Understanding the Newly-Refined Role of Customary International Law in U.S. Courts

*By Vincent J. Vitkowsky**

I. Introduction

There is much controversy concerning the role of international and foreign legal sources in U.S. courts. Although in some contexts this subject can seem abstract, it becomes very concrete when the international source involves "customary international law," which is considered to be part of the Law of Nations. Customary international law can provide the basis for a federal cause of action where Congress has not created one. Understanding why and how this occurs requires analysis of the U.S. Constitution, federal statutes, and a series of key decisions, most notably the 2004 U.S. Supreme Court decision in *Sosa v. Alvarez-Machain*.[1] This article will present the essential framework of analysis and identify the key open issues.

II. What is Customary International Law?

The Law of Nations consists of (1) certain treaties and (2) customary international law. Customary international law is defined as (a) a widespread and uniform practice among nations that has ripened into a customary norm, (b) that nations follow out of a sense of legal obligation ("*opino juris siv necessitatis*").

To become a custom, a practice must have the widespread, but not necessarily universal support of nations concerned with the issue, and must usually have continued long enough to give rise to at least an inference of recognition and acquiescence. Interim rules become customary international law once a large enough number of nations having an interest in them act in accordance with the rules.[2] The assent of a nation is inferred by silence, except as to "consistent objectors."

There is a special category of customary international law, *jus congens* or "compelling law," which is considered to consist of peremptory norms. The argument is that no nation is permitted to act contrary to those norms, whether or not it has acquiesced. This category can have real effect in U.S. courts.

III. Constitutional and Statutory Background

Article I, § 8 contains the only express reference to the Law of Nations in the Constitution. It gives Congress the power to "define and punish Piracies and Felonies committed on the high seas, and Offences against the Law of Nations."

Article VI, cl 2, the "Supremacy Clause," explicitly mentions Treaties, but it does not mention any other aspects of the Law of Nations:

> The 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, anything in the Constitution or Laws of any State to the contrary notwithstanding.

Article III, § 2, cl 1, dealing with Original Jurisdiction, also mentions Treaties, but not other aspects of the Law of Nations:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; to all Cases affecting Ambassadors, other public Ministers and Consuls; to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party; to Controversies between two or more States; between a State and Citizens of another State; between Citizens of different States; between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Questions have arisen concerning the extent to which the phrase "the Laws of the United States which shall be made in pursuance [of the Constitution]," as used in the Supremacy Clause, and the phrase "the Laws of the United States," as used in the Original Jurisdiction Clause, include aspects of the Law of Nations.

The judicial power is given effect in two statutes that have been argued to implicate customary international law. First, the Federal Question statute[3] provides as follows:

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

A critical testing ground for customary international law in the U.S. courts has been the Alien Tort Statute[4] (ATS), which provides as follows:

> Alien's action for tort
>
> The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

IV. The Status of Customary International Law in U.S. Courts

Historically, the Law of Nations was regarded to a part of "federal common law," which consists of federal rules of decision applied by courts in the absence of express constitutional or statutory direction. The scope of federal common law was famously reduced by *Erie Railroad Co. v. Tompkins*, which held "there is no federal general common law."[5] Despite the sweep of this statement, *Erie* in fact left some categories of federal common law permissible "on issues of national concern."

This gave rise to questions concerning the status of customary international law in the post-*Erie* order. Under one interpretation, following *Erie*, a federal court could not apply customary international law in the absence of express statutory authorization to do so. As discussed below, *Sosa* rejected this interpretation.

Under another interpretation, customary international law became part of the new federal common law. This interpretation would support the conclusion that customary international law is incorporated into "Laws of the United States" as used in Article III, cl 1. If it is, this could support the view that it falls within federal court's subject matter jurisdiction, so that the presence of a customary international law issue gives rise to (1) federal question "arising under" jurisdiction, and (2) Supreme Court jurisdiction on review of state court decisions. This is the position taken by the Restatement (Third) of Foreign Relations Law (1987) (Restatement), § 111.

Moreover, under Article VI, the Supremacy Clause, customary international law would preempt inconsistent state law. This, too, is the view taken by the Restatement, and it reflects a cognitive disconnect between international academic theoreticians and the practicing bar and bench. Consider whether a claim that state death penalty statutes were superceded by contrary customary international law would pass the proverbial "red-face test" of effective advocacy.

V. Key Case Law Before *Sosa*

Customary international law has especially important implications in suits brought in U.S. courts under the ATS. The ATS was largely unused between its enactment in 1789 and 1980, but took on dramatic new life in the Second Circuit decision in *Filartiga v. Pena-Irala*.[6] This was an action between two citizens of Paraguay alleging that defendant, acting under color of state authority, caused the death of plaintiff's son by the use of torture. The Second Circuit allowed the case to proceed, concluding that it had subject matter jurisdiction because a suit for violation of customary international law "arises under" federal law for purposes of Article III. The Court reasoned that "The constitutional basis for [the ATS] is the law of nations, which has always been part of the federal common law."[7] The Court recognized that its reasoning might also sustain jurisdiction under the general Federal Question statute, but expressly rested its decision on the ATS.[8]

The Second Circuit also held that customary international law prohibited state-sponsored torture. This conclusion was not based on state practice, because the Court recognized that many nations engage in torture. Rather, the Court referred to various "soft" sources including (1) the U.N. Charter, (2) the U.N. General Assembly Universal Declaration of Human Rights, (3) the U.N. General Assembly Torture Declaration, (4) several human rights treaties, (5) the writings of jurists, and (6) a survey showing that torture was prohibited, expressly or implicitly, by the constitutions of over fifty-five nations. As addressed below, the weight accorded such soft sources has been significantly reduced by *Sosa*.

But *Filartiga* missed a far more fundamental point. The Federal Question statute and the ATS are each Congressional grants of jurisdiction to the federal courts. But they do not in themselves establish private causes of action. That is, they only confer jurisdiction to adjudicate causes of action that arise from other sources. Unless another statute establishes such a cause of action, the courts must infer one from another source, such as customary international law.

This important distinction was addressed by the D.C. Circuit in *Tel Oren v. Libyan Arab Republic*.[9] Plaintiffs were survivors and representatives of persons murdered in an armed terrorist attack on a civilian bus in Israel. Plaintiffs alleged multiple tortious acts in violation of the law of nations, treaties, the criminal law of the U.S., and common law. Both Federal Question statute and the ATS were alleged to give rise to jurisdiction. The D.C. Circuit concluded that there was no subject matter jurisdiction under either statute. The unanimous decision was derived from three separate opinions, and Judge Bork's was notable for its intellectual rigor and coherence. He wrote that "the Second Circuit in *Filartiga* assumed that Congress' grant of jurisdiction also created a cause of action. That seems fundamentally wrong and certain to produce pernicious results."[10] Judge Bork concluded that no body of law expressly granted a cause of action, and he declined to infer one. He noted that to do so "would present grave separation of powers problems,"[11] but based his conclusion on the grounds that there was insufficient international consensus to establish that customary principles of international law had been violated.

VI. *Sosa v. Alvarez-Machain*

The scope of principles that might constitute customary international law affording a private cause of action under the ATS was narrowed and refined by *Sosa v. Alvarez-Machain*.[12] There, the U.S. Supreme Court left open the possibility that new principles of customary international law might emerge. But the Court took pains to urge judicial restraint, and gave strong indications that courts should limit rather than increase the emergence of such new principles.

The claim in *Sosa* was brought by a Mexican doctor, Alvarez, who was believed to be implicated in the torture and murder of an agent of the Drug Enforcement Administration. Alvarez was abducted in Mexico by Mexicans who brought him to Texas, where he was turned over to federal officers. He was ultimately acquitted, and then brought an action against, *inter alia*, one of his abductors under the ATS, alleging a violation of the Law of Nations.

The Supreme Court dismissed. Its precise holding was that a single illegal detention of less than a day, followed by the transfer of custody to lawful authorities and a prompt arraignment, violated no norm of customary international law so well defined as to support the creation of a federal remedy.[13]

The Court confirmed the view that the ATS was only jurisdictional, *i.e*. it did not in itself create a new cause of action for torts in violation of the Law of Nations. But the Court rejected the argument that a cause of action could only arise by a further statute expressly creating it. Rather, it wrote that: "We think that at the time of enactment, the jurisdiction enabled federal courts to hear claims in a very limited category defined by the law of nations and recognized as common law."[14] After reviewing that category, the Court concluded as follows: "The jurisdictional grant is best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time."[15]

The Court expressly assumed that because Congress has not precluded federal courts from recognizing a claim under the customary international law of nations as an element of common law, the federal courts had that authority.[16] For the purposes of the ATS, the Court set the following standard for any new principles which would provide a cause of action:

> [W]e think courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized.[17]

The Court identified the "18th-century paradigms" as offenses against diplomats, violations of safe conduct, and piracy.

Thus, as the Court put it, "the door is still ajar subject to vigilant doorkeeping, and thus open to a narrow class of international norms today."[18]

The Court then examined the current state of customary international law and concluded that it includes no "general prohibition against 'arbitrary' detention defined as officially sanctioned action exceeding positive authorization to detain under the domestic law of some government, regardless of the circumstances."[19]

Several aspects of the opinion provided guidance on other open questions, and generally direct courts toward a restricted approach. First, the Court expressed a measure of deference to the Executive Branch, stating that "there is a strong argument that federal courts should give serious weight to the Executive Branch's view of the case's impact on foreign policy."[20]

Further, the Court found that two widely-cited sources of soft authority did not meet the standard set in the opinion for identifying controlling customary international law. First, the Court concluded that the U.N. Universal Declaration of Human Rights does not of its own force impose obligations as a matter of international law. Next, the Court concluded that the U.N. International Covenant of Civil and Political Rights did not establish a rule of law, because the U.S. ratified it "on the express understanding that it was not self-executing and thus did not itself create obligations binding in the federal courts."[21] This approach should discourage lower courts from relying on other soft sources of customary international law.

Finally, the Court strongly suggested that the presence of customary international law issues would not provide an independent basis for federal question jurisdiction. It wrote that "Our position does not. . .imply. . .that the grant of federal question jurisdiction [in 28 U.S.C. § 1331] would be equally good for our purposes as [the ATS]."[22]

VII. Issues After *Sosa*

The chief consequence of *Sosa* is that unless Congress prohibits the courts from utilizing customary international law as a form of the Law of Nations, giving substantive rights to litigants in U.S. courts, the practice will continue. The opinion leaves scope for further litigation on many issues. Notably, it remains to be seen which additional principles of customary international law, if any, will meet the test established by *Sosa* for the purpose of the ATS.

Future cases will present issues concerning the use of customary international law under statutes other than the ATS, and perhaps under the Constitution. Other cases will present issues concerning which branch of government has the authority to issue binding interpretations of customary international law. In the absence of Congressional action, what weight is to be given to interpretations by the Executive Branch?

Finally, it is widely accepted that a new federal statute would take precedence over a principle of customary international law. But issues may arise concerning the precedence of a federal statute that pre-dated the emergence of a new custom.

* Vincent J. Vitkowsky is a Partner at Edwards Angell Palmer & Dodge LLP, resident in its New York office. The views expressed in this article are his own.

Footnotes

[1] 542 U.S. 692 (2004).

[2] An important question beyond the scope of this article is how one distinguishes between a state practice that violates customary international law and a state practice that replaces old with new customary international law. For example, to what extent would the war in Iraq give rise to a new customary international law norm of anticipatory self-defense? *See* John Alan Cohen, *The Bush Doctrine and the Emerging Norm of Anticipatory Self-Defense in Customary International Law*, 15 Pace Int'l L. Rev. 283 (2003).

[3] 28 USC § 1331 (2000).

[4] 28 USC § 1350 (2000).

[5] 304 U.S. 64, 78 (1938).

[6] 630 F.2d 876 (2d Cir. 1980).

[7] *Id.* at 885.

[8] *Id.* at 887, n.22.

[9] 726 F.2d 774 (D.C. Cir. 1984).

[10] *Id.* at 801.

[11] *Id.* at 805.

[12] 542 U.S. 692 (2004).

[13] *Id.* at 738.

[14] *Id.* at 712.

[15] *Id.* at 724.

[16] In dissent, Justice Scalia wrote that "[t]his turns our jurisprudence regarding federal common law on its head. The question is not what *prevents* federal courts from applying the law of nations as part of the general common law, it is what *authorizes* that peculiar exception from *Erie*'s fundamental holding that a general common law *does not exist*." 541 U.S. at 744 (emphasis in original).

[17] *Id.* at 725.

[18] *Id.* at 729.

[19] *Id.* at 736.

[20] *Id.* at 733, n.21.

[21] *Id.* at 734-735.

[22] *Id.* at 731, n.19.