CUSTOMARY INTERNATIONAL HUMAN RIGHTS LAW IN DOMESTIC COURT DECISIONS

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My paper examines domestic court choices among operational rules as guides to decision in human rights litigation, with emphasis on U.S. federal courts, when customary international human rights law is invoked as the basis for jurisdiction, causes of action or remedies.

United States courts deeply resist "incorporating" the developing customary international human rights law, even when there is a statutory basis.1 There is little evidence that courts in the United States are influenced much by such new customary law by itself, without explicit approval by the political branches,2 despite a powerfully-supported litigation strategy of human rights groups beginning in the late 1970s and a strong tradition of incorporating customary international law as part of United States law.3 Traditional customary international law, however, continues to be accepted without express incorporation unless directed otherwise by the political branches.

While I enthusiastically agree with the renewal of importance of the international legal process movement, especially as articulated in Harold Koh's thesis about infusing public values in transnational litigation,4 I view the trends in international human rights litigation in the United States less optimistically. There is a clear preference in domestic adjudication for presuming that traditional customary international law (whether considered horizontal or vertical, jurisdictional or decisional, public or private) is part

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of U.S. law, but against presuming that customary international human rights law is part of U.S. law without enactment.\(^5\) The modest insight offered here in my essay suggests using a post-realist choice of law analysis in the transnational legal process for human rights litigation in all operational decisions (procedural and substantive) in case-by-case adjudication before U.S. courts in which customary international human rights law is invoked alongside forum law and foreign law. The judge then cannot duck the substantive public law values involved by resisting allegiance to a universal cosmopolitan public order. The interests in choice of law decisions would include comity or mutual respect in international cooperation in administering the overlapping consensus about those human rights values most universally accepted by the national systems of the community of nations.

What legal policy should a domestic court judge consider when emerging world-wide demands for universal respect for human rights have crystallized into customary international law traditionally considered part of U.S. law? In what respect should domestic courts act as autonomous agents of the emerging international legal order by internalizing these new expectations from the international community of states as a whole, thus helping to reshape the traditional internal political relationship of citizen to state? Holding officials of a state accountable to the larger community of states for gross abuses of human rights law in relation to the state’s own citizens is a major claim to international competence by domestic courts which is likely to place them at odds with national political authority.\(^6\) Human rights touch

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\(^{5}\) Professor Koh equates transnational human rights litigation in U.S. courts with transnational commercial litigation. *Id.* at 2379 n.167. I see a difference in the underlying substantive preferences courts have adopted in using customary international law as a baseline for decisions or presumptions in economic or inter-state sovereignty questions in contrast to those in human rights between individuals and their governments. *See infra*, Section I(B).

\(^{6}\) The proper function of domestic courts in the international legal order is a familiar question in the 20th century. *See Richard A. Falk, The Role of Domestic Courts in the International Legal Order* 75 (1964) (deference to foreign law is proper when diversity is legitimate—as in economic or social laws; when diversity of values of two national societies is illegitimate—as in allowing abuse of genuinely universal human rights—domestic courts properly fulfill their role by refusing to further the policy of foreign or domestic law and by giving maximum effect to universality); Richard B. Lillich, *The Proper Role of Domestic Courts in the International Legal Order*, 11 Va. J. Int’l L. 9, 33 (1970) (preferring an activist role of domestic courts both in economic and in human rights questions by refusing deference either to foreign law or the domestic executive and by applying international law directly in litigation).
the "very foundations of a regime, on its sources and exercises of power, on its links to its citizens or subjects," making it a "dangerous issue." 7

I. STRATEGIES, TRENDS AND NEW ALTERNATIVES

Scholars, governments and courts traditionally have used two doctrines to deal strategically with the tension between international and municipal law. These doctrines are the incorporation of international law into municipal law (monism) and the transformation of one system of rules into that of a different, incommensurable other system (dualism). 8

A. Strategies

Commonly-accepted wisdom for incorporating international human rights law into United States municipal law is uniformly described in three ways: by direct incorporation through self-executing treaties or by statute; by direct incorporation of customary international human rights law as part of U.S. or common law; and by indirect incorporation or "infusion" of human rights

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law through interpretation of existing domestic law. With poor success in ratification of human rights treaties without non-self-executing or other reservations, and with limited success with statutes recognizing causes of action grounded in international human rights law, recent litigating strategy has focused upon expanding the existing statutory base by interpretation of the Alien Tort Statute, the Torture Victim Protection Act of 1991, the Foreign Sovereign Immunities Act, the Federal Tort Claims Act and 42 U.S.C. § 1983 to cover remedies for abuses of internationally protected human rights.

A second strategy has been to use customary international human rights law for causes of action through U.S. or common law without a statutory base. This approach has taken several forms. One advances the argument from incorporation as part of U.S. or common law, absent statutes or constitutional provisions in conflict, to create an actionable international tort akin to a Bivens-type constitutional tort. A second has been more adventuresome, arguing that some norms of customary international law are jus cogens, the highest status or quality (peremptory norms of the highest

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14 See A.C.L.U. Int'l Human Rights Task Force, *International Civil Liberties Report* (1994) for a series of reports on strategies involving these statutes as well as customary international human rights law and treaties. See also Paust, supra note 9 (comprehensive survey of use of international law to interpret statutes and constitutional provisions, claiming steadily increasing interpretive reliance on customary international law).

15 Paust, supra note 9.

16 Handel v. Artukovic, 601 F. Supp. 1421, 1428 (C.D. Cal. 1985) (rejecting Bivens-type cause of action under customary international law for crimes against humanity in Croatia during World War II in absence of affirmative legislation, "the critical right of the sovereign to determine whether and how international rights should be enforced in that municipality").
order and greatest acceptance by the community of states as a whole). With this status, they are so powerful that, according to some commentators, they overcome defenses based upon sovereign or head of state immunities and may even limit constitutional powers internally. Jus cogens was invoked (but found not established) as basis for American citizens’ civil suit against their own government to recover for injuries growing from U.S. responsibility for its breach of important peremptory norms forbidding the use of coercion in Nicaragua. While some language as obiter dictum in several decisions of courts of appeal states that U.S. courts have recognized the concept of jus cogens as part of U.S. law, not a single case has granted a remedy on that basis alone without being overturned. This kind of


[T]he use of collective coercion against the human person under assumptions of state sovereignty poses cosmopolitan questions. What justification must officials and elites provide without the immunity of official orders? Jus cogens norms increase the need for justification for otherwise legitimate, collective coercion to be made directly to the larger international society whose demands and expectations may not be reflected adequately by governments.

Id. at 647.


20 In Princz v. F.R.G., 26 F.3d 1166 (D.C. Cir. 1994), overturning Judge Sporkin’s reliance below on jus cogens, Judge Ginsburg’s answer by footnote to Judge Wald’s dissent (strongly recommending the incorporation of jus cogens norms as customary international law as a basis for both in personam and subject matter jurisdiction) seems to summarize the dominant view in the federal courts:

While it is true that “international law is a part of our law,” Paquete Habana, 175 U.S. at 700, 20 S. Ct. at 299, it is also our law that a federal court is not competent to hear a claim arising under international law absent a statute granting such jurisdiction. Judge Wald finds that grant through a creative, not to say strained, reading of the FSIA against the background of international law itself.

We think that something more nearly express is wanted before we impute to the Congress an intention that the federal courts assume
advocacy is highly risky, for the effective results of the overwhelming rejection of particular cases has been to raise to an almost impossible threshold the human rights victims’ task of demonstrating the existence of other norms of customary international human rights law when a statutory basis does exist.

In fact, several United States courts of appeals now seem to have adopted the exceedingly onerous burden of proving the existence of a norm of *jus cogens* quality as the threshold to limit tort claims for violations of the law of nations under the Alien Tort Statute. The burden upon human rights victims is now to establish that the tortious breach of the law of nations is “of a norm that is specific, universal, and obligatory” and the statute may apply only to “shockingly egregious violations of universally recognized principles of law.” The Alien Tort Statute, however, does not say that. Its text refers only to tortious breach of the law of nations (or a treaty), a norm shown by reference to traditional sources of international law whether custom, treaty or general principles.

jurisdiction over the countless human rights cases that might well be brought by the victims of all the ruthless military juntas, presidents-for-life, and murderous dictators of the world, from Idi Amin to Mao Zedong. Such an expansive reading . . . would likely place an enormous strain not only upon our courts but, more to the immediate point, upon our country’s diplomatic relations with any number of foreign nations. In many if not most cases the outlaw regime would no longer even be in power and our Government could have normal relations with the government of the day—unless disrupted by our courts, that is.

*Id.* at 1174 n.1.

21 When the Ninth Circuit clearly joined the Second Circuit in concluding that the Alien Tort Statute creates a cause of action for violations of “specific, universal and obligatory international human rights standards” conferring fundamental rights upon all people in relation to their own governments, it linked its justification to *jus cogens*. *In re* Estate of Ferdinand Marcos Human Rights Litig., 25 F.3d 1467, 1475 (9th Cir. 1994) [hereinafter *Marcos*]. It included prohibitions against torture, summary execution and causing disappearances. But it linked this holding with its own dictum in *Siderman de Blake v. Republic of Arg.*, 965 F.2d 699 (9th Cir. 1992) that under international law “official torture violates *jus cogens*” and satisfies “the specific, universal and obligatory standard. . . . [T]he right to be free from official torture is fundamental and universal, a right deserving of the highest stature under international law, a norm of *jus cogens*.” *Id.* at 717.

22 *Marcos*, 25 F.3d at 1475 (citing to *jus cogens* as a reason torture violates customary international law).

It is clear that some way to limit the scope of expansion of the Alien Tort Statute would be found. Soon after the Filartiga decision was handed down, Professor Bilder made the point in a symposium. He expressed "some question whether United States courts will prove very receptive to the idea that they should furnish a forum for suits by foreigners to vindicate alleged violations of human rights abroad, or indeed whether this is an effective way of promoting human rights in other countries." More biting is the explanation that it is the new customary norm directly affecting a nation's relations with its own citizens that is meeting resistance. The litigation strategies for non-statutory claims, moreover, have not been pursued with even-handed skill or consistency by all human rights groups.

A major shift in strategy is underway. Action is moving toward educating the public, judges and officials; toward pursuing legislation to recognize additional causes of action; toward pressing for ratification of treaties without non-self-executing reservations; and toward invoking non-self-executing treaties themselves as evidence for interpreting the Bill of Rights and Civil War Amendments with heightened scrutiny to avoid conflict with treaty obligations.

These strategies simultaneously require shifts in litigation strategy, informed by the international legal process school of thought. Such litigation would be helped by using choice of law principles in all phases of international human rights cases where domestic courts intuitively make decisions on the basis of fairness, interests of victims and concerns of the international system and governments. This use of private international law for public purposes would ground the role of United States courts in a global community of national societies requiring mutual respect and a normative perspective broader than identifying universalism with the subjective views


25 See Schachter, supra note 7. Also, if new customary international human rights law is federal law, would it not preempt state law under the supremacy clause, a constitutional effect that would increase the power of federal judges acting under the authority of The Paquete Habana? Lea Brilmayer, Federalism, State Authority, and the Preemptive Power of International Law, 1995 SUP. CT. REV. 255.

26 But see Boos v. Barry, 485 U.S. 312, 322-29 (1988) (international agreements cannot be used to assert a compelling government interest to justify a ban on protests outside embassies demeaning or insulting the foreign government, such ban being unconstitutional under the First Amendment).
either of hegemonic powers or of commentators. It would not abandon universal respect for human rights as part of customary international law, but would use an overlapping consensus among nations without asking judges to shift allegiance from a national polity to a transcendent hierarchical authority of universality, an unnecessary choice that does not appear to be working.

B. Trends in Recent Decisions

Trends in recent United States court decisions reveal contradictory uses of customary international law, a contemporary update on antimonies of international law drawn from legal realism. Moreover, it is a mistake to leap to the conclusion that parochial domestic courts do not respect or use customary international law in formulating rules of jurisdiction or decision without statutory authority. They do all the time. In questions of jurisdiction, sovereign or diplomatic privileges and immunities, maritime law and the law merchant, customary international law tacitly guides many decisions. In claims invoking customary international human rights law reaching political relationships between individuals and governments, courts have insisted on an explicit statutory basis.

27 See infra notes 89-91 and accompanying text. Bruno Simma & Philip Alston, The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles, 12 AUSTR. Y.B. INT’L L. 82, 107 (1992). These commentators criticize the American concern with customary international law, reflected in the RESTATEMENT’s list in § 702, as “normative chauvinism” in assuming that “American values are synonymous with those reflected in international law.” They take note of Martti Koskenniemi’s comment that this concern is more with teaching American lawyers how to plead in American courts than revealing much about international law. Id. at 94.

28 Schachter, supra note 7, at 328-33 (one antimony is that between sovereign autonomy within states system and universal international human rights standards).

29 See Bayefsky & Fitzpatrick, supra note 2, for a description.

30 Compare Judge Ginsburg’s extreme positivist dualism in recognizing classic sovereign immunity, but refusing to use newer international law to broaden federal court jurisdiction over foreign sovereigns under the FSIA, supra note 20, with Senior Judge Weinstein’s use of customary international law to provide visiting head of state immunity not explicitly covered by the FSIA, in LaFontant v. Aristide, 844 F. Supp. 128, 137 (E.D.N.Y. 1994). See also Phillip R. Trimble, A Revisionist View of Customary International Law, 33 UCLA L. REV. 665 (1986) (critical of incorporating customary international law in U.S. law).

31 Described in Koh, supra note 4, at 2351 et seq.
How does one understand these apparent contradictions in light of recent calls for the interpenetration of domestic and international legal decision-making in redefining "sovereignty"? Limiting my observation mainly to United States courts, I believe that far from "entering a new era," the Supreme Court and perhaps the political branches, too, are still in the Lochner era in how they use customary international law. By analogy to the Supreme Court's use of the common law in constitutional interpretation at the turn of the century, courts today use customary international law in much the same way. Just as the Lochner era courts used common law property and freedom of contract concepts as the constitutional baseline protecting individual and corporate "sovereignty" or "autonomy" as "natural" rights protected from state interference, so today federal courts tend to use the older customary international law to maintain state sovereignty and economic liberties of autonomous enterprise units operating within the international system of order and exchange. And just as the Supreme Court at the turn of the century resisted broad judicial or Congressional enforcement of the human rights provisions of the Civil War amendments directly within the States, so today federal courts resist incorporating the newer customary international human rights law as United States law under the Supremacy Clause to limit state action. The interpenetration of international and domestic law does affect internal relationships between governments and persons within the domestic jurisdiction. But courts tend to intervene in this relationship to protect private economic arrangements across borders under customary international law more than to protect citizens from their own national or state governments' abuse of those human rights outlined in the Universal Declaration of Human Rights. Not all customary international law

33 Koh, supra note 4, at 2402.
35 See CASS SUNSTEIN, THE PARTIAL CONSTITUTION 3-7, 61-67 (1993) (challenging the Lochner era view of constitutional limitations preventing government interventions that disturb the baseline neutrality of existing economic distributions made "naturally" through common law contract and property concepts).
36 The most notorious decision in this era is Plessy v. Ferguson, 163 U.S. 537 (1896) (federal courts must uphold separate but equal race-based discrimination in State laws as not violating the Constitution). See In re Civil Rights Cases, 109 U.S. 3 (1883) (limiting Congressional power to intervene in civil rights matters of the States).
has the same effect in domestic courts. This preliminary insight may be observed through U.S. court decisions involving any government’s international obligations with respect to its own citizens or others within the state’s own jurisdiction.  

In a series of recent cases, the United States Supreme Court and various courts of appeals have told lower federal courts in effect to limit drastically their use of the judicial power to apply general or customary international law as the authoritative rule of decision in certain human rights cases. Specifically, federal courts do not incorporate customary international law of human rights without clear congressional authority. They simply do not give any encouragement to judicial application of the newer customary international human rights law. It has become a general Supreme Court canon that a remedy under federal common law will not be implied from any common law principle if a federal statute does not clearly provide a cause of action. Is it any more astonishing that the courts would resist incorporating the newer customary international law of human rights as self-executing U.S. or common law, without the aid of clearly applicable statutes? Whatever one thinks about the extent to which the traditional law of nations is part of U.S. law, it runs deeply against the grain of contemporary Supreme Court opinion for federal judges to recognize or develop federal law (whether common or “laws of the United States”) to imply private causes of action competing with state remedies without clear statutory authority.

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38 Even under legislative authority provided by statutes such as the Alien Tort Statute, the Torture Victim Protection Act or 28 U.S.C. § 1331, United States courts almost never exercise federal jurisdiction by implying private causes of action arising under this new customary international human rights law between non-state private parties. See Doe v. Karadzic, 866 F. Supp. 734 (S.D.N.Y. 1994) (dismissing action against the de facto head of Bosnian-Serb forces for condoning brutal rapes and human rights violations in former Yugoslavia); Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 792 (D.C. Cir. 1984); Sanchez-Espinoza v. Reagan, 770 F.2d 202, 206-07 (D.C. Cir. 1985).

39 For example, see O’Melveny & Myers v. Fed. Depositor’s Ins. Corp., 114 S. Ct. 2048 (1994), in which the U.S. Supreme Court rejected a claim of federal common law in an agency suit against a law firm for legal malpractice in a failed savings and loan case even when acting to recover funds under federal law.

40 Moving away from Professor Field’s thesis that the power to create federal common law is and should be broader and more discretionary with federal judges than is generally assumed. Martha A. Field, Sources of Law: The Scope of Federal Common Law, 99 Harv.
Even when a statute provides federal jurisdiction to decide a tort in violation of the law of nations, the courts do not open that jurisdictional window very wide in human rights cases.

Those circuit courts of appeals which have allowed subject matter jurisdiction under the Alien Tort Statute for breaches of customary international law limit such jurisdiction to "violations of specific, universal and obligatory international human rights standards which 'confer . . . fundamental rights upon all people vis-a-vis their own governments.'" The Second Circuit limited the reach of the Alien Tort Statute even further to "shockingly egregious violations of universally recognized principles of law" in an appeal after Filartiga, which the court found frivolous and applied sanctions. Under the statute, the Ninth and Fifth Circuits recognize customary international human rights law prohibitions on torture, summary executions or murder, causing disappearances, prolonged arbitrary detention, and perhaps inhuman and degrading treatment, in addition to prohibitions on genocide and slavery. A violation of free speech, however, "does not rise to the level of such universally recognized rights and so does not constitute a 'law of nations.'" Government confiscation of property of a citizen and resident is "not a violation of the law of nations, which governs civilized states in their dealings with each other" and thus does not state a cause of action under the Alien Tort Statute.


41 Marcos, 25 F.3d at 1475 (citing Filartiga, 630 F.2d at 885-87 and allowing prohibitions against summary execution and disappearances in addition to official torture under the Alien Tort Statute).

42 Zapata v. Quinn, 707 F.2d 691 (2d Cir. 1983). The Court of Appeals upheld dismissal of an action under the Alien Tort Statute by a Colombian national for deprivation of property for alleged failure to pay promptly the proceeds of a winning lottery prize. In a warning against "unreasonable and vexatious . . . proceedings by appellant's attorney" the court found the appeal frivolous and awarded double costs against appellant and her attorney. Id. at 692.

43 Marcos, 25 F.3d at 1475; De Sanchez v. Banco Central de Nicar., 770 F.2d 1385, 1397 (5th Cir. 1985).

44 Guinto v. Marcos, 654 F. Supp. 276, 280 (S.D. Cal. 1986). Oscar Schachter's Hague lectures established the theoretical basis for the distinction that relative intensities are more powerfully recognized for slavery, genocide, torture or apartheid than for censorship or property takings. Schachter, supra note 7, at 336-38.

45 Dreyfus v. Von Finck, 534 F.2d 24, 31 (2d Cir. 1976); Jafari v. Islamic Republic of Iran, 539 F. Supp. 209 (N.D. Ill. 1992); De Sanchez, 770 F.2d at 1397 ("the taking by a state of its national's property does not contravene the international law of minimum human rights"); but cf. Siderman de Blake, 965 F.2d at 711-12 (proceeding at trial on the grounds
While most federal courts resist new federal common law, they less reluctantly incorporate and apply long-standing customary international law without statute. They incorporate into the interpretation of statutes or treaties general principles of international law derived from territorial sovereignty among nation-states. Judge Weinstein, for instance, recently invoked common law immunity for visiting heads of state as background to interpret the Foreign Sovereign Immunities Act in a suit brought against President Aristide of Haiti under the Torture Victim Protection Act of 1991. Courts cite international law to limit the effect of broad statutes to United States territory unless Congress specifies clearly otherwise.

In business and commercial dealings, the presumption shifts as well. The policy of the federal courts is to enforce party choice of law and forum in arbitration clauses placed in international contracts for disputes even under a federal statute, as if reading into the federal arbitration statute a right of freedom of contract across national boundaries, unless the substantive statute creates an exclusive federal remedy which explicitly limits the parties' choice to opt out of federal jurisdiction. Moreover, in interpreting self-executing commercial treaties in the face of later statutes such as the Civil Rights Act of 1964, federal courts strain to avoid conflicts with treaty preferences and immunities for foreign investors and managers who might be charged with discriminatory practices under the statute.

Possibly to preserve market economies across national boundaries, the Supreme Court recently refused to apply an asserted rule of customary international law of reasonableness limiting the extraterritorial reach of the

that expropriation without compensation of a U.S. citizen's property in Argentina by the Argentine government violates international law).

46 The Paquete Habana, 175 U.S. 677 (1900), provided a remedy under ancient custom and usage in prize law for wrongful seizure of a private vessel on the high seas during time of war, thus incorporating customary international law to determine a claim of title or compensation, absent political directives otherwise.


Sherman Antitrust Act over foreign reinsurers not exempt under the domestic exception for setting insurance rates. Federal courts use the older customary international law of state-to-state relations to determine title to property or to protect the negotiability of title in international commerce in appropriate cases. Interpenetration of public international law and domestic law in business and commercial transactions is presumptively acceptable. Interpenetration in international human rights law requires explicit legislative enactment.

Many international lawyers criticize the judges for failure to appreciate arguments that customary international law, like federal common law, is binding in appropriate cases as the authoritative rule of decision. Advocates have lost ground trying to use that argument when general or customary international human rights law places duties on states in relation to their own citizens. U.S. courts have resisted applying that law as the sole rule of decision, even when authorized. American jurists are not inclined to use international law to protect individuals in domestic litigation, as Justice Blackmun eloquently pointed out in his dinner address to the American

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51 Hartford Fire Ins. Co. v. California, 113 S. Ct. 2891 (1993). Justice Scalia's partial dissent strongly disagreed with Justice Souter's majority opinion and analysis of the application of international comity. The dissent said "the practice of using international law to limit the extraterritorial reach of statutes is firmly established in our jurisprudence." Id. at 2920. Scalia repeatedly cited the RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, especially in relying on Timberlane Lumber Co. v. Bank of America, N.T. & S.A., 549 F.2d 597 (9th Cir. 1976). Justice Souter barely mentioned that case and did not rely upon its reasoning. He would have merely limited jurisdiction to adjudicate but only after first considering the federal jurisdiction and then only when a foreign defendant could not comply both with foreign law and U.S. law. The Scalia dissent would have considered limitations from international law in the initial question of jurisdiction to prescribe.

52 See Paquete Habana, 175 U.S. 677 (1900) (claim of title to or compensation for taking of a vessel seized on the high seas during war in violation of the laws of war); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964) (presumptive validity of act of foreign state taking property within its own territory thereby assuring negotiability of title and bill of lading in international commerce).


54 Cf. FALK, supra note 6. Perhaps Falk's thesis of judicial deference in economic regulation where international law lacks consensus but judicial activism to protect human rights where a consensus is universal needs revision. Would it not be more accurate to say that trends support a consensus favoring contract and property concepts but that human rights concepts, except for a few, are now among the most divisive and non-universally recognized?

55 See Judge Nickerson's hybrid analysis, infra note 92 and accompanying text.
The Supreme Court has reinforced this inclination in recent cases. It declined to use general or customary international law as an aid in interpreting the meaning of an extradition treaty in order to protect the rights of an accused by limiting the Executive's exercise of enforcement jurisdiction abroad. The Supreme Court rejected the use of customary international law to interpret a statute to protect Haitian refugees on the high seas, in effect upholding the President's power on the high seas to turn their boats back. The Court of Appeals for the D.C. Circuit declined to recognize for the purpose of jurisdiction that international terrorism and torture by non-state actors injuring U.S. citizens abroad violates customary international human rights law. Nor can we be sure that the Supreme Court would affirm the Second, Fifth and Ninth Circuits' interpretations of the Alien Tort Statute to allow the cause of action to be stated by an independent rule of customary international law, beyond its use as a jurisdictional base under the statute.

In contrast, the Supreme Court has used general international law to buttress a canon of statutory construction that presumes statutes are territorial and cannot be extended to protect individuals abroad from discrimination by U.S. companies under the Civil Rights Act unless Congress declares its will explicitly. The Court has used general international law principles as background structure for interpreting the Foreign Sovereign Immunities Act to allow jurisdictional immunity for sovereign acts: 1) damaging a neutral ship and cargo on the high seas during war; and 2) allegedly torturing a...
United States citizen in its own territory despite an employment relationship, a commercial activity negotiated in the United States.\textsuperscript{63}

Lower courts which try to import or imaginatively develop the norms of general or customary international law of human rights as rules of decision in cases before them risk reversal on appeal or affirmance on other grounds.\textsuperscript{64} There is also a direct parallel here to the Reconstruction era when the Supreme Court cut back decisions and remedies of lower courts in enforcing the Fourteenth Amendment and civil rights laws, thereby curtailing national intervention to protect citizens from wrongs by the states, except when the police power affected property and contract—economic liberties—in the \textit{Lochner} era.\textsuperscript{65}

In two law review articles at the beginning of the 1980s, I advanced two theses for a decisional process to balance obligations of customary international law recognized by the community of states with domestic law in judicial proceedings litigating human rights claims. One applied the process to civil liability. The other proposed its use in a constitutional process to determine limitations on governmental power.

The first thesis distinguishes the use of customary international law for exercising federal jurisdiction in a civil action from its permissible use as a rule of decision where choice of law principles would normally apply in U.S. courts to determine the law governing a transitory tort committed abroad.\textsuperscript{66} I argued that customary international human rights law should be used as the standard for choice of law policy decisions.\textsuperscript{67} In my opinion Judge


\textsuperscript{65} For discussion of the favorable civil rights rulings by lower federal courts during the first part of Reconstruction and the subsequent reversal by the Supreme Court during the second part, see ROBERT J. KACZOROWSKI, \textbf{THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, DEPARTMENT OF JUSTICE AND CIVIL RIGHTS, 1866-1876} (1985).

\textsuperscript{66} The Supreme Court had not yet decided Verlinden B.V. v. Cent. Bank of Nig., 461 U.S. 480 (1983) (allowing federal jurisdiction between a foreign plaintiff and a foreign state instrumentality under FSIA even though there was no diversity jurisdiction).


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In choice of law questions involving foreign law, fundamental human
Nickerson used a similar approach in the *Filartiga* case remand.68

The second thesis proposes a way to interpret constitutional limitations on delegated or reserved powers, such as provided in the due process and equal protection clauses, by an exacting examination of government action to avoid breaching international legal obligations—whether in non-self-executing treaties or under customary international law—to protect fundamental human rights without offending principles of representative democracy.69 The recommended process of a more searching judicial review, when state action burdens a constitutional right that overlaps an international human rights obligation, avoids the problem of incorporating fundamental human rights directly as extra-constitutional limitations on the powers of the President or Congress or on the reserved powers of the states. Instead, the courts should respect those international legal obligations created or observed by the political branches by using them as important instruments of interpretation of the limitations of the due process and equal protections clauses in appropriate cases. This process would take the international rule of law seriously in interpreting these limitations. “This use should avoid conflict between democratic theory and the universal standards of the international community.”70

The Supreme Court has never considered this process approach, nor, to my knowledge, have any of the federal courts of appeals. Apart from litigation under the Alien Tort Statute or the Torture Victim Protection Act, the trend has in fact moved the other way, to subordinate international norms in human rights controversies to municipal constitutional interpretation.71

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rights norms should be used as the standard for determining whether to use the law of the other country, thereby giving it comity and respect, or when the *lex delicti* derogates too greatly from the standards of the forum, to create a new norm based on the international human rights standard.

*Id.* at 55.

68 See *infra* note 92 and accompanying text.


Judicial recognition and balancing of important international obligations, according to critics, might undercut core constitutional freedoms.\(^7\)

II. WHY HAVE STRATEGIES FAILED?

Why do federal courts resist implying a cause of action from customary international human rights law as part of United States law, given the historical status of customary international law as part of that law and its use in traditional state-to-state and economic transactions?\(^3\) Professor Brilmayer's optimistic appraisal suggests that courts should defer to political authority in traditional horizontal state-to-state relationships, but appropriately use international law to adjudicate claims from vertical relationships between individuals and governments, as in human rights abuses.\(^4\) This explanation, however, does not inquire further into the substantive and policy differences in decisions in vertical relationships between those for human rights abuses and those protecting economic freedoms observed above.\(^5\)

Consider at least four further explanations.

First is the fear that the hard-won protections already within the Bill of Rights, widely viewed as more protective of liberties than under international human rights law, might be diluted and weakened by reference to external standards.\(^6\)

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\(^7\) In Boos v. Barry, 485 U.S. 312, 322-29 (1988), the Supreme Court said that international agreements could not be used to support a compelling government interest required by the First Amendment to justify a ban on protests outside embassies aimed at demeaning or insulting the foreign government. Using international obligations to accord higher standards than may be accorded under domestic law by increasing the burden of justification on government, however, is not the same as using international agreements to reduce protection of freedom of expression under the domestic constitution.

\(^3\) Paust, supra note 3.


\(^6\) In this connection, see the statements in opposition to ratification of the international human rights treaties, made during hearings in 1979, *extracted and reprinted in Henry J. Steiner et al., Transnational Legal Problems* 626-33 (4th ed. 1994) (e.g., Phyllis Schlafly, "the treaties imperil or restrict existing rights of Americans by using treaty law ... to upset the balance of power within our unique system of federalism"). While freedom of expression is the one most clearly on point, there are other examples in which cutting back
Second, it is widely and correctly thought that international human rights law is grounded in affirmative duties placed on governments to ensure social equality and human dignity and not just in negative duties not to deprive individuals of liberties. Such affirmative international obligations, basically redistributive in nature, demand an increased role for central government which should be beyond the judicial prerogative, according to this central criticism. For courts to incorporate the new underlying premises of affirmative human rights obligations on government in rules of decision or equitable relief, it is thought, would allow courts to direct the democratic institutions of republican government in ways that go well beyond the normal responses to the counter-majoritarian dilemma. Assuming this burden as a judicial function prudentially exceeds judicial competence and know-how, the argument goes. It would not just upset the constitutional balance among the states, the presidency, the federal courts and Congress: a balance which has been worked out at least from the time of the New Deal, when the political branches wrested power away from the courts. It is likely to be exercised poorly, without the instruments of government and political operation to implement and make effective the affirmative obligations courts are not very good at undertaking through the remedial powers of equity. To preserve judicial power, courts need to use these sparingly. And there is no guarantee that affirmative remedial actions will move in the substantive direction desired by human rights activists.

78 constitutional protection in criminal procedure of the states under the 14th Amendment has also had the effect of diluting the formerly stricter federal standard of the original Bill of Rights.


78 Even Roosevelt's call for a "second bill of rights" and a new social contract for economic well-being did not mean a judicially-enforced set of affirmative constitutional entitlements. He did not trust the courts, generally being conservative organs, and wanted them to stand out of the way of the legislative political agenda.

79 For a response to this concern, see Lea Brilmayer, supra note 74, at 2309-11; Bayefsky & Fitzpatrick, supra note 2, at 82-89.
There is some merit in these arguments. The judicial restrictions placed on the 14th amendment curtailed drastically congressional and judicial enforcement of the values underlying the civil war amendments (except for property and contract) for over a hundred years. By a denuding interpretation of the privileges or immunities clause of the 14th Amendment, the Supreme Court disabled Congress from legislating under enforcement powers expressly delegated in Section 5 of that Amendment. Only the strained interpretation of the due process and equal protection clauses in the New Deal era saved the powers of the national legislature and the federal courts to protect civil rights. There is no guarantee that the courts will not in fact create judicial obstacles to the incorporation of international human rights norms.

Third, an unspoken fear, probably present from the beginning in relation to slavery, is that officials and elites in the United States might be held accountable themselves, perhaps in foreign courts, under the new customary international human rights law for treatment of their own people and minorities—the same standard we expect of other countries. Where there is an affirmative obligation upon government to guarantee positive rights to food, education, health and well-being, omissions of state might be actionable if customary international law is an incorporated rule of decision. Under this theory of incorporation, officials acting under color of law could be held accountable in foreign or domestic courts for serious breaches of international standards.

The fourth concern is that the floodgates will open to foreign plaintiffs' suits against their governments as well as citizens' suits against officials in the United States beyond those permitted by statute.

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80 On this point, see the statements of Professors Farer and Sohn, made in the 1979 Senate Hearings on International Human Rights Treaties, extracted and reprinted in Steiner et al., supra note 76, at 631 (race relations, superior attitudes and a fear of skeletons in the closet).


Would a more artful shift in strategy with more carefully designed cases for litigation accomplish better results? I doubt that a strategy of direct or indirect incorporation would. The important question is whether the courts should leave the incorporation of the broad premises of international human rights law affecting the basic relationship of citizens with their governments to the political organs of each country for detailed implementation. There is, however, a better strategy for litigation (in addition to the legislative route), which does not ask domestic courts on their own national authority to act hierarchically as agents for international society to interpose customary international human rights law between citizens and governments.

My recommendation revises and extends the use of customary international human rights law for the operational rules throughout the litigation process. Instead of relying upon the incorporation theory, it is time to consider choice of law theory, but used with greater sophistication. Opening policy choices among rules of decision that will allow a balance among international and domestic policies and interests to shape outcomes is familiar to U.S. courts, from their extensive domestic conflict of laws experience. From the perspectives of U.S., foreign and international communities, different policies and interests shape operational decisions on jurisdiction, procedure, causes of action, damages and enforcement in all aspects of litigation. Imaginative opportunities from conflict of laws theory also might best advance human rights without undercutting democratic institutions or imposing forum law when international interests might suggest better results. By allowing consideration of the law in other countries when the litigation is closely connected to government interests there, as well as by considering universal consensus of the community of peoples in all countries, conflict of law theory accommodates the counter-majoritarian argument and permits non-democratic hierarchical regimes respect so long as they do not abridge those human rights universally recognized.\(^{83}\)

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\(^{83}\) When customary international law is nationalized, the closest analogy for choice of law analysis is Lauritzen v. Larsen, 345 U.S. 571 (1953) (applying interest analysis to choose foreign law over U.S. law in case involving alien seaman injured on board foreign vessel in port of third country). That case was suggested by Judge Nickerson as a beginning point in choice of law and fairness analysis in *Filartiga*, on remand.
III. CONFLICT OF LAWS AND CUSTOMARY INTERNATIONAL HUMAN RIGHTS LAW

A strong legal realist tradition in the United States, reflected in interest and policy analyses of conflict of laws questions, recognizes that jurisdiction is the central question. All other questions, including the law governing choice of law, become forum court choice of policies underlying the available rules, once the court has jurisdiction over persons and subject matter, absent a clear statute or constitutional requirements such as due process or full faith and credit.

When universal respect for human rights begins to suggest international constitutional loyalties for federal judges because the jurisdiction of federal courts is based not on diversity but on federal questions arising from customary international law, a potentially revolutionary idea may be unleashed. The legal realist may answer that all international law is domestic law because only decisions made by a forum with coercive power over the parties count as law to guide other decisions. But that answer is also instrumental and inadequate as Lasswell and McDougal first understood at the outset of World War II when they proposed a comprehensive post-realist process of decision in service of human dignity. At all stages of functional realist analysis, questions of substance, not merely of loyalty to the polity authorizing coercion, have to be faced—including the

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84 See Harold G. Maier & Thomas R. McCoy, A Unifying Theory for Judicial Jurisdiction and Choice of Law, 39 AM. J. COMP. L. 249, 252-58 (summarizing legal realists' view of interest analysis). In that tradition, the authors' thesis is that "the different forms of rhetoric distinguishing judicial jurisdiction decisions from choice of law decisions are, in fact, only two superficially different formats for describing the answer to a single question . . . . Choice of judicial jurisdiction is choice of law because choosing a jurisdiction chooses the legal regime that will select, interpret and apply the policies that will determine the result in the particular case." Id. at 255.

85 Harold G. Maier, Baseball and Chicken Salad: A Realistic Look at Choice of Law, 44 VAND. L. REV. 827, 838 (1991) (disagreeing with Professor Brilmayer’s political rights basis for applying a foreign rule of law: “There can be no burden and no political right not to be burdened until some authoritative decisionmaker realistically contemplates applying the rule to a party in a case, and the only authoritative decisionmaker that can apply it is the forum court. The court derives that authority solely from its own body politic.”).


87 Nicholas deB. Katzenbach, Conflicts on an Unruly Horse: Reciprocal Claims and Tolerances in Interstate and International Law, 65 YALE L.J. 1087 (1956).
questions of consequences of a forum court decision when the parties are not completely subject to the forum polity's coercive powers.\textsuperscript{88}

Theoretically, conflict of laws jurisprudence in civil actions for international human rights violations is compatible with a universal consensus for respecting fundamental human rights among a reasonable society of peoples while respecting institutions of domestic law.\textsuperscript{89} A mutual reciprocal respect of that political relationship by domestic courts reinforces a court's allegiance to its own state's political institutions, so long as it is compatible with the minimum conditions for "a law of peoples" (non-expansionist and peaceful; law legitimate in the eyes of its own people; and honoring basic human rights).\textsuperscript{90} Only when an outlaw regime does not honor the basic human rights in its own formal law would another state's institutions prudently apply universal human rights law to hold the regime responsible to victims of its abuse, for according to Rawls, a peoples should be encouraged to develop free-standing institutions capable of meeting minimum conditions even in hierarchical, non-liberal societies.\textsuperscript{91}

This process of analysis can be seen in the remand of \textit{Filartiga} from the Second Circuit once the Alien Tort Statute had been interpreted to allow jurisdiction over an outlaw regime's abuse of its own people because its officials did not follow that country's own law which formally outlawed torture and thus complied with basic international human rights prohibiting official torture. District Court Judge Nickerson stated pointedly that the "common law of the United States includes... conflict of laws [principles that] have been concerned with the relevant policies of the interested national states, and with 'the needs' of the 'international systems.' "\textsuperscript{92} From that beginning principle of reciprocal respect, he then used interest analysis to

\textsuperscript{88} For a view of legal realism taking into account international realism and proposing new directions for choice of laws, see LEA BRILMAYER, CONFLICT OF LAWS: FOUNDATIONS AND FUTURE DIRECTIONS 30-41, 107-08 (1991).

\textsuperscript{89} See John Rawls, The Law of Peoples, in ON HUMAN RIGHTS: THE OXFORD AMNESTY LECTURES 1993, at 41, 68 (Stephen Shute & Susan Hurley eds., 1993) ("... basic human rights express a minimum standard of well-ordered political institutions for all peoples who belong, as members in good standing, to a just political society of peoples."). See also JOHN RAWLS, POLITICAL LIBERALISM 39, 207-09 (1993) for an exposition of the meaning of "overlapping consensus" as a way to reach common good among liberal and hierarchical societies.

\textsuperscript{90} Rawls, \textit{The Law of Peoples}, supra note 89, at 78-82.

\textsuperscript{91} Id. at 73-74.

shape a rule of decision, citing the Restatement (Second) of Conflict of Laws § 6(2). He considered “interests of Paraguay to the extent they do not inhibit the appropriate enforcement of the applicable international law or conflict with the public policy of the United States.” Instead of choosing a single external rule, he constructed a hybrid rule of decision for the particular case considering foreign law of Paraguay first and then analyzing its consistency with customary international law and with forum law:

The international law prohibiting torture established the standard and referred to the national states the task of enforcing it . . . . Congress entrusted that task to the federal courts and gave them power to choose and develop federal remedies to effectuate the purposes of the international law incorporated into United States common law . . . . [A]ny remedy they fashion must recognize that this case concerns an act so monstrous as to make its perpetrator an outlaw around the globe . . . . [That] the interests of the global community transcend those of any one state . . . does not mean that traditional choice-of-law principles are irrelevant . . . . All these factors make it appropriate to look first to Paraguayan law in determining the remedy for the violation of international law . . . . In concert with the other nations of the world Paraguay prohibited torture and thereby reaped the benefits the condemnation brought with it. Paraguayan citizens may not pretend that no such condemnation exists.  

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93 RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971) (needs of the international system are to be considered in the factor analysis). “Choice-of-law rules . . . should seek to further harmonious relations between states. . . .” Id. at cmt. d, at 13.

94 Filartiga v. Pena-Irala, 577 F. Supp. 860 (E.D.N.Y. 1984). Compare this reasoning to that of this commentator before the remand was decided:

The role of the domestic court in choice of law matters is to give respect and deference to the law of the place of injury, as well as to international law. Respect for the lex delicti is a deference to order as well. When the law of the forum is premised upon respect for fundamental human rights, the reconciliation of the choice of law will rest heavily upon the judgment of whether the law of the foreign state is compatible with both the law of the forum and international human rights law. If it is not compatible, only then would the court face the question of whether an independent private cause of action might emerge through a rule of decision premised
What has been forgotten is the connection between the public international law question addressed in Judge Kaufman's theory of jurisdiction and Judge Nickerson's theory of choice of law to shape rules of operational decision in reaching a judgment. Many commentators credit the Kaufman opinion with deciding that customary international human rights law prohibiting official torture is to determine the outcome of the case as well as jurisdiction under the Alien Tort Statute. That was plainly not what Judge Kaufman decided or said. And it was not quite what Judge Nickerson decided or said either. The trial judge considered international human rights law, to be sure, and it influenced his rule of decision. But his reasoning was rooted in the conflict of laws reasoning drawn from legal realism, in which customary international human rights law became relevant not directly through the jurisdictional statute as such but through forum choice of policy analysis forming a coherent part of the decision process once the court had jurisdiction over the subject matter.

This distinction opens the entire human rights litigation arena to a richer use of international law and comity for shaping all the operational rules for conducting the litigation. International choice of law in customary international human rights then theoretically becomes an instrument of public international law through instruction by the legislature. It gives respect to harmonious relations between states as well as to the minimum conditions for basic human rights among a "society of peoples." In each phase of litigation, comity or reciprocal respect among nations is an important policy to be weighed together with forum law, foreign law and basic human rights

upon the human rights norm outlawing torture.


Judge Kaufman decided only the question of jurisdiction, commenting that the choice of law inquiry is much broader, primarily concerned with fairness. Filartiga v. Pena-Irala, 630 F.2d at 889.

As Dickinson pointed out, the law of nations "became a source, rather than an integral part, of the national system. . . . Indeed, in its modern version, the doctrine [of incorporation] is essentially like the modern Anglo-American doctrine underlying the so-called conflict of laws or private international law." Edwin D. Dickinson, Changing Concepts and the Doctrine of Incorporation, 26 AM. J. INT'L L. 239, 260 (1932). For a similar conclusion for federal jurisdiction and supremacy, see Harold H. Sprout, Theories as to the Applicability of International Law in the Federal Courts of the United States, 26 AM. J. INT'L L. 280, 294-95 (1932) (international law cannot per se become part of municipal law through federal law without subject matter jurisdiction and even then "denotes not a separate legal system, but merely a legal subject-matter.").
law when shaping rules of operational decision. In international human rights litigation, questions arise at each stage where private international law analysis would strengthen global cooperation in international human rights.

First, what law or policy should govern jurisdiction? Second, what policies should determine which rule the forum court selects to govern the cause of action? Third, should only forum law govern procedure, including international choice of law governing limitations of action or certification of an international class action comprised solely or significantly of human rights victims in other countries? Fourth, what principles should govern the choice of remedies, including actual and punitive damages and injunctions? Fifth, what consideration should be given to principles that govern the enforcement of human rights judgments rendered by the forum court in the courts of another state? It is instructive to see precisely how these questions were addressed in the leading cases in U.S. courts.

After deciding jurisdiction in Filartiga, Judge Kaufman explicitly leaves the further choice of law policy analysis to the trial judge on remand, commenting later in an article in the New York Times Magazine that the broad response to torture is best left to the policy makers and cautioning that the Alien Tort Statute should not be read as "engaging in messianic moral imperialism."³⁷

On remand, District Judge Nickerson begins his under-appreciated opinion by stating that the

Court of Appeals decided only that Section 1350 gave jurisdiction. We must now face the issue left open . . ., namely, the nature of the ‘action’ over which the section affords jurisdiction. Does the ‘tort’ to which the statute refers mean a wrong ‘in violation of the law of nations’ or merely a wrong actionable under the law of the appropriate sovereign state? The latter construction would make the violation of international law pertinent only to afford jurisdiction. The court would then, in accordance with traditional conflict of laws principles, apply the substantive law of Paraguay. If the ‘tort’ to which the statute refers is the violation of international law, the court must look to that

body of law to determine what substantive principles to apply.98

This reasoning was decidedly not “messianic moral imperialism” because the forum court gave full respect to the law of Paraguay but also used the customary international law of human rights to prevent the hypocrisy of the claim by Pena, the Paraguayan citizen-official, that Paraguayan law did not cover official torture because it had not been applied in the past. The court then proceeded to apply the law of Paraguay to include moral damages adding punitive damages under international law and public policy of the forum court, a somewhat more controversial determination.99

While forum procedure controlled the case, it is not so clear that procedure always should be forum court law. Are limitations of actions never considered under foreign law? Should class actions involving international classes always be governed by forum due process concepts of fairness and representation? Should the conduct of litigation never take into consideration the fact that enforcement of judgments may entail public international law aspects as well as those from private international law?

In the Marcos’ Estate international human rights litigation, forum procedure (Federal Rules of Civil Procedure) applied to the certification of an international class of victims in the Philippines, to equitable remedies to preserve the Estate’s assets and to the survival of action; Philippine law was applied to allow punitive damages.100 The interests of the international community as a whole (as in harmonious relations between two democracies) were not evaluated except through the perspective of universal standards against official torture and arbitrary killings. When international law provides no limitation of action in a claim of torture, genocide and slave labor, forum law presumably would be used as a limitation, unless an overriding norm of the international community were selected as part of the policy of the forum.101

100 Marcos, 25 F.3d 1467 (9th Cir. 1994).
IV. FUNCTIONAL RULES OF DECISION IN DOMESTIC HUMAN RIGHTS LITIGATION

Customary international human rights law, forum law and relevant foreign law represent different policies and interests. All should contribute to the best policy to guide decisions for each aspect of human rights litigation in domestic courts in the United States. There are five distinct questions for forum courts to ask when litigation invoking customary international human rights law comes before them.

Jurisdiction. First, should courts ever invoke customary international human rights law to determine federal jurisdiction over civil cases or controversies, with concurrent jurisdiction in state courts, as law of the United States or federal common law? Without a clearly applicable statute, as we have seen, recent trends say no. Such law undoubtedly provides a base for Congress to exercise federal jurisdiction to prescribe or adjudicate issues within “international jurisdiction” not otherwise within delegated constitutional powers. This use should be distinguished from the function of determining the jurisdictional threshold under a specific jurisdictional statute such as the Alien Tort Statute or the Torture Victim Protection Act. A statute such as the Federal Tort Claims Act or 42 U.S.C. § 1983 is probably not specific enough to confer subject-matter jurisdiction over an international human rights claim between individuals and officials or governments. Peremptory norms of jus cogens quality by themselves do not confer federal question or subject matter jurisdiction, not even for the most heinous wrongs, nor do they justify an implied waiver of sovereign immunity.102

Substantive Rules of Decision. Second, assuming a U.S. domestic court has subject matter jurisdiction over a case or controversy (including transitory torts), should customary international human rights law ever determine the law governing the cause of action? With a statutory jurisdictional basis, international choice of law principles may use, but do not require, customary international human rights law, unless explicitly directed by statute, as under the Torture Victim Protection Act. Forum selection of law often might prefer foreign law or forum law for reasons of forum choice of law policy so long as it is not incompatible with human rights law. Although traditional customary international law has been incorporated as the rule of decision in prize, maritime or commercial cases when no controlling

102 Id.
executive or legislative policy intercedes, domestic courts resist extending this tradition to human rights law between individuals and officials or between individuals without a political or legislative directive. So far, *jus cogens* principles have served to constrain forum policy choices of rules of decision by increasing the strictness of the criteria for recognizing private actions for international common law torts under the Alien Tort Statute and other jurisdictional statutes.

**Procedure of the Case.** Third, should U.S. forum law alone continue to govern procedure in human rights litigation with important effects in other countries? Choice of procedure policy also might apply to limitations of actions brought by foreign plaintiffs or certification of class actions comprised largely of claimants in other countries, when the court has discretion. Procedure, especially in class actions with large numbers of members in many countries, should be shaped by the forum court within its discretionary authority to anticipate consequences that might offend principles of fairness in international litigation or of the international system or yield easy objections to the recognition and enforcement of its judgments abroad that would frustrate international cooperation in achieving human rights.

**Choice of Law Governing Remedies.** Fourth, what principles should govern the choice of remedies sought or allowed, including actual and punitive damages, equitable relief and injunctions in aid of future enforcement? These questions are likely to enmesh plaintiffs in international litigation not contemplated. They need to be anticipated and faced.

**Recognition and Enforcement of Judgments Abroad.** Fifth, what principles of private international law or comity should govern the enforcement of a judgment in the courts of one state for breach of customary international

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104 See BRILMAYER, supra note 88, at 25, 153-55.
human rights law arising in another against assets in the courts of a third state? Are the interests of the international community or the forum state harmed by recognizing and enforcing a foreign judgment for punitive damages awarded to an international class who were inadequately represented before the judgment forum? What is the best law for human rights victims? For the representative of the class?

V. CONCLUSION

At each point in international human rights litigation before domestic courts, however briefly it may be consciously considered, a forum court should make a functional analysis with as much intuitive sense as suggested in conflict of laws theory for each stage. It should begin its analysis with the interests and purposes for each rule shaped or decision undertaken, balanced among governmental and international interests in harmonious inter-state relations, stability, predictability and effectiveness in achieving universally recognized international human rights norms, subject to statutory and constitutional limitations.

Consciousness in domestic court decision-making at each phase of the case should eliminate a problem which human rights advocates sometimes place before American courts, in effect forcing judges to base their decisions on the choice between authorities promulgating rules. In facing a hierarchy of loyalties between these systems of authority, U.S. federal courts do not seem willing to subordinate their constitutional loyalty to national political authority to that of an emerging consensus of the international community of states, unless first given the green light by the national political branches.

The false choice between loyalty to the national political community, allegiance to the international community of states or a new allegiance to a cosmopolitan world community not yet here is an escape from making hard substantive choices balancing a number of interests and values in shaping rules of decision for each transnational human rights case. If these alternatives of choice among authority systems are the only ones realistically

seen by federal courts, international human rights law will continue to be but the symptom of vast political upheaval which the federal courts will shun entering.