# CONGRESSIONAL SUPPORT FOR CUSTOMARY INTERNATIONAL HUMAN RIGHTS AS FEDERAL COMMON LAW: LESSONS OF THE TORTURE VICTIM PROTECTION ACT

*Ryan Goodman**



## I. INTRODUCTION

Transnational human rights litigation has succeeded at a steady pace since the Second Circuit's 1980 decision, *Filartiga v. Pena-Irala*.[1] In *Filartiga*, the court construed an eighteenth century statute — the Alien Tort Claims Act (ATCA)[2] — as granting both a cause of action and jurisdiction to two Paraguayan citizens.[3] The ATCA provides: "[D]istrict courts shall have original jurisdiction of any civil action by an alien for a tort only committed in violation of the law of nations or treaty of the United States."[4] Accordingly, the Second Circuit permitted the Filartigas to file suit against a Paraguayan official for violating the customary

* M.A., Yale University, 1998; J.D. candidate, Yale Law School, 1999, Ph.D. candidate, Yale University, 2000. I owe many thanks to David S. Bedeerman, Drew S. Days, III, Paul Dubinsky, Robert D. Harrison, Derek P. Jinks, Harold Hongju Koh, Ruti Teitel, and Beth Van Schaack. This Article is dedicated to Jennifer Morrow.

1. Filartiga v. Pena-Irala, 630 F.2d 876 (1980).
2. 28 U.S.C. § 1350 (1982).
3. *Filartiga*, 630 F.2d at 876.
4. 28 U.S.C. § 1350 (1982).

international law against torture since the official had allegedly tortured to death Dr. Filartiga's seventeen year-old son. Over the years, the *Filartiga* ruling has achieved a strong following in several other circuits.[5]

Notably, the *Filartiga* line of cases was temporarily disturbed by a contrary District of Columbia Circuit decision *Tel-Oren v. Libyan Arab Republic*.[6] Congress effectively overturned that case by passing the Torture Victim Protection Act (TVPA).[7] The TVPA contadicts Judge Bork's position in *Tel Oren* that the ATCA could not establish a cause of action for modern customary international law.[8] The Statute enumerated two specific causes of action, torture and extrajudicial killing, leaving the remainder of the ATCA intact. Now several years after the TVPA, Section 1350 case law has continued to develop; with more circuits following the *Filartiga* decision and other causes of action being deemed appropriate for litigation.[9]

In this discussion, I analyze the TVPA and its legislative history to demonstrate the scope and consequence of Congress' endorsement of human rights litigation. This endeavor is undertaken primarily in response to an emergent challenge to transnational human rights litigation. That is, a handful of scholars have recently argued that the consensus view on international law includes an ill-founded maxim that customary international law is federal common law.[10] This critique, which has been called the *revisionist position*, potentially disrupts ATCA litigation. Specifically, if customary international law is not federal common law, the federal judiciary arguably could not elaborate other causes of action without specific political branch authorization.

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5. *See, e.g.*, Abebe-Jira v. Negewo, 72 F.3d 844 (11th Cir. 1996); *In re* Estate of Ferdinand Marcos, Human Rights Litigation, 978 F.2d 493, 495-96 (9th Cir. 1992); Xuncax v. Gramajo, 886 F. Supp. 162, 189 (1995); Forti v. Suarez-Mason I, 672 F. Supp. 1531 (N.D. Cal. 1987); Fernandez v. Wilkinson, 505 F. Supp. 787, 798 (D. Kan. 1980), *aff'd on other grounds*, 654 F.2d 1382 (10th Cir. 1981).

6. Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984).

7. Torture Victim Protection Act of 1991, Pub.L. No. 102-256, 106 Stat. 78, codified at 28 U.S.C. § 1350.

8. *Tel-Oren*, 726 F.2d at 801 (Bork, J., concurring).

9. *See, e.g.*, Kadic v. Karadzic, 70 F.3d 232 (2nd Cir. 1995) (genocide); Doe v. Unocal, 1997 U.S. Dist. LEXIS 5094, 32-35 (March 25, 1997) (slave trade).

10. *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 (1997); Curtis A. Bradley & Jack L. Goldsmith, *The Current Illegitimacy of Human Rights Litigation*, 66 FORDHAM L. REV. (1997); Arthur M. Weisburd, *State Courts, Federal Courts, and International Cases*, 20 YALE J. INT'L L. 1 (1995) [hereinafter Weisburd, *State Courts*]; Arthur M. Weisburd, *The Executive Branch and International Law*, 41 VAND. L. REV. 1205 (1988); *Cf.* Phillip R. Trimble, *A Revisionist View of Customary International Law*, 33 UCLA L. REV. 665 (1986).

Indeed, revisionists argue that customary international law should not be federal law without a prior political branch sanction due, in large part, to democratic accountability and separation-of-power concerns. In response, I take the position that the TVPA blunts the force of this criticism. In particular, the statute's text and legislative history demonstrate: that passage of the TVPA provides ample political branch authorization for the wider *Filartiga* doctrine if such authorization was indeed necessary; and that the TVPA legislative history indicates Congressional agreement with the conventional view that customary international law is federal common law absent political branch action.[11] The TVPA, thus, both immunizes the *Filartiga* doctrine from the revisionist challenge, and brings into question the merits of the revisionist position itself.

## II. READING THE TVPA: CHOOSING AN INTERPRETIVE METHOD

My discussion primarily relates to aspects of the revisionist critique presented by Professors Curtis Bradley and Jack Goldsmith, since their work both explicitly challenges *Filartiga* and also attempts to account for the TVPA. Notably, Bradley and Goldsmith's argument has evolved; that is, their position has increasingly hardened in response to their critics. Initially, they presented their argument that political branch authorization is necessary for federal courts to apply customary international law as federal law, but gave no indication of rules that would define such an authoritative signal. Derek Jinks and I argued that if such a political branch signal were necessary, it has been given: Congress, in passing the TVPA, endorsed the *Filartiga* line of cases.[12]

In rebuttal to our TVPA argument, Bradley and Goldsmith moved from an earlier, cursory discussion of the statute[13] to recognizing that the

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11. The present discussion directly builds on earlier work. *See* Ryan Goodman & Derek P. Jinks, *Filartiga's Firm Footing: International Human Rights and Federal Common Law*, 66 FORDHAM L. REV. 463 (Nov. 1997). This work should be consulted for its more encompassing analysis of the revisionist position within the context of the *Filartiga* doctrine. For other extensive criticisms of the revisionist position, see Derek P. Jinks, *The Federal Common Law of Universal, Obligatory, and Definable Human Rights* Norms, 4 ILSA J. INT'L & COMP. L. (forthcoming 1998); Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. (forthcoming 1998); Gerald L. Neuman, *Sense and Nonsense About Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 FORDHAM. L. REV. 371 (Nov. 1997); and Beth Stephens, *The Law of Our Land Customary International Law as Federal Law After Erie*, 66 FORDHAM L. REV. 393 (Nov. 1997).

12. *See* Goodman & Jinks, *supra* note 11.

13. Indeed, the initial revisionist position only briefly mentioned the statute for the limited claim that the TVPA "[b]y creating a federal cause of action for torture . . . *arguably* provides a basis for federal question jurisdiction for suits involving *torture*." Bradley & Goldsmith,

TVPA definitely creates a cause of action for torture and extrajudicial killing. However, they claim that the TVPA should be read, first, as failing to endorse the *Filartiga* line of casesand, second, as a Congressional rejection of *Filartiga*'s open-ended approach. The TVPA, they argue, should be construed to limit Section 1350 suits to only the enumerated causes of action, torture and extrajudicial killing. They conclude: that if Congress intended to sanction the federal courts' view that other causes of action are permitted under Section 1350, the text of the statute would have to stipulate such an endorsement explicitly. In short, this most recent articulation of their position effectively denies the very possibility of federal *common* law; since the Congress must specify by the full extent of the judiciary's interpretive domain.

Indeed, to avoid the TVPA destructive implications for the revisionist position, Bradley and Goldsmith implicitly now appear to embrace Justice Scalia's textualist approach to statutory interpretation. Conspicuously, Bradley and Goldsmith eschew discussion of any details of the legislative history. Instead, they perform a series of exercises that accord with the textualist approach: comparing the purposes of analogous statutes and making inferences from the structure of the statute as a whole. Most importantly, their suggested requirement of a clear textual statement closely accords with the central "radical"[14] principles of Justice Scalia's textualism. Ultimately, their approach departs from established conventions not only of international law but also of statutory interpretation.

In contrast to Bradley and Goldsmith's approach, I interpret the meaning and purpose of Section 1350 and the TVPA by including a close examination of the TVPA legislative history. The judiciary's general method of statutory interpretation encourages this use of legislative history.[15] And, my assessment of the TVPA, in particular, relies on the

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*Customary International Law*, *supra* note 10, at 873 n.356 (citing Weisburd, *State Courts*, *supra* note 10, at 3-4); *see also* Weisburd, *State Courts*, *supra* note 10, at 56 ("Congress can enact statutes creating federal causes of action for violations of international law, as it has done with respect to torture, for example.") This brief aside offered no indication of either the deep interconnections between the TVPA and Section 1350, or the extensive legislative history concerning congressional support of the *Filartiga* doctrine. Furthermore, claiming the TVPA *arguably* provides a cause of action for torture is unnecessarily ambiguous; and discussing the statutes application only to torture — when the body of the statute also deals extensively with extrajudicial killings — suggests a surface reading of simply the statute's title.

14. William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 624 (1990).

15. In 1983, Judge Patricia Wald remarked: "No occasion for statutory construction now exists when the Court will not look at the legislative history." Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195 (1983). Although the frequency of the Court's reliance on legislative history has declined, nearly all the Justices still generally agree to the utility of legislative history in statutory

most authoritative aspects of the relevant record committee reports[16] and statements by the bill's sponsors.[17]

## III. LESSONS OF THE TVPA

An honest appraisal of the TVPA legislative history reveals clear Congressional support for the consensus position: that *Filartiga* was rightly decided and that customary international human rights law is federal common law. This assessment can be analyzed in three parts. That is, examining the TVPA text and legislative history establishes: a) Congress did not intend the TVPA to prevent the litigation of other causes of action under the ATCA; b) Congress' intent endorsed the *Filartiga* doctrine; and c) Congress agreed with the conventional view that customary international law is federal common law. I discuss each of these assessments in turn.

### *A. The TVPA Should Not Limit Other ATCA Causes of Action*

A textualist would be hard pressed to prove the TVPA should limit the scope of the ATCA. Judges have read the ATCA to include a clear substantive component: a relatively open-ended cause of action for torts committed in violation of the law of nations. The TVPA provides no statement, clause, or provision to suggest Congressional disagreement with the prevailing judicial application of the ATCA. Moreover, a strong presumption rests against interpreting a subsequent statute to limit the effect of a prior statute, without a clear Congressional statement to such an

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interpretation. WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 751 (2d ed. 1995) ("The Supreme Court still relies on committee reports (even if less than before), and in Wisconsin Public Intervenor v. Mortier, 501 U.S. 597, 610 n.4 (1991), all of the other Justices joined in a footnote explicitly rejecting Justice Scalia's general proposition that legislative history is irrelevant to proper statutory interpretation.").

16. Wald, *supra* note 15, at 201 ("Committee reports remain the most widely accepted indicators of Congress' intent."); ESKRIDGE & FRICKEY, *supra* note 15, at 743 ("Most judges and scholars agree that committee reports should be considered as authoritative legislative history and should be given great weight (i.e., a statement in a committee report will usually count more than a statement by a single legislator)."); *Id.* ("Committee reports appear particularly well-suited for the authoritative role they play. Most legislation is essentially written in committee or subcommittee, and any collective statement by the members of that subgroup will represent the best-informed thought about what the proposed legislation is doing.").

17. ESKRIDGE & FRICKEY, *supra* note 15, at 791 ("The qualms courts and commentators may have about relying on statements made during floor debates and in legislative hearings often disappear when the speaker is the sponsor of the bill or amendment that includes the statutory provision being interpreted.").

effect.[18] Indeed, examining the structure of the statute as a whole now with the codification of the TVPA at Section 1350 supports the consensus view: the statute encompasses more than jurisdictional issues. That is, the ATCA wing like the TVPA wing creates procedural jurisdiction, but also creates a substantive cause of action. Several federal courts, relying on their "reading of *the plain text* of Section 1350," have recognized similar implications.[19] Notwithstanding these assessments, at worst, Section 1350 statutory construction is unclear. And, in the event of textual ambiguity, even a plain meaning rule would permit recourse to legislative history.[20]

The TVPA legislative history reveals one pervading concern in the Congressional deliberations: that passage of the TVPA should not disturb the ongoing development of ATCA litigation. Indeed, the House's principal sponsor of the TVPA — Representative Gus Yatron — specially denounced interpreting the TVPA as a narrowing device:

> International human rights violators visiting or residing in the United States have formerly been held liable to money damages under the Alien Torts Claims Act. It is not the intent of the Congress to weaken this law, but to strengthen and clarify it. Federal courts should not allow Congressional actions with respect to this legislation to prejudice positive developments, but rather to act upon existing law when ruling on the cases presently before them.[21]

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18. *Id.* at 645 (explaining the interpretive rule "that one provision of a statute should not be interpreted in such a way as to negate or perhaps even derogate from other provisions of the statute (to the extent that this is possible)").

19. *See, e.g., In re* Estate of Ferdinand Marcos, Human Rights Litigation II, 25 F.3d 1467, 1475 (9th Cir. 1994) ("Our reading of *the plain text* of §1350 is confirmed by the Torture Victim Protection Act of 1991, codified at this section.") (emphasis added); Beanal v. Freeport-McMoran, No. 96-1474 1997 U.S. Dist. LEXIS 4767, *54, *55 (E.D. La. Apr. 9, 1997); Kadic v. Karadzic, 70 F.3d 232, 241 (2nd Cir. 1996); Xuncax v. Gramajo, 886 F. Supp. 162, 181, 185 (D.Mass. 1995).

20. Patricia U. Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-1989 Term of the United States Supreme Court,* 39 AM. U.L.REV. 277, 285 (1990).

The Plain Meaning Rule basically articulates a hierarchy of sources from which to divine legislative intent. Text comes first, and if it is clearly dispositive, then the inquiry is at an end. Legislative history, therefore, still has an important role to play as long as statutory construction is not entirely plain.

21. *The Torture Victim Protection Act: Hearings on H.R. 1417 Before the Subcomm. on Human Rights and International Organizations of the House Comm. on Foreign Affairs*, 100th Cong., 2nd Sess. 1 (1988) (Rep. Yatron). [hereinafter *TVPA House Hearings*].

In this regard, members of the House Subcommittee asked all the witnesses to give assurances that the legislation would endorse, rather than weaken, other Section 1350 litigation.[22] In short, the TVPA legislative history provides little, if anything, to suggest that the Congress thought the TVPA should be a device for *restricting* suits; rather, the evidence overwhelmingly supports the conclusion that Congress wanted to leave the *Filartiga* doctrine, at the very least, unimpeded.

### *B. Congress Adopted the TVPA to Endorse the Filartiga Doctrine*

The TVPA legislative history provides a surplus of evidence concerning Congress' endorsement of progressive developments in Section 1350 case law. In particular, the House Report provides language unequivocally supporting the *Filartiga* litigation, and emphasizes the acceptability of the judiciary's prospective incorporation of existing and evolving customary international law norms: "[C]laims based on torture or summary executions do not exhaust the list of actions that may appropriately be covered by Section 1350. The statute should remain intact to permit suits based on other norms that already exist or may ripen in the future into rules of customary international law."[23]

Correspondingly, the Senate Report reiterates the House Report, explaining the reason Congress added the TVPA to Section 1350, rather than replace Section 1350, was to assure the continuation of other causes of action.[24] Additionally, the Senate Report specifically discusses ATCA cases involving other causes of action to underscore the view that: "[T]orture or summary executions do not exhaust the list of actions that may appropriately be covered by Section 1350."[25] Indeed, the Senate's principal sponsor of the bill, Senator Arlen Specter, explained that the TVPA was primarily a gap-filling device, meant to safeguard the ongoing litigation: "This bill closes a gap in the law. Under court decisions, aliens have the right to sue their torturers under the Alien Tort Claims Act, but not United States citizens. This bill would extend protection to United

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22. *TVPA House Hearings*, *supra* note 21, at 71-72 (Rep. Yatron) (asking all panelists to assure committee that TVPA would not weaken ATCA).

23. H. REP. NO. 367(I), 102D CONG., 1st Sess. 1991, 1992 U.S.C.C.A.N. 84, 86 1991 WL 255964 (Nov. 25, 1991).

24. S. REP. NO. 249, 102D CONG., 1st Sess., 1991 WL 258662 (Leg. Hist.) at 3 (Nov. 26, 1991) (emphasis added). ("Section 1350 has other important uses and should not be replaced.").

25. *Id* at 4;. ("For example, outside of the torture and summary execution context, several Federal court decisions have relied on Section 1350.") (*citing* Von Dardel v. Union of Soviet Socialist Republics, 623 F.Supp 246 (1985); Adra v. Clift, 195 F. Supp. 857, 864 (D. Md. 1961)).

States citizens *while retaining the current law's protection of aliens.*"[26] The TVPA was essentially understood as a measure to "eliminate any uncertainty here and would *compliment the ongoing litigation efforts under the ATCA.*"[27] In sum, Congress wanted to ensure that human rights litigation would not be bottlenecked by *Tel-Oren* and passed the TVPA to ensure the continued success of the *Filartiga* doctrine.

### *C. The TVPA Indicates Congress Joins the Consensus View that Customary International Law is Federal Common Law*

Perhaps most debilitating for the revisionist position is the Senate Report's language strongly supporting the position that customary international law is appropriately considered federal common law. In no uncertain terms, the Senate Report endorses this principle, with specific regard to the elaboration of international law in human rights cases:

> While the legislation specifically provides Federal district courts with jurisdiction over these suits, it does not preclude state courts from exercising their general jurisdiction to adjudicate the same type of cases. As a practical matter, however, state courts are not likely to be inclined or well-suited to consider these cases. International human rights cases predictably raise legal issues such as interpretations of international law that are matters of Federal common law and within the particular expertise of Federal courts.[28]

The Senate Report dovetails with the House Report's emphasis on keeping the ATCA "intact to permit suits based on other norms that already exist or may ripen in the future into rules of customary international law."[29] In short, the Congress, itself, adheres to the maxim that *customary international law is federal common law*, especially in human rights cases.

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26. 137 CONG. REC. S1378, 1378 (Jan. 31, 1991) (Statement of Sen. Specter) (emphasis added); *see also TVPA House Hearings*, *supra* note 21, at 86-87 (Sen. Solomon) ("[The TVPA] will serve, in my judgment, to clarify a technical point in the existing law.")

27. Torture Victim Protection Act of 1989, Hearings before the Subcommittee on Immigration & Refugee Affairs of Senate Comm. on the Judiciary, 101 C., 2 S. 19 (1990) at 40-41 (emphasis added); *see also* 135 CONG. REC. H6423, 6426 (Oct. 2, 1989) (statement of Sen. Leach) (describing TVPA clarificatory function in ensuring progression of ATCA judicial successes).

28. S. REP., *supra* note 24, at 6 (emphasis added).

29. H. REP. NO. 367(I), 102D CONG., 1st Sess. 1991, 1992 U.S.C.C.A.N., 86 1991 WL 255964 (Nov. 25, 1991).

## IV. IMPLICATIONS AND ASSESSMENTS

After the TVPA, judges who want to respect Congress' intentions should feel free, if not encouraged, to incorporate human rights violations in addition to official torture and extrajudicial killing. Indeed, the revisionist reading of the TVPA requires Herculean judicial activism to avoid this conclusion. Furthermore, some of the revisionist arguments concerning the TVPA demonstrate the hollowness of their claims for democracy. Congress, after all, clearly did not want the TVPA to disturb the incorporation of other causes of action under the *Filartiga* doctrine. Yet, Bradley and Goldsmith would use the TVPA specifically for such mischief.

At a greater level of abstraction, the TVPA also indicates Congress' support for the continued judicial practice of applying customary international human rights law as federal common law. Congress' stance should confound the revisionist position. The revisionists' instruction to courts, to incorporate as federal law only customary international law norms that are designated by statute is a rule that the Congress, itself, opposes.