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BRIDGING *ERIE*: CUSTOMARY INTERNATIONAL LAW IN THE U.S. LEGAL SYSTEM AFTER *SOSA V.* *ALVAREZ-MACHAIN*

William S. Dodge[†]

I. INTRODUCTION

Of all the decisions in the Supreme Court's recent international term,¹ *Sosa v. Alvarez-Machain*² is likely to prove the most significant. This is not just because it endorsed the *Filartiga* line of cases,³ allowing suits in U.S.

† Professor of Law, University of California, Hastings College of the Law. This article is an expanded version of remarks given at *International Law and the 2003-04 Supreme Court Term: Building Bridges or Constructing Barriers Between National, Foreign, and International Law?* My thanks to Beth Stephens and Carlos Vazquez for comments on an earlier draft. I should disclose that I participated in *Sosa v. Alvarez-Machain* by filing an amicus brief in support of Respondents. See Brief of Professors of Federal Jurisdiction and Legal History as *Amici Curiae* in Support of Respondents, reprinted in 28 HASTINGS INT'L & COMP. L. REV. 95 (2004).

1. In addition to the *Sosa* case discussed below, the international cases decided by the Supreme Court during the October Term 2003 include: *Rumsfeld v. Padilla*, 124 S. Ct. 2711 (2004) (proper district for filing habeas petition to challenge detention of U.S. citizen as enemy combatant); *Rasul v. Bush*, 124 S. Ct. 2686 (2004) (jurisdiction over aliens held at Guantanamo Bay); *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004) (authority to hold U.S. citizen as enemy combatant); *Intel Corp. v. Advanced Micro Devices, Inc.*, 124 S. Ct. 2466 (2004) (discovery for use in foreign proceedings); *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 124 S. Ct. 2359 (2004) (extraterritorial application of U.S. antitrust law); *Republic of Austria v. Altmann*, 124 S. Ct. 2240 (2004) (retroactive application of Foreign Sovereign Immunities Act); *Dep't of Transp. v. Public Citizen*, 124 S. Ct. 2204 (2004) (applicability of environmental impact statements to actions required by NAFTA); *Olympic Airways v. Husain*, 540 U.S. 644 (2004) (treaty interpretation).

2. 124 S. Ct. 2739 (2004).

3. See, e.g., *Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996), cert. denied, 519 U.S. 830 (1996); *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995), cert. denied, 518 U.S. 1005 (1996); *Hilao v. Estate of Marcos*, 25 F.3d 1467 (9th Cir. 1994), cert. denied, 513 U.S. 1126 (1995); *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

courts for human rights abuses abroad,⁴ but also because of what *Sosa* has to say about the place of customary international law in the U.S. legal system. Indeed, *Sosa* may stand with *Sabbatino*⁵ as one of the Court's seminal decisions on the relationship between international and U.S. domestic law. *Sosa* has built a bridge between international and domestic law.⁶ The decision reaffirmed that "the domestic law of the United States recognizes the law of nations"⁷ and characterized customary international law as "federal common law"⁸ for purposes of the Alien Tort Statute (ATS).⁹ But *Sosa*'s is also a distinctive bridge, and worth examining further for clues about where it might lead.

I would like to make two basic observations about the architecture of the bridge that *Sosa* has built. First, it is a narrow bridge. Although the Supreme Court held that federal courts may apply customary international law as federal common law in cases under the ATS, it also suggested that federal courts should not apply customary international law as federal common law under the general federal-question statute.¹⁰ The Court seems inclined to address the role of customary international law in the U.S. legal system issue-by-issue, incorporating it for some purposes but not others. Second, *Sosa*'s bridge is made of both historical and modern struts. The Court found support for allowing federal courts to apply the law of nations under the ATS in the history of that provision and in the First Congress's understanding of the law of nations.¹¹ Yet the Court also recognized that the U.S. legal system has changed significantly since

4. See *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2765-66 (2004) (characterizing the decision as "generally consistent with the reasoning of many of the courts and judges who faced the issue before it reached this Court" and citing *Filartiga*).

5. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

6. Although the opinions in *Sosa* spoke of a "door" between international and domestic law, see, e.g., *Sosa*, 124 S. Ct. at 2764 ("Whereas Justice SCALIA sees these developments as sufficient to close the door to further independent judicial recognition of actionable international norms, other considerations persuade us that the judicial power should be exercised on the understanding that the door is still ajar subject to vigilant doorkeeping . . ."); *id.* at 2774 (Scalia, J., concurring) ("The general common law was the old door. We do not close that door today, for the deed was done in *Erie*. . . Federal common law is a *new* door. The question is not whether that door will be left ajar, but whether this Court will open it."), a bridge seems a more apt metaphor.

7. *Id.* at 2764.

8. *Id.* at 2765.

9. 28 U.S.C. § 1350 (2000).

10. 28 U.S.C. § 1331 (2000). See *Sosa*, 124 S. Ct. at 2765, n.19. Compare *Illinois v. Milwaukee*, 406 U.S. 91, 100 (1972) ("1331 jurisdiction will support claims founded upon federal common law as well as those of a statutory origin").

11. *Sosa*, 124 S. Ct. at 2754-61.

ratification of the Constitution and passage of the first Judiciary Act, and that modern developments might alter the proper role of customary international law within that system.¹² *Sosa* links not just the international with the domestic, but the past with the present.

Part II of this Article places the *Sosa* decision in context by reviewing the recent controversy over the role of customary international law in the U.S. legal system. Part III focuses on the *Sosa* decision itself, examining the Court's particularized approach to the incorporation of customary international law and its two-part methodology. Part IV then applies this two-part methodology to some of the questions that *Sosa* left unresolved, including the status of customary international law under Article III of the U.S. Constitution and the Supremacy Clause of Article VI. A brief conclusion follows.

II. THE CONTROVERSY OVER CUSTOMARY INTERNATIONAL LAW

To set the *Sosa* decision in context, it is appropriate to review the recent controversy over the status of customary international law in the United States.¹³ There is widespread agreement that, when the Constitution was adopted and the First Judiciary Act was passed, the law of nations was understood to be general common law, which was binding on both federal and state courts.¹⁴ Prior to the Supreme Court's decision in

12. *Id.* at 2761-65.

13. The recent controversy began with an article by Professors Curtis Bradley and Jack Goldsmith, 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), although earlier articles had made some of the same points. See, e.g., A.M. Weisburd, *State Courts, Federal Courts, and International Cases*, 20 YALE J. INT'L L. 1 (1995); Phillip R. Trimble, *A Revisionist View of Customary International Law*, 33 UCLA L. REV. 665 (1986). For responses to the Bradley-Goldsmith critique, see, e.g., Ernest A. Young, *Sorting Out the Debate Over Customary International Law*, 42 VA. J. INT'L L. 365 (2002); Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824 (1998); Beth Stephens, *The Law of Our Land: Customary International Law As Federal Law After Erie*, 66 FORDHAM L. REV. 393 (1997); Gerald L. Neuman, *Sense and Nonsense About Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 FORDHAM L. REV. 371 (1997).

14. See, e.g., Bradley & Goldsmith, *supra* note 13, at 824 ("the law of nations . . . had the legal status of general common law"); Stewart Jay, *The Status of the Law of Nations in Early American Law*, 42 VAND. L. REV. 819, 832-33 (1989) ("in appropriate situations, the 'general' law (of which the law of nations was a part) prevailed, and thus the country was bound by it") [hereinafter *The Status of Law of Nations*]; William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513, 1517 (1984) ("the general law was not attached to any

Erie Railroad Co. v. Tompkins,¹⁵ there was no need to classify the law of nations as either federal or state law. As Professor Henkin has noted, “[e]arly in our history, the question whether international law was state law or federal law was not an issue: it was ‘the common law.’”¹⁶ *Erie*, of course, did away with the regime of general common law and put in its place a system in which the common law was generally state law, with limited enclaves of federal common law.¹⁷ The new question was where customary international law fit in.

A. *The Orthodox View*

The orthodox view is that customary international law became an enclave of federal common law. One year after *Erie*, Professor Philip Jessup argued that the decision had “no direct application to international law.”¹⁸ “Any question of applying international law in our courts,” he wrote, “involves the foreign relations of the United States and can thus be brought within a federal power. . . . It would be as unsound as it would be unwise to make our state courts our ultimate authority for pronouncing the rules of international law.”¹⁹ In *Sabbatino*, the Supreme Court seemed to endorse Jessup’s position,²⁰ and stated that an issue concerned with a basic choice regarding the competence and function of the Judiciary and the National Executive in ordering our relationships with other members of the international community must be treated exclusively as an aspect of federal law.²¹ Thus, as summarized in the *Restatement (Third) of Foreign Relations Law*, the orthodox view is that “[c]ustomary international law is

particular sovereign; rather, it existed by common practice and consent among a number of sovereigns”).

15. 304 U.S. 64 (1938).

16. Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1557 (1984).

17. See, e.g., *Sosa*, 124 S. Ct. at 2764 (“*Erie* did not in terms bar any judicial recognition of new substantive rules, no matter what the circumstances, and post-*Erie* understanding has identified limited enclaves in which federal courts may derive some substantive law in a common law way.”). See generally Henry J. Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383 (1964).

18. Philip C. Jessup, *The Doctrine of Erie Railroad v. Tompkins Applied to International Law*, 33 AM. J. INT’L L. 740, 741 (1939).

19. *Id.* at 743.

20. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425 (1964) (“[Jessup] cautioned that rules of international law should not be left to divergent and perhaps parochial state interpretations. His basic rationale is equally applicable to the act of state doctrine.”).

21. *Id.*; see also *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981) (“[F]ederal common law exists only in such narrow areas as those concerned with . . . international disputes implicating . . . our relations with foreign nations . . .”).

considered to be like common law in the United States, but it is federal law."²²

B. *The Bradley-Goldsmith Critique*

In 1997, Professors Curtis Bradley and Jack Goldsmith took aim at this orthodox view.²³ First, they noted its potentially far-reaching implications. "If CIL [customary international law] has the status of federal common law," they wrote, "it presumably preempts inconsistent state law pursuant to the Supremacy Clause and provides a basis for Article III 'arising under' jurisdiction. It may also bind the President under Article II's Take Care Clause."²⁴

Second, they argued that *Erie* had changed everything by requiring a sovereign source for every rule of decision.²⁵ After *Erie*, a federal court can no longer apply customary international law in the absence of some domestic authorization to do so, as it could under the regime of general common law.²⁶ Pre-*Erie* decisions applying the law of nations as *general* common law provided no authority to apply the law of nations as *federal* common law.²⁷ Nor was there any such authorization in the U.S. Constitution or in federal statutes.²⁸ Therefore, Bradley and Goldsmith concluded, federal courts could not apply customary international law unless it had been incorporated into state law.²⁹

22. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 111 cmt. d (1987).

23. Bradley and Goldsmith refer to the orthodox view as the "modern position," Bradley & Goldsmith, *supra* note 13, at 816, but it is in fact no more modern than their own view that customary international law should be considered state law. Both views try to fit customary international law into the post-*Erie* framework. Only a few commentators have maintained that courts may continue to apply customary international law today as pre-*Erie* general common law. See, e.g., Young, *supra* note 13, at 370-71; Weisburd, *supra* note 13, at 49.

24. Bradley & Goldsmith, *supra* note 13, at 817; see also *id.* at 838-48 (elaborating these implications).

25. *Id.* at 852.

26. *Id.* at 852-53.

27. *Id.* at 853; see also *id.* at 849.

28. *Id.* at 856-57.

29. *Id.* at 870. They further reasoned that "[i]f a state chooses to incorporate CIL [customary international law] into state law, then the federal courts would be bound to apply the state interpretation of CIL on issues not otherwise governed by federal law." *Id.* *Sabbatino* was not to the contrary, Bradley and Goldsmith argued, because it had technically held that the act of state doctrine, not customary international law, was federal common law, and because *Sabbatino* had in fact applied the act of state doctrine to *preclude* federal courts from enforcing rules of customary international law. *Id.* at 859-60.

C. *The Issue in Sosa*

The central issue in *Sosa* was the proper role of federal courts in applying customary international law. Under the orthodox view, federal courts may apply customary international law as federal law in any case over which they have jurisdiction.³⁰ Under the Bradley-Goldsmith view, federal courts may not apply customary international law unless Congress (or the states) has expressly authorized them to do so.³¹ Petitioner *Sosa* and the Bush Administration advanced the Bradley-Goldsmith view, arguing that the ATS was purely jurisdictional and that further congressional authorization in the form of an express, statutory cause of action was necessary before suits could be brought under this provision. Although the Supreme Court agreed that the ATS is purely jurisdictional, it rejected the argument that further congressional action was necessary before a federal court could apply customary international law.³²

III. THE *SOSA* DECISION

The events that gave rise to the *Sosa* case began nearly two decades ago. At the behest of the U.S. Drug Enforcement Administration (DEA), a group of Mexicans (including *Sosa*) abducted Alvarez, a Mexican doctor, and brought him to the United States to be tried for alleged involvement in the torture and murder of a DEA agent.³³ Alvarez moved to dismiss the indictment because of the government's conduct, but the Supreme Court held that his abduction did not affect the jurisdiction of the district court.³⁴ At trial, the district court granted Alvarez's motion for a judgment of acquittal after the close of the government's case. Alvarez then sued the United States under the Federal Tort Claims Act, and sued his Mexican abductors under the ATS. The district court awarded \$25,000 in damages against *Sosa*, which the Ninth Circuit affirmed, holding that Alvarez's

30. See *supra* notes 18-22 and accompanying text.

31. See *supra* notes 23-29 and accompanying text. This difference in views tracks the monism/dualism debate. As Professor Henkin explains, "[m]onists view international and domestic law as together constituting a single legal system," while "dualists view international law as a discrete legal system." Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853, 864 (1987). The Bradley-Goldsmith position is dualist, in that it requires Congress to incorporate customary international law before that law may be applied as domestic law. See also J. G. Starke, *Monism and Dualism in the Theory of International Law*, 17 BRIT. Y.B. INT'L L. 66 (1936); Gerald Fitzmaurice, *The General Principles of International Law Considered from the Standpoint of the Rule of Law*, 92 RECUEIL DES COURS 1, 70-85 (1957).

32. *Sosa*, 124 S. Ct. at 2755.

33. *Id.* at 2746-47.

34. *United States v. Alvarez-Machain*, 504 U.S. 655 (1992).

arrest violated a customary international law norm against arbitrary arrest and detention.³⁵

The ATS began as a provision of the Judiciary Act of 1789, which established the federal courts.³⁶ Agreeing with petitioner *Sosa*, the Supreme Court held that the ATS was strictly jurisdictional and did not create any new causes of action.³⁷ But as the Court noted, “holding the ATS jurisdictional raises a new question, this one about the interaction between the ATS at the time of its enactment and the ambient law of the era.”³⁸ After an extensive review of the history of the ATS and the First Congress’s understanding of the law of nations, the Court concluded that “[t]he 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.”³⁹

The Court went on to hold that federal courts may recognize claims “based on the present-day law of nations [that] . . . 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.”⁴⁰ To justify this “restrained conception of the discretion

35. *Alvarez-Machain v. United States*, 331 F.3d 604 (9th Cir. 2003) (en banc), *rev’d sum nom. Sosa*, 124 S. Ct. 2739 (2004), *vacated sub nom. Alvarez-Machain v. United States*, 374 F.3d 1384 (2004).

36. As originally enacted, the ATS provided that the district courts “shall also have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States.” An Act to establish the Judicial Courts of the United States, ch. 20, § 9, 1 Stat. 73, 77 (1789) [hereinafter Judiciary Act]. As the *Sosa* Court noted, “[t]he statute has been slightly modified on a number of occasions since its original enactment,” *Sosa*, 124 S. Ct. at 2755 n.10, and now reads: “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.” 28 U.S.C. § 1350. The Court did not suggest that these changes in wording had changed the meaning of the ATS.

37. *Sosa*, 124 S. Ct. at 2755.

38. *Id.*

39. *Id.* at 2761.

40. *Id.* at 2761-62. Those 18th-century paradigms are violations of safe conduct, infringement of the rights of ambassadors, and piracy. *Id.* at 2761. One writer has argued that *Sosa* requires actionable norms to share six specific characteristics with piracy, a test no modern human rights norm can pass, not even torture. See Eugene Kontorovich, *Implementing Sosa v. Alvarez-Machain: What Piracy Teaches About the Limits of the Alien Tort Statute*, 80 NOTRE DAME L. REV. (forthcoming 2004), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=592161. Suffice it to say that this argument ignores the Supreme Court’s own statement that its test is generally consistent with the lower court decisions since *Filartiga*. See *infra* note 45 and accompanying text.

a federal court should exercise in considering a new cause of action of this kind,"⁴¹ the Court invoked a series of modern reasons that "argue for judicial caution":⁴² (1) changes in "the prevailing conception of the common law";⁴³ (2) *Erie's* restrictions on common-law making by the federal courts; (3) the primary role of Congress in creating private rights of action today; (4) foreign relations implications; and (5) the lack of a "congressional mandate to seek out and define new and debatable violations of the law of nations."⁴⁴ However, the restraint imposed by the *Sosa* Court, was no more than the lower courts had already been exercising in cases under the ATS.

This limit upon judicial recognition is generally consistent with the reasoning of many of the courts and judges who faced the issue before it reached this Court. See *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980) ("for purposes of civil liability, the torturer has become like the pirate and slave trader before him *hostis humani generis*, an enemy of all mankind"); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 781 (D.C. Cir. 1984) (Edwards, J., concurring) (suggesting that the limits of § 1350's reach be defined by "a handful of heinous actions – each of which violates definable, universal and obligatory norms"); see also *In re Estate of Ferdinand Marco, Human Rights Litigation*, 25 F.3d 1467, 1475 (9th Cir. 1994) ("Actionable violations of international law must be of a norm that is specific, universal, and obligatory."⁴⁵)

At the end of the day, Alvarez's claim of arbitrary detention did not satisfy this test. The Court concluded: "It is enough to hold that a single illegal detention of less than a day, followed by the transfer of custody to lawful authorities and a prompt arraignment, violates no norm of customary international law so well defined as to support the creation of a federal remedy."⁴⁶

A. Customary International Law as Federal Common Law

Beyond its endorsement of *Filartiga*, the *Sosa* decision speaks directly to the evolving role of customary international law in the U.S. legal system. All of the Justices agreed that in 1789 "torts in violation of the law of

41. *Sosa*, 124 S. Ct. at 2761.

42. *Id.* at 2762.

43. *Id.*

44. *Id.* at 2763. For further discussion, see *infra* notes 69-79 and accompanying text.

45. *Id.* at 2765-66. *Cf. id.* at 2775 (Scalia, J., concurring) ("Endorsing the very formula that led the Ninth Circuit to its result in this case hardly seems to be a recipe for restraint in the future.").

46. *Sosa*, 124 S. Ct. at 2769.

nations would have been recognized within the common law of the time."⁴⁷ Where they parted company was over the effect *Erie* should have on the federal courts ability to apply customary international law today.

Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, argued that federal courts could no longer apply customary international law as general common law, because the Court had closed that door in *Erie*.⁴⁸ Tracking Bradley's and Goldsmith's arguments,⁴⁹ Justice Scalia noted that "[b]ecause post-*Erie* federal common law is made, not discovered, federal courts must possess some federal-common-law-making authority before undertaking to craft it."⁵⁰ Neither pre-*Erie* decisions applying the law of nations nor the ATS itself provide such authority because "[p]ost-*Erie* federal common lawmaking . . . is so far removed from that general-common-law adjudication which applied the 'law of nations' that it would be anachronistic to find authorization to do the former in a statutory grant of jurisdiction that was thought to enable the latter."⁵¹

A six-Justice majority, however, rejected the Bradley-Goldsmith-Scalia view.⁵² While noting that *Erie* involved a "significant rethinking of the federal courts' role in making common law,"⁵³ the Court observed:

Erie did not in terms bar any judicial recognition of new substantive rules, no matter what the circumstances, and post-*Erie* understanding has identified limited enclaves in which federal courts may derive some substantive law in a common law way. For two centuries we have

47. *Id.* at 2755. Chief Justice Rehnquist, Justice Scalia, and Justice Thomas joined Part III of the Court's opinion. See *id.* at 2769 (Scalia, J., concurring); see also *id.* at 2770 ("The law of nations that would have been applied in this federal forum was at the time part of the so-called general common law."). The Court's understanding is consistent with the scholarly consensus that the law of nations was understood to be part of the general common law. See *supra* note 14 and accompanying text.

48. *Sosa*, 124 S. Ct. at 2774 (Scalia, J., concurring); see also *id.* at 2770-71 ("*Erie* affected the status of the law of nations in federal courts not merely by the implication of its holding but quite directly, since the question decided in *Swift* turned on the 'law merchant,' then a subset of the law of nations.>").

49. See *supra* notes 23-29 and accompanying text.

50. *Sosa*, 124 S. Ct. at 2771 (Scalia, J., concurring).

51. *Id.* at 2773.

52. The Court also rejected the Bradley-Goldsmith reading of *Sabbatino*. See *supra* note 29. "*Sabbatino* itself did not directly apply international law," the Court acknowledged, "but neither did it question the application of that law in appropriate cases, and it further endorsed the reasoning of a noted commentator [Jessup] who had argued that *Erie* should not preclude the continued application of international law in federal courts." *Sosa*, 124 S. Ct. at 2765, n.18.

53. *Sosa*, 124 S. Ct. at 2762.

affirmed that the domestic law of the United States recognizes the law of nations. . . . We think it would be unreasonable to assume that the First Congress would have expected federal courts to lose all capacity to recognize enforceable international norms simply because the common law might lose some metaphysical cachet on the road to modern realism.⁵⁴

Thus, the Court held that federal courts could recognize claims under the ATS “based on the present-day law of nations.”⁵⁵ Moreover, it expressly characterized such claims as “claims under federal common law.”⁵⁶

B. The Court's Particularized Approach

What, then, are the implications of the Court's holding for customary international law in non-ATS cases? In a footnote, Justice Scalia said: “[A] judicially created federal rule based on international norms would be supreme federal law. Moreover, a federal-common-law cause of action . . . would ‘arise under’ the laws of the United States, not only for purposes of Article III but also for purposes of *statutory* federal-question jurisdiction.”⁵⁷ The Court responded with a footnote of its own. Notwithstanding the holding in *Illinois v. Milwaukee*, “that § 1331 jurisdiction will support claims founded upon federal common law as well as those of a statutory origin,”⁵⁸ the *Sosa* majority denied that cases involving customary international law would arise under the laws of the United States for purposes of the federal question statute: “[The ATS] was enacted on the congressional understanding that courts would exercise jurisdiction by entertaining some common law claims derived from the law of nations; and we know of no reason to think that federal-question jurisdiction was extended subject to any comparable congressional assumption.”⁵⁹ The Court did not respond to Justice Scalia with respect to Article III or the Supremacy Clause of Article VI.

In contrast with the all-or-nothing approach of Justice Scalia,⁶⁰ and of Professors Bradley and Goldsmith,⁶¹ the Court seems to prefer a more

54. *Id.* at 2764-65. The Court added that “[l]ater Congresses seem to have shared our view” and had acted to supplement *Filartiga* rather than to overrule it. *Id.* at 2765.

55. *Id.* at 2761.

56. *Id.* at 2765.

57. *Id.* at 2773, n.* (Scalia, J., concurring) (emphasis omitted).

58. 406 U.S. 91, 100 (1972).

59. *Sosa*, 124 S. Ct. at 2765 n.19.

60. *Id.* at 2773 n.* (Scalia, J., concurring).

particularized approach that looks at the incorporation of customary international law into the U.S. legal system issue-by-issue.⁶² Customary international law may be federal common law for purposes of the ATS, but not for the purposes of § 1331. Where this leaves customary international law with respect to other statutory and constitutional provisions *Sosa* does not say, but its methodology may provide some clues.

C. *Sosa's Two-Part Analysis*

Both in *Sosa's* analysis of the ATS and in its much briefer discussion of § 1331, one sees the same two-part analysis. The Court began with the understanding of those who enacted the provision. In the case of the ATS, the First Congress understood that “[w]hen the *United States* declared their independence, they were bound to receive the law of nations, in its modern state of purity and refinement.”⁶³ That law proscribed individual

61. See Bradley & Goldsmith, *supra* note 13, at 817. Some of Bradley and Goldsmith's opponents have adopted a similar all-or-nothing position. See, e.g., Stephens, *supra* note 13, at 393-94:

If international law is part of federal law, it provides the basis for federal court jurisdiction over cases raising well-pleaded international law claims. Moreover, if international law is part of federal law, it is the law of land, binding on the states pursuant to the supremacy clause; and state courts are bound to follow federal court decisions as to its meaning.

See also Henkin, *supra* note 16, at 1559-60:

[T]here is now general agreement that international law, as incorporated into domestic law in the United States, is federal, not state law; that cases arising under international law are “cases arising under . . . the Laws of the United States” and therefore are within the judicial power to the United States under article III of the Constitution; that principles of international law as incorporated in the law of the United States are “Laws of the United States” and supreme under article VI; that international law, therefore, is to be determined independently by the federal courts, and ultimately by the United States Supreme Court, with its determination binding on the state courts; and that a determination of international law by a state court is a federal question subject to review by the Supreme Court.

62. Some academic writing has also suggested an issue-by-issue approach. See, e.g., Michael D. Ramsey, *International Law as Part of Our Law: A Constitutional Perspective*, 29 PEPPERDINE L. REV. 187, 188 (2001) (“I argue that the Bradley/Goldsmith position, rather than being a single claim about the status of international law, is properly viewed as a series of claims about particular parts of the Constitution, some of which are more persuasive than others”); William S. Dodge, *The Constitutionality of the Alien Tort Statute: Some Observations on Text and Context*, 42 VA. J. INT'L L. 687, 702 n.82 (2002) [hereinafter *The Constitutionality of the Alien Tort Statute*] (“One may disaggregate Bradley and Goldsmith's argument into at least . . . six questions.”).

63. *Sosa*, 124 S. Ct. at 2755 (quoting *Ware v. Hylton*, 3 U.S. 199, 281 (1796) (Wilson, J.)).

offenses against the law of nations, including “violation of safe conducts, infringement of the rights of ambassadors, and piracy.”⁶⁴ The Court noted the extensive efforts of both the Continental Congress and the First Congress to address violations of the law of nations,⁶⁵ reasoning that “[t]here is too much in the historical record to believe that Congress would have enacted the ATS only to leave it lying fallow indefinitely.”⁶⁶ Instead, after examining contemporaneous sources on the relationship between the law of nations and the common law,⁶⁷ the Court concluded that the ATS “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.”⁶⁸

The First Congress’s original understanding of the relationship between the law of nations and the ATS was just the beginning of the Court’s analysis. In Part IV of its decision, the Court turned to a series of modern developments that “argue for judicial caution when considering the kinds of individual claims that might implement the jurisdiction conferred by the early statute. First, the prevailing conception of the common law has changed since 1789.”⁶⁹ Thus, today “there is a general understanding that the law is not so much found or discovered as it is either made or created.”⁷⁰ Second, *Erie* changed the role of the federal courts in making common law, relegating them to “havens of speciality.”⁷¹ Third, these days the Court generally leaves decisions about whether to create a private right of action to Congress.⁷² Fourth, creating private rights of action for violating international law in particular may have foreign relations implications.

It is one thing for American courts to enforce constitutional limits on our own State and Federal Governments’ power, but quite another to consider suits under rules that would go so far as to claim a limit on the

64. *Id.* at 2756.

65. *Id.* at 2756-58.

66. *Id.* at 2758-59.

67. *Id.* at 2759-61.

68. *Sosa*, 124 S. Ct. at 2761.

69. *Id.* at 2762.

70. *Id.* One might question that characterization as applied to customary international law, which derives from the general practice of states. “Unlike federal common law, customary international law is not made and developed by the federal courts independently and in the exercise of their own law-making judgment. In a real sense federal courts *find* international law rather than make it” Henkin, *supra* note 16, at 1561-62.

71. *Sosa*, 124 S. Ct. at 2762.

72. *Id.* at 2762-63.

power of foreign governments over their own citizens; and to hold that a foreign government or its agent has transgressed those limits.⁷³

Finally, Congress has also given the courts no “mandate to seek out and define new and debatable violations of the law of nations,” and indeed “declined to give the federal courts the task of interpreting and applying international human rights law” when it made the International Covenant on Civil and Political Rights non-self-executing.⁷⁴

It is not clear whether these modern developments impose additional limitations on the ATS or simply reinforce its inherent limitations.⁷⁵ After all, the ATS does not grant jurisdiction over all tort actions by aliens, but only over those “committed in violation of the law of nations or a treaty of the United States.”⁷⁶ This law-of-nations test is a stringent one. Contrary to the views of some critics, customary international law does not derive from the morality of law professors,⁷⁷ but rather from “a general and consistent practice of states followed by them from a sense of legal obligation.”⁷⁸ Thus, the ATS itself requires the “vigilant doorkeeping” of which *Sosa* speaks.⁷⁹ What is clear is that the *Sosa* Court was attempting to find a middle ground – one that would give effect as to the expectations of the First Congress while also taking seriously more modern concerns.

The Court’s brief discussion of § 1331 displays the same two-part approach. It first looked to the original understanding of the provision, which was enacted in 1875, observing that “we know of no reason to think that federal-question jurisdiction was extended subject to any comparable congressional assumption,” that is, to any “understanding that courts

73. *Id.* at 2763.

74. *Id.*

75. *Cf.* William S. Dodge, *Which Torts in Violation of the Law of Nations*, 24 HASTINGS INT’L & COMP. L. REV. 351, 355 (2001) (“One might argue that the phrase ‘universal, definable, and obligatory’ is simply a way of restating the requirements for recognizing a rule of customary international law.”).

76. 28 U.S.C. § 1350.

77. *See, e.g.*, Robert H. Bork, *Judicial Imperialism*, WALL ST. J., July 12, 2004, at A16.

78. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102(2) (1987); *see also* The Paquete Habana, 175 U.S. 677, 700 (1900):

[W]here 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. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.

79. *Sosa*, 124 S. Ct. at 2764.

would exercise jurisdiction by entertaining some common law claims derived from the law of nations.”⁸⁰ But the Court also took into account changes in the U.S. legal system since 1875: “our holding today [with respect to the ATS] is consistent with the division of responsibilities between federal and state courts after *Erie* . . . as a more expansive common law power related to 28 U.S.C. § 1331 might not be.”⁸¹

In sum, *Sosa*'s methodology attempts to bridge a gap not just between the international and the domestic, but between the past and the present. In determining the relationship between customary international law and a particular legal provision, both the original understanding of those who enacted the provision and modern developments in the U.S. legal system are relevant, but neither is determinative. In building a bridge to link the past and the present, the Court works from both sides.

IV. *SOSA*'S ANALYSIS APPLIED

The *Sosa* Court's particularized approach left a series of questions unanswered. While the Court has now clearly held that federal courts may apply customary international law as federal common law under the ATS,⁸² and has strongly suggested that the general federal question statute does not extend to cases arising under customary international law,⁸³ the Court chose not to discuss the status of customary international law under Article III or the Supremacy Clause of Article VI, despite Justice Scalia's goading.⁸⁴ To answer these questions (and others concerning the relationship between customary international law and various constitutional⁸⁵ and statutory⁸⁶ provisions) one might use *Sosa*'s two-part analysis.

80. *Id.* at 2765 n.19.

81. *Id.*

82. *Id.* at 2765.

83. *Id.* at n.19.

84. See *supra* notes 57-59 and accompanying text.

85. Articles III and VI are not the only provisions of the Constitution to which customary international law may be relevant. The President has a constitutional duty to “take Care that the Laws be faithfully executed.” U.S. CONST. art. II, § 3. Some have argued that this duty extends to customary international law, see, e.g., Henkin, *supra* note 16, at 1567; Michael J. Glennon, *Raising the Paquete Habana: Is Violation of Customary International Law by the Executive Unconstitutional?*, 80 NW. U. L. REV. 321, 325 (1985), while others have maintained that “[c]ustomary international law . . . cannot bind the executive branch under the Constitution because it is not federal law.” Application of Treaties and Laws to al Qaeda and Taliban Detainees, Memorandum for Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, General Counsel of the Department of Defense 32 (Jan. 22, 2002), available at

A. Article III

The relationship between customary international law and Article III has important implications for ATS cases. Unless customary international law is part of the “Laws of the United States”⁸⁷ for purposes of Article III, the *Filartiga*-type suits that the Supreme Court endorsed in *Sosa*⁸⁸ would appear to be unconstitutional because the parties to such suits are both aliens and these suits would therefore fall outside Article III’s grant of alienage jurisdiction.⁸⁹

<http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.22.pdf>. Although a full analysis is beyond the scope of this article, the original understanding appears to be that the Take Care Clause encompasses the law of nations. See Alexander Hamilton, *Letters of Pacificus, No. 1* (1793), reprinted in 15 THE PAPERS OF ALEXANDER HAMILTON 33, 40 (Harold C. Syrett ed., 1969) (“The Executive is charged with the execution of all laws, the laws of Nations as well as the Municipal law, which recognises and adopts those laws”); *id.* at 43 (“The President is the constitutional EXECUTOR of the laws. Our Treaties and the laws of Nations form a part of the law of the land”); see also James Madison, *Letters of Helvidius, No. 2* (1793), reprinted in 15 THE PAPERS OF JAMES MADISON 86 (Thomas A. Mason et al. eds., 1985) (referring to Hamilton’s point about the law of nations as a “truth”). Even if customary international law is within the Take Care Clause, however, other barriers such as the political question doctrine or standing requirements may make it difficult to enforce this obligation against the President. See Henkin, *supra* note 16, at 1567 n.41.

86. For example, 28 U.S.C. § 1257(a), allows the Supreme Court to review state court decisions “where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States.” In *New York Life Ins. Co. v. Hendren*, 92 U.S. 286 (1875), the Court held under a predecessor statute that it had no jurisdiction to review a state court interpretation of the law of nations. *Hendren*’s holding would seem to be a prime candidate for reconsideration. See *infra* notes 110-33 (discussing the status of customary international law under the Supremacy Clause). The decision in *Oliver American Trading Co. v. Mex.*, 264 U.S. 440 (1924), that questions of customary international law are not a basis for removal to federal court, on the other hand, appears secure after *Sosa*. The current statute, 28 U.S.C. § 1441, ties removal to the original jurisdiction of the district court, and under *Sosa*’s interpretation of § 1331, the district courts would lack jurisdiction over claims arising under customary international law. See *supra* note 59 and accompanying text.

87. U.S. CONST. art. III, § 2, cl. 1.

88. See *supra* notes 3, 45 and accompanying text.

89. See Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT’L L. 587 (2002). It might seem curious that the petitioner in *Sosa* did not raise this argument, since both parties in that case were aliens. I suspect the explanation is that the Article III argument would not have halted the alien tort suits now pending against many U.S. corporations, over which the federal courts clearly do have alienage jurisdiction under Article III. Counsel for the petitioner in *Sosa* was also counsel for Unocal in an alien tort case that subsequently settled. See Edward Alden et al., *Unocal Pays Out in Burma Abuse Case*, FIN. TIMES, Dec. 14, 2004, at 12.

As I have argued at length elsewhere,⁹⁰ the original understanding of Article III was that the law of nations was part of “the Laws of the United States.”⁹¹ Starting with the text, one may contrast Article III’s phrase with Article VI’s reference to the “Laws of the United States which shall be made in Pursuance [of the Constitution].”⁹² The difference in language suggests that there is at least one category of laws not “made in Pursuance” of the Constitution that are still “Laws of the United States” for the purpose of Article III. Indeed, the Constitutional Convention deliberately struck the words “passed by the Legislature” from the text of Article III reported by the Committee of Detail.⁹³ Many of the delegates to the Convention sought to create a judiciary with jurisdiction over all cases involving the law of nations,⁹⁴ and many of them thought this was precisely what they had done.⁹⁵ To give just one example, John Jay wrote in *Federalist No. 3*:

Under the national government, treaties and articles of treaties, as well as the laws of nations, will always be expounded in one sense and executed in the same manner—whereas adjudications on the same points and questions in thirteen States, or in three or four confederacies, will not always accord or be consistent[.] . . . The wisdom of the convention in committing such questions to the jurisdiction and judgment of courts appointed by and responsible only to one national government cannot be too much commended.⁹⁶

The First Congress reflected this understanding of Article III in the ATS when it granted the district courts jurisdiction over “*all* causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States.”⁹⁷ Indeed, if the ATS were limited by Article III to suits against citizens of the United States, it would not reach cases like the *Marbois* incident, which the *Sosa* Court noted was one of the motivations

90. *The Constitutionality of the Alien Tort Statute*, *supra* note 62, at 701-11.

91. U.S. CONST. art. III, § 2, cl. 1.

92. U.S. CONST. art. VI, cl. 2.

93. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 423-24, 431 (Max Farrand ed., 1911) [hereinafter 2 FARRAND].

94. *See, e.g.*, Letter from George Mason as to Arthur Lee (May 21, 1787), *reprinted in* 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 24 (Max Farrand ed., 1911) (“The most prevalent idea [was] . . . to establish . . . a judiciary system with cognizance of all such matters as depend upon the law of nations, and such other objects as the local courts of justice may be inadequate to. . . .”); *see also The Constitutionality of the Alien Tort Statute*, *supra* note 62, at 705-06.

95. *See The Constitutionality of the Alien Tort Statute*, *supra* note 62, at 707-09.

96. THE FEDERALIST NO. 3, at 41, 43 (John Jay) (Clinton Rossiter ed., 1961).

97. *See* Judiciary Act, *supra* note 36, at ch. 20, § 9 (emphasis added).

for the ATS.⁹⁸ Oliver Ellsworth, who drafted the ATS,⁹⁹ also served on the Committee of Detail at the Constitutional Convention¹⁰⁰ and presumably understood the scope of Article III.

Although many aspects of the U.S. legal system have changed since 1787, the need for a uniform, federal interpretation of customary international law that Jay expressed in *Federalist No. 3* has not. In *Sabbatino*, the Court noted a pervasive “concern for uniformity in this country’s dealings with foreign nations and . . . desire to give matters of international significance to the jurisdiction of federal institutions.”¹⁰¹ Also, in *Texas Industries, Inc. v. Radcliff Materials, Inc.*, the Court noted the “‘uniquely federal interests’ . . . [in] international disputes implicating . . . our relations with foreign nations.”¹⁰²

None of the reasons for caution noted by the *Sosa* Court¹⁰³ apply with greater force in the context of Article III than they did with respect to the ATS. Indeed, those reasons having to do with the desirability of “legislative guidance,”¹⁰⁴ “legislative judgment,”¹⁰⁵ and a “congressional

98. *Sosa*, 124 S. Ct. at 2757. The 1784 Marbois incident arose from an assault by a French adventurer the Chevalier de Longchamps upon the French Consul General, Francis Barbe Marbois. For further discussion, see William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the “Originalists,”* 19 HASTINGS INT’L & COMP. L. REV. 221, 229-30 (1996) [hereinafter *The Historical Origins of the Alien Tort Statute*]; William R. Casto, *The Federal Courts’ Protective Jurisdiction Over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467, 491-94 (1986).

99. *Sosa*, 124 S. Ct. at 2758.

100. 2 FARRAND, *supra* note 93, at 97-98. Other members of the Committee of Detail included James Wilson and Edmund Randolph. Wilson had been specially retained to assist in the prosecution of Marbois’s assailant. See Casto, *supra* note 98, at 492 n.141. Randolph had drafted the 1781 resolution of the Continental Congress that was the forerunner of the ATS, see 21 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 1136-37 (Gaillard Hunt ed., 1912), and complained in his opening speech to the Constitutional Convention of the Continental Congress’s inability to “cause infractions of treaties or of the law of nations, to be punished.” 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 19 (Max Farrand ed., 1911).

101. *Sabbatino*, 376 U.S. at 427 n.25.

102. 451 U.S. 630, 640-41 (1981) (quoting *Sabbatino*, 376 U.S. at 426); see also *American Ins. Assoc. v. Garamendi*, 539 U.S. 396, 413-14 (2003) (quoting *Sabbatino*, 376 U.S. at 427 n.25) (noting “the ‘concern for uniformity in this country’s dealings with foreign nations’ that animated the Constitution’s allocation of the foreign relations power to the National Government”); *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 381-82 & n.16 (2000) (noting interest in speaking with “one voice” in foreign affairs).

103. See *supra* notes 69-79 and accompanying text.

104. *Sosa*, 124 S. Ct. at 2762.

105. *Id.*

mandate"¹⁰⁶ are significantly weaker. The judicial power established by Article III is not self-vesting.¹⁰⁷ At a minimum, congressional action giving the federal courts statutory jurisdiction over cases involving the law of nations is required.¹⁰⁸ Thus, interpreting Article III's phrase "the Laws of the United States" to embrace customary international law does not raise the specter of unbridled judicial involvement in foreign affairs.¹⁰⁹

In sum, although *Sosa* does not answer the question whether cases arising under customary international law fall within Article III's grant of federal-question jurisdiction, *Sosa's* analysis strongly suggests that the answer is yes, for both history and sound policy support it.

B. Article VI

The status of customary international law under the Supremacy Clause of Article VI¹¹⁰ also has important implications. Those that have received the most attention are the limits that customary international law might place upon the states' ability to impose the death penalty.¹¹¹ The Supreme Court has previously looked to the practices of other nations to determine "evolving standards of decency"¹¹² under the Eighth Amendment,¹¹³ but the application of customary international law through

106. *Id.* at 2763.

107. *See Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 807 (1986) (Article III's "grant of power . . . is not self-executing"); *see also Sheldon v. Sill*, 49 U.S. 441, 449 (1850) ("Courts created by statute can have no jurisdiction but such as the statute confers. No one of them can assert a just claim to jurisdiction exclusively conferred on another, or withheld from all.").

108. In the modern era, further action conferring an express cause of action may be necessary. *See, e.g., Torture Victim Protection Act*, Pub. L. No. 256, 106 Stat. 73 (1992).

109. U.S. CONST. art. III, § 2, cl. 1. The *Sosa* Court's statement that § 1331's federal-question jurisdiction does not extend to claims under the law of nations, 124 S. Ct. at 2765 n.19, does not foreclose that possibility under Article III. Although § 1331's language tracks that of Article III, the Court has "long construed the statutory grant of federal-question jurisdiction as conferring a more limited power." *Merrell Dow*, 478 U.S. at 807.

110. U.S. CONST. art. VI, cl. 2.

111. *See, e.g., Curtis A. Bradley, The Juvenile Death Penalty and International Law*, 52 DUKE L.J. 485, 550-54 (2002); *see also Lea Brilmayer, Federalism, State Authority, and the Preemptive Power of International Law*, 1994 SUP. CT. REV. 295, 322-26; *Sosa*, 124 S. Ct. at 2776 (Scalia, J., concurring) ("The Framers would, I am confident, be appalled by the proposition that, for example, the American peoples' democratic adoption of the death penalty . . . could be judicially nullified because of the disapproving views of foreigners.").

112. *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion).

113. *See Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002) ("within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved"); *see also Thompson v. Oklahoma*, 487 U.S. 815 (1988) (plurality opinion) ("the conclusion that it would offend civilized standards of decency to

the Supremacy Clause would be an alternative means of holding the States to international standards.¹¹⁴

The text of the Supremacy Clause does not mention the law of nations: “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”¹¹⁵ The omission can be explained, however, by looking to “the ambient law of the era.”¹¹⁶ Because the law of nations was general common law, it was already binding on the states¹¹⁷ and there was consequently no need to list it.¹¹⁸ “The law of nations of the time was not seen as something imposed on the states by the new U.S. government; it had been binding on and accepted by the states before the U.S. government was even established.”¹¹⁹ Moreover, the law of nations was understood to be immutable, in the sense that it could not be altered by legislation.¹²⁰ Vattel had written that “[w]hence, as this law is immutable . . . and the obligations that arise from it necessary and indispensable, nations

execute a person who was less than 16 years old at the time of his or her offense. . . . is also consistent with the views expressed . . . by other nations that share our Anglo-American heritage, and by the leading members of the Western European community”); *Enmund v. Florida*, 458 U.S. 782, 796, n.22 (1982) (“the doctrine of felony murder has been abolished in England and India, severely restricted in Canada and a number of other Commonwealth countries, and is unknown in continental Europe”); *Coker v. Georgia*, 433 U.S. 584, 596, n.10 (1977) (“It is thus not irrelevant here that out of 60 major nations in the world surveyed in 1965, only 3 retained the death penalty for rape where death did not ensue.”). *But see* *Stanford v. Kentucky*, 492 US 361, 369 n.1 (1989) (“We emphasize that it is *American* conceptions of decency that are dispositive, rejecting the contention of petitioners and their various *amici* . . . that the sentencing practices of other countries are relevant.”).

114. Brillmayer, *supra* note 111, at 325.

115. U.S. CONST. art. VI, cl. 2.

116. *Sosa*, 124 S. Ct. at 2755.

117. *See supra* note 14 and accompanying text.

118. *The Status of Law of Nations, supra* note 14, at 832 (“The status of the law of nations as general law also explains the omission of it and any other type of common law from the supremacy clause . . .”).

119. Henkin, *supra* note 16, at 1566.

120. *The Status of Law of Nations, supra* note 14, at 827 (“Jurists of this era also typically recited that as to its obligatory elements the law of nations could not be violated by positive enactments.”). The framers nonetheless understood that the law of nations could evolve. As Justice Wilson wrote in *Ware v. Hylton*, 3 U.S. 199 (1796), “[w]hen the *United States* declared their independence, they were bound to receive the law of nations, *in its modern state of purity and refinement*.” *Id.* at 281 (Wilson, J., concurring), *quoted in Sosa*, 124 S. Ct. at 2755 (second emphasis added); *see also The Historical Origins of the Alien Tort Statute, supra* note 98, at 241-43.

can neither make any changes in it by their conventions, dispense with it in their own conduct, nor reciprocally release each other from the observance of it.”¹²¹ Justice James Iredell explained that “[e]ven the Legislature cannot rightfully controul’ [the law of nations]”¹²² Thus, in contrast to the local common law, which the states were free to alter, “[g]eneral common law was . . . ‘binding’ on the states by the very nature of its transnational character”¹²³ The expectation of the Framers, then, was that the law of nations would bind the states in the same way as the Constitution, federal legislation, and treaties notwithstanding its omission from the Supremacy Clause.

With respect to Article VI, modern developments seem to strengthen the case for the supremacy of customary international law.¹²⁴ First, the Supreme Court has held that other sources of law, though not specifically enumerated in Article VI, are nevertheless supreme over state law. In *United States v. Belmont*,¹²⁵ decided the year before *Erie*, the Court held that an executive agreement preempted inconsistent state law. In regard to supremacy, the Court reasoned that:

while this rule in respect of treaties is established by the express language of cl. 2, Art. VI, of the Constitution, the same rule would result in the case of all international compacts and agreements from the very fact that complete power over international affairs is in the national government and is not and cannot be subject to any curtailment or interference on the part of the several states.¹²⁶

The Court reaffirmed this holding just four years after *Erie* in *United States v. Pink*.¹²⁷ *Belmont*'s reasoning applies equally to customary international law. Although the supremacy of customary international law is not established by the express language of Article VI, it nevertheless follows “from the very fact that complete power over international affairs

121. EMMERICH DE VATTEL, *THE LAW OF NATIONS*, PRELIMINARIES 9 (Joseph Chitty trans. & ed., 1883).

122. Charge to the Grand Jury for the District of South Carolina (May 12, 1794), *quoted in* Jay, *supra* note 14, at 827.

123. Stewart Jay, *Origins of Federal Common Law: Part Two*, 133 U. PA. L. REV. 1231, 1275 (1985).

124. Article VI thus presents a contrast to the ATS, where the Supreme Court arguably used modern developments to limit the First Congress's understanding. *See Sosa v. Alvarez-Machain*, 124 S. Ct. at 2761-63.

125. 301 U.S. 324 (1937).

126. *Id.* at 331.

127. 315 U.S. 203, 230 (1942).

is in the national government and is not and cannot be subject to any curtailment or interference on the part of the several states."¹²⁸

Second, *Sosa*'s concern about foreign relations cuts the other way in this context. The *Sosa* Court observed:

It is one thing for American courts to enforce constitutional limits on our own State and Federal Governments' power, but quite another to consider suits under rules that would go so far as to claim a limit on the power of foreign governments over their own citizens, and to hold that a foreign government or its agent has transgressed those limits.¹²⁹

In spite of this concern, the Court *did* interpret the ATS to allow suits against foreign actors for violations of customary international law. As the quoted language suggests, holding the states to their obligations under customary international law should be comparatively unproblematic from the viewpoint of foreign relations. Indeed, recent experience shows that it is the failure to ensure that the states follow international law that is likely to cause difficulties with foreign nations. State death sentences imposed on foreign nationals who were not afforded their rights under the Vienna Convention on Consular Relations, for example, have led other nations to sue the United States in the World Court.¹³⁰ A state attempting to execute a foreign defendant who is mentally retarded or who committed his crime as a juvenile might be expected to provoke a similarly hostile response from other nations.

Finally, it is worth noting that binding the states to observe customary international law under the Supremacy Clause is arguably less invasive of state sovereignty than relying on the practices of other nations to interpret the Eighth Amendment. In contrast to the understanding at the time of the Framing,¹³¹ it is generally accepted today that Congress may enact legislation that violates customary international law.¹³² This means that

128. *Belmont*, 301 U.S. at 331; *see also* *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427 n.25 (1964) (noting "concern for uniformity in this country's dealings with foreign nations and . . . desire to give matters of international significance to the jurisdiction of federal institutions"); *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640-41 (1981) (noting the "uniquely federal interests . . . [in] international disputes implicating . . . our relations with foreign nations.").

129. *Sosa*, 124 S. Ct. at 2763.

130. *See Avena and other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 128 (Mar. 31); *see also* *LaGrand (F.R.G. v. U.S.)*, 2001 I.C.J. 104 (June 27).

131. *See supra* notes 120-22 and accompanying text.

132. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 115(1)(a) ("An act of Congress supersedes an earlier rule of international law or a provision of an international agreement as law of the United States if the purpose of the act to supersede the earlier rule

Congress could decide to authorize particular state violations of customary international law and to bear the consequences of such violations. Judicial interpretations of the Eighth Amendment, by contrast, are not subject to revision by Congress.¹³³ Again, although *Sosa* does not answer the question directly, its methodology suggests that customary international law should be given supremacy over state law.

V. CONCLUSION

The relationship between international and domestic law is a complex subject, made more complex by changes in the U.S. legal system since the 18th century. *Sosa* is a landmark modern case charting that relationship. In one sense, the holding of *Sosa* is narrow – that federal courts may apply customary international law to a limited set of claims under the ATS without further congressional authorization. But *Sosa*'s approach of proceeding issue by issue and of considering both historical and modern arguments has much broader implications. *Sosa* has built a fascinating bridge, and only time will tell precisely where it leads.

or provision is clear or if the act and the earlier rule or provision cannot be fairly reconciled.”).

133. For this reason, I disagree with Professor Young that using international norms to interpret the Eighth Amendment is the more modest claim. See Young, *supra* note 13, at 383.