The Supreme Court Giveth and the Supreme Court Taketh Away: An Assessment of Corporate Liability Under § 1350

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I. INTRODUCTION

"US plaintiffs' lawyers have revived a dormant 18th-century law and made it their chief weapon in a 21st-century battle over corporate responsibility in an age of globalisation."\(^1\)

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The once dormant eighteenth-century law—referred to in this paper as the Alien Tort Statute (ATS)—has, as the above quote indicates, come to life recently after two centuries of hibernation, and is generating practitioner and academic debate. Even the name is controversial, with commentators referring to it as the Alien Tort Statute or the Alien Tort Claims Act, depending on whether or not they believe it creates a cause of action.

Professor Kenneth C. Randall reported in a 1985 study that he had been able to locate only twenty-one reported cases brought prior to June 30, 1980 in which plaintiffs had sought to invoke the ATS. Only two had been successful. Not a single case during the nineteenth century utilized it, and of the twenty-one he identified, only three predated 1958. As recently as 1975, Judge Friendly referred to the ATS as a “legal Lohengrin” that was “old but little used.”

What has breathed new life into a statute that, like Mark Twain, was prematurely believed dead is the new-found ability to enforce and collect judgments; former Paraguayan policemen tended to be far more judgment


2 Emeka Duruiqbo, The Economic Cost of Alien Tort Litigation: A Response to Awakening Monster: The Alien Tort Statute of 1789, 14 MINN. J. GLOBAL TRADE, 1, 10 (2004) (“The question of whether the Alien Tort Statute provides a cause of action, or provides jurisdiction only for causes of action established by other instruments, is fundamental. To underscore its importance, many who believe that the statute provides more than a jurisdictional grant refer to it as the "Alien Tort Claims Act (ATCA)," while some of their opponents and some neutral observers settle for the term "Alien Tort Statute (ATS)."”)


4 Duruiqbo, supra note 2, at 4 n.14 (“The ATS was largely buried, until it was brought back from near death about two and half decades ago.”).


7 Id.

8 Id.

9 Id. v. Vencap, Ltd., 519 F.2d 1001, 1015 (2d Cir. 1975).

10 As recently as 1995, Professor McFadden complained that the Supreme Court was seemingly oblivious to the existence of international law. Patrick M. McFadden, Provincialism in United States Courts, 81 CORNELL L. REV. 4, 15 (1995) (“In the recent practice of the Supreme Court, international law has dropped from sight with hardly a trace.”)

11 Sandra Coliver, Jennie Green & Paul Hoffman, Holding Human Rights Violators Accountable By Using International Law in U.S. Courts: Advocacy Efforts and Complementary Strategies, 19 EMORY INT'L L. REV. 169, 179 (2005) (“It is believed that there has been money collected in only three of the individual defendant cases: a little more than $1 million from the estate of Philippine President Ferdinand Marcos, and approximately $1,000 each from General Suarez-Mason
proof than multinational oil corporations. The Supreme Court noted in its recent Sosa decision that federal courts needed to weigh the “practical consequences” of ATS litigation in their decision and singled out corporate and private party liability as a particular source of concern under this rubric.

Today, the fifty or so corporations sued under the statute and the varied locale of the alleged torts read like a veritable Who’s Who of international business. They include: Abercrombie & Fitch, BHP, Chevron, Coca-Cola, Del Monte, Dole, Drummond Coal, Exxon-Mobil, The Gap, J.C. Penney Co., Levis Strauss, Nike, Pfizer, Rio Tinto, Shell, Siemens, Southern Peru Copper Corporation, Target, Texaco, Total, Union Carbide and Unocal. The legal profession and the public alike seem to have been surprised by the results of an arcane process by which alien plaintiffs seeking redress for atrocities committed in distant lands end up in American courtrooms.

Judge Bork, perhaps the statute’s most prominent critic, wrote that it seemed preposterous that American courts should rule on cases premised on actions by foreigners against foreigners on foreign soil. The Second Circuit observed that “Most Americans would probably be surprised to learn that victims of atrocities committed in Bosnia are suing the leader of the insurgent Bosnian-Serb forces in a United States District Court in Manhattan.”

and Kelbessa Negewo. In 2003, $270,000 was collected from one of the defendants in the Roma-gaza case.

12 Donald J. Kochan, The Political Economy of the Production of Customary International Law: The Role of Non-governmental Organizations in U.S. Courts, 22 BERKELEY J. INT’L L. 240, 241 (2004) (“The ever-growing prospect of enforceability in U.S. courts dramatically increases the return on such investment.”). See also Beth Stephens, Individuals Enforcing International Law: The Comparative and Historical Context, 52 DEPAUL L. REV. 433, 437 (2002) (“The number of cases filed increased rapidly once it became possible to sue corporations, in part because such defendants are far more likely than individual foreigners to have assets to pay a judgment.”).


14 Id. at 733 n.21 (“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.”) (comparing views expressed in Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 791-795 (D.C. Cir. 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 (2d Cir. 1995) (sufficient consensus in 1995 that genocide by private actors violates international law)).

15 See generally LINDA A. WILLETT ET AL., THE ALIEN TORT STATUTE AND ITS IMPLICATIONS FOR MULTINATIONAL CORPORATIONS (National Center for the Public Interest, 2003).

16 See Robert Vosper, Conduct Unbecoming: No Longer Satisfied With Destroying the Reputa-tions of Corporations That Get Entangled in Human Rights Abuses Overseas, Activist Groups are Seeking Retribution in U.S. Courts, CORP. LEG. TIMES, October 2002, at 35. See also Kochan, supra note 1, at 117.

17 Kochan, supra note 12, at 242 (“Despite evidence of some attention, however, the ATS’s potential impact seems largely unappreciated in the popular press and among popular minds.”).


More immediately, corporate America worried that if companies lost cases under various theories of vicarious liability under the statute, it would become “a major headache for many American companies operating abroad.”

Britain’s Financial Times warned that the relentless expansion of ATS litigation was positioning the U.S. litigation system as the “world’s civil court of first resort.” The U.S. Chamber of Commerce cautioned the ATS provided a venue for “global venue shopping,” with Chamber President Thomas Donohue noting that “U.S. is increasingly becoming the jurisdiction of choice for opportunistic foreign plaintiffs.”

Fortune feared that ATS suits could become the next asbestos litigation.

This paper argues that the fears and hype over the ATS are greatly exaggerated. Despite media publicity and academic controversy, the suits

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20 Editorial, To Sue a Dictator, THE ECONOMIST, Apr. 24, 1999, at A20. See also Kochan, supra note 1 at 108 n.22.

21 Thomas Niles, The Very Long Arm of American Law, FIN. TIMES, (London), Nov. 6, 2002 at 15. See also Kochan, supra note 1, at 109 n.22.

22 Tony Mauro, Justices Debate Alien Tort Law, LEG. TIMES, Apr. 5, 2004, at 8. See also Kochan, supra note 1, at 109 n.22.


24 For a typically breathless story, see e.g., Daphne Eviatar, Judgment Day: Will an Obscure Law Bring Down the Global Economy?, BOSTON GLOBE, Dec. 28, 2003, at D1.


26 See Harold Hongju Koh, Separating Myth From Reality About Corporate Responsibility Litigation, 7 J. INT’L ECON. L. 263 (2004) (arguing that attacks on the ATS rest on several myths: that United States courts cannot hold private corporations civilly liable for torts in violation of international law; that there is a flood of such cases that would impose liability on corporations simply for doing business in a difficult country; that statutory amendment or doctrinal reversal is necessary to stem this flood of litigation; and that domestic litigation is in any event a bad way to promote higher corporate standards.).

27 Stephanie Mencimer, False Alarm: How the Media Helps the Insurance Industry and the GOP Promote the Myth of America’s “Lawsuit Crisis,” WASH. MONTHLY, Oct. 2004, at 18, 18 (discussing the prevalence of “fictional lawsuit horror stor[ies]”); see also Marc Galanter, An Oil Strike in Hell: Contemporary Legends About the Civil Justice System, 40 ARIZ. L. REV. 717, 731 (1998) (discussing the hyping of seemingly outrageous cases that are either fictional or distorted); Edith Greene, A Love-Hate Relationship, 18 JUST. SYS. J. 99, 100 (1995) (“The plural of anecdote is not data.”). See also id. at 269 (“There are currently very high, multiple barriers to recovery under the ATS.”).

themselves have had limited success, and the Supreme Court has left the door only "slightly ajar" to the recognition of "new" (i.e. post 1789) claims. It addresses fears that trace the allegedly new found vitality of the statute to the dual interests of legal elites promoting international law, 29 and other interest groups who see it as a lucrative lever over large corporations otherwise impervious to pressure -- in other words as legalized extortion or, in common parlance, a "shakedown." 30

II. INTERNATIONAL LAW IN AMERICAN COURTS

A. Application of International Law in American Courts

"International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination." 31 -- Justice Gray

From its very inception, the United States has been concerned about its place among the pantheon of nations. 32 The nation "had, by taking a place


29 See e.g. ROBERT H. BORK, COERCING VIRTUE: THE WORLDWIDE RULE OF JUDGES 27 (2003) ("The modern expansion of the Alien Tort Claims Act is judicial activism - indeed, moral presumption - at its highest pitch.").

30 Kochan, supra note 12, at 241. But see Koh, supra note 26, at 258 ("Given the 215 years of the ATS's history, more than a dozen cases does not constitute a flood. Of these, only three or four have survived a motion to dismiss, and only one, the Unocal case, is even past the stage of a summary judgment motion.").

31 The Paquete Habana, 175 U.S. 677, 700 (1900). Justice Gray appeared to be reiterating a stance he had first articulated five years prior to The Paquete Habana:

International law, in its widest and most comprehensive sense, --including not only questions of right between nations, governed by what has been appropriately called the "law of nations," but also questions arising under what is usually called "private international law," or the "conflict of laws," and concerning the rights of persons within the territory and dominion of one nation, by reason of acts, private or public, done within the dominions of another nation,--is part of our law, and must be ascertained and administered by the courts of justice as often as such questions are presented in litigation between man and man, duly submitted to their determination.

Hilton v. Guyot, 159 U.S. 113, 163 (1895). Though neither Hilton nor Paquete Habana dealt with the ATS, their assessments seemed to embody a rather expansive view of the role of international law in U.S. jurisprudence.

32 See DECLARATION OF INDEPENDENCE para. 1 (1776) in THE PORTABLE THOMAS JEFFERSON, 235 (Merrill D. Peterson ed., Penguin Books 1977) ("When, in the Course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with one another . . . a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.") (emphasis added). But See Eugene Kon-
among the nations of the earth, become amenable to the laws of nations . . . .”

Chief Justice Marshall wrote that the Court was bound by the law of nations, “which is a part of the law of the land.”

Professor Henkin noted that early legislators would have found this observation unexceptional. Dean Koh of the Yale Law School points out that, even apart from the ATS context, “under current practice, federal courts regularly incorporate norms of customary international law into federal law.”

The idea is hardly revolutionary: at the time of the birth of the nation, its courts imported English common law as the germator for their own, and English common law drew on customary international law as a matter of course.

The Restatement (Third) of the Foreign Relations Law of the United States refers to the English roots of the domestication doctrine in its introduction. Customary international law was held applicable in state courts as well. Professor Henkin argues that international law was self-executing and could be applied by American courts without any intervening step by Congress.

This view is not without its detractors. The late Jack M. Goldklang, an international law expert for the Department of Justice argued that the very “idea that international norms can override constitutional acts seems incompatible with the U.S. system of representative democracy.”

Several court decisions

torovich, Disrespecting the "Opinions of Mankind": International Law in Constitutional Interpretation, 8 GREEN BAG 2D 261 (2005) (arguing that the historical context of the phrase did not imply approval of international law). See also Eugene Kontorovich, The Opinion of Mankind, N.Y. SUN, July 1, 2005, at 9.

33 Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 474 (1793).

34 The Nereide, 13 U.S. (9 Cranch) 388, 423 (1815).


38 Restatement (Third) of the Foreign Relations Law of the United States § 111 introductory note (1987) (“From the beginning, the law of nations, later referred to as international law, was considered to be incorporated into the law of the United States without the need for any action by Congress or the President, and the courts, State and federal, have applied it and given it effect as the courts of England had done.”).

39 Respublica v. De Longchamps, 1 U.S. (1 Dall.) 111, 113 (1784) (holding that the law of nations is part of the law of Pennsylvania).

40 See Henkin, supra note 37, at 1561 (“International law . . . is 'self-executing' and is applied by courts in the United States without any need for it to be enacted or implemented by Congress.”).

have voiced the same concern. The Goldklang thesis is that far from conceding the paramount nature of customary international law, U.S. courts have long maintained that domestic laws override conflicting international law, irrespective of the time of promulgation.

He cast the landmark decision regarding assimilation of customary international law into U.S. law, the Paquete Habana, as upholding this position, noting that it required U.S. courts to give effect to international law "in the absence of any treaty or other public act of their own government in relation to the matter." He argued that a necessary inference was that any governmental action in the matter would supersede international law, including, in the Paquete Habana instance, seizure of fishing vessels in contravention of international law.

In recent years, several prominent scholars, most famously Professors Goldsmith and Bradley, have advanced the Goldklang view, alleging that the current attempts to domesticate international law, primarily through ATS litigation, are a grotesque twist on the framers' intent. They argue that the Constitution is silent "regarding the domestic legal status" of customary international law, and that the currently prevalent position that customary international law is part of federal law "has become orthodoxy only in the last two decades."

Under this view, the ATS represents an extension of regular diversity jurisdiction to alien cases, though Professors Goldsmith and Bradley concede that such an interpretation appears inconsistent with the language of the statute. Their concern is that the activist position is a tortured and circuitous attempt to domesticate vague international law in response to the refusal of the

42 See e.g. Al Odah v. United States, 321 F.3d 1134, 1145 (D.C. Cir. 2003) (Randolph, J., concurring) (contesting the constitutionality of the Filartiga holding that federal common law incorporates international law), rev'd sub nom. Rasul v. Bush, 542 U.S. 466 (2004). See also Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 826 n.5 (D.C. Cir. 1984) (Robb, J., concurring) (arguing that Filartiga "appears . . . to be fundamentally at odds with the reality of the international structure and with the role of United States courts within that structure").
43 Goldklang, supra note 41, at 144 (quoting Tag v. Rogers, 267 F.2d 664, 666 (D.C. Cir. 1959)).
44 Id. at 144-145 (citing In re The Paquete Habana, 175 U.S. 677, 712 (1900)).
45 Id. at 145-146 (citing Brown v. United States, 12 U.S. (3 Cranch) 110, 128 (1814) (the President may ignore international law)).
46 Bradley & Goldsmith, Critique, supra note 28, at 821.
47 Id. at 819-823. Bradley and Goldsmith concede that many decisions in the past two centuries have been predicated on customary international law, but argue that they "failed to identify any theory to support the application of [customary international law]." Id. at 822-23 (citing In re The Paquete Habana, 175 U.S. 677, 700 (1900); United States v. Smith, 18 U.S. (5 Wheat.) 153, 161 (1820); In re The Nereide, 13 U.S. (9 Cranch) 388, 423 (1815); Thirty Hogsheads of Sugar v. Boyle, 13 U.S. (9 Cranch) 191, 198 (1815); In re The Venus, 12 U.S. (8 Cranch) 253, 297 (1814); Talbot v. Janson, 3 U.S. (3 Dall.) 133, 161 (1795).
48 Bradley & Goldsmith, critique, supra note 28, at 851.
political branches to enact the activist’s favored treaties.\textsuperscript{49} This is of particular interest to corporations, since the bulk of their abettor liability as defendants is anchored in customary international law.

The current interpretation of the role of international law in domestic U.S. jurisprudence was laid down by the Supreme Court’s 1964 decision in \textit{Banco Nacional de Cuba v. Sabbatino}.\textsuperscript{50} The Court expounded on the role and interpretation of international law at some length – a fact that in itself underscored the importance of the concept to domestic jurisprudence.\textsuperscript{51} The Court would hardly have expended the resources to analyze a concept with no relevance to the nation’s jurisprudence.\textsuperscript{52} Even Justice White’s dissent did not challenge the essential role of international law.\textsuperscript{53}

The \textit{Sabbatino} Court held that “the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it, since the courts can then focus on the application of an agreed principle to circumstances of fact.”\textsuperscript{54} It is important that this underlying standard of a high level of consensus as a prerequisite to triggering international law would later be laid down by the Supreme Court as the benchmark in \textit{Sosa} for the creation of a cause of action under the ATS.\textsuperscript{55} In effect this requirement creates a high standard for plaintiffs to meet and offers an excellent defense option for a corporate defendant litigating an ATS claim.

Rules derived from international law have been utilized routinely, and without apparent controversy, in several contexts independent of the ATS by federal courts at several levels.\textsuperscript{56} Dean Koh notes that that in addition to domestic land issues,\textsuperscript{57} federal courts have utilized international law to decide cases

\textsuperscript{49} Bradley & Goldsmith, \textit{Illegitimacy}, \textit{supra} note 28, at 330-31 ("It permits federal courts to accomplish through the back door of CIL what the political branches have prohibited through the front door of treaties.").

\textsuperscript{50} 376 U.S. 398, 450-56 (1964). Courts have applied \textit{Sabbatino} to hold that certain international litigation arises under federal common law, which in turn suffices to confer federal question jurisdiction under 28 U.S.C. § 1331 (2003). Patrickson v. Dole Food Co., 251 F.3d 795, 800 (9th Cir. 2001). Ironically, the \textit{Sabbatino} litigants were completely diverse, so the district court had proper diversity jurisdiction in the first place. \textit{Id}.

\textsuperscript{51} Koh, \textit{supra} note 36, at 1833.

\textsuperscript{52} \textit{Id}.

\textsuperscript{53} \textit{Id}.

\textsuperscript{54} \textit{Sabbatino}, 376 U.S. at 428.

\textsuperscript{55} \textit{Id}.

\textsuperscript{56} Koh, \textit{supra} note 36, at 1837-38.

\textsuperscript{57} \textit{Id} (citing, \textit{inter alia}, United States v. Louisiana (The Alabama and Mississippi Boundary Case), 470 U.S. 93, 106-07 (1985) (applying customary international law to define the term "historic bay" in the 1958 Territorial Sea Convention); United States v. Maine (The Rhode Island and New York Boundary Case), 469 U.S. 504, 526 (1985) (holding that Long Island and Block Island Sounds constituted a "juridical bay," and that their waters were therefore internal state waters)).
involving property expropriation, treaty interpretation, and the standards for treatment of diplomats and prisoners. Statutory interpretation also draws from the font of international law, for example, U.S. trade law theoretically incorporates international human rights standards, as does Admiralty law.

None of these have been particularly exceptional. "Once customary norms have sufficiently crystallized, courts should presumptively incorporate them into federal common law, unless the norms have been ousted as law for the United States by contrary federal directives." Even in the case of apparently contradictory federal directives, the Supreme Court has long held that an Act of Congress should never be construed to violate the law of nations if an alternative interpretation is available.

In particular, despite the concerns of some critics that international law is a mechanism for foreign leftist professors, NGOs, and fringe states to ride

58 Id. (citing Banco Nacional de Cuba v. Chase Manhattan Bank, 658 F.2d 875, 891-93 (2d Cir. 1981)).
59 Id. (citing Jhirad v. Ferrandina, 355 F. Supp. 1155, 1159 (S.D.N.Y. 1973)).
63 Some of the Supreme Court's decisions citing foreign (not international) law during the 2004-2005 cycle did trigger a firestorm. Justice Kennedy's opinions on sodomy proved particularly controversial, and were denounced as upholding "Marxist, Leninist, satanic principles drawn from foreign law." Dana Milbank, And the Verdict on Justice Kennedy Is: Guilty, WASH. POST, Apr. 9, 2005, at A3. The pressure prompted Congress to introduce bills prohibiting courts from using foreign or international law in the decision making, and singling out particular justices by name for ire. See H.R.J. Res. 97, 109th Cong. (2005); S. Res. 92, 109th Cong. (2005). See also Congressman Tom Feeney, Should Americans Be Governed by the Laws of Jamaica, India, Zimbabwe, or the European Union?, http://www.house.gov/feeney/reaffirmation.htm (last visited Mar 13, 2006). Similarly, Justices Scalia and Thomas have been critical of their colleague's tendency to look to jurisprudence abroad to support their own reasoning. See, e.g., Printz v. United States, 521 U.S. 898, 921 n.11 (1997) (Scalia, J.). Knight v. Florida, 528 U.S. 990, 990 (1999) (Thomas, J., concurring in denial of certiorari). The problem is that any advocate looking abroad to support a particular point will undoubtedly be able to cherry-pick an impressive list of authorities. As Justice Scalia memorably complained: "In other words, all the Court has done today, to borrow from another context, is to look over the heads of the crowd and pick out its friends." Roper v. Simmons, 543 U.S. 551, 617 (2005) (Scalia, J., dissenting). Of course, recalling the quip that the devil can quote scripture to suit his own ends, (WILLIAM SHAKESPEARE, THE MERCHANT OF VENICE, act 1, sc. 3, at 56 (Kenneth Myrick ed., New American Library 1965)) this has not prevented the Justices in question from turning abroad when needed. See, e.g., McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 381-82 (1995) (Scalia, J., joined by Rehnquist, C.J., dissenting) (recounting the experiences of other democracies). Unfortunately, a full analysis of this controversy is beyond the scope of this paper.
64 Koh, supra note 36, at 1835.
65 Murray v. Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804).
rough shod over U.S. legislative practices in an undemocratic manner, Dean Koh points out that, as the leading power of the past century, the United States has been exceptionally well-positioned to guide the formation of international law at all its fonts: state practice, treaties (in which the United States almost invariably takes a leadership role) and academia. American interests in international law, inside and outside the alien tort context, remain very well represented. Indeed, Justice Blackmun complained a decade ago that the Supreme Court offered insufficient, rather than excessive, deference to international law, and saw it as an undesirable deviation from past practice.  

B. The Sources of International Law

The Court [ICJ], whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
(a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
(b) international custom, as evidence of a general practice accepted as law;
(c) the general principles of law recognized by civilized nations;
(d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.  

Despite the perception that international law is a modern innovation, the law of nations in fact dates back to the Romans. "Lacking a global legislature or court system, international law develops through a complex interaction of governments, multinational organizations and scholars." Critics charge that this poly-glott process makes it virtually impossible for corporations to comply

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66 Koh, supra note 36, at 1854.
67 Harry A. Blackmun, The Supreme Court and the Law of Nations, 104 YALE L.J. 39, 40 (1994) (complaining that in recent jurisprudence, the Supreme Court "has shown something less than 'a decent respect to the opinions of mankind').
69 Bork, supra note 18 ("My thought was that [the statute] must be a modern excrecence.").
70 Mark W. Janis, An Introduction to International Law 1 (2d ed. 1993) ("The Romans knew of a jus gentium, a law of nations, which Gaius, in the second century, saw as a law 'common to all men,' a universal law that could be applied by Roman courts to foreigners when the specific law of their own nation was unknown and when Roman Law was inapposite.").
with the law, or even know what it is. 72 "There has been little judicial interpretation of what constitutes the law of nations and no universally accepted definition of this phrase." 73

Perhaps the strongest source of international law is international practice and custom. 74 Custom is recognized by courts when a practice becomes so universally accepted that it constitutes a norm and is considered obligatory. 75 Commentators often add an additional element— the requirement that states follow these practices out of a sense of legal obligation, or opio juris. Congress has noted that the birth of customary international law is an incremental process, through which practices become sufficiently established to constitute norms, which in turn harden into customary international law. 76

Customary international law thus results from the "general and consistent practice of states followed by them from a sense of legal obligation." 77 From its earliest days, the United States has proactively tried to channel and influence the evolution of customary international law in line with its own values. 78

In its strongest form, customary international law constitutes jus cogens norms. 79 Under the Vienna Convention 80 "no derogation is permitted" from jus

72 See Phillip R. Trimble, Globalization, International Institutions, and the Erosion of National Sovereignty and Democracy, 95 Mich. L. Rev. 1944, 1949 (1997) (book review) (reviewing Thomas M. Franck, Fairness in International Law and Institutions (1995)). See also Bork, supra note 18 ("American individuals and businesses are now without guidance as to what law may apply to them. . . . No one knows what actions some courts may hold to be violations of the law of nations.").

73 Dreyfus v. Von Finck, 534 F.2d 24, 30 (2d Cir. 1976).

74 For a detailed analysis, See Brigitte Stern, Custom at the Heart of International Law, 11 Duke J. Comp. & Int'L L. 89 (2001) (arguing that custom and accepted practices are the paramount source of international law) (quoting and translating Paul Reuter, Introduction Au Droit Des Traité’s 38 (1972)).

75 See Military and Paramilitary Activities (Nicaragua v. United States), 1986 I.C.J. 14, 97 (June 27). "[Opino juris] may be thought of as a solvent that transforms the nitty-gritty of a historical rendition of examples of state practice into a more liquid form: a rule of customary international law that may be applied to current problems." Pei-Yun Hsu, Should Congress Repeal the Alien Tort Claims Act?, 28 S. Ill. U. L.J. 579, 583 (2004). See also, Janis, supra note 70, at 46. But See Bork, supra note 18 ("The Ninth Circuit... has fashioned a customary international law out of international agreements that the U.S. has refused to join, nonbinding agreements, and political resolutions of U.N. bodies and other nonbinding statements.").

76 H.R. Rep. No. 102-367, pt. 1, at 4 (1991), as reprinted in 1992 U.S.C.C.A.N. 84, 86 (Congressional note that though the Torture Victims Protection Act would provide redress to torture victims, the ATS was needed "to permit suits based on other norms that already exist or may ripen in the future into rules of customary international law.").


cogens norms. It is the nonderogable nature of jus cogens norms that distinguish them from customary international law. Indeed, experts have argued that there is no way to modify jus cogens norms because any effort to establish such a change would be void at its inception under the terms of Article 53. U.S. Courts recognize the binding nature of jus cogens norms. The Restatement (Third) of Foreign Relations Law reflects this by incorporating the Vienna Convention terminology in its comments.

U.S. jurisprudence has evolved to take cognizance of the higher jus cogens standards. "Since the Vienna Convention was signed in 1969, the concept of jus cogens has figured in nineteen decisions of the federal courts of ap-

http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf ([A] peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.)

See Chubb & Son, Inc. v. Asiana Airlines, 214 F.3d 301, 308 (2d Cir. 2000) (noting that the United States has stated that in those instances where it does not recognize the Vienna Convention as codifying international law, it will treat it as customary law "going forward"). The United States has stated that it will respect the Vienna Convention to the extent it recognizes it as reflecting customary international law; though it has not ratified it, all three branches of government reference it. See Evan Criddle, The Vienna Convention on the Law of Treaties in U.S. Treaty Interpretation, 44 Va. J. Int'l L. 431, 433-35 (2004). However, despite "the Vienna Convention's internationally authoritative status, the Supreme Court has never applied the Convention as U.S. law." Id. U.S. practice and interpretation of the Convention vary from other understandings. Id. (citing RESTATEMENT (THIRD) ON THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 432 cmt. d-g (1987) and outlining differences, including the fact that U.S. practice and the Vienna Convention "take radically different approaches to customary international law as an interpretive guide.").


See also id.


See, e.g., Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 715-16 (9th Cir. 1992).

RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 cmt. k (1987) ("Some rules of international law are recognized by the international community of states as peremptory, permitting no derogation. These rules prevail over and invalidate international agreements and other rules of international law in conflict with them. Such a peremptory norm is subject to modification only by a subsequent norm of international law having the same character.").

See, e.g., Sampson v. Federal Republic of Germany, 250 F.3d 1145, 1150 (7th Cir. 2001) ("Courts seeking to determine whether a norm of customary international law has attained the status of jus cogens look to the same sources [as for customary international law], but must also determine whether the international community recognizes the norm as one from which no derogation is permitted." (quoting Siderman de Blake, 965 F.2d at 715 (internal quotation marks omitted)).
It is illustrative that the Restatement specifies offenses that its authors believe violate *jus cogens* norms: genocide, slavery or slave trade, murder, torture, prolonged arbitrary detention, and systematic racial discrimination. This list is considered neither exhaustive nor closed. Indeed, it evolves in response to changes in international law. On the other hand, American courts have found only a handful of crimes – genocide, torture, slavery and summary execution – to constitute *jus cogens* offenses.

Professor Stephens points to the instances of punishment violations of *jus cogens* offenses as precursors of modern corporate ATS litigation. Dean Koh explains:

If corporations have rights under international law, by parity of reasoning, they must have duties as well. As history and precedent make clear, corporations can be held liable in two ways, particularly when they are involved in jus cogens violations. First, corporations can be held liable as agents of the state committing what Andrew Clapham calls ‘complicity offenses’, namely, acting under color of state law or in concert with state actors. Second, it has always been true that private actors, including corporations, can be held liable under international law if they commit certain “transnational offenses” – namely, heinous offenses that can be committed by either a public or a private entity.

The most notable instances of corporate violations of international law were highlighted in the post World War II trials of defendants convicted of war crimes as accomplices, including German industrialists who sold poison gas to the Nazis knowing the purpose to which it would be put, and German pharma-

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90 Bridgeford, supra note 81, at 1022-23; see also Restatement (Third) of the Foreign Relations Law of the United States § 702 cmt. a (1987).
91 See Laura Bowersett, Doe v. Unocal: Torturous Decision for Multinationals Doing Business in Politically Unstable Environments, 11 TRANSNAT'L L. 361, 372 (1998); see also id. at 1023 (“Slavery, genocide, torture, and summary execution constitute this narrow subset of offenses.”).
92 Koh, supra note 26, at 265 (footnotes omitted).
ceutical executives who supplied vaccines to the Nazis, knowing that the latter would use them to conduct medical experiments on concentration camp inmates.\textsuperscript{94} They were sentenced under the contemporaneous understandings of abetting or leadership theories.

This understanding also underlies modern treaty law,\textsuperscript{95} such as the founding statute of the International Criminal Court, which imposes liabilities on an individual who “aids, abets or other otherwise assists in the commission of a crime.”\textsuperscript{96} Skeptics point out however, that the United States has not ratified many of the treaties and declarations that are sought to be a source of the law, and that even ratification did not reflect self-executing intent.\textsuperscript{97}

This concern – that an expansive international law derived from a mélange of declarations, resolutions and assorted treaties could generate endless causes of action and thus runaway ATS litigation – seems to have been addressed directly in \textit{Sosa}, which held that the plaintiff, Alvarez, could not establish that the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICPR) were intended to create enforceable obligations.\textsuperscript{98} Not only did this effectively cut off the UDHR and ICPR as fonts of potential causes of action, but it gave rise to the inference that any cause of action recognized under the ATS must be far more concretely established in international practice than lofty aspiration on endless reams of paper.

Finally, the writings of international scholars are considered to be a source of law.\textsuperscript{99} Though savaged by both commentators\textsuperscript{100} and some judges,\textsuperscript{101}

\textsuperscript{94} \textit{Id.} at 559 n.127 (citing United States v. Krauch, VIII Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 101081, 1169-72 (1952)).

\textsuperscript{95} \textit{Id.} at 559 n.128 (noting that the Torture Convention criminalizes any act “that constitutes complicity or participation in torture.” (quoting Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 4(1), Dec. 10, 1984, 1465 U.N.T.S. 113, 113)).


\textsuperscript{97} Bork, supra note 18; see also Kevin M. McDonald, \textit{Corporate Civil Liability Under the U.S. Alien Tort Claims Act for Violations of Customary International Law During the Third Reich, 1997 ST. LOUIS–WARSAW TRANSATLANTIC L.J. 167, 186 (1997).}


\textsuperscript{99} In re The Paguate Habana, 175 U.S. 677, 700 (1900) (explaining that in order to ascertain customary international law, courts must look to the “customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators”). \textit{But see id.} at 720 (Fuller, J., dissenting) (stating that it was “needless to review the speculations and repetitions of the writers on international law . . . . Their lucubrations may be persuasive, but are not authoritative”).

\textsuperscript{100} See Bork, supra note 18 (“There could be no more anti-democratic way to make international law than to rest it upon the opinions of professors. That process is not only anti-constitutional and undemocratic, it is class oriented. The professoriat in social matters is well to the left of the American public . . . .”).
the unique role of scholars has been acknowledged by the Supreme Court in *United States v. Smith*\(^\text{102}\) and *The Paquete Habana*,\(^\text{103}\) as well as by different international documents.

Critics charge that the cacophony of academic debate would quickly confuse judges and juries in ATS cases, who “would be swamped in citations to various distinguished journals of international legal studies, but would be left with little more than a numbing sense of how varied is the world of public international ‘law.’”\(^\text{104}\) Addressing these concerns the Supreme Court set an extremely cautionary standard in *Sosa*, quoting *The Paquete Habana*, to note that it would be appropriate, impliedly in limited circumstances, to turn to scholarly materials as indicia, if not a source, of law, which U.S. jurisprudence has “long, albeit cautiously, recognized,” to the extent they are offered to delineate “what the law really is” and not for academic ruminations “concerning what the law ought to be.”\(^\text{105}\)

Proponents of the statute point out that in sifting through the gravitas and authoritative sounding opinions of differing international law professors, judges perform the same function in ATS cases as they do in virtually any complex litigation entailing expert testimony.\(^\text{106}\) Furthermore, in the absence of a general consensus among experts, courts have declined to find the existence of a norm, a necessary predicate for building an ATS suit.\(^\text{107}\) The advantage of any doubt in such cases invariably accrues to corporate defendants.

Finally, international law has its own gap-filler provisions, cobbled together from general sources of law, natural law, and accepted practices of nations; these apply only when primary sources, such as international law or treaties, do not offer specific guidance on the controversy at issue.\(^\text{108}\)

\(^{101}\) Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 827 (D.C. Cir. 1984) (Robb, J., concurring) (“Courts ought not to serve as debating clubs for professors willing to argue over what is or what is not an accepted violation of the law of nations . . . . Plaintiffs would troop to court marshalling their ‘experts’ behind them. Defendants would quickly organize their own platoons of authorities. The typical judge or jury would be swamped in citations . . . .”).

\(^{102}\) United States v. Smith, 18 US (5 Wheat.) 153, 160 (1820) (“What the law of nations on this subject is, may be ascertained by consulting the works of jurists, writing professedly on public laws . . . .”).

\(^{103}\) *The Paquete Habana*, 175 U.S. at 700 (noting courts applying international law may refer to the work of “jurists and commentators . . . for trustworthy evidence of what the law really is”).

\(^{104}\) Tel-Oren , 726 F.2d at 827 (Robb, J., concurring).


\(^{106}\) Stephens, *supra* note 71, at 487.

\(^{107}\) Id. at 488.

\(^{108}\) See Pei-Yun Hsu, *Should Congress Repeal the Alien Tort Claims Act?,* 28 S. ILL. U. L.J. 579, 583 (2004) (“These nonconsensual sources of law function as gap fillers since there are some gaps when only applying treaties and customary international law.”).
III. THE ALIEN TORT STATUTE

Had General Pinochet come to the United States instead of to England, he most likely would have been sued, not arrested.109

Plaintiffs filing suit under the ATS must establish that “(1) they are aliens, (2) they are suing for a tort, and (3) the tort violates ‘the law of nations.’”110 Professor Stephens, a supporter of an expansive ATS interpretation, argues that the Constitution clearly grants Congress the mandate to “define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations”111 and that an expansive interpretation of the ATS can be seen as executing this power.112

This power was invoked in a number of early cases, including Talbot v. Janson,113 where “the court found the defendant liable for aiding in the unlawful capture of a neutral ship,”114 and Henfield’s Case,115 which noted that “committing, aiding, or abetting hostilities” in violation of international law would entail liability.116 Other offenses have included piracy117 and attacks on diplomats.118

In analyzing these cases, Professor Steinhardt points out that “Congress has criminalized a variety of offenses against the law of nations, and U.S. courts have exercised criminal jurisdiction over violations of international law since the founding of the nation.”119 Against this backdrop, providing a civil remedy for such violations would not be wholly unforeseeable. Corporate defendants became increasingly amenable to suits under the ATS as the result of three landmark decisions in the waning decades of the twentieth century. The decisions shaped, over several decades, the general contours of modern ATS jurisprudence.

111 U.S. CONST. art I, § 8, cl. 10.
113 3 U.S. (3 Dall.) 133, 156-157 (1795).
114 Stephens, supra note 93, at 560.
115 11 F. Cas. 1099 (C.C.D. Pa. 1793).
116 Stephens, supra note 93, at 559 (quoting Henfield’s Case, 11 F. Cas. at 1103).
118 See, e.g., Republica v. De Longchamps, 1 U.S. (1 Dall.) 120, 120, 124 (1784).
First, the Second Circuit revived the long moribund statute with its landmark ruling in *Filartiga v. Pena-Irala*,\(^{120}\) which held that torture by an official violated the laws of nations, and created a cause of action under the ATS.\(^{121}\) Dean Koh described *Filartiga* as the *Brown v. Board of Education* of transnational public litigation.\(^{122}\) The decision was generally well received: “Although one opinion from a splintered panel of the District of Columbia Circuit largely rejected *Filartiga*, its views were not adopted by any other courts and were rejected by most commentators.”\(^{123}\)

Second, nearly twenty years later, in *Kadic v. Karadžić*,\(^{124}\) the Second Circuit found that some international norms were applicable to private actors as well as state individuals.\(^{125}\) Even more ominously for corporations, *Karadžić* held that private actors could be held responsible for torts in violation of international law, either as accomplices, or directly as tortfeasors.\(^{126}\) Other circuits would eventually follow the Second Circuit’s lead.\(^{127}\)

Third, in a 1996 case against Unocal, the court explicitly recognized that corporations could be held civilly liable for violations of international law in conjunction with state authorities.\(^{128}\) One commentator noted that the decision was “unprecedented,” since a federal court had never before held a private corporation liable under the ATS for a violation of international law."\(^{129}\)

The hype may have far outpaced the reality. “Over the life of the statute, approximately 120 cases have raised claims; 20 of those – all but 2 unsuc-

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\(^{120}\) 630 F.2d 876, 878 (2d Cir. 1980).

\(^{121}\) *Id.*


\(^{124}\) 70 F.3d 232 (2d Cir. 1995).

\(^{125}\) *Id.* at 241-43.

\(^{126}\) *Id.* at 239 (“[C]ertain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals.”).

\(^{127}\) *See, e.g.*, Doe I v. Unocal Corp., 395 F.3d 932, 946 (9th Cir. 2002) (“Thus, under *Kadic*, even crimes like rape, torture, and summary execution, which by themselves require state action for ATCA liability to attach, do not require state action when committed in furtherance of other crimes like slave trading, genocide or war crimes, which by themselves do not require state action for ATCA liability to attach. We agree with this view and apply it below to Plaintiffs’ various ATCA claims.”); reh’g en banc granted, 395 F.3d 978 (2003), appeal dismissed per stipulation, 403 F.3d 708 (2005).

\(^{128}\) Doe I v. Unocal Corp., 963 F. Supp. 880, 892 (C.D. Cal. 1997), aff’d in part, rev’d in part, 395 F.3d 932, 962 (9th Cir. 2001) (reversing grant of summary judgment for defendants on ATS claims of “forced labor, murder, and rape,” but affirming grant of summary judgment for defendants on ATS claim of torture); reh’g en banc granted, 395 F.3d 978 (2003), opinion vacated, appeal dismissed per stipulation, 403 F.3d 708 (2005).

cessful – predated *Filártiga.*” Even after *Filártiga,* “most [cases] have been dismissed, most often for failure to allege a violation of international recognized human rights, for *forum non conveniens,* or because of the immunity of the defendant.” Yet, despite this less than scintillating record, “controversy over this line of litigation has exploded in the past few years.”

A. *Pre-Sosa: Jurisdiction Only, or Jurisdiction Plus Cause of Action?*

[I]t is essential that there be an explicit grant of a cause of action before a private plaintiff [can] be allowed to enforce principles of international law in a federal tribunal.

The fountainhead for much of the literature arguing that the ATS does not grant a cause of action is Judge Bork’s concurrence in *Tel-Oren v. Libyan Arab Republic.* In that opinion, Judge Bork held that plaintiffs could not claim for damages for violations of international law under the statute, since it did not state an independent cause of action. In his view, the statute conferred limited subject matter jurisdiction confined to the violations of the law of nations acknowledged in 1789.

This view is premised on the basis that at the time of the statute’s enactment “[i]n 1789, the Law of Nations was restricted to safe conduct, rights of

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130 Stephens, *supra* note 123, at 177.
131 *Id.*
132 *Id.*
133 *Tel-Oren v. Libyan Arab Republic,* 726 F.2d 774, 801 (D.C. Cir. 1984) (Bork, J., concurring).
134 Jason Jarvis, Comment, *A New Paradigm for the Alien Tort Statute Under Extraterritoriality and the Universality Principle,* 30 *PEPP. L. REV.* 671, 673 n.6 (2003) (“Scholarship regarding the ATS is vast. Much of it focuses on the debate raised by the concurring opinion of Judge Bork in *Tel-Oren.*”).
135 726 F.2d at 798-823 (Bork, J., concurring).
136 *Id.* at 810.

Appellants’ argument that they may recover damages for violations of international law is simple. International law, they point out, is part of the common law of the United States. This proposition is unexceptionable. But appellants then contend that federal common law automatically provides a cause of action for international law violations, as it would for violations of other federal common law rights. I cannot accept this conclusion.

*Id.* (citations omitted).
137 *Id.* at 813-14 (“What kinds of alien tort actions, then, might the Congress of 1789 have meant to bring into federal courts? According to Blackstone, . . . ‘the principal offences against the law of nations, animadverted on as such by the municipal laws of England, [were] of three kinds; 1. Violation of safe-conducts; 2. Infringement of the rights of ambassadors; and 3. Piracy.’ One might suppose that these were the kinds of offenses for which Congress wished to provide tort jurisdiction for suits by aliens in order to avoid conflicts with other nations.”) (citation omitted) (alteration in original); *see also* Hufbauer, *supra* note 5, at 82.
ambassadors, issues of prize, and prohibitions against piracy." Any expansion would require a fresh grant by Congress. As recently as 2003, Judge Randolph held to this line of reasoning in his concurrence in *Al Odah v. United States*. Professor Casto went so far as to say that in the light of the historical evidence, any position that "the statute create[d] a federal statutory cause of action [was] simply frivolous."

This view posits the statute as strictly jurisdictional, and would require a specific congressional grant as a prerequisite to creating a cause of action. The defendant's position in *Sosa* asserted this position as a ground of his defense, an assertion in which he was supported by the Bush Administration. Though Judges Bork and Robb had advanced this reasoning in *Tel-Oren* and *Al-Odah*, at the time of *Sosa* their "views [had not been] adopted by any other courts and [had been] rejected by most commentators." Opponents argued that such an interpretation would virtually eviscerate the statute, rendering the exercise of its enactment a pointless exercise in futility. Their view – one that apparently gained some traction with the majority in *Sosa* – emphasizes that a somewhat broader reading would have been more compatible with the drafter's contemporaneous understanding of the statute.

In particular, the *Sosa* majority seemed to be swayed by the "1795 opinion of Attorney General William Bradford, who was asked whether criminal prosecution was available against Americans who had taken part in the French plunder of a British slave colony in Sierra Leone." Though equivocal on the issue of criminal liability, the Attorney General had been emphatic that civil liability was clearly available as a remedy option:

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138 Hufbauer, supra note 5, at 77.

139 Id. at 82.


144 Stephens, supra note 123, at 175.


146 See Stephens, supra note 123, at 175.

147 *Sosa*, 542 U.S. at 721 (citing 1 Op. Att'y. Gen. 57, 59 (1795)).
"But there 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 . . . ."148

Though emphasized by the Sosa Court, the 1795 opinion was hardly unique.149 Even before Sosa, at least four Circuits – the Second,150 Fifth,151 Ninth152 and Eleventh153 – had come around to the view that the statute granted both jurisdiction and a cause of action.154 However, this view was far from uniform.155 In the wake of Sosa, Judge Bork’s view of the ATS as merely jurisdictional is effectively “a dead letter – unless revived by Congress.”156 Conversely, the fears of commentators157 and judges158 that the recognition of causes of action in the absence of explicit congressional grants would lead to courts cherry picking law and “pernicious results”159 seem to have been sidelined – for now.

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149 See, e.g., 26 Op. Att’y Gen. 250, 253 (1907) (“I repeat that the statute[] thus provide[s] a forum and a right of action.”).
150 Kadic v. Karadžič, 70 F.3d 232, 244 (2d Cir. 1995).
152 In re Estate of Ferdinand Marcos, Human Rights Litig., 25 F.3d 1467, 1475-76 (9th Cir. 1994).
154 Abebe-Jira, 72 F.3d 847-48; Bridgeman, supra note 110, at 5 n.21.
155 See, e.g., In re Estate of Ferdinand E. Marcos Human Rights Litig., 978 F.2d 493, 500 (9th Cir. 1992) (disagreeing, in dicta, with the government’s position that § 1350 does not provide a cause of action); Goldstar (Panama) S.A. v. United States, 967 F.2d 965, 968 (4th Cir. 1992) (finding that the ATS is a “jurisdictional statute only”); Jones v. Petty Ray Geophysical Geosource, Inc., 722 F. Supp. 343, 348 (S.D. Tex. 1989) (stating that the ATS solely jurisdictional, and does not provide a cause of action); Jaffe v. Boyles, 616 F. Supp. 1371, 1378 (W.D.N.Y. 1985) (ATS is merely jurisdictional and does not create a cause of action).
156 Hufbauer, supra note 5, at 82 (speculating that corporate liability under the ATS could lead to asbestos-like litigation and the discouragement of foreign investment).
157 Id. at 79.
159 See Hufbauer, supra note 5, at 79 ("In ATS litigation, lower federal courts have unfortunately adopted a mix and match approach to the choice of law . . .").
B. Post-Sosa: The Supreme Court Giveth and Taketh Away

"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."\(^{161}\)

Commentators viewed the Supreme Court's Sosa judgment as a species of limited "jurisdiction plus" analysis: the statute created a cause of action, albeit limited, in addition to conferring jurisdiction.\(^{162}\) Furthermore, and "[p]erhaps most importantly, Sosa leaves open the possibility of creating a common law cause of action in connection with international law."\(^{163}\) Though pivotal for the purposes of ATS litigation, the principle itself was hardly an innovation; over a century ago, the Supreme Court had already noted in The Paquete Habana that international law could evolve "by the general assent of civilized nations."\(^{164}\)

Though categorically\(^{165}\) "reject[ing] [the] argument that the statute was in effect stillborn in the absence of separate authorizing legislation,"\(^{166}\) Sosa rejected the idea that the statute created a new cause of action, deeming such a reading "implausible."\(^{167}\) In effect, the Supreme Court split the difference between the Bork and activist viewpoints.\(^{168}\) It held that, "Although we agree the statute is in terms only jurisdictional, we think that at the time of enactment the jurisdiction enabled federal courts to hear claims in a very limited category de-

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\(^{162}\) Fuks, supra note 143, at 121.

\(^{163}\) Id.

\(^{164}\) 175 U.S. 677, 694 (1900).

\(^{165}\) Sosa, 542 U.S. at 719 ("[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 . . . for the benefit of foreigners.").


\(^{167}\) Sosa, 542 U.S. at 713.

\(^{168}\) Both sides claimed victory. See David L. Hudson, Jr., Foreign Turf: Human Rights Suits Against Corporations Hinge on How Open the Door Is, A.B.A. J., Sept. 2004, at 20 (Human rights advocates and anti-ATS groups alike are holding Sosa out as a victory for their side.). Activists emphasized that the Supreme Court left the door ajar for additional claims. Id. Skeptics focused on the admonition any new cognizable claims must be analogous to the designated 1789 offenses. Id. Judge Bork was far less nuanced, and expressed profound disappointment: "[T]here was considerable hope when the Supreme Court agreed to review a decision by the Ninth Circuit in Sosa . . . . Surely, the Court would rescue us from the disfigurements worked upon the statute by lower federal courts. That hope was dashed." Bork, supra note 18.
fined by the law of nations and recognized at common law.”\textsuperscript{169} The Court stressed that no specific grant of jurisdiction was required “because torts in violation of the law of nations would have been recognized within the common law of the time.”\textsuperscript{170}

Even more importantly, the Court seemed amenable to recognizing post-1789 torts, albeit very cautiously: “the door is still ajar subject to vigilant doorkeeping, and thus open to a narrow class of international norms today.”\textsuperscript{171} “Thus, the ATCA will recognize a cause of action beyond the list of violations of safe conducts, piracy, and ambassador law, so long as it is accepted by the international community and defined with the same degree of specificity that those violations had been.”\textsuperscript{172}

This holding not only rejected the “jurisdiction only” argument, but seemed to posit the Court on the verge of recognizing further international torts, thereby opening the floodgates to a torrent of newly recognized claims. Instead, the Court stepped back from the precipice by stressing that the statute would include only a handful of torts within its ambit – a “relatively modest set of actions . . . very limited set of claims”\textsuperscript{173} – those analogous to the widely accepted violations of the laws of nations of 1789.\textsuperscript{174}

Noting that there were good reasons for a restrained approach,\textsuperscript{175} Sosa directed federal courts evaluating ATS suits to “require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized.”\textsuperscript{176} Explaining the standard, the Court held that “the creation of a federal remedy” under the ATS required a violation of “a norm of customary international law so well defined” as to be binding, rather than aspirational.\textsuperscript{177}

The Court cited, with apparent approval, several circuit cases that had delineated a similarly high threshold.\textsuperscript{178} This test was so stringent that even Alvarez himself, the plaintiff before the Supreme Court, could not demonstrate

\textsuperscript{169} Sosa, 542 U.S. at 712.
\textsuperscript{170} Id. at 714.
\textsuperscript{171} Id at 729.
\textsuperscript{172} Fuks, supra note 143, at 122.
\textsuperscript{173} Sosa, 542 U.S. at 720.
\textsuperscript{174} Id.
\textsuperscript{175} See Diskin, supra note 166, at 820 (noting, inter alia, the Erie doctrine, the lack of a specific Congressional grant, and potential foreign policy implications).
\textsuperscript{176} Sosa, 542 U.S. at 725.
\textsuperscript{177} Id. at 757.
\textsuperscript{178} Id. at 732 (citing, with apparent approval In re Estate of Marcos, 25 F.3d 1467, 1475 (9th Cir. 1994) ("Actionable violations of international law must be of a norm that is specific, universal, and obligatory.") and Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 781 (D.C. Cir. 1984) (Edwards, J., concurring) (suggesting that the limits of the ATS be defined by "a handful of heinous actions-each of which violates definable, universal and obligatory norms.").
that his grievance reflected a violation of an established norm: "Whatever may be said for the broad principle Alvarez advances, in the present, imperfect world, it expresses an aspiration that exceeds any binding customary rule having the specificity we require." After this tantalizing beginning, the Supreme Court stopped short of delineating the contours of the doctrine, saying only that the determination required an individualized assessment.

Customary international law is often an unwritten doctrine of uncertain contours. Therefore, if the norms equate to customary international law, much uncertainty and litigation may be expected. The only concession the cryptic decision made to disappointed observers was a strong hint that the issue would be revisited in the near future. In the interim, with the recognition of norms an apparently open question, much uncertainty, jockeying, and court confusion may be expected.

IV. CORPORATE LITIGATION UNDER THE STATUTE

"The next big test will be whether the Alien Tort Claims Act can be used against companies as well as individuals." The idea of holding corporations liable for violations of international law is hardly new. As this paper noted earlier, a number of German businessmen were convicted at Nuremberg under theories of accomplice or abettor liability. They included steel magnate Friedrich Flick for the use of slave labor.

179 Sosa at 738.
180 Id. at 732-33.
181 Bradley & Goldsmith, Critique, supra note 28, at 858-59.
182 Some guidance might be available from earlier decisions. See, e.g., United States v. Smith, 18 U.S. (5 Wheat.) 153, 160 (1820) (delineating the standard for determining whether the torts alleged, such as piracy, are law of nations violations).
183 See, e.g., Grace C. Spencer, Comment, Her Body Is A Battlefield: The Applicability of the Alien Tort Statute to Corporate Human Rights Abuses in Juarez, Mexico, 40 GONZ. L. REV. 503, 523 (2004-05) (calling the Sosa decision "dangerous because it lacks internal coherence ... [i]t fails to present clear criteria for determining specific human rights norms that would constitute a law of nations.").
184 Sosa, 542 U.S. at 733 n.21 ("We would certainly consider [Amici proposals] ... in an appropriate case.").
185 In re South African Apartheid Litigation, 346 F. Supp. 2d 538, 547 (S.D.N.Y. 2004) ("While it would have been unquestionably preferable for the lower federal courts if the Supreme Court had created a bright-line rule that limited the ATCA to those violations of international law clearly recognized at the time of its enactment, the Supreme Court left the door at least slightly ajar for the federal courts to apply that statute to a narrow and limited class of international law violations beyond those well-recognized at that time.").
187 Diskin, supra note 166, at 825.
and the Zyklon B Case, where the defendants sold poisonous gas to the Nazis knowing that that it would be used to kill Jews in the concentration camps.

"In all of the above cases, international tribunals demonstrated that those who aid and abet international law violations have themselves violated international law as accessories and are therefore guilty." Therefore, there is some historical precedent to extend ATS liabilities to corporations. This is critical because a plaintiff suing under the ATS must allege a violation of the law of nations to invoke the statute.

Some commentators such as Hufbauer and Mitrokostas have disputed the validity of the Nuremberg comparison, arguing that the German businessmen were convicted on grounds of individual criminal, not corporate civil, culpability. However, the argument seems self-defeating. Logic would seem to dictate that if corporations can be found criminally liable for violation of international law, civil liability seems to require a substantially less dramatic leap of faith. And if the individual criminal conduct was carried out within the scope of employment with a corporation, it would follow that the latter should be at least civilly liable for the wrong-doing from which it had profited.

In particular, the literature in the field recognizes that both criminal and civil penalties can attach in such situations, if anything, the elements for criminal liability are harder to establish than the elements for civil liability. Seen in this light, Nuremberg would seem to be a stronger, not a weaker prece-

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189 The Zyklon B Case: Trial of Bruno Tesch and Two Others, UNITED NATIONS WAR CRIMES COMMISSION, 1 LAW REPORTS OF TRIALS OF WAR CRIMINALS 93 (Brit. Mil. Ct. 1946).
190 Diskin, supra note 166, at 825.
191 Id.
192 See Filartiga v. Pena-Irala, 630 F.2d 876, 880 (2d Cir. 1980) ("A threshold question on the jurisdictional issue is whether the conduct alleged violates the law of nations."). See also Amlon Metals, Inc. v. FMC Corp., 775 F. Supp. 668, 671 (S.D.N.Y. 1991) (same).
194 See Callanan v. United States, 364 U.S. 587, 593 (1961). In Callanan, Justice Frankfurter explained why crime acting in concert was more dangerous than sole crime: "Concerted action both increases the likelihood that the criminal object will be successfully attained and decreases the probability that the individuals involved will depart from their path of criminality. Group association ... makes possible the attainment of ends more complex than those which one criminal could accomplish."
195 Koh, supra note 26, at 266 ("Nor does it make sense to argue that international law may impose criminal liability on corporations, but not civil liability.").
196 See Darryl K. Brown, The Problematic and Faintly Promising Dynamics of Corporate Crime Enforcement, 1 OHIO ST. J. CRIM. L. 521, 541 (2004) ("[W]e have both criminal and civil enterprise liability as an option for firms whenever an agent on the job commits a crime on behalf of the firm.").
ient for corporate ATS liability than Hufbauer and Mitrokostas argue. In the
domestic context, Judge Learned Hand had noted that corporate civil and crimi-
nal liability could attach to the same conduct, and both would be encompassed
under the concept of respondeat superior.

Indeed, corporate civil responsibility for a myriad of activities has been
laid down in a number of international treaties concerning slave or child lab-
or, hazardous waste, nuclear accidents, environmental disasters result-
ing from oil spills or bribery. An argument could be made that these con-
ventions show the ability of developed nations (the homes of most multi-
national corporations) to address corporate responsibility without the necessarily
ad hoc basis of ATS litigation. On the other hand, Dean Koh points out that
ATS critics face a logical disconnect here: "So how can it be that corporations
can be held responsible under international law for their complicity in oil spills,
but not for their complicity in genocide? How can corporations be held liable
under European law for anticompetitive behavior, but not for slavery?"

So far U.S. Courts have refused to exempt corporations from liability
under the law of nations. Rejecting the submissions of prominent scholars

198 See Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289, 308
(S.D.N.Y. 2003) ("[A] considerable body of United States and international precedent indicates
that corporations may be liable for violations of international law, particularly when their actions
constitute jus cogens violations.").


200 See Declaration Adopted by the Governing Body of the International Labour Organization
at its 204th Session, at 10, 16, 37, 41 (November 1977), available at
http://www.ilo.org/public/english/standards/norm/sources/mne.htm (last visited February 25th,
2006).

201 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and

202 See, e.g., Convention Relating to Civil Liability in the Field of Maritime Carriage of Nu-

203 See, e.g., International Convention on Civil Liability for Oil Pollution Damage, Nov. 29,

204 See Convention on Combating Bribery of Foreign Public Officials in International Business
Transactions, at art. 3 (Dec. 17, 1997), available at http://www.oecd.org/document/21/0,2340,
en_2649_34855_2017813_1_1_1_1,00.html ("The bribery of a foreign public official shall be
punishable by effective, proportionate and dissuasive criminal penalties. The range of penalties
shall be comparable to that applicable to the bribery of the Party's own public officials and shall,
in the case of natural persons, include deprivation of liberty sufficient to enable effective mutual
legal assistance and extradition.").

205 Koh, supra note 26, at 265. The existence of corporations as legal entities with rights is long
established. See Bank of the U.S. v. Deveaux, 9 U.S. (5 Cranch) 61 (1809) (corporations are "cit-
izens" for purposes of diversity jurisdiction); First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765,
778-79 n.14 (1978) (upholding corporation's right to spend money to influence referenda).

dismiss suit on the basis of defendant's corporate status); Estate of Rodriguez v. Drummond Co.,
James Crawford and Christopher Greenwood who argued for such immunity, one court noted that they had not been able to cite a single U.S. case as authority to buttress their bland assertions.207 Another court noted that “[n]o logical reason exists for allowing private individuals and corporations to escape liability for universally condemned violations of international law . . . .”208

Though critics have charged that the gradual “jurisdiction creep”209 of the ATS has triggered “the spate” of lawsuits under the act that now allegedly plague corporate defendants,210 there is some historical support for the idea that at the time of the statute’s enactment, courts did in fact envision accomplices in the violation of international law as entailing some sort of accomplice liability.211 This strand of accomplice liability has survived in the two centuries since.212 What is harder to determine is its precise parameters – though, as noted above, this confusion works to the advantage of defendants rather than plaintiffs.

In the wake of Sosa, the critical questions are: what torts will meet the ATS threshold, and to what extent will corporations will be held liable as abettors?213 So far the Supreme Court’s guidance is cryptic at best: “The claim must

210 Saman Zia-Zarifi, Suing Multinational Corporations in the U.S. for Violating International Law, 4 UCLA J. INT’L L. & FOREIGN AFF. 81, 93 (1999). But see Arthur R. Miller, The Pretrial Rush to Judgment: Are the “Litigation Explosion,” “Liability Crisis,” and Efficiency Cliches Eroding Our Day in Court and Jury Trial Commitments?, 78 N.Y.U. L. Rev. 982, 992-994 (2003) (noting that “the claims of the alleged ‘litigation explosion’ are exaggerated . . . . [studies show] that any trend towards litigation growth has been stabilizing if not reversing . . . . the overall U.S. litigation rate . . . is not higher than it has been during other periods of American history, and, per capita, is in the same range as other industrialized countries’ rates.”).
211 Stephens, supra note 93, at 558 (citing 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 66-73 (Dublin, The Company of Booksellers 1775)).
212 See, e.g., First Nat’l City Bank v. Banco Para El Comercio Exterior de Cuba, 462 U.S. 611, 622-23 (1983) (reiterating the principle that international law is part of American law and considering the appropriateness of piercing the corporate veil under principles of international law and federal common law).
213 See Aldana v. Fresh Del Monte Produce, Inc., 305 F. Supp. 2d 1285, 1301 (S.D. Fla. 2003), aff’d in part, vacated in part, 416 F.3d 1242 (11th Cir. 2005) (noting that in most ATS cases involving corporate defendants, the complaint alleges complicity in what are “actions taken by state entities.”). See also Kochan, supra note 1, at 117 (noting that recent holdings that corpora-
meet a threshold level of acceptance in the international community, and the claim must have specificity comparable to the original set of limited violations.”

Some commentators read this as effectively shutting the door to corporate abettor suits: “In a pre-Sosa court room, aiding and abetting may have qualified as an actionable claim under a basic customary international law analysis. Post-Sosa, however, it is apparent that a far greater degree of specificity will be required to support the creation of a federal remedy for a new claim.”

Professor Kontororovich has argued that Sosa requires any new causes of action to share six specific characteristics with piracy, and that virtually no torts can satisfy this test. Professor Dodge challenges this view as irreconcilable with the text of Sosa. Justice Scalia pointed out that Sosa’s own standard seemed to incorporate the Ninth Circuit’s “specific, universal and obligatory” test wholesale, yet arrived at a different conclusion while applying it. He dismissed the “door ajar” test as an “illegitimate lawmaking endeavor.”

Academics and courts alike have struggled to comprehend the Sosa holding. In part the holding may simply be a reflection of the amorphous nature of international law. Critics have long argued that international law in general is far too nebulous to offer corporations clear bright line rules for conduct; one commentator complained that it provided a “a vague and evolving standard, which defines neither the bounds of acceptable action nor inaction.” The

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214 Fuks, supra note 143, at 122.
219 Id. at 750.
220 See The Supreme Court, 2003 Term--Leading Cases, 118 HARV. L. REV. 446, 454-55 (2004) (“the Court’s analysis offers few practical cues to lower courts that must perform the inquiry”).
222 Gomez, supra note 215, at 143 (“Ultimately, the corporate argument is not very convincing, as actors in any legal regime must learn to exist with some degree of uncertainty.”).
complaint is that the international law provides no clarity in assessing the liability of corporations, and corporations are thus vulnerable to virtually limitless lines of attack.\textsuperscript{225}

However, an alternative reading may be that international law sets a high threshold for complicity or abetting offenses.\textsuperscript{226} For example, the International Criminal Tribunal for the Former Yugoslavia has required that the assistance must be "direct and substantial."\textsuperscript{227} Similarly, in another case, it noted that the conduct needed to consist of "practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of a crime."\textsuperscript{228} Both of these decisions seem to set a complicity threshold far higher than the mere "doing business in a disfavored nation" scenario feared by corporate America.\textsuperscript{229}

Furthermore, the absence of bright line rules in the context of vicarious liability is hardly new or confined to the Alien Tort context: as far back as 1984, Professor Alan Sykes observed that the issue tended to be one of the chief generators of corporate litigation.\textsuperscript{230} Furthermore, for several decades, commentators have argued that the absence of rules is at least as problematic for plaintiffs as it is for corporations.\textsuperscript{231}

In Sosa, the Supreme Court itself noted the corporate implications of its decision: "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 . . . ."\textsuperscript{232} In fact, the only ATS case to reach the Supreme Court prior to Sosa involved a corporation as a plaintiff: at the time, the Supreme Court had noted that the statute "by its terms does not distinguish among classes of defendants."\textsuperscript{233}

\textsuperscript{225} Id. at 640. See also John E. Howard, The Alien Tort Claims Act: Is Our Litigation-Run Amok Going Global?, UNITED STATES CHAMBER OF COMMERCE (Oct. 2002) available at http://www.uschamber.com/press/opeds/0210howardlitigation.htm (last visited Feb. 25, 2006) (stating that companies doing business abroad are vulnerable to "a myriad of complaints.")

\textsuperscript{226} Koh, supra note 26, at 265.

\textsuperscript{227} Id.


\textsuperscript{229} Howard, supra note 225 (stating that "under current U.S. law, foreigners could sue your company in U.S. courts — if you simply did business, paid taxes and complied with the laws of a foreign country in which those foreigners allege that an atrocity occurred").

\textsuperscript{230} Alan Sykes, The Economics of Vicarious Liability, 93 YALE L.J. 1231, 1231(1984) ("Hierarchy and delegation are so pervasive in modern business relationships that a staggering number of legal disputes directly or indirectly involve rules of vicarious liability.").

\textsuperscript{231} See, e.g., Mark P. Jacobsen, Comment, 28 U.S.C. 1350: A Legal Remedy for Torture in Paraguay?, 69 GEO. L.J. 833, 834, 847-48 (1981) (describing the "amorphous law of nations" and noting that ATS jurisdiction is "restricted . . . by difficulty in defining when an act is governed by the law of nations").


Some pre-Sosa lower courts have had no difficulty extrapolating underlying principles to hold that ATS liability can attach to corporations. They read international law to incorporate principles of corporate liability. Their reasoning was that accomplice liability is a feature of international law and could thus generate a cause of action under the ATS. This view seemed to be gaining traction. If liability can be premised against principals on this basis, extending it to cover corporations that allegedly expedited or assisted in the abuses would be a logical extension. Since Sosa, at least some lower courts have proceeded far more gingerly: they see the extension as an expansion of the basic jurisdiction conferred by the ATS and see such an expansion as incompatible with Sosa's cautionary tone.

In either view, however, it seems unlikely that even the most capricious court would, as some commentators fear, hold a corporation responsible simply for doing business in, or paying taxes to, a disfavored country. Whatever the level of involvement required, corporations tend to be sued for some causal nexus with specific atrocities, not simply doing business in an unsavory locality. Critics warn that this uneven approach will eventually direct all ATS litigation to the most favorable courts, leaving corporate defendants vulnerable to suits in the most unfriendly jurisdictions:

In ATS litigation, lower federal courts have unfortunately adopted a mix and match approach to the choice of law (some choosing standards from the law of the foreign forum, some

235 See Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289, 308 (S.D.N.Y. 2003) ("[A] considerable body of United States and international precedent indicates that corporations may be liable for violations of international law . . . .").
238 David I. Becker, A Call for the Codification of the Unocal Doctrine, 32 CORNELL INT'L L.J. 183, 194, n.103 (1998) (noting that "the first use of the ATCA by a foreign national as a means of asserting a claim against a U.S. company for 'vicarious' human rights violations committed abroad is found in Carmichael v. United Techs. Corp., 835 F.2d 109 (5th Cir. 1988)").
239 In re South African Apartheid Litigation, 346 F. Supp. 2d 538, 549-50 (S.D.N.Y. 2004) (finding that international law is not explicit on the subject of the abettor liability and noting "admonition in Sosa that Congress should be deferred to with respect to innovative interpretations of that statute").
240 Howard, supra note 225. But see Fuks, supra note 143, at 141 n.210 ("The limitations on ATCA suits that courts have developed and Sosa has underscored have clearly created meaningful roadblocks to most of the liabilities from ATCA through purely business activities.").
241 Duruigbo, supra note 2, at 41.
from U.S. law, some from international law, and some from all three). Unchecked, this flexible approach will certainly encourage forum shopping as plaintiffs seek the most friendly federal courts.242

Forum shopping, of course, is hardly a novel innovation, or confined to alien litigants – Judge J. Skelly Wright famously referred to it as a “national legal pastime.”243 Prudent defense counsel engage in their own versions of savvy jurisdiction shopping.244 But as Professor Juenger,245 and federal courts246 have noted, it is neither surprising nor intrinsically evil for litigants to jockey to position themselves in the most favorable venue possible.247

The bottom line may simply be that U.S. courts have devices to deal with litigants who attempt to misuse the system; Dean Koh, one of the prominent experts in ATS litigation, argues that courts have used these effectively and should be continued to allow to use them.248 The alternative, closing the courthouse doors to alien tort victims, would seem to be throwing out the baby of meritorious cases with the dirty bathwater of nuisance suits.

242 Hufbauer, supra note 5, at 78.
244 George D. Brown, The Ideologies of Forum Shopping--Why Doesn't a Conservative Court Protect Defendants?, 71 N.C. L. REV. 649, 653 (1993) (noting that defendants have procedurals devices of their own to obtain favorable forums). See also Charles B. Camp, Advocates Hope To Pass the "Big Four" Tort Reforms, DALLAS MORNING NEWS, Jan. 8, 1995, at 10H.
245 Friedrich K. Juenger, Forum Shopping, Domestic and International, 63 Tul. L. Rev. 553, 571 (1989) (noting that forum shopping “is only a pejorative way of saying that, if you offer a plaintiff a choice of jurisdictions, he will naturally choose the one in which he thinks his case can be most favourably presented: this should be a matter neither for surprise nor for indignation”).
246 Goad v. Celotex Corp., 831 F.2d 508, 512 n.12 (4th Cir. 1987) (“There is nothing inherently evil about forum-shopping.”).
247 Debra Lyn Bassett, The Forum Game, 84 N.C. L. REV. 333, 395 (2006) (“Forum shopping is not a form of ‘cheating’ by those who refuse to play by the rules . . . . [i]t he availability of more than one legally-authorized forum results in legitimate choice . . . . [s]electing the most favorable forum is a rational strategy under law and economics’ rational choice theory and game theory.”).
248 Koh, supra note 122, at 2382 (“Rather than applying overbroad rules that treat all transnational public law cases as inherently unfit for domestic adjudication, courts should target their concerns by applying those doctrines that have been specifically tailored to address them.”).
V. INTERNATIONAL LAW DEFENSES UNDER THE STATUTE

A. Conventional Defenses

“No suit has yet been decided against a corporation, and a wide variety of substantive and procedural obstacles stand in their [plaintiffs’] way.”

Since Unocal, no corporate defendant has lost in an ATS action. Even Unocal, perhaps the strongest ATS suit ever brought, settled out of court rather than proceeding to a final judgment. Several prudential considerations – the act of state doctrine, principles of international comity, foreign policy concerns and the political question doctrine – bar the ATS litigant’s access to his day in federal court.

Furthermore, Professor Stephens notes that that all the ordinary defenses potentially available in other tort actions – standing, sovereign immunity, the statute of limitations, and forum non conveniens remain available, and many ATS suits have foundered on their shoals. Forum non conveniens tends to be particularly efficacious in ATS cases because under the terms of

251 See Banco Nacional de Cuba v. Sabbatino, 376 U.S. 482-426 (1964) (outlining the scope of the act of state doctrine, which bars courts from inquiring as to the propriety of acts of foreign sovereign within its own territory).
252 Sosa v. Alvarez-Machain, 542 U.S. 692, 733 n.21 (2004) (noting a possible limitation to an ATS suit would be deference to the political branches regarding foreign policy concerns and citing the South African apartheid litigation cases of one such instance).
255 The federal courts have held that federal law requires the use of the most closely analogous statute of limitations when federal interests are paramount. Finding that the ATS presents such a scenario, the courts have sought for the most closely analogous statute of limitations, and at least some have held that the Torture Victims Protection Act provides the applicable limits. See, e.g., Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424, 427 (D.N.J. 1999) (citing Reed v. United Transp. Union 488 U.S. 319, 324 (1989)). The only Court of Appeals case apparently on point also borrows the TVPA’s ten-year bar. Deutsch v. Turner Corp., 317 F.3d 1005 (9th Cir. 2003).
257 Stephens, supra note 123, at 176.
the statute the plaintiff must be an alien, and thus uniquely vulnerable to this procedural device.

Though the jurisprudence is unclear on whether aliens are required to exhaust their remedies in their home country, forum non conveniens analysis frequently imposes such a de facto requirement.\(^{258}\) Under this traditional analysis, if any remedy at all is available to plaintiffs in their home country, the case should be dismissed, perhaps provisionally.\(^{259}\) The Torture Victim Protection Act (TVPA) does include such an exhaustion requirement.\(^{260}\)

Because \textit{Sosa} has pointed to the TVPA as an exemplar of ATS enabling legislation and pointedly suggested more Congressional action in the area, it is likely that such an exhaustion restriction may eventually be embedded in ATS litigation.\(^{261}\) It is noteworthy that the most recent attempt to amend the Alien Tort Statute in the wake of \textit{Sosa} – Senator Feinstein’s “Alien Tort Statute Reform Act” – included precisely such a provision.\(^{262}\)

Even assuming jurisdiction is available, the very international nature of ATS litigation means that service of process may need to be obtained abroad, a cumbersome and costly enterprise.\(^{263}\) Carrying the burden of proof under such circumstances can be extremely difficult.\(^{264}\) It is noteworthy that courts have not been hesitant to impose Rule 11\(^{265}\) sanctions on ATS attorneys,\(^{266}\) a development that one commentator complained casts a “serious chilling effect” in human rights legislation.\(^{267}\) No less an authority than Dean Koh of the Yale Law

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\(^{259}\) \textit{Id.} at 19. (citing Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947)).


\(^{261}\) \textit{Sosa v. Alvarez-Machain} 542 U.S. 692, 731(2004) (noting that “we would welcome any congressional guidance” and pointing to the TVPA as implying Congressional approval of ATS litigation). Courts have also “borrowed” the TVPA’s statute of limitations in ATS suits. \textit{See supra} note 255 and accompanying text.


\(^{264}\) \textit{See Beanal v. Freeport-McMoran, Inc.}, 197 F.3d 161, 169 (5th Cir. 1999) (finding that plaintiffs failed to provide sufficient underlying facts to support claims).

\(^{265}\) \textit{Fed. R. Civ. P.} 11


School confessed to considerable stress while faced with the onslaught of government Rule 11 motions.268

B. Cause of Action Defenses

The chief problem for plaintiffs is, of course, demonstrating a cause of action. Courts have been particularly restrained in determining whether particular torts constitute violations of "the law of nations,"269 despite scholarly urging to the contrary.270 Factual concerns aside, proving a definitive violation of a well-established international norm is difficult even as a question of law.271 A threshold issue to invoke jurisdiction in the statute is determining whether the alleged conduct violates the law of nations.272

Courts have held that alleging a breach of a treaty obligation or international law is a prerequisite to conferring subject matter jurisdiction under the Act.273 It is important because subject matter jurisdiction cannot be waived by either party, and the entry of a valid judgment can be set aside by even the United States Supreme Court if it determines that subject matter jurisdiction did not in fact exist.274 In practice, even pre-Sosa courts have required that the plaintiff establish the nature of the tort, and that it must be "definable, obligatory (rather than hortatory) and universally condemned."275

Even before the Supreme Court’s Sosa admonitions, courts tended to be restrictive,276 requiring that the torts violate jus cogens rather than customary

268 Harold Hongju Koh, The Human Face of the Haitian Interdiction Program, 33 VA. J. INT’L L. 483, 485 (1993) (“Shortly after we filed suit, the government moved against us for Rule 11 sanctions for filing a ‘frivolous’ lawsuit, and demanded that we post a $10,000,000 bond to proceed with the case. Rule 11 sanctions run against both the clients and the lawyers personally, which gave us considerable concern.”).
269 Breed, supra note 253, at 1017.
272 Filartiga v. Pena-Irala, 630 F.2d 876, 880 (2d. Cir. 1980).
274 Capron v. Van Noorden, 6 U.S. 126, 127 (1804) (“Here it was the duty of the Court to see that they had jurisdiction, for the consent of parties could not give it.”).
276 See, e.g., Nat’l Coal. Gov’t of the Union of Burma v. Unocal, Inc., 176 F.R.D. 329, 345 (C.D. Cal. 1997) (“Jurisdiction under the ATCA may be premised on alleged violations of a jus cogens, or peremptory, norm. . . . [e]xpropriation of . . . property does not constitute a jus cogens
norms.\textsuperscript{277} This limited any colorable ATS claims to a miniscule minority of all potential suits, even though the text of the statute itself did not contain any such stringent requirements.\textsuperscript{278} This stringency might explain why ATS plaintiffs often allege "a veritable cornucopia of international law violations."\textsuperscript{279} Professor Stephens notes that the fear of a tsunami of frivolous claims has not materialized, chiefly because of the difficulty of meeting the Sosa requirement that the alleged tort constitute an established, not an aspirational norm.\textsuperscript{280}

In particular, the more exotic causes of action that critics had conjured up - novel environmental claims,\textsuperscript{281} alleged cultural genocide\textsuperscript{282} or even lottery payout methods\textsuperscript{283} - have almost invariably failed.\textsuperscript{284} Courts have held the line in requiring that plaintiffs must plead and demonstrate a violation of established international law,\textsuperscript{285} not merely unsavory conduct or a failure to meet international standards.\textsuperscript{286} Virtually all ATS claims alluded to by critics, pertaining to novel legal theories such as the right to health or the right to sustainable development, have been "dismissed for being beyond the narrow confines of universally recognized norms" which underwrite the "very limited scope of the ATCA."\textsuperscript{287}

Though critics often cite "a lengthy litany of various unratified treaties and conventions dealing with issues such as economic and cultural rights, and the rights of children" that have been asserted in ATS cases, the only two reported cases invoking such rights have been dismissed outright.\textsuperscript{288} In other

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words, the charges of ATS detractors can be recast from corporate defendants struggling with exotic claims to the reality that the handful of such claims have been summarily dealt with by the judicial system.\textsuperscript{289} This is a testament to the strength of, not an attack on, the overreach of the U.S. judicial system.

VI. CONCLUSION

"Among the defenses rejected at trial were claims that the CEO was too busy to be expected to know details of the business and that no one in the company committed any crimes personally but instead merely sold a lawful product with no control over the use to which it was put. Any reader of today's financial press will find both those defenses familiar." – Professor Bratspies on the Nuremberg trials of German industrialists.\textsuperscript{290}

ATS actions against corporate entities are in a unique class because they offer a chance of actually collecting; otherwise, even the seminal \textit{Filartiga} decision was essentially symbolic.\textsuperscript{291} Judge Bork would of course, deny even this symbolism, opining that the stamp of judicial decision gives international activists a legitimacy that is not theirs.\textsuperscript{292} This view fears that "unholy alliance of imperialistic judges and a leftish cadre of international law professors"\textsuperscript{293} would seek to create rights to "everything from the right to a healthy environment to the right to organize and bargain collectively."\textsuperscript{294} Professor Kochan, like Judge Bork, sees the statute as a weapon of class-warfare by vigilante law professors: "Perhaps more importantly, the creation of ‘law’ by a group of international organizations, which produce statements of ‘norms’ and purport to speak for the world, has fueled this development."\textsuperscript{295}

More practically, there is little guidance for American businesses as to what law would leave them open to an ingenious plaintiffs attacking, fearing being "sued on such exotic theories as causing air pollution . . . [n]o one knows what actions some courts may hold to be violations of the law of nations."\textsuperscript{296} Some fear that \textit{Sosa} was only the first drop in a torrential downpour of frivolous litigation that will ultimately culminate in mammoth class-action law suits on

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\footnote{289}{Id.}

\footnote{290}{Rebecca M. Bratspies, \textit{"Organs of Society"}#: A Plea for Human Rights Accountability for Transnational Enterprises and Other Business Entities, 13 MICH. ST. J. INT’L L. 9, 22 n.51 (2005).}

\footnote{291}{Fuks, supra note 143, at 116.}

\footnote{292}{Bork, supra note 18.}

\footnote{293}{Id.}

\footnote{294}{Id.}

\footnote{295}{Kochan, supra note 12, at 240.}

\footnote{296}{Id.; See also Hufbauer, supra note 5, at 81.}
\end{footnotesize}
the lines of the tobacco or asbestos litigation. After all, international law, like domestic law, is an ever-changing entity. U.S. courts interpreting the ATS acknowledge this evolution and tailor their judgments accordingly.

ATS critics fear that international treaties and covenants on civil, political, labor and humanitarian command increasing adherence – more than three quarters of all states are signatories – reflecting increasing acceptance and hence credence in both international and derivative domestic law such as the ATS. One potential major source of change would be the acceptance of aspirational norms such as the Universal Declaration of Human Rights (UDHR) as *jus cogens* or even customary international norms, something that many academics argue has already occurred. The UDHR explicitly extends to non-state actors such as corporations, and establishing it as a universal norm could spawn virtually limitless litigation. This could theoretically drive ATS litigation toward the asbestos-like scenario that some envision.

However, the Supreme Court categorically stopped any such developments; *Sosa* explicitly and unequivocally rejected the idea that either the UDHR or similar covenants can impose any legal obligations, particularly under the ATS. This should assuage critics who fear that *jug cogens* claims represent

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297 Hufbauer, *supra* note 5, at 81 (speculating that corporate liability under the ATS could lead to asbestos-like litigation and the discouragement of foreign investment).

298 See *Kadic v. Karadzic*, 70 F.3d 232, 238-39 (2d Cir. 1995) (noting that international law changes and evolves, and courts must give interpret it accordingly); *Filartiga v. Pena-Irala*, 630 F.2d 876, 880-81 (2d Cir. 1979) (same).


302 See Universal Declaration, *supra* note 300, at art. 30 (“Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.”)

303 Salazar, *supra* note 301, at 143.

only the thin edge of an ever-widening edge. Indeed, even internationalists ponder the desirability of setting up the U.S. court system to judge any and every litigant who can be hauled within its ambit, on the basis of tenuous claims such as violations of the UDHR.  

Even before Sosa, former Secretary of State Dean Rusk, who had drafted official instructions for the U.S. diplomatic contingent that drafted the UDHR, was emphatic that it was not—and never intended to be law: “As one of the authors of the instruction that Mrs. Roosevelt [head of the U.S. delegation] received from her government on this point, I can report that there was no question in Washington or in New York that the Universal Declaration was not intended to operate as law.”

Despite oft-stated intentions and the prodding of the Secretary-General, the United Nations General Assembly has failed to assert itself or shown effectiveness in enforcement of law rather than perpetual deliberation. Therefore, despite its passage of the UDHR and ability to generate reams of other economic resolutions and papers, the General Assembly’s resolutions are not binding, and any attempt to ripen them into law invariably generates intense controversy.

The UDHR episode illustrates the solution to another possible concern regarding international law. Through the “persistent objector” principle, the

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305 Harvey Rishikof, Framing International Rights with a Janusism Edge—Foreign Policy and Class Actions—Legal Institutions as Soft Power, 2003 U. CHI. LEGAL F. 247, 271(2003) (“But the critical point, and the one that should give us pause, is that the international defendant is hauled into a U.S. court by a U.S. procedure enforcing either U.S. law or U.S. interpretation of international law, though the international defendant often has little direct connection to the United States.”). This does not excuse the tortfeasor: “This is not to say that the defendants are not bad actors, but when did the United States become the center of a global legal order with worldwide jurisdiction, at the expense of the other international institutions of justice?” Id. at 271-72.

306 Dean Rusk, A Comment on Filartiga v. Pena-Irala, 11 GA. J. INT’L & COMP. L. 311, 314 (1981). See also id. (“There was no serious consultation with the appropriate committees or Congress, as would have been essential had there been any expectation that law was coming into being. Indeed, Mrs. Roosevelt was given great leeway in her part in the drafting of the Declaration partly because it was understood that law was not being created.”) But see Anthony Lester, The Overseas Trade in the American Bill of Rights, 88 COLUM. L. REV. 537, 539 (1988) (noting that the UDHR was “greatly influenced by the American Bill of Rights”).


308 Id. at 917-941.

309 Id. at 269. But see Chris Bordelon, The Illegality of the U.S. Policy of Preemptive Self-Defense Under International Law, 9 CHAP. L. REV. 111, 131 n.152 (2005) (“Arguments that [General Assembly] resolutions should be regarded as having no legal import even though international law was the subject matter of the resolutions leads to the absurd conclusion that the Assembly acted for no reason.”).

310 LORI FISLER DAMROSCH ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 101 (4th ed. 2001) (“[A] customary rule may arise notwithstanding the opposition of one State, or even perhaps a few States, provided that otherwise the necessary degree of generality is reached. But they may also seem to lay down that the rule so created will not bind the objectors; in other words, that in international law there is no majority rule even with respect to the formation of customary
United States can prevent the emergence of norms that it considers undesirable.\textsuperscript{311} Though critics charge that the United States has little control over the evolution of international law, the United States has, in practice, tended to be active at conferences, in academia, and in the development of state practice.

Other fears have already proved groundless. Professor Cleveland has noted that the Sosa decision did not ignite controversy from foreign governments; by contrast, for example, state government’s efforts to impose private “economic sanctions” on foreign governments tend to generate a blizzard of controversy and a flurry of \textit{amicus curae} briefs.\textsuperscript{312} “If frivolous ATS litigation were in fact proliferating against foreign nationals and industries and creating friction with foreign states, one might have expected a vociferous appearance from foreign governments in that case.”\textsuperscript{313} To the contrary, several foreign nations, including the United Kingdom and France, have permitted suits against corporate defendants to be filed for violations of international law, citing the American experience with the ATS.\textsuperscript{314}

Whether foreign governments can sue as \textit{parens patriae}\textsuperscript{315} plaintiffs under the ATS is an open question.\textsuperscript{316} Precedent indicates that U.S. courts are extremely deferential to executive branch determinations regarding foreign gov-

\textsuperscript{311} Stein, supra note 310, at 475 (noting that the principle can become important depending on “whose ox is being gored ... the principle of the persistent objector becomes an enormously attractive means of protecting the ox”).


\textsuperscript{313} Id at 986.

\textsuperscript{314} Id at 977-78. See also Halina Ward, \textit{Securing Transnational Corporate Accountability Through National Courts: Implications and Policy Options}, 24 Hastings Int’l & Comp. L. Rev. 451, 456 (2001) (“In Canada, Quebec mining company Cambior faced litigation over pollution from its gold mine in Guyana; in Australia the company BHP faces claims arising out of pollution in Papua New Guinea. In England, actions have been brought against Rio Tinto (at the time still known as RTZ) arising out of working conditions at its Rossing Uranium Mine in Namibia; against former asbestos mining company Cape in respect of its operations in South Africa; and against Thor Chemicals over mercury poisoning suffered by workers at its South African mercury recycling plant.”).

\textsuperscript{315} \textit{Parens Patriae} is a common law doctrine enabling the sovereign to intervene on behalf of a person claiming its protection who is unable to act on their own behalf of a legislative prerogative. Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez 458 U.S. 592, 600 (1982).

ernment access to U.S. courts. The Bush Administration has been generally unsympathetic to ATS suits on foreign policy grounds. Past Administrations tended to be more equivocal on ATS suits, depending on the particular issues under consideration. The Bush Administration’s foreign policy rationale has frequently, but not invariably, swayed lower courts.

However, the crux of the Bush argument – that such actions impact U.S. foreign policy abroad – has commanded credence with the Supreme Court, which recently struck down at least two state human rights statutes on these grounds. As a practical matter, considering that ATS suits often allege that the corporate defendant acted in conjunction with a repressive foreign government, it would be ludicrous to expect the foreign government to turn around and sue a corporate defendant for the aiding and abetting of its own actions.

Critics point to the ability of courts to adjudicate cases. "If anything, the corporate cases that have actually been decided reaffirm that the courts have the necessary tools to distinguish non justiciable or frivolous claims from those that are meritorious." Despite the concerns of business, many of the allegations presented in the suits are fairly serious and represent violations of law more serious than merely aspirational.

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319 Cleveland, supra note 312, at 983.


322 This does not necessarily imply that a successor government would not avail itself of the ATS mechanism. But in such instances, the doors of U.S. courts open to foreign governments only at the sufferance of the U.S. government. See Estados Unidos Mexicanos v. DeCoste, 229 F.3d 332, 337-39 (1st Cir. 2000) (generally, only domestic states may intervene as parens patriae).


In particular, the expense and effort entailed in litigating an ATS case required "that it be viewed as an extraordinary remedy." Indeed, despite the fears of ATS critics, there is little evidence that the suits are curtailing corporate activity abroad; Shell and Chevron both announced extensive investment in Nigeria despite ATS suits being filed against them for activities there.

Still, valid concerns persist for what ATS litigation might portend for the future. Indeed, more than one commentator has posited ATS litigation today to tobacco litigation two decades ago; despite a ceaseless series of victories in court, a single reversal broke the dam. A similar scenario might conceivably play out in the ATS context and unleash a torrent of cases in a story whose final chapter has yet to be written. One lingering question-mark, for instance, is alluded to in Sosa: potential action by Congress. In the wake of Sabbatino, for instance, Congress intervened by passing the "Hickenhooper Amendment." As Senator Feinstein's efforts above indicate, Congress, as well as the federal courts, stand ready and able to thwart an unwarranted profusion of ATS litigation.

Though some would argue that ATS litigation represents a U.S. effort to make law for the whole world, it may simply reflect the fact that in an increasingly connected world, litigation, like politics, may no longer stop at the water's edge. As John Donne put it 400 years ago:

No man is an island, entire of itself; every man is a piece of the continent, a part of the main. If a clod be washed away by the sea, Europe is the less, as well as if a promontory were, as well as if a manor of thy friend's or of thine own were: any man's death diminishes me, because I am involved in mankind, and

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326 See, e.g., Bradley, supra note 25, at 458.
327 Duruigbo, supra note 2, at 30.
328 Hufbauer, supra note 5, at 84-85 (fearing that snowballing corporate liability under the ATS could lead to asbestos-like litigation and the kill foreign investment in the nations that need it the most).
329 Koh, supra note 26, at 269 ("But of course, the sky might also fall in tomorrow. As Chicken Little learned, just because it might happen, does not mean that sky-falling is a likely scenario, particularly when prudent federal judges are properly managing their dockets.").
332 Lord Ellenborough, C. J., in Buchanan v. Rucker, (1808) 9 East 192, 103 Eng. Rep. 546, 547 ("Can the island of Tobago pass a law to bind the rights of the whole world?").
therefore never send to know for whom the bell tolls; it tolls for thee.  

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