Jay, *supra* note 28, at 1233 (noting that alternative understanding of federal common law was that governmental authority was considered to be from single sovereign and not concurrent state and federal jurisdiction).

298. *See* Swift v. Tyson, 41 U.S. 1, 17-18 (1842) (noting that decisions of courts are not what law is but "at most evidence of laws").

299. *See Erie*, 304 U.S. at 78 (1938) (noting that until this opinion, *Swift* doctrine was unquestioned).

300. *See* Harold Maier, et al., *The Role of International Law in Human Rights Litigation in the United States*, 82 AM. SOC. INT'L LAW PROC. 456, 458 (1988) (arguing that custom-

ing customary international law.[301] Justice Jessup's anticipated this view with his warning that state courts should not have ultimate authority to declare rules of international law as a narrow reading of *Erie* would dictate.[302] The *Sabbatino* Court noted Justice Jessup's warning against parochialism.[303]

III. *U.S. COURTS MUST CONTINUE TO INCORPORATE CUSTOMARY INTERNATIONAL LAW AS A PART OF FEDERAL COMMON LAW*

Since the establishment of the U.S. government by the Constitution, customary international law has acted as federal common law.[304] This proposition was recognized in early U.S. legislation with the passage of the Alien Tort Claim Act.[305] Early maritime judicial opinions advanced the legal standard of the application of customary international law,[306] in turn establishing the mandate that federal courts must find and apply customary international law and that customary international law must be used in statutory interpretation.[307] The use of customary international law laid dormant while international relations and trade began to surge.[308] The establishment of the *Erie* Doctrine, which mandated that federal courts apply state common law in

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ary international law is fundamental source for the development of federal common law).

301. *See id.* (citing *Sabbatino* 376 U.S. 398, 425 and *Zschernig v. Miller* 389 U.S. 429 (1968)).

302. *See* Jessup, *supra* note 238, at 740 (cautioning that international law should not be interpreted by divergent states).

303. *See Sabbatino*, 376 U.S. 398, 425 (applying Jessup's caution of divergent and parochial interests to act of state doctrine); *see also* RESTATEMENT (THIRD) FOREIGN RELATIONS LAW *supra* note 21, § 111 cmt. 3, at 49 (noting that customary international law acts as federal common law).

304. *See* Jay, *supra* note 23, at 832 (noting that "[t]he law of nations was classified as 'general law' in the sense that *Swift* . . . employed the term." (footnote omitted)); *see also* RESTATEMENT (THIRD) FOREIGN RELATIONS LAW, *supra* note 21, § 111 (introductory note), at 41 (concluding that law of nations, what we now call customary international law, had legal authority of common law).

305. *See* Burley, *supra* note 33, at 477 (tracing use of federal common law since founding of U.S. government).

306. *See Charming Betsy* 6 U.S. (2 Cranch) 64 (1804) (applying law of nations to U.S. legislation).

307. *See* Steinhardt, *supra* note 156, at 1152 (determining that *Charming Betsy* provides authority to interpret U.S. statutes with customary international law).

308. *See* Koh, *supra* note 133, at 2366 (noting significance of enforcement of international trade agreements with enforcement of customary international law).

suits based on diverse citizenship,[309] did not affect federal determination and implementation of customary international law.[310] Because of Article VI of the U.S. Constitution,[311] customary international law preserves its privileged position, which is that customary international law retains supremacy over State law, like treaties and other international agreements.[312] With the increase of international travel and the subsequent frequent crossing of international borders the precept of applying customary international law without consideration of which nation-state a person may be residing emerged.[313] With the prevalence of the U.S. courts enforcing international trade agreements came the logical pressure that the federal courts also enforce laws against the most egregious crimes against all peoples, that is, violations of customary international law.[314] This enforcement was most clear in *Filartiga* where the U.S. district court held a Paraguayan police official liable for injuries he caused a boy's family after torturing a boy to death.[315]

A. *Customary International Law Needs to Act as Federal Common Law to Preserve National Honor*

Predating the U.S. Constitution, concerns of the founders of the United States centered on national honor.[316] Indeed, the United States was founded as a government established differently than other governments, a government of laws and not men, rule by and for the people and not at the pleasure of the

309. *Erie*, 304 U.S. at 78-79.

310. RESTATEMENT (THIRD) FOREIGN RELATIONS LAW, *supra* note 21, § 111 (introductory note), at 41.

311. U.S. CONST. Art. VI (mandating that ". . . all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land . . . .").

312. *See Adra*, 195 F. Supp. at 866 (applying international law to cross border abduction absent bilateral treaty); *see also* RESTATEMENT (THIRD) FOREIGN RELATIONS LAW, *supra* note 21, at 41 (citing authority of U.S. Constitution Art. VI as federal supremacy of customary international law over state law even in diversity cases).

313. *See Adra*, 195 F. Supp. 857, at 866 (applying international law regardless of resident of defendant).

314. *See* Koh, *supra* note 133, at 2366 and accompanying text (arguing that enforcement of human rights should be as accepted as enforcement of international contracts).

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

316. *See* MORRIS, *supra* note 1, at 230 (finding that preservation of national honor was of paramount concern for nation's founders and resolutions of early national questions).

sovereign.[317] The U.S. government's fundamental governing principle that governing power derived from the people of the United States, is perhaps best seen in the violation of that principle when the United State's government disenfranchises African-Americans,[318] women,[319] and Native Americans.[320] The U.S. government's high standard of just conduct is most clearly highlighted in its insistence that foreign states respect customary international law.[321] With the increasing number of international cases in federal courts,[322] the urgency of Justice Jessup's warning that international law should not be delegated to the fifty divergent and perhaps parochial states has increasing importance.[323] The status of customary international law in U.S. law is about values, and essentially about whether the U.S. should sacrifice a tradition of honor in upholding international law.[324] Lastly, acting as federal common law is simply common sense; international precepts should be judicially applied on a national rather than a state level.[325]

B. *Customary International Law Acts as Federal Common Law in U.S. Courts*

Perhaps the most compelling and productive modern jurisprudence is the enforcement of human rights protection as a

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317. *Marbury*, 5 U.S. at 163 (1803).

318. See Laughlin, *supra* note 7 at 1292 (concluding that minorities have not achieved equality of political participation).

319. *See* Dorothy Q. Thomas, *Women's Human Rights: From Visibility to Accountability*, 66 ST. JOHN'S L. REV. 217, 220 (concluding that U.S. government does not advance women's human rights).

320. Greg Overstreet, *Re-Empowering The Native American: A Conservative Proposal to Restore Tribal Sovereignty and self-reliance to Federal Indian Policy*, 14 HAMLINE J. PUB. L. & POL'Y 1, 20 (discussing Native Americans' relationship with U.S. government as both nemesis and provider).

321. *See, e.g.*, Sorensen, *supra* note 14, at C1 (reporting on U.S. world leadership role).

322. *See* Bradley & Goldsmith, *supra* note 30, at 876 (commenting on increasing number of international cases in federal courts).

323. *Sabbatino*, 376 U.S. at 425 (citation omitted).

324. *See* Lessig, *supra* note 23, at 1810 (placing value of justice as context of whether customary international law is a part of U.S. law).

325. *See* Bradley & Goldsmith, *supra* note 30, at 876 (noting that it is plausible that customary international law acts as federal common law, but federal court judges ignorance of customary international law prohibits treating customary international law as federal common law).

part of customary international law.[326] In fact *Erie*, if read in its context, was simply about legal values of the time which encompassed legal positivism.[327] The concern that this category of protected human rights norms might change with the passing of time, or without proper legislation, misunderstands a fundamental principle of common law, common law's purpose is to fill gaps of the law.[328] When federal judges apply customary international law they accomplish three goals, maintaining established precedents of customary international law acting as federal common law in U.S. courts;[329] maintaining the honor of the United States by respecting humane values;[330] and maintaining that the United States is a country ruled by law, not men.[331]

CONCLUSION

It is the nation's duty to enforce international rules that respect the individual. This duty at least equals the U.S. federal courts' duty to enforce trading agreements. This enforcement prohibits, slavery, genocide, disappearance, rape and other torture, prolonged arbitrary detention, and systemic racial discrimination. These are the six universally accepted proscriptions of customary international law.[332] Simple justice dictates that this enforcement is maintained at the highest level, the federal courts.

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326. *See* Lessig, *supra* note 23, at 1797 (noting that substance of customary international law's U.S. jurisprudence is productive and compelling).

327. Soper, *supra* note 102 and accompanying text.

328. CHEMERINSKY, *supra* note 91, and accompanying text.

329. *See Forti*, *supra* note 65, and accompanying text; *see also Adra*, *supra* note 135 (demonstrating that federal court upholds customary international law even in diverse cases); *but see supra Ker*, note 162, and *supra* My Lai, note 196 (providing two instances when U.S. government acted in violation of customary international law).

330. Burley, *supra* note 33, and accompanying text.

331. *Marbury*, *supra* note 43, and accompanying text.

332. *See* RESTATEMENT (THIRD) FOREIGN RELATIONS LAW, *supra* note 21, § 702, at 161 (listing norms of customary international law).