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

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International law is part of United States law. Indeed, international law — or the "law of nations" in eighteenth century parlance — has been considered part of United States law since the founding.[1] The Judiciary Act of 1789, the enabling legislation of Article III,[2] establishes federal court jurisdiction over torts committed in violation of the law of nations. This provision, the Alien Tort Claims Act (ATCA), provides: "[D]istrict courts shall have original jurisdiction of any civil action by an alien for a tort only committed in violation of the law of nations or treaty of the United States."[3] Given the paucity of potential claims arising under eighteenth-century "law of nations," this provision predictably generated

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1. *See* Edwin D. Dickinson, *The Law of Nations as Part of the National Law of the United States*, 101 U. PA. L. REV. 26, 55-56 (1952).

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

2. *See* Anthony D'Amato, *The Alien Tort Statute and the Founding of the Constitution*, 82 AM. J. INT'L L. 62 (1988) (describing Judiciary Act as "the structural statutory law of the new nation" and, with the Constitution, part of the "'organic laws'" of the Founding).

3. 28 U.S.C. § 1350 (1994).

few suits through the early years of the republic.[4] The shockwaves of Nazi Germany, the "final solution," and Nuremberg would, however, fundamentally alter the landscape of international law.[5] Since the end of World War II, international law has regulated not only relations between states, but also relations between states and their citizens.[6] Individual human rights are now indisputably part of the transnational legal system. This development created the juridical space necessary to revive the ATCA. Given the ever-widening consensus on the legal status of an inviolable core of international human rights, renewed interest in the ATCA was arguably inevitable.

Filartiga v. Pena-Irala was the breakthrough case.[7] In *Filartiga* — aptly termed the "*Brown v. Board of Education* of domestic human rights litigation"[8] — the Second Circuit Court of Appeals held that official torture violates the law of nations, and, therefore, gives rise to an actionable claim under the ATCA.[9] Confronted with a constitutional challenge to the ATCA, the *Filartiga* court also held that Article III permitted such jurisdiction since the "law of nations," as part of the federal common law, arises under the laws of the United States.[10] *Filartiga* has since met with near uniform approval in the academy[11] and federal courts.[12] Only Judge

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4. Of course, eighteenth century CIL encompassed very few norms. *See* Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984) (Bork, J., concurring). Additionally, only roughly 15 treaties were in force in 1789. *See* Kenneth C. Randall, *Federal Jurisdiction Over International Law Claims: Inquiries into the Alien Tort Statute*, 18 N.Y.U. J. INT'L L. & POL. 1, 46 (1985). Many scholars have offered explanations for this initial paucity of ATCA claims. For a particularly rich account, 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, 470-71 (1989).

5. *See* Ruti Teitel, *Transitional Jurisprudence: The Role of Law in Political Transformation*, 106 YALE L.J. 2009, 2038 (1997) (discussing Nuremberg as a "paradigm shift").

6. *See* MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 227-40 (1993); Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather than States*, 32 AM. U. L. REV. 1-16 (1982).

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

8. Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L. J. 2347, 2366 (1991).

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

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

11. *See, e.g*, Kathryn Burke, et al., *Application of International Human Rights Law in State and Federal Courts*, 18 TEX. INT'L L.J. 291, 321 (1983); Jeffrey M. Blum & Ralph G. Steinhardt, *Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act After Filartiga v. Pena-Irala*, 22 HARV. INT'L L.J. 53, 57, 98-102 (1981); Symposium,

Bork's now-repudiated concurrence in *Tel-Oren v. Libyan Arab Republic* challenged the *Filartiga* holding that the ATCA provided a federal cause of action for certain international human rights violations.[13] In short, a veritable consensus emerged that some subset of CIL, including certain international human rights norms, is part of federal common law.

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

The *Filartiga* line now faces a new challenge.[14] This emergent challenge to the consensus view, which Ryan Goodman and I have called the "revisionist position,"[15] questions the foundations of the *Filartiga* holding. This critique claims that the consensus view "is the result of a combination of troubling developments, including mistaken interpretations of history, doctrinal bootstrapping by the *Restatement (Third) of Foreign*

INT'L L. 1 (1981); Symposium: *Federal Jurisdiction, Human Rights, and the Law of Nations: Essays on* Filartiga v. Pena-Irala, 11 GA. J. INT'L & COMP. L. 305 (1981).

12. *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, 817 (1997) [hereinafter *Customary International Law*] ("[A]lmost every federal court that has considered the modern position has endorsed it.") *See, e.g.*, Kadic v. Karadzic, 70 F.3d 232, 246 (2d Cir. 1995) (describing the "settled proposition that federal common law incorporates international law"), *cert. denied*, 116 S. Ct. 2524 (1996); *In re* Estate of Ferdinand E. Marcos Human Rights Litig., 978 F.2d 493, 502 (9th Cir. 1992) ("It is . . . well settled that the law of nations is part of federal common law."); Xuncax v. Gramajo, 886 F. Supp. 162, 193 (D. Mass. 1995) ("It is well settled that the body of principles that comprise customary international law is subsumed and incorporated by federal common law."); *In re* Estate of Ferdinand Marcos, Human Rights Litig., 25 F.3d 1467, 1473, 1475 (9th Cir. 1994); *Filartiga*, 630 F.2d 876, 885; *Xuncax*, 886 F. Supp. 162, 193; United States v. Schiffer, 836 F. Supp. 1164, 1170 (E.D. Pa. 1993), *aff'd*, 31 F.3d 1175 (3d Cir. 1994); Forti v. Suarez-Mason, 672 F. Supp. 1531, 1544 (N.D. Cal. 1987), *reh'g granted on other grounds* 694 F. Supp. 707 (N.D. Cal. 1988); Fernandez v. Wilkinson, 505 F. Supp. 787, 798 (D. Kan. 1980), *aff'd on other grounds* 654 F.2d 1382 (10th Cir. 1981).

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

14. *See* Bradley & Goldsmith, *supra* note 12; Curtis A. Bradley & Jack L. Goldsmith, *The Current Illegitimacy of Human Rights Litigation*, 66 FORDHAM L. REV. 319 (1997) [hereinafter *Human Rights Litigation*]; *see also* Arthur M. Weisburd, *State Courts, Federal Courts, and International Cases*, 20 YALE J. INT'L L. 1 (1995); Arthur M. Weisburd, *The Executive Branch and International Law*, 41 VAND. L. REV. 1205 (1988); Phillip R. Trimble, *A Revisionist View of Customary International Law*, 33 UCLA L. REV. 665 (1986).

15. *See* Ryan Goodman & Derek P. Jinks, *Filartiga's Firm Footing: Federal Common Law and International Human Rights*, 66 FORDHAM L. REV. 463, 469 (1997).

Relations Law, and academic fiat."[16] Professors Curtis Bradley and Jack Goldsmith suggest that — contrary to *Filartiga*'s holding — CIL is not federal law absent political branch authorization and, as a consequence, federal courts should have limited, if any, jurisdiction over claims arising under CIL.[17] Furthermore, the revisionists argue that if CIL is not part of federal common law, ATCA suits between non-citizens would be unconstitutional for failure to fit under any of Article III's provisions. Indeed, the doctrinal consequences of the revisionist critique are potentially crippling for the *Filartiga* line.

The normative force of the revisionist position rests on two related concerns. First, the revisionists suggest that international law increasingly regulates "many areas that were formerly of exclusive domestic concern."[18] Second, the revisionists decry the "new CIL,"[19] which governs a broad range of juridical relationships,[20] emerges quickly,[21] and is less consent-based than traditional CIL.[22] Thus, the revisionists conclude that the "new CIL" has many potentially troubling doctrinal implications: federal CIL might preempt an unacceptably broad range of state laws;[23] federal CIL might involve federal courts in issues best left to the political branches;[24] and federal CIL might potentially invalidate inconsistent, democratically-produced United States political branch action.[25] Under the revisionist view, these concerns counsel against the wholesale incorporation of CIL

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16. Bradley & Goldsmith, *supra* note 12, at 821.

17. A word on the parameters of my analysis is in order. First, in this short presentation, I will not provide an in-depth explication of Bradley and Goldsmith's position. For a summary of their argument, see Goodman & Jinks, *supra* note 15, at 470-79. The steps of the argument are far more nuanced than I will discuss, however, the objections I raise here center on the applicability of this critique to ongoing ATCA litigation. Second, I will not discuss the implications of the Torture Victim Protection Act. For an excellent, succinct discussion of the TVPA's relevance to this debate, see Ryan Goodman, *Congressional Support for Customary International Human Rights Law as Federal Common Law: Lessons of the Torture Victim Protection Act*, 4 ILSA J. COMP. & INT'L L. (forthcoming 1998). This short Article draws on a more extended piece I co-authored with Ryan Goodman, *supra* note 15. Article written by Ryan Goodman and I. *See* Ryan Goodman & Derek P. Jinks, *Filartiga's Firm Footing: Federal Common Law and International Human Rights*, 66 FORDHAM L. REV. (forthcoming 1997). This piece summarizes one of the arguments we advance in that Article.

18. Bradley & Goldsmith, *supra* note 12, at 821.

19. *See id.* at 838-42.

20. *See id.* at 839-40.

21. *See id.* at 840-41.

22. *See id.* at 841-42.

23. *See id.* at 846-47.

24. *See* Bradley & Goldsmith, *supra* note 12, at 844-46.

25. *Id.* at 857-58, 868-69.

into federal common law. Bradley and Goldsmith thus conclude that absent political branch authorization, CIL is not federal law.[26]

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

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

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

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

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26. *See id.* at 868, 870; Bradley & Goldsmith, *supra* note 15, at 1.

27. Many commentators have provided sound critiques of the revisionist position. *See* Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. (forthcoming 1998); Goodman, *supra* note 17; Goodman & Jinks, *supra* note 17; Gerald L. Neuman, *Sense and Nonsense About Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 FORD. L. REV. 371 (1997); Beth Stephens, *Law of Our Land Customary International Law as Federal Law After Erie*, 66 FORD. L. REV. 393 (1997).

28. *Filartiga*, 630 F.2d at 885-87; *see also In re* Estate of Ferdinand Marcos, Human Rights Litigation II, 25 F.3d 1467, 1475 (9th Cir. 1994) (citing *Filartiga*, 630 F.2d at 885-87) ("We thus join the Second Circuit in concluding that the Alien Tort Act, 28 U.S.C. § 1350 (1982), creates a cause of action for violations of specific, universal and obligatory international human rights standards . . . ."); Forti v. Suarez-Mason I, 672 F. Supp. 1531, 1539-40 (N.D. Cal. 1987) (citing *Filartiga*, 630 F.2d at 881) (other citations omitted) ("The contours of the requirement have been delineated by the *Filartiga* court and by Judge Edwards in *Tel-Oren* . . . .

claims to a small subset of CIL, namely, *jus cogens* (or "compelling law") norms. Therefore, successful ATCA plaintiffs must raise claims based on *jus cogens* norms,[29] a short list of settled, peremptory norms.[30] Accordingly, the three prongs of the ATCA's "*jus cogens* test"[31] enable a delimited but fundamentally important category of legal norms to succeed.

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

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

29. *See* Vienna Convention on the Law of Treaties, 39th Sess., art. 53, U.N. Doc. A/39/27 (1969); Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 715 (9th Cir. 1992) ("[*J*]*us cogens* 'embraces customary laws considered binding on all nations,' and 'is derived from values taken to be fundamental by the international community, rather than from the fortuitous or self-interested choices of nations.'") (quoting David F. Klein, *A Theory for the Application of the Customary International Law of Human Rights by Domestic Courts*, 13 YALE J. INT'L L. 332, 350-51 (1988); RESTATEMENT OF FOREIGN RELATIONS § 102 cmt. K 1987; Craig Scott, et al., *A Memorial for Bosnia*, 16 MICH. J. INT'L L. 1, 28 (1994) (*Jus cogens* norms "derive from principles that the legal conscience of humankind deems essential to coexistence in the international community.").

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

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

32. *See, e.g.*, Kadic v. Karadic, 70 F.3d 232 (2nd Cir. 1996); Beanal v. Freeport-McMoran, 1997 U.S. Dist. LEXIS 4767, *19-21 (E.D. La. Apr. 9, 1997); Mushikiwabo v. Berayagwiza, 1996 U.S. Dist. LEXIS 4409, *3-4 (S.D.N.Y. Apr. 8, 1996).

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

34. *See, eg.*, *Forti*, 672 F. Supp. 1531 (N.D. Cal. 1987); *Xuncax*, 886 F. Supp 162, 185.

disappearances,[35] and prolonged arbitrary detention.[36] Likewise the federal courts have uniformly rejected a (much broader) range of CIL. Note that many of these norms are arguably CIL, but they fail to meet the "*jus cogens* test." The list of unsuccessful claims includes: expropriation of property,[37] fraud, [38] negligence in aircraft crashes[39] and mismanaged sea

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[T]he practices of summary execution . . . have been met with universal condemnation and opprobrium. . . . An affidavit signed by twenty-seven widely respected scholars of international law attests that every instrument or agreement that has attempted to define the scope of international human rights has 'recognized a right to life coupled with a right to due process to protect that right.' And again, not only are the proscriptions of these acts universal and obligatory, they are adequately defined to encompass the instant allegations. (citations omitted).

35. *See, e.g., Forti*, 694 F.Supp 707; *Xuncax*, 886 F.Supp. 162, 185.

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

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

38. *See* Trans-Continental Investment Corp., S.A. v. Bank of the Commonwealth, 500 F. Supp. 565 (C.D. Cal. 1980) (concerning fraudulent misrepresentation to receive $2.5 million deposit in bank); IIT v. Vencap, Ltd., 519 F.2d 1001 (2nd Cir. 1975) (involving action for fraud, conversion, and corporate waste); Abiodun v. Martin Oil Service, Inc., 475 F.2d 142 (7th Cir. 1973) (per curiam) (involving fraud in procuring workers from foreign country).

39. *See* Benjamin v. British Europena Airways, 572 F.2d 913, 916 (2nd Cir. 1978) (finding that no evidence supports the claim that negligence constitutes law of nations violation).

vessels,[40] free speech,[41] libel,[42] child custody law,[43] and financial misconduct.[44]

The degree of consensus in ATCA litigation is remarkable. Indeed, federal courts are divided on the status of only one CIL norm: the prohibition of cruel, inhuman, or degrading treatment. While the norm clearly satisfies the requirements of universal condemnation and obligatory prohibition, federal courts have disagreed about the definability of the norm.[45]

Significantly, federal courts have closely guarded against any unwarranted expansion of the *jus cogens* category.[46] The range of potential *jus cogens* violations are, of course, not a fixed set. Other norms may at some point assume the character of a universal, obligatory norm, and

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

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

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

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

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

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

46. *See, e.g.*, *Xuncax*, 886 F. Supp. 162, 189 ("[C]aution is required in identifying new violations of *jus cogens*."); *Forti I*, 672 F.Supp, at 1542-43 ("Before this Court may adjudicate a court claim under §1350, it must be satisfied that the legal standard it is to apply his one with universal acceptance and definition; on no other bases may the Court exercise jurisdiction over a claimed violation of the law of nations.").

definable. This is the nature of an evolving legal order. Nevertheless, federal courts have clearly exercised great caution in determining whether an alleged offense constitutes such a violation.

III. RETHINKING REVISIONISM: THE LESSONS OF THE ATCA LITIGATION

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

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

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

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47. Bradley & Goldsmith, *supra* note 12, at 855.

48. *Id.* at 858.