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INTEREST OF THE *AMICI CURIAE*[1]

This brief *amicus curiae* is respectfully submitted by law professors with expertise in international law, federal jurisdiction, and the foreign relations law of the United States. *Amici* believe that the Ninth Circuit's interpretation of 28 U.S.C. § 1350 in this case, which draws on an earlier innovation of the Second Circuit in *Filartiga v. Peña-Irala*, 630 F.2d 876 (1980), reflects unsound statutory interpretation and impermissibly shifts the lawmaking role from the politically accountable branches to the courts. The principal effect of the unrestrained role for the judiciary advanced by the decision below is to place the United States at a structural disadvantage in its international relations by undermining the government's capacity to ensure the meaning of its commitments under international agreements. As specialists in international law and federal jurisdiction, we are concerned that an affirmance of the ruling below would impose upon the political branches of our country handicaps faced by the governments of no other nation and seriously complicate the ability of the United States to advance the interests of its people in international affairs.

SUMMARY OF ARGUMENT

The Ninth Circuit incorrectly interpreted 28 U.S.C. § 1350 as authorizing federal courts to create means of enforcing international obligations through private civil suits between aliens. Shifting the power to create remedies for supposed violations of international law away from the Executive and

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[1] No counsel for any party authored this brief either in whole or in part, and no persons other than the *amici curiae* made any monetary contribution to its preparation or submission. The written consents of petitioner and respondent Alvarez-Machain to the filing of this brief have been filed with the Clerk. The written consent of respondent United States accompanies this brief.

Congress and towards the courts undermines the role of state consent in the creation of international law by imposing upon the United States enforcement obligations that it has not assumed. The political branches should decide whether particular obligations reached in international negotiations will carry with them a private right of action for money damages. The Ninth Circuit's reading will undermine the capacity of the United States to participate in the sound development of international law. Other nations do not recognize a general power on the part of their courts to use private civil suits as a means of enforcing international law. There is no reason to believe that Congress in 1789 created such a power in the judiciary. The long history of disuse of 28 U.S.C. § 1350, from the time of its enactment in 1789 until the Second Circuit's 1980 invocation in *Filartiga*, indicates that the interpretation embraced by the Ninth Circuit is a modern artifact unrelated to the original purpose of Congress in enacting the statute.

ARGUMENT

I. The Ninth Circuit's Interpretation of 28 U.S.C. § 1350 Is Unsound and Imposes Burdens under International Law to Which This Country Has Not Assented.

The fundamental issue in this case is whether 28 U.S.C. § 1350 (hereinafter "§ 1350"), in referring to "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," means to treat as actionable torts all injuries traceable to transgressions of "the law of nations" or any treaty.

The court below ruled that § 1350 both creates federal court jurisdiction to hear all claims based on international law and authorizes the federal courts to develop a federal common law of torts based on international law.

We discuss the question of jurisdiction in Part V below. As to the rule of decision, the operative language of the statute is

"a tort only, committed in violation of the law of nations or a treaty of the United States." There is no basis for believing that Congress intended this language to embrace all violations of international law anywhere. By using these words of limitation, Congress addressed only those instances where international law itself regarded specific conduct as giving rise to a civil action for damages on the part of a person injured by the violation. It is not enough for international law to forbid particular conduct. International law must provide for civil liability for a violation in order for the violation to constitute a tort under § 1350.

A proper understanding of the meaning and purpose of this language in § 1350 requires an appreciation of what international law is and is not. International law in its essence involves obligations that a state has assumed. In the case of treaties, the assumption of the obligation results from the state's consent to the treaty, and the content of the obligation becomes a matter of treaty interpretation. *See*, *e.g.*, *El Al Israel Airlines, Ltd. v. Tseng*, 525 U.S. 155, 167 (1999) (focus on words of treaty and evidence of the understanding of parties); *Air France v. Saks*, 470 U.S. 392, 399 (1985) (same). As with a private contract, a treaty will not be understood to impose on parties duties that they did not intend to assume.

There is considerable disagreement as to what kind of law customary international law is, and in particular whether it constitutes federal law within the meaning of Article III of the Constitution.[2] There is no debate, however, about the core

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[2] The academic literature debating the status of customary international law as federal law is vast and contentious. For the early stages of this debate, compare 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), and Curtis A. Bradley & Jack L. Goldsmith, *Federal Courts and the Incorporation of International Law*, 110 HARV. L. REV. 2260 (1998),

principle that a rule of customary international law exists if, and only if, states regard that norm as creating a binding legal obligation. A state which has rejected the binding character of a purported norm of customary international law is not bound by that norm.[3]

In determining the obligations that bind a state under international law, whether through a treaty or as a matter of customary international law, one must distinguish between the primary rule of conduct – whether a promise to disarm, to adopt a rule of international commercial law, or to respect core human rights – and the remedial mechanisms for enforcing that rule, including the choice of persons against whom an obligation may be enforced. A state may accept a particular obligation while imposing strict limits on the ways that obligation can be enforced against it or its subjects. In sum, a state is bound under international law only to the extent it has assented both to an obligation and to the means of enforcing that obligation.

This Court's jurisprudence recognizes that the existence of an obligation under international law does not imply a license for the judiciary to create methods to enforce the obligation. For example, in *Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122 (1989), the Court confronted an air carrier's violation of an

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Phillip R. Trimble, *A Revisionist View of Customary International Law*, 33 U.C.L.A. L REV. 665 (1986), and A. Mark Weisburd, *State Courts, Federal Courts, and International Cases*, 20 YALE J. INT'L L. 1 (1995), with RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 111 comment d, 115 comment e (1987), and Harold H. Koh, *Is International Law Really State Law?* 111 HARV. L. REV. 1824 (1998). Of course, if customary international law is not federal law, then a suit brought by an alien against another alien, not based on admiralty, would not vel non come within federal court jurisdiction.

[3] RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 comment d (ALI 1987).

obligation to provide adequate notice of the limits to the carrier's liability resulting from the Warsaw Convention. The Court noted that whatever the precise obligation of the carrier to notify passengers of the liability limits, the Warsaw Convention did not impose suspension of the limits as a sanction. The Court recognized, in other words, that both the duty and the consequences for its violations had to be determined by reference to the international instrument in question, and not based on a free-standing mandate for judges to create whatever enforcement mechanisms they might wish.

The decision of the court below, as did the earlier ruling of the Second Circuit in *Filartiga v. Peña-Irala*, 630 F.2d 876 (1980), flouts this fundamental principle of international law. It leaps from a determination that a norm of customary international law exists to an assertion that a transgression of that norm must result in a right to a civil action against an individual under § 1350. This move is unwarranted and unsound.

The court below conceded, as it must, that no international agreement to which the United States (or, for that matter, any other state) is a party creates a personal right not to be subjected to what it characterized as a transborder abduction.[4] Instead, the court divined the existence of an individual right under customary international law to be free from "arbitrary arrest and detention." It further determined that a violation of this supposed right occurred when a state allegedly carried out an arrest on the territory of another state without the permission or consent of the latter state or express authorization under its

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[4] Indeed, a treaty signed by the United States and Mexico, which has not yet gone into force, would expressly prohibit suits for such abductions. Treaty to Prohibit Transborder Abductions, Nov. 23, 1994, U.S.-Mex., *reprinted in* Michael Abbell, *Extradition to and From the United States*, at A-303 (2002) (cited in *Alvarez-Machain v. United States*, 331 F.3d 604, 619 (9th Cir. 2003).

own law. *Alvarez-Machain v. United States*, 331 F.3d 604, 623 & n.23 (9th Cir. 2003). It then concluded that § 1350 required a court to regard transgression of this freshly minted right as "a tort . . . committed in violation of the law of nations" and therefore actionable in federal court. *Id.* at 631.

In concentrating on the question whether international custom provided general support for the proposition that individuals may not be subjected to arbitrary arrest and detention, the court ignored the question of what consequences international law attached to violations and therefore what constitutes "a tort . . . committed in violation of the law of nations." The evidence cited by the court for the existence of this supposed custom cum law included the European Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature*, Nov. 4, 1950, 213 U.N.T.S. 222, and the African Charter on Human and Peoples' Rights, *opened for signature*, June 27, 1981, 1520 U.N.T.S. 217, instruments to which the United States is manifestly not a party and which in no case provide for a right to a civil action for damages in domestic courts, and the American Convention on Human Rights, *opened for signature*, Nov. 22, 1969, 1144 U.N.T.S. 123, an instrument that the United States has not ratified and which also does not provide for domestic judicial enforcement. 331 F.3d at 621 n.17. The court below also relied on the International Covenant on Civil and Political Rights, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976; for the United States, Sept. 8, 1992), an instrument which the United States in ratifying explicitly stated does not create any judicially enforceable remedies under U.S. law. U.S. Senate Resolution of Advice and Consent to Ratification of the International Covenant on Civil and Political Rights, 138 CONG. REC. S4783 (daily ed. Apr. 2, 1992); REPORT OF THE COMMITTEE ON FOREIGN RELATIONS, INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, S. Exec. Rep.

102-23, at 10 (1992). None of the authorities cited by the court below suggests the existence under international law of a right to sue for damages for arbitrary arrest and detention. Further, the international instruments cited by that court purport to create rights against governments only, not against individual government agents.[5]

The holding of the court below produces a result clearly at odds with the obligations that the United States has assumed. First, by defining an "arbitrary arrest and detention" as comprising all instances where the United States carries out an arrest outside of U.S. territory without the cooperation and consent of local authorities (absent express domestic authority to effect extraterritorial arrests), it in effect creates an individual right not to be subjected to transborder abduction. This result flies in the face of the Ninth Circuit's correct determination that no such U.S. obligation exists. Second, the holding of the court below would appear to make a nullity of the provision of the impending U.S.-Mexican treaty that forbids lawsuits based on abductions. *See* note 4 *supra.* Third, it reverses the determination of the U.S. Senate that the International Covenant on Civil and Political Rights should not have direct effect in U.S. law by authorizing a damages action for violation of that treaty. Fourth, it brings into effect the American Convention on Human Rights without any Senate consent at all. In essence, the Ninth Circuit seeks to impose on

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[5] The United States, of course, has remarkably strong legal protections against arbitrary arrest and detention, based principally on the Fourth and Fourteenth Amendments. *See*, *e.g.*, *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971). These protections, however, do not extend to the actions of foreign actors such as petitioner Sosa. The Ninth Circuit in effect interpreted the international obligations of the United States as comprising the creation of a *Bivens* claim on behalf of all persons, including nonresident aliens, against all governmental actors worldwide. No international treaty, however, creates such an obligation.

the United States, in the guise of "finding" customary international law, an obligation which the political branches of our government have manifestly refused to assume.

A proper reading of § 1350 avoids each of these obviously problematic outcomes. It would not regard § 1350 as an open invitation to develop a law of sanctions for any behavior that might be regarded as violating some aspect of international law. To the contrary, that statute applies only to particular international-law obligations, namely those recognized under international law as giving rise to a civil action in tort for compensation. It does not give federal courts the authority to treat as torts all violations of international law involving aliens, but instead is limited to violations that, as a matter of "the law of nations or a treaty of the United States," constitute a tort. And a tort, both at the time of this provision's enactment and today, means precisely a legally authorized civil action for damages.

II. 28 U.S.C. § 1350 Does Not Authorize Federal Courts to Incorporate International Law into U.S. Domestic Law

We do not dispute that Congress in enacting a statute may choose to incorporate a rule of international law into the law of the United States, and in doing so may specify what sanctions apply.

A review of U.S. practice suggests that Congress and the President, acting together through the legislative process, have bestowed on the federal courts the authority to interpret and apply international law in situations where the exercise of that capacity is consistent with the national interest. They have done so selectively and in response to particular concerns. These specific instances of delegating limited authority to the courts to determine the content of international law would have been superfluous if § 1350 meant what the court below claims it means.

An early and important example of delegation of the

authority to determine international law is the creation of "admiralty and maritime jurisdiction," mentioned specifically in Article III § 2, cl. 1, of the Constitution and established by Section Nine of the Judiciary Act of 1789. As the leading treatise on the subject states,

> "It was assumed at first, and later expressly stated by all authorities, that those courts to which judicial jurisdiction over maritime cases was granted were thereby empowered and obligated to apply to such cases, in the absence of statute, the rules of the general maritime law."

Grant Gilmore & Charles L. Black, Jr., THE LAW OF ADMIRALTY 41 (1957). Thus, in *The Marianna Flora*, 24 U.S. (11 Wheat.) 1, 41 (1826), the Court declared that an unauthorized attack by a private armed vessel "may be punished by all the penalties which the law of nations can properly administer." And at the outset of the twentieth century, this Court similarly observed that a rule of decision "that at the present day, by the general consent of the civilized nations of the world, and independently of any express treaty or other public act" had become an established rule of international law, "is one which prize courts, administering the law of nations, are bound to take judicial notice of, and to give effect to, in the absence of any treaty or other public act of their own government in relation to the matter." *The Paquete Habana*, 175 U.S. 677, 708 (1900) (ascertaining content of international law for purposes of resolving an admiralty dispute). Early on the Court made clear that the rules of decision applicable to admiralty cases did not "arise under" the laws of the United States, except where a statute or treaty expressly displaced the common law. *See American Insurance Co. v. Canter*, 26 U.S. (1 Pet.) 511, 545-46 (1828).

One cannot infer from the establishment of admiralty jurisdiction, in which courts were given a special warrant to apply customary international law based on well-recognized

causes of action in the absence of other legal authority, a general practice of authorizing federal courts to develop international law norms across the board. Article III explicitly authorizes the creation of admiralty jurisdiction.[6] It contains no reference to international law other than treaties, whereas Article I, § 8, cl. 10 clearly assigns to Congress, and not the courts, the power to "define and punish . . . Offenses against the Law of Nations."

Another example of legislative authorization for federal courts to determine general rules of international law is the so-called Second Hickenlooper Amendment. Foreign Assistance Act of 1964, Pub. L. No. 88-633, § 301(2), 78 Stat. 1009, 1013. This provision, a reaction to the decision in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), requires federal courts not to:

> "decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim of title or other right to property is asserted by any party including a foreign state . . . based upon (or traced through) a confiscation or other taking . . . by an act of that state in violation of the principles of international law, . . ."

The Second Hickenlooper Amendment had the effect of authorizing federal courts to employ principles of international law to determine when a state's expropriation of an alien's property would be actionable, in spite of this Court's

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[6] At the time of the founding of the Republic, admiralty already was a well developed body of law of critical importance to a seafaring nation heavily dependent on maritime trade. The United States, then a relatively weak force internationally, had no reason to impose its own rules, but instead sought to reconcile its judicial practice with that of British and continental courts. This concern was particular and pressing, and not relevant to other aspects of international custom.

expressions of reluctance, *Sabbatino*, *supra*, at 824-25, to determine on its own whether such law existed.[7] The courts have honored this command of Congress and, when necessary, have assessed the legality of governmental confiscations. *See*, *e.g.*, *First National City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611 (1983) (international-law-based right of compensation can offset claim on letter of credit); *Banco Nacional de Cuba v. First National City Bank*, 478 F.2d 191 (2nd Cir. 1973) (Cuban seizure of bank property violated customary international law), *on remand from* 406 U.S. 759 (1972); *West v. Multibanco Comermex, S.A.*, 807 F.2d 820 (9th Cir.) (Mexican imposition of restrictions on right to withdraw dollars from local banks did not violate international law), *cert. denied*, 482 U.S. 906 (1987). In each of these cases, however, the underlying right of action was not derived from international law, but rather was "a claim of title or other right to property," as specified in the Second Hickenlooper Amendment, based on state or foreign law.

Again, no inference can be drawn from the enactment of the Second Hickenlooper Amendment that Congress in 1964 – let alone in 1789 – contemplated that persons wronged by any and all violations of international law have an automatic right to sue for damages in federal courts. *Sabbatino* was a case where federal jurisdiction rested on alienage diversity jurisdiction (a suit by an instrumentality of a foreign government against citizens of a U.S. state) and where the defendants interposed a violation of international law as a defense to a claim based on a commercial contract. There is no evidence that Congress believed that victims of expropriations had any rights under

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[7] Congress in 1976 supplemented the power of federal courts to deal with disputes over confiscation of property in violation of international law by authorizing jurisdiction over suits raising these claims against foreign sovereigns. *See* 28 U.S.C. §§ 1330(a), 1605(a)(3).

§ 1350, and the expressions of the *Sabbatino* Court about the undesirability of federal courts entertaining suits to vindicate the rights of owners of confiscated property, if anything, supports the opposite inference.[8]

Yet another instance of the carefully calibrated incorporation of international law principles into U.S. domestic law is the enactment of 28 U.S.C. § 1330 as part of the Foreign Sovereign Immunity Act of 1976 (FSIA). Before enactment of the FSIA, foreign sovereign immunity in the United States rested on decisional law rather than a statute or treaty. Congress decided to supplant that body of law with the FSIA, which codifies the immunity enjoyed by foreign sovereigns and authorizes federal jurisdiction over all suits brought against foreign sovereigns where an exception to immunity exists. As this Court recognized in *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480 (1983), the enactment of 28 U.S.C. § 1330 did not create any new rules of decision governing the conduct of foreign sovereigns, but rather established federal standards for determining when American courts could assert jurisdiction over claims arising under foreign, international,

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[8] This Court stated that:

> "There are few if any issues in international law today on which opinion seems to be so divided as the limitations on a state's power to expropriate the property of aliens. . . It is difficult to imagine the courts of this country embarking on adjudication in an area which touches more sensitively the practical and ideological goals of the various members of the community of nations."

Sabbatino, *supra*, at 824-25. Under the reasoning of the court below, however, a federal court would be obligated to hear all such claims, at least if asserted by aliens, even if Congress never had enacted the Second Hickenlooper Amendment.

state, or federal law asserted against foreign sovereigns.[9] Of special relevance, in light of the Ninth Circuit's assertion that § 1350's grant of jurisdiction implies the authority to create a federal common law of international human rights, is the evident capacity of Congress to create federal court jurisdiction pursuant to the "arising under" prong of Article III, § 2, cl. 1, without at the same time conferring on the federal courts any authority to create a federal common law of international relations.

Another illustration of legislative incorporation of international law into domestic law involves the implementation of trade agreements. Section 102(b)(2), (c) of the North American Free Trade Agreement Implementation Act of 1993, *codified at* 19 U.S.C. § 3312(b)(2), (c), recognizes the legal force of a particular international agreement, *i.e.*, the North American Free Trade Agreement, but restricts domestic enforcement to suits for injunctive relief brought solely by the United States government. Section 102(b)(2)(A), (c) of the Uruguay Round Agreements Act of 1994, *codified at* 19 U.S.C. § 3512(b)(2)(A), (c), achieves precisely the same result, albeit with somewhat more precise and elaborate language, with respect to the Uruguay Round Agreements. These instruments provide rules of decision for lawsuits in the United States, but only if invoked by the federal government in the course of seeking injunctive relief against state and local governments. This clearly expressed desire of Congress runs contrary to the lower court's interpretation of § 1350, which, for example,

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[9] In *Verlinden* the Court in particular recognized that the creation by Congress of a federal remedy for a claim arising against a foreign sovereign presented a question "arising under . . . the laws of the United States" sufficient to sustain jurisdiction under Article III, § 2, cl. 1, even though the substantive rule of decision on which a claim would be based did not arise under U.S. law. 461 U.S. at 492-97.

might lead to a tort suit for seizure of property by a customs official (characterized as an unjustified injury to property in violation of customary international law) if that official could be shown to be acting inconsistently with one of the Uruguay Round Agreements and if a court were prepared to infer the existence of a rule of customary international law simply from the existence of an international agreement on the subject.[10]

Next, we consider the Torture Victim Protection Act of 1991 (TVPA), *codified as* 28 U.S.C. § 1350 note. Congress in that legislation adverted precisely to the conduct at issue in *Filartiga v. Peña-Irala*, 630 F.2 876 (1980), namely extrajudicial killing and torture carried out under authority of law in violation of fundamental and widely shared concepts of decency. As noted above, Congress referred to international

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[10] Lest this extension of the reasoning of the court below seems too hypothetical, we would note that a number of lower court decisions did recognize a right to bring a civil action pursuant to the General Agreement on Tariffs and Trade (GATT), the predecessor to the Uruguay Round Agreements. *See* Territory of Hawaii v. Ho, 41 Haw. 565 (1957); Baldwin-Lima-Hamilton Corp. v. Superior Court, 208 Cal. App. 2nd 803, 25 Cal. Rptr. 798 (Dist. Ct. App. 1962). For commentators who applauded this outcome and called for its extension, see Ronald A. Brand, *The Status of the General Agreement on Tariffs and Trade in United States Domestic Law*, 26 STAN. J. INT'L L. 479 (1990); Robert E. Hudec, *The Legal Status of the GATT in the Domestic Law of the United States*, in THE EUROPEAN COMMUNITY AND GATT 187 (Meinhard Hilf, Francis G. Jacobs & Ernst-Ulrich Petersmann eds. 1986); John H. Jackson, *The General Agreement on Tariffs and Trade in United States Domestic Law*, 66 MICH. L. REV. 260 (1967); Note, *The United States Participation in the General Agreement on Tariffs and Trade*, 61 COLUM. L. REV. 505 (1961). Moreover, we note that the court below found a way, through its interpretation of § 1350, to provide a private action for damages to enforce the International Covenant on Civil and Political Rights despite the express declaration by the Senate, with the concurrence of the President, that such actions were not authorized. 331 F.3d at 620-21. Undoubtedly, ingenious courts similarly could find a way around the express command of 19 U.S.C. § 3512(b)(2)(A), (c).

standards to define an actionable extrajudicial killing. At the same time, however, Congress provided its own clear and precise definition of actionable torture, rather than referring to any definition found in various international conventions and instruments. If § 1350 meant what *Filartiga* and the court below claimed, this action by Congress would have been unnecessary and superfluous. Yet Congress enacted the TVPA precisely because it believed that victims of extrajudicial killing and torture carried out by the agents of foreign states otherwise might not have access to the federal courts to sue their tormentors.[11]

Finally, we refer to the modern practice of the President and the Senate, when ratifying international treaties dealing with human rights, to state expressly that those instruments shall not give rise to a right to a civil action in U.S. courts.[12] President Carter first used this approach to meet objections to such treaties, and every subsequent administration, in cooperation with the Senate, has followed this practice. The clearly expressed concern of the political branches is that opportunistic

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[11] We say "might," because even before the enactment of the TVPA litigants could have brought claims in federal court to the extent that they satisfied the requirements of federal diversity jurisdiction under 28 U.S.C. § 1332. In cases such as *Filartiga*, the presence of aliens on both sides and no citizen of a U.S. state on either side would foreclose, as a constitutional matter, diversity jurisdiction. *Mossman v. Higginson*, 4 U.S. (4 Dall.) 12 (1800).

[12] For a review and defense of U.S. practice, see Curtis A Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. PA. L. REV. 399 (2000). For criticism of U.S. practice, see Louis Henkin, *U.S. Ratification of Human Rights Treaties: The Ghost of Senator Bricker*, 89 AM. J. INT'L L. 341 (1995). For a review of the practice of other states, see Catherine J. Redgwell, *Reservations to Treaties and Human Rights Committee General Comment No. 24(52)*, 46 INT'L & COMP. L.Q. 390. 391-404 (1997); Catherine Redgwell, *Universality or Integrity? Some Reflections on Reservations to General Multilateral Treaties*, 1993 BRIT. Y.B. INT'L L. 245, 269-78.

litigants would exploit a right to sue for damages to alter the balance of robust protection of individual rights already existing under U.S. law, in spite of the conviction of the President and the Senate that the United States already meets its obligations under these instruments.

We provide this truncated and necessarily incomplete survey of U.S. practice regarding international law to show that the President and Congress incorporate international law selectively, and do not regard the federal judiciary as endowed with an across-the-board warrant to determine the content, scope and remedies of international law obligations in all instances where a dispute otherwise exists.[13] On occasion Congress authorizes the judiciary to combine international rules of decision with domestic remedies, but U.S. practice also evidences a considered wariness about this practice and an unwillingness to authorize wholesale judicial enforcement of international rules. The interpretation of § 1350 by the court below is in clear opposition to this practice.

III. The Court Below's Interpretation of 28 U.S.C. § 1350 Would Hinder U.S. Participation in the Sound Development of International Law.

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[13] Although these examples focus on the participation of Congress in the implementation of international law, the President, acting within the scope of authority delegated by the Congress and his independent Article II powers, can also implement international law. For example, in Article 15 of the 1920 Articles of War, Congress recognized the jurisdiction of military commissions over "offenses that by statute *or by the law of war* may be triable by such military commissions." Act of June 4, 1920, art. 15, 41 Stat. 759, 790 (contemporary version incorporated in the Uniform Code of Military Justice, at 10 U.S.C. § 821) (emphasis added). In establishing military commissions, Presidents have referred to this provision, most recently in Military Order of November 13, 2001, 66 FED. REG. 57,833 (Nov. 16, 2001). This example illustrates how the President, acting as Commander in Chief, may maintain rules derived from customary international law in proceedings necessary to the conduct of war. *See Ex parte Quirin*, 317 U.S. 1, 30 (1942).

The decision of the court below opens up the prospect of virtually all violations of international law being converted into actionable torts within the jurisdiction of the federal courts, subject only to the limitation that *in personam* jurisdiction exist over the defendant. Under its reading of § 1350, aliens would have the right to sue other aliens for injuries inflicted anywhere in the world. The prospect of such suits in U.S. courts, we submit, will significantly interfere with the capacity of the United States to participate in the salutary development of international law.

At the outset, it is important to keep in mind the distinctive features of the U.S. civil litigation system:

–The civil jury trial as we know it is unheard of elsewhere in the world, save for rarely used discretionary trials in Canada and juries in libel actions in the United Kingdom and other Commonwealth countries.

–A person alleging injury can obtain the services of a lawyer without extending any money and normally will not be liable for the defendants' legal fees if the suit is unsuccessful. Most jurisdictions elsewhere, by contrast, limit or forbid contingency fees, and many impose attorneys' fees on the losing party. Those foreign jurisdictions that provide for lawyers without cost do not give those lawyers an economic stake in the outcome of the litigation.

–A person bringing suit in a U.S. federal court has a right to sweeping pretrial discovery under the Federal Rules of Civil Procedure. We are not aware of any other jurisdiction that accords parties comparable rights, and foreign courts such as the British House of Lords have expressed concern about and opposition to the scope of U.S. pretrial

discovery.[14]

–Generous U.S. rules on the recognition of class actions allows the multiplication of claims to augment the value of a lawsuit; the practice of most if not all other jurisdictions is much more restrictive.

–Finally, U.S. damages rules, which recognize open-ended compensation for pain and suffering and in some cases punitive damages, often lead to far greater awards than those available in other civil justice systems.

Taken together, these features make recognition of a right to sue for damages in a U.S. court a matter of great economic as well as political significance, especially in relation to rights to sue in other jurisdictions.[15]

Confronted with a risk that the recognition of any particular obligation under international law may lead to costly litigation, the United States and other countries with which it negotiates face a serious dilemma. On the one hand, they may perceive areas of cooperation that would be to their mutual benefit and would like to rely on law to reassure each other of the seriousness of their commitment to cooperation. On the other hand, they may not want that commitment to invite the risk of costly private litigation and hefty jury verdicts. If they were unable to ensure that any agreement reached would not result in this risk, some otherwise valuable international agreements

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[14] *E.g.*, *Rio Tinto Zinc Corp. v. Westinghouse Electric Corp.*, [1978] A.C. 547, 562-63 (H.L.) (British obligation under Hague Convention on Taking of Evidence Abroad does not extend to cooperating with request for interviewing witnesses and obtaining documents that lacks the specificity required under British law, even though requests conformed to U.S. Federal Rules of Civil Procedure).

[15] We make these observations not to suggest any criticism of any of these aspects of the U.S. civil litigation system, but merely to emphasize the significance of recognizing a civil action under U.S. law in comparison to recognition of such an action under the law of other jurisdictions.

would not come about.

This argument is not speculative, but rather is confirmed both by history and contemporary events. Consider first the various human rights treaties that the United Nations sponsored in the decades after its founding. These include the Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951; for the United States, Feb. 23, 1989); the International Convention on the Elimination of All Forms of Racial Discrimination, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969; for the United States, Nov. 20, 1994); and the International Covenant on Civil and Political Rights, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976; for the United States, Sep. 8, 1992). The reaction of the U.S. Senate to the promulgation of these instruments, which representatives of the U.S. government had helped to negotiate, was that they raised the specter of legal challenges to aspects of the U.S. legal system that were either already undergoing sweeping change (such as de jure racial segregation) or were widely accepted but also controversial (such as the death penalty). Not only did the Senate initially refuse to consent to these conventions, but it seriously considered a constitutional amendment that would have forbidden international law from having any domestic effect in the United States, absent an incorporating act of Congress. The Eisenhower Administration thwarted the effort to constitutionalize this issue, but only by representing to the Senate that it would not adhere to any international agreement that had as its purpose domestic law reform.

The United States eventually became a party to all these covenants, but only after the President and the Senate reached agreement that various reservations, understandings, and declarations would limit their legal force and in particular would foreclose the possibility of civil actions by private persons in U.S. courts. Reassured by these commitments, the

Senate ultimately gave its consent to the treaties.[16] It is inconceivable that the President and the Senate meant these restrictions to be of no effect, yet the decision of the Ninth Circuit achieves exactly that result.

Another instance of the tension between international law creation and its enforcement through civil actions involves the Uruguay Round Agreements, which the United States signed in 1994 and which, pursuant to the Uruguay Round Agreements Act, entered into force for the United States on January 1, 1995. Uruguay Round Agreements Act of 1994, 108 Stat. 4809 (codified at 19 U.S.C. § 3511 *et seq.*) As we observed above, note 10 *supra,* some lower courts had indicated that the predecessor agreement, the General Agreement on Tariffs and Trade, had direct effect in U.S. law, and considerable academic authority urged that conclusion. Over the years, the United States saw the need for a more extensive set of agreements covering not just tariff reduction and nondiscrimination against imports, but a wide range of international economic issues. These agreements would affect many U.S. regulatory initiatives, including those aimed at public health and safety, that might be viewed in some quarters as *de facto* trade barriers. Congress appreciated the importance of these agreements, but also was deeply concerned about private

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[16] *See*, *e.g.*, Treaties and Executive Agreements: Hearings on S.J. Res. 1 and S.J. Res. 43 before a Subcomm. of the Senate Comm. on the Judiciary, 83d Cong.,1st Sess. 825 (1953) (statement of Secretary Dulles); U.S. State Dep't Circular No. 175, ¶ 2 (Dec. 13, 1955), *reprinted in* 50 AM. J. INT'L L. 784, 785 (1956); Four Treaties Relating to Human Rights, Hearing before the Comm. On Foreign Relations, 96th Cong., 1st Sess. 21 (1979) (testimony of Deputy Secretary of State Christopher); U.S. Senate Resolution of Advice and Consent to Ratification of the International Covenant on Civil and Political Rights, 138 CONG. REC. S4783 (daily ed. Apr. 2, 1992); REPORT OF THE COMMITTEE ON FOREIGN RELATIONS, INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, S. Exec. Rep. 102-23, at 10 (1992).

litigants exploiting them to challenge legitimate regulatory programs at the federal and state level. The compromise that made adoption of these agreements possible is contained in 19 U.S.C. § 3512(b)(2)(A), (c), which forbids U.S. courts from enforcing these agreements except in the case of a suit for injunctive relief brought by the United States.

Finally, lawsuits recently filed in several U.S. district courts illustrate the destabilizing potential of the lower court's interpretation of § 1350. The end of the South African apartheid regime and the peaceful transition to majority rule in that country were extraordinary achievements. Many observers believe that the truth and reconciliation process that accompanied this transition was essential to its success. A broad cross section of political scientists and lawyers have seen this experience as a model for other societies making a transition from a repressive past to a free and democratic future. And an important part of the truth and reconciliation process was an amnesty from civil as well as criminal liability for those who cooperated with the designated authorities and made a full disclosure of their role in the maintenance of apartheid.[17]

In the face of this delicate and important political compromise, several persons purporting to act on behalf of victims of apartheid in 2002 brought suits for damages under § 1350 against a number of multinational companies said to have been complicit in the maintenance of the former regime.

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[17] South Africa's Constitutional Court upheld the legislation providing for this amnesty in the face of the challenge that it allowed the architects of apartheid to escape full accountability. The court justified the amnesty as necessary for promoting the country's peaceful transition to democracy. Constitutional Court of South Africa, the Azanian Peoples Organization and Others v. the President of the Republic of South Africa and Others, CCT 17/1996, 25 July 1996. For a full discussion, see Kristin Henard, *Post-Apartheid South Africa: Transformation and Reconciliation*, 166 WORLD AFFAIRS 37 (2003).

In re South African Apartheid Litigation, MDL No. 1499 (S.D.N.Y.). The legal theory of these cases would extend not just to companies that did business in South Africa, but to anyone involved in administering apartheid, including precisely those persons who received official amnesties as part of the peace and reconciliation process.

It is difficult to overstate the potential for mischief that such lawsuits have, but under the interpretation of § 1350 propounded by the court below, as well as by the Second Circuit in *Filartiga*, such cases may be quite properly brought in a U.S. court, so long as that court is willing to infer the existence of a rule of customary international law simply from the fact that there exists a treaty addressing the same subject as the putative customary law rule. Experience over the last two decades demonstrates the desirability of nonviolent ends to authoritarian regimes, which on occasion has involved the establishment of some kind of immunity for persons who might otherwise thwart peaceful change. We do not mean to endorse any particular amnesty arrangement, but only observe that § 1350, as interpreted by the court below, could threaten to unravel many transition strategies adopted by emerging democracies.[18]

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[18] We recognize that statutes enacted in a handful of countries, in particular Belgium and Spain, appear to allow the public authorities to pursue criminal charges against former members of authoritarian regimes who might have benefitted from an amnesty. To the best of our knowledge, however, none of these jurisdictions allows private litigants to bring a civil action for damages against such persons. Furthermore, the scope of these countries' efforts is limited by the reach of their extradition treaties. In particular, the United Kingdom has interpreted its extradition treaty with these countries as not authorizing rendition of a person unless he or she is accused of an offense that would violate the statutory law of the United Kingdom, including those provisions specifying extraterritorial jurisdiction. In the particular case of the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, the House of Lords has ruled that it is bound by the

IV. Other States Do Not Permit Private Civil Suits for Damages Based Solely on Alleged Violations of General International Law.

A review of the practice of other countries establishes that there is no custom of providing a civil action in domestic courts for violations of general international law. To the contrary, authorization of civil suits by private persons for damages are relatively infrequent, and always rest on specific, particular, and express treaty or statutory commitments. Those treaties and statutes that do explicitly authorize civil actions reflect a background assumption that violations of international law normally do not give rise to such a right.

The most important international treaty contemplating some private remedies, including private suits for damages, is the European Convention for the Protection of Human Rights and Fundamental Freedoms. This instrument in many respects tracks the personal guarantees and protections found in the U.S. Constitution, in large part because it came into being in the aftermath of World War II. Adverting to the question of compensation for injuries, Article 13 states:

> "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

Article 41 of that instrument, in describing the function of the European Court of Human Rights, in turn states:

"If the Court finds that there has been a violation of the

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terms of the Act of Parliament implementing that Convention. Accordingly, it will not order the extradition of anyone accused of torture occurring before the adoption of that Act, which does not have *ex post facto* effect. *Regina v. Bow Street Metropolitan Stipendiary Magistrate and others*, ex parte *Pinochet Ugarte (No. 3)*, [2000] 1 A.C. 147 (H.L.).

Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

Read in tandem, these provisions describe the Convention's remedial scheme, and in particular its approach to civil damages for violations. The jurisprudence of the European Court makes it clear that Article 13 imposes an obligation to provide an "effective" remedy, but states have considerable leeway in choosing how to investigate, assess, and compensate for Convention violations. The European Court has held that a state may meet this obligation by providing access to a civil action for damages as a means of compensation, and in at least one recent case has held that a substantial truncation of a right to a civil action, in the absence of other means of recourse against governmental actors, may constitute a violation of Article 13. *E. v. United Kingdom* (App. No. 33218/96), (Nov. 26, 2002) (awarding damages under Article 43 because British law at the time did not appear to provide a right to a civil action for negligence by child protection authorities). At the same time, the European Court has made clear that the existence of a right to a civil action against official actors is a sufficient, but not necessary, means for a state to fulfil its obligation under Article 13. *Id.*

The European Convention does not require that states directly incorporate the norms of the Convention into domestic law, as long as domestic law effectively remedies Convention violations. In practice, not all parties do directly incorporate the Convention into civil law or make Convention violations actionable in the domestic courts. The United Kingdom, by the Human Rights Act 1998, did take this step, effective as of October 2000. One should note, however, that Parliament limited that enactment and did not make actionable violations of international law other than the European Convention. *See*

Human Rights Act, 1998, c. 42 (Eng.).

British practice is reflected in other Commonwealth countries. Justice Kirby, in a concurring opinion, recently observed:

> "The main impact of the principles of universal human rights upon the development of tort law in this country, as in England and elsewhere, lies in the future."

Brodie v. Singleton Shire Council, 186 Australian L. Rptr. 145, 211 (Australian High Ct. 2001) (referring to international standards as support for particular interpretation of Australian common law). Similarly, although Canadian courts have referred to international human rights law as an aid to interpreting domestic law, including the development of domestic torts, they have not recognized any cause of action for civil damages based directly on international human rights law. *See*, *e.g.*, *Schreiber v. Canada*, 216 Dom. L. Rptr. 513, 533-34 (2002) (Sup. Ct. Can.) (speculating that violations of human rights law might meet statutory requirements for waiver of sovereign immunity, but finding no violation).[19]

A brief review of the practice in non-Commonwealth jurisdictions indicates that civil suits to seek damages for violations of international human rights law are virtually nonexistent. Some countries do allow victims of human rights violations to take part in criminal proceedings and to seek compensation in the course of those proceedings. This procedure is seen as satisfying the requirements of Article 13

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[19] For commentary expressing a desire for Commonwealth courts to follow *Filartiga* while acknowledging that this has not happened, see TORTURE AS TORT – COMPARATIVE PERSPECTIVES ON THE DEVELOPMENT OF TRANSNATIONAL HUMAN RIGHTS LITIGATION (Craig Scott ed. 2001); Human Rights Committee, International Law Association (British Branch), *Report on Civil Actions in the English Courts for Serious Human Rights Violations Abroad*, 2 EUR. HUM. RTS. L. REV. 129 (2001).

of the European Convention. But such rights are derivative of and depend on a prosecutor's decisions to bring criminal charges. Beth Stephens, *Translating* Filártiga*: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations*, 27 YALE J. INT'L L. 1, 18-21 (2002).

In sum, there is no international practice that treats violations of general norms of international law, and specifically the customary international law of human rights, as creating a right to a civil action for damages. Such rights to civil actions as exist rest on specific and limited treaty commitments, not general norms of international law. The interpretation of § 1350 by the court below not only does not reflect international practice, but in some respects may place the United States at risk of being found in violation of international law.[20]

V. The Argument that 28 U.S.C. § 1350 Provides a Cause of Action for Private Civil Suits Based on Alleged Violations of International Law Cannot Be Reconciled with the 190-Year Gap in That Statute's History.

A remarkable fact about § 1350 is that this provision, adopted by Congress in 1789 as part of Section Nine of the

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[20] A refusal to recognize the immunity from suit of a high government official and the exercise of jurisdiction over activity with no connection to the forum state may constitute a violation of international law. The International Court of Justice recently has stated that a failure to respect the immunity from suit of high government officials violates international law. *Democratic Republic of the Congo v. Belgium*, [2002] I.C.J. ___ (criminal arrest warrant for Minister of Foreign Affairs). That decision did not resolve the issue of whether Belgium's assertion of universal jurisdiction also violated international law, but in the face of international criticism Belgium has modified its statute to make it applicable only to conduct having a jurisdictional nexus with that country. Loi relative aux violations graves du droit international humanitaire. (Loi du 5 August 2003) in Moniteur Belge, Aug. 7, 2003, p. 40506. Suits under § 1350 have the potential to raise both of these problems.

Judiciary Act, had no impact on U.S. litigation until its invocation by the Second Circuit in *Filartiga v. Peña-Irala*, 630 F.2d 876 (1980). One would have thought that, if the dramatic and sweeping implications of the reading assigned to the statute by *Filartiga* and its progeny corresponded in any way to the expectations of those who enacted this statute, that *someone* would have sought civil liability for a violation of the law of nations in the preceding 190 years. The absence of any record of such litigation weighs heavily against arguments for the correctness of that interpretation.

Our review of the case law suggests that there is no pre-1980 case where a federal court unambiguously based its jurisdiction on § 1350, and very few such cases where litigants sought this outcome.

Not long before *Filartiga*, the Second Circuit described § 1350 as a "kind of legal Lohengrin" (a reference to the magical knight who could not reveal his name or origin) in the course of rejecting an argument that an alleged fraud perpetrated on foreign investors was actionable under that statute. *IIT v. Vencap*, 519 F.2d 1001, 1015 (2nd Cir. 1975). This Court itself has ascribed to later sessions of Congress uncertainty over what, if anything, § 1350 does. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 436 (1989).[21]

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[21] A review of the secondary literature in the period before the *Filartiga* decision is not much more helpful in explaining the original understanding of § 1350. Professor Henkin's treatise did not discuss the provision, aside from speculating in a footnote that the statute suggests that Congress in 1789 may have believed that the "law of nations" was part of the "laws of the United States." Louis Henkin, FOREIGN AFFAIRS AND THE CONSTITUTION 459 (1972). The treatise does not explain the basis for this inference, which seems inconsistent with the clear contemporaneous understanding of Congress that federal courts could apply the law of admiralty without that law becoming the law of the United States. The first tentative draft of the RESTATEMENT (THIRD)

Although the intention of Congress in enacting the portion of Section Nine of the Judiciary Act of 1789 that became § 1350 is murky at best, a few points are reasonably clear. First, Congress in that Act had no intention of exercising its power under Article III to create general "federal question" jurisdiction. It did not do so until 1875. Act of Mar. 3, 1875, § 1, 18 Stat. 470 (current version codified at 28 U.S.C. § 1331). Section Nine of the Judiciary Act, which deals with the district courts, focuses principally on admiralty jurisdiction, with cases "arising under" federal law limited to lesser federal crimes, challenges to seizures, penalties and forfeitures by the United States, and suits in which the United States was a plaintiff. Section Eleven of the Judiciary Act established diversity jurisdiction, but in the circuit courts and subject to a jurisdictional floor of $ 500 in dispute.[22] There is no evidence at the time that Congress believed that an action for a tort in violation of international law arose under federal law, and clear evidence that it believed that the law applied in admiralty does not arise under the laws of the United States. Second, it seems extremely doubtful that Congress believed that a suit by an alien against another alien would satisfy the requirements of diversity jurisdiction under Article III, given this Court's

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OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (1980), which antedated *Filartiga*, made a similar passing reference to § 1350 and in at least some respects seems to treat that provision as having a much more limited scope than did *Filartiga*. *See* Paul B. Stephan, *Courts, the Constitution, and Customary International Law: The Intellectual Origins of the Restatement (Third) of the Foreign Relations Law of the United States*, 44 VA. J. INT'L L. 33, 44 nn. 38-39 (2003) (noting tentative draft's implication that statute would apply only to violations taking place on territory of United States).

[22] Section Eleven also gave the circuit courts jurisdiction over more serious crimes under the laws of the United States, defined as those where the penalty exceeded a fine exceeding $ 100, imprisonment greater than six months, or corporal punishment greater than thirty stripes of the lash.

emphatic and conclusive rejection of such a proposition not many years after enactment of the Judiciary Act. *Mossman v. Higginson*, 4 U.S. (4 Dall.) 12 (1800).[23]

An annotation in the Statutes of Large, which connects the language of the Judiciary Act that became § 1350 to a circuit court opinion by Justice Story, provides a slight hint of what Congress might have believed it accomplished with this provision. In the opinion, Story stated:

> "The district court as a court of admiralty and maritime jurisdiction, may entertain suits for all torts, damages, and unlawful seizures, committed upon the high seas, and other navigable waters, where the tide ebbs and flows."

Burke v. Trevitt, 4 Fed. Cas. 746, 747 (C.C.D. Mass. 1816), The suggestion, admittedly subtle, is that Congress may have thought that what is now § 1350 was necessary to ensure that admiralty courts heard not only disputes over the ownership of property, including salvage, but also all torts, including personal injuries, occurring within the maritime jurisdiction of the United States.

Recent historical scholarship also indicates that Congress understood that, to the extent that the language that became § 1350 authorized suits not encompassed by the grant of admiralty jurisdiction under Article III of the Constitution, Congress intended that the suit satisfy the requirements of Article III's diversity jurisdiction. This meant, as later expressed in *Mossman v. Higginson*, 4 Dall. 12 (1800), that the claim would have to be brought against a U.S. citizen. *See* Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT'L L. 587 (2002). So understood, this portion of

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[23] We note in passing that one of the members of the *Mossman* Court was Justice Ellsworth, who as a U.S. Senator had been one of the drafters of the 1789 Judiciary Act.

Section Nine of the 1789 Act was not redundant, even given the authorization of general diversity jurisdiction under Section Eleven of the 1789 Act, because Section Nine authorized jurisdiction in the district courts (with four sessions annually) rather than in the circuit courts (with only two sessions annually) and did not impose a dollar-amount limit. In sum, Congress expected that suits seeking compensation for a tort in violation of a treaty or the law of nations would have to satisfy the requirements of either admiralty or diversity jurisdiction under Article III, but would not have to meet the more onerous requirements of Section Eleven.

What we can state with confidence is that no one has come forward with persuasive evidence that Congress in 1789 believed it had authorized the federal courts to exercise general jurisdiction over claims based on international law or to apply international law as the law of the United States. No federal court held so until 1980. Decisions by several of the courts of appeals since then have purported to find in the statute both jurisdiction to hear claims and an authorization to develop a federal common law of international human rights, but none of these decisions has seriously attempted to relate the authority asserted to the intent of Congress or to explain the 190-year gap in the record. Rather, they have based their arguments largely on policy arguments for federal court enforcement of international law. Those arguments, for the reasons given above, are unsound.

CONCLUSION

The judgement of the court of appeals should be reversed.

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