

A CATEGORICAL APPROACH TO HUMAN RIGHTS CLAIMS: *JUS COGENS* AS A LIMITATION ON ENFORCEMENT?

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I. INTRODUCTION

Since the second circuit's 1980 decision in *Filartiga v. Pena-Irala*,¹ federal courts have generally recognized that violations of international human rights may be pursued under the Alien Tort Claims Act and the Torture Victim Protection Act.² In addition, courts have accepted that an expanding list of prohibited conduct may serve as the basis for such actions.³ However, there has emerged in a series of cases the suggestion, if not the holding, that the remedy provided for by the ATCA is only available for violations of *jus cogens* norms.⁴

A *jus cogens* norm is a peremptory rule of international law that prevails over any conflicting rule or agreement.⁵ Such a norm permits no derogation and may "be modified only by a subsequent norm. . . . [of] the same character."⁶ "While it seems clear that an allegation that such a *jus cogens* norm has been violated would be sufficient to invoke federal jurisdiction under the ATCA, that such an allegation is necessary to invoke such jurisdiction is far from clear."⁷ As will be discussed,⁸ this distinction matters because there is little consensus regarding what satisfies

¹ 630 F. 2d 876 (2d. Cir. 1980).

² See 28 U.S.C. §1350; see also, Pamela J. Stephens, *Beyond Torture: Enforcing International Human Rights in Federal Courts*, 51 SYRACUSE L. REV. 941 (2001) [hereinafter Stephens, *Beyond Torture*].

³ See, e.g., *Forti v. Suarez-Mason*, 672 F. Supp. 1535 (N.D. Cal. 1987) (torture, prolonged arbitrary detention, summary execution); *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995) (summary execution, torture, disappearance and arbitrary detention); *Kadic v. Karadzic*, 70 F. 3d 232 (2d Cir. 1995) (genocide, war crimes, torture and summary execution).

⁴ See Stephens, *supra* note 2, at 982.

⁵ Vienna Convention on the Law of Treaties, Art. 53, 1155 U.N.T.S. 331, 344.

⁶ *Id.*

⁷ See Stephens, *supra* note 2, at 983.

⁸ See *infra* notes 39-54 and accompanying text.

the term *jus cogens*.⁹ But it is certainly true that many of the human rights violations already accepted as the basis of ATCA claims might not appear on that list. One could argue that to the extent that the concept of *jus cogens* has relevance in the human rights field (as it certainly does) the concept has been viewed as providing *more not less* protection of human rights.

The court in *Filartiga* posited an evolving view of customary international law¹⁰ and it is in this spirit that subsequent courts set about the task of defining human rights violations under the ATCA. “Nothing in the *Filartiga* opinion suggests that the court intended to limit the language of the ATCA referring to a tort in violation of the law of nations to those acts violating *jus cogens* norms.”¹¹ However a few cases have suggested such a limitation.¹²

This article addresses this proposed *jus cogens* limitation on human rights litigation in federal courts. Section II will consider the concept of *jus cogens*. Section III discusses the cases which have considered such a limitation and the extent to which this limitation is required by the ATCA. Section IV considers the extent to which international law compels or allows this concept to limit human rights enforcement. The article concludes that neither domestic law nor international law supports the application of *jus cogens* in this context, nor is there any good policy

⁹ Contrast RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, §702 (1987) and Frank Newman and David Weissbrodt, *International Human Rights: Law Policy and Process*, 18-19 (1996):

The concept of *jus cogens* is of relatively recent origin, although it is incorporated in the Vienna Convention on the Law of Treaties. Its content is disputed, and thus far, only the UN Charter’s principles prohibiting the use of force are generally agreed to be *jus cogens* Commentators have suggested that prohibitions against genocide, slavery, racial discrimination, and other gross human rights violations also have acquired *jus cogens* status.

And see also, *infra* notes 40-54 and accompanying text.

¹⁰ “Thus it is clear that courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today. See *Ware v. Hylton*, 3 U.S. (3 Dall.) 198, 1 L.Ed. 568 (1796) (distinguishing between “ancient” and “modern” law of nations.)” 630 F. 2d at 881.

¹¹ Stephens, *supra* note 2, at 984.

¹² See, e.g., *In re Estate of Ferdinand E. Marcos Human Rights Litigation*, 978 F. 2d 493, (9th Cir. 1992); *Doe v. Unocal*, 110 F. Supp. 1294, 1304 (CD Cal. 2000); *Xuncax v. Gramajo*, 886 F. Supp. 162, 183 (1995).

which would argue for the use of *jus cogens* in a way that would lessen rather than enhance protection of human rights.

II. *JUS COGENS*

In considering the concept of *jus cogens* norms in this context, one must grapple with at least three sets of questions: first, what does the term *jus cogens* mean in a general sense; second, what is the source of *jus cogens* norms (i.e., where and how do they originate); and, third, what is the specific content of this category of international norms (i.e., how do we decide which norms are *jus cogens* norms). The first of these questions is perhaps the easiest to answer, in that there seems to be international consensus regarding the general definition of *jus cogens*.¹³ The second question may be unanswerable and the answer to the third is a matter of some dispute.¹⁴

A. DEFINING A *JUS COGENS* NORM:

Article 53 of the Vienna Convention on the Law of Treaties is entitled “Treaties Conflicting with a Peremptory Norm of General International Law (*Jus Cogens*)” and provides that:

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.¹⁵

So the International Law Commission, in drafting the Vienna Convention, sought to recognize a category of existing norms, peremptory in nature, which would supersede any treaty

¹³ See *infra* notes 14-20 and accompanying text.

¹⁴ “Much of the importance of the *jus cogens* doctrine lies not in its practical application but in its symbolic significance in the international legal process. It assumes that decisions with respect to normative priorities can be made and that certain norms can be deemed to be of fundamental significance. It thus incorporates notions of universality and superiority into international law.” Hillary Charlesworth & Christine Chinkin, *The Gender of Jus Cogens*, 15 HUM. RTS. Q. 63,66 (1993).

¹⁵ Vienna Convention on the Law of Treaties, *supra* note 5.

provisions which were in conflict. “[T]he basic concept seems simple enough in the literature: some principles of general international law are or ought to be so compelling that they might be recognized by the international community for the purpose of invalidating or forcing revision in ordinary norms of treaty or custom in conflict with them.”¹⁶ Note the rather limited function of these peremptory norms as set forth in Article 53. The sole function is to render void any treaty obligation which conflicts with such a norm, that is, the peremptory norm acts as a type of “super-norm” to render any conflicting treaty ineffective.¹⁷ Thus the *jus cogens* norm acts as a check on the power of a state to enter into agreements. “Traditionally, international law functionally has distinguished the *erga omnes* and *jus cogens* doctrines, which address state responsibility, from the universality principle, which addresses violations of individual responsibility.”¹⁸ Professor Randall argues that perhaps those doctrines “may subsidiarily support the right of all states to exercise universal jurisdiction over the individual offenders.”¹⁹ Professor Meron has also suggested that “*jus cogens* principles apply not only to treaties,” but also to “any other act or action of States.”²⁰

¹⁶ Christensen, *Jus Cogens: Guarding Interests Fundamental to International Society*, 28 VA. J. INT'L. L. 585, 585-86 (1988). And see, THEODOR MERON, HUMAN RIGHTS LAW-MAKING IN THE UNITED NATIONS 174, 184-200; C. Rozakis, *The Concept of Jus Cogens in the Law of Treaties* 19 (1976); Whiteman, *Jus Cogens in International Law with a Projected List*, 7 GA. J. INT'L & COMP. L. 609 (1977).

¹⁷ And presumably “[i]nconsistent principles of customary international law cannot stand alongside *jus cogens*.” Charlesworth & Chinkin, *supra* note 14, at 66.

¹⁸ Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785, 830 (1988); see also, Oscar Schacter, *International Law Implications of U.S. Human Rights Policies*, 24 N.Y.L. SCH. L. REV. 63, 71-74 (1978); C. Rozakis, *supra* note 6; N. G. Onuf & Richard K. Birney, *Peremptory Norms of International Law: Their Source, Function and Future*, 4 DENVER J. INT'L L. & POL'Y 187 (1974); Georg Schwarzenberger, *International Jus Cogens ?*, 43 TEX. L. REV. 455 (1965); Egon Schwelb, *Some Aspects of International Jus Cogens As Formulated by the International Law Commission*, 61 AM. J. INT'L L. 946 (1967). “*Jus cogens* refers to the legal status that certain international crimes reach, and *obligatio erga omnes* to the legal implications arising out of a certain crime’s characterization as *jus cogens*.” M. Cherif Bassiouni, *International Crimes: Jus Cogens and Obligatio Erga Omnes*, 59 A.U.T. LAW & CONTEMP. PROBS. 63, 63 (1996). One such “legal implication” in Bassiouni’s view is the obligation to assert universal jurisdiction over individuals who violate *jus cogens* norms. *Id.* at 67.

¹⁹ Randall, *supra* note 18, at 830.

²⁰ Theodor Meron, *On a Hierarchy of International Human Rights*, 80 AM. J. INT'L L., 19-21 (1986).

B. SOURCE OF *JUS COGENS* NORMS:

There is little agreement about the source of *jus cogens* norms: where do they come from; how are new ones formed? One school of thought characterizes such norms as a product of natural law. "*Jus cogens* is a legal emanation which grew out of the naturalist school, from those who were uncomfortable with the positivists' elevation of the state as the sole source of international law."²¹ Professor Janis goes further to describe such a norm:

Functionally, a rule of *jus cogens* is by its nature and utility, a rule so fundamental to the international community of states as a whole that the rule constitutes a basis for the community's legal system. . . . Thus it is a sort of international law that, once ensconced, cannot be displaced by states, either in their treaties or in their practice. *Jus Cogens* therefore functions like a natural law that is so fundamental that states, at least for the time being, cannot avoid its force."²²

Others have focused on the language of Article 53 providing that a *jus cogens* norm is a "norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted. . . ."²³ to suggest that an element of consent to such a norm exists."²⁴ "This distinction leaves open and unresolved the argument as to sources. . . . The requirement of acceptance by the international community of states as a whole in Article 53 obviously implies *consent* for peremptory norms."²⁵ This view of *jus cogens* norms is as a variety of customary international law. Klein, for example, focuses upon the eighteenth century theorists' distinction between *jus cogens* and *jus*

²¹ Mark W. Janis, Colloquy, *The Nature of Jus Cogens*, 3 CONN. J. INT'L L. 359, 362 (1988).

²² *Id.* See also, Hersch Lauterpacht, *The Grotian Tradition in International Law*, 23 BRIT. Y. B. INT'L. L. 1 (1940).

²³ Vienna Convention, *supra* note 5.

²⁴ See, e.g., Mary Ellen Turpel & Phillippe Sands, *Peremptory International Law and Sovereignty: Some Questions*, 3 CONN. J. INT'L L. 364, 367 (1988).

²⁵ *Id.* Turpel and Sands go on to argue that the problem with identifying the sources of *jus cogens* norms is a result of "a two-century reign of international legal positivism, which envisages the 'state' to be a free, independent and equal sovereign in a transnational 'state of nature';" the only limitations upon its actions are those

dispositivum. “*Jus cogens* embraces customary law considered binding on all nations, and cannot be preempted by treaty. *Jus dispositivum* consists of norms derived from the consent of states, whose force is dependent upon continued state acquiescence.”²⁶ The latter may be varied by treaty and by subsequent changes in customary international law. Klein then clearly places *jus cogens* in a more positivist tradition as a particular category of law to which nations have consented, a kind of “super-customary law.” Klein states that *jus cogens* . . . is customary law that is ordered to a transcendent good of the international community, while the *jus dispositivum* is customary law that embodies a fusion of self-regarding national interests.”²⁷ Though *jus cogens* norms are rooted in custom, Klein argues that such norms have a moral force which derives from their rational foundation. He states that, “this description comes close to an international natural law theory.” But since nations do observe *jus cogens*, seek to enforce it upon each other and deny their own violations of it, they pay homage to its moral force and informally ratify authorization of its application.²⁸ Klein argues these acts of ratification and authorization constitute a “rule of recognition.”²⁹ Increasingly, the strict delineation between natural law and strict positivism has been eroded and as Klein suggests positive law gains its authority from the moral force behind it.³⁰

it imposes upon itself. Within this realm of voluntarism, states view themselves subjects *and* masters of the law. It is their ‘sovereignty’ which theoretically places them outside the law. . . . The doctrine of *jus cogens* cannot be accommodated within such a paradigm.” *Id.* at 369.

²⁶ David 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 (Summer 1988).

²⁷ *Id.* at 351, (quoting Alan Brudner, *The Domestic Enforcement of International Covenants on Human Rights: A Theoretical Framework*, 35 U. TORONTO L. J. 219, 221-24 (1985)).

²⁸ Klein, *supra* note 26, at 351.

²⁹ *Id.* at 352, citing H.L.A. HART, *THE CONCEPT OF LAW* 92 (1961) (“In a developed legal system the rules of recognition. . . may be the fact of their having been enacted by a specific body, or their long customary practice, or their relation to judicial decisions.”).

³⁰ *See, e.g.*, Hart, *supra* note 29, at 199; Julius Cohen, *The Myth of Neutrality in Positive Legal Theory*, 31 AM. J. JURIS. 97 (1986); Anthony D’Amato, *The Moral*

A third argument made for a source of *jus cogens* law is an analogy to municipal law concepts of public policy or *ordre public*.³¹ Professor Schwelb traces the idea of including a provision such as Article 53 in the Treaty Convention to a proposal by Professor Lauterpacht in his First Report on the Law of Treaties of 1953.³² In that report, Lauterpacht proposed that “a treaty, or any of its provisions, is void if its performance involves an Act which is illegal under international law and if it is declared so to be by the International Court of Justice.”³³ His comment to that proposed article stated that “the test was not inconsistency with customary international law pure and simple, but inconsistency with such overriding principles of international law which may be regarded as constituting principles on international public policy.”³⁴ Schwelb goes on to consider the relatively sparse international case law dealing with this issue: two dissenting opinions of the Permanent Court of International Justice;³⁵ a case tried by a United State’s Military Tribunal;³⁶ and a German court case.³⁷ In each of these cases the opinions cited relied upon notions of international public policy or public order. For example, in the case against Alfried Krupps, the defendants were charged with “employment of prisoners of war in . . . work having a direct relation to war operations, including the manufacture and transport

Dilemma of Positivism, 20 VAL. U. L. REV. 43 (1985). See also, Martti Koskeniemi, FROM APOLOGY TO UTOPIA 283 (1989) (“[*Jus cogens* doctrine shows itself as a compromise Peremptory norms bind irrespective of consent . . . But what those norms are is determined by consent.”).

³¹ See generally, Schwelb, *supra* note 18, at 948-953. (“The great difficulty of receiving a municipal law concept like *jus cogens* into public international law arises from the fact that the municipal legal systems provide either expressly or by implication which of their rules are peremptory and which are not. International law, including the draft articles [of the Vienna Convention on the Law of Treaties] reproduced above, does not, or not yet, state where is the borderline between *jus cogens* and *jus dispositivum*.” *Id.* at 948.).

³² *Id.* at 949, citing 1953 I.L.C. Yearbook (II) 154-56.

³³ *Id.*

³⁴ *Id.*

³⁵ Schwelb, *supra* note 18, at 949-50 (discussing *The Wimbledon Case*, (U.K., France, Italy, Japan v. Germany) 1923 P.C.I.J. 1 (July 6) and *The Oscar Chinn Case* (Belgium v. Great Britain), 1934 P.C.I.J. 63 (Dec. 12)).

³⁶ *Id.* at 950-51 (discussing *United States v. Alfried Krupps and others*, Trials of War Criminals before the Nuremberg Military Tribunals Under Control Council Law No. 10, Vol. IX (Washington, U.S. Government Printing Office, 1950)).

³⁷ *Id.* at 951 (discussing *Entscheidungen des Bundes ver fassungsgerichts* 441).

of armament and munitions.”³⁸ Defendants attempted to justify their use of French prisoners of war as having been authorized by an agreement between Germany and the French Vichy government. The tribunal found that no such agreement was proven. However, “it went on to say. . .that if there was any such agreement it was void under the law of nations. If Laval or the Vichy Ambassador to Berlin made any agreement with respect to the use of French prisoners of war in German armament production, it was manifestly *contra bonos mores* and hence void.”³⁹

While there is something attractive about the argument that *jus cogens* performs the same function in international law that the public policy and *ordre public* concepts perform in common law and civil law systems, respectively, it does not seem a wholly persuasive analogy. First, while public policy and *ordre public* norms do function to override private legal agreements (for example, a contract in violation of public policy), much less often are these concepts used to override legislative pronouncements (which more nearly resemble many treaties). In addition, there is usually much greater consensus within a municipal legal system regarding not only the content of this public policy, but also how it relates to other law within the system. Finally, there is a process for the imposition or declaration of this policy, that is a judicial process by which the law asserted will be tested against the public policy. No comparable mechanism exists under international law.

C. THE CONTENT OF *JUS COGENS* NORMS:

As with the question of the source of these peremptory norms, there is very little agreement as to which norms fall within the category of *jus cogens* norms.⁴⁰ The drafters of Article 53 of the Law of Treaties did not spell out which norms of international law fell within the definition given of peremptory norms. “The Commission considered it to be the right course to leave the full content of the rule to be worked out in State practice and

³⁸ *United States v. Krupps*, *supra* note 36, at 29.

³⁹ Schwelb, *supra* note 18, at 951.

⁴⁰ “Among those jurists who accept the category of *jus cogens*, however, continuing controversy remains over what norms qualify as principles of *jus cogens*.” Charlesworth & Chinkin, *supra* note 14, at 65.

in the jurisprudence of international tribunals.”⁴¹ Some members of the Commission favored including examples of peremptory norms in the body of the treaty, at least of the most settled and accepted *jus cogens* rules.⁴² In its Commentary, “the Commission gives two reasons for not identifying any rules of *jus cogens*. First, the mention of some cases might lead to misunderstanding as to the position concerning *other* cases. Secondly, an attempt to draw up, even on a selective basis, a list of rules of *jus cogens* might find the Commission engaged in a prolonged study of matters which fall outside the draft articles.”⁴³ However, the members of the Commission do acknowledge in their Commentary “obvious and well-settled rules of *jus cogens*”⁴⁴ about which there is general agreement. The examples they include are:

(A) a treaty contemplating an unlawful use of force contrary to the principles of the Charter. (B) a treaty contemplating the performance of any other act criminal under international law and (C) a treaty contemplating or conniving at the commission of acts such as trade in slaves, piracy or genocide, in the suppression of which every state is called upon to co-operate.⁴⁵

The Commentary also raises the possibility that “treaties violating human rights, the equality of States or the principle of self-determination” might conflict with peremptory norms.⁴⁶

Much has been written regarding the content of such norms and while some consensus exists around such prohibitions against

⁴¹ Schwelb, *supra* note 18, at 963.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ 1963 I.L.C. Y.B. (I), 705th mtg, para. 3 of the commentary to Draft Art. 50.

⁴⁵ *Id.*

⁴⁶ *Id.*

the use of force, slavery, genocide, piracy,⁴⁷ significant disagreement can be found when one moves beyond this small core.⁴⁸

This issue, regarding the content of *jus cogens* norms, brings us back to the issue of the source of such norms and the process by which such a norm is “created” or at least “recognized” by the international community. “Usually, a *jus cogens* norm presupposes an international public order sufficiently potent to control states that might otherwise establish contrary rules on a consensual basis.”⁴⁹ The International Court of Justice, which might seem integral to such a public order, has spoken to the question of which norms are *jus cogens* only sporadically,⁵⁰ most recently having concluded that the UN Charter’s prohibition against the use of force is “a conspicuous example of a rule of international law having the character of *jus cogens*”⁵¹ The Court here acknowledges *jus cogens* as a valid doctrine, applicable in international law, but offers no explanation regarding the source or further content of the doctrine. Moreover, the Court was not called upon in that case to apply the *jus cogens* norm to override a treaty obligation.

Professor Christensen has argued that “[a] norm is peremptory when it meets criteria designed to serve an overriding community purpose structurally differentiated from that served by ordinary rules of treaty or custom.”⁵² He cites the Federal Constitutional Tribunal of the Federal Republic of Germany, which in 1965 offered its view on the criteria for peremptory norms:

⁴⁷ The American Law Institute’s Restatement 3rd of Foreign Relations Law, Section 702 contains a list of customary international law violations and identifies within that list the following as *jus cogens* violations: genocide, slave trade, murder/disappearance, torture, prolonged detention and systematic racial discrimination. RSMT (THIRD) FOR. RD., § 702 (1987). “This list has been described as ‘a particularly striking instance of assuming American values are synonymous with those reflected in international law.’” Charlesworth & Chinkin, *supra* note 14, at 68, quoting Bruno Semma & Phillip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens, General Principles*, 12 AUST. Y.B. INT’L L. 82, 94 (1992).

⁴⁸ See *supra* note 9.

⁴⁹ MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW, 62 (4th ed. 2003).

⁵⁰ *Barcelona Traction, Light and Power* (Belg. v. Spain) I.C.J. Rep. 3 (1970).

⁵¹ *Case Concerning Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.) ICJ 14 (Merits Judgment of June 27) (1986).

⁵² Christensen, *supra* note 16, at 592.

The quality of such peremptory norms may be attributed only to such legal rules as are firmly rooted in the legal conviction of the community of nations and are indispensable to the existence of the law of nations as an international legal order and the observance of which can be required by all members of the international community.⁵³

One begins to see that not only is it difficult to ascertain which norms may be *jus cogens*, or as Professor Brownlie has put it “more authority exists for the category of *jus cogens* than exists for its particular content,”⁵⁴ but it is also difficult to articulate how a norm becomes *jus cogens*.

III. THE *JUS COGENS* LIMITATION EMERGES

A. RELEVANT CASE LAW:

The first appearance of the suggestion of this *jus cogens* limitation in United States courts seems to be in the Ninth Circuit’s opinion in *In re Estate of Ferdinand E. Marcos Human Rights Litigation*.⁵⁵ That case was brought by a Philippine citizen against the daughter of former Philippine President Marcos, asserting that her son was tortured and killed in the Philippines by police and military intelligence personnel under the control of the defendant. In upholding the default judgment entered in the district court, the ninth circuit held that the “prohibition against official torture ‘carries with it the force of a *jus cogens* norm,’ which ‘enjoys the highest status within international law.’”⁵⁶ the court subsequently concluded that “the district court did not err

⁵³ *Id.* Christensen goes on to elaborate on these three criteria: noting that the first requires showing “a subjective or psychological element: the existence of widespread rules entrenched in the legal conscience of the international community of States difficult to measure empirically and easily confused with *opinio juris* in determining ordinary rules of customary international law”; the second requiring that “a claim must demonstrate the norm’s indispensability to the existence of the system of public international law, a question begging proposition, whose meaning lacks self-evidence”; and regarding the final criteria, “a claim must show an objective obligation running to all States allowing any or all of them to demand observance of the norm.” *Id.* at 593.

⁵⁴ IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 514 (Oxford 5th ed. 1998).

⁵⁵ 978 F. 2d 493 (9th Cir. 1992).

⁵⁶ *Id.* at 500, citing *Siderman de Blake v. Argentina*, 965 F.2d. 699 at 715 (1992).

in founding jurisdiction on a violation of the *jus cogens* norm prohibiting official torture.”⁵⁷ In response to defendants’ concern that the “district court’s interpretation of §1350 would open the floodgates to ‘foreign’ cases in the federal courts,”⁵⁸ The court answered that this is unlikely since the “prohibition against official torture occupies a uniquely high status among norms of international law.”⁵⁹ While at least one commentator noted the *Marcus* limitation approvingly,⁶⁰ neither subsequent case law nor scholarly attention rested upon this limitation.

In two recent cases, however, the *jus cogens* issue has reemerged. In *Doe v. Unocal*,⁶¹ a group of Burmese villagers brought suit against the Unocal Corporation, a U.S. corporation under the ATCA. Unocal had entered into a joint venture with a French company and the Myanmar government to extract natural gas from oil fields off the coast of Burma and transport the gas to the Thai border via a gas pipeline. It was alleged that defendants used forced or slave labor in furtherance of the pipeline project and that other human rights violations occurred as well: forced relocation of families; rape; imprisonment and execution of those opposing the project.⁶²

In considering whether jurisdiction over this case existed by virtue of the ATCA, the court first cited language from the *Filar-tiga* opinion that “actionable violations of international law must be of a norm that is specific, universal and obligatory.”⁶³ The

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* The court seems to cite its previous decision in *Siderman* in support of these statements regarding official torture as a *jus cogens* norm. However, *Siderman* does not stand for such a proposition. Judge Fletcher in that case engages in a lengthy and thoughtful consideration of whether the prohibition against torture has achieved the status of a *jus cogens* norm, not in order to determine whether it states a violation under the ATCA, but rather in consideration of plaintiff’s argument that violation of a *jus cogens* norm creates an exception to the Foreign Sovereign Immunities Act. See *Siderman de Blake*, *supra* note 56, at 714-15.

⁶⁰ Herbert N. Ramo, Comment, *Alien Tort claims Act – Official Torture as a Violation of the Law of Nations Under the Alien Tort Claims Act*, *In re Estate of Ferdinand E. Marcos Human Rights Litigation*, 978 F.2d 493 (9th Cir. 1992), *cert. denied*, 113 S.Ct. 2960 (1993), 17 SUFFOLK TRANSNAT’L L. REV. 578 (1994).

⁶¹ 110 F. Supp. 2d 1294 (C.D. Cal. 2000).

⁶² *Id.*

⁶³ *Id.* at 1304.

court then observed that “the parties dispute whether only those violations that rise to the level of a *jus cogens* violation are actionable under section 1350.”⁶⁴ The court concludes that “[w]hile the Ninth Circuit has not expressly held that only *jus cogens* norms are actionable, the Circuit’s holding in *Estate II* that actionable violations are only those that are specific, universal and obligatory is consistent with this interpretation.”⁶⁵ The court went on to hold that “[i]t is well-accepted that torture, murder, genocide and slavery all constitute violations of *jus cogens* norms.”⁶⁶

The second recent case raising the *jus cogens* issue is that of *Xuncax v. Gramajo*,⁶⁷ in which nine expatriate citizens of Guatemala and one U.S. citizen sued the former Guatemalan Minister of Defense under the ATCA and the TVPA for acts constituting summary execution, “disappearance”, torture, arbitrary detention and cruel, inhuman and degrading treatment. In considering the scope of the ATCA, the district court characterized “the kinds of wrongs meant to be addressed under §1350: those perpetrated by *hostis humani generis* (‘enemies of all humankind’) in contravention of *jus cogens* (peremptory norms of international law).”⁶⁸

When, however, the *Xuncax* court went on to consider plaintiffs’ claims, it focused on whether these involve “fully recognized violations of international law” and stated that such a finding requires:

[T]hat 1) no state condone the act in question and that there is a recognizable “universal” consensus against it; 2) there are sufficient criteria to determine whether a given action amounts to the prohibited act and thus violates the

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.* citing *United States v. Matta-Ballesteros*, 71 F.3d 754, 764, n.5 (9th Cir. 1995)(citing *Sideman de Blake*, *supra* note 56, at 717).

⁶⁷ 886 F. Supp. 162 (D. Mass. 1995).

⁶⁸ *Id.* at 183. It should be noted that the court makes this observation in the context of its conclusion that domestic tort law is an “inadequate placeholder” for the values sought to be protected by the ATCA under international human rights law, which should therefore preclude viewing the ATCA as a jurisdictional grant only.

norm; 3) the prohibition against it is non-derogable and therefore binding at all times upon all actors.⁶⁹

B. *DOE V. UNOCAL* AND THE NINTH CIRCUIT

The district court in *Doe v. Unocal* granted the defendant's motion for summary judgment on the ATCA claims based on murder, rape and torture because the plaintiffs could not show that Unocal engaged in state action or that Unocal had controlled the Myanmar military. The district court also granted defendant's motion for summary judgment on the ATCA claims based upon forced labor because plaintiffs could not show that Unocal "actively participated" in the forced labor.⁷⁰ On appeal, the ninth circuit reversed the district court on the bulk of the ATCA claims, finding that the appropriate standard to use in determining a corporation's liability for the human rights violations of another actor was an international standard. This standard imposed aiding and abetting liability "for knowing practical assistance or encouragement which has a substantial effect on the perpetration of the crime, leaving the question whether such liability should also be imposed for moral support which has the required substantial effect to another day."⁷¹ The appellate court concluded that the record contained sufficient facts to demonstrate that a genuine issue of fact existed with regard to the application of that standard on all of the ATCA claims except for the claim of torture.⁷²

In reaching its conclusion that plaintiffs' case against Unocal should be allowed to proceed, the appellate court noted that,

⁶⁹ *Id.* at 184.

⁷⁰ *Doe v. Unocal*, F.3d, vacated and hearing en banc granted (9th Cir. 2002) *citing Doe v. Unocal*, 110 F. Supp. 1294 (C.D. Cal. 2000). The district court also dismissed plaintiffs' RICO claim for lack of jurisdiction.

⁷¹ *Doe v. Unocal*, *supra* note 70.

⁷² *Id.* at 59. Torture was excluded because "the record does not. . . contain sufficient evidence to establish a claim of torture (other than by means of rape) involving plaintiffs. Although a number of witnesses described acts of extreme physical abuse that might give rise to a claim of torture, the allegations all involved victims other than Plaintiffs. As this is not a class action, such allegations cannot serve to establish the Plaintiffs' claims of torture here." *Id.*

“[o]ne threshold question in any ATCA case is whether the alleged tort is a violation of the law of nations.”⁷³ Moreover, the court stated that the torts alleged in this case, “torture, murder, and slavery are *jus cogens* violations and thus, violations of the law of nations”⁷⁴ and that “[r]ape can be a form of torture.”⁷⁵ In addition, the court held that, “forced labor is so widely condemned that it has achieved the status of a *jus cogens* violation. . . . Accordingly, all torts alleged in the present case are *jus cogens* violations and, thereby, violations of the law of nations.”⁷⁶ However, Judge Pregerson, writing for the court, goes on to note:

We stress that although a *jus cogens* violation is, by definition, ‘a violation of ‘specific, universal, and obligatory’ international norm that is actionable under the ATCA, any “violation of ‘specific, universal and obligatory’ international norms” – *jus cogens* or not– is actionable under the ATCA. . . . Thus a *jus cogens* violation is sufficient, but not necessary to state a claim under the ATCA.⁷⁷

Here we have finally a court addressing the precise issue with which this article is concerned and resolving it with clarity, although with little explanation. The court correctly emphasizes that what the ATCA requires, according to *Filartiga*, is a violation of a “specific, universal, obligatory norm” and recognizes that such norms may be either *jus cogens* or not. That being the case, Judge Pregerson’s opinion embraces all such norms as creating a cause of action under the ATCA. The court of appeals is unanimous in its view that a *jus cogens* norm is not necessary in *Doe v. Unocal* for the plaintiffs’ claims to proceed under the ATCA. However, Judge Reinhardt, writing separately to address his disagreement with the majority’s use of an international aiding and abetting standard, also sets out a somewhat different view of the role of *jus cogens* norms under the ATCA. In his view, whether or not a *jus cogens* norm is alleged “is of no legal consequence in this case, because there is no requirement that

⁷³ *Id.* at 28.

⁷⁴ *Id.* citing *U.S. v. Matta-Ballesteros*, 71 F.3d 754, 764, n.5 (9th Cir.1995).

⁷⁵ *Id.* citing *Farmer v. Brennan*, 511 U.S. 825, 852 (1994)(Blackmun, J., concurring); *Kadic v. Karadzic*, 70 F.3d 232, 242 (2d cir. 1995).

⁷⁶ *Id.*

⁷⁷ *Id.*

plaintiffs state a *jus cogens* violation in order to obtain jurisdiction under the ATCA.”⁷⁸ His argument to this point is in accord with the majority, but he goes on to draw a further distinction, saying “[i]t is true that a cause of action against non-state actors for conduct in which they engage *directly* exists only for acts that constitute *jus cogens* violations and that other conduct of private parties that would violate international law if engaged in by a governmental entity is not actionable under the ATCA.”⁷⁹ Since any liability of Unocal’s on these facts would be derivative of the illegal acts of the Myanmar military, “third party liability may attach regardless of whether the international law violated is *jus cogens*.”⁸⁰

Following the ninth circuit opinion in *Doe v. Unocal*, that court had occasion to revisit the *jus cogens* issue in an *en banc* opinion, *Alvarez-Machain v. United States*.⁸¹ The plaintiff is a Mexican national who was abducted in Mexico and brought to the United States to face prosecution for the murder of a U.S. DEA agent. After his acquittal on those charges, he brought this action asserting, *inter alia*, claims under the ATCA for arbitrary arrest and detention.⁸² One of the individual defendants in the case, Jose Francisco Sosa, a former Mexican policeman (and one of those who abducted Alvarez-Machain), argued for a narrow reading of the phrase “law of nations” in the ATCA. “He argues that only violations of *jus cogens* norms, as distinguished from violations of customary international law, are sufficiently ‘universal’ and ‘obligatory’ to be actionable as violations of the ‘law of nations’ under the ATCA.”⁸³ The ninth circuit court of appeals rejects that argument.⁸⁴ The court notes that “although a

⁷⁸ *Doe v. Unocal*, *supra* note 70 (Reinhardt concurrence).

⁷⁹ *Doe v. Unocal*, *supra* note 70; citing *Kadic v. Karadzic*, 70 F.3d 232, 240 (2d Cir. 1995).

⁸⁰ *Id.*

⁸¹ 331 F.3d 604 (9th Cir. 2003). Given the decision in this case, whatever the 9th Circuit concludes *en banc* in *Doe* regarding the aiding and abetting standard, it will probably not disturb the part of the decision regarding the *jus cogens* limitation.

⁸² *Id.* at 609.

⁸³ *Id.* at 612-13.

⁸⁴ *Id.* (“We decline to embrace this restrictive reading, as we are guided by the language of the statute, not an imported restriction.”)

strict categorical approach may have surface appeal for its apparent ease of application, it is far from certain which norms would qualify for *jus cogens* status.”⁸⁵ The court went on to hold that “there exists a clear and universally recognized norm prohibiting arbitrary arrest and detention.”⁸⁶ Such a prohibition is “codified in every major comprehensive human rights instrument and is reflected in at least 119 national constitutions.”⁸⁷

IV. ANALYSIS OF THE INTERNATIONAL *JUS COGENS* NORM IN U.S. COURTS

This section of the Article will concern itself with the questions surrounding the suggestion in the federal courts that the Alien Tort Claims Act only applies to violations of *jus cogens* norms. As noted earlier this distinction matters because the category of customary international law with regard to human rights is much broader than that of *jus cogens* norms. It has been acknowledged that a “rule need not be a peremptory norm (*jus cogens*), however, to be part of the customary international law of human rights.”⁸⁸ That being the case, it should be asked what purpose limiting ATCA claims to *jus cogens* norms would serve? Is this in any sense “required” by international law or domestic law? Does it serve any legitimate public policy? Or rather, does it act only to constrain the bringing of human rights claims in federal courts.

⁸⁵ *Doe v. Unocal*, *supra* note 70. (“The development of an elite category of human rights norms is of relatively recent origin in international law, and although the concept of *jus cogens* is now accepted, its content is not agreed.” *Id.* citing Restatement (Third) of the Foreign Relations Law of the United States section 102, n.6 (1987).)

⁸⁶ *Id.* at 614-15.

⁸⁷ *Id.* In addition to *Unocal* and *Alvarez-Machain*, at least one other court has rejected outright the *jus cogens* limitation recently. See *The Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 306 (S.D.N.Y. 2003). (“Of course, while *jus cogens* violations are actionable under the ATCA, a *jus cogens* violation is not required. Under the ATCA, any violation of a specific, universal, obligatory norm is actionable, whether it is *jus cogens* or not.” *Id.* at 306, n.18.)

⁸⁸ Remarks by R. Lillich, Proceedings of the 79th Annual Meeting, April 25-27, 1985, ASIL at 86, n.2.

A. DOMESTIC LAW JUSTIFICATION

The first question to be addressed is whether anything in domestic U.S. law compels a *jus cogens* limitation on the bringing of ATCA actions. Nothing in the statutory language itself suggests such a limitation.⁸⁹ The ATCA requires only a tort in violation of the law of nations. The reference in the statute to both treaties and the law of nations seems clearly to draw the distinction between treaty law and customary international law. Moreover, even in the earliest cases that applied the statute, no such requirement was read into the statute.⁹⁰ In the modern era, dating from the *Filartiga* decision in 1980, courts have overwhelmingly applied the ATCA without reference to *jus cogens*.⁹¹ In fact, in many of the cases courts have found jurisdiction under the ATCA in situations where the international law violated may not rise to the level of *jus cogens*.⁹² Finally, it seems clear that the concept of *jus cogens* was not well-established at the time of the First Judiciary Act and the drafting of the ATCA.⁹³ Though, one must also acknowledge that human rights law was similarly not well established in 1789. In addition to the statutory language itself, courts since *Filartiga* have ascribed to the ATCA a broad remedial purpose and a reliance on an evolving interpretation of international law. At least one court has maintained that the

⁸⁹ “All Courts that have decided the issue have concluded that the statute authorizes suits in federal when its facial requirements are met; that is, an alien can sue for a tort in violation of international law, no matter where committed, so long as the court has personal jurisdiction over the defendant.” Beth Stephens, *Translating Filartiga: A Comparative and International law Analysis of Domestic Remedies for International Human Rights Violations*, 27 YALE J. INT’L L. 1, 8 (2002).

⁹⁰ See *Adra v. Clift*, 195 F. Supp. 857 (D. Md. 1961) (a child custody dispute between two aliens) and *Bolchos v. Darrel*, 3 F. Cas. 810 (D.S.C. 1795) (No. 1607) (suit for restitution of three slaves who were on board a Spanish ship seized as a prize of war.).

⁹¹ See, e.g., *Doe v. Islamic Salvation Front*, 993 F. Supp. 3 (D.C. 1998); *Abebe-Jira v. Negewa*, 72 F. 3d 844 (11th Cir. 1996); *Kadic v. Karadzic*, 70 F. 3d 232 (2d Cir. 1995); *Forti v. Suarez-Mason*, 672 F. Supp. 1531 (N.D. Cal. 1987).

⁹² See, e.g., *Forti v. Suarez-Mason*, 672 at 1539-40 (prolonged arbitrary detention and “causing disappearance” on rehearing); *Xuncax v. Gramajo*, 886 F. Supp. 162 (disappearance and arbitrary detention).

⁹³ “The notion of *jus cogens* was not a part of the legal landscape when Congress enacted the ATCA in 1789.” *Alvarez-Machain* at 331 F.3d at 614 (citing BROWN-LIE, *supra* note 54, at 516.).

ATCA and TVPA together evidence a strong congressional interest in having such suits tried in the federal courts.⁹⁴ Such a remedial purpose and a congressional interest are not consistent with a narrow reading of the statute. Thus nothing in domestic law compels (or even allows one could argue⁹⁵) a *jus cogens* limitation on the bringing of ATCA cases in federal court.⁹⁶

In the ATCA cases, the federal courts have overwhelmingly adopted the view that the ATCA provides not only federal subject matter jurisdiction, but also supplies a cause of action.⁹⁷ That cause of action, a domestic tort based upon a violation of the “law of nations,” requires the court to determine (according to *Filartiga*) whether any specific, universal and obligatory norm of international law has been violated, by the defendant. It is this fundamental understanding of the ATCA that the Department of Justice (DOJ) is asking the ninth circuit to reconsider in the *en banc* rehearing in *Unocal*⁹⁸ the DOJ makes essentially a two-pronged attack on the ATCA. First, it argues that courts may not infer a “private right of action” from what is a purely jurisdictional statute.⁹⁹ Second, the brief argues that under U.S. domestic law no cause of action for extraterritorial acts exists absent congressional authorization.¹⁰⁰

⁹⁴ See, e.g., *Wiwa v. Royal Dutch Petroleum Company*, 226 F.3d 88 (2d Cir. 2000) (“We believe plaintiffs make a strong argument in contending that the present law in addition to merely permitting U.S. District Courts to entertain suits alleging violation of the law of nations, expresses a policy favoring receptivity by our courts. . . . The statute [TVPA] has . . . communicated a policy that such suits should not be facily dismissed on the assumption that the ostensibly foreign controversy is not our business.”) *Id.* at 104.

⁹⁵ “To restrict actionable violations of international law to only those claims that fall within the categorical universe known as *jus cogens* would deviate from both the history and text of the ATCA.” *Alvarez-Machain*, 331 F.3d at 613.

⁹⁶ The question regarding such a domestic limitation is separate from the domestic law arguments raised by the Department of Justice in its amicus brief in the *Unocal* *en banc* rehearing: first, that the statute is merely jurisdictional and provides no cause of action and second, that the statute may not be applied “extraterritorially” without express congressional authorization. See, Brief for the United States of America, as *Amicus Curiae*, *Doe v. Unocal*, 248 F.3d 915 (rehearing *en banc* 2003) at 2-3.

⁹⁷ See, Beth Stephens, *Translating Filartiga supra* note .

⁹⁸ Brief for the United States of America, *Amicus Curiae*, *Doe v. Unocal*, *supra* note 96, at 5-8.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 11.

Although dismissed rather summarily by the brief, the answer to both of these seems to be the same. The Congress, post *Filartiga*, passed the Torture Victim Protection Act of 1991 [TVPA],¹⁰¹ which provides for a cause of action in the precise situation that existed in *Filartiga*, thereby ratifying the second circuit's decision in that case. Perhaps more importantly, Congress indicated in passing the TVPA that it did not intend to supplant the ATCA, but rather the statute would continue to exist and evolve independently of the TVPA.¹⁰² Such a view of the ATCA, concurrent with the adoption of the TVPA is certainly a long way from mere "legislative dicta"¹⁰³ and comes close to addressing the concerns some have raised as to whether the courts are getting out too far ahead of Congress in these ATCA cases.¹⁰⁴ I agree with some of those concerns, particularly with respect to cases which lack any connection to the U.S. But certainly, *Unocal* is not the case for arguing that the U.S. judicial system has no interest in proceeding. U.S. corporations acting in flagrant violation of international human rights law ought not to be able to argue that they should be free from being held responsible, any more than Nuremberg defendants were able to argue their war crimes should go untried.

¹⁰¹ Pub. L. No. 102-256, 106 Stat. (28 U.S.C. §1350).

¹⁰² S. Rep. No. 102-249, at 4 (1992). ("Claims based on torture or summary execution do not exhaust the list of actions that may appropriately be covered by Section 1350. Consequently that statute [ATCA] should remain intact.").

¹⁰³ Brief for the United States of America, *supra* note 96, at 28.

¹⁰⁴ As the Second Circuit notes in *Wiwa*:

"In passing the Torture Victim Protection Act, 28 U.S.C. § 1350 App., in 1991, Congress expressly ratified our holding in *Filartiga* that the United States courts have jurisdiction over suits by aliens alleging torture under color of law of a foreign nation and carried it significantly further. . . . The TVPA thus recognizes explicitly what was perhaps implicit in the Act of 1789 – that the law of nations is incorporated into the law of the United States and that a violation of the international law of human rights is (at least with regard to torture) *ipso facto* a violation of U.S. domestic law. See, H.R. Rep. No. 102-367, at 4 (1991), reprinted U.S.C.C.A.N. 84, 86 (noting the purposes of the TVPA are to codify *Filartiga*, to alleviate separation of powers concerns, and to expand the remedy to include U.S. citizens.)" 226 F. 3d at 104-05.

B. INTERNATIONAL LAW JUSTIFICATION

Judges who suggest that suggest ATCA claims should be limited to the cases involving peremptory norms have a fundamental misunderstanding of the role that such norms play in international law. The purpose of such norms is to constrain state behavior, as the Vienna Convention makes clear,¹⁰⁵ “For purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”¹⁰⁶ Professor Brownlie would read that provision and the commentary accompanying it as “mak[ing] it clear that by ‘derogation’ is meant the use of agreement (and presumably acquiescence as a form of agreement) to contract out of rules of international law.”¹⁰⁷ Nothing in such a doctrine either requires or precludes a domestic court from accepting jurisdiction over an alleged violation of international human rights law.

Two errors of reasoning by the U.S. Courts are apparent. Both appear to arise from the lack of familiarity with and infrequent application of international law in the domestic courts. Both are variations on the concern that the courts do not seem to have a clear understanding of the role *jus cogens* norms play in international law. The first issue concerns the courts’ failure (particularly evidenced in *Xuncax* and the district court opinion in *Doe v. Unocal*) to distinguish *jus cogens* norms from other norms of international law which are also universal and non-derogable. The second issue is raised by the seeming facility and certainty with which the federal courts pronounce *jus cogens* norms in the face of great uncertainty in the international community at large about the specific content of peremptory norms.¹⁰⁸

¹⁰⁵ Vienna Convention on the Law of Treaties, Article 53, 1155 U.N.T.S. 331, 344.

¹⁰⁶ *Id.*

¹⁰⁷ Brownlie, *supra* note , at 516.

¹⁰⁸ See, e.g., George D. Haimbaugh, Jr., *Jus Cogens: Root and Branch (An Inventory)*, 3 *TOURO L. REV.* 203 (1986-1987) (declaring “the fecundity of *jus cogens* in legal literature and its near sterility in international jurisprudence and diplomacy.”); Christenson, *supra* note 16.

In her thoughtful and well-presented opinion in *Siderman de Blake*, Judge Fletcher proves herself an exception to my generalization regarding federal judges. She recognizes that there is a relationship between customary international law and peremptory norms, but she distinguishes the latter from the former by noting they differ in one important respect. "Customary international law, like international law defined by treaties and other international agreements, rests on the consent of states. . . . In contrast, *jus cogens* 'embraces customary laws considered binding on all nations' . . . and 'is derived from values taken to be fundamental by the international community, rather from the fortuitous or self-interested choices of nations.'"¹⁰⁹ The opinion further explains "[w]hereas customary international law derives solely from the consent of states, the fundamental and universal norms constituting *jus cogens* transcend such consent, as exemplified by the theories underlying the judgments of the Nuremberg tribunals following World War II."¹¹⁰

Unlike the *Siderman de Blake* opinion, subsequent opinions which have relied upon *jus cogens* as a requirement for stating an ATCA claim have not clearly distinguished such norms from other significant human rights norms under customary international law. So, there is a failure to recognize that there may be norms of international law which are universal and non-derogable and yet not *jus cogens*.¹¹¹

The process by which courts have identified *jus cogens* norms seems less than clear in the cases discussed above. A definitive list of those human rights prohibitions that constitute peremptory norms of international law does not exist internationally. Yet United States courts have pronounced in this area, seemingly with a great deal of certainty. What is less than certain is the process by which those courts arrived at their conclusions. In *Doe v. Unocal* the district court simply states its

¹⁰⁹ *Siderman de Blake v. Republic of Argentina*, 965 F. 2d 699, 715 (9th Cir. 1992) cert. denied., quoting Klein, *A Theory for Application of the Customary International Law of Human Rights by Domestic Courts*, 13 YALE J. INT'L L. 332, 350-351 (1988).

¹¹⁰ *Id.*

¹¹¹ Clearly such a distinction was in the minds of the members of the International Law Commission in drafting Article 53 of the Vienna Convention. See, International Law Commission Report [1966] II Y.B.INT'L. L. COMM'N 169, 247-249, U.N. Doc. A/CN.4/SER. A/1966/Add.1.

conclusion that “it is well accepted that torture, murder, genocide and slavery all constitute violations of *jus cogens* norms” with only a citation to another Ninth Circuit opinion, *Matta-Ballesteros*.¹¹² In *Matta-Ballesteros*¹¹³ the court in a footnote concludes (without much discussion) that “kidnapping also does not qualify as a *jus cogens* norm, such that its commission would be justiciable in our courts even absent a domestic law. *Jus cogens* norms, which are nonderogable and peremptory, enjoy the highest status within customary international law, are binding on all nations, and cannot be preempted by treaty While Art. 9 or the Universal Declaration of Human Rights does state that no one “shall be subjected to arbitrary arrest, detention or exile. . . , kidnapping does not rise to the level of other *jus cogens* norms, such as torture, murder, genocide, and slavery.”¹¹⁴

There are two concepts “related” to *jus cogens* that may have influenced U.S. Courts in their application of that doctrine. The first of these is the concept of *erga omnes*, which holds in certain instances that obligations flow from legal norms, the “legal implications arising out of a certain crime’s characterization as *jus cogens*.”¹¹⁵ One of these legal implications, in Professor Bassouni’s view, is the obligation to assert universal jurisdiction (raising the second concept) over individuals who violate *jus cogens* norms.¹¹⁶ Note, that this is not a view shared by all scholars, some of whom would instead insist that violation of a *jus cogens* norm *allows* for the assertion of universal jurisdiction, while not requiring it.¹¹⁷

As can be seen from the above discussion, the function of characterizing a norm as *jus cogens* may be to create either permission or an obligation on the part of a State to assert jurisdiction over the violator, historically an individual violator, not a

¹¹² 110 F. Supp. 2d 1294, 1304.

¹¹³ 71 F.3d at 754 .

¹¹⁴ *Id.* at 764, n.5.

¹¹⁵ Bassiouni, *supra* note 18, at 63.

¹¹⁶ *Id.* at 65-66 (“Thus recognizing certain international crimes as *jus cogens* carries with it the duty to prosecute or extradite.”).

¹¹⁷ See, e.g., Michael Scharf, *The Letter of the Law: The Scope of the International Obligation to Prosecute Human Rights Crimes*, 59 LAW & CONTEMP. PROBS. 41, 52-59 (1996); Theodor Meron, *International Criminalization of Internal Atrocities*, in WAR CRIMES LAW COMES OF AGE: ESSAYS 228, 251-52, 254-55 (1998).

State.¹¹⁸ In other words, the violation of a *jus cogens* may act to expand domestic jurisdiction to prosecute. However, nothing about this scheme alone precludes a State from asserting civil jurisdiction over a violation of international law that falls short of a *jus cogens*.

Perhaps, the one aspect of international law that might suggest a constraint on the jurisdiction of U.S. courts is the law surrounding legislative or “prescriptive” jurisdiction.¹¹⁹ Prescriptive jurisdiction refers to the “authority of states to make and apply laws.”¹²⁰ The most universally accepted basis for such jurisdiction is territoriality – the notion that each state is sovereign over persons and acts within its territory.¹²¹ States also, however, generally accept the assertion of extraterritorial jurisdiction on the basis of nationality, that is they reserve the right to regulate the behavior of their nationals abroad.¹²²

A few other principles have been suggested as the basis for prescriptive jurisdiction and have achieved varying degrees of acceptance by the international community. The protective principle would allow jurisdiction for “acts done abroad which affect the security of the state, a concept which takes in a variety of political offenses, but is not necessarily confined to political acts.”¹²³ The passive personality principle is probably the “least

¹¹⁸ Foreign sovereign immunity generally protects State from suit, *see, e.g.*, Foreign Sovereign Immunity Act of 1976, §1330, et. al.

¹¹⁹ This is apparently the basis of an additional argument made by the DOJ in its *Unocal* amicus brief, i.e., that international law precludes the regulation of acts taking place in a foreign country. This is clearly an overstatement, since certain bases for extraterritorial application of the forum’s law are well recognized. Particularly relevant in this case, would be prescriptive jurisdiction based upon nationality, since *Unocal* is a U.S. corporation. *See infra* notes 70-84 and accompanying text.

¹²⁰ Janis, *supra* note 49, at 318; “The term jurisdiction, whether it applies to civil or criminal matters, includes the powers to prescribe, adjudicate, and enforce.” M. Cherif Bassiouni, *Universal Jurisdiction*, 42 VA. J. INT’L L. 81, 89 (2001).

¹²¹ Janis, *supra* note 49, at 318-319.; Brownlie, *supra* note 54, at 303.

¹²² Janis, *supra* note 49, at 320; Brownlie, *supra* note 54, at 306. (“Nationality, as a mark of allegiance and an aspect of sovereignty, is also generally recognized as a basis for jurisdiction over extra-territorial acts.” *Id.*).

¹²³ Brownlie, *supra* note 54, at 307. Under this principle, counterfeiting, immigration violations and acts posing a threat to national security might be prohibited.

justifiable, as a general principle, of the various bases of jurisdiction.”¹²⁴ This principle allows a state to prohibit and punish acts done abroad against the national of that state.¹²⁵ Finally, as has been previously alluded to, it is generally accepted that States may assert universal jurisdiction over those who commit certain international crimes.¹²⁶ There are two characteristics of such universal jurisdiction: first, historically such jurisdiction presumed that the asserting state had custody of the offender;¹²⁷ second, the person over whom jurisdiction was asserted was prosecuted under the domestic law of the forum.¹²⁸

It should be noted that the concept of universal jurisdiction itself is still somewhat in flux. As Professor Bassiouni has said “[u]niversal jurisdiction is not as well established in conventional and customary international law as its ardent proponents, including major human rights organizations profess it to be.”¹²⁹ His concern is that the “law in this area is largely driven by scholars and there is an absence of state practice to support it.”¹³⁰ Moreover, and perhaps more importantly, the international law with respect to universal jurisdiction (to the extent that it exists) is almost exclusively concerned with criminal prosecution. Given this, it is not clear that one should extrapolate from criminal to civil cases

¹²⁴ *Id.* at 306.

¹²⁵ Janis, *supra* note 49, at 325-26.

¹²⁶ *Id.* at 325. (“The universality principle is perhaps best illustrated by the jurisdiction that every state traditionally has over pirates and by the more modern jurisdiction that some states claim over those who commit crimes against human rights.”)

¹²⁷ *Id.* at 307.

¹²⁸ Brownlie, *supra* note 54, at 308. That is, such jurisdiction required the forum to have domestic authority to prosecute such crimes.

¹²⁹ M. Cherif Bassiouni, *Universal Jurisdiction*, 42 VA J. INT’L L. 81, 82 (2001, citing, *The Pinochet Precedent: How Victims Can Pursue Human Rights Criminals Abroad*, Human Rights Watch Update (Human Rights Watch), Sept. 2000; *Universal Jurisdiction: 14 Principles on the Effective Exercise of Universal Jurisdiction* (Amnesty International); *Universal Jurisdiction in Europe: Criminal Prosecutions in Europe Since 1990 for War Crimes, Crimes Against Humanity, Torture and Genocide (Redress)* June 1999.

¹³⁰ Bassiouni, *supra* note 120, at 104. He does acknowledge being one of those scholars who supports “the proposition that an independent theory of universal jurisdiction exists with respect to *jus cogens* international crimes.” *Id.*

and assume that a *jus cogens* based universal jurisdiction is required to assert extraterritorial jurisdiction in civil cases.¹³¹

Two possible arguments may be made regarding broader jurisdictional reach in civil cases. First, there was a tendency historically for greater deference to states in civil actions.¹³² Thus to the extent one could argue for broad universal jurisdiction covering not just *jus cogens* based, but other international crimes as well, extraterritorial jurisdiction would be much more broadly available in ATCA cases.¹³³ The second argument is more sweeping; that international law poses no constraint on the assertion of jurisdiction over civil claims.¹³⁴

In *Doe v. Unocal*, Judge Reinhardt writing in partial dissent drew a distinction between ATCA cases in which state action was alleged and those in which non-state actors were the defendants. Apparently, Judge Reinhardt would limit jurisdiction in ATCA cases against non-state actors to those cases in which *jus cogens* norms have been violated and thus universal jurisdiction would apply. While superficially the conclusion he draws makes sense, in that U.S. courts have thus far, arguably, applied only *jus cogens* norms against non-state actors (relying upon the serious nature of such crimes to create individual responsibility for non-

¹³¹ It is not necessarily that universal jurisdiction does not extend to civil cases. See generally, Stephens, *supra* note 89, and the Senate Report on the TVPA which stated that "according to the doctrine of universal jurisdiction, the courts of all nations have jurisdiction over 'offenses of international concern.'" S. REP. NO. 102-249, at 5 (1992). Nor is it true that a *jus cogens* violation is required for universal jurisdiction in criminal cases. Such jurisdiction may be treaty based. See, e.g., *United Nations: International Convention Against The Taking of Hostages*, U.N. GAOR 6th Comm., 6th Sess., at art. 5, U.N. Doc. A/C.6/34/L.23 (1979).

¹³² James Paul George, *Defining Filartiga: Characterizing International Torture in United States Courts*, 2 DICK. J. INT'L L. 1, 32 (1984) (arguing that it is easier to assert universal jurisdiction over civil claims).

¹³³ "Imposing criminal sanctions on an individual is clearly more intrusive than asserting adjudicatory jurisdiction in a civil action." Blum and 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, 86 (1981).

¹³⁴ See, e.g., Gerald Fitzmaurice, *The General Principles of International Law*, 92 R.C.A.D.I. 1, 218 (1957) and Michael Akehurst, *Jurisdiction in International Law*, 1972-73 BRIT. Y.B. INT'L L. 145, 176-77.

state actors)¹³⁵ ultimately this argument fails. Judge Reinhardt misconstrued the court's reasoning in *Karadzic*. The second circuit does not draw a distinction between violations of *jus cogens* norms and other violations of the law of nations, finding that only the former apply to non-state actors. Instead, the court looks to international crimes as defined by international law. Torture, when perpetrated by a State, is an international crime. Torture, when perpetrated by an individual, not acting with State authority, may be a crime, but it is not an international crime. This conclusion does not rest upon defining official torture as a *jus cogens* violation. For example, arbitrary detention by a State is almost certainly a violation of customary international law (but not necessarily *jus cogens*), while private detention of a person is almost certainly not. Several U.S. courts have held arbitrary detention by a State to so violate the law of nations as to be actionable under the ATCA.¹³⁶ Private detention would not so qualify.¹³⁷ The distinction being drawn here, and in *Karadzic* does not rely upon characterization of a norm as *jus cogens*. The second circuit in *Karadzic* does not purport to be relying upon *jus cogens* norms. It is merely defining the crimes/torts alleged against Karadzic in terms of international law crimes. Such crimes regarding individual responsibility have tended to coincide with *jus cogens* norms, though there is nothing requiring them to do so.¹³⁸

V. CONCLUSION

The imposition of a *jus cogens* limitation by some federal courts on the assertion of an Alien Tort Claims Act claim rests upon a fundamental misunderstanding of the international law

¹³⁵ See, *Kadic v. Karadzic*, 70 F. 3d. 232 at 239 ("We do not agree that the law of nations, as understood in the modern era, confines its reach to state action. Instead, we hold that certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals.")

¹³⁶ See, e.g., *supra* note 92 and the cases cited therein.

¹³⁷ See, e.g., *U. S. v. Matta-Ballesteros*, 71 F.3d 754 (9th Cir. 1995).

¹³⁸ Universal jurisdiction is supported both by *jus cogens* norms and by treaty law. (See, e.g., the TVPA's reliance on the Torture Convention as source of prescriptive jurisdiction). So that even if universal jurisdiction were the basis for federal courts asserting extraterritorial jurisdiction under the ATCA, it would not necessarily follow that a *jus cogens* norm was required.

concept of peremptory norms and a gross misapplication of that doctrine to domestic law. In addition, such a limitation is inconsistent with the goal of such domestic enforcement of human rights claims. While a broad assertion of jurisdiction over foreign litigants for foreign acts has met with some criticism,¹³⁹ even those critics recognize the potential benefit to transnational and U.S. jurisprudence of deciding such cases.¹⁴⁰ If one were to posit a categorical approach to determining which human rights offenses might be pursued in civil actions in U.S. courts, one ought to be able to define the categories used with some precision. That does not appear to be the situation with *jus cogens* norms. The remaining circuit courts should follow the lead of the Ninth Circuit and reject such a limitation.

¹³⁹ See, e.g., Anne Marie Slaughter & David Bosco, *Plaintiff's Diplomacy*, FOREIGN AFF., Sept./Oct. 2002 102, 115. ("But the expansion of Plaintiffs' power in U.S. courts looks quite different from the perspective of other countries. The juxtaposition of this increased involvement of U.S. court in foreign affairs with the continued American refusal to participate in bodies like the International Criminal Court creates the image of a country happy to haul foreign defendants into its own courts while stubbornly resisting even the remote possibility that its own citizens might be called to account.") *Id.*

¹⁴⁰ *Id.* at 106. ("From the perspective of American jurisprudence, however, the Alien Tort Statute cases have been more beneficial. They have forced U.S. courts to grapple with developments in international law that might otherwise have received little attention – a much-needed tonic for a judicial system often lamentably out of touch with international law.") *Id.*