FEDERAL JURISDICTION — STATUS OF INTERNATIONAL LAW — FIRST CIRCUIT HOLDS THAT CUSTOMARY INTERNATIONAL LAW DOES NOT OBLIGATE THE UNITED STATES TO GRANT THE PRESIDENTIAL VOTE TO PUERTO RICAN RESIDENTS. — *Igartúa–de la Rosa v. United States* (*Igartúa III*), 417 F.3d 145 (1st Cir. 2005) (en banc).

The role of international norms in U.S. domestic law has been hotly debated in the legal community.[1] Although the predominant view since the nation's founding has been that "[i]nternational law is part of our law,"[2] some commentators have questioned whether, after *Erie Railroad Co. v. Tompkins*[3] in 1938, federal courts retained the power to incorporate into federal common law international norms not embodied in positive law. The Supreme Court's 2004 decision in *Sosa v. Alvarez-Machain*[4] appeared to settle that question, holding that, in at least some circumstances, courts can recognize a narrow set of international norms as federal common law.[5] The *Sosa* decision, however, left some ambiguities as to the scope of its holding and its theoretical understanding of the role of international norms in domestic law. Recently, in *Igartúa–de la Rosa v. United States* (*Igartúa III*),[6] the First Circuit held that customary international law does not impose on Congress any obligation to grant Puerto Rican residents the right to vote in presidential elections.[7] The court's treatment of the customary law claim added important clarity to the ambiguities in *Sosa*'s scope and theoretical underpinnings.

Puerto Rico's complex relationship with the United States began in 1898, when the end of the Spanish-American War commenced this country's venture into colonialism.[8] Unlike with earlier territorial acquisitions, the United States had no intention of incorporating Puerto Rico into the nation as a state.[9] Over the next half century, the is-

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[1] *See, e.g.*, *The Supreme Court, 2004 Term—Comment: The Debate over Foreign Law in* Roper v. Simmons, 119 HARV. L. REV. 103 (2005).

[2] The Paquete Habana, 175 U.S. 677, 700 (1900); *see also* Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1555–56 (1984) (stating that "[i]nternational law became part of 'our law' with independence in 1776," though noting different views as to whether this occurred via "inheritance" from English common law or "by implication from our independence, by virtue of international statehood").

[3] 304 U.S. 64 (1938).

[4] 124 S. Ct. 2739 (2004).

[5] *See id.* at 2765.

[6] 417 F.3d 145 (1st Cir. 2005) (en banc).

[7] *See id.* at 151–52.

[8] *See* JOSÉ A. CABRANES, CITIZENSHIP AND THE AMERICAN EMPIRE 1–4 (1979).

[9] Instead, as stipulated by the Treaty of Paris, which ended the Spanish-American War, Congress retained absolute power to determine "[t]he civil rights and political status of the territories . . . ceded to the United States." Treaty of Peace, U.S.-Spain, art. IX, Dec. 10, 1898, 30 Stat. 1754.

land's political relationship with the United States shifted from military control to a civilian government, and eventually to the commonwealth status Puerto Rico currently maintains.[10] Though the island never attained statehood — and, indeed, the question of statehood remains a heated political debate in Puerto Rico[11] — Puerto Rican residents have been U.S. citizens since 1952.[12] Under this arrangement, Puerto Ricans enjoy many of the benefits of citizenship, including the freedom to enter and leave the mainland at will; unlike residents of the states, however, Puerto Rican residents do not pay federal taxes or have voting representatives in Congress, and they cannot vote for President or Vice President.[13]

In 1994, a group of Puerto Rican residents challenged their lack of presidential voting power in *Igartua de la Rosa v. United States* (*Igartúa I*),[14] the first of three similar cases brought before the First Circuit. The plaintiffs claimed that their inability to vote for President and Vice President violated their constitutional rights.[15] The U.S. District Court for the District of Puerto Rico had dismissed the claim, noting that "[t]he right to vote in presidential elections under Article II [of the Constitution] inheres not in citizens but in states."[16] Because of Article II's Electoral College system,[17] the court had reasoned, the only

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[10] *See* PEDRO A. MALAVET, AMERICA'S COLONY: THE POLITICAL AND CULTURAL CONFLICT BETWEEN THE UNITED STATES AND PUERTO RICO 35–48 (2004). *See generally* JOSÉ TRÍAS MONGE, PUERTO RICO: THE TRIALS OF THE OLDEST COLONY IN THE WORLD 30–118 (1997) (detailing the development of the relationship between the United States and Puerto Rico).

[11] Puerto Ricans have voted against altering the island's commonwealth status in three separate plebiscites, the first two in 1967 and 1993, *see* TRÍAS MONGE, *supra* note 10, at 130, 134–35, and most recently in 1998, *see* Mireya Navarro, *With a Vote for 'None of the Above,' Puerto Ricans Endorse Island's Status Quo*, N.Y. TIMES, Dec. 14, 1998, at A18.

[12] *See* 8 U.S.C. § 1402 (2000) (effective 1952) (granting citizenship to "[a]ll persons born in Puerto Rico").

[13] *See* MALAVET, *supra* note 10, at 2. Puerto Rican residents do, however, vote for a "Resident Commissioner," who serves in Congress without a vote and is technically a federal officer. *See* 48 U.S.C. § 891 (2000) (establishing the position of Resident Commissioner); 42 U.S.C. § 1973ff-6(3) (2000) (including Resident Commissioner in the definition of "Federal office").

[14] 32 F.3d 8 (1st Cir. 1994) (per curiam).

[15] *Id.* at 9. In addition to this broader claim, a subset of the plaintiffs, who had previously voted in presidential elections while living in a state and then lost that right to vote when they returned to Puerto Rico, raised due process and equal protection challenges against the Uniformed and Overseas Citizens Absentee Voting Act §§ 102, 107, 42 U.S.C. §§ 1973ff-1, 1973ff-6. *See Igartúa I*, 32 F.3d at 10. That Act, which provides absentee voting rights to U.S. citizens residing "outside the United States," considers Puerto Rico to be within the U.S. territory, and thus new residents of Puerto Rico are ineligible for absentee voting in their last place of residence. *Id.* (citing 42 U.S.C. §§ 1973ff-1, 1973ff-6). The court found that no suspect class or fundamental right was affected and dismissed the claim under rational basis review. *See id.* at 10–11.

[16] Igartua de la Rosa v. United States, 842 F. Supp. 607, 609 (D.P.R. 1994) (quoting Attorney General of Guam v. United States, 738 F.2d 1017, 1019 (9th Cir. 1984)) (internal quotation marks omitted).

[17] *See* U.S. CONST. art. II, § 1, cls. 2–3.

means by which Puerto Ricans can attain a constitutional right to vote are by becoming a state or by amending the Constitution.[18] The First Circuit affirmed in a short per curiam opinion.[19] In 2000, the plaintiffs brought the action again, this time convincing the district court that barring Puerto Rican residents from voting for President was unconstitutional.[20] This victory was short-lived, however, as the First Circuit quickly reversed the decision, stating that only a "special justification" could cause the court to depart from *Igartúa I*.[21]

Undeterred by these two prior decisions, the plaintiffs brought the case for a third time in 2004.[22] The district court granted the government's motion to dismiss based on stare decisis, rejecting the plaintiffs' claim that new developments in voting law warranted a departure from the First Circuit's previous *Igartúa* decisions.[23] The First Circuit again affirmed in a short per curiam opinion.[24] The plaintiffs petitioned for a rehearing, which the panel granted, limiting the substantive issue to the United States's "international legal obligations" regarding Puerto Ricans' presidential voting rights.[25] The First Circuit then voted to rehear the case en banc.[26]

On rehearing, the plaintiffs asserted that several treaties[27] obligate the United States to grant Puerto Ricans a presidential vote.[28] They

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[18] *See Igartua*, 842 F. Supp. at 609; *see also* U.S. CONST. amend. XXIII (granting residents of the District of Columbia the right to vote in presidential elections).

[19] *See Igartúa I*, 32 F.3d at 9.

[20] *See* Igartua de la Rosa v. United States, 107 F. Supp. 2d 140 (D.P.R. 2000). The court distinguished *Igartúa I* as focusing on the plaintiffs' "inability to vote for the President and Vice President," while the 2000 case focused on "their inability to elect delegates to the electoral college." *Id.* at 145. Finding that "Article II merely sets forth the mechanism by which the right to vote will be implemented in the states," the district court rejected *Igartúa I*'s reasoning, declaring that "[t]he right to vote is a function of citizenship and a fundamental right." *Id.*

[21] Igartua de la Rosa v. United States (*Igartúa II*), 229 F.3d 80, 84 n.1 (1st Cir. 2000) (per curiam).

[22] Igartua de la Rosa v. United States, 331 F. Supp. 2d 76 (D.P.R. 2004).

[23] *See id.* at 79. Specifically, the plaintiffs pointed to *Bush v. Gore*, 531 U.S. 98 (2000) (per curiam), the National Voter Registration Act of 1993 §§ 2–12, 42 U.S.C. §§ 1973gg to 1973gg-10 (2000 & Supp. II 2002), and the Help America Vote Act of 2002 §§ 101–106, 42 U.S.C. §§ 15301–15306 (Supp. II 2002), to support their claim that recent jurisprudence and legislation had "establishe[d] citizenship as the basis for voting in federal elections." *Igartua*, 331 F. Supp. 2d at 79 n.4.

[24] Igartúa–de la Rosa v. United States, 386 F.3d 313, 314 (1st Cir. 2004) (per curiam).

[25] Igartúa–de la Rosa v. United States, 404 F.3d 1, 1 (1st Cir. 2005) (order for rehearing). The court also heard arguments as to "the availability of declaratory judgment" as a judicial remedy if the court found the government had violated its legal obligations. *Id.*

[26] Igartúa de la Rosa v. United States, 407 F.3d 30, 31 (1st Cir. 2005) (en banc) (per curiam).

[27] In the earlier two iterations of the case, the plaintiffs had raised a claim based on the International Covenant on Civil and Political Rights, *adopted* Dec. 19, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368, (ICCPR). *See Igartúa II*, 229 F.3d at 82; *Igartúa I*, 32 F.3d 8, 10 n.1 (1st Cir. 1994) (per curiam). In 2004, the plaintiffs added claims under the Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., U.N. Doc. A/810 (Dec. 12, 1948), and the Charter of the Organization of American States, Apr. 30, 1948, 2 U.S.T. 2394, 119 U.N.T.S. 3, (OAS Democratic Charter). *See Igartua*, 331 F. Supp. 2d at 79.

also asserted that customary international law imposes the same obligation.[29] These arguments notwithstanding, the First Circuit affirmed its earlier panel decision. Writing for the en banc court, Judge Boudin[30] "put the constitutional claim fully at rest," reiterating *Igartúa I*'s holding that the only way Puerto Ricans can achieve a constitutional right to vote is through statehood or constitutional amendment.[31] Judge Boudin then rejected the plaintiffs' treaty claim, finding that "the Constitution is the supreme law of the land, and neither a statute nor a treaty can override the Constitution."[32] Finally, he disposed of the plaintiffs' customary international law claim, finding that "[n]o serious argument exists that customary international law . . . requires a particular form of representative government."[33]

Judge Torruella dissented.[34] After elaborating a detailed and often scathing exposition of the history of the United States's political relationship with Puerto Rico, Judge Torruella justified his dissent on several grounds.[35] First, a growing constitutional jurisprudence has deemed voting a fundamental right, which "should apply fully to U.S. citizens residing in Puerto Rico" because it has long been held "that the Constitution extends fundamental rights to Puerto Rico."[36] Second, the treaties cited "are all evidence of the emergence of a norm of customary international law" requiring a "right to equal political partici-

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[28] *Igartúa III*, 417 F.3d at 148.

[29] *Id.* at 151.

[30] Senior Judge Campbell and Judges Selya and Lynch joined Judge Boudin's opinion. Although he agreed with the court's denial of relief, Judge Lipez argued that because the outcome of a declaratory judgment would be pure speculation, the claim was not judicially redressable and therefore "the federal court ha[d] no power to address the merits of the issues underlying the dispute." *Id.* at 152 (Lipez, J., concurring in the judgment). Judge Campbell concurred in both the majority's opinion and Judge Lipez's concurrence, writing briefly to point out his belief that "[t]he two are not in conflict." *Id.* (Campbell, J., concurring).

[31] *Id.* at 148 (majority opinion).

[32] *Id.* Furthermore, the treaties the plaintiffs cited do not create judicially enforceable legal obligations. The Universal Declaration of Human Rights is considered precatory and thus creates no obligations for the United States of its own force. *See* Sosa v. Alvarez-Machain, 124 S. Ct. 2739, 2767 (2004). The OAS Democratic Charter is similarly nonbinding. *See Igartúa III*, 417 F.3d at 150 n.6. Though the ICCPR is a treaty that is internationally binding, the judiciary cannot enforce its obligations because the United States ratified it on the understanding that it was not self-executing. *See Sosa*, 124 S. Ct. at 2767.

[33] *Igartúa III*, 417 F.3d at 151.

[34] Judge Howard also wrote a separate dissent in which he rejected the court's dismissal on the pleadings, arguing that the court should assess "the full spectrum of sources necessary to evaluate the extent to which, if at all, the plaintiffs may possess one or more enforceable rights under the [ICCPR]." *Id.* at 192 (Howard, J., dissenting).

[35] In addition to his substantive justifications, Judge Torruella argued that declaratory judgment would be an appropriate remedy in this case because it is "substantially likely" to "result in some form of relief" to Puerto Rican residents. *Id.* at 180 (Torruella, J., dissenting).

[36] *Id.* at 170.

pation."[37] According to Judge Torruella, this norm meets all the requirements the Supreme Court demands to render its breach an "actionable violation[] of the law of nations."[38]

The court's analysis of the plaintiffs' customary international law claim, however brief,[39] significantly shaped the contours of the doctrine articulated in *Sosa* and further highlighted the conception of international law underlying that doctrine. In *Sosa*, the Supreme Court held that federal courts can "recognize private claims under federal common law for violations of" international norms.[40] Despite this grant of judicial power, however, the Court set a high bar for cognizability: federal courts cannot recognize "any international law norm with less definite content and acceptance among civilized nations than the historical paradigms" that existed in 1789.[41] Importantly, the *Sosa* holding was made in the context of the Alien Tort Statute[42] (ATS), which grants a federal forum to aliens for torts "committed in violation of the law of nations or a treaty of the United States."[43] Whereas the ATS "arguably authorized some degree of importation [of international norms] by federal courts,"[44] it is less clear that federal question jurisdiction, as provided by 28 U.S.C. § 1331, authorized the same judicial power for claims raised by U.S. citizens. Although the *Sosa* Court reserved judgment as to whether its holding extended to the § 1331 context, in footnote nineteen of the opinion the Court implied that it would not.[45]

In doing so, the *Sosa* Court was ambiguous as to the theory of international law underlying its decision. A recent debate in legal academia has centered around the status of international law norms in U.S. domestic law. The predominant viewpoint — the "internationalist" position — holds that customary international law is part of fed-

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[37] *Id.* at 176.

[38] *Id.* at 178 (referring to the *Sosa* test).

[39] That the majority devoted the time it did to the claim is notable, however, because the court could have dismissed the claim entirely on Supremacy Clause grounds without further discussion. The Supremacy Clause states that the "Constitution . . . shall be the supreme Law of the Land" U.S. CONST. art. VI, cl. 2. Thus, regardless of whether there exists a customary international norm of equal political participation, the court could not recognize such a norm as part of domestic law, for doing so would contradict Article II's requirement that electors be limited to states. The court noted this point in the context of the plaintiffs' treaty claim. *See Igartúa III*, 417 F.3d at 148.

[40] Sosa v. Alvarez-Machain, 124 S. Ct. 2739, 2765 (2004).

[41] *Id.*

[42] 28 U.S.C. § 1350 (2000).

[43] *Id.*

[44] *Igartúa III*, 417 F.3d at 151.

[45] *Sosa*, 124 S. Ct. at 2765 n.19 ("[The ATS] was enacted on the congressional understanding that courts would exercise jurisdiction by entertaining some common law claims derived from the law of nations; and we know of no reason to think that federal-question jurisdiction was extended subject to any comparable congressional assumption.").

eral common law;[46] thus, international law norms, after being recognized by courts, become available bases for private causes of action and are supreme to state law.[47] This view has been challenged by the "revisionist" position,[48] which maintains that when *Erie* extinguished the notion of a "general federal common law,"[49] it necessarily discontinued federal courts' ability to "find" new causes of action in international norms. For revisionists, only legislative bodies can turn international norms into private causes of action.[50]

In *Sosa*, the Court clearly rejected this revisionist argument, adopting the language of the predominant view.[51] As some commentators have noted, however, the *Sosa* Court equivocated in other passages as to whether its holding was truly based on an internationalist theory.[52] Particularly, the Court's suggestion in footnote nineteen that federal question jurisdiction might not give courts the power to recognize international law claims seems to run counter to the notion "that customary international law is federal common law, both *jurisdiction-granting* and supreme over state law."[53] If international law really is federal law, then federal courts should have the power to recognize claims based on international norms in federal question cases;[54] such

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[46] *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111(1) & cmt. d (1987); *see also* Gerald L. Neuman, *Sense and Nonsense About Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 FORDHAM L. REV. 371 (1997); Beth Stephens, *The Law of Our Land: Customary International Law as Federal Law After* Erie, 66 FORDHAM L. REV. 393 (1997).

[47] *See* LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 236–37 (2d ed. 1996); Lea Brilmayer, *Federalism, State Authority, and the Preemptive Power of International Law*, 1994 SUP. CT. REV. 295, 295.

[48] The most influential articulation of this position appears in 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).

[49] Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).

[50] Importantly, though, the internationalist position does not necessarily hold that judicially recognized international claims trump federal positive law. *See* The Paquete Habana, 175 U.S. 677, 700 (1900) (noting that "resort must be had to the customs and usages of civilized nations" but only "where there is . . . no controlling executive or legislative act").

[51] *See* Sosa v. Alvarez-Machain, 124 S. Ct. 2739, 2764 (2004) ("*Erie* did not in terms bar any judicial recognition of new substantive rules, . . . and post-*Erie* understanding has identified limited enclaves in which federal courts may derive some substantive law in a common law way. For two centuries we have affirmed that the domestic law of the United States recognizes the law of nations."). *But see id.* at 2772–74 (Scalia, J., concurring in the judgment) (advocating the revisionist viewpoint).

[52] *See, e.g.*, *The Supreme Court, 2003 Term—Leading Cases*, 118 HARV. L. REV. 248, 453 (2004) (noting that while "[m]uch of the majority's analysis is consistent with the view that since *Erie* all customary international law has been included within federal common law," the majority's language "implies a different legal model, in which norms of customary international law are not necessarily incorporated within post-*Erie* federal common law").

[53] Stephens, *supra* note 46, at 453 (emphasis added).

[54] *See id.* at 393–94 ("If international law is part of federal law, it provides the basis for federal court jurisdiction over cases raising well-pleaded international law claims.").

claims would by definition "aris[e] under the . . . laws of the United States."[55]

By considering *Sosa* in a domestic case, *Igartúa III* supports an understanding of *Sosa* as resting on an internationalist theory. In *Igartúa III*, the plaintiffs sought to enforce an international norm in a purely domestic context: they were U.S. citizens suing the United States for an alleged violation of an international norm. For the federal courts to have jurisdiction over such an international law claim, the claim would have to be considered part of federal question jurisdiction. The fact that the *Igartúa III* court applied the *Sosa* standard suggests that the First Circuit believed — or at least did not rule out — that *Sosa*'s holding was not limited to the ATS context, despite the *Sosa* Court's reservations in footnote nineteen.[56] To be sure, the *Igartúa III* majority expressed some doubt as to *Sosa*'s scope.[57] Nevertheless, the court could have simply made an affirmative statement that *Sosa* gave federal courts the power to recognize a limited set of international law claims *only* in ATS cases — in other words, that *Sosa*'s footnote nineteen precluded the court from even entertaining the plaintiffs' international law claim. That the court considered *Sosa* in this purely domestic case suggests that lower courts may interpret *Sosa* as resting on an internationalist theory.

Even given *Igartúa III*'s application of *Sosa* to federal question jurisdiction, however, some commentators may use *Igartúa III* to argue that *Sosa* does not conform to the internationalist theory. In particular, they might point out that in addressing the plaintiffs' customary international law claim, the court did not deny that such a norm may exist in international law. Instead, it merely noted that "[i]f there exists an international norm of democratic government, it is at a level of generality so high as to be unsuitable for importation into domestic law."[58] This statement — an application of the *Sosa* standard — elucidates a conception of international law as a broad set of norms, only

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[55] 28 U.S.C. § 1331 (2000).

[56] Although the *Igartúa III* majority did not specifically mention federal question jurisdiction, Judge Torruella addressed the point explicitly in his dissent, noting that "legislative history . . . indicates Congress's intent to extend federal jurisdiction over cases 'arising under' federal law to the fullest extent the Constitution would allow," and thus customary international law should be considered part of federal common law for § 1331 purposes. *Igartúa III*, 417 F.3d at 178 (Torruella, J., dissenting).

[57] Specifically, the court noted that international law's "status in our domestic courts is . . . qualified" and pointed out that the ATS is "a federal statute governing alien tort actions that arguably authorized some degree of importation [of international norms] by federal courts," suggesting a contrast with § 1331, which does not expressly authorize judicial recognition of international law claims. *Id.* at 151 (majority opinion).

[58] *Id.*

a subset of which are judicially cognizable.[59] Some have criticized this conception of international law as being "inconsistent with the modern position's simple rule that customary international law simply *is* federal law."[60] This criticism, however, is misplaced. The internationalist motto that "[i]nternational law is part of our law"[61] does not suggest that any imaginable international norm becomes immediate grounds for a federal cause of action. As Professor Gerald Neuman, a leading proponent of the internationalist view, notes, "Customary international law does not automatically become federal law, and does not automatically give rise to a private right of action . . . . It enters federal law by the agency of some branch of government, including the courts."[62] Viewed in light of *Igartúa III*, *Sosa* took precisely this approach: it granted federal courts the authority to incorporate into U.S. law a limited number of claims from a larger body of international norms.[63] That the *Sosa* Court was pragmatic does not make it any less internationalist.

Ultimately, the application of *Sosa* to the domestic context by decisions like *Igartúa III* may have little practical effect for U.S. citizens because so few international norms are judicially cognizable, and those that are cognizable are likely already covered by positive law. Nevertheless, *Igartúa III*'s consideration of *Sosa* outside the ATS context eliminates some of the conceptual ambiguities left by the *Sosa* Court.

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[59] *See* Gerald L. Neuman, *The Abiding Significance of Law in Foreign Relations*, 2004 SUP. CT. REV. 111, 131 ("Deliberately, the [*Sosa*] Court accepts the possibility that not every customary norm will be implemented by a private right of action."). Professor Neuman notes that this aspect of *Sosa*

> entails a significant guideline for the phrasing of legal conclusions in ATS cases denying liability. Because national court decisions applying international law are important data in the demonstration of international custom, federal courts rejecting ATS claims should be careful not to deny the existence of a customary international norm merely because the plaintiff has failed to prove that it possesses sufficient specificity to justify a private right of action under *Sosa*.

Id. at 131 n.91. The *Igartúa III* majority clearly abided by this phrasing guideline.

[60] Ernest A. Young, *Sorting Out the Debate over Customary International Law*, 42 VA. J. INT'L L. 365, 380 (2002). Professor Young is referring to the fact that federal courts even prior to *Sosa* tended to limit ATS claims to particularly heinous wrongs, such as official torture, extrajudicial killings, and genocide, while not accepting "claims based on more controversial norms." *Id.*

[61] The Paquete Habana, 175 U.S. 677, 700 (1900).

[62] Neuman, *supra* note 59, at 130.

[63] The larger body of international norms not incorporated into domestic law might be considered "aspirational." Professor Richard Fallon argues that constitutional norms should be viewed this way, since there is a "constitutionally permissible gap . . . between background rights and the rights that courts or other officials will currently enforce." Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274, 1324 (2006).