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# COMMENT

## *Sosa v. Alvarez-Machain*

### "THE DOOR IS STILL AJAR" FOR HUMAN RIGHTS LITIGATION IN U.S. COURTS\*

*Beth Stephens*<sup>†</sup>

#### INTRODUCTION

The Supreme Court's decision in *Sosa v. Alvarez-Machain*<sup>1</sup> ended over two decades of suspense about the modern application of the Alien Tort Statute (ATS),<sup>2</sup> an eighteenth-century statute that has been used since 1980 as the basis for international human rights litigation in federal courts. The Court announced that "the door is still ajar" to such litigation,

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<sup>†</sup> Professor, Rutgers-Camden School of Law. I submitted an amicus brief to the Supreme Court in support of Alvarez-Machain, on behalf of fifty international human rights organizations. I have participated on the side of the plaintiffs in several of the human rights cases discussed in this article, as counsel, through amicus briefs, or as a consultant.

<sup>1</sup> 124 S. Ct. 2739 (2004).

<sup>2</sup> 28 U.S.C. § 1350 (2000). One of the many disputes about the statute concerned its proper name, Alien Tort Claims Act (ATCA) or Alien Tort Statute (ATS). Some opponents complained that labeling the statute "ATCA" pre-judged the key interpretive question as to whether it authorized "claims." Although I have long been a proponent of ATCA, largely because it forms an acronym that can be said out loud, I switch with this article to ATS, the name adopted by the Supreme Court in *Sosa*, 124 S. Ct. at 2746.

although “subject to vigilant doorkeeping.”<sup>3</sup> *Sosa* affirmed the cautious approach adopted by most of the lower courts and left the door open for current and future cases that address the most egregious violations of international law.

Adopted in 1789 by the first Congress, the Alien Tort Statute states, “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.”<sup>4</sup> In 1980, *Filártiga v. Peña-Irala*<sup>5</sup> interpreted the statute to permit claims for modern human rights violations.<sup>6</sup> Since that decision, the statute has prompted intense scrutiny and triggered hundreds of law review articles and media reports, and multiple executive branch interventions.<sup>7</sup> This interest far outstrips the actual results of the litigation: most ATS cases have been dismissed, only about two dozen cases have produced final judgments under the statute, and only one judgment has led to the collection of significant damages. ATS cases attract disproportionate attention because of a compelling combination of human drama, human rights principles, foreign policy, and complex questions of international, constitutional, and statutory law.

Following *Filártiga*, every court to reach a decision on the issue concluded that the first Congress intended the ATS to permit federal claims for violations of international law.<sup>8</sup> The courts struggled, however, to articulate a theory to explain that result. After several denials of petitions for certiorari, the Supreme Court agreed last year to consider the proper interpretation of the statute. The Court traced a careful path through the available evidence to conclude that at the time the statute was enacted, Congress intended it to grant federal courts jurisdiction over common law claims for a narrow set of international law violations. The Court then held that the statute today continues to afford jurisdiction over comparable modern violations of international law. The opinion is replete with cautionary language. But both the careful tone and the

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<sup>3</sup> 124 S. Ct. at 2764.

<sup>4</sup> 28 U.S.C. § 1350 (2000). Aside from minor updates in terminology, the language is identical to that of the original, which was enacted as part of the Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 77 (1789).

<sup>5</sup> 630 F.2d 876 (2d Cir. 1980).

<sup>6</sup> *Id.*

<sup>7</sup> Westlaw recorded 1847 articles citing “*Filártiga*” or “alien tort” as of August 2004, before the likely explosion of articles discussing the *Sosa* decision.

<sup>8</sup> See *infra* text accompanying notes 17-19.

actual wording of the standard mirror the narrow holding of the *Filártiga* decision and most of the cases that followed, indicating that most of the lower court precedents remain valid.

This article begins in Part I with an overview of the pre-*Sosa* development of the ATS. After a description of the history of *Sosa v. Alvarez-Machain* in Part II, Part III explains how the Supreme Court reconciled the intent of the late-eighteenth-century drafters of the statute with the jurisprudential demands of our modern judicial system, and Part IV analyzes the standard the case develops. *Sosa* left several contentious issues unresolved. First, the case did not involve the most controversial current ATS cases, claims against corporate defendants sued for complicity in human rights violations. Debate about *Sosa*'s impact on those cases has already begun, and is addressed in Part V. Finally, Part VI discusses an obtuse footnote in which the Court left open the role of the executive branch in urging the courts to dismiss claims that impinge upon executive control of foreign affairs, a process that is likely to be highly disputed in future litigation.

Who won and who lost in *Sosa*? The varied media accounts reflect the efforts by all sides to "spin" the interpretation of the *Sosa* opinion.<sup>9</sup> Those who viewed the ATS as placing the federal courts at the cutting edge of the progressive development of international human rights norms have been disappointed. The Court limited ATS claims to clearly defined norms that have already attained general acceptance. Those who sought to derail all ATS litigation or to rescue corporations from ATS liability have also been disappointed. But the decision is a clear victory for those human rights advocates who view the statute as a means to hold the most egregious perpetrators accountable for the most egregious violations of international law.

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<sup>9</sup> Compare Robert S. Greenberger & Pui-Wing Tam, *Human Rights Suits Against U.S. Firms Curbed*, WALL ST. J., June 30, 2004, at A3 (quoting counsel for Unocal Oil Corporation stating that *Sosa* represents a "sound rejection" of human rights litigation and "is a nail in the coffin" of suits against businesses) with Reni Gertner, *Human Rights Claims Against Corporations May Go Forward*, LAW. WKLY. USA, July 19, 2004, at 1 (quoting William Aceves, a professor who submitted an amicus brief in support of Alvarez, stating that the court "has given a green light to litigation under the Alien Tort Statute.").

## I. THE PRE-SOSA EVOLUTION OF THE ALIEN TORT STATUTE

In the early 1970s attorneys at the Center for Constitutional Rights (CCR) identified the Alien Tort Statute as the basis for claims of violations of international law.<sup>10</sup> CCR put the discovery to use just a few years later, when Dolly Filártiga came to CCR seeking justice for the murder of her brother, Joelito Filártiga. Joelito had been tortured to death in 1976 in Paraguay by a Paraguayan police officer in retaliation for his father's opposition to the military dictatorship.<sup>11</sup> The family discovered the police officer living in Brooklyn and brought suit against him under the ATS seeking damages for torture, a tort in violation of the law of nations. The District Court dismissed the lawsuit, relying on Second Circuit dicta stating that international law did not apply to a government's treatment of its own citizens.<sup>12</sup>

The Second Circuit reinstated the claim on appeal, ruling that the ATS incorporates modern, evolving international law norms and that international law prohibits offenses such as torture even when committed within national borders.<sup>13</sup> In a brief requested by the Second Circuit, the Carter administration strongly supported this interpretation of the statute.<sup>14</sup> The *Filártiga* decision closes with a ringing endorsement of the power of human rights norms:

In the twentieth century the international community has come to recognize the common danger posed by the flagrant disregard of basic human rights and particularly the right to be free of torture. . . . Indeed, for purposes of civil liability, the torturer has become—like the pirate and slave trader before him—*hostis humani generis*, an enemy of all mankind. Our holding today, giving effect to a jurisdictional provision enacted by our First Congress, is a small but

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<sup>10</sup> See discussion of pre-*Filártiga* application of the ATS in BETH STEPHENS & MICHAEL RATNER, INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS 9 (1996).

<sup>11</sup> The facts of the case are described in *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980). See RICHARD ALAN WHITE, BREAKING SILENCE: THE CASE THAT CHANGED THE FACE OF HUMAN RIGHTS (2004), for a detailed history of the *Filártiga* family's attempts to seek justice in both Paraguay and through U.S. litigation.

<sup>12</sup> *Filártiga v. Peña-Irala*, 577 F. Supp. 860 (E.D.N.Y. 1984).

<sup>13</sup> "[I]nternational law confers fundamental rights upon all people vis-a-vis their own governments." 630 F.2d at 885. Past cases holding that violations committed by a state against its own citizens do not violate international law are "clearly out of tune with the current usage and practice of international law." *Id.* at 884.

<sup>14</sup> See Memorandum for the United States Submitted to the Court of Appeals for the Second Circuit, *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980) (No. 79-6090), reprinted in 19 I.L.M. 585 (1980).

important step in the fulfillment of the ageless dream to free all people from brutal violence.<sup>15</sup>

Later cases generally followed the lead of the *Filártiga* court and often adopted its passionate tone as well. Although a split panel of the D.C. Circuit failed to reach a decision on the meaning of the statute,<sup>16</sup> federal courts from several other circuits applied the *Filártiga* holding to award damages for human rights violations committed in countries such as the Philippines, Ethiopia, Guatemala, and Bosnia-Herzegovina.<sup>17</sup> The decisions recognized a small core of actionable human rights violations in addition to torture, including summary execution, disappearance, war crimes, crimes against humanity, slavery, and arbitrary detention.<sup>18</sup> The courts also recognized that liability attaches to commanders and others complicit in the abuses, as well as to the individuals who actually inflict harm.<sup>19</sup>

Despite an outpouring of law review commentary, the *Filártiga* line of cases triggered little controversy through most of the 1990s. Most of the defendants were foreign individuals and most cases resulted in default judgments that could not be enforced against those defendants.<sup>20</sup> In the late 1990s, however, cases filed against multinational corporations began to draw attention. The corporate cases built on the recognition that some international law norms apply to private actors.<sup>21</sup> Private

<sup>15</sup> 630 F.2d at 890.

<sup>16</sup> The three judges on the D.C. Circuit panel filed separate opinions in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984), cert. denied, 470 U.S. 1003 (1985).

<sup>17</sup> Cases upholding ATS claims include, for example, *Hilao v. Estate of Marcos*, 103 F.3d 789 (9th Cir. 1996) (Philippines); *Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996), cert. denied, 519 U.S. 830 (1996) (Ethiopia); *Kadic v. Karadžić*, 70 F.3d 232 (2d Cir. 1995), cert. denied, 518 U.S. 1005 (1996) (Bosnia-Herzegovina); *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995) (Guatemala).

<sup>18</sup> See, e.g., *Hilao*, 103 F.3d at 795 (arbitrary detention, torture); *Abebe-Jira*, 72 F.3d at 845-46 (torture, summary executions, arbitrary detention); *Kadic*, 70 F.3d at 236-37, 242-43 (genocide, war crimes, crimes against humanity, summary execution, torture); *Xuncax*, 886 F. Supp. at 184 (summary execution, torture, disappearance, arbitrary detention).

<sup>19</sup> See, e.g., *Hilao*, 103 F.3d at 795 (commanding officer); *Xuncax*, 886 F. Supp. at 187-89 (same).

<sup>20</sup> For discussion of ATS cases and default judgments, see STEPHENS & RATNER, *supra* note 10, at 20-23, 175.

<sup>21</sup> In a case filed against the head of the unrecognized, de facto government of Bosnia-Herzegovina, the Second Circuit held that the prohibition against genocide applies to private persons, as well as state actors. *Kadic*, 70 F.3d at 241-42. The court also held that the defendant could be held liable for a violation that requires state action when acting in complicity with the public officials of the former Yugoslavia. *Id.* at 245.

corporations can therefore be held liable both when they act in complicity with state actors and when they commit violations that do not require state action, such as crimes against humanity, slavery, and forced labor. In *Doe v. Unocal Corporation*, for example, Burmese citizens charged that the oil corporation had acted in complicity with the Burmese military and was therefore responsible for violations that included forced labor and torture.<sup>22</sup> A few cases filed against multinational corporations have survived preliminary motions, although none has yet produced a final judgment.<sup>23</sup> The response in the business and conservative press was largely negative and opponents began efforts to derail ATS litigation.<sup>24</sup>

The U.S. executive branch's position on ATS suits also has changed dramatically.<sup>25</sup> The Reagan administration filed a poorly reasoned opposition to the *Filártiga* interpretation of the ATS in *Trajano v. Marcos*, but largely let the issue drop,<sup>26</sup> as did the first Bush administration. The Clinton administration

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<sup>22</sup> *Doe v. Unocal Corp.*, 963 F. Supp. 880, 883-84, 892 (C.D. Cal. 1997) (decision denying motion to dismiss). See also *Doe v. Unocal Corp.*, 110 F. Supp. 2d 1294 (C.D. Cal. 2000) (decision granting motion for summary judgment), *aff'd in part, rev'd in part* by No. 00-56603, 2002 WL 31063976 (9th Cir. Sept. 18, 2002), *reh'g en banc granted*, No. 00-56603, 2003 WL 359787 (9th Cir. Feb. 14, 2003). In December 2004, the parties announced a settlement in principle and removed the case from the Ninth Circuit docket while they finalized the tentative agreement. Neither side would disclose details of the settlement. Lisa Girion, *Unocal to Settle Rights Claims*, LOS ANGELES TIMES, Dec. 14, 2004, at A1.

<sup>23</sup> See, e.g., *Bowoto v. Chevron Texaco Corp.*, 312 F. Supp. 2d 1229, 1233 (N.D. Cal. 2004); *Estate of Rodriguez v. Drummond Co.*, 256 F. Supp. 2d 1250, 1253 (N.D. Ala. 2003); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 296 (S.D.N.Y. 2003); *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 92 (2d Cir. 2000).

<sup>24</sup> See, e.g., GARY CLYDE HUFBAUER & NICHOLAS K. MITROKOSTAS, *AWAKENING MONSTER: THE ALIEN TORT STATUTE OF 1789* (2003); Cait Murphy, *Is This the Next Tort Trap? Using an Ancient Statute, Lawyers Make Business Quake*, FORTUNE, June 23, 2003, at 30; Robert H. Bork, *Judicial Imperialism*, WALL ST. J., June 17, 2003, at A16; *Corporate Ethics: Big oil's dirty secrets*, ECONOMIST, May 10, 2003, at 53; Patti Waldmeir, *An Abuse of Power - US Courts Should Not Punish Companies for Human Rights Violations Committed Overseas*, FIN. TIMES, Mar. 14, 2003, at 12.

<sup>25</sup> See Beth Stephens, *Upsetting Checks and Balances: The Bush Administration's Efforts to Limit Human Rights Litigation*, 17 HARV. HUM. RTS. J. 169, 181 (2004) [hereinafter Stephens, *Upsetting Checks and Balances*]. Compare Memorandum for the United States as Amicus Curiae at 5, 13, *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980) (No. 79-6090) (Carter administration supporting jurisdiction) with United States filings discussed *infra* notes 26-28.

<sup>26</sup> See Brief for the United States as Amicus Curiae, *Trajano v. Marcos*, 978 F.2d 493 (9th Cir. 1980) (No. 86-2448) (Reagan administration offering restrictive interpretation of the ATCA); Brief for the United States as Amicus Curiae at 7, *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984) (per curiam), *cert. denied*, 470 U.S. 1003 (1985) (Reagan administration opposing certiorari).

was largely supportive.<sup>27</sup> Not until the administration of George W. Bush did the cases come under concerted attack by the executive branch, an attack that was repeated before the Supreme Court in the *Sosa* litigation.<sup>28</sup>

## II. *SOSA V. ALVAREZ-MACHAIN*

Humberto Alvarez-Machain is the unlikely centerpiece of a constitutional, diplomatic, and international law struggle that has now lasted for almost two decades.<sup>29</sup> In 1985, Enrique Camarena-Salazar, an agent of the U.S. Drug Enforcement Agency (DEA), was captured, brutally tortured, and murdered by drug traffickers in Mexico. Alvarez, a doctor, was indicted in the United States, accused of participating in the crime by keeping Camarena alive during the torture so that he could be interrogated longer. Unable to extradite Alvarez to the United States, the DEA hired a group of Mexicans to kidnap him. They held him captive overnight in Mexico, then flew him to the United States and delivered him to waiting DEA agents in Texas. The lower courts dismissed the Alvarez indictment, holding that the illegal kidnapping constituted "outrageous governmental conduct." The Supreme Court reversed, ruling that the manner of his seizure did not affect federal court jurisdiction, and remanded the case for trial on the original criminal indictment. The decision provoked an international uproar.<sup>30</sup> In 1992 the District Court granted Alvarez's motion for judgment of acquittal, which ended the criminal prosecution.

Alvarez filed a civil suit for damages against José Francisco Sosa, one of the Mexican citizens responsible for his detention, as well as against several DEA agents and the United States government. Most of the claims and defendants

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<sup>27</sup> See Brief of the United States as Amicus Curiae at 2, *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995) (Nos. 94-9035, 94-9069) (Clinton administration supporting jurisdiction).

<sup>28</sup> See Reply Brief for the United States as Respondent Supporting Petitioner at 1-2, *Sosa v. Alvarez-Machain*, 331 F.3d 604 (9th Cir. 2003), cert. granted, 540 U.S. 1045 (2003) (No. 03-339) (George W. Bush administration opposing jurisdiction).

<sup>29</sup> The facts and procedural history are detailed in the first of the two *Alvarez-Machain* Supreme Court decisions, *United States v. Alvarez-Machain*, 504 U.S. 655, 657-58 (1992), and summarized in the recent opinion, *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2746 (2004).

<sup>30</sup> See Mark S. Zaid, *Military Might Versus Sovereign Right: The Kidnapping of Dr. Humberto Alvarez-Machain and the Resulting Fallout*, 19 HOUS. J. INT'L L. 829 (1997) (detailing foreign government reaction to the *Alvarez-Machain* case).



were dismissed after a series of motions and an interlocutory appeal, leaving only *Sosa* and the U.S. government.<sup>31</sup> The district court entered a \$25,000 judgment against *Sosa* for arbitrary arrest and detention under the ATS, but dismissed the false arrest claim against the U.S. government.<sup>32</sup> A three-judge panel of the Ninth Circuit affirmed the ATS judgment against *Sosa* but reinstated the claim against the U.S. government.<sup>33</sup> The Ninth Circuit agreed to hear the case en banc and, in a 6-5 decision, affirmed the panel decisions on both claims.<sup>34</sup> All of the judges agreed that the ATS permits claims for human rights violations; the dissenters disagreed with the application of the statute to the Alvarez facts.<sup>35</sup> Although the Supreme Court had denied several petitions for certiorari review of ATS decisions in the past, the involvement of the U.S. government, the sharply split Ninth Circuit decision, and the increasing controversy over the proper interpretation of the ATS led many commentators to predict, correctly, that the Court would agree to review this decision.

The Supreme Court opinion addressed both the false arrest claim against the U.S. government and the ATS claim against *Sosa*. Although the focus of this article is the ATS analysis in *Sosa*, a brief summary of the false arrest claim offers additional background.

The United States is subject to suit pursuant to the Federal Tort Claims Act (FTCA), which authorizes suits for injuries "caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."<sup>36</sup> The Ninth Circuit held that, under the FTCA, the United States could be held liable for false arrest, a

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<sup>31</sup> Pursuant to 28 U.S.C. § 2679 (2000), the U.S. government may substitute itself as the defendant in place of individual government employees sued for acts committed while acting within the scope of their employment.

<sup>32</sup> *Sosa*, 124 S. Ct. at 2747.

<sup>33</sup> *Alvarez-Machain v. United States*, 266 F.3d 1045, 1064 (9th Cir. 2001), *reh'g en banc granted*, 284 F.3d 1039, 1040 (9th Cir. 2002).

<sup>34</sup> *Alvarez-Machain v. United States*, 331 F.3d 604 (9th Cir. 2003).

<sup>35</sup> Four of the dissenting judges would have held that the treatment of Alvarez did not constitute a violation of international or domestic law. *Alvarez-Machain*, 331 F.3d at 645-46 (9th Cir. 2003) (O'Scannlain, J., dissenting). The fifth would have dismissed the claim as a nonjusticiable political question. *Id.* at 659 (Gould, J., dissenting).

<sup>36</sup> 28 U.S.C. § 1346(b)(1) (2000). *See also* 28 U.S.C. §§ 2671-2680 (2000).

tort.<sup>37</sup> The FTCA, however, contains several limitations, including a bar on FTCA suits for "[a]ny claim arising in a foreign country."<sup>38</sup> The Ninth Circuit found this limitation inapplicable because of the "headquarters doctrine," according to which several circuits had held that a claim did not arise in a foreign country if the decisions that led to the injury had been made within the United States.<sup>39</sup> Applied to Alvarez, the doctrine negated the foreign country limitation because DEA officials in Washington, D.C. authorized the kidnapping and detention in Mexico.

On appeal to the Supreme Court, the U.S. government claimed that Alvarez's detention did not constitute false arrest because U.S. law authorized his detention in Mexico. The Court did not reach this issue. Instead, the Court found that the case fell within the FTCA's foreign country limitation. The Court rejected the headquarters doctrine as a matter of statutory construction, holding that Congress intended the foreign country exception to apply whenever the harm complained of occurred in a foreign country, regardless of where the chain of events leading to the injury took place.<sup>40</sup> All of the Justices agreed that the foreign country exception required dismissal of the claim.

### III. UNDERSTANDING THE ALIEN TORT STATUTE: THE DRAFTERS' INTENT

Post-*Filártiga*, every court that reached a decision on an ATS claim agreed that the statute authorized private civil claims for universally recognized violations of international human rights.<sup>41</sup> That consensus, however, masked disagreement about exactly how the statute worked. *Sosa* resolved this dispute with an explanation that is consistent with the available history and the likely intent of the statute.

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<sup>37</sup> *Sosa*, 124 S. Ct. at 2747.

<sup>38</sup> 28 U.S.C. § 2680(k) (2000).

<sup>39</sup> *Sosa*, 124 S. Ct. at 2748.

<sup>40</sup> *Id.* at 2752.

<sup>41</sup> See *supra* notes 17-18 and accompanying text. The two lone dissenting voices were Judge Bork, in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 798-823 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985) (Bork, J., concurring), and Judge Randolph in *Al Odah v. United States*, 321 F.3d 1134, 1145-49 (D.C. Cir. 2003) (Randolph, J. concurring), *rev'd and remanded* by *Rasul v. Bush*, 124 S. Ct. 2686, 2698-99 (2004) (specifically noting ATS jurisdiction over claims).

### A. *Competing Theories*

The Alien Tort Statute as enacted stated that the district courts "shall also 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 a tort only in violation of the law of nations or a treaty of the United States."<sup>42</sup> Two amendments updated the terminology without any apparent intent to change the meaning, so that the statute today reads in full: "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."<sup>43</sup> Some commentators viewed this language as a straightforward grant of jurisdiction, nothing more.<sup>44</sup> As a jurisdictional grant, the statute would not by itself authorize federal court claims. In addition to jurisdiction, a federal claim must identify the source of the private right to sue, i.e., the cause of action.

Modern cases found authorization for a private ATS remedy through two theories. *Filártiga* held that the ATS affords federal jurisdiction over international law claims: "[W]e believe it is sufficient here to construe the Alien Tort Statute, not as granting new rights to aliens, but simply as opening the federal courts for adjudication of the rights already recognized by international law." This approach relied on the assumption that international law can be the independent basis for a cause of action, or private right to sue, in federal courts. If accurate, however, there would arguably be no need for the ATS, for international law claims would be covered by the general grant of federal jurisdiction over claims "arising under" federal law.<sup>45</sup> Thus, the *Filártiga* approach might prove too much.

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<sup>42</sup> Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 77 (codified as amended at 28 U.S.C. § 1350 (2000)).

<sup>43</sup> 28 U.S.C. § 1350 (2000).

<sup>44</sup> See, e.g., William R. Casto, *The Federal Courts' Protective Jurisdiction Over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467, 479-80 (1986).

<sup>45</sup> The Second Circuit recognized this possibility but declined to rule on it in *Filártiga*: "We recognize that our reasoning might also sustain jurisdiction under the general federal question provision, 28 U.S.C. § 1331. We prefer, however, to rest our decision upon the Alien Tort Statute, in light of that provision's close coincidence with the jurisdictional facts presented in this case." *Filártiga v. Peña-Irala*, 630 F.2d 876, 887 n.22 (2d Cir. 1980) (citing to *Romero v. Int'l Terminal Operating Co.*, 358 U.S. 354 (1959)). The *Filártiga* opinion is somewhat vague about the role played by international law in other aspects of ATS litigation, leaving open the possibility that a choice of law analysis might point to Paraguayan law, rather than international law.

An alternative approach located the cause of action within the statute itself. As the Ninth Circuit has stated, the statute "creates a cause of action for violations of specific, universal and obligatory international human rights standards."<sup>46</sup> Several courts drew support for this view from the language "*committed in violation of the law of nations*," concluding that it implied a grant of a right to sue as well as jurisdiction.<sup>47</sup> The theory that the ATS creates a cause of action ran into its own difficulties. First, the use of the term "cognizance" and the placement of the statute in a jurisdictional act both imply only a jurisdictional grant. Second, this argument also proved too much. When the statute was enacted, it would have made no sense to create a statutory cause of action for violations of international law. In the late-eighteenth century, international law was part of the common law and the common law was the basis for a right to sue without further legislative action.<sup>48</sup>

The Supreme Court resolved the debate by working carefully through the available information about the intent of those who enacted the statute.

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*Id.* at 889 n.25.

<sup>46</sup> *In re Estate of Marcos*, 25 F.3d 1467, 1474-75 (9th Cir. 1994). *See also* *Abebe-Jira v. Negewo*, 72 F.3d 844, 847 (11th Cir. 1996) (statute "provid[es] both a private cause of action and a federal forum where aliens may seek redress for violations of international law."); *Xuncax v. Gramajo*, 886 F. Supp. 162, 179 (D. Mass. 1995) ("[Section] 1350 yields both a jurisdictional grant and a private right to sue for tortious violations of international law . . . without recourse to other law as a source of the cause of action.").

<sup>47</sup> *Handel v. Artukovic*, 601 F. Supp. 1421, 1427 (C.D. Cal. 1985) ("[T]he 'violation' language of section 1350 may be interpreted as explicitly granting a cause of action. . ."). *See also Abebe-Jira*, 72 F.3d at 847 ("the 'committed in violation' language of the statute suggests that Congress did not intend to require an alien plaintiff to invoke a separate enabling statute as a precondition to relief under the Alien Tort Claims Act."); *Paul v. Avril*, 812 F. Supp. 207, 212 (S.D. Fla. 1993) ("The plain language of the statute and the use of the words 'committed in violation' strongly implies that a well pled tort[,] if committed in violation of the law of nations, would be sufficient [to give rise to a cause of action].").

<sup>48</sup> A related theory suggested that in enacting the ATS, Congress delegated to the courts the power to develop federal common law remedies to redress torts in violation of international law. "Congress, of course, may enact a statute that confers on the federal courts jurisdiction over a particular class of cases while delegating to the courts the task of fashioning remedies that give effect to the federal policies underlying the statute." *Abebe-Jira*, 72 F.3d at 848 (citing *Textile Workers of America v. Lincoln Mills*, 353 U.S. 448 (1957)). This theory was also attacked as out of tune with the jurisprudence of the time: given that the common law was understood to establish causes of action, the first Congress would not have understood the *Lincoln Mills* approach. *See* Curtis A. Bradley & Jack L. Goldsmith, III, *The Current Illegitimacy of International Human Rights Litigation*, 66 *FORDHAM L. REV.* 319, 358-59 (1997).

## B. *The Supreme Court's Resolution*

The Supreme Court made short shrift of the argument that the ATS creates a cause of action, calling that reading of the statute “implausible.”<sup>49</sup> The Court focused on the statute’s use of the term “cognizance,” which “bespoke a grant of jurisdiction, not power to mold substantive law.”<sup>50</sup> The Court also found important the placement of the statute within the Judiciary Act, “a statute otherwise exclusively concerned with federal-court jurisdiction.”<sup>51</sup> Finally, the Court observed that “the distinction between jurisdiction and cause of action [would not] have been elided by the drafters of the Act or those who voted on it.”<sup>52</sup> The Court concluded, “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.”<sup>53</sup>

But the Court also recognized the need to understand “the interaction between the ATS at the time of its enactment and the ambient law of the era”.<sup>54</sup>

Sosa would have it that the ATS was stillborn because there could be no claim for relief without a further statute expressly authorizing adoption of causes of action. *Amici* professors of federal jurisdiction and legal history take a different tack, that federal courts could entertain claims once the 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. . . . We think history and practice give the edge to this latter position.<sup>55</sup>

The Court reached its conclusion by looking first at the nature of international law when the statute was enacted. International law in the late-eighteenth century included the law governing relations among states and the “more pedestrian” law governing individuals when they acted across state lines, as in the law merchant. But the Court found that international law also included a “narrow set” of “hybrid international norms” in which the “rules binding individuals

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<sup>49</sup> *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2755 (2004).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Sosa*, 124 S. Ct. at 2755.

<sup>55</sup> *Id.* (citing Brief of Professors of Federal Jurisdiction and Legal History as *Amici Curiae* in Support of Respondents at 2, *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739 (2004) (No. 03-339), available at 2004 WL 419425 (citations omitted)).

for the benefit of other individuals overlapped with the norms of state relationships."<sup>56</sup> As the Court observed, "It was this narrow set of violations of the law of nations, admitting of a judicial remedy and at the same time threatening serious consequences in international affairs, that was probably on [the] minds of the men who drafted the ATS with its reference to tort."<sup>57</sup> Although primarily directed at setting rules of behavior for individuals, these norms were also of concern to governments because violations threatened to undermine international relations.

Second, the Court recognized that the framers of the Constitution and members of the first Congress were "preoccup[ied]" with the hybrid norms because of the difficulty they had faced ensuring compliance with international law during the period of the Confederation.<sup>58</sup> The Continental Congress repeatedly—and ineffectually—called upon the states to enforce international law and provide remedies for violations. Since the ATS echoes the language of these resolutions as well as concerns expressed at the constitutional convention, it seems designed to respond to this problem.<sup>59</sup>

Finally, the Court noted that the available records indicate that the statute was indeed intended to provide a remedy for those injured by violations of international law without further action by Congress:

[T]here is every reason to suppose that the First Congress did not pass the ATS as a jurisdictional convenience to be placed on the shelf for use by a future Congress or state legislature that might, some day, authorize the creation of causes of action or itself decide to make some element of the law of nations actionable for the benefit of foreigners.<sup>60</sup>

The members of the first Congress were too concerned with the consequences of violations of international law "to believe that Congress would have enacted the ATS only to leave it lying fallow indefinitely."<sup>61</sup>

The Court noted that the historical references to the statute, though "sparse," support this view.<sup>62</sup> In two cases

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<sup>56</sup> *Id.* at 2756.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Sosa*, 124 S. Ct. at 2756-57.

<sup>60</sup> *Id.* at 2758.

<sup>61</sup> *Id.* at 2758-59.

<sup>62</sup> *Id.* at 2759.

decided within a few years of the enactment of the ATS, district courts referring to the statute assumed that it would authorize suit in appropriate cases without further congressional action.<sup>63</sup> And a 1795 opinion by Attorney General William Bradford stated clearly that a civil claim for a violation of the international norms of neutrality could have been filed under the ATS:

[T]here can be no doubt that the company or individuals who have been injured by these acts of hostility have a remedy by a *civil* suit in the courts of the United States; jurisdiction being expressly given to these courts in all cases where an alien sues for a tort only, in violation of the laws of nations, or a treaty of the United States. . . .<sup>64</sup>

As the Court recognized, "it appears likely that Bradford understood the ATS to provide jurisdiction over what must have amounted to common law causes of action."<sup>65</sup>

On the basis of this review of the historical framework and contemporary statements about the statute, the Court concluded:

In sum, although the ATS is a jurisdictional statute creating no new causes of action, the reasonable inference from the historical materials is that the statute was intended to have practical effect the moment it became law. The jurisdictional grant is best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time.<sup>66</sup>

Up to this point, the *Sosa* decision was unanimous. All agreed ("or at least Justice Scalia does not dispute") that the ATS is only jurisdictional and that it originally was "available to enforce a small number of international norms that a federal court could properly recognize as within the common law enforceable without further statutory authority."<sup>67</sup> All also agreed that modern application of the statute requires at least caution for several reasons.<sup>68</sup> First, the conception of both the

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<sup>63</sup> See *Bolchos v. Darrel*, 3 F. Cas. 810, 810 (D.S.C. 1795) (No. 1607) (stating that the ATS provided jurisdiction for a claim for damages on behalf of a French privateer); *Moxon v. The Fanny*, 17 F. Cas. 942, 948 (D. Pa. 1793) (No. 9895) (stating in dictum that ATS did not apply because claim was not one "for a tort only").

<sup>64</sup> 1 Op. Att'y. Gen. 57, 59 (1795) (discussing the criminal and civil liability of U.S. citizens who joined a French attack on a British colony in Sierra Leone).

<sup>65</sup> *Sosa*, 124 S. Ct. at 2759.

<sup>66</sup> *Id.* at 2761.

<sup>67</sup> *Id.* at 2764.

<sup>68</sup> *Id.* at 2762-64. Justice Scalia, however, finds that these considerations do

common law and the role of the federal courts in enforcing it has changed since the eighteenth century.<sup>69</sup> Second, the courts are reluctant to recognize new rights of action without clear guidance from Congress.<sup>70</sup> Third, these cases touch upon foreign affairs, an area constitutionally delegated to the political branches.<sup>71</sup> And finally, Congress has indicated caution in authorizing private rights to enforce international law norms.<sup>72</sup>

Despite its cautionary language, however, the Court concluded that the statute operates in much the same way today as it did in 1789: the ATS affords jurisdiction over violations of international law that the federal courts, in the exercise of their discretion, recognize as stating causes of action. The Court held that international law violations today that are of similar nature as those recognized in 1789 give rise to a private right of action. The "narrow class of international norms" actionable under the ATS are those "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."<sup>73</sup>

This final step in the majority's analysis provoked Justice Scalia to dissent, joined by Chief Justice Rehnquist and Justice Thomas.<sup>74</sup> Justice Scalia argued that changes in the understanding of the common law have deprived modern federal courts of the power to recognize common law claims derived from international law. He maintained that the eighteenth-century common law right to sue was based in the now-discredited *general* common law. In the pre-*Erie* legal system, federal courts interpreted and applied the general common law to the disputes that came before them even if otherwise governed by state common law. *Erie* rejected the general common law, holding that all law was grounded in a particular sovereign, either the federal or state government.<sup>75</sup>

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not merely point to the need of courts to be "circumspect," but rather explains "why courts cannot possibly be thought to have been given, and should not be thought to possess, federal-common-law-making powers with regard to the creation of private federal causes of action for violations of customary international law." *Id.* at 2774 (Scalia, J., concurring in part).

<sup>69</sup> *Id.* at 2762.

<sup>70</sup> *Sosa*, 124 S. Ct. at 2762-63.

<sup>71</sup> *Id.* at 2763.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 2761-62.

<sup>74</sup> *Id.* at 2769 (Scalia, J., concurring in part, dissenting in part).

<sup>75</sup> *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).



Justice Scalia concluded that post-*Erie*, the federal courts can no longer recognize a common law cause of action for violations of international law.<sup>76</sup>

In rejecting Justice Scalia's absolutist approach, the Supreme Court majority recognized that post-*Erie* federal common law includes those aspects of the old general common law that are peculiarly within the power of the federal government, and that international law was and remains within that area of federal control.<sup>77</sup> Neither *Erie* nor subsequent judicial or legislative developments have deprived the federal courts of the power to recognize common law claims based on international law.<sup>78</sup> The ATS lies "at the intersection of the judicial and legislative powers,"<sup>79</sup> utilizing the combined powers of Congress and the federal courts. In the exercise of its constitutional powers, Congress enacted a statute authorizing the federal courts to adjudicate civil claims for violations of international law. In the absence of congressional instructions to the contrary, the courts should continue to do so. As the Court declared, "it would be unreasonable to assume that the First Congress would have expected federal courts to lose all capacity to recognize enforceable international norms simply because the common law might lose some metaphysical cachet on the road to modern realism."<sup>80</sup> The federal courts had in the

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<sup>76</sup> This argument, developed by Professors Bradley and Goldsmith in a series of articles, has been strenuously debated. Compare Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997) and Curtis A. Bradley & Jack L. Goldsmith, III, *The Current Illegitimacy of International Human Rights Litigation*, 66 FORDHAM L. REV. 319, 327-30 (1997), with Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824 (1998); Gerald L. Neuman, *Sense and Nonsense About Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 FORDHAM L. REV. 371 (1997); and Beth Stephens, *The Law of Our Land: Customary International Law as Federal Law After Erie*, 66 FORDHAM L. REV. 393 (1997).

<sup>77</sup> *Sosa*, 124 S. Ct. at 2764 ("Erie did not in terms bar any judicial recognition of new substantive rules, no matter what the circumstances, and post-*Erie* understanding has identified limited enclaves in which federal courts may derive some substantive law in a common law way.").

<sup>78</sup> As the Court stated,  
[N]o development in the two centuries from the enactment of § 1350 to the birth of the modern line of cases beginning with *Filartiga v. Pena-Irala*, 630 F.2d 876 (C.A. 2 1980), has categorically precluded federal courts from recognizing a claim under the law of nations as an element of common law; Congress has not in any relevant way amended § 1350 or limited civil common law power by another statute.

*Id.* at 2761.

<sup>79</sup> *Id.* at 2765.

<sup>80</sup> *Id.*

past, and still have today, the power, in their discretion, to recognize private claims to enforce international law norms.

The Court emphasized that this discretionary power to recognize causes of action based upon violations of international law should not be exercised as a general practice, given all of the factors that militate against the exercise of discretion in this area. The majority found in the ATS itself a congressional instruction to do so only in the narrow realm addressed by that statute.<sup>81</sup> Not only did the First Congress "assume[] that federal courts *could* properly identify some international norms as enforceable in the exercise of § 1350 jurisdiction,"<sup>82</sup> but they enacted the statute "on the congressional understanding that courts *would* exercise jurisdiction by entertaining some common law claims derived from the law of nations."<sup>83</sup> Thus, the ATS, a voice from the congressional past, provides the guidance necessary to override concerns about the exercise of judicial discretion to recognize such claims.

Justice Scalia and other critics of modern ATS litigation correctly note that the modern conception of international law is different from that of the late-eighteenth century. Justice Scalia claims to be more true to the intent of the framers when he resists incorporation of modern human rights norms into a jurisdictional grant that was drafted when international law addressed distinct concerns. This originalist argument is not so clear cut, however, given that the framers understood that international law would evolve.<sup>84</sup> Efforts to limit the ATS to the specific violations recognized in 1789 ignore the framers' intentional use of a term—"the law of nations"—that they expected to change over time. To limit the meaning of this eighteenth-century statute to the kinds of violations recognized at the time would ignore this important insight about the

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<sup>81</sup> This interpretation explains why the courts will not recognize a cause of action for all violations of international law with federal question jurisdiction granted by 28 U.S.C. § 1331: "Section 1350 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." *Sosa*, 124 S. Ct. at 2765 n.19.

<sup>82</sup> *Id.* at 2765 (emphasis added).

<sup>83</sup> *Id.* at 2765 n.19 (emphasis added).

<sup>84</sup> See Beth Stephens, *Federalism and Foreign Affairs: Congress's Power to "Define and Punish . . . Offenses Against the Law of Nations,"* 42 WM. & MARY L. REV. 447, 553-55 (2000) (discussing framers' understanding of the evolving nature of international law).

evolving body of international law norms. The majority of the Court recognized this and incorporated the *standard* used by the framers, rather than the particular violations, or even the categories of violations, that the framers would have recognized as falling within that standard.

Moreover, despite its cautionary language, the *Sosa* opinion does not instruct the lower courts to apply in every case the prudential concerns reviewed by the Court. After careful consideration of the limitations on the discretionary powers of the federal judiciary, the Supreme Court concluded that the statute instructs the judiciary to exercise its discretion to recognize common law claims for violations of certain international human rights norms. Any claim that meets the *Sosa* standard is properly within the scope of the statute.

#### IV. THE STANDARD: WHICH VIOLATIONS OF INTERNATIONAL LAW?

The Court framed its development of an ATS standard within an extended discussion of the need for great caution in judicial recognition of a common law claim for international law violations. It emphasized that "there are good reasons for a restrained conception of the discretion a federal court should exercise in considering a new cause of action of this kind."<sup>85</sup> The resulting standard, the Court states, is a narrow one that recognizes that although "the door is still ajar" it is "subject to vigilant doorkeeping."<sup>86</sup> The "narrow class of international norms" actionable under the ATS are those "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."<sup>87</sup>

[F]ederal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted. See, e.g., *United States v. Smith*, 5 Wheat. 153, 163-180, n. a, 5 L. Ed. 57 (1820) (illustrating the specificity with which the law of nations defined piracy).<sup>88</sup>

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<sup>85</sup> *Sosa*, 124 S. Ct. at 2744.

<sup>86</sup> *Id.* at 2764.

<sup>87</sup> *Id.* at 2761-62.

<sup>88</sup> *Id.* at 2765.

The Court presented this standard—definite content and widespread acceptance—as a stringent test intended to prevent litigation of claims for lesser, more parochial, or idiosyncratic prohibitions.

This cautious approach mirrors that applied by most of the lower courts considering ATS claims before *Sosa*. The Court recognized this, citing with approval the key lower court decisions defining the reach of the ATS.<sup>89</sup> *Filártiga* held that an actionable norm under the ATS must “command the ‘general assent of civilized nations’”<sup>90</sup> and be capable of “clear and unambiguous” definition.<sup>91</sup> This is identical to the standard adopted in *Sosa*: in order to trigger ATS jurisdiction, an international norm must be both generally accepted by “civilized nations” and clearly and unambiguously defined. The formulation in *Filártiga*, in turn, was based on *Paquete Habana*, which was also relied on by *Sosa*. *Paquete Habana* recognized that a binding international law norm must command “the general assent of civilized nations” and constitute “a settled rule of international law.”<sup>92</sup> *Filártiga* adopted this “stringent” standard.<sup>93</sup> Even the evidence relied

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<sup>89</sup> The Court placed its standard squarely within the past precedents:

This limit upon judicial recognition is generally consistent with the reasoning of many of the courts and judges who faced the issue before it reached this Court. See *Filártiga*, *supra*, at 890 (“[F]or purposes of civil liability, the torturer has become—like the pirate and slave trader before him—*hostis humani generis*, an enemy of all mankind”); *Tel-Oren*, *supra*, at 781 (Edwards, J., concurring) (suggesting that the “limits of section 1350’s reach” be defined by “a handful of heinous actions—each of which violates definable, universal and obligatory norms”); see also *In re Estate of Marcos Human Rights Litigation*, 25 F.3d 1467, 1475 (C.A. 9 1994) (“Actionable violations of international law must be of a norm that is specific, universal, and obligatory”).

*Id.* at 2765-66.

<sup>90</sup> *Filártiga v. Peña-Irala*, 630 F.2d 876, 881 (2d Cir. 1980).

<sup>91</sup> *Id.* at 884.

<sup>92</sup> 175 U.S. 677, 694 (1900).

<sup>93</sup> *Filártiga* relied heavily on the *Paquete Habana* approach to international law:

*Habana* is particularly instructive for present purposes, for it held that the traditional prohibition against seizure of an enemy’s coastal fishing vessels during wartime, a standard that began as one of comity only, had ripened over the preceding century into “a settled rule of international law” by “the general assent of civilized nations.” *Id.* at 694, 20 S.Ct. at 297; accord, *id.* at 686, 20 S.Ct. at 297. . . . The requirement that a rule command the “general assent of civilized nations” to become binding upon them all is a stringent one. Were this not so, the courts of one nation might feel free to impose idiosyncratic legal rules upon others, in the name of applying international law.

*Filártiga*, 630 F.2d at 881. See *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2766 (2004) (quoting similar language in *Paquete Habana*). *Filártiga* similarly requires that courts

upon by *Sosa* and *Filártiga* was similar: while noting that non-self-executing treaties are not independently enforceable, *Sosa* approved their use as evidence of binding customary international law, as did *Filártiga* and as do most of the lower court decisions.<sup>94</sup>

*Sosa* offered the definition of piracy in *United States v. Smith* as a model for the modern application of the ATS. In *Smith*, a defendant accused of piracy challenged the constitutionality of a statute that punished "the crime of piracy, as defined by the law of nations."<sup>95</sup> Daniel Webster, representing the alleged pirates, argued that the law of nations did not provide a sufficiently clear definition, claiming that "[t]he writers on public law do not define the crime of piracy with precision and certainty."<sup>96</sup> The Court rejected that argument. Framing the issue in terms virtually identical to the issue triggered by modern ATS cases, the court asked "whether the crime of piracy is defined by the law of nations with reasonable certainty."<sup>97</sup>

In the absence of an international agreement defining piracy, the Court looked to scholarship, custom and domestic judicial opinions to determine the international definition.<sup>98</sup> After reviewing multiple sources, the Court recognized a general consensus that piracy was a "crime of a settled and determinate nature," and that "whatever may be the diversity of definitions, in other respects, all writers concur, in holding, that robbery, or forcible depredations upon the sea, *animo furandi*, is piracy."<sup>99</sup> The Court therefore concluded that defining the crime of piracy by reference to the law of nations was sufficient and constitutional.<sup>100</sup> As a model for the modern

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submit ATS claims to "a . . . searching . . . review," 630 F.2d at 887, and that norms be of "mutual, and not merely several concern. . . ." *Filártiga*, 630 F.2d at 888.

<sup>94</sup> Compare *Sosa*, 124 S. Ct. at 2767-68, with *Filártiga*, 630 F.2d at 882.

<sup>95</sup> *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 153-54 (1820) (quoting Act of March 3, 1819, ch. 77, § 5, 3 Stat. 513 (1819)).

<sup>96</sup> *Id.* at 157.

<sup>97</sup> *Id.* at 160.

<sup>98</sup> *Id.* at 160-61. ("What the law of nations on this subject is, may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognising and enforcing that law.")

<sup>99</sup> *Id.* at 161. "Animus furandi" is defined by Webster's On-Line dictionary as "the intention to steal." Webster's On-Line Dictionary, available at <http://www.webster-dictionary.org/definition/Animus+furandi> (last visited Nov. 21, 2004).

<sup>100</sup> The Court in *Smith* concluded:

[W]hether we advert to writers on the common law, or the maritime law, or the law of nations, we shall find that they universally treat of piracy as an offence against the law of nations, and that its true definition by that law is

application of the law of nations in the ATS, it is notable that the *Smith* court did not require uniformity as to all aspects of the definition of piracy. Despite some "diversity of definitions, in other respects," it was sufficient that the commentators agreed on the core definition of piracy as "robbery upon the sea."

Most of the core violations recognized by the lower courts in prior ATS decisions rest on even clearer consensus and precision than that in *Smith*. Before *Sosa*, the lower courts repeatedly dismissed ATS claims that did not meet the stringent "specific, universal and obligatory" test. Environmental claims, for example, have been rejected on the finding that the international law governing environmental harm does not at this point impose clearly defined obligations.<sup>101</sup> By contrast, torture is defined by an international agreement ratified by 138 nations; genocide is defined and prohibited in a convention ratified by 136 nations.<sup>102</sup> War crimes, crimes against humanity, forced labor and slavery have all been the subject of international development and definition involving most of the countries of the world. In its first post-*Sosa* brief in an ATS case, the executive branch did not challenge the Ninth Circuit's finding that forced labor triggers ATS jurisdiction, apparently accepting that a forced labor claim satisfies the *Sosa* standard.<sup>103</sup>

The Court's discussion of the arbitrary detention claim in *Sosa* provides additional guidance about which claims are

robbery upon the sea. . . . We have, therefore, no hesitation in declaring, that piracy, by the law of nations, is robbery upon the sea, and that it is sufficiently and constitutionally defined by the fifth section of the act of 1819.

*Smith*, 18 U.S. (5 Wheat.) at 162.

<sup>101</sup> See, e.g., *Flores v. S. Peru Copper Corp.*, 343 F.3d 140, 159-72 (2d Cir. 2003) (rejecting environmental claim); *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161, 166-67 (5th Cir. 1999) (same). See also *Hamid v. Price Waterhouse*, 51 F.3d 1411, 1418 (9th Cir. 1995) (rejecting claim of fraud); *Tamari v. Bache & Co. S.A.L.*, 730 F.2d 1103, 1104 (7th Cir. 1984) (same); *Guinto v. Marcos*, 654 F. Supp. 276, 280 (S.D. Cal. 1986) (rejecting claim of censorship); *De Wit v. KLM Royal Dutch Airlines, N.V.*, 570 F. Supp. 613, 618 (S.D.N.Y. 1983) (rejecting claim of commercial tort).

<sup>102</sup> See <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty14.asp> (last visited Nov. 5, 2004) (ratifications of Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment); <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty1.asp> (last visited Nov. 5, 2004) (ratifications of Convention on the Prevention and Punishment of the Crime of Genocide).

<sup>103</sup> See Supplemental Brief for the United States of America as Amicus Curiae at 4, 17, 26, *Doe v. Unocal Corp.*, 2003 WL 359787 (9th Cir. 2003) (Nos. 00-56603, 00-56628), available at <http://www.earthrights.org/unocal/dojunocalbrief.pdf> (last visited Nov. 5, 2004).

not sufficient. Alvarez argued that an arrest would violate international law if "exceeding positive authorization to detain under the domestic law of some government, regardless of the circumstances."<sup>104</sup> The Supreme Court rejected this "broad" definition of arbitrary arrest, noting that its "implications would be breathtaking."<sup>105</sup> But the Court's holding in *Sosa* is quite narrow: "It is enough to hold that a single illegal detention of less than a day, followed by the transfer of custody to lawful authorities and a prompt arraignment, violates no norm of customary international law so well defined as to support the creation of a federal remedy."<sup>106</sup>

Thus, the Supreme Court reversed the Ninth Circuit's decision in *Sosa* not because it objected to the standard applied, but rather because it disagreed with the application of the stringent standard to the *Sosa* facts. This holding falls within the parameters set by lower court ATS decisions. The Ninth Circuit had split on the application of this standard to Alvarez's facts by a vote of 6-5. Compared to prior cases, *Sosa* was clearly an outlier: no ATS claim had ever survived based on abuse comparable to that proved by Alvarez. Accordingly, the Court's statement that it rejected unnamed prior federal court authority on arbitrary detention "to the extent it supports Alvarez's position"<sup>107</sup> is difficult to apply. None of the prior arbitrary detention cases involved brief detentions in the absence of other abuses, such as torture, and in none of the cases were the detainees "transfer[red] to lawful authorities" for "a prompt arraignment" after less than a day.<sup>108</sup> In *Sosa*, the

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<sup>104</sup> *Sosa*, 124 S. Ct. at 2743.

<sup>105</sup> *Id.* at 2744-45. The Court held that a violation of a binding international norm would require conduct more egregious than a mere violation of domestic arrest procedures:

Any credible invocation of a principle against arbitrary detention that the civilized world accepts as binding customary international law requires a factual basis beyond relatively brief detention in excess of positive authority. . . . In any event, the label would never fit the reckless policeman who botches his warrant, even though that same officer might pay damages under municipal law.

*Id.* at 2768-69.

<sup>106</sup> *Id.* at 2769.

<sup>107</sup> *Id.* at 2768 n.27.

<sup>108</sup> The cases cited by Alvarez all awarded damages for detentions without any pretense of lawful authority, not for the technical violations of arresting authority that concerned the *Sosa* Court. In addition, all involved physical abuse and/or much longer periods of detention. See, e.g., *Xuncax v. Gramajo*, 886 F. Supp. 162, 170 (D. Mass. 1995) (detentions of fourteen hours to two days while being tortured); *Paul v. Avril*, 901 F. Supp. 330, 334 (S.D. Fla. 1994) (one plaintiff held for under ten hours, tortured and permanently injured); *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1541 (N.D. Cal. 1987)

Court seemed animated by the view that the problem with Alvarez's arrest was a technicality, a fact setting that is not present in any of the earlier cases.

Justice Scalia correctly recognized that the majority endorsed the same standard applied by the lower courts to date, including by the Ninth Circuit in this very case: "[T]he verbal formula it applied is the same verbal formula that the Court explicitly endorses."<sup>109</sup> Moreover, this was the standard proposed by Alvarez and the amici who submitted briefs on his behalf. A brief filed on behalf of international law scholars, for example, summarized the pre-*Sosa* precedents as applying the statute "to impose civil liability for only the most serious violations of international law".<sup>110</sup>

To date, the federal courts have engaged in a careful and measured analysis of the individual claims raised in ATCA cases, accepting only well-established, universally recognized norms of international law. Contrary to Petitioner's assertions, the federal courts have functioned as effective gatekeepers in ATCA cases, allowing only claims that are well-established under customary international law (and recognized by the United States) to proceed.<sup>111</sup>

The Supreme Court in *Sosa* focused attention on the narrowness of the standard and the need for caution in defining ATS jurisdiction. The Court also rejected efforts to extend actionable international torts to those based on technical violations of domestic law. But the heart and soul of ATS jurisprudence remain intact: redress for individuals who have suffered egregious violations of their human rights.

## V. CORPORATE DEFENDANTS AND COMPLICITY IN HUMAN RIGHTS VIOLATIONS POST-SOSA

Leading up to the Supreme Court decision, much of the debate over the ATS centered on its application to corporate defendants. Several business groups filed amicus briefs arguing that enforcing corporate liability for human rights violations in U.S. courts would severely hamper U.S. business around the world.<sup>112</sup> This dispute implicated two legal issues not

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(one plaintiff held for more than four years, another arrested and never charged or released).

<sup>109</sup> *Sosa*, 124 S. Ct. at 2775.

<sup>110</sup> Brief of Amici Curiae National and Foreign Legal Scholars in Support of Respondents at \*1, *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739 (2004) (No. 03-339).

<sup>111</sup> *Id.* at \*18-19.

<sup>112</sup> See Brief of Amici Curiae National Foreign Trade Council et al. at 4-5,



raised by *Sosa* but central to post-*Sosa* litigation. First, corporate liability requires a finding that a particular international norm applies to private legal entities such as corporations. Second, many corporate cases involve allegations that corporations have been complicit in human rights violations committed by others, requiring analysis of the standards for determining vicarious liability.

These questions turn on the resolution of a basic choice of law issue: In an ATS case, what law governs who is bound by a norm? *Sosa* confirmed that federal courts adjudicate ATS claims as an exercise of their power to recognize federal common law claims for violations of certain international law norms. Consistent with the Supreme Court approach to the ATS, lower courts addressing the choice of law question generally have held that ATS claims are founded in federal common law, but that the federal courts should look to international law both to define the elements of the violation and to determine who is bound by a given norm.

#### A. *International Norms Apply to Corporate Defendants*

In *Sosa*, the Court indicated general agreement with this approach. In a footnote addressing the liability of private actors, the Court cited with approval two decisions that relied on international law to define who is governed by a given international law norm:

A related consideration is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual. Compare *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 791-795 (C.A.D.C.1984) (Edwards, J., concurring) (insufficient consensus in 1984 that torture by private actors violates international law), with *Kadic v. Karadzic*, 70 F.3d 232, 239-241 (C.A.2 1995) (sufficient consensus in 1995 that genocide by private actors violates international law).<sup>113</sup>

The Court in this note indicated that international law determines which actors are bound by particular international law norms. The Court also recognized that some international norms apply to private actors—corporations as well as individuals.

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*Sosa* (No. 03-339), available at 2004 WL 162760. See also Brief for the National Association of Manufacturers at 4-5, *Sosa* (No. 03-339), available at 2004 WL 199236.

<sup>113</sup> *Sosa*, 124 S. Ct. at 2766 n.20.

In *Kadic*, one of the cases cited by the Supreme Court, the Second Circuit held that "evolving standards of international law govern who is within the [ATS] jurisdictional grant."<sup>114</sup> *Kadic* concluded that the prohibition of genocide applies to private actors by reviewing a range of authorities, including the Nuremberg charter, a 1946 General Assembly resolution, the international convention against genocide, and the U.S. statute implementing that convention.<sup>115</sup> These authorities indicated that the prohibition on genocide extends to private actors. In contrast, Judge Edwards in *Tel-Oren* examined international documents on torture and concluded that the prohibition applies only to torture committed under color of law, and not to purely private torture.<sup>116</sup>

International tribunals have applied human rights and humanitarian norms to corporations at least since World War II, when the Nuremberg Tribunal made clear that norms applicable to "persons" applied to legal persons as well as individuals. Organizations were declared to be criminal if their purpose was to commit or facilitate crimes detailed in the Charter.<sup>117</sup>

The handful of courts that have considered the issue under the ATS have all agreed that the international norms that apply to private individuals also apply to corporations.<sup>118</sup> In

<sup>114</sup> *Kadic v. Karadžić*, 70 F.3d 232, 241 (2d Cir. 1995) (quoting *Amerada Hess Shipping Corp. v. Argentine Republic*, 830 F.2d 421, 425 (2d Cir. 1987), *rev'd on other grounds*, 488 U.S. 428 (1989)).

<sup>115</sup> See *Kadic*, 70 F.3d at 241-42 (citing Article 6 of the Agreement and Charter Establishing the Nuremberg War Crimes Tribunal (punishing "persecutions on political, racial, or religious grounds," regardless of whether the offenders acted "as individuals or as members of organizations"); G.A. Res. 96(I), 1 U.N. GAOR, U.N. Doc. A/64/Add.1, at 188-89 (1946) (declaring "that genocide is a crime under international law that is condemned by the civilized world, whether the perpetrators are 'private individuals, public officials or statesmen.'"); Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, art. IV, 102 Stat. 3045, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951, for the United States Feb. 23, 1989) ("[p]ersons committing genocide . . . shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals."); Genocide Convention Implementation Act of 1987, 18 U.S.C. § 1091 (1988) (criminalizing acts of genocide without regard to whether the offender is acting under color of law); see *id.* § 1091(a) ("[w]hoever commits genocide shall be punished, if the crime is committed within the United States or by a U.S. national); *id.* § 1091(d).

<sup>116</sup> *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 791-95 (D.C. Cir. 1984) (Edwards, J., concurring).

<sup>117</sup> Nuremberg Judgment, The Accused Organizations, Oct. 1, 1946, *reprinted in* 41 AM. J. INT'L L. 172 (1947). See Case No. 57, The I.G. Farben Trial, U.S. Military Tribunal, Nuremberg, 14 Aug. 1947-July 29, 1948, 10 LAW REPORTS OF TRIALS OF WAR CRIMINALS 1; 8 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS 1108, 1132, 1140, INT'L L. REP. 676 (1948).

<sup>118</sup> See, e.g., *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000);

*Presbyterian Church of Sudan v. Talisman Energy, Inc.*, for example, the court undertook an exhaustive review of ATS decisions and international precedents and concluded that "a considerable body of United States and international precedent indicates that corporations may be liable for violations of international law. . . ."<sup>119</sup> The *Sosa* decision validated the approach of the lower courts.

*B. Vicarious Liability and Complicity in Human Rights Violations*

In a recent submission to the Ninth Circuit, the executive branch argued that aiding and abetting liability is not so clearly established as to support ATS jurisdiction after *Sosa*.<sup>120</sup> This misses the point in two ways. First, it is simply not true: for over 200 years, international law has recognized accomplice liability. But even if international law left a gap in the definition of vicarious liability, federal common law could look to federal standards to supply an appropriate standard. *Sosa* does not require that every ancillary rule applied in an ATS case meet the level of international consensus required for the definition of the underlying violation. As in any case in which the federal courts exercise discretion to recognize federal common law, the courts will fashion rules to fill gaps, borrowing from the most analogous body of law.

At the time the ATS was enacted, the federal courts clearly recognized accomplice liability for violations of international law.<sup>121</sup> In a 1795 opinion cited by the Court in

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*Bowoto v. Chevron*, 312 F. Supp. 2d 1229 (N.D. Cal. 2004); *Estate of Rodriguez v. Drummond Co.*, 256 F. Supp. 2d 1250 (N.D. Ala. 2003); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289 (S.D.N.Y. 2003); *Doe v. Unocal Corp.*, 963 F. Supp. 880 (C.D. Cal. 1997).

<sup>119</sup> 244 F. Supp. 2d at 308.

<sup>120</sup> See Supplemental Brief for the United States of America as Amicus Curiae at 7-8, *Doe v. Unocal Corp.*, 2002 WL 31063976 (9th Cir. 2004) (Nos. 00-56603, 00-56628), available at <http://www.earthrights.org/unocal/dojunocalbrief.pdf> (last visited Jan. 21, 2005).

<sup>121</sup> So did William Blackstone, the main source relied upon by the Supreme Court in its analysis of the original intent of the ATS. In his discussion of piracy, Blackstone recognized broad liability for those aiding pirates in any manner.

By the statute 8 Geo. I. c. 24, the trading with known pirates, or furnishing them with stores or ammunition, or fitting out any vessel for that purpose, or in any wise consulting, combining, confederating, or corresponding with them . . . shall be deemed piracy: and all accessories to piracy, are declared to be principal pirates . . .

4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, 66-73 (Dublin, The Company of Booksellers 1775).

Sosa, Attorney General Bradford noted that liability for violations of the law of nations extends to those "committing, aiding, or abetting" such violations.<sup>122</sup> Several of the classic eighteenth-century cases applying international law in criminal prosecutions invoked accessory liability. In *Talbot v. Janson*,<sup>123</sup> for example, the Court found the defendant liable for aiding in the unlawful capture of a neutral ship.<sup>124</sup> Similarly, *Henfield's Case*<sup>125</sup> recognized liability for "committing, aiding or abetting hostilities" in violation of the law of nations.<sup>126</sup> International law today continues to recognize accomplice liability. Several World War II cases found defendants guilty of war crimes and crimes against humanity as accomplices to the crimes.<sup>127</sup> Modern treaties incorporate accessory liability,<sup>128</sup> and the modern international criminal tribunals have applied the international law definition of aiding and abetting liability. The statute of the International Criminal Court, for example, assigns liability to a person who, "[f]or the purpose of facilitating the commission" of a crime, "aids, abets or otherwise assists in its commission. . . ."<sup>129</sup>

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<sup>122</sup> 1 U.S. Op. Att'y. Gen. 57, 59 (1795) (discussing the criminal and civil liability of U.S. citizens who joined a French attack on a British colony in Sierra Leone).

<sup>123</sup> 3 U.S. (3 Dall.) 133 (1795).

<sup>124</sup> *Id.* at 156-57.

<sup>125</sup> 11 F. Cas. 1099 (C.C.D. Pa. 1793).

<sup>126</sup> *Id.* at 1103.

<sup>127</sup> See, e.g., The Zyklon B Case (Trial of Bruno Tesch and Two Others), 1 LAW REPORTS OF TRIALS OF WAR CRIMINALS 93 (Brit. Mil. Ct. 1946) (German industrialists convicted of supplying poison gas to Nazi concentration camps based on proof that they knew the purpose for which the gas was to be used); United States v. Flick, 6 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 1, 1216-23 (1949) (Flick convicted for knowingly contributing financial support to the Nazis); United States v. Krauch, 8 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 101081, 1169-72 (1952) (pharmaceutical industrialists convicted because they supplied experimental vaccines to the Nazis knowing that the vaccines would be used in illegal medical experiments on concentration camp inmates).

<sup>128</sup> The Genocide Convention prohibits both complicity and conspiracy to commit genocide, as well as prohibiting genocide itself. Convention on the Prevention and Punishment of the Crime of Genocide, *supra* note 113, at 277. The Torture Convention requires states to criminalize any act "that constitutes complicity or participation in torture." Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, art. 4(1), 1465 U.N.T.S. 113, 113 (entered into force June 26, 1987). Similarly, the Supplementary Slavery Convention establishes liability for "being an accessory" to the enslavement of another person, or "being a party to a conspiracy to accomplish any such acts." Supplementary Convention on the Abolition of Slavery, the Slave Trade, Institutions and Practices Similar to Slavery, Sept. 7, 1956, art. 6, 266 U.N.T.S. 3, 43.

<sup>129</sup> Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/CONF.183/9 (1998), art. 25, §3(c). The Rwanda tribunal, quoting an English case

*Sosa* makes no mention of vicarious liability and the Supreme Court gave no explicit instructions as to how to resolve such collateral issues. The Court cannot have intended that all aspects of an ATS claim be determined by international law. International law as a rule establishes only general parameters and leaves domestic courts to determine the manner by which its rules will be enforced. The standard practice of federal courts enforcing federal common law claims provides guidance for resolution of the countless issues that arise in federal court litigation. Where federal law does not provide a clear rule, the courts borrow from analogous federal or even state rules, as appropriate, to answer ancillary issues.<sup>130</sup> Here, a court might ask first whether international law provides a clear answer, then look to federal vicarious liability standards as necessary to fill any gaps.<sup>131</sup>

## VI. THE UNRESOLVED ISSUE: THE ROLE OF THE EXECUTIVE BRANCH

The *Sosa* Court recognized that certain discretionary doctrines may bar adjudication of ATS claims, including the requirement that plaintiffs exhaust local remedies.<sup>132</sup> In addition, the opinion contains a cryptic reference to the role of the executive branch in cases that may have foreign policy

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with clear parallels to corporate liability today, stated:

[A]n indifference to the result of the crime does not of itself negate abetting. If one man deliberately sells to another a gun to be used for murdering a third, he may be indifferent about whether the third lives or dies and interested only in the cash profit to be made out of the sale, but he can still be an aider and abettor.

Prosecutor v. Akayesu, Case No. ICTR-96-4-T (Int'l Crim. Trib. for Rwanda, Trial Chamber I, Sept. 2, 1998), ¶ 539 (quoting Nat'l Coal Bd. v. Gamble, 1 Q.B. 11 (1959)), available at <http://www.ictr.org/ENGLISH/cases/Akayesu/judgement/akay001.htm> (last visited Nov. 13, 2004).

<sup>130</sup> Federal courts develop federal common law in a limited set of circumstances, some of which apply directly to application of the ATS: to fill gaps in a federal statutory scheme, to fulfill congressional intent, and to protect uniquely federal interests in a few areas that include matters involving international law. ERWIN CHEMERINSKY, FEDERAL JURISDICTION 333-34 (2d ed. 1994).

<sup>131</sup> This is the issue that was before the Ninth Circuit sitting en banc in *Doe v. Unocal Corporation*, but is now off the docket because the case was settled. See *supra* note 22. See *Doe v. Unocal Corp.*, 2003 WL 359787 (9th Cir. Feb. 14, 2003) (Nos. 00-56603, 00-56628), *reh'g granted en banc*. The two-judge majority applied international vicarious liability principles. *Doe v. Unocal Corp.*, 2002 WL 31063976, at \*11 (9th Cir. Sept. 18, 2002) (Nos. 00-56603, 00-57197, 00-56628, 00-57195). The concurring opinion applied federal complicity rules. *Id.* at \*24-36. Despite the heated disagreement, the two approaches derived virtually identical standards from the different bodies of law and came to the same result when applying their standards to the facts.

<sup>132</sup> *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2766 n.21 (2004).

implications. In footnote 21, the Court referred to "a policy of case-specific deference to the political branches."<sup>133</sup> The Court indicated one set of particularly controversial cases that might warrant such deference:

[T]here are now pending in federal district court several class actions seeking damages from various corporations alleged to have participated in, or abetted, the regime of apartheid that formerly controlled South Africa. See *In re South African Apartheid Litigation*, 238 F. Supp. 2d 1379 (JPML 2002) (granting a motion to transfer the cases to the Southern District of New York). The Government of South Africa has said that these cases interfere with the policy embodied by its Truth and Reconciliation Commission, which "deliberately avoided a 'victors' justice' approach to the crimes of apartheid and chose instead one based on confession and absolution, informed by the principles of reconciliation, reconstruction, reparation and goodwill. . . ." The United States has agreed. . . . 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. Cf. *Republic of Austria v. Altmann*, 124 S. Ct. 2240, 2255-2256 (2004) (discussing the State Department's use of statements of interest in cases involving the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1602 *et seq.*).<sup>134</sup>

Unfortunately, the Court did not identify which characteristics of the apartheid cases support the finding that executive branch views might be entitled to "serious weight." Nor did the court explain under what doctrine, and applying what standards of review, the lower courts should evaluate such opinions. The one citation is to a case decided just days before, *Republic of Austria v. Altmann*.<sup>135</sup> The Court's discussion of executive branch views in *Altmann* itself was cryptic. The Court invited the executive branch to express its views not about the interpretation of the statutory scheme, but rather about the foreign policy issues implicated by a particular case.<sup>136</sup>

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<sup>133</sup> *Id.*

<sup>134</sup> *Id.* (parallel citations omitted).

<sup>135</sup> 124 S. Ct. 2240 (2004). In November 2004, a federal judge dismissed the consolidated *South African Apartheid* cases for reasons largely unrelated to the concerns raised in this Supreme Court footnote. *In re South African Apartheid Litigation*, 346 F. Supp. 2d 538 (S.D.N.Y. 2004), 2004 WL 2722204. Relying more on Justice Scalia's opinion in *Sosa* than on the majority decision, Judge Sprizzo found that the conduct alleged by plaintiffs did not trigger jurisdiction under the ATS.

<sup>136</sup> The dissent in *Altmann* questioned the majority's invitation to the executive branch to comment on the application of sovereign immunity. 124 S. Ct. at 2274-75. In reply, the majority opinion stated in a footnote: "We do not hold . . . that executive intervention could or would trump considered application of the [Foreign Sovereign Immunities Act's] more neutral principles; we merely note that the Executive's views on questions within its area of expertise merit greater deference than

But the examples *Altmann* cited in support of this invitation all addressed issues on which the law governing sovereign immunity was unclear: the propriety of seizure of diplomatic property to satisfy a judgment or the immunity of a successor state.<sup>137</sup> The proper interpretation of the breadth of sovereign immunity is a legal issue on which the courts traditionally look to the executive branch for guidance.

By contrast, the administration of President George W. Bush has argued that ATS cases are non-justiciable not because of legal impediments, but because of their purported impact on business investments or relations with foreign governments. The difficult issue for the courts is the degree of deference to be accorded executive branch submissions when plaintiffs challenge the factual basis for the administration's views, offering conflicting evidence about the potential impact and about U.S. interests and policies. The cryptic *Sosa* footnote states that "there is a strong argument" that the court should "give serious weight" to the views submitted in the apartheid cases. But those cases reflect the unique history of South Africa and its transition from apartheid to democracy. The government that replaced the apartheid regime was recognized internationally as representative both of the majority of the nation and, in particular, of the victims of past human rights abuses. The transition included a negotiated process by which abuses would be investigated and perpetrators given the opportunity to testify about their actions in return for amnesty. When the democratically elected, representative government of South Africa objected to the impact of the U.S. litigation on the negotiated transition process, the executive branch asked the courts to defer to this judgment. All of these factors provide support for the Court's suggestion that there is a "strong argument" that executive branch views "in such cases" are entitled to "serious weight."<sup>138</sup>

This context is important, for the constitutional division of powers requires that federal courts subject executive branch

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its opinions regarding the scope of a congressional enactment." *Id.* at 2255 n.23. Note the limited deference given to executive branch views of the proper interpretation of the scope of a statute. In keeping with this approach, the Supreme Court in *Sosa* barely mentioned the executive branch's arguments against its interpretation of the ATS.

<sup>137</sup> 124 S. Ct. at 2255 n.21.

<sup>138</sup> Exhaustion of domestic remedies might be a more appropriate doctrine on which to challenge the litigation, given that South Africa also has a functioning judicial system.

submissions to review. In *First National City Bank v. Banco Nacional de Cuba*,<sup>139</sup> Justice Douglas warned about the unconstitutionality of granting the executive branch the power to determine when litigation must be dismissed on foreign policy grounds, recognizing that unquestioning deference would render the Court "a mere errand boy for the Executive Branch which may choose to pick some people's chestnuts from the fire, but not others."<sup>140</sup> In that case, six of the justices in separate opinions concluded that executive branch views were not binding on the judiciary. As stated by Justice Powell, "I would be uncomfortable with a doctrine which would require the judiciary to receive the Executive's permission before invoking its jurisdiction. Such a notion, in the name of the doctrine of separation of powers, seems to me to conflict with that very doctrine."<sup>141</sup> Justice Brennan added, "The Executive Branch . . . cannot by simple stipulation change a political question into a cognizable claim."<sup>142</sup> Noting that six members of the Court shared his view on this point, he concluded that "the representations of the Department of State are entitled to weight for the light they shed on the permutation and combination of factors underlying the act of state doctrine. But they cannot be determinative."<sup>143</sup>

The Court has reviewed the coherence of executive branch submissions even when ultimately following their guidance.<sup>144</sup> Lower courts have adopted this position as well. In

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<sup>139</sup> 406 U.S. 759 (1972).

<sup>140</sup> *Id.* at 773 (1972) (Douglas, J., concurring).

<sup>141</sup> *Id.* at 773 (Powell, J., concurring).

<sup>142</sup> *Id.* at 788-89 (Brennan, J., dissenting).

<sup>143</sup> *Id.* at 790 (Brennan, J. dissenting). See *Zschernig v. Miller*, 389 U.S. 429 (1968), where the Court refused to follow the executive branch's views. The concurring justices harshly rejected any obligation to defer to the State Department's views:

We deal here with the basic allocation of power between the States and the Nation. Resolution of so fundamental a constitutional issue cannot vary from day to day with the shifting winds at the State Department. Today, we are told, Oregon's statute does not conflict with the national interest. Tomorrow it may. But, however, that may be, the fact remains that the conduct of our foreign affairs is entrusted under the Constitution to the National Government, not to the probate courts of the several States.

*Id.* at 443 (Stewart, J., concurring).

<sup>144</sup> *Regan v. Wald*, 468 U.S. 222 (1984), for example, addressed a challenge to currency restrictions imposed on U.S. citizens traveling to Cuba. While recognizing that the executive branch's views were entitled to deference, the Court reviewed the underlying facts and concluded that the restrictions were justified based on "the evidence presented to both the District Court and the Court of Appeals." *Id.* at 243. In *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 422 (2003), the court followed executive branch recommendations after concluding that "[t]he approach taken [by the executive branch] serves to resolve . . . several competing matters of national concern" at issue in



*Washington Post Co. v. U.S. Dep't of State*, for example, the D.C. Circuit declared, "whatever weight the opinion of the Department, as a presumed expert in the foreign relations field, is able to garner, deference cannot extend to blatant disregard of countervailing evidence."<sup>145</sup> Thus, the views of the executive branch are entitled to "respectful consideration" but cannot be given conclusive weight.<sup>146</sup>

The pattern of executive intervention in ATS cases under the administration of President George W. Bush illustrates the need for a searching review. In a series of cases, the administration opposed judicial review of cases alleging egregious behavior because of the possible impact on business investments or because of weakly supported claims about the likely reaction of foreign governments.<sup>147</sup> As I have argued elsewhere, the Bush Administration's opposition to human rights litigation coincides with the filing of lawsuits against politically powerful defendants: corporations, foreign government officials, and the U.S. government itself. Although couched in terms of separation of powers, the campaign seeks to protect allies from accountability for egregiously wrongful behavior.<sup>148</sup>

Recent Bush administration submissions also have been criticized as contrary to long-standing U.S. policy. In *Doe v. ExxonMobil*,<sup>149</sup> for example, plaintiffs alleged that the oil giant paid the Indonesian military to provide protection for operations conducted in the midst of a civil war in the Aceh province with the full knowledge that the military had employed genocide, murder and torture in its efforts to maintain order. The State Department legal advisor suggested

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the dispute.

<sup>145</sup> *Wash. Post Co. v. U.S. Dep't of State*, 840 F.2d 26, 36-37 (D. C. Cir. 1988), *vacated on other grounds*, 898 F.2d 793 (D.C. Cir. 1990).

<sup>146</sup> *Kadic v. Karadžić*, 70 F.3d 232, 250 (2d Cir. 1995). *See also* *Allied Bank Int'l*, 757 F.2d 516, 521 n.2 (2d Cir. 1985) (decision to invoke the act of state doctrine, "may be guided but not controlled by the position, if any, articulated by the executive as to the applicability *vel non* of the doctrine to a particular set of facts. Whether to invoke the act of state doctrine is ultimately and always a judicial question."); *Belgrade v. Sidex Int'l Furniture Corp.*, 2 F. Supp. 2d 407, 416 (S.D.N.Y. 1998) ("[T]he views of the executive branch often will have an important bearing on a court's determination, especially where the concern is possible conflict with a coordinate branch of government, [but] they are not conclusive.").

<sup>147</sup> *See* Stephens, *Upsetting Checks and Balances*, *supra* note 25, at 196-202.

<sup>148</sup> *Id.* at 170.

<sup>149</sup> Complaint at 14-19, *Doe v. ExxonMobil*, No. 01-CV-1357 (D.D.C. filed June 19, 2001), available at <http://www.laborrights.org/projects/corporate/exxon/index.html> (last visited Jan. 21, 2005).

that the litigation would harm U.S. interests because it would decrease cooperation with counter-terrorism measures, deter foreign investment in Indonesia, and give foreign business competitors an advantage over U.S. businesses.<sup>150</sup> In response, plaintiffs submitted an affidavit from a former State Department official who challenged the Bush administration's policy assumptions.<sup>151</sup> He noted that "an honest assessment of Indonesia's human rights records by American governmental institutions has always been an *integral part* of United States foreign policy toward Indonesia."<sup>152</sup> Plaintiffs also challenged the administration's portrayal of U.S. foreign policy, noting the U.S. interest in "ensuring that U.S. corporate entities comply with international human rights obligations in their conduct abroad."<sup>153</sup>

If the executive branch continues to maintain an implacable opposition to all human rights litigation in U.S. courts, battles over the proper weight to be given to its views are likely to be a major issue in post-*Sosa* litigation. The Bush administration fired the first salvo in a brief filed before the Ninth Circuit sitting en banc in *Doe v. Unocal Corporation*.<sup>154</sup>

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<sup>150</sup> Letter from William H. Taft, Legal Advisor, Department of State, to Honorable Louis F. Oberdorfer, United States District Court Judge for the District of Columbia, submitted in *Doe v. ExxonMobil*, No. 01-CV-1357 (D.D.C. July, 29, 2002), available at <http://www.laborrights.org/projects/corporate/exxon/stateexxonmobile.pdf> (last visited Nov. 16, 2004).

<sup>151</sup> Affidavit of Harold Hongju Koh, Assistant Secretary of State for Democracy, Human Rights, and Labor in the Clinton administration, submitted in *Doe v. ExxonMobil*, No. 01-CV-1357 (D.D.C. Aug. 28, 2002), reprinted in Terry Collingsworth, *The Alien Tort Claims Act – A Vital Tool for Preventing Corporations from Violating Human Rights*, Attachment C, available at <http://laborrights.org/publication/ATCA.pdf> (last visited Nov. 16, 2004).

<sup>152</sup> *Id.* at 5, ¶ 14. Koh also observed that repeated criticism by the Clinton administration, the second Bush administration and Congress has not led the Indonesian government to cease cooperation with the U.S. government, and that it is not plausible to predict that Indonesia will do so in the future because of a lawsuit filed by private parties in a U.S. federal court. *See id.* at 5, ¶ 14-17.

<sup>153</sup> *Id.* at 8, ¶ 19. The administration itself has endorsed this policy, stressing the relationship between the rule of law and respect for human rights and economic progress:

These principles are vital to our own economic security here at home and are the only sustainable way for United States companies to engage abroad. . . . [I]t is good not only for American business, but also for the global investment climate that American firms be the best corporate citizens possible.

*Id.* at 8-9, ¶ 19 (quoting E. Anthony Wayne, Assistant Secretary of State for Economic and Business Affairs, who served both President Clinton and the second President Bush, Announcement of "Voluntary Principles on Security and Human Rights," U.S. Department of State, Dec. 20, 2000, available at [http://www.state.gov/www/policy\\_remarks/2000/001220\\_wayne\\_principles.html](http://www.state.gov/www/policy_remarks/2000/001220_wayne_principles.html) (last visited Nov. 11, 2004)).

<sup>154</sup> Supplemental Brief for the United States as Amicus Curiae, *Doe v. Unocal Corp.*, 2003 U.S. App. LEXIS 2716 (9th Cir. 2003) (Nos. 00-56603, 00-56628) at

The brief made no effort to argue either that forced labor fails to meet the *Sosa* standard or that adjudication of the case would harm relations with Burma. Such an argument would have been difficult to support: the U.S. government has repeatedly criticized the abusive military regime governing Burma and has imposed strict economic sanctions.<sup>155</sup> In addition, the Clinton administration informed the district court that adjudication of the case against Unocal would have no impact on U.S. foreign policy.<sup>156</sup> Instead, the Bush executive branch brief asserted that any recognition of corporate liability for aiding and abetting egregious human rights abuses, in any case, would interfere with U.S. foreign policy because it would deter foreign investment and tie the hands of the executive branch.<sup>157</sup> Plaintiffs challenged this extreme view, arguing that deterrence of knowing complicity in violations of core international human rights norms would have no detrimental impact on overall investment or U.S. policy.<sup>158</sup> In such cases, the courts must decide what level of consideration to afford executive branch claims about the impact of particular cases or doctrines on U.S. foreign policy. The executive branch's factual claims about the impact of litigation should be the legitimate subject of debate and challenge, as "these predictions about the impact of the litigation appear far more subjective than factual, more designed to protect powerful defendants than to protect U.S. foreign policy."<sup>159</sup>

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<http://www.earthrights.org/unocal/index.shtml> (Aug. 2004). After the Supreme Court decided *Sosa*, the Circuit requested additional briefing. The briefs are available at <http://www.earthrights.org/unocal/index.shtml> (last updated Oct. 15, 2004). The case has now been settled. See *supra* note 22.

<sup>155</sup> See the description of sanctions imposed by President Clinton in *National Coalition Government of the Union of Burma v. Unocal, Inc.*, 176 F.R.D. 329, 335 (C.D. Cal. 1997).

<sup>156</sup> See Letter of Michael J. Matheson, Acting Legal Advisor (July 8, 1997), reprinted in Nat'l Coalition Gov't of the Union of Burma v. Unocal, Inc., 176 F.R.D. 329, 362 (C.D. Cal. 1997) [hereinafter Matheson Letter] (stating that "adjudication of the claims based on the allegations of torture and slavery would not prejudice or impede the conduct of U.S. foreign relations with the current government of Burma").

<sup>157</sup> Supplemental Brief for the United States as Amicus Curiae, *supra* note 154, at 11-17.

<sup>158</sup> Plaintiffs also argue that this submission ignores the Court's invitation to raise "case-specific" foreign policy concerns, focusing rather on the same kind of sweeping objections to the ATS that the Court rejected in *Sosa*. Appellants' Response to United States Amicus Curiae Brief at 25-32, *Doe v. Unocal Corp.*, 2003 U.S. App. LEXIS 2716 (9th Cir. 2003) (Nos. 00-5603, 00-56628, 00-57195, 00-57197) at <http://www.earthrights.org/unocal/index.shtml> (Aug. 2004).

<sup>159</sup> Stephens, *Upsetting Checks and Balances*, *supra* note 25, at 202.

The highly politicized, extreme positions taken by the executive branch under the leadership of President Bush may ultimately undermine the respect normally accorded executive branch views by the Supreme Court. In a series of decisions at the end of the 2004 term, the Court refused to follow the administration's guidance, even when couched in super-heated national security terms.<sup>160</sup> It is striking that the *Sosa* opinion makes no mention at all of the executive branch's views of the case or of its overwrought description of the supposed danger that ATS cases pose to U.S. foreign policy. Lower courts may well take guidance from the Supreme Court's example and reject the administration's demand that the courts decline to adjudicate cases properly before them under the ATS.

## CONCLUSION

Activists, scholars and corporate representatives have speculated about the risks and benefits of broad application of the ATS. One analysis went so far as to describe the statute as "an awakening monster" that would cost the U.S. economy billions of dollars.<sup>161</sup> At the same time, law review authors and litigators have argued for inclusion of a long list of human rights violations as possible ATS claims. Ignoring the two extremes, the lower courts moved ahead cautiously, rejecting far more claims than they accepted and issuing judgments only in cases involving egregious human rights violations. The Supreme Court validated their cautious approach in *Sosa*, preserving a measured mechanism for human rights accountability that affirms a narrow but very significant role for U.S. domestic courts in providing redress for victims of egregious human rights abuses. In the words of the *Filártiga* court, ATS litigation represents "a small but important step in the fulfillment of the ageless dream to free all people from brutal violence."<sup>162</sup>

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<sup>160</sup> The *Sosa* decision was released the day after the Court issued opinions in cases challenging the administration's detention of enemy combatants, *Rasul v. Bush*, 124 S. Ct. 2686 (2004), and *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004). In both decisions, the Court rejected administration claims that the executive branch should be given complete discretion to respond to the exigencies of the war against terror.

<sup>161</sup> GARY CLYDE HUFBAUER & NICHOLAS K. MITROKOSTAS, *AWAKENING MONSTER: THE ALIEN TORT STATUTE OF 1789* (2003).

<sup>162</sup> *Filártiga v. Peña-Irala*, 630 F.2d 876, 890 (2d Cir. 1980).

