Who Watches the Watchmen? 'Vigilant Doorkeeping,' The Alien Tort Statute, & Possible Reform

Keith A. Petty
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by Keith A. Petty*
I. Introduction

The Alien Tort Statute allows alien plaintiffs to file civil actions in U.S. district courts for
torts violating the law of nations or U.S. treaties. The scope of the Alien Tort Statute (“ATS”) is
potentially limitless. Litigants in any given case under the statute may include aliens located
within the United States, foreign officials, multi-national corporations, and even U.S.
government officials. The potential scope of actionable claims is no less broad, depending on
federal court interpretation of customary international law (“CIL”). Underlying these cases is a
debate in the academy as to whether the ATS is a valuable tool to combat human rights
violations, or whether it infringes on the role of the political branches in foreign relations.¹

The U.S. Supreme Court in Sosa v. Alvarez-Machain warned that there must be “vigilant
doorkeeping” to claims under the ATS. In spite of this warning the courts do not seem best

¹ For exemplary articles underlying this debate and the role of CIL in U.S. jurisprudence, see, e.g., Ralph G.
Steinhardt, Laying One Bankrupt Critique to Rest: Sosa v. Alvarez-Machain and the Future of International Human
169 (2004) (arguing that the Executive opposition to ATS claims is not entitled to judicial deference) [hereinafter
Stephens]; Lea Brilmayer, Federalism, State Authority, and the Preemptive Power of International Law, 1994 Sup.
111 Harv. L. Rev. 1824, 1846-47 (1998); Anne-Marie Burley, The Alien Tort Statute and the Judiciary Act of
International Law, and the Continuing Relevance of Erie, 120 Harv. L. Rev. 869, at 870-71 (2007) [hereinafter
Bradley & Sosa]; David H. Moore, An Emerging Uniformity for International Law, 75 Geo. Wash. L. Rev. 1
(2006) (efforts to incorporate international law as federal law should focus on the political branches, not the courts);
Julian Ku and John Yoo, Beyond Formalism in Foreign Affairs: A Functional Approach to the Alien Tort Statute,
2004 Sup. Ct. Rev. 153 (2004) (arguing that the courts are not as well equipped as the Executive to achieve the
purpose behind the ATS); Curtis A. Bradley & Jack L. Goldsmith, Customary International Law as Federal
Customary International Law, 33 UCLA L. Rev. 665 (1986)).
equipped to juggle the competing interests at stake in ATS litigation, nor do they suggest that they should be the watchmen. The struggle between plaintiff’s lawyers seeking to broaden the scope of the ATS and defendants’ attempts – often supported by the Executive Branch – to limit actionable claims is unlikely to be resolved through judicial decision. The cases, to date, have not lead to a coherent jurisprudence.

Who, then, watches the watchmen? Better stated, from whom should the court receive guidance? In several cases, the judicial branch has called out for assistance from the political branches. When ATS litigation touches on foreign policy concerns, such as suits against foreign heads of state, input from the executive branch may be solicited. In other cases less connected to foreign affairs, the Executive may offer guidance that is not followed. A coherent framework for ATS claims is needed, and it must come from the Legislature.

Congress is best suited to clarify the scope of actionable claims under the ATS through its constitutional authority to “define and punish…Offenses against the Law of Nations.”2 This article outlines the legal underpinnings of ATS actions and the need for reform. Section II discusses the history of ATS litigation as well as the difficulties inherent in limiting causes of action based on customary international law. The four primary subjects of ATS litigation from *Filartiga* to the present are discussed in detail in Section III. Whether reform to the ATS is necessary is discussed in Section IV, which outlines several mechanisms of judicial deference and recognizes that in spite of these safeguards reform is, in fact, necessary. This article concludes by recommending a basis for a revised ATS, including mirroring the CIL violations specified in the Third Restatement of foreign relations law as well as allowing for input from the Executive in cases likely to impact foreign relations.

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2 U.S. CONST. art. I, § 8, cl. 10.
II. History of the ATS and the Application of Customary International Law

a. Alien Tort Statute Litigation From 1789-2004

The Alien Tort Statute ("ATS") first appeared as a clause in the Judiciary Act of 1789.\(^3\) In its most recent form, the ATS provides: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."\(^4\) While the origins of the ATS remain unclear, given the historical context it is likely that "its principal motivation was to provide redress for offenses committed by U.S. persons against foreign officials in the United States."\(^5\)

The ATS remained largely dormant for almost two centuries\(^6\) until the case of *Filartiga v. Pena-Irala* in 1980.\(^7\) The plaintiffs in that case, relatives of a Paraguayan national, successfully sued a Paraguayan police official responsible for the kidnapping, torture, and death of their son. While human rights advocates rightfully celebrated this decision as a clear victory,

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\(^3\) Judiciary Act of 1789, ch. 20, 1 Stat. 73, (providing “[t]he district courts shall have…cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for tort only in violation of the law of nations or a treaty of the United States.”).


\(^7\) Filartiga v. Pen-Irala, 630 F. 2d 876 (2d. Cir. 1980).
questions remained as to whether the ATS was merely jurisdictional, or whether it provided an independent cause of action for human rights violations.

The jurisdictional issue for the 2nd Circuit was clear. The ATS did not create new rights for aliens, rather it opened “the federal courts for adjudication of the rights already recognized by international law.”\(^8\) According to one commentator, “[t]he court in Filartiga did not hold, however, that either CIL itself or the ATS created the plaintiffs’ cause of action.”\(^9\) The strictly jurisdictional nature of the ATS is further supported by its placement in the Judiciary Act, which established the jurisdiction and structure of federal courts.\(^10\) Nonetheless, during the twenty-four years following *Filartiga*, the debate over whether the ATS only provided jurisdiction or whether it created independent causes of action would linger.

In the 1980’s most of the suits resembled those in *Filartiga* – foreign nationals suing their own government. The litigation expanded in the 1990’s to private actors, to include suits against multi-national corporations for aiding and abetting alleged human rights abuses by foreign States. During the post-*Filartiga* era, many courts held that the ATS was both jurisdictional and substantive in nature.\(^11\) In fact, the lower courts uniformly held that no additional statutory cause of action was required to bring a claim under the ATS.\(^12\)

\(^8\) *Filartiga*, 630 F. 2d at 887.

\(^9\) Bradley & Sosa, supra note 1, at 888.

\(^10\) Bradley & Sosa, *supra* note 1, at 887. There is little legislative history to explain the origins of the ATS and how it fits into the Judiciary Act. For a detailed analysis of the history of the ATS, see Thomas H. Lee, *The Safe Conduct Theory of the Alien Tort Statute*, 106 COLUM. L. REV. 830 (2006) (arguing that only violations of “safe conducts” were recognized in 1789 as an actionable claim under the ATS).

\(^11\) Kadic v. Karadzic, 70 F.3d 232, 241 (2d Cir. 1995); In re Estate of Ferdinand Marcos, Human Rights Litig., 25 F.3d 1467, 1475 (9th Cir. 1994).

The jurisdiction over substance quandary was due in part to the *Filartiga* Court leaving the door open for ATS claims based on violations of the law of nations. The scope of the law of nations can be interpreted rather broadly, as discussed in greater detail below. In fact, *Filartiga* refuted the argument that the law of nations may only be designated by Congress under the “Define and Punish” clause.\(^\text{13}\) Courts in subsequent cases were left with the daunting task of identifying which “law of nations”\(^\text{14}\) norms were embodied in the federal common law, and, therefore, actionable under the ATS.\(^\text{15}\) It was not until 2004, twenty-four years after the *Filartiga* decision, that the Supreme Court set limits to ATS claims in *Sosa v. Alvarez-Machain*.

### b. The Alien Tort Statute After *Sosa v. Alvarez-Machain*: The Era of Uncertainty

In the seminal decision of *Sosa v. Alvarez-Machain*, the Supreme Court affirmed the jurisdictional nature of the ATS, but left several key issues unresolved. On jurisdiction, the Court provided, “In sum, we think the statute was intended as jurisdictional in the sense of addressing the power of the courts to entertain cases concerned with a certain subject.”\(^\text{16}\) The Court added, however, that historically “federal courts could entertain claims once the

\(^{\text{13}}\) U.S. CONST. art. I, § 8, cl. 10.
\(^{\text{14}}\) In this article, the phrase “law of nations” is used interchangeably with “customary international law” — international norms that develop from sufficient State practice, when States act out of a sense of legal obligation to do so. The law of nations, however, is a term of art unique to the U.S. constitutional legal system. See U.S. CONST. art. I, § 8, cl. 10 (“The Congress shall have Power…To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations”).
\(^{\text{15}}\) Historically, applying international law to federal causes of action has not been problematic. Numerous cases apply rules of international law uncodified by Congress. See, e.g, Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796) (“When the United States declared their independence, they were bound to receive the law of nations, in its modern state of purity and refinement.”) Ware, 3 U.S. at 281. See also The Paguate Habana, 175 U.S. 677 (1900), Banco Nacional De Cuba v. Sabbatino, 376 U.S. 398 (1964). And see The Nereide, 13 U.S. (9 Cranch) 388, 422 (1815) (stating U.S. courts are “bound by the law of nations, which is a part of the law of the land.”); See also United States v. Smith, 18 U.S. (5 Wheat.) 153, 158-60 (1820); See also THE FEDERALIST NO. 3, at 22 (John Jay) (1 Bourne ed. 1901).
\(^{\text{16}}\) *Sosa*, 124 S. Ct. at 2755.
jurisdictional grant was on the books, because torts in violation of the law of nations would have been recognized within the common law of the time.”[17] Therefore, according to the Court, the ATS was purely jurisdictional, but allowed the courts to entertain causes of action under federal common law.

The next challenge, as highlighted by the Court, is defining actionable claims under the ATS – the “scope” of ATS causes of action. The Sosa Court provided some guidance by stating, “[W]e think the courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized.”[18] The 18th-century paradigms recognized by the Court include norms against the “violation of safe conducts, infringement of the rights of ambassadors, and piracy.”[19] The Court recognized, in addition to the three norms governing State conduct, the overlapping protective norms which are “binding on individuals for the benefit of other individuals.”[20] This reading of applicable international law is embraced by a human rights approach to ATS litigation, which will be discussed in greater detail below. Even based on Sosa’s guidance, however, the scope of ATS claims remains an ill-defined battleground for litigants.

The sources of law used to define actionable law of nations violations is similarly problematic. The drafters of the ATS did not help matters by leaving few signs of legislative intent.[21] The Constitution puts the historical law of nations in context in the “Define and Punish” clause, which provides “The Congress shall have Power…To define and punish Piracies

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[17] Id.
[18] Id. at 2765.
[19] Id. at 2761 (citing 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 68 (1769)).
[21] Id. at 2761 (stating that “we have found no basis to suspect Congress had any examples in mind beyond those torts corresponding to Blackstone's three primary offenses.”).
and Felonies committed on the high Seas, and Offences against the Law of Nations.”

In light of this provision, Congress in 1789 may have been targeting piracy, as well as other norms of the law merchant through the ATS. The three wrongs recognized in Sosa rely on similar historical sources, but the question remains, which legal pronouncements legitimately define the modern law of nations?

c. The Scope of Actionable ATS Claims

The door to actionable claims under the ATS was kept ajar subject to vigilant doorkeeping by the federal courts. But just how far open is this door, and which claims should be permitted to enter? The answers to these questions lay at the heart of unraveling the modern ATS puzzle. To begin, the plain text of the ATS grants jurisdiction over violations of the law of nations. Therefore, one must undertake an analysis that determines: 1) what potential actions fall within customary international law, and 2) which of these norms are as “accepted by the civilized world and defined with a specificity comparable” to how safe conducts, rights of ambassadors, and piracy were in 1789.

According to universally accepted definitions, customary international law “results from a general and consistent practice of states followed by them from a sense of legal obligation.”

The question then becomes, how do we determine which CIL principles are as fully recognized

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22 U.S. CONST. art. I, § 8, cl. 10  
23 Engle, supra note 6, at 6 n. 25-6 (citing Al Odah v. United States, 321 F.3d 1134, 1148 (D.C. Cir. 2003) for prize jurisdiction).  
24 Sosa, 124 S. Ct. at 2764.  
25 Id. at 2765.  
26 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987) [hereinafter RESTATEMENT]. See also Statute of the International Court of Justice art. 38(1)(b), June 26, 1945, 59 Stat. 1055, 1060 (stating that international custom is a source of law that can be applied by the international Court of Justice “as evidence of a general practice accepted as law”). Article 38(1)(c) of the ICJ Statute recognizes “the general principles of law recognized by civilized nations” as a source of law. It could be argued that certain general principles, which may not have ripened into customary law, support ATS claims. That discussion, however, is beyond the scope of this article.
as those that were actionable in 1789?27 The Supreme Court alluded to this issue in *United States v. Smith.*28 In discussing the interpretation of a statute prohibiting piracy, the Court noted, “Offences, too, against the law of nations, cannot, with any accuracy, be said to be completely ascertained and defined in any public code recognised by the common consent of nations,” suggesting the common law must be relied upon to define some understood, but unenumerated, offenses.29

The application of CIL in U.S. courts triggers a visceral response in some. According to the “revisionists,” CIL has the status of federal common law only when there is authorization to treat it as such under the Constitution, a statute, a treaty, or an Executive pronouncement.30 This reasoning follows from the post-Erie interpretation that federal common law, to the extent it still exists, must be grounded in actual federal law.31 The Supreme Court notes that “[l]ike substantive federal law itself, private rights of action to enforce federal law must be created in Congress.”32 In fact, recent cases suggest the Court “has adopted a restrictive approach to judicial recognition of private rights of action under federal statutes and the Constitution.”33

27 *Sosa*, 124 S. Ct. at 2761. See also Bradley & Sosa, *supra* note 1, at 897 n. 146 (arguing that the CIL claims available under the ATS are much more limited than CIL in the general international law sense. ATS CIL violations are a “subset of all CIL violations”). See also *Sosa*, 124 S. Ct. at 2768-69.


29 *Id.* at 159.


The “modernists” take a different approach, arguing that CIL has the status of self-executing federal common law to be applied without implementing legislation.34 This argument appeals to the universal nature of the law of nations, which many suggest should be interpreted by States in a similar fashion, rather than through the bifurcated process of implementing domestic legislation. Under this paradigm, a broader interpretation of CIL is warranted. In fact, at least one commentator argues that the development of CIL has accelerated in the post-WWII era as a result of State participation in multilateral intergovernmental organizations and the growing influence of non-governmental organizations.35 Under this view, rather than limit actionable ATS claims, they should be expanded.

This interpretation, however, runs afoul of the very heart of the *Sosa* decision. As stated by the Court, “We have no congressional mandate to seek out and define new and debatable violations of the law of nations, and modern indications of congressional understanding of the judicial role in the field have not affirmatively encouraged greater judicial creativity.”36 Environmental torts are an example of a failed attempt to create a new violation of the law of nations in the courts.37 The Second Circuit denied jurisdiction over an environmental claim brought under the ATS, noting that “environmental torts are unlikely to be found to violate the

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35 Steinhardt, *supra* note 1, at 2265 n. 108.

36 *Sosa*, 124 S. Ct. at 2763 (rejecting national constitutions and part of the Restatement as sources of defining arbitrary detention as a CIL violation actionable under ATS).

37 Engle, *supra* note 6, at 11.
law of nations.” Without Congressional action, this is unlikely to be the last “creative” law of nation violation claimed under the ATS.

The different interpretations as to the scope of CIL are contentious enough. Verifying which of these norms have been established with the same certainty as the 18th-century law of nations violations is more difficult still. What is certain, however, is that federal common law may still be used as a gap filler, particularly when the CIL norm to be applied under an ATS claim is not found in a federal statute or treaty. As the next section discusses, defining CIL norms absent legislation becomes nearly impossible as long as the “modernist” and “revisionist” views on applicable sources of law are irreconcilable.

d. Sources Providing Evidence of Customary International Law

The sources of law relied upon as evidence of CIL norms is a continual struggle. In determining causes of action for violations of international law, it seems that a broad survey of foreign and international law sources would be an effective indication of State practice. This issue, however, has been particularly divisive in the courts and the academy.

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38 Ajuindo v. Texaco, 303 F.3d 470, 476 (2nd Cir. 2002). See also Jota v. Texaco, 157 F.3d 153, 155-56 (2nd Cir. 1998); Beanal, 97 F.3d 161. And see Bano v. Union Carbide, 273 F.3d 120 (2d Cir. 2001).
39 Other areas of interest which have arguably risen to the level of CIL include the prohibition on trafficking in persons as well as standards set out in the Convention on the Rights of the Child, G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), entered into force Sept. 2 1990, which to date has 193 State Parties, with the noticeable absence of the United States (signed but not ratified) and Somalia. See Office of the United Nations, http://www2.ohchr.org/english/bodies/ratification/11.htm.

*Sosa* suggested a more stringent test in applying CIL than the lower courts.\footnote{Sosa, 124 S. Ct. at 2761. See also Bradley & Sosa, *supra* note 1, at 900 n. 169 (citing Estate of Marcos, 103 F.3d at 795; and *Talisman*, 244 F. Supp. 2d at 305 as examples of pre-*Sosa* lower court decisions mistakenly relying on the *RESTATEMENT* as a source of CIL violations actionable under the ATS).} Defining norms “accepted by the civilized world” to the same degree as violations of safe conduct, infringement of the rights of ambassadors, and piracy in 1789,\footnote{Sosa, 124 S. Ct. at 2761.} the Court refocused on the practice of States and gave little validity to other international sources. Specifically, the weight of the Universal Declaration of Human Rights (UDHR)\footnote{GA Res. 217A(III), U.N. GAOR, 3d Sess., U.N. Doc. A/810 (Dec. 12, 1948).} and the International Covenant on Civil and Political Rights (ICCPR),\footnote{International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U. N. T. S. 171.} which, although ratified, was not self-executing and not enforceable in U.S. courts.\footnote{U.S. Reservations, Declarations and Understanding, International Covenant on Civil and Political Rights, 138 Cong. Rec. S4781-01, art. III(1) (daily ed. Apr. 2, 1992).} The Court also rejected national constitutions (consensus prohibiting arbitrary detention is norm, but highly general), an International Court of Justice case (different international norms and detention was more severe and longer), and federal case law (more assertive view expressed on federal judicial discretion on CIL claims than the Supreme Court takes). One of the more profound statements issued by the Court was in reference to the

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41 *Filartiga*, 630 F. 2d at 881-84.
45 See, e.g., *Sosa*, 124 S. Ct. at 2761. See also Bradley & Sosa, *supra* note 1, at 900 n. 169 (citing Estate of Marcos, 103 F.3d at 795; and *Talisman*, 244 F. Supp. 2d at 305 as examples of pre-*Sosa* lower court decisions mistakenly relying on the *RESTATEMENT* as a source of CIL violations actionable under the ATS).
46 Sosa, 124 S. Ct. at 2761.
ICCPR, which the United States has ratified. The Court noted that there was an implication that “the presence of a norm in the ICCPR no longer provides significant evidence of a CIL cause of action in ATS cases.”\textsuperscript{50}

Some are concerned with the invasive nature of applying international and foreign sources used in constitutional interpretation. But should we not, contrary to these concerns, welcome a new era of “judicial globalization,” as suggested by others?\textsuperscript{51} The truth is found somewhere in between these opposing views.

In order to remain a leader in guiding the development of international legal norms, the United States would benefit from an interpretation of the law of nations that took the practice of other nations into account. For example, the principles enshrined in the UDHR – a document co-authored by Eleanor Roosevelt – have undoubtedly become part of customary international law. In fact, several Supreme Court cases cite the UDHR as a measure to judge other norms.\textsuperscript{52} Similarly, the ICCPR was short-changed in Sosa. It has not only been ratified by the United States, but it is the embodiment of several important customary international human rights standards. Recall that one of the primary foreign relations concerns of the founders, and likely the rationale behind the ATS in 1789, was to provide consistent federal remedies for law of nations violations.\textsuperscript{53} Utilizing sources recognized by the global community as reflecting customary international law norms would follow that intent.

\textsuperscript{50} Bradley & Sosa, \textit{supra} note 1, at 899 (citing Aldana v. Del Monte Fresh Produce, N.A., Inc., 416 F. 3d 1242, 1247 (11\textsuperscript{th} Cir. 2005) (disapproving pre-Sosa district court decisions that had relied on the ICCPR)).


\textsuperscript{53} See \textit{supra} section II.a., text accompanying note 5.
The Supreme Court’s reliance on international legal sources in recent years has been welcomed by modernists.\(^\text{54}\) On the other hand, the “judicial globalization” honeymoon may be short-lived in light of cases such as *Medellin*.\(^\text{55}\) The significance of this debate directly affects the inability to resolve the issue of the scope of CIL norms actionable under the ATS, and the sources of law used to prove the viability of these norms for ATS purposes.

Notwithstanding the academic discussion, the locus of the struggle is in the courts. The resort to an ill-defined body of law,\(^\text{56}\) drawing from debatable sources, does not bode well for consistent jurisprudence. Claimants deserve to know with more certainty when they have a legitimate cause of action, and prospective defendants need to know how to amend their behavior in order to avoid violating the proscribed actions under the ATS. Well defined legislation will, in large part, preclude the above debate as to which torts are actionable, and which sources of law apply. The legislation will be the courts’ guidance.

### III. Current Subjects of ATS Litigation

The subject areas currently being litigated under the ATS fall into four primary categories. First, there are the traditional *Filartiga*-like cases in which the law of nations violator/torturer is found within the territorial United States. Second, there are claims against foreign governments, challenging their internal policies as they relate to their own citizens.

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\(^{55}\) *Medellin v. Texas*, 128 S. Ct. 1346 (2008). The significance of the Medellin decision cannot be overlooked. This Court, in particular, seems unlikely to extend private rights of action for ill-defined CIL violations without implementing legislation of those norms. See, e.g., id. at 1357, n. 3.

\(^{56}\) For a good example, see the debate over CIL as applied in the international humanitarian law context in the ICRC CIL Report and the U.S. State Department Reply. See ICRC STUDY, supra note 40; and see U.S. RESPONSE, supra note 40.
Corporate aiding and abetting liability cases make up the third, but most active, field in ATS litigation. Finally, a new area of litigation, which will likely be a growth industry in coming years, relate to U.S. officials being sued for actions taken in the context of the so-called war on terror. Each of these areas raises considerable issues in their own right, absent guiding legislation from Congress.

a. When Human Rights Violators Are In The United States

The *Filartiga* case was the first, and best, example of a foreign official found in the United States, who could be served with an ATS claim by another foreign national. This type of claim, while seemingly in line with U.S. human rights objectives,\(^{57}\) raises concerns over whether the ATS was intended to be used between two foreign parties, particularly when the conduct in question has little to no connection to the United States.

While certain policy considerations should be taken into account, the law clearly allows for these actions. The Supreme Court held that Congress has the authority, under the “arising under” clause, to confer jurisdiction on U.S. courts for claims brought by foreign plaintiffs against foreign defendants.\(^{58}\)

Proponents of these actions argue that Congress not only recognized this form of extraterritorial extension of human rights claims, but “approved and expanded the court’s ruling in Filartiga.”\(^{59}\) This argument is supported by the enactment of the Torture Victims Protection Act (TVPA).\(^{60}\) To be clear, “The TVPA creates a cause of action against one who commits torture or extrajudicial killing and was intended to codify judicial decisions recognizing such a


\(^{59}\) *Engle*, supra note 6, at 17 (citing *Karadzic*, 70 F.3d at 243).

cause of action under the Alien Tort Claims Act.”61 There is no doubt in the case of foreign officials who “subject an individual” to torture or extrajudicial killing,62 that the TVPA – over the ATS – now controls the field.63

According to the legislative history, but not the language of the TVPA, the statute also applies to “anyone with higher authority who authorized, tolerated or knowingly ignored those acts.”64 Subsequent cases have applied the same standard and even extended a “command responsibility” theory of liability usually reserved for war crimes.65 In *Hilao v. Estate of Marcos*, the 9th Circuit relied on a post-WWII military tribunal case referenced in the Senate Report,66 as well as the Statute of the International Criminal Tribunal for the former Yugoslavia to develop its tort-based command responsibility theory.67 Although allowing civil actions for conduct underlying criminal offenses is well established, juxtaposing theories of liability from the criminal side to the civil is at times problematic. In this instance, the courts come dangerously close to confounding the laws of war, as utilized in war crimes prosecutions, with civil liability for acts occurring in the absence of an armed conflict. While “the goal of international law regarding the treatment of noncombatants in wartime…is similar to the goal of international human rights law,”68 the similarities between this aspiration and the goals of the ATS should not be overextended. In contrast to the codification and Congressional intent behind

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63 Enhaoro v. Abubakar, 408 F.3d 877 (7th Cir. 2005).
66 In Re Yamashita, 327 U.S. 1, 14-16 (1946).
68 Estate of Marcos, 103 F.3d at 777 (9th Cir. 1996).
the TVPA, the ATS is less well-defined and, according to Sosa, must only permit claims as universally accepted as those existing under the federal common law in 1789.

The extraterritorial application of the TVPA is another area of concern shared with ATS litigation. The Senate Majority and Minority Reports to the TVPA were in sharp disagreement as to the scope of these claims.\(^69\) The majority embraced the extraterritorial component of the act, while the minority cautioned against such an expansive application of U.S. federal law.\(^70\) The Minority Report, for example, questioned whether the Convention Against Torture – as understood and ratified by the United States – contemplated an extraterritorial extension of civil liability for torture claims as provided for in the TVPA. The first President Bush expressed similar misgivings when he signed the TVPA into law, stating, “U.S. courts may become embroiled in difficult and sensitive disputes in other countries, and possibly ill-founded or politically motivated suits, which have nothing to do with the United States and which offer little prospect of successful recovery.”\(^71\)

Rather than expand available claims, the TVPA has several limitations in the scope of its application. The most obvious limit under the TVPA is that it only creates a cause of action for two specific offenses – torture and extra-judicial killing. The statute also requires an exhaustion of local remedies prior to utilizing U.S. courts, and there is a ten-year statute of limitations. Similarly, and these limits relate more to the nature of the subject matter within the TVPA, a certain amount of State action is required to impute liability. This holds true in spite of certain protections for States under the Foreign Sovereign Immunities Act (FSIA), as discussed below.

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b. Suits Against Foreign Officials

The drafters of the ATS, following the concerns of the founders, were likely seeking a unified approach to complying with international law obligations and to avoid conflicts with other nations. The question remains whether the use of the ATS today is consistent with that purpose.72 As suits against foreign officials became a prime area of litigation, several issues arose, including: the extent to which U.S. law was intended to govern the conduct of other States, the impact these suits have on U.S. foreign relations, and whether this form of ATS litigation interferes with the prerogatives of the Executive branch.

Historically, the integrity of the sovereign was sacrosanct, and courts were reluctant to become involved in how States treat their citizens. According to a Second Circuit case in 1976, dealing with reparations to a Jewish survivor of Nazi Germany whose property was confiscated by the State, “There is a general consensus, however, that [international law] deals primarily with the relationship among nations rather than among individuals.”73 Well before this case, however, the individual was becoming a subject in international law. The development of international human rights law, concurrently with international criminal law, began in earnest after WWII – most notably the prosecution of Nazi war criminals at the Nuremburg military tribunal and the adoption of the Universal Declaration of Human Rights – and continues today. In the early 21st-century, there can be no doubt that “how a state treats individual human beings…is a matter of international concern and a proper subject for regulation by international law.”74

72 Sosa, 124 S. Ct. at 2776 (providing “[t]he notion that a law of nations, redefined to mean the consensus of states on any subject, can be used by a private citizen to control a sovereign’s treatment of its own citizens within its own territory is a 20th-century invention of internationalist law professors and human-rights advocates.” (J. Scalia concurring in part and concurring in the judgment).
73 Drefus v. Von Finck, 534 F.2d 24, 30-31 (2nd Cir. 1976).
74 RESTATEMENT, supra note 26, pt. VII introductory note at 144-45.
The recognition of the individual as a subject of international law does not clarify the extent to which “our courts [should] sit in judgment of the conduct of foreign officials in their own countries with respect to their own citizens.”\textsuperscript{75} Largely because foreign relations fall within the purview of the political branches, there are certain limits on filing claims against States and foreign officials in U.S. courts.

The Foreign Sovereign Immunities Act (FSIA),\textsuperscript{76} for example, is the only way in the U.S. to gain jurisdiction over a foreign sovereign.\textsuperscript{77} The general rule is that the foreign State is immune from liability for its sovereign acts unless there is a waiver of immunity, or if the State is engaged in commercial activity. A waiver of immunity may be implied, but this is strictly construed against the private plaintiff.\textsuperscript{78} Commercial acts, referred to as \textit{acto jure gestionis} in the international context, are actionable against the State if the act occurred, or has direct effects, in the United States.\textsuperscript{79}

The courts must exercise caution when interpreting a claim to pierce sovereign immunity, as the consequences could have diplomatic significance. Judge Ginsburg, in \textit{Princz v. Fed. Republic of Germany}, wisely noted:

We think that something more nearly express [than the FSIA implied waiver provision] is wanted before we impute to the Congress an intention that the federal courts assume 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 of § 1605 (a)(1) 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

\textsuperscript{75} Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 813 (CADC 1984) (Judge Bork, concurring).
\textsuperscript{76} 28 U.S.C. § 1605. See Engle, \textit{supra} note 6, at 41-47.
\textsuperscript{78} Sampson v. Fed. Republic of Germany & Claims Cong., 250 F.3d 1145 (7th Cir. 2001) (where immunity was not implicitly waived, even though the acts in question related to \textit{jus cogens} norms).
\textsuperscript{79} See, e.g., Argentine Republic v. Amareda Hess, 488 U.S. 428 (1989), Adler v. Federal Republic of Nigeria, 219 F.3d 869 (9th Cir. 2000); Australian Gov’t Aircraft Factories v. Lynne, 743 F.2d 672, 673-75 (9th Cir. 1984). See also Engle, \textit{supra} note 6, at 45.
could have normal relations with the government of the day--unless disrupted by our courts, that is.80

ATS claims against foreign sovereigns, if the FSIA does not stand in the way, could have similarly damaging effects.

Not unlike the Sovereign State, foreign officials are afforded immunity in certain circumstances. Ministers and heads of state once enjoyed absolute immunity during terms in office.81 Once their term is complete, State officials enjoy relative immunity,82 and, in some instances, no immunity at all if their actions related to commercial activity or takings.83 There is no immunity for acts committed that are illegal under the law of the State.84

Following the Filartiga decision, some judges were concerned that the ATS was being interpreted to allow “our courts [to] sit in judgment of the conduct of foreign officials in their own countries with respect to their own citizens.”85 In Sampson v. Fed. Republic of Germany, this notion was taken to its limit when the 7th Circuit reasoned that in spite of alleged violations of jus cogens norms,86 there is no obligation to remedy such violations.87 Proponents of this type of ATS action claim that precluding a cause of action for human rights abuses goes against the doctrine that “every right, when withheld, must have a remedy.”88 As discussed below, actions under the ATS may not be the only remedy available to victims of human rights violations.

82 Congo v. Belgium, 2002 ICJ 121 (Feb. 14).
83 Sugarman v. Aeromexica, 626 F.2d 270, 273-74 (3rd Cir. 1984) (citing Letter of Jack B. Tate, Acting Legal Adviser, Department of State, to Acting Attorney General Philip B. Perlman (May 19, 1932), reprinted in 26 Dep't of State Bull 984, 984-85 (1952)).
84 Filartiga, 630 F.2d at 884.
85 Tel-Oren, 726 F.2d 774, 813 (D.C. Cir. 1984) (Judge Bork, concurring).
86 Jus cogens is a special set of customary international law from which no derogation is permissible. See Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 714 (9th Cir. 1992) (quoting the Vienna Convention on the Law of Treaties, art. 53, May 23, 1969, 1155 U.N.T.S. 332, 8 I.L.M. 679); See also Comm. Of U.S. Citizens Living in Nicaragua v. Reagan, 859 F.2d 929, 940 (D.C. Cir. 1988); and see RESTATEMENT, supra note 26, § 102 cmt k.
87 Sampson, 250 F.3d at 1145.
88 Marbury v. Madison, 5 U.S. (1 Cranch) 137, at 147 (1803) (citing WILLIAM BLACKSTONE 3 COMMENTARIES 109).
The State Department, often partnering with the Department of Justice, advocates that the political solution to violating States must take precedence over a judicial solution. The legal advisor to the Secretary of State, John Bellinger, has expressly raised concerns over the extraterritorial application of U.S. laws as seen in ATS cases, and the undermining effect this has on the Executive’s diplomatic policies. In ATS cases, the State Department often submits “statements of interest” to the Court asking for dismissal based on political considerations. These statements draw sharp criticism from commentators and human rights advocates.

The courts, however, do not always rely on executive branch statements in ATS cases involving foreign sovereigns and officials. Utilizing the immunity theories, the political question doctrine, the act of state doctrine, and forum non conveniens the courts have some tools available to preclude suits that are not properly before them. While some argue that these tools of abstention or judicial deference allow for “vigilant doorkeeping,” many frivolous claims are permitted to slip through, particularly in the Corporate litigation context.

**c. Corporate Cases**

There is no better microcosm in which to view the relentless debate surrounding the application of the ATS than in cases involving corporate liability. It has been noted that

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89 Bellinger, supra note 5.
93 In re Nazi Cases Against German Defendants Litg., 129 F. Supp. 2d (D.N.J. 2001); Talisman, 244 F. Supp. 2d 289; Abdullah v. Pfizer, No. 01 Civ. 8118, 2002 WL 31082956 (S.D.N.Y. Sept. 17, 2002); Bodner v. Banque
“[b]oth the scholarship provided by those in the field of human rights gazing at multi-national enterprises] and the scholarship offered by those gazing back the other way from corporations to human rights is startling in its positivistic approach.”

The most controversial theory of liability for corporations under the ATS is seen in the aiding and abetting cases. Even though there is no indication in the language of the ATS itself of third party liability for violations of the law of nations, many argue that multi-national corporations must be held accountable for their alleged complicity in cases of human rights abuse. To allow such claims, however, would greatly expand the “modest number” of claims under ATS suggested by Sosa. Moreover, “innovative” interpretations of ATS claims should be left to Congress. Under the ATS, and the standards articulated in Sosa, aiding and abetting liability for corporations does not meet the “definite content and acceptance among civilized nations.”

In Sosa the court focused on the ATS standard – whether international law norms were universal enough to allow suits against different parties to include corporations.

Not only is it doubtful that the ATS extends to aiding and abetting liability, the sources evidencing such liability are problematic. For example, in the Apartheid Litigation case, the Court found the international sources to be inadequate for [ATS] purposes. Furthermore, relying on non-binding decisions of international criminal tribunals as evidence of aiding and abetting liability in CIL is erroneous. The international criminal tribunals do not create binding

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95 Doe I v. Unocal Corp., 395 F.3d 932 (9th Cir. 2002).
96 Sosa, 124 S. Ct. at 2761-63.
sources of law and are concerned with criminal, rather than civil matters.98 The gap between what Sosa declined to consider enforceable ATS claims for arbitrary arrest and detention applies doubly to aiding and abetting liability – there are far fewer sources to confirm the status of aiding and abetting as a CIL claim.

If this theory of liability holds, then a significant number of defendants in the United States will be subject to ATS jurisdiction, in part, because corporations have more assets and are better targets of litigation. Far from being a noble tool combating human rights abuse, ATS litigation in this context is likely based more on politics and greed.99 Furthermore, it has been U.S. policy to object to the use of aiding and abetting liability to combat transnational crime.100

Similar to political branch pronouncements, the Supreme Court declined to imply aiding and abetting liability in civil cases under the securities fraud statute, arguing this expanded litigation would imply policy trade-offs best resolved by Congress.101 When Congress acted, it did not allow private causes of action for aiding and abetting in this field.102

In the context of ATS litigation, the lower courts are in conflict over whether aiding and abetting liability for human rights abuses is a common law claim consistent with Sosa. Some courts held that when Congress has not explicitly provided for aiding and abetting liability for

98 Id. at 138 (citing In re South African Apartheid Litigation, 346 F. Supp.2d 538, 550 (S.D.N.Y. 2004)). In contrast, see Steinhardt, supra note 1, at 2286 n. 204, citing international criminal tribunals as evidence that corporations may be held liable under an aiding and abetting theory.
99 See Bellinger, supra note 5.
101 See, e.g., Central Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164, 181-82, 189-90 (1994) (where the Supreme Court concluded that civil liability for aiding and abetting was uncertain – requires explicit application by Congress in a statute).
102 Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc., 128 S. Ct. 761, 769 (2008) (“The § 10(b) implied private right of action [under the Securities Exchange Act of 1934, 15 U.S.C.S. § 78j(b)] does not extend to aiders and abettors. The conduct of a secondary actor must satisfy each of the elements or preconditions for liability; and we consider whether the allegations here are sufficient to do so.”). Id. at 769.
private actors, it should not be implied. In other cases, the courts relied on the fact that significant human rights violations were at stake, and based their decisions, in part, on international common law. Ultimately, the uncertainty in the ATS aiding and abetting jurisprudence must be clarified by Congress. As one commentator notes, “Whether corporations should be liable for aiding and abetting violations of customary international law is an issue that will need to be addressed in the first instance by the political branches.”

Others do not see a need to reform the ATS, as it is considered a useful tool in combating gross international human rights violations. Corporations, they argue, must share liability with the violating States from which they derive significant monetary gain. There should be little doubt that “[c]ertain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals.” It follows that “corporations may be liable for violations of international law.” Even conceding this point, it is one thing to hold corporations liable for offenses they actually commit, still another to hold them liable as a third party, removed from the law of nations violation itself.

Proponents of this view argue that courts must have flexibility in evidentiary tests and may find a nexus between corporate and state conduct under a “color of law” theory. Under

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105 Bradley & Sosa, supra note 1, at 929.


107 Karadzic, 70 F.3d at 239. See also Trajano v. Marcos, 978 F.2d 493, 499 (9th Cir. 1992). And see Carmichael v. United Techs. Corp., 835 F.2d 109, 113-14 (5th Cir. 1988).

108 Talisman, 374 F. Supp. 2d at 308. See generally Steinhardt, supra note 1, at 2286 n. 204.

109 Smith, 18 U.S. at 159. See generally Steinhardt, supra note 1, at 2290.
this theory, “A private individual acts under color of law within the meaning of [42 U.S.C. § 1983] when he acts together with state officials or with significant aid.” But the jurisprudence underpinning this theory of third party liability is plagued with inconsistencies. Courts have held that private parties may be found liable for State conduct when the act “in law [is] deemed to be that of the state,” when there is significant aid from the State, or when there is a “substantial degree of cooperative action” between the State and private actor. Other cases have held that sharing a “[c]ommon unconstitutional goal,” or merely a close financial relationship, is enough to impute liability. Given the incongruent results in the “color of law” cases, there seems to be little chance that they are as sufficiently well-defined as the causes of action under the laws of nations in 1789.

Ultimately, aiding and abetting liability fails the test set out in Sosa. Not only is this theory of liability not as well recognized as the 18th-century paradigm, but these cases run a serious risk of interfering with U.S. foreign policy similar to the cases against foreign officials. As mentioned by John Bellinger, Legal Advisor to the Department of State, several States – many of which are leaders in international human rights – have objected to ATS claims filed against their corporations.

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110 Karadzic 70 F.3d at 245.
114 Gallagher v. Neil Young Freedom Concert, 49 F.3d 1442, 1453 (10th Cir. 1995).
117 Bellinger, supra note 5 (referencing objections made by Canada, Australia, and the United Kingdom against claims filed against their corporations under the ATS).
d. Suits Against U.S. Officials Post-9/11

Yet another area of litigation under the ATS is emerging. The most recent cases concern U.S. Government actions during the “war on terror.” Cases include challenges to the legality of military commissions to try detainees held at Guantanamo Bay, Cuba, and others involving allegations of torture, arbitrary detention, and unlawful rendition.118 Under the Alien Tort Statute, only the claimant need be an alien, not the defendant. Also, the Federal Tort Claims Act partially waives sovereign immunity, but leaves exception for claims “arising in a foreign country.”119 Therefore, U.S. government officials, and former officials, are potentially open to liability.

Nonetheless, it remains unlikely that these cases will be successful under the ATS after Sosa. At present, it is uncertain which of these claims, if any, were as specifically defined as those in 1789. Furthermore, the practical consequences of any of these actions could have a severe impact on the political branches’ ability to undertake a robust foreign policy.

While the applicability of CIL in the U.S. constitutional context raises many questions, it should not be necessary for the Executive to engage in a guessing game when tackling significant foreign policy issues.120 In the many potential claims arising under the ATS, it is unclear whether the President may disregard CIL when there is no statute or treaty to back up the CIL norm. The Supreme Court expressly provided that CIL should be applied “where there is no

120 For cases where CIL could not override controlling executive acts, see Barrera-Echavarria v. Rison, 44 F.3d 1441, 1451 (9th Cir. 1995); Gisbert v. U.S. Attorney Gen., 988 F.2d 1437; Garcia-Mir v. Meese, 788 F.2d 1446. For a case where CIL binds the President at least absent official presidential act, see In re Agent Orange Prod. Liab. Litig., 373 F. Supp. 2d 7, 109-10.
treaty, and no controlling executive or legislative act or judicial decision.”

On the other hand, some argue that “[i]f CIL is not automatically domestic federal law, then it is hard to see how it is binding on the President as part of the “Laws” that he must faithfully execute under Article II.”

Domestic court application of CIL is rooted in congressional/executive authorization. For example, in *Hamdan v. Rumsfeld*, the Court reasoned that even though Common Article 3 to the Geneva Conventions could not be invoked as a source of law, it was part of the international laws of war, which Congress recognized in the Uniform Code of Military Justice. Therefore, even though Common Article 3 is considered a part of CIL, it was applicable to U.S. courts through a federal statute.

The lack of Congressional authorization for suits against U.S. officials, past and present, is at least one indication that ATS suits in this area will ultimately fail. Successful reform to the ATS must allow for political considerations – specifically, for the Executive to weigh in on certain issues. Conducting foreign policy is the most obvious, and most important issue on which the Executive will need to be heard in future litigation.

**IV. Is There a Need for Reform? Judicial Deference and Practical Consequences: The Door Rests Wide Open**

While the need for amending the ATS seems self-evident to some, to others the judiciary has established ample safeguards to prevent overly broad, and overly political interpretations of the law of nations. Theories of judicial deference to the political branches are already subject to certain limits, including the political question doctrine, and the restrictions established by the *Sosa* decision with regard to political consequences of ATS litigation.

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121 *Paquete Habana*, 175 U.S. at 700.
122 Bradley & Sosa, *supra* note 1, at 931.
a. Judicial Deference

The political question doctrine sets some limits on the types of cases that the judiciary will hear. Nearly every case brought under the ATS will be challenged on the grounds of a non-justiciable political question. In a recent case, Sarei v. Rio Tinto, the 9th Circuit rejected the defendant’s claims that the case involved a non-justiciable political question.\(^{124}\) In a 2-1 decision, the court denied the defendant’s motion to dismiss based on the political question doctrine established in Baker v. Carr.\(^{125}\) The Court did not consider the Executive’s statement of interest which stated that “continued adjudication of the claims…would risk a potentially serious adverse impact on the peace process [in Papua New Guinea], and hence on the conduct of our foreign relations.”\(^{126}\) The outcome of the en banc rehearing was pending when this article was written.

In Matar v. Dichter, the Court dismissed a claim against a former Israeli official, who allegedly committed war crimes and crimes against humanity by carrying out Israeli policy in Gaza.\(^{127}\) The Court based its dismissal on the grounds that the Israeli official was acting in his official capacity at all times in question, and the acts were clearly political in nature and non-justiciable under the political question doctrine.

Another case discussing the political question doctrine in the context of the ATS is Kadic v. Karadzic.\(^{128}\) In spite of the judiciary’s own policies of deference, it is uncertain that the judge-made policies alone are sufficient to filter out frivolous ATS claims. Unfortunately, there is no bright line distinction between non-justiciable political questions and otherwise actionable

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\(^{124}\) Sarei v. Rio Tinto, PLC, 487 F. 3d 1193 (9th Cir. 2007), vacated, reh’g, en banc, granted by, 2007 U.S. App. LEXIS 19751 (9th Cir., Aug. 20, 2007).

\(^{125}\) Baker v. Carr, 369 U.S. 186 (1962) (establishing the six factors for non-justiciable political questions and holding that the political question doctrine should apply when there are no judicially manageable standards for the court to apply).

\(^{126}\) Rio Tinto, 487 F. 3d at 1205-1206.


\(^{128}\) Karadzic, 70 F.3d at 248-50.
claims. As stated in the *Achille Lauro* case, the political question doctrine concerns political questions, not political cases.\(^{129}\)

Similarly, the act of state doctrine was meant to keep the courts out of foreign affairs controversies. The doctrine arises where the relief sought or the defense asserted requires a court in the United States to declare invalid the official acts of a foreign sovereign performed in its own territory.\(^{130}\) Courts have considered whether the foreign sovereign acted in the public interest.\(^{131}\)

The Restatement makes it clear that U.S. courts will not review the official acts of foreign governments taken within their own territory so long as any injury arose from a law or official policy.\(^{132}\) This doctrine is of particular relevance here, when one of the primary applications of ATS cases concern foreign governments.\(^{133}\) However, as human rights advocates are quick to point out, violating regimes are not usually the first to designate their acts of human rights abuse as official State policy. Therefore, the act of state doctrine does filter certain ATS cases, but in a limited capacity.

*Forum non conveniens* is another method of keeping ATS cases with few connections to the United States out of the federal courts.\(^{134}\) For the defendant in ATS human rights cases, it can be extremely difficult to prove that an adequate alternative forum exists.\(^{135}\) This and other discretionary doctrines like it are insufficient to add clarity – both to plaintiffs and defendants alike – to actionable ATS claims.

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\(^{129}\) Klinghoffer v. S.N.C. Achille Lauro, 937 F.2d 44, 49 (2nd Cir. 1991).

\(^{130}\) *Sabbatino*, 376 U.S. at 416.

\(^{131}\) *Doe*, 963 F. Supp. at 893.

\(^{132}\) RESTATEMENT, supra note 26, at 443, 444.

\(^{133}\) See, e.g., *Karadzic*, 70 F. 3d 232; *Doe*, 395 F. 3d 932.

\(^{134}\) See, e.g., *Aguinda* v. *Texaco*, Inc., 303 F.3d 470 (2d Cir. 2002).

\(^{135}\) See Steinhradt, supra note 1, at 2277-78.
In spite of the doctrines of judicial deference already in place – perhaps also as a result of them – the Sosa Court was wary of an adventurous judiciary carving out new causes of action under the ATS where none previously existed. It is clear that the Supreme Court in the majority of cases favors the creation of private rights of action by the legislature, not the courts. Even now, the courts appear to have no Congressional mandate to define new, debatable violations of the law of nations.

b. Practical Consequences

Paramount among the concerns in ATS cases are the potential implications for U.S. foreign relations. In fact, the Sosa Court reiterates the authority of the executive and legislature to manage foreign affairs. As stated in Sosa, “[T]he determination whether a norm is sufficiently definite to support a cause of action should (and, indeed, inevitably must) involve an element of judgment about the practical consequences of making that cause of action available to litigants in the federal courts.”

The courts look to the political branches in most cases dealing with foreign affairs. For example, in head of state immunity cases, some courts go by the congressional authority under FSIA, while others ask for executive branch authorization. In all cases, courts look, at least to some degree, for political branch authorization. The lack of Congressional guidance in ATS cases demands an even greater deference to Executive branch interests.

136 Sosa, 124 S. Ct. at 2762-63 (citing Correctional Services Corp. v. Malesko, 534 U.S. 61, 68 (2001); Alexander v. Sandoval, 532 U.S. 275, 286-87 (2001)).
137 Sosa, 124 S. Ct. at 2762-63.
138 Id. at 2766. See also Kiobel v. Royal Dutch Petroleum Co., 456 F. Supp. 2d 457, at 462 n.4 (suggesting that Sosa may have intended to convey: “in addition to” considering whether a norm has sufficient definiteness and acceptance, a court should consider practical consequences).
140 Bradley & Sosa, supra note 1, at 924 (citing the following cases for the proposition that most courts look to executive branch authorization to apply head of state immunity: Ye v. Zemin, 383 F.3d 620, 624-25 (7th Cir. 2004);
Those arguing against limits on the application of the ATS readily push for an expansive reading of CIL. Is CIL not our law which the Executive must enforce? In support of this proposition, many cite the Paquete Habana case out of context. While it is true that international law is our law, the Court goes on to explain that international law is U.S. law absent a controlling executive or legislative act. Similarly, under the Charming Betsy canon of statutory interpretation, many argue that the ATS should be read not to conflict with international law principles. Again, the correct application is to read ambiguous statutes in a light that does not contradict international law to the extent possible. Congress needs to enact an unambiguous ATS amendment in order to remove any doubt as to the scope of actionable claims.

Similar to these historic cases, the Sosa court stated that “[f]or two centuries we have affirmed that the domestic law of the US recognizes the law of nations.” Based on Sosa opinion, the fact the U.S. law “recognizes” CIL, does not incorporate CIL into domestic law, let alone make it federal law. This simply means that U.S. law “can take account of CIL” independent of the modern position.

At least one commentator, however, argues that even prior to the Paquete Habana, the Court foreclosed the notion that “customary international law depended for its domestic

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141 Paquete Habana, 175 U.S. at 700.
142 Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 81 (1804).
143 Sosa, 124 S. Ct. at 2764. See also William S. Dodge, Bridging Erie: Customary International Law in the U.S. Legal System After Sosa v. Alvarez-Machain, 12 TULSA J. COMP. & INT’L L. 87, 95-96 (2004); And see Gerald L. Neuman, The Abiding Significance of Law in Foreign Relations, 2004 SUP. CT. REV. 111, 129 (2004); And see Steinhardt, supra note 1, at 2252.
144 Bradley & Sosa, supra note 1, at 907.
enforceability on statutory authorization.”145 It is further argued that CIL is self-executing and no affirmative legislation is needed to apply it in U.S. courts.146

Putting this view in perspective, to date Congress has incorporated limited CIL provisions. Moreover, political branches have placed strict limits on international human rights norms and their ratification – arguing that they do not want these norms to be the basis of private litigation.

Citing Sabbatino, the Sosa Court recognized the institutional limits on the “competence to make judicial rules of decision of particular importance to foreign relations, such as the act of state doctrine.”147 The Court explained that even in the foreign relations context, “the general practice has been to look for legislative guidance before exercising innovative authority over substantive law.”148 In spite of this clear pronouncement, many still maintain that CIL is ripe for federal common law making by the courts.149 While customary international law is one area that arguably remains within the federal common law,150 the Sosa Court was right to warn of – if not ask for relief from – judicial rules made without legislative guidance.

For example, the Sosa Court, in discussing the Apartheid Litigation cases, warns that “in such cases, there is a strong argument that federal courts should give serious weight to the Executive Branch’s view of the case’s impact on foreign policy.”151 In cases that involve U.S.

145 Steinhardt, supra note 1, at 2259 (citing Hylton, 3 U.S. (3 Dall.) at 209 (1796); De Longchamps, 1 U.S. (1 Dall.) 111 (1784); Nereida, 13 U.S (9 Cranch) at 423).
146 Henkin, supra note 1, at 1561.
147 Sosa, 124 S. Ct. at 2762.
148 Id. See generally Bradley & Sosa, supra note 1, at 902.
151 Sosa, 124 S. Ct. at 2766 n.21.
treaty obligations or treaties between two foreign sovereigns, the courts have historically deferred to the Executive.152

The Legal Advisor to the State Department, John Bellinger, agrees. He states that “the ATS has given rise to friction, sometimes considerable, in our relations with foreign governments, who understandably object to their officials, or their domestic corporations, being subjected to U.S. jurisdiction for activities taking place in foreign countries and having nothing to do with the United States.”153 He explains that the Sosa Court recognized the potential harm in impinging on the “discretion of the Legislative and Executive Branches in managing foreign affairs.”154

c. The Time Is Right For Reform

The Executive branch is vocal in ATS cases. As mentioned above, the U.S Department of State, frequently in conjunction with the U.S. Department of Justice, files letters, briefs, and statements of interest in ATS cases that might impact U.S. foreign relations.155 In contrast, Congress has remained silent for nearly 220 years.156 The time is right to provide legislative

152 Flatow v. Islamic Republic of Iran, 305 F. 3d 1249, 1251-52 (D.C. Cir. 2002); Sea Hunt, Inc. v. Unidentified Shipwrecked Vessel or Vessels, 221 F. 3d 634, 642 (4th Cir. 2000); see also Joo v. Japan, 413 F.3d 45 (2005).
153 Bellinger, supra note 5.
154 Id. As one example, Mr. Bellinger cites a suit filed by a Falun Gong member against Chinese Officials – who were traveling through the United States on official business. “The diplomatic friction caused by these cases runs directly contrary to one of the reasons for enacting the ATS – to prevent harassment of foreign officials in the United States and prevent international incidents.” Id.
156 An attempt to reform the ATS was made in 2005 by Senator Diane Feinstein. See S. 1874, 109th Cong. (2005), 151 Cong. Rec. S11423 (2005). However, the bill was quickly stalled, largely due to an outcry from the human rights community. See, e.g., Eliza Strickland, Was DiFi Batting for Big Oil?, East Bay Express (Nov. 9, 2005). For further discussion, see Aron Ketchel, Deriving Lessons for the Alien Tort Claims Act from the Foreign Sovereign Immunities Act, 32 YALE J. INT’L L. 191, 217-218 (2007).
guidance to the courts who serve as the ‘vigilant doorkeepers’ to human rights claims under the ATS.

The Supreme Court in *Sosa* stated, “[W]e would welcome any congressional guidance in exercising jurisdiction with such obvious potential to affect foreign relations….” Following *Sosa*, some lower courts were still left wanting for guidance. As noted in the Apartheid Litigation case, “While it would have been unquestionably preferable for the lower federal courts if [Sosa] had created a bright-line rule that limited the ATCA to those violations of international law clearly recognized at the time of its enactment, the Supreme Court left the door at least slightly ajar for the federal courts to apply that statute to a narrow and limited class of international law violations beyond those well-recognized at that time.”

The Courts are reaching out for guidance, in part, because they are ill equipped to deal with the subject matter – foreign relations – that is typically reserved for the political branches. In spite of warnings in *Sosa*, the lower courts continue to allow inconsistent results and adventurous causes of action to slip through the door.

In this regard, the extra-territorial application of U.S. law in ATS cases remains troubling for both the Executive and foreign governments. On one hand, the Executive is put in a difficult spot by pressure from foreign governments to act on their behalf in these cases. Silence from the Executive could be interpreted by the Court to mean there are no foreign policy concerns. Conversely foreign States could interpret this to mean that the United States cares less about their relations. Moreover, statements of interest could be read as political support for the

157 *Sosa*, 124 S. Ct. at 2765.
158 In re S. African Apartheid Litig., 346 F. Supp. 2d at 547 (citing *Sosa*, 124 S. Ct. at 2761, 2764).
159 Bellinger, *supra* note 5 (mentioning that, in spite of the *Sosa* Court singling this case out by name, the 2nd Circuit reversed the District Court dismissal of *Isuzu Motors v. Ntsebeza*, also known as the Apartheid case. The case is currently in the petition phase before the Supreme Court).
activities of States over the legitimate interests of plaintiff victims.\textsuperscript{160} There should be a provision in an updated ATS providing for deference to the political branches in certain cases. This is consistent with recent foreign relations cases.\textsuperscript{161}

Another reason to reform the ATS is to clarify the scope of actionable claims. Clarity in the form of federal legislation will remove the need to define CIL in each ATS case. Rather CIL would serve as a gap-filler for causes of action not explicitly provided for in the statute. The practical reasons for guidance are clear.

The Executive, for one, should not be put in the unenviable position of possibly violating CIL. Currently, the courts are split on whether the Executive is bound by CIL as controlling federal law.\textsuperscript{162} Even human rights proponents agree that the standard of proof plaintiffs must achieve – establishing the norm at issue is defined with the specificity of 
Sosa's\textsuperscript{18th-century} paradigms – is vague and ill-supported by case law.\textsuperscript{163} In light of the reluctance to create new theories of liability without political branch interpretation,\textsuperscript{164} legislative guidance, informed by the Executive, would take the guess-work of ATS cases out of the hands of litigants and the judiciary.\textsuperscript{165}

Finally, by passing legislation there would no longer be the debate about applicable CIL norms and the proper sources to use as evidence of these norms. As previously mentioned,

\textsuperscript{160} Bellinger, \textit{supra} note 5.
\textsuperscript{162} \textit{FOR. REL. LAW}, \textit{supra} note 64, at 499 (citing the following cases for the proposition that the Executive may violate CIL: Barrera-Echavarria v. Rison, 44 F. 3d 1441, 1451 (9th Cir. 1995); Gisbert v. United States Attorney General, 988 F.2d 1437, 1448 (5th Cir. 1993); Garcia-Mir v. Meese, 788 F.2d 1446, 1454-55 (11th Cir. 1986) (relying heavily on \textit{Paquete Habana} that CIL is to be used in U.S. courts “only ‘where there is no treaty and no controlling executive or legislative act or judicial decision…..’” \textit{Garcia-Mir}, 788 F.2d at 1454 (quoting \textit{Paquete Habana}, 175 U.S. at 700) (citing the following case for the proposition that CIL overrides the Executive: Fernandez v. Wilkinson, 505 F. Supp. 787, 195, 198 (D. Kan. 1980))).
\textsuperscript{163} Steinhardt, \textit{supra} note 1, at 2261.
\textsuperscript{165} Bellinger, \textit{supra} note 5.
Congress has the constitutional authority to define and punish offenses against the law of nations. By revising the ATS for the purposes of clarification, there will be no need to denigrate valued international law sources such as the UDHR or the ICCPR, or engage in philosophical arguments about the meaning of the Paquete Habana. An updated ATS will be the controlling legislation which, rather than supplant CIL norms, will compliment internationally recognized human rights standards. This will “ensure the ATS does not complicate international efforts by the political branches to promote human rights abroad, a cause to which the United States is deeply committed.”

The proponents of ATS actions see no reason to amend the statute. There is ample precedence of judicial deference and jurisdictional safeguards, discussed in detail above. Specifically, the political question doctrine, the act of state doctrine, and the theories of immunity all set limits on ATS actions. The courts are also adept at filtering out creative causes of action not anticipated by the drafters. Evidence of judicial restraint is seen in the growing number of ATS actions dismissed when the CIL norm at issue could not be proven with the requisite specificity.

Furthermore, it is argued, the ATS is an effective tool for combating human rights violations. These suits advance the cause in several ways, to include: 1.) promoting accountability and providing a voice to victims of abuse – particularly when there is no other

166 U.S. CONST. art. I, § 8, cl. 10 (“The Congress shall have Power…To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations”).

167 Bellinger, supra note 5.

168 See supra, § IV.a.


170 See, e.g., supra note 1.
In spite of the best intentions of ATS advocates, many of these arguments are policy driven, and based less in the law. And, unfortunately, not every suit filed under the ATS is moved by justice, rather money and politics. No matter how capable the federal courts are, the fact remains that they are calling out for congressional guidance in these cases.

Congress has not spoken on the issue and has set no limitation on the type of suits permissible under the ATS. Moreover, there is currently no formal role for the Executive in ATS litigation. This is in sharp contrast to the role of the Executive in terrorism cases, as they fall under the FSIA. Under the Anti-Terrorism and Effective Death Penalty Act (amending the FSIA), States designated as sponsors of terrorism by the Executive may be sued. This is an exception to the FSIA, which generally bars suits against foreign States. The key here is participation in foreign affairs issues by both branches. Congress established the parameters of the cause of action, and took into account the concerns of the Executive, by allowing it to designate certain States as sponsors of terror, thereby stripping them of FSIA immunity.

In contrast, under the ATS there has only been judicial decision making, which has been referred to as a “democratic cost.” Unlike statutory or treaty law, ATS law is now largely judicially based, and “not the product of a formal Legislative or Executive process.” The time for legislative clarity is now.

171 Bellinger, supra note 5.
173 Bellinger, supra note 5 (discussing the 1996 exception to FSIA). But see Ketchel, supra note 156 (comparing the invocation of the political question doctrine in FSIA cases v. ATS cases, arguing for a legislative solution to prevent executive “abuse” of the political question doctrine).
174 Id.
V. Conclusion and Recommendations For Reform

Amending the ATS “could serve the interests of both plaintiffs and defendants, as well as the judiciary….”175 Striking the proper balance is crucial. Maintaining the integrity of the ATS as a useful mechanism to combat violations against the law of nations without compromising U.S. foreign policy objectives is no small task. Ultimately, there must be a statute of limitations, an exhaustion of remedies requirement, and clearly defined causes of action.

The first step in drafting the reform statute is to set procedural limits. Following the model of the TVPA, the revised ATS will include a ten-year statute of limitations. The 9th Circuit has already imputed the TVPA’s statute of limitations onto ATS actions.176 Also following the lead of the TVPA, an exhaustion of local remedies will be required prior to bringing suit in U.S. district courts. This will prevent forum shopping but will not be insurmountable. Plaintiffs must simply overcome a rebuttable presumption that, for actions occurring outside of the United States, the foreign jurisdiction is better suited to handle the claim. If, however, the plaintiff can make a reasonable proffer that the alternative forum is not able to provide a fair trial, or there is no similar cause of action under the foreign State’s laws, then the district courts may exercise jurisdiction.

Second, and perhaps most importantly, the violations must be clearly defined. Embracing the human rights potential of a reformed ATS – tentatively titled the Alien Tort Prevention Act (ATPA) – an international perspective must be utilized in drafting the new statute.

The Restatement (Third) of Foreign Relations Law provides that “[a] state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community

175 Steinhardt, supra note 1, at 2290.
176 Papa v. United States, 281 F.3d 1004, at 1012-13 (9th Cir. 2002).
of nations as of universal concern.” In drafting the revised statute, it would be wise to stay true to the customary international law norms specified in the Restatement itself. This is not only an indication of issues of universal concern, but is also well regarded in the domestic and international legal academy.

The Restatement lists the following violations of the law of nations: genocide, slavery or slave trade, murder or causing the disappearance of individuals, torture or other cruel, inhumane, or degrading treatment or punishment, prolonged arbitrary detention, systematic racial discrimination or a consistent pattern of gross violations of internationally recognized human rights.

While not all of the violations listed above are as well defined as others, it is within the authority of Congress to define the law of nations violations that are enforceable through a private right of action. There is a colorable argument to be made, however, that each of these violations falls within CIL. The norms may not be as well defined as safe passages, ambassadorial protections, and piracy, but they need not be. A significant aspect behind the amended statute is to do away with the 18th-century paradigm puzzle. With a law on the books, the debate over scope and sources will end.

Finally, by adding a simple provision to the statute allowing for case by case deference to the Executive when cognizable foreign policy interests are at stake, the judiciary will be able to

177 RESTATEMENT, supra note 24, § 404.
178 Id. at 702.
179 See generally Dhooge, supra note 92 (arguing that only torture, extra-judicial killing, genocide, slavery and slave trading are sufficiently well defined to satisfy the standards of the ATS). To maintain clarity in the proposed amended statute, it might be helpful to omit the language “consistent pattern of gross violations of internationally recognized human rights.” On the other hand, it could be argued that this phrase serve as a catch-all for future human rights violations that develop into customary international law norms.
determine just how much weight to give statements of interest. This is consistent with cases such as *Altmann*, *Garamendi*, and, of course, *Sosa*.

Embracing an amended ATS can serve the conciliatory function of combating human rights violations while respecting the prerogatives of the political branches in foreign affairs. Allowing plaintiffs to file claims with more confidence and encouraging potential defendants to modify their behavior, the revised ATS will clear away a great deal of uncertainty experienced in the courts today. In this sense, the political branches will put their weight behind the judicial watchmen as they keep the door.

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181 See discussion, *supra* notes 90, 161 and accompanying text.