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The Curious History of the Alien Tort Statute

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ARTICLES

THE CURIOUS HISTORY OF THE ALIEN TORT STATUTE

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INTRODUCTION

The Alien Tort Statute (ATS)[1] has provoked extensive, passionate debate, despite the relatively modest practical import of ATS cases. The outsized controversy surrounding the statute reflects its role in a longstanding struggle for control over the interpretation and enforcement of international law, and over whether that law will serve as a meaningful restraint on the actions of states, state officials, and corporations. As a result, the history of the ATS offers a unique window into the modern history of international law.

Since the 1980 *Filartiga* decision first applied the eighteenth century statute to modern human rights claims,[2] only a handful of lawsuits have produced enforceable judgments for plaintiffs, while another handful settled, and a few dozen cases led to judgments that vindicated the plaintiffs' claims, but could not be enforced. Despite this limited litigation success, government officials, scholars, litigators, human rights activists, business leaders,

* Professor, Rutgers Law School. I have participated on the side of plaintiffs in many of the cases described in this Article, and currently represent the plaintiffs in an Alien Tort Statute claim pending in the Southern District of Florida, *Mamani v. Sánchez-Berzaín*. Thanks to William Aceves, Doug Cassel, William Casto, Judith Chomsky, William Dodge, Jean Galbraith, David Noll, and colleagues at a Rutgers Law School faculty colloquium for helpful comments on an earlier draft of this Article. And many thanks to Daniel Palmisano and Michael Perez for excellent research assistance.

1 The Alien Tort Statute, 28 U.S.C. § 1350 (2006), states in full: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." Congress enacted the ATS in 1789, as part of the Judiciary Act that established the new federal court system. Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 76–77 (codified as amended at 28 U.S.C. § 1350 (2006)).

2 Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980).

and law students have written about the statute,[3] sought to replicate or repeal it, and argued about its impact. The Supreme Court decided ATS claims three times in the past ten years, in cases that attracted scores of amicus briefs. The executive branch has filed briefs or statements of interest in ATS cases at all levels of the federal court system. Business leaders assert that the ATS could derail the international economy, while human rights advocates praise the statute as a significant mechanism to attain human rights accountability.

The uproar surrounding the ATS reflects its position at the intersection of highly contentious modern disputes about international law. By authorizing private parties to bring claims for violations of human rights norms, ATS litigation institutionalizes a role for individuals and other non-state actors in the definition and implementation of international law, a role that, traditionally, states and state-run international organizations have monopolized. By raising such issues in the federal courts, modern ATS cases trigger highly contested questions about the roles of the three branches of the federal government in regulating the incorporation of international law into U.S. law. Despite its implications for these broader questions, however, the ATS remained relatively noncontroversial as long as the practical implications of the cases seemed minimal. However, when ATS claims began to target transnational corporations and government officials from the United States and its allies, both sectors reacted as if the very future of global capitalism and diplomatic relations were at risk.

Debates about the ATS mirror debates about international law. Both trigger concerted opposition when they threaten to serve as a viable constraint on government and corporate conduct. This Article offers a history of the ATS that analyzes the cases, the doctrinal debates, and the responses of human rights groups, business interests, and government actors in the context of the larger battle over international law and human rights.

The story begins in Part I with one of the few noncontroversial aspects of the statute: the well-known history of the ATS as a reflection of the Framers' decision to grant the national government control over foreign affairs, including enforcement of at least some norms of international law. The statute was largely ignored for almost 200 years, until, with the human rights movement of the late twentieth century as a backdrop, federal court decisions recognized the ATS as a means to enforce human rights norms. Part II describes the rapid expansion of human rights activism in the 1970s, the *Filartiga* decision, and the relatively uncontroversial ATS cases that followed. Although there were dissenting voices, early ATS cases and commentators generally welcomed ATS litigation as a key part of a movement to offer

3 Over 4000 law review articles have cited the statute since 1980. The Westlaw "Journals and Law Reviews" database provides a rough estimate (although it is less accurate for the 1980s, because it does not include early volumes of some international law journals): 153 hits for "alien tort" as of 1990, 807 as of 2000, 3376 as of 2010, and 4244 as of January 5, 2014.

redress, accountability, and justice to victims and survivors of human rights abuses.

The honeymoon came to an end in the late 1990s, when a concerted critique of the doctrine underlying the cases coincided with a string of lawsuits against more powerful defendants: multinational corporations, officials from foreign states with political clout in the United States, and U.S. government officials. That combination triggered a backlash against modern ATS litigation that continues today. As explained in Part III, the doctrinal debates focused on the power to interpret and enforce international law, with emphasis on the competing powers of the judiciary and the executive branch. The Supreme Court first reviewed the ATS in 2004,[4] at the height of the controversy over expanded claims of executive power by the administration of President George W. Bush. The Court rejected the challenge to the ATS and offered a strong affirmation of judicial power,[5] a decision likely influenced by judicial resistance to the Bush Administration's controversial claims.

The *Sosa* decision did not resolve key questions about whether and under what circumstances ATS cases can target two sets of powerful defendants: multinational corporations and the officials of states that assert immunity on behalf of their officials, issues addressed in Part IV. Contentious debates about corporate-defendant ATS litigation reflect disputes about whether international law can serve as an effective restraint on the conduct of transnational corporations, and, if so, who has the authority to define and enforce that restraint. Similar concerns underlie an issue that gained particular salience during debates about the Bush Administration's mistreatment of detainees following the September 11, 2001 attacks: whether state officials implementing the policies of their governments can be held personally liable for violations of international law. This question pits supporters of international law as an enforceable limit on the conduct of government actors against those who argue that only states and their officials have the power to define and enforce that law.

Finally, Part V considers the current status of the ATS. The Supreme Court decision in *Kiobel v. Royal Dutch Petroleum Co.*[6] left intact the *Sosa* understanding of the statute as permitting federal courts to recognize common law causes of action for violations of international law, but imposed a presumption against extraterritoriality.[7] Debate over the meaning of *Kiobel* has already taken a familiar path. Those who favor international law limits on state and corporate actions argue that the decision permits ATS claims with greater ties to the United States than those present in *Kiobel*, while opponents insist that the decision ruled out all claims based on conduct in a foreign state. However, if the federal courts close their doors to human rights litigation, cases will gravitate to state courts, with a state-by-state effort to

4 Sosa v. Alvarez-Machain, 542 U.S. 692, 714 (2004).

5 *Id.* at 712.

6 133 S. Ct. 1659 (2013).

7 *Id.* at 1669.

obtain redress for torts involving torture, summary execution, and similar abuses. At that point, the ATS will have come full circle. Enacted as a means to ensure federal court jurisdiction over claims impacting foreign states, the demise of the modern interpretation of the ATS will leave such cases to the varying rules of the courts of the fifty states.

The assault on the ATS that led to *Kiobel* reflects the vehemence of the state and corporate resistance to the development of meaningful means to enforce international law. That resistance has narrowed the scope of the ATS and left its future unclear. Nevertheless, the robust accountability movement that gave birth to the modern ATS and that took strength from it will, inevitably, continue to seek ways to assert human rights claims, whether through the ATS or new, alternative accountability mechanisms.

I. THE ORIGINS OF THE ALIEN TORT STATUTE

At the time of its modern revival in 1980, the ATS had been virtually ignored for almost 200 years. In an oft-quoted line, Judge Friendly called the statute "a legal Lohengrin; although it has been with us since the first Judiciary Act . . . no one seems to know whence it came."[8] Since Judge Friendly wrote, however, scholars have unearthed significant information about the likely origins of the statute and have clarified the eighteenth century jurisprudential tenets that help explain, in broad terms, the significance of the statute. One of the basic points of agreement is that the statute was part of a broad push to grant the newly created federal government power over foreign affairs.[9] In particular, courts and scholars generally agree that the Framers enacted the ATS in order to provide a federal court forum in which foreigners could seek remedies for at least some violations of international law.[10]

Eighteenth century jurists recognized the existence of binding, unwritten natural laws that included the law of nations.[11] As stated repeatedly by

8 IIT v. Vencap, Ltd., 519 F.2d 1001, 1015 (2d Cir. 1975).

9 *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 427 n.25 (1964) (describing the ATS as one of several constitutional and statutory provisions "indicating a desire to give matters of international significance to the jurisdiction of federal institutions"); *see also* Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 813–14 (D.C. Cir. 1984) (Bork, J., concurring) (concluding that the ATS was probably intended to provide jurisdiction over a small set of claims by aliens "in order to avoid conflicts with other nations").

10 Exactly which violations of international law are included, however, is hotly contested, as explained in Part III.

11 Natural law was based on "maxims and customs . . . of higher antiquity than memory or history can reach," 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *67 (1765), and afforded individuals "God-given, natural, inalienable rights, distilled from reason and justice through the social and governmental compacts," BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 77 (1992). *See* Jules Lobel, *The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law*, 71 VA. L. REV. 1071, 1078–83 (1985) (describing the Framers' reliance on both natural law, founded in morality, and common law, based in reason).

the leading figures of the new government,[12] the law of nations was "part of the laws of [the United States], and of every other civilized nation."[13] U.S. law at the time did not distinguish between state and federal common law, so the law of nations, although unwritten, was a binding part of both state and federal law.[14]

Prior to the adoption of the Constitution, the leaders of the Confederation's weak central government repeatedly expressed concern about their inability to enforce international law obligations[15] and noted that state resistance to enforcing international law—including the treaty obligation to

12 *See* Stewart Jay, *The Status of the Law of Nations in Early American Law*, 42 VAND. L. REV. 819, 824–28 (1989) (collecting statements from a variety of sources).

13 *Id.* at 825 (quoting *Charge to the Grand Jury for the District of New York* (Apr. 4, 1790), *in* N.H. GAZETTE (Portsmouth 1790)) (internal quotations marks omitted); *see also* Ware v. Hylton, 3 U.S. (3 Dall.) 199, 281 (1796) (Wilson, J.) ("When the *United States* declared their independence, they were bound to receive the law of nations, in its modern state of purity and refinement.").

14 *See* William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513, 1516–20 (1984).

15 The Articles of Confederation granted the central government no authority to implement international law obligations. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 716 (2004) (quoting JAMES MADISON, JOURNAL OF THE CONSTITUTIONAL CONVENTION 60 (E. Scott ed. 1893)) (explaining that the Continental Congress was hamstrung by its inability to "cause infractions of treaties, or of the law of nations to be punished").

In 1781, the Continental Congress recommended to the states that they provide criminal prosecution and civil remedies for violations of the law of nations, but apparently received little response. *See* 21 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 1136–37 (Gaillard Hunt ed., 1912), *available at* http://memory.loc.gov/ammem/amlaw/lwjclink.html.

Two incidents, both discussed in *Sosa*, 542 U.S. at 716–17, contributed to these concerns. First, in 1784, a minor scuffle between a French citizen and a French diplomat triggered an international incident that preoccupied multiple members of the new government as they strove to fend off France's demand for retribution. *See* Respublica v. De Longchamps, 1 U.S. (1 Dall.) 111, 111–12 (1784) (explaining that Longchamps called Francis Barbe Marbois, the diplomat, a "coquette" and a "blackguard" and struck Marbois' cane; Marbois then "employed his stick with great severity, till the spectators interfered and separated the parties"). For a discussion of the response of the Framers, see William R. Casto, *The Federal Courts' Protective Jurisdiction over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467, 492–93 n.143 (1986) (counting dozens of references to Marbois in the private correspondence of U.S. public figures). Second, another uproar ensued in 1787 when local police entered the home of the Dutch ambassador in New York. *Id.* at 494. John Jay informed Congress that the Dutch government had protested the incident, but explained that "the federal government does not appear . . . to be vested with any judicial Powers competent to the Cognizance and Judgment of such Cases." *Id.* at 494 n.152 (internal quotation marks omitted).

In 1785, Congress again recommended to the states that they provide "for punishing the infractions of the laws of nations." 29 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 655 (John C. Fitzpatrick ed., 1933), *available at* http://memory.loc.gov/ammem/amlaw/lwjclink.html.

repay British creditors—threatened the security of the Confederation.[16] Edmund Randolph, for example, wrote in 1787 that because "the law of nations is unprovided with sanctions in many cases," the Confederation might be "doomed to be plunged into war, from its wretched impotency to check offenses against this law."[17] Concern about the Confederation's lack of power over foreign affairs, including enforcement of international law, was one of the driving forces behind the decision to draft the Constitution.[18] In response, the Constitution assigned to the federal government control over most aspects of international relations, including granting to Congress the power to "define and punish . . . offenses against the law of nations."[19]

The First Congress enacted the ATS in 1789 as part of the Judiciary Act, the statute that created the federal court system and authorized the basic categories of federal court jurisdiction.[20] Just six years later, U.S. Attorney General William Bradford cited the statute in a legal opinion that recognized that providing a civil remedy to foreign citizens injured by an international law violation could help defuse tensions with a foreign state.[21] Only two cases mentioned the ATS in the 1790s,[22] and the statute was then largely ignored for almost 200 years. Between 1795 and 1980, fewer than two dozen reported cases cited the statute, with only one relying on ATS jurisdiction.[23]

16 "The failure of states to enforce debts owed to foreigners (British creditors in particular) was a special concern because the law of nations at that time could be interpreted to allow a creditor nation to resort to war for satisfaction." Jay, *supra* note 12, at 825 (citation omitted). For an extended discussion of the difficulties the Confederation faced in enforcing treaty obligations, see David M. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition*, 85 N.Y.U. L. REV. 932, 954–61 (2010).

17 A Letter of His Excellency Edmund Randolph, Esquire, on the Federal Constitution (Oct. 10, 1787), *in* 2 THE COMPLETE ANTI-FEDERALIST 86, 88 (Herbert J. Storing ed., 1981).

18 Jack N. Rakove, *Making Foreign Policy–The View from 1787*, *in* FOREIGN POLICY AND THE CONSTITUTION 1, 2 (Robert A. Goldwin & Robert A. Licht eds., 1990) (stating that the most pressing criticism of the Articles of Confederation was that they did not grant Congress the powers necessary to effectively manage foreign relations).

19 U.S. CONST. art. I, § 8, cl. 10. *See* Jay, *supra* note 12, at 829 ("Given the importance of the law of nations to national affairs, the Framers assumed as a matter of course that the federal government should have the ability to dominate most of the decisionmaking related to that law.").

20 Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 76–77 (codified as amended at 28 U.S.C. § 1350 (2006)).

21 *See* Breach of Neutrality, 1 Op. Att'y Gen. 57, 59 (1795) (stating that aliens injured when U.S. citizens plundered a British colony in Sierra Leone in violation of a neutrality treaty could bring a civil suit for damages in U.S. courts).

22 In *Moxon v. The Fanny*, 17 F. Cas. 942, 948 (D. Pa. 1793) (No. 9895), ship owners sought "restitution" from a privateer who had seized their ship; the district court rejected application of the ATS because the suit did not involve a claim for "a tort only." In *Bolchos v. Darrel*, 3 F. Cas. 810, 810 (D.S.C. 1795) (No. 1607), the court asserted ATS jurisdiction over a suit for restitution of "property" seized in violation of international law. The alleged "property" consisted of three enslaved people. *Id.*

23 Adra v. Clift, 195 F. Supp. 857 (D. Md. 1961). *Adra* combined a common law tort, wrongful interference with custody, with an international law passport violation to find

The Supreme Court referenced the statute in a 1964 opinion, listing it as one of several provisions "reflecting a concern for uniformity in this country's dealings with foreign nations and indicating a desire to give matters of international significance to the jurisdiction of federal institutions."[24]

In 1980, when the statute was first applied to a claim alleging a violation of a modern human rights norm, the court noted the centrality of these federalism concerns. In its opening sentences, *Filartiga* noted that the Constitution made interpretation and application of the law of nations "preeminently a federal concern,"[25] and that Congress enacted the ATS to "[i]mplement[ ] the constitutional mandate for national control over foreign relations."[26] Although the administrations of Presidents Jimmy Carter and Ronald Reagan agreed on very little about the ATS, they did agree that the statute was enacted to grant the federal government power over issues relevant to foreign affairs. The Carter Administration brief filed in *Filartiga* stated that "the statute's central concern" is "uniformity in this country's dealings with foreign nations."[27] A Reagan Administration amicus brief agreed that the ATS was enacted as part of the Framers' recognition that the enforcement of the law of nations should be assigned to the national government, not left to the states.[28] Post-*Filartiga*, courts reiterated that the ATS was enacted in order to grant federal courts, rather than state courts, jurisdiction over claims that might impact foreign affairs. As the Ninth Circuit stated in *Trajano v. Marcos* in 1992, "the First Congress enacted the [ATS] to provide a federal forum for transitory torts . . . whenever such actions implicate the foreign relations of the United States."[29]

ATS jurisdiction over a claim that a mother had used a false passport to take her children from their father and bring them to United States. *Id.* at 862–63; *see also* Kenneth C. Randall, *Federal Jurisdiction over International Law Claims: Inquiries into the Alien Tort Statute*, 18 N.Y.U. J. INT'L L. & POL. 1, 4–5 nn.15–16 (1986) (noting that the ATS was cited twenty-one times from its inception to when *Filartiga* was decided).

24 Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 427 n.25 (1964).

25 Filartiga v. Pena-Irala, 630 F.2d 876, 878 (2d Cir. 1980).

26 *Id.*; *see id.* at 886 (noting that the Constitution was drafted in part "to remedy . . . the central government's inability to 'cause infractions of treaties or of the law of nations, to be punished'" (quoting 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 19 (Max Farrand ed., rev. ed. 1937) (Notes of James Madison)); *id.* at 887 (noting "[t]he Framers' overarching concern that control over international affairs be vested in the new national government to safeguard the standing of the United States among the nations of the world").

27 Memorandum for the United States as Amicus Curie at 5, Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980) (No. 79-6090) [hereinafter U.S. *Filartiga* Brief].

28 Brief for the United States of America as Amicus Curiae at 16, Trajano v. Marcos, 878 F.2d 1439 (9th Cir. 1989) (Nos. 86-2448, 86-2449, 86-2496, 86-15039, 87-1706, 87-1707) [hereinafter U.S. *Trajano* Brief].

29 Trajano v. Marcos (*In re* Estate of Marcos), 978 F.2d 493, 503 (9th Cir. 1992). The court in that case treated the injuries as torts under Philippine law. *Id.* A later Ninth Circuit decision held that the ATS created a cause of action for international law violations. Hilao v. Estate of Marcos (*In re* Estate of Marcos), 25 F.3d 1467, 1475 (9th Cir. 1994) (concluding that the ATS "creates a cause of action for violations of specific, universal and obligatory international human rights standards").

Scholars and courts thus generally agree that the purpose of the ATS was to assign the federal courts jurisdiction over some set of cases that involved enforcement of international law. Ironically, however, human rights claims may gravitate back to state courts after the Supreme Court's limiting interpretation of the ATS in *Kiobel*, as discussed in Part V. Moreover, agreement at a very broad level of generality on that straightforward goal—to grant federal courts jurisdiction over some international law claims—does little to resolve questions about the modern import of the statute. Part II looks at the 1980 revival of the ATS in the framework of an escalating debate over human rights in the United States and around the world.

II. THE ALIEN TORT STATUTE, *FILARTIGA*, AND THE LATE TWENTIETH CENTURY HUMAN RIGHTS MOVEMENT

The *Filartiga* decision, the case that launched the modern application of the ATS, came at a time of an active, expanding human rights movement. The 1970s had seen an unprecedented growth in international human rights organizing, focused on both expanding the scope of the rights protected by international law and developing mechanisms to enforce those protections in the face of government opposition. This Part begins by situating *Filartiga* and the ATS cases that followed within the modern internationalized human rights movement that began after World War II and flourished in the 1970s. As explained in the second Section, despite initial trepidation, the executive branch in the administration of President Jimmy Carter enthusiastically supported a modern interpretation of the ATS as permitting victims of human rights abuses to sue the government official responsible for the abuses. The final Section of this Part discusses the first wave of ATS cases, from the 1980 *Filartiga* decision until the late 1990s, cases that were received enthusiastically by most academics and human rights advocates and triggered little opposition. That honeymoon phase of ATS litigation came to an end in the late 1990s, the topic of the subsequent Parts of this Article.

A. The Rise of Human Rights Activism

The modern human rights movement emerged in the aftermath of World War II, when outrage at Nazi human rights violations led to the Nuremberg Tribunals and helped spur the founding of the United Nations.[30] The U.N. Charter, adopted in 1945, requires all member states to

30 *See generally* Philip Alston, *Does the Past Matter? On the Origins of Human Rights*, 126 HARV. L. REV. 2043, 2065 (2013) (reviewing JENNY S. MARTINEZ, THE SLAVE TRADE AND THE ORIGINS OF INTERNATIONAL HUMAN RIGHTS LAW (2012)) ("[B]y far the most common starting point for modern histories of human rights is the United Nations Charter of 1945 and the Universal Declaration of 1948.").

Many historians trace the origins of human rights to ancient religious and moral values, *see, e.g.*, PAUL GORDON LAUREN, THE EVOLUTION OF INTERNATIONAL HUMAN RIGHTS: VISIONS SEEN 5–42 (3d ed. 2011), while others focus on later, explicit references to international norms, such as the inclusion of protections for religious minorities in the seven-

cooperate to promote respect for human rights.[31] The 1948 Universal Declaration of Human Rights (UDHR),[32] enacted as a non-binding statement of principles, detailed the substance of those rights, many of which are now binding norms of international law.[33] A series of human rights treaties followed, starting with the Convention Against Genocide[34] and broad conventions on civil and political rights and economic, social, and cultural rights.[35] These were followed in turn by agreements addressing, *inter alia*, torture, women's rights, and racism.[36] Increasingly, human rights groups worked across borders on international campaigns to draft and ratify human rights agreements and implement them in domestic law.

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teenth century Westphalian treaties, *see, e.g.*, NATAN LERNER, GROUP RIGHTS AND DISCRIMINATION IN INTERNATIONAL LAW 7 (2d ed. 2003) ("International human rights law actually began, rather timidly, as an attempt to protect discriminated groups, particularly religious minorities, through initial emphasis on tolerance more than on rights."). In the eighteenth century, the anti-slavery movement consciously sought to use both treaties and customary international law as a restraint on the actions of state actors and private persons. *See* MARTINEZ, *supra*, at 12–15. Most historians of human rights describe the nineteenth century anti-slavery movement as the first organized international human rights campaign, as activists in multiple countries worked to abolish both the slave trade and slavery itself. *See, e.g.*, LAUREN, *supra*, at 44–55.

The past decade has produced competing histories of human rights. For analysis of these debates, see generally SAMUEL MOYN, THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY (2010); Alston, *supra* (reviewing MARTINEZ, *supra*); Kenneth Cmiel, *The Recent History of Human Rights*, 109 AM. HIST. REV. 117 (2004); Devin O. Pendas, *Toward a New Politics? On the Recent Historiography of Human Rights*, 21 CONTEMP. EUR. HIST. 95 (2012).

31 "All Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of . . . universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion." U.N. CHARTER arts. 55, 56.

32 Universal Declaration of Human Rights, G.A. Res. 217(III)A, U.N. GAOR, 3d Sess., at 71, U.N. Doc. A/810 (Dec. 10, 1948).

33 *See The Foundation of International Human Rights Law*, UNITED NATIONS, (2008), *available at* http://www.un.org/en/events/humanrightsday/2008/ihrl.shtml (noting that the commitments contained in the UDHR have been "translated into law . . . in the forms of treaties, customary international law, [and] general principles," as well as in regional agreements and domestic law).

34 Convention on the Prevention and Punishment of the Crime of Genocide, G.A. Res. 260(III)A, U.N. GAOR, 3d Sess., at 174, U.N. Doc. A/760 (Dec. 9, 1948) [hereinafter Genocide Convention].

35 International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (Dec. 16, 1966) [hereinafter ICCPR]; International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 51, U.N. Doc. A/6316 (Dec. 16, 1966).

36 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res 39/46, 39th Sess., Supp. No. 51, U.N. Doc. A/39/51 (Dec. 10, 1984); International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106 (XX), U.N. GAOR, 20th Sess., Supp. No. 14, U.N. Doc. A/6014 (Dec. 21, 1965); Convention on the Elimination of All Forms of Discrimination against Women, G.A. Res. 180, U.N. GAOR, 34th Sess., Supp. No. 46, at 193, U.N. Doc. A/34/46 (Dec. 18, 1979).

Each of the human rights agreements was the product of hard-fought struggles between those who sought recognition that sovereign states have wide-ranging, binding human rights obligations and those who resisted binding norms and worked to eliminate or strictly limit human rights obligations.[37] The state sovereignty side largely won these battles. The human rights language of the U.N. Charter was left vague, binding states only to work together to promote human rights. The U.N. General Assembly adopted the UDHR as a non-binding resolution.[38] The treaties that followed were subject to ratification and thus not binding on states that chose not to accept their norms, and contained only optional enforcement mechanisms.[39] In addition, social, economic, and cultural rights were divorced from civil and political rights and placed in a separate treaty with language that softened the obligations imposed. Nevertheless, the combination of the Charter, the UDHR, and the treaties created a web of standards, expectations, and monitoring bodies that nurtured a growing human rights movement.

In the United States, the U.N. human rights agreements triggered a concerted battle over the interpretation and implementation of international law that began with the ratification of the U.N. Charter and heated up with the adoption of the UDHR and each successive human rights treaty. Southern segregationists who feared that non-discrimination clauses in the U.N. agreements would undermine racist policies in the United States led the opposition to enforcement of any international norms.[40] They were joined by supporters of states' rights; those who opposed imposition of *federal* law on the states were even more incensed by the possibility that the states might be bound by *international* law.[41] Human rights advocates sought to implement the new international documents for exactly that reason: the hope that international protection against abuses such as racial discrimination would be

37 *See* LAUREN, *supra* note 30, at 214–18 (discussing states' concerns that an enforcement mechanism would interfere with domestic sovereignty); Bert B. Lockwood, Jr., *The United Nations Charter and United States Civil Rights Litigation: 1946–1955*, 69 IOWA L. REV. 901, 912 (1984) (noting that state sovereignty was a "brooding issue" during the negotiation of the human rights provisions of the U.N. Charter).

38 Human Rights, 5 WHITEMAN DIGEST § 16, at 243 (quoting a Department of State bulletin stating that the UDHR was enacted as a declaration of human rights principles, not as a legally binding treaty).

39 *See, e.g.*, ICCPR, *supra* note 35, arts. 40, 41 (authorizing states to file complaints against other states, but only if both states have explicitly accepted this procedure); Optional Protocol to the International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966) (permitting individuals to file complaints, but only against a state that has ratified the Protocol).

40 *See infra* notes 50–54 and accompanying text (discussing the Bricker Amendment).

41 *See* Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. PA. L. REV. 399, 411 (2000) (noting the concern that treaties would preempt state law).

stronger than the then-current interpretation of the Constitution and would override contradictory state laws.[42]

U.S. advocates immediately sought means to enforce the new norms. As early as 1946, civil rights groups asked the U.N. Commission on Human Rights to find that racial discrimination in the United States violated the U.N. Charter.[43] In 1951, civil rights leaders filed a complaint with the United Nations asserting that U.S. violence against African Americans constituted genocide.[44] Litigants in U.S. courts relied on international norms in multiple challenges to discriminatory state legislation.[45] In a Supreme Court case challenging California's Alien Land Law, which prohibited Japanese immigrants from owning land, four Justices would have relied on the U.N. Charter's anti-discrimination provisions.[46] A California state appellate court struck down the state's Alien Land Law, relying explicitly on the U.N. Char-

42 *See* CAROL ANDERSON, EYES OFF THE PRIZE: THE UNITED NATIONS AND THE AFRICAN AMERICAN STRUGGLE FOR HUMAN RIGHTS, 1944–1955, at 1–2 (2003) (arguing that constitutional "civil rights" could only remedy "overt political and legal discrimination," while human rights as defined by the United Nations could address as well "the education, health care, housing, and employment needs that haunted the black community").

43 *Id.* at 58–112 (describing multiple efforts to challenge racial segregation and inequality through the United Nations); Catherine Powell, *The Ghost of Senator Bricker*, OPINIO JURIS (Mar. 22, 2008, 5:41 PM), http://opiniojuris.org/2008/03/22/the-ghost-of-senator-bricker/ (same).

44 ANDERSON, *supra* note 42, at 179–80; Powell, *supra* note 43.

45 *See generally* Lockwood, *supra* note 37 (detailing efforts to enforce U.N. Charter provisions in U.S. state and federal courts between 1946 and 1955).

46 Oyama v. California, 332 U.S. 633, 635 (1948). The statute also made it difficult for the immigrants to transfer their property to their U.S. citizen relatives; the Court found the statute unconstitutional based on the violation of the rights of those U.S. citizens. *Id.* at 647. Justices Black and Douglas wrote:

> [W]e have recently pledged ourselves to cooperate with the United Nations to "promote . . . universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion." How can this nation be faithful to this international pledge if state laws which bar land ownership and occupancy by aliens on account of race are permitted to be enforced?

Id. at 649–50 (Black, J., concurring) (alteration in original) (citation omitted). Justices Murphy and Rutledge added:

> Moreover, this nation has recently pledged itself, through the United Nations Charter, to promote respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language and religion. The Alien Land Law stands as a barrier to the fulfillment of that national pledge. Its inconsistency with the Charter, which has been duly ratified and adopted by the United States, is but one more reason why the statute must be condemned.

Id. at 673 (Murphy, J., concurring).

In *Namba v. McCourt*, 204 P.2d 569, 579 (Or. 1949), the Oregon Supreme Court relied in part on United States ratification of the U.N. Charter, with its anti-discrimination pledge, to invalidate a similar alien land law.

ter and the UDHR.[47] The California appellate court's reliance on international law triggered a backlash, however, and the California Supreme Court affirmed the decision only on constitutional grounds.[48] Later decisions from state and federal courts followed the same path, rejecting reliance on international norms.

Despite the failure to enforce international agreements in U.S. courts, litigants continued to present arguments based on the U.N. Charter and the UDHR, and both opponents and supporters viewed judicial enforcement of international norms as a real possibility at the time.[49] In response, opponents of treaty enforcement mounted an effort to amend the Constitution to explicitly state that treaties had no domestic force, requiring instead that Congress enact any change in U.S. law. Southerners worried about the impact of the international ban on racial discrimination were the driving force behind the proposed amendments, although concerns about states' rights also played an important role.[50] The amendment came close to passage in the Senate.[51] President Dwight D. Eisenhower diffused the effort only by agreeing that his administration would not submit human rights treaties to the Senate for ratification.[52] This agreement remained operative for decades. As a result, the United States did not ratify the Genocide Convention, the least controversial of the human rights treaties, until 1988, forty years after it was drafted.[53] More significantly, to this day, all human rights treaties have been ratified with the condition that they are not "self-executing," thus achieving in practice one of the key goals of the proposed amendment.[54]

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47 Sei Fujii v. State, 217 P.2d 481, 488 (Cal. Dist. Ct. App. 1950) (holding the Alien Land Law "[i]s incompatible with Article 17 of the Declaration of Human Rights which proclaims the right of everyone to own property. . . . Clearly such a discrimination against a people of one race is contrary both to the letter and to the spirit of the Charter[,] which, as a treaty, is paramount to every law of every state in conflict with it. The Alien Land Laws must therefore yield to the treaty as the superior authority.").

48 Sei Fujii v. State, 242 P.2d 617, 630 (Cal. 1952).

49 "At that moment, greater reliance on international-agreement-based judicial decisions to advance civil rights seemed a likely prospect." ROBERT E. SCOTT & PAUL B. STEPHAN, THE LIMITS OF LEVIATHAN: CONTRACT THEORY AND THE ENFORCEMENT OF INTERNATIONAL LAW 170 (2006).

50 The proposed amendments, known collectively as the "Bricker Amendment," after their chief sponsor, Senator John Bricker, would have amended the Constitution to provide that "[a] treaty shall become effective in the United States only through legislation which would be valid in the absence of treaty." Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT'L L. 341, 348 (1995).

51 Bradley & Goldsmith, *supra* note 41, at 413 (noting that one of the proposed amendments came within one vote of passage).

52 Henkin, *supra* note 50, at 349.

53 Genocide Convention Implementation Act of 1987, 18 U.S.C. § 1091 (2006).

54 Henkin, *supra* note 50, at 349.

In the 1970s, a network of activists and non-profit organizations expanded rapidly into a vibrant international human rights movement.[55] In the United States, human rights organizing took inspiration from the civil rights movement and the struggle to end the Vietnam War, spurred as well by opposition to the cynical foreign policy of President Richard Nixon and Henry Kissinger, his Secretary of State.[56] Congress held its first hearing on human rights in 1973 and passed a series of statutes tying foreign aid to human rights in the mid-1970s.[57] President Jimmy Carter took office in January 1977 with an explicit commitment to a human rights-oriented foreign policy. In his inaugural address, he stated that the nation's "commitment to human rights must be absolute" and expressed a "clearcut preference" for nations that "share with us an abiding respect for individual human rights."[58] Shortly after his inauguration, President Carter told the United Nations:

> All the signatories of the United Nations Charter have pledged themselves to observe and to respect basic human rights. Thus, no member of the United Nations can claim that mistreatment of its citizens is solely its own business. Equally, no member can avoid its responsibilities to review and to speak when torture or unwarranted deprivation occurs in any part of the world.[59]

By the end of the Carter Administration, concerns about stability, security, and anti-communism had muted his human rights foreign policy.[60] But his administration's rhetorical and, at times, political and policy support for human rights contributed to the rapid expansion of human rights consciousness in the 1970s.

In 1979, during this time of growing human rights activism, the Filártigas filed their lawsuit in federal court in Brooklyn, New York.

B. The Filartiga *Litigation*

Seventeen-year-old Joelito Filártiga was tortured to death in Paraguay in 1976 by Americo Peña-Irala, a Paraguayan police officer, in retaliation for the

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55 Amnesty International, founded in 1961, expanded rapidly in the 1970s and was awarded the Nobel Peace Prize in 1977, and many new organizations were established, including Human Rights Watch (1978) and the Lawyers Committee for Human Rights (1975). Kenneth Cmiel, *The Emergence of Human Rights Politics in the United States*, 86 J. AM. HIST. 1231, 1234–35 (1999) (noting that by the end of the 1970s, there were over 200 human rights organizations in the United States).

56 For a discussion of this time period, see David Carleton & Michael Stohl, *The Foreign Policy of Human Rights: Rhetoric and Reality from Jimmy Carter to Ronald Reagan*, 7 HUM. RTS. Q. 205, 206 n.2 (1985). *See also* Cmiel, *supra* note 55, at 1234 (noting the influence of the 1973 military coup in Chile).

57 Carleton & Stohl, *supra* note 56, at 206 n.2; Cmiel, *supra* note 55, at 1236.

58 Jimmy Carter, Inaugural Address (Jan. 20, 1977), *available at* http://www.jimmycarterlibrary.gov/documents/speeches/inaugadd.phtml.

59 President Jimmy Carter, Address to the United Nations (Mar. 17, 1977), *reprinted in* 78 DEP'T OF STATE BULL. 329 (1977), *quoted in* Filartiga v. Pena-Irala, 630 F.2d 876, 889 n.24 (2d Cir. 1980).

60 *See* Hauke Hartmann, *U.S. Human Rights Policy Under Carter and Reagan, 1977–1981*, 23 HUM. RTS. Q. 402, 418–20 (2001).

human rights advocacy of Joelito's father.[61] The Filártiga family tried unsuccessfully to initiate a criminal action against Peña-Irala in Paraguay, and then learned in 1978 that, with the assistance of the Paraguayan government, Peña-Irala had slipped out of the country and moved to Brooklyn, New York.[62] The Filártigas' search for a means to bring Peña-Irala to justice in the United States led them to the Center for Constitutional Rights (CCR). In April 1979, CCR filed an ATS claim on the Filártigas' behalf in federal court in Brooklyn. CCR lawyers had cited the ATS while working on an earlier lawsuit, but had not previously relied on it as the basis for federal court jurisdiction.[63]

The district court dismissed the case quickly, holding that international human rights norms, including the prohibition of torture, did not apply to a state's torture of its own citizens.[64] The court considered itself bound by two prior Second Circuit decisions that stated that international law did not govern a state's treatment of its own citizens.[65]

The *Filartiga* appeal was argued on October 16, 1979 and decided in June 1980. During the eight months when the appeal was pending, international events brought human rights issues into stark relief. Mohammad Reza Pahlavi, the Shah of Iran, a brutal leader accused of egregious human rights abuses, was ousted by a popular uprising in February 1979 and came to the United States for medical treatment on October 22, 1979, less than a week after the *Filartiga* oral argument.[66] In response to the decision to permit the Shah to enter the United States, student radicals seized the U.S. embassy in Iran on November 4, taking hostage hundreds of U.S. citizens who were not freed until early 1981, over fourteen months later.[67] The hostage crisis dominated U.S. media and political life for months and loomed large as the Second Circuit wrote its decision in *Filartiga*. Looking back years later, the clerk who drafted the decision commented on the impact of this national security crisis on the court's deliberations:

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61 *Filartiga*, 630 F.2d at 878.

62 *Id.* at 878–79.

63 In *Nguyen Da Yen v. Kissinger*, 528 F.2d 1194, 1201 n.13 (9th Cir. 1975), CCR cited the ATS in a challenge to the "baby lift" that transported thousands of Vietnamese children to the United State for adoption in the closing days of the war. The Ninth Circuit noted that the ATS "[m]ay be available . . . [because] [t]he illegal seizure, removal and detention of an alien against his will in a foreign country would appear to be a tort . . . and it may well be a tort in violation of the 'law of nations,'" but the court did not rule on the ATS claim. *Id.* (citations omitted).

64 *See Filartiga*, 630 F.2d at 880 (describing the district court decision in *Filartiga v. Pena-Irala*, No. 79-917 (E.D.N.Y. May 15, 1979)).

65 *Id.* (citing Dreyfus v. Von Finck, 534 F.2d 24, 31 (2d Cir. 1976); IIT v. Vencap, Ltd., 519 F.2d 1001, 1015 (2d Cir. 1975)).

66 Warren Christopher & Richard M. Mosk, *The Iranian Hostage Crisis and the Iran-U.S. Claims Tribunal: Implications for International Dispute Resolution and Diplomacy*, 7 PEPP. DISP. RESOL. L.J. 165, 167 (2007).

67 *Id.*

> The Iran hostage crisis began in the middle of all this, and the nation felt itself under siege more than it would again for another 22 years. Everyone knew that if the panel didn't take the easy way out . . . we'd be sailing into uncharted waters . . . No one seemed to doubt that a finding of jurisdiction comported with our national ideals; the honest question we all had was whether it comported with our national interests as well.[68]

The hostage crisis both highlighted the potential consequences of providing a safe haven to human rights abusers and demonstrated the potential life-and-death consequences of foreign affairs and international law issues.

At the same time, the Carter Administration was pondering its response to the *Filartiga* lawsuit. In August 1979, before the oral argument, lawyers in the State Department proposed that the administration file a brief in the appeal. They were particularly concerned with the district court's conclusion that human rights norms such as the prohibition against torture did not apply to a state's treatment of its own citizens. In a letter to the Department of Justice, the State Department Deputy Legal Advisor wrote:

> This now obsolete doctrine fails to take account of 20th century (and earlier) developments of international law which firmly establish that all natural persons are entitled to fundamental human rights. . . . That an individual has [a right not to be tortured] is a conclusion founded on provisions of the United Nations Charter, . . . on other treaties, on international custom and practice and on the general principles of law—all as recognized by the United States and other nations.[69]

The Department of Justice responded with a draft amicus brief that argued both that torture violated international law and that the ATS permitted the Filártigas' suit to go forward.[70] In a letter commenting on the draft, the State Department questioned whether international law authorized a domestic court to assert jurisdiction over acts, aside from piracy, that did not impact that state's interests or those of its own citizens.[71] The letter concluded that the ATS "should be construed as not according federal courts the jurisdiction to entertain suits by an alien in tort for acts of torture allegedly committed by another alien abroad."[72]

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68 Bruce R. Kraus, Filártiga *Memoir*, *quoted in* Harold Hongju Koh, Filártiga v. Peña-Irala*: Judicial Internalization into Domestic Law of the Customary International Law Norm Against Torture*, *in* INTERNATIONAL LAW STORIES 45, 50–51 (John E. Noyes et al. eds., 2007) (memorandum written by former clerk to Judge Irving R. Kaufman).

69 Letter from Stephen M. Schwebel, Deputy Legal Advisor, U.S. Dep't of State, to John Huerta, Deputy Assistant Att'y Gen., U.S. Dep't of Justice (Aug. 9, 1979), *reprinted in* WILLIAM J. ACEVES, THE ANATOMY OF TORTURE: A DOCUMENTARY HISTORY OF *FILARTIGA V. PENA IRALA* 481–82 (2007).

70 Memorandum from the Justice Dept., Civil Rights Div., to the Solicitor General, Filartiga v. Pena-Irala, No. 79-6090 (2d Cir. 1980), *reprinted in* ACEVES, *supra* note 69, at 485–507.

71 Letter from Stephen M. Schwebel, Deputy Legal Adviser, U.S. Dep't of State, to Richard Allen, Office of the Solicitor General, U.S. Dep't of Justice (Sept. 14, 1979), *reprinted in* ACEVES, *supra* note 69, at 511–14.

72 *Id.* at 514.

The exchanges over the content of the government's submission continued for over eight months. Government lawyers expressed concern about the impact of the case "for the treatment of our own nationals in foreign courts."[73] They also worried that the U.S. courts and the U.S. government "would gradually become self-appointed policemen for the world," creating tension in our foreign relations.[74] The State Department Legal Advisor proposed, as a compromise, that the government argue that, although the ATS did provide jurisdiction over the claim, the courts should abstain because the claim could be pursued in Paraguayan courts, especially considering that the defendant had been deported back to Paraguay.[75]

With its position unresolved, the executive branch did not file anything in the case until May 1980.[76] At that point, despite concerns about the potential impact and "after much internal soul-searching and debate,"[77] the U.S. government filed an amicus brief supporting the Filártigas' view that the ATS provided jurisdiction over their claim.[78] The submission touched upon the key issues that remained controversial for the following decades. First, the brief argued that the ATS incorporates an evolving body of international law[79] and that the modern prohibition of torture applies to a state's treatment of its own citizens.[80] Second, the amicus brief concluded that the judiciary had the authority to decide the case despite its foreign affairs implications, stating that, where "there is a consensus in the international community that the right is protected" and "a widely shared understanding of the scope of this protection," there is "little danger that judicial enforcement will impair our foreign policy efforts. To the contrary, a refusal to recognize a private cause of action in these circumstances might seriously damage the credibility of our nation's commitment to the protection of human rights."[81] Third, the brief affirmed that international law affords individual rights that can be directly enforced in domestic courts.[82] Finally,

73 Letter from Wade H. McCree, Solicitor General, U.S. Dep't of Justice, to Congressman Toby Moffett et al. (Oct. 3, 1979), *reprinted in* ACEVES, *supra* note 69, at 539–40.

74 Honorable Roberts B. Owen, Legal Adviser, U.S. Dep't of State, Address at the Annual Dinner of the American Branch of the International Law Association (Nov. 14, 1980) [hereinafter Owen Address], *quoted in* ACEVES, *supra* note 69, at 47 (citing PROCEEDINGS AND COMMITTEE REPORTS OF THE AMERICAN BRANCH OF THE INTERNATIONAL LAW ASSOCIATION 11, 16 (Theodore R. Giuttari ed., 1982)).

75 Letter from Roberts B. Owen, Legal Advisor, U.S. Dep't of State, to Warren Christopher, Deputy Secretary of State (Mar. 5, 1980), *quoted in* ACEVES, *supra* note 69, at 45–46 (citing CUMULATIVE DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 1979, at 534–25 (Marian Nash (Leich) ed., 1983)).

76 The Second Circuit requested the executive branch's input on October 29, 1978. Letter from Daniel Fusaro, Clerk, Second Circuit Court of Appeals, to Roberts Owen, Legal Adviser, U.S. Dep't of State (Oct. 29, 1979), *reprinted in* ACEVES, *supra* note 69, at 557.

77 Owen Address, *supra* note 74.

78 U.S. *Filartiga* Brief, *supra* note 27.

79 *Id.* at 4–5.

80 *Id.* at 10–20.

81 *Id.* at 22–23.

82 *Id.* at 20–21.

the argument that the court should abstain was downgraded to a footnote suggesting that dismissal based on *forum non conveniens* might be appropriate and stating that the case should be decided in Paraguay, absent a "very clear and persuasive showing" that litigation in Paraguay would not be possible.[83]

Just a month after the executive branch filed its brief, the Second Circuit issued the *Filartiga* decision. Reduced to its core, *Filartiga* stated a narrow holding: the ATS affords jurisdiction over a claim for torture against a former foreign government official who came to the United States to escape liability at home, when his state did not assert immunity on his behalf and when the executive branch supported the assertion of jurisdiction, and subject to consideration of whether the claim could be litigated in the home country. Given that the same claim could have been litigated in state court as the tort of battery, the key legal holding was that the ATS affords federal subject matter jurisdiction when the conduct meets the international definition of torture or a small number of similar modern human rights violations, those that are prohibited by "a settled rule of international law" that commands "the general assent of civilized nations."[84] While legal minds can certainly differ about this interpretation of the statute, it was hardly a radical conclusion, particularly given that the executive branch endorsed it. The law clerk who drafted the opinion for Judge Kaufman later confirmed that he was "bending over backwards not to open any floodgates," and "rhetoric notwithstanding, to decide as little as possible."[85]

The rhetoric and reasoning, however, gave the decision a much broader tone. The opinion emphasized that international law is "part of our law," relying on language in Supreme Court cases from 1900 and earlier.[86] To interpret the content of international law, the court chose not to rely on the executive branch's assessment of the substance of customary international law, but instead conducted its own analysis. While noting that the executive branch agreed with its conclusions, the court relied on U.N. declarations, treaties that had not been ratified by the United States, and the views of scholars.[87] The court concluded that "international law confers fundamental rights upon all people vis-à-vis their own governments,"[88] including the right

83 *Id.* at 25 n.48.

84 Filartiga v. Pena-Irala, 630 F.2d 876, 881 (2d Cir. 1980) (quoting The Paquete Habana, 175 U.S. 677, 694 (1900)). Later cases summarized this standard as requiring a clearly defined, universal, and obligatory violation of international law. *See, e.g.*, Hilao v. Estate of Marcos (*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.").

85 Kraus, *supra* note 68, *quoted in* Koh, *supra* note 68, at 53. Kraus noted, however, that the opinion "seems to have succeeded not at all" in limiting the impact of its interpretation of the ATS. *Id.*

86 *Filartiga*, 630 F.2d at 887 (quoting *The Paquete Habana*, 175 U.S. at 700).

87 *Id.* at 883–85. The Filártigas supported their claim with affidavits from human rights scholars who each stated that torture as alleged in the complaint violated customary international law. *Id.* at 883–85.

88 *Id.* at 885.

to be free from physical torture.[89] And the opinion asserted each state's right to bring to justice those who commit torture, at least when the torturers were found within its territory, and thereby to deny "safe haven" to those who have committed torture in their home countries.

The final paragraph of the opinion captured the larger sweep of a case that sought to represent far more than its narrow holding:

> In the twentieth century the international community has come to recognize the common danger posed by the flagrant disregard of basic human rights and particularly the right to be free of torture. Spurred first by the Great War, and then the Second, civilized nations have banded together to prescribe acceptable norms of international behavior. . . . Among the rights universally proclaimed by all nations . . . is the right to be free of physical torture. Indeed, for purposes of civil liability, the torturer has become—like the pirate and slave trader before him—*hostis humani generis*, an enemy of all mankind. Our holding today, giving effect to a jurisdictional provision enacted by our First Congress, is a small but important step in the fulfillment of the ageless dream to free all people from brutal violence.[90]

The human rights legal community welcomed the *Filartiga* decision as a signal achievement. In the words of Professor Harold Koh, "In *Filartiga*, transnational public law litigants finally found their *Brown v. Board of Education*."[91] *Filartiga* advanced central goals in the struggle over the interpretation and enforcement of international law. First, the court's interpretation of the ATS offered a means by which international law could be enforced in U.S. domestic courts, permitting victims and survivors of human rights abuses—private, non-state actors—to seek remedies for violations of international law. Second, the court asserted the power to determine the substance of international law through an independent analysis that did not defer to the views of the executive branch or even give those views prominence in its analysis. Finally, the language of the decision provided a ringing endorsement of both human rights norms and the importance of permitting judicial enforcement of those norms.

C. *The Post-*Filartiga *Honeymoon*

Academic commentary during the first phase of modern ATS litigation, from 1980 until 1997, was overwhelmingly supportive of *Filartiga*.[92] A flurry of articles published in 1981 welcomed the decision with cautious optimism.[93] Scholars generally agreed that a small group of human rights claims

89 *Id.* at 890.

90 *Id.*

91 Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2366 (1991).

92 For a representative list of articles published as of 1996, see William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the "Originalists,"* 19 HASTINGS INT'L & COMP. L. REV. 221, 221 n.2 (1996).

93 See, for example, a series of essays published in the *Georgia Journal of International and Comparative Law*, Symposium, *Federal Jurisdiction, Human Rights, and the Law of Nations:*

could be brought in federal courts pursuant to the ATS, although, as discussed in Part III, they disagreed about exactly how the statute achieved that result.

The first judicial response to *Filartiga* was not particularly promising. In a 1984 decision in *Tel-Oren v. Libyan Arab Republic*,[94] a panel of the District of Columbia Circuit split three ways on a claim alleging ATS jurisdiction based on acts of terrorism. Although all three judges agreed that the claims should be dismissed, they could not agree on the reasoning. While Judge Edwards largely agreed with the *Filartiga* interpretation of the ATS, he held it inapplicable to the claims in that case.[95] Judge Robb would have dismissed the case on political question grounds.[96] Judge Bork wrote a long and blistering critique of *Filartiga*.[97] He insisted that the ATS only granted federal subject matter jurisdiction and that the federal courts had no power to recognize a cause of action for the claims at issue in *Filartiga* or *Tel-Oren*, because such a cause of action would intrude upon the foreign affairs powers of the executive branch.[98] He concluded that these claims could not possibly have been what the drafters of the ATS intended.[99]

The political climate for human rights advocacy took a significant turn shortly after the *Filartiga* decision, with the election of President Ronald Reagan. During his campaign, Reagan harshly criticized President Carter's human rights record, calling it morally misguided, ineffective, and a threat to U.S. national security.[100] President Reagan's approach to human rights was captured by Jeanne Kirkpatrick, his first ambassador to the United Nations and close advisor. Kirkpatrick famously distinguished between authoritarian regimes that were allies regardless of their human rights record and Soviet-supported totalitarian regimes that must be opposed.[101] She blamed President Carter's human rights policies for leading to the overthrow of staunch U.S. allies, such as Anastasio Somoza, the long-time, brutal Nicaraguan dictator.[102] U.S. support for the government of El Salvador and the Nicaraguan

Essays on Filartiga v. Pena-Irala, 11 GA. J. INT'L & COMP. L. 305, 305–41 (1981). That same year, Jeffrey Blum and Ralph Steinhardt published the first extensive analysis of the statute. Jeffrey M. Blum & Ralph G. Steinhardt, *Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act After* Filartiga v. Peña-Irala, 22 HARV. INT'L L.J. 53 (1981).

For notable exceptions to the generally positive scholarly response, see, for example, Farooq Hassan, *Panacea or Mirage? Domestic Enforcement of International Human Rights Law: Recent Cases*, 4 HOUS. J. INT'L L. 13 (1981); Alfred P. Rubin, *Professor D'Amato's Concept of American Jurisdiction Is Seriously Mistaken*, 79 AM. J. INT'L L. 105 (1985).

94 726 F.2d 774 (D.C. Cir. 1984).

95 *Id.* at 791 n.20 (Edwards, J., concurring).

96 *Id.* at 823 (Robb, J., concurring).

97 *Id.* at 798–823 (Bork, J., concurring).

98 *Id.* at 802.

99 *Id.* at 812–16.

100 Carleton & Stohl, *supra* note 56, at 205.

101 Tamar Jacoby, *The Reagan Turnaround on Human Rights*, 64 FOREIGN AFF. 1066, 1068 (1986) (discussing Jeane Kirkpatrick's 1979 article, *Dictatorships and Double Standards*, COMMENTARY 34–45 (1979)).

102 *See* Jeane Kirkpatrick, *U.S. Security & Latin America*, COMMENTARY 29–40 (1979).

counterrevolutionaries ("contras")—both accused of massive human rights violations—provoked blistering battles in Congress and in the media, with competing human rights organizations producing conflicting reports.[103]

Not surprisingly, the Reagan Administration urged the courts to dismiss ATS claims and to reject the *Filartiga* interpretation of the ATS.[104] In 1984, in its first ATS submission, the Reagan Administration argued that the statute was purely jurisdictional and did not authorize judicial recognition of a cause of action for a violation of international law.[105] Three years later, a submission in *Trajano v. Marcos* made that argument in even stronger terms.[106] Submitted on behalf of the Department of Justice alone—the Department of State did not join—the *Trajano* brief argued that the ATS did not authorize federal courts to take jurisdiction over claims that were not violations of U.S. law and that such claims would require that Congress create a statutory cause of action.[107] The brief explicitly repudiated the executive branch's *Filartiga* amicus brief on these points.[108] The submission emphasized that the purpose of the ATS was to respond to violations of international law for which

103 *See* Doyle McManus, *Rights Groups Accuse Contras: Atrocities in Nicaragua Against Civilians Charged*, L.A. TIMES, Mar. 8, 1985, at 1 (detailing the battles over human rights); *see also* WILLIAM M. LEOGRANDE, OUR OWN BACKYARD: THE UNITED STATES IN CENTRAL AMERICA, 1977–1992, at 226–36 (1998) (El Salvador); *id.* at 413–17 (Nicaragua); Christopher Mitchell, *Policy Toward Western Hemisphere Immigration and Human Rights*, *in* UNITED STATES POLICY IN LATIN AMERICA 272, 289 (John D. Martz ed., 1995) (describing the "strident and polarized" public debate on U.S. policies towards human rights in the Americas, particularly Central America).

104 U.S. *Trajano* Brief, *supra* note 28, at 21 n.18. Professor Jide Nzelibe recently analyzed the different presidential positions on the ATS "through the lens of partisan politics." Jide Nzelibe, *Contesting Adjudication: The Partisan Divide over Alien Tort Statute Litigation*, 33 NW. J. INT'L L. & BUS. 475, 479 (2013). He proposed that "a simple partisan electoral competition explanation" accounted for variations in both judicial and presidential approaches to the ATS. *Id.* at 480.

105 Brief for the Federal Appellees at 9, 32–40, Sanchez-Espinoza v. Reagan, 770 F.2d 202 (D.C. Cir. 1985) (No. 83-1997), *cited in* Brief for the United States as Amici Curiae at 11 n.11, Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, (D.C. Cir. 1984) (No. 83-2052) [hereinafter U.S. *Tel-Oren* Brief] (brief filed with the Supreme Court at petition for certiorari stage) ("In our brief on appeal in *Sanchez-Espinoza*, we have argued that the alien tort statute is purely jurisdictional and cannot be interpreted either to mandate the creation of a federal common law of international tort or to authorize individuals to enforce in domestic courts private rights of action derived directly from customary international law."); *see also* Michael C. Small, Note, *Enforcing International Human Rights Law in Federal Courts: The Alien Tort Statute and the Separation of Powers*, 74 GEO. L.J. 163, 165 n.17 (1985) (noting that the Justice Department brief in *Sanchez-Espinoza* argued that the ATS does not authorize a private right of action for violations of customary international law).

106 U.S. *Trajano* Brief, *supra* note 28, at 9–10; *see also* Brief for the United States as Amici Curiae Supporting Petitioner at 22 n.11, Arg. Republic v. Amerada Hess Ship. Corp., 488 U.S. 428 (1989) (Nos. 86-7602, 86-7603) (arguing that the ATS does not provide a cause of action and the courts should not infer one).

107 U.S. *Trajano* Brief, *supra* note 28, at 4, 5, 9–10, 12, 25–26.

108 *Id.* at 21 n.18.

the United States might be held accountable, primarily violations committed by U.S. citizens or by aliens while physically present in the United States.[109]

But the most important Reagan Administration brief may have been the one submitted to the Supreme Court when a petition for certiorari was pending in *Tel-Oren*.[110] The administration recommended that the Supreme Court not grant review, arguing that the circuit courts should be given more time to work out the proper interpretation of the ATS.[111] Had the Supreme Court granted review in *Tel-Oren*, it might well have resolved issues that have triggered so much debate over the ensuing decades.

Despite the challenge from the Reagan Administration and Judge Bork's criticism of *Filartiga* in *Tel-Oren*, the courts uniformly followed *Filartiga* over the next seventeen years, and the Supreme Court denied review each time it was requested.[112] Only about thirty-two ATS cases were litigated between 1980 and 1997.[113] Seven lawsuits resulted in judgments for the plaintiffs during that time period, one in the 1980s[114] and six between 1990 and 1996, including two after contested trials.[115] The courts upheld claims for violations such as genocide, summary execution, and crimes against humanity and recognized the liability of commanding officers as well as the direct perpetrator of the abuse.[116] None of the plaintiffs in any of these cases were able to collect their judgments, however. The rest of the cases—the large majority of those filed—were dismissed on motions to dismiss, for reasons

109 *Id.* at 8, 10–11, 15.

110 U.S. *Tel-Oren* Brief, *supra* note 105. Interestingly, the brief was signed (among others) by both Harold Koh, who has become one of the leading supporters of ATS litigation, *see* Koh, *supra* note 91, and John Rogers, who, in a 1988 article, presented one of the early scholarly critiques of the *Filartiga* interpretation of the ATS, *see* John M. Rogers, *The Alien Tort Statute and How Individuals 'Violate' International Law*, 21 VAND. J. TRANSNAT'L L. 47, 48 (1988).

111 U.S. *Tel-Oren* Brief, *supra* note 105, at 12.

112 *See, e.g.*, Negewo v. Abebe-Jiri, 519 U.S. 830 (1996), *cert. denied*; Karadzic v. Kadic, 518 U.S. 1005 (1996), *cert. denied*; Marcos-Manotoc v. Trajano, 508 U.S. 972 (1993), *cert. denied*; Tel-Oren v. Libyan Arab Republic, 470 U.S. 1003 (1985), *cert. denied*.

113 These numbers are approximate, based on a search for "alien tort" in the Westlaw "all feds" database, counting those in which the ATS was one basis for the lawsuit.

114 Forti v. Suarez-Mason, 672 F. Supp. 1531, 1552 (N.D. Cal. 1987). Although counted here as one case, three separate claims were filed against Suarez-Mason. As in *Filartiga*, the defendant had been living in the United States at the time the lawsuits were filed; he was extradited to Argentina in 1988. *In re* Extradition of Suarez-Mason, 694 F. Supp. 676, 707 (N.D. Cal. 1988).

115 In the most hotly contested case, thousands of Filipinos sued Ferdinand Marcos, the former dictator, for summary execution, torture, and disappearances, and received a billion dollar judgment after a jury trial. Hilao v. Estate of Marcos, 103 F.3d 767, 787 (9th Cir. 1996); *see also* Abebe-Jira v. Negewo, 72 F.3d 844, 848 (11th Cir. 1996) (judgment for plaintiffs after bench trial); Cabiri v. Assasie-Gyimah, 921 F. Supp. 1189, 1199 (S.D.N.Y. 1996) (default judgment); Mushikiwabo v. Barayagwiza, No. 94 Civ. 3627, 1996 WL 164496 (S.D.N.Y. April 9, 1996) (same); Xuncax v. Gramajo, 886 F. Supp. 162, 202 (D. Mass. 1995) (same); Paul v. Avril, 901 F. Supp. 330, 336 (S.D. Fla. 1994) (same).

116 *See, e.g.*, *Hilao*, 103 F.3d at 772; Kadic v. Karadžić, 70 F.3d 232, 244 (2d Cir. 1995); *Xuncax*, 886 F. Supp. at 178–83; *Paul*, 901 F. Supp. at 335.

that included failure to state a violation of international law, the fact that the plaintiffs were U.S. citizens, the defendant's immunity, the statute of limitations, *forum non conveniens*, and the political question doctrine.[117]

While no effort to repeal or amend the ATS was advanced in Congress during this time period, Congress did consider—and expand—the ability of private parties to litigate civil claims for human rights violations, through three separate statutes. Each responded to different political forces, and each included specific—and different—substantive and procedural requirements. Most importantly, the Torture Victim Protection Act (TVPA),[118] enacted in 1992, grants U.S. citizens, as well as aliens, a right to sue an individual for torture or extrajudicial execution and provides detailed definitions of each abuse.[119] The violations must be committed "under actual or appar-

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For an overview of ATS litigation, including the facts summarized in this paragraph, see BETH STEPHENS ET AL., INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS 12–23 (2d ed. 2008).

117 *See, e.g.*, Miner v. Begum, 8 F. Supp. 2d 643, 644 (S.D. Tex. 1998) (dismissing claim asserting ATS jurisdiction because plaintiffs were U.S. citizens); Brancaccio v. Reno, 964 F. Supp. 1, 4 (D.D.C. 1997) (failure to demonstrate violation of international law); Lafontant v. Aristide, 844 F. Supp. 128, 139 (E.D.N.Y. 1994) (head of state immunity); Industria Panificadora, S.A. v. United States, 763 F. Supp. 1154, 1161 (D.D.C. 1991), *aff'd*, 957 F.2d 886, 887 (D.C. Cir. 1992) (political question); Guinto v. Marcos, 654 F. Supp. 276, 279–80 (S.D. Cal. 1986) (holding restriction of First Amendment rights is not a universally recognized violation).

118 28 U.S.C. § 1350 note (2006).

119 In addition to the TVPA, discussed in the text, Congress enacted the Anti-Terrorism Act (ATA) in 1994. The ATA authorizes a U.S. national "injured in his or her person, property, or business by reason of an act of international terrorism" to sue for treble damages. 18 U.S.C. § 2333(a) (2006). The statute defines an act of "international terrorism" as a violent criminal act, committed either outside the United States or "transcend[ing] national boundaries," if the act "appear[s] intended to intimidate or coerce" civilians or a government. *Id.* § 2331(1).

The bulk of the cases under this statute have been filed against Palestinian organizations or groups alleged to have assisted these organizations, or against groups and individuals accused of liability for the September 11, 2001 attacks. *See* Jason Binimow, *Validity, Construction, and Application of 18 U.S.C.A. § 2333(a), Which Allows U.S. Nationals Who Have Been Injured "By Reason of International Terrorism" to Sue Therefor and Recover Treble Damages*, 195 A.L.R. FED. 217 (2004) (providing an updated list of ATA cases). The unpopular entities targeted by the ATA and its link to international terrorism have muted objections to the statute.

The third modern statute authorizing civil claims for human rights abuses, a 1996 amendment to the Foreign Sovereign Immunities Act (FSIA), created an exception to foreign state immunity to permit civil suits against a limited set of foreign states for torture, extrajudicial killing, aircraft sabotage, or hostage-taking, or the provision of material support or resources for such an act. 28 U.S.C. § 1605(a) (2006). The exception permits suits by U.S. citizens when the defendant government is on the U.S. government's list of state sponsors of terrorism. The State Department currently designates four such countries: Cuba, Iran, Sudan, and Syria. (Iraq, Libya, and North Korea have been removed from the list.) *State Sponsors of Terrorism*, U.S. DEP'T OF STATE, http://www.state.gov/j/ct/list/c14151.htm (last visited Jan. 17, 2014). The amendment was the result of an unusual lobbying campaign by the survivors of U.S. citizens killed in the bombing of a plane over Lockerbie,

ent authority, or color of law, of any foreign nation."[120] One impetus behind the proposal to enact the TVPA was to codify a cause of action for those two egregious human rights violations, in light of the possibility that the *Filartiga* interpretation of the ATS might not survive.[121] The TVPA legislative history, however, also contains a strong endorsement of the *Filartiga* decision and the ATS[122] that has been cited in multiple opinions.[123]

The TVPA is considerably less controversial than the ATS for several reasons: it was enacted by a modern Congress; it contains both statutory definitions of the cause of action and procedural requirements, such as a statute of limitations and exhaustion of domestic remedies; and the requirement that the violations be committed under color of law of a foreign nation rules out all or most suits against U.S. officials. Although early decisions held that the statute could be used against corporate defendants, later courts disagreed, and the Supreme Court held in 2012 that the statute did not apply to corporations.[124] While proponents of the *Filartiga* interpretation of the ATS relied on the TVPA's legislative history for support, opponents argued that the enactment of the TVPA demonstrated exactly what was lacking in the ATS: a congressionally created cause of action, with the detail necessary to enable courts to apply it without trespassing on the powers of the political branches.[125]

In contrast to the ATS, these modern statutes did not trigger larger disputes about interpretation and enforcement of human rights norms, because of the narrow requirements that limited their scope, the politically unpopular targets of much of the litigation, and the fact that each was enacted through the political process, with explicit definitions and procedural rules. As a result, the political branches, not the courts, both created and defined the claims.

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As of 1997, the ATS had played a modest role in the human rights movement, offering a small number of victims and survivors of severe human rights abuses the opportunity to present their claims in court and create a record of what they had suffered. Although the judgments during this time period are often described as "merely" symbolic, plaintiffs generally

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Scotland, described in ALLAN GERSON & GERRY ADLER, THE PRICE OF TERROR: ONE BOMB. ONE PLANE. 270 LIVES. THE HISTORY-MAKING STRUGGLE FOR JUSTICE AFTER PAN AM 103 (2001).

120 TVPA, 18 U.S.C. § 1350 note, § 2(a).

121 *See* TVPA HOUSE REPORT, H.R. REP. NO. 102-367, at 4 (1991).

122 *Id.* at 3 (stating that the ATS section 1350 has "important uses and should not be replaced").

123 *See, e.g.*, Abebe-Jira v. Negewo, 72 F.3d 844, 848 (11th Cir. 1996) (citing the TVPA legislative history as evidence that, "in enacting the TVPA, Congress endorsed the *Filartiga* line of cases"); Kadic v. Karadžić, 70 F.3d 232, 241 (2d Cir. 1996) (same).

124 Mohamad v. Palestinian Auth., 132 S. Ct. 1702, 1710–11 (2012).

125 *See* Curtis A. Bradley & Jack L. Goldsmith III, *The Current Illegitimacy of International Human Rights Litigation*, 66 FORDHAM L. REV. 319, 363 (1997).

expressed satisfaction with their victories, which, they felt, vindicated their rights, created a record of what they had endured and the defendant's conduct, and strengthened the rule of law.[126] Despite the lack of enforcement of ATS money judgments, the decisions satisfied in part the drive to enforce human rights prohibitions by formally holding accountable those responsible and making clear that future perpetrators might face consequences.

Human rights advocates lauded the statute as a means to define and strengthen both the substance of human rights norms and their enforcement. Each ATS court decision constituted a data point that contributed to the development of those norms and could be cited by both domestic and international bodies as evidence of the content of international human rights law. The cases thus contributed to the slow growth of a body of law that applied and defined international human rights norms, while affirming that those norms could, in narrow circumstances, be used to hold accountable perpetrators of egregious abuses.

At the same time, the courts had reached a tentative consensus about the basic contours of the ATS, concluding that the statute permitted aliens to sue for a small number of human rights abuses, as long as they could obtain personal jurisdiction over the defendant and the suit was not barred by immunity or by doctrines such as the political question or *forum non conveniens*. Nevertheless, the decisions did not apply a uniform or coherent theory to explain how the statute worked. As a result, the relative unanimity of the ATS cases rested on a shaky foundation.

This honeymoon phase of post-*Filartiga* litigation drew to a close as the modern application of the ATS came under attack from several directions. A prominent scholarly critique published in 1997 provided a doctrinal framework from which to challenge the litigation, the subject of Part III. And, as discussed in Part IV, ATS cases against powerful defendants—corporations, officials of powerful foreign governments, and U.S. officials—multiplied the number of those who opposed the modern application of the statute, the vehemence of their objections, and the political and legal clout of their views.

III. SEPARATION OF POWERS AND THE BATTLE TO CONTROL INTERNATIONAL LAW IN THE U.S. LEGAL SYSTEM

The doctrinal puzzles underlying the modern application of the ATS raise surprisingly complex questions of federal law that have intrigued scholars for decades. But the outpouring of commentary on the ATS also reflects deep ideological divisions about the role of international law in the U.S. legal system and the relative powers of the three branches of the federal government. These issues gained increased salience after the September 11, 2001 attacks, when the administration of President George W. Bush proposed assertive theories of executive power, including the claim that the President

126 *See, e.g.*, Dolly Filártiga, *Foreword* to STEPHENS ET AL., *supra* note 116, at xvii–xviii (describing her family's lawsuit against the man who tortured her brother to death as "an enormous victory" for human rights and the pursuit of justice).

could authorize torture and other violations of international law. The first Section of this Part ties the heated debate about the ATS to the controversy over the powers of the judicial and executive branches that helps explain the outsized interest showered on the ATS.

In 2004, in the highly charged atmosphere created by the Bush Administration's claims to expansive powers and efforts to limit judicial authority to interpret and apply international law, the Supreme Court issued a surprising decision in *Sosa v. Alvarez-Machain*[127] that affirmed the basic tenets of modern ATS litigation. Released on the last day of the 2003 term, just one day after two key decisions on executive branch detention powers,[128] the Justices in *Sosa* pushed back against overreaching claims of executive power. The second Section of this Part places the *Sosa* decision in that context.

The discussion outlines the issues in broad strokes, in order to place doctrinal debates over the ATS in the framework of ongoing battles over the powers of the three branches of the federal government, their roles in the interpretation and enforcement of international law, and the role of civil litigation in our society. There are dozens of excellent scholarly articles on these topics, and this analysis cannot cite even a fraction of them, much less do justice to the detail and power of their arguments.

A. The Federal Courts and Customary International Law

In the 1990s, debate about the ATS focused on two fundamental, but surprisingly unresolved, questions: What is the constitutional basis for the statute, and what authorized the courts to recognize a cause of action, or private right to sue, for the torts in violation of the law of nations identified in the ATS? These questions became enmeshed in ongoing controversy over the roles of the executive branch and the judiciary in interpreting and enforcing international law, and, more generally, over judicial power to police executive branch actions. As explained in Section III.B, the *Sosa* decision answered these questions with a robust interpretation of federal court power.

1. International Law as "Our" Law and the Constitutional Basis for the ATS

The ATS is a jurisdictional statute, granting federal courts subject matter jurisdiction over claims for "a tort only, committed in violation of the law of nations."[129] *Filartiga* held that the statute fell within the constitutional authorization for federal subject matter jurisdiction in Article III because customary international law is part of federal common law, and cases based on federal common law arise under the laws of the United States:

127 542 U.S. 692 (2004).

128 Rasul v. Bush, 542 U.S. 466 (2004); Hamdi v. Rumsfeld, 542 U.S. 507 (2004).

129 28 U.S.C. § 1350 (2006).

> A case properly "aris[es] under the . . . laws of the United States" for Article III purposes if grounded upon statutes enacted by Congress or upon the common law of the United States. The law of nations forms an integral part of the common law, and a review of the history surrounding the adoption of the Constitution demonstrates that it became a part of the common law of the United States upon the adoption of the Constitution. Therefore, the enactment of the Alien Tort Statute was authorized by Article III.[130]

The *Filartiga* theory was simple: international law is part of federal common law, and, as the Supreme Court has made clear, claims based on federal common law trigger federal subject matter jurisdiction.[131] In 1987, the newly adopted *Restatement (Third) of the Foreign Relations Law*, in a slightly different formulation, stated that customary international law is federal law, is "like federal common law," and is jurisdiction-granting; that is, claims arising under customary international law arise under federal law and fall within a constitutional category of subject matter jurisdiction.[132]

In 1997, Professors Bradley and Goldsmith published an influential critique of *Filartiga*, the *Restatement (Third)*, and, more generally, the view that customary international law is part of federal common law, a view that they called "the modern position."[133] They argued that only the political branches could incorporate customary international law into U.S. law, and that, in the absence of such incorporation, the federal courts overstepped their authority when they applied international law norms. Recognizing that U.S. courts have long noted that international law, including customary international law, is "part of our law"[134] and "the law of the land,"[135] they asserted that these pre-*Erie* decisions meant only that customary law was part of the

130 Filartiga v. Pena-Irala, 630 F.2d 876, 886 (2d Cir. 1980) (internal citations omitted). For full discussion, see *id.* at 885–87.

131 *Id.* at 886 (citing Illinois v. City of Milwaukee, 406 U.S. 91, 99–100 (1972) (holding that claims founded on federal common law arise under the laws of the United States and trigger federal subject matter jurisdiction)).

132 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111(2) (1987) ("Cases arising under international law . . . are within the jurisdiction of the federal courts."); *id.* § 111 cmt. d (noting that "customary international law . . . [is] federal law" and "is considered to be like common law in the United States").

133 Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 816 (1997). Professors Trimble and Weisburd had published similar, earlier critiques. *See* Phillip R. Trimble, *A Revisionist View of Customary International Law*, 33 UCLA L. REV. 665, 669 (1986); A.M. Weisburd, *State Courts, Federal Courts, and International Cases*, 20 YALE J. INT'L L. 1, 2 (1995).

Much has been written about the modern position, the revisionists, and multiple intermediate positions. For a thorough analysis of the scholarship on this issue, see Carlos M. Vázquez, *Customary International Law as U.S. Law: A Critique of the Revisionist and Intermediate Positions and a Defense of the Modern Position*, 86 NOTRE DAME L. REV. 1495 (2011).

134 The Paquete Habana, 175 U.S. 677, 700 (1900).

135 The Nereide, 13 U.S. (9 Cranch) 388, 423 (1815) ("[T]he Court is bound by the law of nations which is a part of the law of the land.").

general common law, a species of common law repudiated by the Supreme Court in *Erie*.[136]

As applied to *Filartiga* and other ATS litigation, the Bradley and Goldsmith argument had two consequences. First, they claimed that *Filartiga*'s theory of the constitutionality of the ATS was incorrect, because customary international law was neither federal law nor jurisdiction-granting.[137] Second, they argued that federal courts had no constitutional authority to apply customary international law norms in the absence of political branch incorporation.[138]

Their attack on the modern position channeled two strains of conservative legal thought: suspicion of international law norms and rejection of expansive federal court powers, particularly the power to recognize substantive rules of law. Conservative critics viewed international law as a dangerous body of ill-defined rules, created outside of the U.S. constitutional process. They argued that it should not be enforced in the United States, or, at least, not without executive branch or congressional authorization, and should not bind the states.[139] Opposition to domestic application of international law, as discussed in Part II, has long roots in the United States. Conservative opponents of the ever-expanding role of the federal government have long feared that the federal courts would bypass the political branches of government and, relying on international law, would create judge-made rules to govern domestic issues that are properly within the control of the states.[140]

ATS cases constituted a perfect storm, combining concerns about the nature of international law and expansive federal court powers. The cases authorized federal judicial enforcement of international law norms in the absence of explicit executive or congressional adoption of those norms—and, potentially, even in the face of executive branch opposition.

The Bradley and Goldsmith analysis was firmly rooted in this conservative critique of international law and judicial lawmaking. International law, they wrote, has non-American roots[141] and has long been "viewed as some-

136 Erie R.R. v. Tompkins, 304 U.S. 64, 65 (1938). *Erie* overruled the longstanding view that federal courts could decide state law claims by applying "general common law," a body of norms that reflected "common practice and consent among a number of sovereigns," and could "provide the rules of decision in particular cases without insisting that the law be attached to any particular sovereign." Fletcher, *supra* note 14, at 1517.

137 Bradley & Goldsmith, *supra* note 133, at 831–52.

138 *Id.* at 857–74.

139 *See, e.g.*, Lee A. Casey & David B. Rivkin, Jr., *International Law and the Nation-State at the U.N.: A Guide for U.S. Policymakers*, BACKGROUNDER, HERITAGE FOUND., Aug. 18, 2006, at 1, *available at* http://www.heritage.org/research/reports/2006/08/international-law-and-the-nation-state-at-the-un-a-guide-for-us-policymakers (warning against "an advanced and determined movement" that, "through the mechanisms of international law and supernational institutions . . . challenge[s] the right of the United States to define its own legal obligations as an independent and sovereign nation-state"). Peter Spiro summarized—and contested—these views in Peter Spiro, *The New Sovereigntists*, 79 FOREIGN AFF. 9 (2000).

140 Bradley & Goldsmith, *supra* note 125, at 330–31.

141 Bradley & Goldsmith, *supra* note 133, at 868–69.

thing alien to our political and legal traditions."[142] Modern international law is amorphous,[143] includes an expansive list of norms,[144] and intrudes into areas "formerly of exclusive domestic concern,"[145] including a government's treatment of its own citizens.[146] Judicial adoption of international law norms as federal law is "in tension with fundamental constitutional principles"[147] and "basic notions of American representative democracy,"[148] as "*unelected federal judges* apply customary law made by *the world community* at the expense of state prerogatives."[149] ATS litigation and the modern position pose "a potential threat to traditional U.S. domestic lawmaking processes."[150] Bradley and Goldsmith buttressed their objections with citations to a series of law review articles arguing that a long list of human rights violations might violate customary international law.[151]

While opposition to ATS litigation is rooted in longstanding conservative concerns about international law and judicial activism, support for the domestic implementation of international law has equally deep roots, dating back to the moral and religious beliefs of the late eighteenth century, the international law advocacy of anti-slavery activists, and the internationalists who pushed for U.S. engagement with the League of Nations and drafted the Universal Declaration of Human Rights after World War II. Supporters of ATS litigation placed their support for judicial enforcement of international human rights norms squarely within this tradition. Anne-Marie Burley, for example, viewed the ATS as a reflection of the eighteenth century commitment to compliance with the law of nations, which was both a pragmatic necessity and "a moral imperative—a matter of national honor."[152] In modern times, the lawyers filing ATS cases in the 1980s and 1990s were largely public interest lawyers with a background in civil rights lawyering and a com-

142 Bradley & Goldsmith, *supra* note 125, at 369. "In the United States, international law has long suffered from doubts of legitimacy—in the academy, in policy circles, and in the popular mind." *Id.*

143 Bradley & Goldsmith, *supra* note 133, at 858.

144 *Id.* at 818, 841.

145 *Id.* at 821.

146 *Id.* at 839–42.

147 *Id.* at 817.

148 *Id.* at 857.

149 *Id.* at 868 (emphasis in original). Further, they argued, courts apply it against the states without the constitutionally authorized process. *Id.* at 868–69.

150 *Id.* at 874.

151 *Id.* at 841 nn.169–71. Bradley and Goldsmith acknowledged that most of these claims were proposed by scholars but not accepted by courts. *Id.* at 838.

152 Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AM. J. INT'L L. 461, 482 (1989); *see also* Blum & Steinhardt, *supra* note 93, at 59–62, 64–75 (explaining that modern human rights litigation has roots in eighteenth century views of international law that were largely lost in the nineteenth century and recounting the transformation of human rights law after World War II that provided the foundation for the *Filartiga* decision).

mitment to expanding both the substance and enforcement of human rights.[153]

Despite the linkage between the ATS and the debate about the modern position, the doctrinal connection is actually tenuous. Bradley and Goldsmith argued that the *Filartiga* theory of the constitutionality of the statute would fail if, as they claimed, international law is not considered part of federal common law. However, they recognized that other theories support the constitutionality of the statute,[154] including the approach later adopted in *Sosa*, when the Supreme Court held that ATS claims are based on federal common law causes of action.[155]

In addition, the debate about the modern application of the ATS is, at heart, at debate about congressional intent. Congress has the constitutional authority to create a cause of action for violations of international law; if it does so, the federal courts have jurisdiction over those claims under Article III and 28 U.S.C. § 1331, the federal question statute. The Supreme Court has held that Congress also has the constitutional authority to create a regulatory scheme and authorize the courts to recognize common law causes of action to implement that scheme.[156] The debate is over whether Congress either created a cause of action or authorized the courts to do so when it enacted the ATS.[157] That is, even those who find this result unpalatable acknowledge that Congress has the authority to enable ATS litigation, if it so chooses.

As scholars developed a better idea of the jurisprudential understandings when Congress enacted the ATS in 1789, they focused increasingly on the interaction between the likely intent of the late eighteenth century Congress that enacted the statute and modern understandings of the powers of the federal courts. In this sensitive realm of litigation, which impacted foreign affairs and required implementation of international law norms by the judiciary, did the courts have the power to recognize ATS claims without additional guidance from the legislative branch?

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153 *Filartiga*, for example, was filed by lawyers at the Center for Constitutional Rights, an organization formed during the 1960s civil rights movement to defend and advance constitutional rights.

154 Bradley & Goldsmith, *supra* note 133, at 872–73.

155 *See* discussion *infra* Section III.B. For additional exploration of the constitutional basis for the ATS, see William S. Dodge, *The Constitutionality of the Alien Tort Statute: Some Observations on Text and Context*, 42 VA. J. INT'L L. 687 (2002); Vázquez, *supra* note 133, at 1505–07.

156 Textile Workers Union v. Lincoln Mills of Ala., 353 U.S. 448, 456–57 (1957).

157 *See* Julian Ku & John Yoo, *Beyond Formalism in Foreign Affairs: A Functional Approach to the Alien Tort Statute*, 2004 SUP. CT. REV. 153, 170 ("No one doubted that if Congress, under its Article I, Section 8 power to define offenses under the law of nations, had decided to incorporate international law through a statute, it could have. The only question was whether the ATS ought to be interpreted as doing so.").

2. The Cause of Action in ATS Litigation

Independent of the debate over the modern position, ATS theorists faced two problematic challenges. The first questioned federal court power to recognize a cause of action in ATS cases.[158] Jurisdiction-granting statutes do not create a cause of action or a private right to sue,[159] and the Supreme Court has held that private parties do not have a right to sue to obtain a remedy for a violation of a federal statute unless Congress has created such a right.[160] The second challenged the scope of possible ATS claims: Even if the courts can recognize a cause of action under the ATS, what claims can be recognized and what relationship should those claims have to the very different claims that Congress would have recognized in 1789?

a. The Elusive Source of the Cause of Action

The ATS is phrased solely in terms of subject matter jurisdiction, with no explicit cause of action. Some courts responded to the cause of action challenge by concluding that the ATS, because of its unusual wording, created a cause of action as well as affording jurisdiction. The Ninth Circuit held that the ATS "creates a cause of action for violations of specific, universal and obligatory international human rights standards."[161] This approach had the important advantage of also resolving the constitutional challenge. If the ATS creates a cause of action, then the claim arises under that federal statute, and jurisdiction is proper under the Constitution's "arising under" jurisdiction.

However, this interpretation had significant flaws. First, the ATS itself speaks in terms of jurisdiction only[162] and is embedded in a jurisdiction-granting section of the Judiciary Act. Second, in the late eighteenth century,

158 As William Dodge explains in his article in this issue, ATS litigation would have taken a completely different path if the courts had concluded that the statute afforded jurisdiction over claims based on the law of the place where the tort occurred, an option left open by the *Filartiga* decision. William S. Dodge, *Alien Tort Litigation: The Road Not Taken*, 89 NOTRE DAME L. REV. 1577 (2014).

159 Tex. Indus. v. Radcliff Materials, Inc., 451 U.S. 630, 640–41 (1981) ("The vesting of jurisdiction in the federal courts does not in and of itself give rise to authority to formulate federal common law, nor does the existence of congressional authority under Art. I mean that federal courts are free to develop a common law to govern those areas until Congress acts." (citation omitted)).

160 Alexander v. Sandoval, 532 U.S. 275, 286 (2001) ("Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress."); Cort v. Ash, 422 U.S. 66, 78 (1978) (rejecting prior doctrine that courts should recognize remedies as needed to make effective rights protected by congressional statutes).

161 Hilao v. Estate of Marcos (*In re* Estate of Marcos), 25 F.3d 1467, 1475 (9th Cir. 1994). As explained in *Paul v. Avril*, 812 F. Supp. 207, 212 (S.D. Fla. 1993), "the use of the words 'committed in violation' strongly implies that a well pled tort, if committed in violation of the law of nations, would be sufficient" to create a private right to sue.

162 The original language of the statute afforded the federal courts "cognizance" of certain claims, a term that was understood in the eighteenth century to refer to the courts' power to try a case. Casto, *supra* note 15, at 479.

plaintiffs did not need to point to an independent cause of action. A violation of the common law, including general common law, carried with it a right to sue for redress.[163] Thus, Congress would not have seen a need to "create" a cause of action in order to enable private citizens to sue for this, or any, tort. As Professor William Casto said, relying on both the jurisdictional language of the statute and the jurisprudential framework of the eighteenth century, the argument that the ATS created a cause of action was "simply frivolous."[164]

An alternative interpretation of the ATS suggested that the jurisdictional statute carried with it a congressional authorization to recognize common law causes of action. The Supreme Court recognized such a delegation in *Textile Workers Union v. Lincoln Mills of Alabama*, holding that a federal statute authorized the federal courts to fashion federal common law.[165] The Eleventh Circuit endorsed this approach in *Abebe-Jira v. Negewo*, stating that "Congress, of course, may enact a statute that confers on the federal courts jurisdiction over a particular class of cases while delegating to the courts the task of fashioning remedies that give effect to the federal policies underlying the statute."[166] Commentators pointed out that this theory was anachronistic as well: as noted, at the time the ATS was enacted, the common law provided a right to sue, without need for an independent cause of action.[167] Congress would not have recognized the need to delegate to the federal courts the authority to recognize a cause of action for a violation of customary international law because the courts could and would do so as part of the judiciary's own inherent powers.

The administrations of Presidents Ronald Reagan and George W. Bush insisted that the ATS was solely jurisdictional and that federal courts did not have the constitutional power to infer a cause of action from the statute's jurisdictional grant. For example, a 2003 Bush Administration brief in *Doe I v. Unocal* stated that the ATS "does not purport to *create* any private cause of

163 *Id.* at 480–81 (explaining that jurists in the late eighteenth century "assumed . . . that domestic common law . . . provided domestic remedies for violations of the law of nations"); Dodge, *supra* note 155, at 690 ("The First Congress assumed that torts in violation of the law of nations would be cognizable at common law, just as any other tort would be.").

164 Casto, *supra* note 15, at 479–80. This language was quoted in *Sosa v. Alvarez-Machain*, 542 U.S. 692, 713 (2004).

165 353 U.S. 448, 456–57 (1957). The federal common law of admiralty also derives from a grant of jurisdiction. *See* S. Pac. Co. v. Jensen, 244 U.S. 205, 215 (1917) (holding that admiralty law is governed by federal common law); RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 655–59 (6th ed. 2009) (discussing sources of federal admiralty law).

166 Abebe-Jira v. Negewo, 72 F.3d 844, 848 (11th Cir. 1996).

167 *See supra* notes 163–64 and accompanying text.

action,"[168] and insisted that it would be "plainly erroneous" to read the statute as implicitly authorizing the courts to create such a cause of action.[169]

The cause of action dispute reflected the larger battle over the powers of the federal courts and their ability to afford remedies to injured litigants. In the last decades of the twentieth century, the Supreme Court sharply curtailed federal court power to recognize private rights to sue, concluding instead that Congress must authorize private enforcement of federal laws, and that such authorization must be explicit, not implied.[170] A private right to sue for a violation of a federal standard transforms that norm into a tool by which individuals can enforce the law. Proponents of strengthened implementation of human rights norms sought exactly that through ATS litigation: a tool by which victims and survivors of human rights abuses and human rights advocates could enforce human rights norms directly. Opponents generally urged a decreased reliance on federal courts to implement norms, including the Constitution and statutes as well as norms derived from international human rights law.

Application of these principles to the ATS proved tricky. The statute was enacted long before the Supreme Court developed the presumption against implying private rights of action. To the contrary, in the late eighteenth century, at the time the ATS was enacted, courts were *expected* to recognize common law causes of action based on both domestic common law and

168 Brief for the United States of America as Amicus Curiae at 8, Doe I v. Unocal Corp., 403 F.3d 708 (9th Cir. 2005) (Nos. 00-56603, 00-56628) [hereinafter U.S. *Unocal* Brief]; *see also* Supplemental Statement of Interest of the United States of America at 6, Doe v. Exxon Mobil Corp., 393 F. Supp. 2d 20 (D.D.C. 2005) (No. 01-CV-1357) [hereinafter U.S. *Exxon Mobil* Supplemental Statement].

169 U.S. *Unocal* Brief, *supra* note 168, at 14; *see also* U.S. *Trajano* Brief, *supra* note 28, at 26 ("A private right of action will be recognized . . . only if Congress affirmatively *intended* to confer one."); *id.* at 26–27 ("[T]here is no basis whatever to conclude that Congress intended [the ATS] to confer . . . a private right of action.").

170 *See* FALLON ET AL., *supra* note 165, at 705–07 (tracing the Court's changing stance on the powers of the federal judiciary to recognize a right to sue for a statutory violation). Judith Resnik has detailed similar restrictions on the courts' equity powers, as well as a judicial effort to discourage congressional creation of private rights to sue. Judith Resnik, *Constricting Remedies: The Rehnquist Judiciary, Congress, and Federal Power*, 78 IND. L.J. 223, 224–25 (2003). Andrew Siegel linked this move to what he described as the Rehnquist Court's "profound hostility to litigation," Andrew M. Siegel, *The Court Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court's Jurisprudence*, 84 TEX. L. REV. 1097, 1107 (2006), which, he argued, reflected its "concomitant skepticism as to the ability of litigation to function as a mechanism for organizing social relations and collectively administering justice," *id.* at 1108. Howard Wasserman has argued that "[t]he Roberts Court has shown similar hostility to litigation as a means of vindicating legal rights." Howard M. Wasserman, *The Roberts Court and the Civil Procedure Revival*, 31 REV. LITIG. 313, 332 (2012). For an analysis of the broader campaign to reduce judicial protections for individuals, see JAY M. FEINMAN, UN-MAKING LAW: THE CONSERVATIVE CAMPAIGN TO ROLL BACK THE COMMON LAW 6, 172–89 (2004) (discussing movement to undermine legal protections for consumers, workers, small business people, homeowners, and the environment, described as a "concerted effort by an array of business groups and conservative ideologues to transform the common law").

international law, which was part of that common law. In 2001, however, in *Alexander v. Sandoval*, the Court made clear that the bar on judicially inferred causes of action applied to statutes enacted before the Court developed this presumption.[171] Opponents argued that the courts should not infer or create such a cause of action in the absence of any indication in the language of the ATS suggesting that Congress intended to create a private right to sue.[172] Those who supported continuing ATS litigation distinguished *Sandoval* and related cases, arguing that they dealt with the standard for inferring statutorily created rights, while the ATS governed remedies for pre-existing violations of international law.[173] The Supreme Court adopted this approach in *Sosa*, stating that "the absence of congressional action addressing private rights of action under an international norm is more equivocal than its failure to provide such a right when it creates a statute."[174]

Scholarship on the ATS cause of action question has been inconclusive in part because, as with much legal scholarship, neither history nor legal analysis provides an answer that is convincing to all sides. After decades of research, it is generally accepted that, at the time the ATS was enacted, Congress assumed that federal courts would recognize a cause of action for violations of the law of nations, just as they did for other common law torts at the time.[175] Congress did not expressly create a cause of action for ATS claims because that was not necessary. Should the statute be applied today as Congress intended in the eighteenth century, despite the different law of nations violations at issue and the significant changes in our understanding of the common law and judicial powers? As explained in Section B of this Part, the Supreme Court in *Sosa* concluded that nothing had deprived the federal courts of the power to recognize a limited set of common law ATS claims, as they would have been empowered to do at the time the statute was enacted.

b. What Claims Are Cognizable Under the ATS?

Another intractable question underlies interpretation of the scope of the substantive claims actionable under the ATS. When the First Congress

171 Alexander v. Sandoval, 532 U.S. 275, 287–88 (2001) (rejecting the argument that the courts should give "[d]ispositive weight to the expectations that the enacting Congress had formed in light of the contemporary legal context") (internal quotation marks omitted); *see also* Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 67 n.3 (2001) (noting that the Court had "retreated from [its] previous willingness to imply a cause of action where Congress has not provided one").

172 *See, e.g.*, Brief for the United States as Respondent Supporting Petitioner at 11–14, 19–21, Sosa v. Alvarez-Machain, 542 U.S. 692 (2004) (No. 03-339) [hereinafter U.S. *Sosa* Brief].

173 *See* Ralph G. Steinhardt, *Laying One Bankrupt Critique to Rest:* Sosa v. Alvarez-Machain *and the Future of International Human Rights Litigation in U.S. Courts*, 57 VAND. L. REV. 2241, 2269–71 (2004) (arguing that *Sandoval* and later cases authorized courts to recognize a private right to sue when a statute focuses on the individuals protected by it, as does the ATS).

174 *See Sosa*, 542 U.S. at 727.

175 *See supra* note 163 and accompanying text.

chose the expression, "tort in violation of the law of nations," what norms did they intend to include? Did they intend the scope of permissible claims to evolve over time? If the claims do evolve, is that evolution open ended or limited in some way by the general contours of the norms that the 1789 Congress understood to be part of the law of nations? Did Congress assume that future generations would invest the law of nations with the meaning that they deemed appropriate? Despite thirty years of scholarship, no clear historical response to these questions has emerged—if the questions even have single answers, rather than a range of responses particular to each of the legislators who voted on section 9 of Chapter 20 of the first Judiciary Act. Instead, the answers rely on conflicting interpretations of the jurisprudence of the late eighteenth century, interpretations that are steeped in judgments about the wisdom of permitting modern federal courts to recognize claims for modern human rights violations.

The argument in support of an evolving list of claims is relatively straightforward. First, Congress chose to authorize jurisdiction over torts "in violation of the law of nations,"[176] rather than provide a list of actionable violations. Jurists at the time understood that what they called "the modern law of nations" was very different from the law of nations in effect in the past, and that it would continue to evolve.[177] They understood that the international community, not any single nation, would determine the course of that evolution.[178] From the choice of broad language, without restrictions on the term "law of nations," advocates of a flexible application of the statute conclude that Congress intended the substance to evolve without pre-ordained restrictions. Second, several scholars have suggested that the ATS was intended in part to implement a resolution of the Continental Congress that called upon states to provide remedies both for three specific violations of the law of nations and for additional "offences against the law of nations, not contained in the foregoing enumeration."[179] This suggests that the goal of the statute was to address, in general, the problem of redress for violations of the law of nations, not particular violations. Finally, in 1992, the legislative report that accompanied passage of the TVPA endorsed a broad reading of the violations covered by the ATS. That report, after discussing the *Filartiga* decision and the relationship between the TVPA and the ATS, concluded that the ATS "should remain intact to permit suits based on other norms that

176 28 U.S.C. § 1350 (2006).

177 *See* William S. Dodge, The Paquete Habana*: Customary International Law as Part of Our Law, in* INTERNATIONAL LAW STORIES 175, 194–96 (John E. Noyes et al. eds., 2007).

178 As Wilson stated at the Constitutional Convention, in opposition to a proposal that Congress be granted the authority to "define" the law of nations, "To pretend to define the law of nations which depended on the authority of all the Civilized Nations of the World, would have a look of arrogance[ ] that would make us ridiculous." 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 26, at 615 (Notes of James Madison).

179 *See* Dodge, *supra* note 92, at 227.

already exist or *may ripen in the future* into rules of customary international law."[180]

Several different approaches have sought to cabin the reach of the ATS. One approach argues that the statute was intended to reach only the three principle violations of the law of nations cited in Blackstone's *Commentaries*: piracy, violations of safe conducts, and assaults on ambassadors, which are also the three claims highlighted in the 1781 resolution.[181] Focusing on the use of the word "only" in the statute, Professor Joseph Sweeney proposed that the statute was intended to authorize claims only for some prize cases: suits for the tort committed during a capture, when the validity of the seizure was not at issue.[182] Professor Thomas Lee offered a different narrow reading of the statute, concluding that only violations of safe conducts are covered.[183] Professor Bradley argued that the statute may have been intended to apply only to defendants who are U.S. citizens, in part because he concluded that there is no constitutional basis for claims between aliens.[184] He relied as well on the assumption that the statute was intended to respond to situations in which the United States could be held liable for failing to offer redress for a violation of the law of nations, chiefly situations in which either the wrongful conduct occurred within the United States or a U.S. citizen committed the violation.[185]

Each of these theories highlights different aspects of the context in which the ATS was enacted. None is ultimately satisfying, however, because the records are sparse, over 200 years have elapsed since its enactment, and jurisprudential assumptions have evolved. In the face of this minimal history, scholars project their own views onto the sparse language of the statute.

As discussed in the analysis of *Sosa v. Alvarez-Machain* in the final Section of this Part, the Supreme Court in *Sosa* endorsed the view that the ATS incor-

180 TVPA HOUSE REPORT, H.R. REP. NO. 102-367, at 4 (1991) (emphasis added).

181 Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 813–15 (D.C. Cir. 1984) (Bork, J., concurring).

182 Joseph Modeste Sweeney, *A Tort Only in Violation of the Law of Nations*, 18 HASTINGS INT'L & COMP. L. REV. 445, 481–83 (1995). Professor Dodge discussed several alternative explanations for the use of the word "only," including to prevent British creditors from seeking relief under the statute and to limit relief in ATS suits to tort remedies. Dodge, *supra* note 92, at 254–55.

183 Thomas H. Lee, *The Safe-Conduct Theory of the Alien Tort Statute*, 106 COLUM. L. REV. 830, 848–71 (2006). Lee reached this result after concluding that the other violations listed by Blackstone were covered by separate statutes, and that the language of the statute closely matches the eighteenth century concept of safe conducts. *Id.* at 445–48.

184 Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT'L L. 587, 591–92, 619–37 (2002). *But see* Dodge, *supra* note 155, at 691–701 (arguing that "Bradley's thesis is contradicted" by both the text of the Alien Tort Statute and the statute's historical context).

185 Bradley, *supra* note 184, at 630; *see also* Anthony J. Bellia, Jr. & Bradford R. Clark, *The Alien Tort Statute and the Law of Nations*, 78 U. CHI. L. REV. 445 (2011) (arguing that the ATS was based on the obligation to redress violations of the law of nations committed by U.S. citizens, and, therefore, was intended to afford federal jurisdiction over suits by aliens against U.S. citizens for certain intentional torts).

porates an evolving notion of the law of nations, without substantive limitations, as long as the modern norms satisfy the same standard of clear definition and widespread acceptance as the three norms cited by Blackstone. Although *Sosa*'s resolution is unsatisfying to many, it has the virtue of being consistent with *Filartiga*, with most of the courts that had considered the statute before *Sosa*, and with the understanding of the statute adopted by the legislative history of the TVPA. The next subsection, however, addresses yet another doctrinal and political debate underlying the controversy over the ATS, one which may have played a key role in the *Sosa* decision.

3. Executive Branch Control over Foreign Affairs

While questions about the proper roles of the different branches of the federal government in ATS cases date back to *Filartiga*, they played out in a much more highly charged atmosphere during the administration of President George W. Bush, which vehemently opposed ATS litigation. After the September 11, 2001 attacks, the Bush Administration's commitment to strong executive powers led to heightened opposition to the involvement of both the judiciary and private party litigants in cases involving foreign affairs and, in particular, enforcement of international law norms. The executive branch claimed both the exclusive power to define the substance of international law and the constitutional right to violate international norms in the name of national security—including the international law prohibition of torture. In this context, the debates over whether international law would serve as a constraint on government power, and who, if anyone, could impose such constraints, were particularly impassioned. The ATS epitomized what the administration most opposed: it empowered non-state actors to enlist the judicial branch to enforce international rules of law, even over the objection of the executive branch.

As a doctrinal matter, ATS litigation poses a structural dilemma for the constitutional division of powers. Each case involves a plaintiff who is a citizen of a foreign state; almost all involve conduct that occurred in the territory of a foreign state; and, in most cases, the defendants are also foreign citizens. As the Supreme Court has long recognized, "[t]he conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—'the political'—Departments of the Government."[186]

The implications of this truism for ATS litigation, however, are unclear. In each case, one or more plaintiffs seek damages for wrongs allegedly inflicted by the defendant. Resolution of damage claims is a task constitutionally committed to the judicial branch of government.[187] Moreover, in most ATS cases that address events that took place in a foreign state, the

186 Oetjen v. Cent. Leather Co., 246 U.S. 297, 302 (1918).

187 *See* Kadic v. Karadžić, 70 F.3d 232, 249 (2d Cir. 1995) ("[T]he department to whom this issue has been 'constitutionally committed' is none other than our own—the Judiciary." (quoting Klinghoffer v. S.N.C. Achille Lauro, 937 F.2d 44, 49 (2d Cir. 1991))).

foreign government has not (publicly) objected to the U.S. litigation, and, in some cases, foreign governments have affirmatively supported lawsuits and opposed efforts to derail litigation. Where defendants have fled from their home states, their governments may support the right of the plaintiffs—their citizens—to seek relief that is not possible at home. The governments of the Philippines, Haiti, and Bolivia, for example, each waived the immunity of their former officials in order to facilitate ATS litigation against them in the United States.[188] In cases against multinational corporations, the home state may feel that their citizens should have access to remedies that are not available at home, including judgments that can be enforced against the corporation's U.S. assets.[189] Thus, the foreign affairs implications of the lawsuits are not always clear cut.

Some governments do object, however,[190] and the U.S. government has consistently expressed the concern that ATS cases might cause tensions with foreign governments. In *Filartiga*, the Carter Administration amicus brief acknowledged this issue, but it recognized a role for the courts in recognizing and enforcing some international law norms.[191] The brief distinguished between two categories of international rights, "rights enforceable only by the political branches" and "judicially enforceable rights."[192] Judicially enforceable rights require "specificity and universality"[193]: there must be "a widely shared understanding of the scope of this protection" and "a consensus in the international community that the right is protected."[194] If there is

188 *See, e.g.*, Mamani v. Berzain, 654 F.3d 1148, 1151 (11th Cir. 2011) (noting the Bolivian government's waiver of immunity); *In re* Grand Jury Proceedings, Doe No. 700, 817 F.2d 1108, 1110–11 (4th Cir. 1987) (accepting the Philippine government's waiver of head-of-state immunity); Paul v. Avril, 812 F. Supp. 207, 210–11 (S.D. Fla. 1993) (accepting government of Haiti's waiver of all immunities).

189 Nicaragua, among other South American states, has enacted a "blocking statute," designed to dissuade U.S. courts from dismissing cases on *forum non conveniens* grounds. Walter W. Heiser, Forum Non Conveniens *and Retaliatory Legislation: The Impact on the Available Alternative Forum Inquiry and on the Desirability of* Forum Non Conveniens *as a Defense Tactic*, 56 U. KAN. L. REV. 609, 610 (2008).

In the controversial South African apartheid litigation, the South African government endorsed litigation of the claims in a U.S. court. Letter from Jeffrey Thamsanqa Radebe, Minister of Justice & Constitutional Dev., S. Afr., to Honorable Shira A. Scheindlin, U.S. Dist. Judge for S. Dist. of N.Y. (n.d.), *available at* http://viewfromll2.files.wordpress.com/2009/12/radebeletter.pdf.

190 *See* Brief of the Governments of the United Kingdom of Great Britain and Northern Ireland and the Kingdom of the Netherlands as Amici Curiae in Support of the Respondents at 2, Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2013) (No. 10-1491) (arguing that U.S. courts should refrain from hearing cases with wholly extraterritorial facts); *see also* Presbyterian Church of Sudan v. Talisman Energy, Inc., No. 01 Civ. 9882(DLC), 2005 WL 2082846 (S.D.N.Y. Aug. 30, 2005) (arguing that the court's exercise of jurisdiction infringed on Canada's foreign relations).

191 U.S. *Filartiga* Brief, *supra* note 27, at 22.

192 *Id.* at 6.

193 *Id.*

194 *Id.* at 22.

such a consensus, "there is little danger that judicial enforcement will impair our foreign policy efforts. To the contrary, a refusal to recognize a private cause of action in these circumstances might seriously damage the credibility of our nation's commitment to the protection of human rights."[195] The *Filartiga* opinion affirmed the judicial role in determining which norms are appropriate for judicial application. In deciding that international law barred a state's torture of its own citizens, the court conducted its own assessment, treating the executive branch's views as just one source among several.[196]

Since *Filartiga*, courts and different administrations have disagreed about the proper role for the judiciary in ATS cases. Under both President Reagan and President George W. Bush, the executive branch argued strenuously that ATS cases impinge on the foreign affairs powers of the political branches, while the Clinton Administration twice informed the courts that litigation of ATS cases would not interfere with foreign policy.[197] The courts have uniformly rejected the argument that ATS claims should be dismissed under the political question doctrine.[198]

The Bush Administration's opposition to judicial involvement in ATS litigation was particularly vehement. In a series of amicus briefs and letters to courts, the administration argued that litigation of particular claims would harm foreign policy.[199] For example, in *Doe v. Exxon Mobil Corp.*,[200] a lawsuit arising out of events in Indonesia, the Department of State informed the court that the lawsuit could lead to a decrease in foreign investment in Indo-

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195 *Id.* at 22–23.

> [T]he 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 the circumstances of fact rather than on the sensitive task of establishing a principle not inconsistent with the national interest or with international justice.

Id. at 23 (quoting Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964)).

196 *See* Filartiga v. Pena-Irala, 630 F.2d 876, 884–85 (2d Cir. 1980) ("Having examined the sources from which customary international law is derived—the usage of nations, judicial opinions and the works of jurists—we conclude that official torture is now prohibited by the law of nations. . . . The treaties and accords cited above, as well as the express foreign policy of our own government, all make it clear that international law confers fundamental rights upon all people vis-a-vis their own governments." (footnotes omitted)).

197 Statement of Interest of the United States at 2, Kadic v. Karadžić, 70 F.3d 232 (2d Cir. 1995) (Nos. 94-9035, 94-9069); Statement of Interest of the United States, Nat'l Coal. Gov't of the Union of Burma v. Unocal, Inc., 176 F.R.D. 329 (C.D. Cal. 1997) (No. 96-6112), *reprinted in* Exhibit A, *Nat'l Coal. Gov't*, 176 F.R.D. at 361–62.

198 *But see* Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 823–27 (D.C. Cir. 1984) (Robb, J., concurring) (stating that he would have found the terrorism claims raised in that case barred by the political question doctrine).

199 *See* Beth Stephens, *Judicial Deference and the Unreasonable Views of the Bush Administration*, 33 BROOK. J. INT'L L. 773, 792–808 (2008) (listing and analyzing Bush Administration submissions in human rights cases).

200 473 F.3d 345 (D.C. Cir. 2007).

nesia that might undermine Indonesia's economic and political stability and the security of the entire region; it would thereby "risk a potentially serious adverse impact on significant interests of the United States, including interests related directly to the on-going struggle against international terrorism."[201] The administration also argued that ATS litigation places the courts "in the wholly inappropriate role of arbiters of foreign conduct, including international law enforcement,"[202] and that "it is the function of the political Branches, not the courts, to respond" to human rights abuses committed by foreign governments.[203] The submission concluded that judicial involvement would "raise[ ] significant potential for serious interference with the important foreign policy interests of the United States, and is contrary to our constitutional framework and democratic principles."[204]

The Bush Administration also raised concerns about the use of the ATS to challenge the U.S. government's anti-terrorism programs. The executive branch noted that "the ATS bears serious implications for our current war against terrorism," that ATS claims could be brought against "our allies in that war," and that ATS claims had already been filed "against the United States itself in connection with its efforts to combat terrorism"[205] and "against foreign nationals who have assisted our Government in the seizure of criminals abroad."[206]

In this assault on ATS litigation, the administration challenged the courts' constitutional authority to decide claims involving international law violations committed in foreign states and to interpret and apply international law. Drawing a clear line in the sand, the executive branch also issued a stern warning against any judicial effort to impose international law standards as a restraint on the U.S. government. As discussed in the following Section, controversial Bush Administration assertions of executive power may well have influenced the Supreme Court's first foray into the ATS controversy, the 2004 decision in *Sosa v. Alvarez-Machain*.

B. Sosa v. Alvarez-Machain*: The Supreme Court Cautiously Affirms ATS Litigation*

In 2004, the Supreme Court reviewed for the first time the modern application of the ATS,[207] with an opinion that addressed explicitly the cen-

201 Letter from William H. Taft, Legal Advisor, Dep't of State, to Honorable Louis F. Oberdorfer, U.S. Dist. Judge for D.C., at 1 (July 29, 2002).

202 U.S. *Exxon Mobil* Supplemental Statement, *supra* note 168, at 18.

203 U.S. *Unocal* Brief, *supra* note 168, at 4.

204 *Id.*

205 *Id.* at 3 (citing Al Odah v. United States, 321 F.3d 1134, 1144–45 (D.C. Cir. 2003)).

206 *Id.* at 3 (citing Alvarez-Machain v. United States, 266 F.3d 1045, 1051 (9th Cir. 2001)).

207 In an earlier decision, the Court had resolved a question raised by ATS cases against foreign states, holding that such claims were not barred by the Foreign Sovereign Immunities Act and did not trigger an implied exception to sovereign immunity. *See* Arg. Republic v. Amerada Hess Ship. Corp., 488 U.S. 428 (1989).

tral disagreements over judicial power to recognize claims based on violations of international law. *Sosa*'s affirmation of the modern application of the ATS was surprising, given the Rehnquist Court's efforts to restrict litigation as a means to address political and social disputes.[208] But the Court's decision is best understood as an assertion of judicial power that was, at least in part, a reaction to the Bush Administration's claims of expanded executive powers. As passions over that balance-of-powers battle cooled—and as Court personnel changed—the Court has since sought to narrow the reach of the ATS, as discussed in Part V.

The events that led to the *Sosa* decision[209] began in 1985 with the brutal torture and murder of a U.S. drug enforcement agent in Mexico.[210] Convinced that Humberto Alvarez-Machain had participated in the torture, U.S. officials hired a group of Mexican citizens, including José Francisco Sosa, to kidnap Alvarez-Machain from his office in Mexico and bring him to the United States, where he was indicted.[211] Alvarez-Machain was eventually acquitted of the criminal charges. He returned to Mexico and filed a lawsuit against the U.S. officials and Mexican citizens involved in his abduction. After the U.S. government substituted itself as a defendant in place of the U.S. officials and a series of court rulings pared down both the defendants and the claims, the district court dismissed the claims against the United States, but entered a judgment against Sosa pursuant to the ATS and awarded Alvarez-Machain $25,000 for the twenty-four hours he had spent in custody in Mexico before being delivered to law enforcement officials in the United States.[212] On appeal, the Ninth Circuit sitting en banc voted six-to-five to uphold the judgment against Sosa and to reinstate the claims against the U.S. government that the district court had dismissed.[213]

The Supreme Court had, at that point, denied petitions for certiorari in several ATS cases. On its own, the ATS claim in this case was probably not "certworthy": there was no circuit split on any ATS-related issue, no court at any level had rejected the *Filartiga* approach,[214] and the eleven judges on the

208 *See supra* note 170 (discussing the Rehnquist Court's restrictions on civil litigation).

209 *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 697–99 (2004); United States v. Alvarez-Machain, 504 U.S. 655, 657–59 (1992).

210 The murder of Enrique Camarena made news again in August 2013 with the announcement that the alleged mastermind of the crime had been released from prison in Mexico after an appellate court ruled that he should have been tried in a Mexican state court, not Mexican federal court. Randal C. Archibold & Karla Zabludovsky, *Mexican Tied to Killing of D.E.A. Agent Is Freed*, N.Y. TIMES, Aug. 10, 2013, at A4.

211 In a decision affirmed by the Ninth Circuit, the district court dismissed the indictment as a violation of the United States-Mexico extradition treaty, but the Supreme Court reversed that dismissal in 1992. *Alvarez-Machain*, 504 U.S. at 657.

212 *Sosa*, 542 U.S. at 698–99.

213 Alvarez-Machain v. United States, 331 F.3d 604 (9th Cir. 2003), *rev'd sub nom. Sosa*, 542 U.S. 692.

214 The only opposing views had been expressed in concurring opinions by individual judges. *See* Al Odah v. United States, 321 F.3d 1134, 1147 (D.C. Cir. 2003) (Randolph, J., concurring) (rejecting *Filartiga* interpretation of ATS); Tel-Oren v. Libyan Arab Republic,

Ninth Circuit en banc panel agreed that the ATS provided jurisdiction over claims for violations of universal human rights norms.[215] However, the claims against the U.S. government, which were reinstated by the Ninth Circuit, also by a six-to-five vote,[216] probably ensured that the Supreme Court would agree to review the decision.[217] Once certiorari had been granted on both issues, the case offered opponents of the modern application of the ATS an opportunity to launch a concerted attack on the statute in a case with facts that were far less sympathetic than those in any other successful ATS case.[218]

The *Sosa* opinions addressed directly the doctrinal dispute about federal court power to recognize common law causes of action for violations of customary international law. The majority opinion explicitly acknowledged that Sosa and his allies sought to curtail judicial power in these areas, and, over the strenuous objections of the three dissenting Justices, strongly asserted judicial power.[219] In so doing, the opinion also indirectly responded to the broader battle over executive branch powers that had been triggered by the Bush Administration's expanded claims of authority to conduct post-September 11 actions without judicial scrutiny.

The majority opinion first addressed the source of the cause of action in an ATS action. After agreeing with Professor Casto that the argument that the ATS itself created a cause of action was "simply frivolous,"[220] the Court recognized that Congress in 1789 assumed that the courts would use their common law powers to recognize a cause of action for a "modest" set of international law violations.[221] Next, the Court held that federal courts today

726 F.2d 774, 801–05 (D.C. Cir. 1984) (Bork, J., concurring) (arguing that the ATS was a purely jurisdictional statute and courts should not infer a cause of action in the absence of political branch authorization).

215 The five dissenting judges disagreed with the ATS analysis of the six-judge majority about the application of the statute to these facts: four argued that the extraterritorial arrest and detention did not trigger ATS jurisdiction, *Alvarez-Machain*, 331 F.3d at 654–58 (O'Scannlain, J., dissenting), and one would have dismissed the claims under the political question doctrine, *id.* at 659 (Gould, J., dissenting).

216 Judge O'Scannlain's dissent argued that, since the U.S. officials had not committed a tort, the FTCA claims were properly dismissed. *Id.* at 658 n.16 (O'Scannlain, J., dissenting).

217 The Court reversed the Ninth Circuit decision reinstating the FTCA claims, holding that the FTCA bars claims arising in a foreign state even where conduct leading to the claim took place within the United States. *Sosa*, 542 U.S. at 701–12.

218 Humberto Alvarez-Machain was not seen or heard from during the Supreme Court proceedings. Supporters of the ATS preferred to focus attention on more representative ATS plaintiffs; on the day of the oral argument, *The New York Times* published an op-ed by Dolly Filártiga. *See* Dolly Filártiga, Op-Ed., *American Courts, Global Justice*, N.Y. TIMES, Mar. 30, 2004, at A21.

219 *Sosa*, 542 U.S. at 712.

220 *Id.* at 713.

221 *Id.* at 720; *see also id.* at 724 ("The jurisdictional grant is best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time.").

retain the power to recognize such common law claims, stating that "no development in the two centuries from the enactment of § 1350 to the birth of the modern line of cases beginning with *Filartiga v. Pena-Irala* has categorically precluded federal courts from recognizing a claim under the law of nations as an element of common law."[222] The Court cautioned that federal courts should use this power sparingly, particularly in the area of international human rights, given the danger of adverse impact on foreign relations.[223] But it also emphasized that the federal judiciary has the constitutional power to recognize these claims[224] and rejected the executive branch's argument that to do so would be an unconstitutional interference with the powers of the political branches of the government.[225]

Sosa also addressed the debate over the scope of violations encompassed by the ATS, holding that the "narrow class" of modern international norms actionable under the ATS are those "of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms" upon which the statute was based.[226] That is, while the list of actionable violations would be based on evolving, modern international law norms, those norms would be limited to violations of similar stature as those that Congress had in mind when it enacted the statute. The Court then held that the abuse alleged by Alvarez-Machain—a brief detention in Mexico before being turned over to lawful authority in the United States—did not meet that standard.[227]

Justice Scalia raised two objections to the majority opinion. First, he asserted that the federal courts do not have the power to create common law causes of action, subject to limited exceptions that should be narrowly construed.[228] To the extent that the courts recognized common law claims in the eighteenth century, he wrote, they did so as part of the general common law which was repudiated by *Erie*; in the post-*Erie*, positivist era, federal court lawmaking should be limited to areas in which it is explicitly authorized by

222 *Id.* at 724–25 (citation omitted).

223 *Id.* at 725–28 (listing reasons for caution in recognizing ATS claims).

224 *Id.* at 729.

225 U.S. *Sosa* Brief, *supra* note 172, at 28–31. The Court did recognize the role of the executive branch in identifying particular lawsuits that might raise foreign policy concerns, *see Sosa*, 542 U.S. at 733 n.21 (discussing "case-specific deference to the political branches"), but did not defer to the executive branch's assessment of the viability of the claim asserted by Alvarez-Machain, *see id.* at 733–38 (evaluating and rejecting claim, but without referring to the executive branch's views).

226 *Sosa*, 542 U.S. at 724–25.

227 *Id.* at 731–38.

228 Justice Scalia recognized that the Court had accepted two exceptions: the constitutionally delegated lawmaking power in admiralty cases and *Bivens* claims for constitutional violations. He emphasized, however, that he would reject *Bivens* claims, which he described as "a relic of the heady days in which this Court assumed common-law powers to create causes of action." *Id.* at 742 (Scalia, J., concurring) (quoting Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 75 (2001) (Scalia, J., concurring)).

Congress.[229] Second, he argued that this illegitimate lawmaking—that is, the unauthorized recognition of causes of action—is particularly suspect in ATS cases, because it seeks to enforce international human rights norms, which he called "a 20th-century invention of internationalist law professors and human rights advocates."[230] In ATS cases, Justice Scalia wrote, "unelected federal judges . . . usurp[ ] . . . lawmaking power by converting what they regard as norms of international law into American law."[231] But "American law—the law made by the people's democratically elected representatives—does not recognize a category of activity that is so universally disapproved by other nations that it is automatically unlawful here, and automatically gives rise to a private action for money damages in federal court."[232]

In response, the majority noted that international law has long been viewed as part of "our" law, and that *Erie* did not bar recognition of new substantive federal common law rules. [233] Post-*Erie*, the Supreme Court has held that the federal courts have the power to develop common law within limited enclaves, including in the area of foreign affairs.[234] The Court concluded: "We think it would be unreasonable to assume that the First Congress would have expected federal courts to lose all capacity to recognize enforceable international norms simply because the common law might lose some metaphysical cachet on the road to modern realism."[235]

The ideological dispute is thus quite explicit in *Sosa*. Through the vehicle of the ATS, the Justices presented competing visions of the common-law-making powers of the federal courts and the role of modern international law in the U.S. legal system. The six-Justice majority reasserted the federal judiciary's power to apply federal common law, including common law causes of action based on international law norms.

The majority opinion also rejected executive branch claims of exclusive power over claims involving international law. The Bush Administration argued that the courts had no authority to decide ATS cases because to do so would trespass on the power of the executive branch. The brief repeated the administration's earlier arguments that courts cannot recognize a common law cause of action for a violation of international law without authorization from one of the political branches.[236] But the Court upheld judicial powers without even noting the executive branch's concerns. At no point did the

229 *Id.* at 745.

230 *Id.* at 749–50 (citing Bradley & Goldsmith, *supra* note 133, at 831–37). Justice Scalia asserted that the Framers would be "appalled" at "[t]he notion that a law of nations, redefined to mean the consensus of states on *any* subject, can be used by a private citizen to control a sovereign's treatment of *its own citizens* within *its own territory*." *Id.*

231 *Id.* at 750.

232 *Id.* at 751.

233 *Id.* at 729 (majority opinion).

234 *Id.*

235 *Id.* at 730.

236 U.S. *Sosa* Brief, *supra* note 172, at 24–40.

majority even refer to the executive branch's views about the proper interpretation of the ATS.[237]

Sosa's failure to consider the executive branch's position, much less defer to it, is particularly significant in the context of the contemporaneous debate about executive power. *Sosa* was issued on June 29, 2004, the last day of the 2003 Supreme Court term. Just one day earlier, the Court had released two decisions involving the post-September 11 "war on terror" and the Bush Administration's detainee policies: *Rasul v. Bush*[238] and *Hamdi v. Rumsfeld*.[239] In *Rasul*, the Court rejected the administration's claim that detainees held at the U.S. military base in Guantanamo Bay, Cuba, were not entitled to any judicial review of their detention.[240] In *Hamdi*, the administration argued that the courts could not review the classification of a U.S. citizen as an enemy combatant, because that determination fell within the constitutional power of the executive branch.[241] The Court rejected that approach, holding that Hamdi was entitled to challenge his detention in court.[242] In both cases, the Court upheld judicial powers in the midst of heated debate over the administration's claims to unreviewable power over military strategy and national security.

The Bush Administration's excessive claims of unreviewable executive power surely contributed to the short shrift the Supreme Court gave to the administration's views in *Sosa*. *Sosa*, *Rasul*, and *Hamdi* were part of a remarkable set of cases in the 2003 term that affirmed the "shared responsibility of the three branches" of the federal government in foreign affairs decision making.[243] As Professor Neuman observed, given the executive branch's historic dominance in matters touching upon foreign affairs, "[t]he Government's failure to persuade the Supreme Court to adopt its position on three

237 In the final section of the opinion, the Court concluded that the violation alleged by Alvarez-Machain—arbitrary arrest and detention based on his twenty-four hour detention in Mexico before he was flown to the United States for formal arrest and indictment—did not meet the standard necessary to trigger ATS jurisdiction, but did not rely on the views of the executive branch to inform this conclusion. *Sosa*, 542 U.S. at 731–38.

238 542 U.S. 466 (2004).

239 542 U.S. 507 (2004).

240 *Rasul*, 542 U.S. at 484.

241 *Hamdi*, 542 U.S. at 527 (citing Brief for the Respondents at 26, *Hamdi*, 542 U.S. 507 (No. 03-6696)).

242 *Id.* at 535–36 (noting that "[w]hile we accord the greatest respect and consideration to the judgments of military authorities in matters relating to the actual prosecution of a war, and recognize that the scope of that discretion necessarily is wide, it does not infringe on the core role of the military for the courts to exercise their own time-honored and constitutionally mandated roles of reviewing and resolving claims like those presented here," and that the Court has "long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens").

243 Gerald L. Neuman, *The Abiding Significance of Law in Foreign Relations*, 2004 SUP. CT. REV. 111, 111. Neuman's article addressed four "foreign relations" cases: *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004); *Rasul*, 542 U.S. 466; *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004); *Republic of Austria v. Altmann*, 541 U.S. 677 (2004). Neuman, *supra*, at 112–25.

important issues of foreign relations law within a month is . . . striking."[244] Each of these cases affirmed the constitutional role of the judiciary in reviewing executive branch decisions. In particular, *Sosa* affirmed judicial branch authority to interpret and apply international law, rejecting Bush Administration claims of unreviewable executive power.

Despite these striking assertions of judicial power, however, none of the decisions actually imposed substantive norms. Instead, they set out mechanisms by which the courts can hear claims, with no guarantee that courts would actually protect the substantive rights asserted in these or future cases. Remarkable as they were at the time, the decisions were also remarkably cautious, as they affirmed principles of separation of powers while imposing few substantive constraints.[245]

* * * * *

Although the *Sosa* decision set out a means to determine which claims triggered ATS jurisdiction, it decided little else about the functioning of the statute. As a result, despite *Sosa*'s apparent resolution of key doctrinal issues, litigators and scholars segued seamlessly to debate the meaning of the decision,[246] and the controversy over the statute continued unabated. *Sosa* triggered two contradictory lines of analysis. Proponents of ATS litigation emphasized that the opinion had affirmed federal court authority to recognize common law causes of action for a narrow set of human rights violations. This, they pointed out, was the holding of *Filartiga* and its progeny, which had applied the ATS to universal, definable, obligatory norms. *Sosa* cited both *Filartiga* and the *Marcos* decision with apparent approval.[247] Opponents of ATS claims focused on the Court's lengthy discussion of cautionary principles which, the Court said, should lead the federal courts to be wary of using their powers in ATS cases, for fear of interfering in foreign affairs. Judge Richard Posner captured this dichotomy in a 2011 opinion in which he noted that the "mood" of *Sosa* is cautious, even while the holding permits ATS claims to proceed.[248]

Since *Sosa* was decided, the courts have gone far beyond caution and have significantly narrowed the reach of the ATS. How is it possible that

244 Neuman, *supra* note 241, at 125.

245 In response to the detainee decisions, for example, Congress soon enacted a new framework for the treatment of post-September 11 detainees, with a controversial, limited set of procedural rights that fell far short of what their advocates had demanded. *See* Military Commissions Act of 2006, Pub. L. No. 109-366, § 7, 120 Stat. 2600 (codified at 18 U.S.C. § 2241 (2006)), *invalidated by* Boumediene v. Bush, 553 U.S. 723, 732–33 (2008).

246 *See* Ernest A. Young, Sosa *and the Retail Incorporation of International Law*, 120 HARV. L. REV. F. 28, 28 (2007) (describing the *Sosa* decision as "something of a Rorschach blot, in which [we] each . . . see[ ] what [we were] predisposed to see anyway" and "read *Sosa* as vindicating our previously expressed positions").

247 *Sosa*, 542 U.S. at 732.

248 Flomo v. Firestone Natural Rubber Co., 643 F.3d 1013, 1016 (7th Cir. 2011) (noting that the Court's discussion of actionable ATS claims "is best understood as the statement of a mood—and the mood is one of caution").

fewer than ten years after the Supreme Court seemingly affirmed *Filartiga*, the ATS has been further narrowed, and even *Filartiga*-like cases are under attack? Multiple developments altered the ATS landscape, some of them underway even before *Sosa* was decided, but gaining steam in subsequent years. The next Part addresses cases against corporations and officials of politically powerful states that provoked a powerful backlash against the statute. Part V discusses the Supreme Court's 2013 decision in *Kiobel*, in which the Court itself limited the reach of the ATS.

IV. KICKING THE HORNET'S NEST: THE WRATH OF POLITICALLY POWERFUL DEFENDANTS

In the mid-1990s, the doctrinal and policy objections to the ATS litigation still had an abstract tone. Courts had dismissed most ATS cases.[249] As of 1997, only about a dozen cases had led to judgments for the plaintiffs, and most were default judgments against defendants who left the country shortly after the complaint was filed. References to the statute in the media were largely favorable news articles or profiles of plaintiffs who described the abuses they had suffered and their efforts to obtain redress.[250] Opponents of the litigation who warned about the potential consequences of ATS litigation—the Department of Justice under the Reagan Administration, Judges Bork and Robb in *Tel-Oren*, and a few scholars—were concerned about as-yet-unrealized dangers: future courts might recognize controversial new claims, such as an international norm prohibiting the death penalty; ATS cases might trigger foreign policy problems; wealthy defendants might be pressured to settle meritless litigation; and U.S. officials might face similar claims in foreign countries.

Those objections gained increased salience when lawsuits were filed against politically powerful defendants who had the financial resources, political clout, and incentive to fight the claims and publicize their displeasure. As discussed in Section IV.A, starting in 1996, lawsuits targeted corporate defendants, including German and Swiss corporations sued for abuses during World War II[251] and U.S. corporations sued for ongoing abuses committed as part of their operations in foreign countries.[252] The Holocaust litigation

249 *See supra* note 117 and accompanying text. Most ATS claims were dismissed on preliminary motions, often for failure to state an international law violation or because the plaintiff was not an alien.

250 *See, e.g.*, Ronald Smothers, *Nightmare of Torture in Ethiopia Is Relived in an Atlanta Court*, N.Y. TIMES, May 22, 1993, at A6, *available at* http://www.nytimes.com/1993/05/22/us/nightmare-of-torture-in-ethiopia-is-relived-in-an-atlanta-court.html.

251 For an overview of the Holocaust litigation, see generally MICHAEL J. BAZYLER, HOLOCAUST JUSTICE: THE BATTLE FOR RESTITUTION IN AMERICA'S COURTS (2003). The filings of the first lawsuits in 1996 are described at pages 6–11.

252 The first modern corporate-defendant case, *Beanal v. Freeport-McMoran, Inc.*, was filed in August 1996. Complaint, Beanal v. Freeport-McMoran, Inc., 969 F. Supp. 362 (E.D. La. 1997) (No. 96-1474), *aff'd*, 197 F.3d 161, 163 (5th Cir. 1999). Later that year, lawsuits were filed against Unocal Oil for abuses in Burma and against Royal Dutch Petroleum for

drew the strong support of both state and federal government officials, leading to multi-billion dollar settlements.[253] Lawsuits filed for modern violations initially attracted little attention. However, a wide-ranging 2002 class action against scores of corporations that had done business in South Africa during the apartheid regime galvanized business community fears about the potential scope of corporate-defendant litigation. The early ATS cases were mostly litigated by public interest lawyers such as the lawyers at CCR and Paul Hoffman at the ACLU Foundation of Southern California, with assistance from small, plaintiff-side law firms. However, large law firms with class action practices filed some of the corporate-defendant cases. In 2002, after the Ninth Circuit reversed the summary judgment dismissal of claims against Unocal Oil Corporation for abuses occurring in Burma,[254] significant and expensive ATS litigation addressing the ongoing operations of modern corporations suddenly seemed a viable possibility.

During the same time period, ATS cases for the first time took aim at government officials from two states with significant influence in the United States: China and Israel.[255] Concerns about the possible impact of ATS litigation were heightened when cases challenging the response to the September 11, 2001 attacks were filed against U.S. government officials and U.S. government contractors. Section IV.B addresses the contentious question of government official immunity.

Some of the filings against corporate defendants and U.S., Chinese, and Israeli officials predated the Supreme Court's decision in *Sosa* and contributed to the furor surrounding that case. *Sosa*, however, did not directly address corporate-defendant litigation or whether U.S. or foreign government officials could be held liable under the ATS. This Part discusses the intense battle over the ATS that erupted when plaintiffs began to target corporations and other politically powerful opponents.[256]

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abuses in Nigeria. *See* Complaint, Roe v. Unocal Corp., 70 F. Supp. 2d 1073 (C.D. Cal. 1999) (No. 96-6112); Complaint, Doe v. Unocal Corp., 963 F. Supp. 880 (C.D. Cal. 1997) (No. 96-6959); Complaint, Wiwa v. Royal Dutch Petroleum Co., 2002 WL 319887 (S.D.N.Y. Feb. 28, 2002) (No. 96-8386).

253 *See* Michael J. Bazyler & Roger P. Alford, *Introduction* to HOLOCAUST RESTITUTION: PERSPECTIVES ON THE LITIGATION AND ITS LEGACY 1, 3–4 (Michael J. Bazyler & Roger P. Alford eds., 2006) (providing a brief timeline of Holocaust cases and settlements).

254 Doe I v. Unocal Corp., 395 F.3d 932, 962 (9th Cir. 2002), *vacated*, 395 F.3d 978 (9th Cir. 2003).

255 *See* Jacques deLisle, *Human Rights, Civil Wrongs and Foreign Relations: A "Sinical" Look at the Use of U.S. Litigation to Address Human Rights Abuses Abroad*, 52 DEPAUL L. REV. 473, 473–78 (2002) (noting that, until the series of lawsuits against officials of China that started in 2000, ATS cases had been filed against officials of regimes that were either defunct or "politically unimportant" to the United States).

256 Nzelibe offers a slightly different list of factors that produced a backlash against ATS litigation during the administration of President George W. Bush: a changed political climate after September 11, 2001 that raised scrutiny on Bush Administration tactics; opposition to Supreme Court citations to foreign and international law; and corporate-defendant ATS cases. Nzelibe, *supra* note 104, at 508–09.

A. Suing Corporations

The possibility of ATS litigation against corporations attracted the attention of scholars, the business community, and human rights advocates. The responses followed predictable lines: corporate interests expressed fears that the cases would have a devastating impact on the business environment, while human rights advocates were elated by the prospect of a legal mechanism that might hold corporations accountable for serious human rights abuses. Both sides exaggerated the potential consequences of the lawsuits. And, once again, the scholarship on this issue proved inconclusive.

This Section starts with a brief history of the corporate accountability movement, the backdrop to the ATS corporate-defendant cases. After an overview of those cases, the Section turns to an analysis of the role of corporate-defendant ATS litigation in the broader debates about multinational corporations, the rule of law, and international law.

1. The Corporate Accountability Movement

Complaints about multinational corporations and violations of human rights date back to the early years of the colonial era. The British and Dutch governments granted the East India Companies sweeping quasi-governmental power in Asia, Africa, and the Americas, power that they used to oppress human beings and exploit natural resources.[257] The abuses sparked early consumer human rights protests, including protests against the slave trade and boycotts in Massachusetts during the eighteenth and nineteenth centu-

257 *See, e.g.*, Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*, 40 HARV. INT'L L.J. 1, 37 (1999) (describing problems in the administration of colonies by corporate bodies as the "unsurprising" result of the fact that "the territories were administered simply for profit"); Bruce P. Frohnen & Charles J. Reid, Jr., *Diversity in Western Constitutionalism: Chartered Rights, Federated Structure, and Natural-Law Reasoning in Burke's Theory of Empire*, 29 MCGEORGE L. REV. 27, 34–46 (1997) (describing East India Company's rule in India as one of tyranny, despotism, corruption, and bribery); Tayyab Mahmud, *Cheaper Than a Slave: Indentured Labor, Colonialism, and Capitalism*, 34 WHITTIER L. REV. 215, 227–42 (2013) (chronicling indentured servitude of East Indians); Teemu Ruskola, *Conceptualizing Corporations and Kinship: Comparative Law and Development Theory in a Chinese Perspective*, 52 STAN. L. REV. 1599, 1677 (2000) (describing the British East India Company as "one of the most notorious corporations of all time," with a bitter legacy in China); *see also* Beth Stephens, *The Amorality of Profit: Transnational Corporations and Human Rights*, 20 BERKELEY J. INT'L L. 45, 49–53 (2002) (surveying corporate human rights abuses from the Holocaust to more recent times).

ries.[258] International law affirmatively supported the colonial states' unlimited power over their colonies.[259]

In the decades following World War II, most of the colonies gained independence. As equal sovereigns under international law and voting members of international organizations, they demanded a new economic relationship with the developed countries and pushed the United Nations to consider a framework for a new international economic order.[260] Developing states expropriated the investments of foreign corporations and negotiated new agreements that gave them a greater share of the profits earned in their territory.[261] They also began negotiations on a U.N. Code of Conduct on Transnational Corporations that would have required respect for local laws and policies and reinvestment of profits in the host countries.[262] With the triumph of the global economy and free trade in the 1990s, however, efforts to restructure the global economy collapsed. Instead, many developing states have engaged in a competition to attract foreign investment, in part through guarantees of favorable legal treatment for foreign corporations that shield those corporations from liability for their conduct.[263]

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258 *See* Donald C. Dowling, Jr., *The Multinational's Manifesto on Sweatshops, Trade/Labor Linkage, and Codes of Conduct*, 8 TULSA J. COMP. & INT'L L. 27, 52 (2000) ("As far back as the seventeenth century, Britons were outraged at the East India Company's ventures in the slave trade."); Akhil Reed Amar, *A State's Right, a Government's Wrong*, WASH. POST, Mar. 19, 2000, at B1 (noting that Massachusetts citizens boycotted tea from the morally unattractive East India Company in the eighteenth century).

259 *See* 1 LASSA OPPENHEIM, INTERNATIONAL LAW 219 (1905) ("Colonies rank as territory of the motherland . . . ."); Anghie, *supra* note 257, at 9 (analyzing the incorporation of colonialism within international legal doctrine); Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443, 452–53 (2001) (noting the legal support and legitimacy international law afforded to the home state colonial power); Malcolm Shaw, *The Western Sahara Case*, 49 BRIT. Y.B. INT'L L. 119, 133–34 (1978) (noting that international law denied legal personality to non-European entities).

260 Ratner, *supra* note 259, at 454–55.

261 *Id.* at 455–56.

262 *Id.* at 457; *see* Letter dated May 31, 1990 from the Chairman of the Commission on Transnational Corporations, to the President of the Economic and Social Council, U.N. Doc. E/1990/94 (June 12, 1990); Rep. of the Comm'n on Transnational Corps., Spec. Sess., March 7–18 and May 9–21, 1983, U.N. Doc. E/1983/17/Rev. 1, Annex II (1983); Peter T. Muchlinski, *Attempts to Extend the Accountability of Transnational Corporations: The Role of UNCTAD*, *in* LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INTERNATIONAL LAW 97, 98–102 (Menno T. Kamminga & Saman Zia-Zarifi eds., 2000).

263 Ratner, *supra* note 259, at 458–59; *see also* Gary Born, *A New Generation of International Adjudication*, 61 DUKE L.J. 775, 831–43 (2012) (discussing bilateral and regional investment agreements and international investment arbitration mechanisms). For discussions of the potential for conflict between the protections that these agreements afford to corporations and human rights, see LUKE ERIC PETERSON, HUMAN RIGHTS AND BILATERAL INVESTMENT TREATIES (2009), *available at* http://www.etoconsortium.org/nc/en/library/documents/?tx_drblob_pi1[downloadUid]=38; Marc Jacob, *International Investment Agreements and Human Rights* (INEF Inst. For Dev. & Peace, Research Paper, 2010), *available at* http://www.humanrights-business.org/files/international_investment_agreements_and_human_rights.pdf.

In 2003, a subcommittee of the U.N. Human Rights Commission released a broad code of conduct for corporations, based on the subcommittee's assessment of existing international norms.[264] The code provisions incorporated the duty to refrain from violations such as genocide and torture, along with more wide-ranging obligations to "contribute to the full realization" of economic and social rights, such as adequate food and water, health, housing, and education. The response was swift and decisive: the Human Rights Commission ended the process and declared that the code had no legal significance.[265] Faced with strong pressure from the human rights community, however, the Commission agreed to appoint a Special Rapporteur to study international law constraints on corporate behavior. The Rapporteur rejected the subcommittee's approach,[266] then developed an alternative "framework," accepted by the U.N. Human Rights Council, that specifies that corporations should respect human rights. It did not, however, state that corporations have a legal obligation to do so.[267]

During the fifty years since the wholesale dismantling of colonialism, the debate over whether international law will serve as a restraint on the behavior of multinational corporations has cycled through multiple iterations. Opponents have beaten back repeated efforts to develop binding international norms. Corporate-defendant ATS claims threw fuel on this explosive controversy, with both advocates and opponents viewing the threat of significant damage awards from U.S. courts as a possible game-changer.

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264 U.N. Econ. & Social Council, Comm'n on Human Rights, Sub-Comm'n on Promotion and Protection of Human Rights, Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (Aug. 26, 2003) [hereinafter U.N. Econ. & Social Council, Norms]. For a history of the norms and subsequent U.N. activities on corporate human rights responsibilities, see generally Jena Martin Amerson, *"The End of the Beginning?": A Comprehensive Look at the U.N.'s Business and Human Rights Agenda from a Bystander Perspective*, 17 FORDHAM J. CORP. & FIN. L. 871 (2012).

265 *See* Comm'n on Human Rights, Summaries of Post-Sessional Meetings and Other Activities of the Expanded Bureau During the Period from May to September 2004, at 26–27, U.N. Doc. E/CN.4/IM/2004/2, (Sept. 28, 2004), *available at* http://www2.ohchr.org/english/bodies/chr/informal/documents.htm.

266 John G. Ruggie described the earlier effort to establish and codify a list of corporate human rights norms as a "train wreck." John G. Ruggie, Remarks at the Forum on Corporate Social Responsibility 2 (July 14, 2006), *available at* http://www.reports-and-materials.org/Ruggie-remarks-to-Fair-Labor-Association-and-German-Network-of-Business-Ethics-14-June-2006.pdf.

267 *See* Spec. Rep. of the U.N. Secretary-General, Report of the Special Representative of the Secretary-General on the Issue of Human Rights & Transnational Corporations and Other Business Enterprises, at 2–3, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011), *available at* http://www.business-humanrights.org/media/documents/ruggie/ruggie-guiding-principles-21-mar-2011.pdf; U.N. Econ. & Social Council, Norms, *supra* note 264, at 4–7.

2. Corporate-Defendant ATS Claims

Although a dozen ATS cases were filed against corporations before *Filartiga*, and another dozen between 1980 and 1997, the courts dismissed almost all of them on preliminary motions, generally because they alleged domestic tort or contract claims, not violations of international law.[268] None questioned whether the statute could be used against a corporation. As of 1997, all of the successful ATS claims had been filed against former foreign government officials.

The 1996 Second Circuit decision in *Kadic v. Karadžić*[269] articulated for the first time the legal framework for holding a private actor liable in an ATS lawsuit. In *Kadic*, survivors of genocide in Bosnia-Herzegovina sued Radovan Karadžić, the leader of the Bosnian Serbs and head of Srpska, the unrecognized Bosnia-Serb government. The district court dismissed the complaint, concluding that Karadžić was not a state actor and that international law norms did not bind a private actor.[270] The Second Circuit reversed, holding that a non-state actor could be held liable either when committing violations that do not require state action, such as genocide, war crimes, and crimes against humanity, or when acting in complicity with a state actor to commit violations that do require state action, such as torture and summary execution.[271]

Applied to corporations, the *Kadic* holding suggested that a corporate defendant could be held liable under the ATS either for direct involvement in violations such as genocide, the slave trade, or crimes against humanity, or for complicity in violations such as torture or summary execution. A handful of lawsuits against multinational corporations, alleging responsibility for human rights abuses committed in the course of their foreign operations, soon followed. These claims initially had little success, however, and generated little response from the business community.[272] A blockbuster series of class actions filed around the same time against Swiss, Austrian, and German banks, insurance companies, and other corporations for World War II abuses received far more attention. Although several were dismissed, a handful of cases settled for billions of dollars in 1997 and 1998.[273] While many observ-

268 *See* Stephens, *supra* note 199, at 813–18 (summarizing and listing corporate-defendant ATS cases as of 2007). In a claim filed in 1997 against a private corporation operating an immigration detention facility, several plaintiffs settled and one obtained a jury verdict on a state law claim, but lost on her ATS claim. *See* Jama v. Esmor Corr. Serv., Inc., No. 97-3093, 2008 WL 724337, at *1, *4 (D.N.J. Mar. 17, 2008).

269 70 F.3d 232 (2d Cir. 1995).

270 *Id.* at 239.

271 *Id.* at 236, 241–42, 245.

272 *See, e.g.*, Aguinda v. Texaco, Inc., 303 F.3d 470 (2d Cir. 2002); Beanal v. Freeport-McMoran, Inc., 197 F.3d 161 (5th Cir. 1999); Wiwa v. Royal Dutch Petroleum Co., No. 96 Civ. 8386 (KMW), 2002 WL 319887 (S.D.N.Y. Feb. 28, 2002); Doe v. Unocal Corp., 963 F. Supp. 880 (C.D. Cal. 1997).

273 For an extensive discussion of the Holocaust restitution litigation, see generally BAZYLER, *supra* note 251.

ers praised the outcome, others argued vociferously that the litigation constituted a legal shakedown.[274]

In 2002, the modern corporate-defendant cases began to attract attention as well. A state court ruled that claims against Unocal for abuses in Burma could proceed to trial,[275] prompting a commentator writing in *The Wall Street Journal* to predict that the ruling "could subject a long list of U.S. companies to lawsuits in American courts as human-rights groups seek to expand the reach of American tort law to foreign soil."[276] A 2002 column in *The Nation* noted that Wall Street was "paying attention," "watching and waiting—to see if Third World locals screwed by transnationals can obtain justice in [U.S.] courts far from their villages."[277] A litigator representing plaintiffs in corporate-defendant cases asserted that stock fund managers were calling to see if they should worry about the impact that large human rights damage awards might have on the corporations in which they invested.[278] Later that year, the Ninth Circuit held that Unocal could be held liable under the ATS for aiding and abetting violations committed by the Burmese military forces, including forced labor, torture and executions.[279]

As of 2012, approximately sixty cases against corporate defendants had asserted ATS jurisdiction over alleged violations of international law after the Ninth Circuit decision in *Unocal* held that such claims were a viable application of the ATS.[280] Many were dismissed quickly for lack of personal jurisdiction or other pleading problems. About twenty led to protracted

274 *See, e.g.*, Charles Krauthammer, *Reducing the Holocaust to Mere Dollars and Cents*, L.A. TIMES, Dec. 4, 1998, at B9 (labeling lawyers representing plaintiffs in the Holocaust litigation as "shysters" who were engaged in a "shakedown" of Swiss, Austrian, and German corporations).

275 Doe v. Unocal Corp., Nos. BC 237980, BC 237679 (Cal. Super. Ct. Sept. 10, 2002), *available at* http://www.earthrights.org/legal/doe-v-unocal (last visited Jan. 24, 2014) (follow "Unocal-Vicarious-Liability-MSA-Ruling.pdf" hyperlink).

276 Peter Waldman, *Unocal Will Stand Trial Over Myanmar Venture*, WALL ST. J. (June 11, 2002), http://lrights.igc.org/press/venture061102.htm.

277 David Corn, *Corporate Human Rights*, THE NATION, July 15, 2002, *available at* http://www.thenation.com/article/corporate-human-rights, *quoted in* BAZYLER, *supra* note 251, at 58.

278 *Id.* (quoting Terry Collingsworth, Executive Director of the International Labor Rights Fund).

279 Doe I v. Unocal Corp., 395 F.3d 932, 962–63 (9th Cir. 2002). The parties in *Doe I v. Unocal Corp.* settled under undisclosed terms after extensive litigation. *See* Bloomberg News, *Unocal Settles Rights Suit in Myanmar*, N.Y. TIMES (Dec. 14, 2004), http://www.nytimes.com/2004/12/14/business/14unocal.html.

280 This number is approximate, includes only cases with reported decisions, and is based on the cases listed in an amicus brief filed in support of the corporate defendants in *Kiobel*. *See* Brief of Product Liability Advisory Council, Inc., as Amicus Curiae in Support of Respondents, Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2013) (No. 10-1491), 2012 WL 392544 at 5-6, *1AA. According to the same source, approximately sixty additional cases cited the ATS but failed to specify a violation of international law.

litigation.[281] A lawsuit against Pfizer, Inc., for example, alleged that the pharmaceutical company failed to seek informed consent before including Nigerian children in a clinical trial that caused serious medical complications.[282] Many corporate-defendant cases alleged that a corporation bore responsibility for human rights abuses committed by government security forces, often because they aided and abetted those violations or conspired with the government, or because the security forces acted as the corporation's agent. In *Wiwa v. Royal Dutch Petroleum Co.*,[283] for example, the plaintiffs alleged that the company could be held liable for the Nigerian military's violent attacks on civilians protesting the oil corporation's operations. A number of cases have alleged that U.S. corporations operating in Colombia and Guatemala hired private paramilitary groups that violently suppressed labor union activity.[284]

Prior to 2010, corporate-defendant ATS decisions had assumed, with little or no discussion, that the liability rules applicable to natural persons applied equally to corporations. In response to a concurring opinion that questioned whether the ATS claims encompassed corporate defendants,[285] Judge Robert Katzmann explained: "We have repeatedly treated the issue of whether corporations may be held liable under the AT[S] as indistinguishable from the question of whether private individuals may be."[286] Subsequent cases uniformly rejected application of different rules to corporate defendants.[287]

In 2010, however, in a two-to-one decision in *Kiobel v. Royal Dutch Petroleum Co.*,[288] the Second Circuit held that the ATS does not provide jurisdic-

281 This number is based on the lists compiled in the Products Liability Advisory Council brief, *supra* note 280.

282 Abdullahi v. Pfizer, Inc., 562 F.3d 163 (2d Cir. 2009). The case settled after an appellate court refused to dismiss the complaint. *See* Joe Stephens, *Pfizer Reaches Settlement Agreement in Notorious Nigerian Drug Trial*, WASH. POST (Apr. 4, 2009), http://www.washingtonpost.com/wp-dyn/content/article/2009/04/03/AR200904030 1877.html.

283 226 F.3d 88 (2d Cir. 2000) (reversing dismissal of case on *forum non conveniens* grounds). The parties in *Wiwa* settled on the eve of trial. *See* Ed Pilkington, *Shell Pays Out $15.5m over Saro-Wiwa Killing*, THE GUARDIAN (June 8, 2009, 7:07 PM), http://www.guardian.co.uk/world/2009/jun/08/nigeria-usa.

284 *See* Aldana v. Del Monte Fresh Produce N.A., Inc., 578 F.3d 1283, 1300 (11th Cir. 2009) (dismissed on *forum non conveniens* grounds); Sinaltrainal v. Coca-Cola, Co., 578 F.3d 1252 (11th Cir. 2009) (affirming dismissal of ATS claims); Romero v. Drummond Co., 552 F.3d 1303, 1317 (11th Cir. 2008) (dismissing for failure to show a sufficient relationship between the corporate defendant and the Colombian government).

285 The issue was first raised in Judge Korman's concurring opinion in a 2007 ATS decision. *See* Khulumani v. Barclay Nat. Bank Ltd., 504 F.3d 254, 321 (2d Cir. 2007) (Korman, J., concurring in part and dissenting in part).

286 *Id.* at 282 (Katzmann, J., concurring).

287 Even after Judge Korman's opinion first raised the issue, "[e]very court that has passed on the question has rejected the contention." Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 161 (2d Cir. 2010) (Leval, J., concurring), *aff'd on other grounds*, 133 S. Ct. 1659 (2013).

288 621 F.3d 111, *aff'd on other grounds*, 133 S. Ct. 1659.

tion over claims against corporate defendants because international law does not recognize corporate liability for human rights violations. The majority concluded that corporations cannot be held liable under the ATS in the absence of a clearly defined, widely accepted international norm that specifically holds corporations liable for human rights violations.[289] Judge Pierre Leval forcefully disagreed, arguing that federal law, not international law, determines which defendants can be held liable in ATS cases, because international law leaves to domestic law the decision as to how to allocate responsibility for a violation of its norms.[290] He also rejected the conclusion that international law does not recognize corporate liability, arguing that international law norms bind corporations to the same extent as natural persons.[291]

Three circuit courts rejected the *Kiobel* reasoning, holding that the ATS does permit suits against corporate defendants.[292] The Supreme Court granted a petition for certiorari on the corporate accountability issue in *Kiobel*.[293] However, after briefing and oral argument on that question, the Court asked for reargument on a separate issue: whether the ATS applies to conduct occurring in the territory of a foreign state,[294] a topic addressed in Part V. The Supreme Court's opinion in *Kiobel* did not address corporate liability, although the discussion in all of the concurring opinions seemed to assume that corporations can be defendants in ATS lawsuits.[295] Predictably, proponents of corporate-defendant ATS claims argued that *Kiobel* held that such claims can be filed against corporations,[296] while opponents of corpo-

289 *Id.* at 149.

290 *Id.* at 170–74 (Leval, J., concurring).

291 *Id.* at 179–81. The Second Circuit denied the plaintiffs' petition for rehearing en banc by a 5-5 vote. *See* Kiobel v. Royal Dutch Petroleum Co., 642 F.3d 379 (2d Cir. 2011) (Katzmann, J., dissenting) (noting the 5-5 vote).

292 Sarei v. Rio Tinto, PLC, 671 F.3d 736, 748 (9th Cir. 2011) (en banc); Doe v. Exxon Mobil Corp., 654 F.3d 11, 84 (D.C. Cir. 2011); Flomo v. Firestone Natural Rubber Co., 643 F.3d 1013, 1021 (7th Cir. 2011). An earlier decision from the Eleventh Circuit also upheld ATS corporate liability. *See* Romero v. Drummond Co., 552 F.3d 1303, 1315 (11th Cir. 2008).

293 Kiobel v. Royal Dutch Petroleum Co., 132 S. Ct. 472 (2011) (mem.).

294 Reargument Order, Kiobel v. Royal Dutch Petroleum Co., 565 U.S. (Mar. 5, 2012) (No. 10-1491).

295 Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1662–69 (2013); *id.* at 1669 (Kennedy, J., concurring); *id.* at 1669–71 (Alito, J., concurring); *id.* at 1671–78 (Breyer, J., concurring); *see* Doe I v. Nestle USA, Inc., 738 F.3d 1048, 1049 (9th Cir. 2013) (describing *Kiobel* as "suggesting in dicta that corporations may be liable under ATS so long as presumption against extraterritorial application is overcome").

296 *See, e.g.*, Marco Simons, *After Kiobel, Extraterritoriality Is Not a Question of Subject Matter Jurisdiction Under the Alien Tort Statute—and Neither Is Corporate Liability*, CONCURRING OPINIONS (May 13, 2013), http://www.concurringopinions.com/archives/2013/05/after-kiobel-extraterritoriality-is-not-a-question-of-subject-matter-jurisdiction-under-the-alien-tort-statute-and-neither-is-corporate-liability.html; *see also* Katie Redford, *Commentary: Door Still Open for Human Rights Claims After* Kiobel, SCOTUSBLOG (Apr. 17, 2013, 6:48 PM), http://www.scotusblog.com/2013/04/commentary-door-still-open-for-human-rights-claims-after-kiobel/.

rate liability argued that *Kiobel* implied nothing about corporate-defendant cases.[297]

3. The ATS and the Battle over Corporate Accountability

Multiple forces combined to create a storm of opposition to ATS corporate-defendant litigation. The cases gained traction at a time when the United States was in the midst of a prolonged conservative backlash against litigation as a means of resolving disputes.[298] The Supreme Court had cut back on litigation in several decisions that restricted access to the courts.[299] Both Congress and the judiciary viewed class actions with disfavor.[300] At the same time, as discussed in subsection IV.A.1, with the triumph of a global free trade agenda, legal restraints on transnational corporate activities had lost favor, replaced by a push to remove barriers to international trade and to facilitate foreign investment. In combination, these two trends—anti-litigation and anti-regulation of international investment—created a hostile environment for ATS claims against corporations. At the same time, a growing global movement actively sought means to hold accountable multinational corporations. Multinational enterprises are notoriously difficult to regulate in any one country.[301] As a result, activists argued that victims of corporate abuses had no viable remedies for violations of core human rights norms, including torture, executions, and forced labor.

Against the backdrop of this battle over corporate accountability, the corporate-defendant ATS cases precipitated a high-stakes debate about whether international law, enforced through ATS actions in U.S. courts, should serve as a restraint on conduct by multinational corporations that violates human rights. Given that the corporations were likely to have assets subject to the jurisdiction of U.S. courts that could be used to satisfy any judgments, the stakes were significantly higher than in foreign official cases. Moreover, in addition to the mesmerizing effect of the possibility of large,

297 *See, e.g.*, John Bellinger, *Reflections on Kiobel*, LAWFARE (Apr. 22, 2013, 8:52 PM), http://www.lawfareblog.com/2013/04/reflections-on-kiobel/; Eugene Kontorovich, *A Supreme Rebuke to Global Forum-Shopping*, WALL ST. J. (Apr. 22, 2013, 7:20 PM), http://online.wsj.com/news/articles/SB10001424127887324493704578430592807923134; Julian Ku & John Yoo, *The Supreme Court Unanimously Rejects Universal Jurisdiction*, FORBES (Apr. 21, 2013, 10:00 AM), http://www.forbes.com/sites/realspin/2013/04/21/the-supreme-court-unanimously-rejects-universal-jurisdiction.

298 *See, e.g.*, David C. Johnson, *The Attack on Trial Lawyers and Tort Law* 1 (Commonweal Inst., Report, Oct. 1, 2003) (describing "the 'tort reform' movement" as "ideologically associated with a network of organizations . . . which are part of what they themselves call the 'conservative movement'").

299 *See supra* note 170.

300 *See, e.g.*, Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4.

301 *See* PHILLIP I. BLUMBERG, THE MULTINATIONAL CHALLENGE TO CORPORATION LAW 139–40 (1993) (noting that, in the absence of multinational enforcement mechanisms, multinational corporations move their resources and operations among different states to avoid legal regulation); *see also* Stephens, *supra* note 257, at 56–59 (describing the difficulty of regulating multinational corporations).

collectible damage awards, advocates on both sides of the issue saw the precedents as important because of their potential impact on the broader debate about corporate accountability. While the accountability movement sought both to strengthen the substantive norms applicable to corporations and to create mechanisms to enforce those norms, corporations fought hard to limit both. As a result, each case was litigated as if the stakes involved much more than a claim for damages by particular plaintiffs who alleged that a particular corporation bore legal responsibility for their injuries.

In this battle over the merits of ATS litigation as a viable means to hold corporations accountable, both sides were undercut by exaggeration and overreaching. The apartheid class action, for example, which was originally filed against dozens of corporations, some with only a tangential connection to the human rights abuses in South Africa,[302] fueled the narrative that ATS claims were an attack on global capitalism and foreign investment, initiated by out-of-control class action lawyers. Opponents seized on this case as evidence that the entire line of corporate-defendant litigation was based on a weak "doing business" legal theory and was spurred by greedy class action lawyers.[303] Since the few cases that survived pre-trial motions settled out of court, none of the plaintiffs actually proved their factual allegations at trial.

Exaggerated claims of economic harm undermined the credibility of opponents. The Bush Administration, for example, claimed that a lawsuit against Exxon Mobil, based on the corporation's collaboration with security forces in a war-torn section of Indonesia, could drive foreign investment out of Indonesia, leading to the collapse of the Indonesian economy and the consequent destabilization of the entire region.[304] Others argued that ATS litigation might cause the collapse of the world economy.[305] In a decision in

302 For a description of the multiple complaints initially filed in the cases, see *In re S. African Apartheid Litig.*, 346 F. Supp. 2d 538 (S.D.N.Y. 2004). After a dismissal was reversed on appeal, the plaintiffs filed an amended complaint that drastically narrowed the claims and the number of defendants. *See In re South African Apartheid Litigation*, HUMAN RIGHTS & HARVARD LAW, http://hrp.law.harvard.edu/areas-of-focus/alien-tort-statute/in-re-south-african-apartheid-litigation/ (last visited Mar. 12, 2014) (describing history of case).

303 *See* Warren Richey, *U.S. High Court Allows Apartheid Claims Against Multinationals*, CHRISTIAN SCI. MONITOR (May 13, 2008), http://www.csmonitor.com/USA/Justice/2008/0513/p02s01-usju.html (noting that opponents of the apartheid lawsuit had described the case as based on "doing business" in apartheid South Africa, and had labeled the litigants "ambulance chasers").

Many observers thought that the Supreme Court would grant review of the apartheid decision; the Court expressed concern about the litigation in a footnote in *Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n.21 (2004), and the Second Circuit reversed dismissal of the cases in a 2-1 decision in which the majority itself issued two conflicting opinions. The Supreme Court, however, was unable to obtain a quorum to consider the petition for certiorari. *See* Khulumani v. Barclay Nat. Bank Ltd., 504 F.3d 254 (2d Cir. 2007), *aff'd due to lack of a quorum sub nom.* Am. Isuzu Motors, Inc. v. Ntsebeza, 553 U.S. 1028 (2008) (mem.).

304 Letter from William H. Taft to Louis F. Oberdorfer, *supra* note 201, at 1, 3–4 (discussing Doe v. Exxon Mobil, 393 F. Supp. 2d 20 (D.D.C. 2005)).

305 GARY CLYDE HUFBAUER & NICHOLAS K. MITROKOSTAS, AWAKENING MONSTER: THE ALIEN TORT STATUTE OF 1789, at 37–43 (2003).

a case against Firestone, Judge Posner gave short shrift to inflated arguments about the economic impact of human rights litigation:

> One of the amicus curiae briefs argues, seemingly not tongue in cheek, that corporations shouldn't be liable under the Alien Tort Statute because that would be bad for business. That may seem both irrelevant and obvious; it is irrelevant, but not obvious. Businesses in countries that have and enforce laws against child labor are hurt by competition from businesses that employ child labor in countries in which employing children is condoned.[306]

In the outpouring of commentary and amicus briefs on this issue, both sides have relied heavily on history, drawing opposite conclusions from the same sets of facts. Proponents of corporate ATS liability point to corporate tort liability under domestic law in the eighteenth century, along with complaints that corporations had violated international norms, as evidence that the Congress that enacted the ATS would have expected it to apply to corporations as well as natural persons.[307] They also cite precedents from the Nuremberg Tribunals, which found that corporations had engaged in violations of international law.[308] Opponents respond by pointing to the lack of explicit international law claims against corporations at either point in history.[309] They insist that there is no corporate liability under the ATS in the absence of explicit recognition of an international norm of corporate liability.[310]

In the absence of a decisive answer, the logic offered by each side has been incapable of budging the other. The debate has instead been defined by a broader controversy over corporate accountability, focusing on whether international law norms apply to corporations, and, if so, how those norms should be enforced.

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306 Flomo v. Firestone Natural Rubber Co., 643 F.3d 1013, 1021 (7th Cir. 2011). In response to a petition for rehearing of the Second Circuit *Kiobel* decision, Judge Jacobs, who had joined the majority in the panel opinion rejecting corporate liability, offered a surprisingly direct analysis of the policy concerns underlying his rejection of corporate ATS claims. Kiobel v. Royal Dutch Petroleum Co., 642 F.3d 268, 269 (2d Cir. 2011) (denial of petition for rehearing) (Jacobs, J., concurring). Stating that foreign corporations "are often engines of their national economies," he described ATS litigation as a means "to beggar them" through hefty damage awards and legal fees, impacting "the life and death of corporations," with "supreme consequences" for their home countries. *Id.* at 270. "[I]nvasive discovery," he argued, could coerce settlements and render the courts "instruments of abuse and extortion." *Id.* at 271. Judge Jacobs concluded that the only practical impact of ATS claims against corporations would be "abuse of the courts to extort settlements." *Id.*

307 *See* Brief of Professors of Legal History, as Amici Curiae in Support of Petitioners, Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2013) (No. 10-1491), 2011 WL 2472743, at *9–24.

308 *See* Brief of Nuremberg Scholars, as Amici Curiae in Support of Petitioners, *Kiobel*, 133 S. Ct. 1659 (No. 10-1491), 2011 WL 2743196, at *11–20.

309 Julian G. Ku, *The Curious Case of Corporate Liability Under the Alien Tort Statute: A Flawed System of Judicial Lawmaking*, 51 VA. J. INT'L L. 353, 379–82 (2011).

310 *Id.* at 377–89.

B. U.S. and Foreign State Officials

ATS litigation highlights a heated controversy over who bears responsibility for human rights violations committed by state actors. Human rights advocates insist that some behavior is outside the bounds of official conduct, and that government officials, as well as the state, should be held personally liable for violations of core human rights norms. Immunity absolutists argue that only the state itself can be held liable for conduct undertaken on behalf of that state, unless the state consents to waive the immunity of its officials. The immunity issue personalizes the debate over whether international law should serve as a restraint on the actions of governments by asking whether any such restraint should impose liability on individual government officials as well as on the state itself.

In ATS cases, immunity doctrines received little attention for many years after *Filartiga* because courts had little difficulty holding that the acts at issue in ATS cases were not official acts and, therefore, that government officials were not entitled to immunity. In the first decade of this century, two sets of cases upset the tentative consensus about immunity and its limits: lawsuits against former Israeli government officials and claims against U.S. officials for their post-September 11 treatment of detainees.

This Section discusses the international doctrine governing immunity, immunity in ATS cases against former foreign officials, and the even more contentious topic of immunity for U.S. government officials. The final subsection addresses the debate about accountability and international law that underlies conflicting views about whether and when U.S. and foreign government officials should be subject to suit under the ATS.

1. International Immunity Doctrines

As captured in the stirring language of the Nuremberg Tribunals, modern international law recognizes that individuals, not just states, must be held accountable for international crimes: "Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."[311] However, efforts since then to hold government officials accountable for international human rights violations have been halting at best. These efforts have produced no consensus about when, and for what conduct, officials are entitled to immunity under international law.

The extent of a government official's immunity under international law is unclear.[312] As a matter of customary international law, heads of state and

311 I TRIAL OF MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 223 (1947).

312 *See generally* Beth Stephens, *The Modern Common Law of Foreign Official Immunity*, 79 FORDHAM L. REV. 2669, 2673–85 (2011) (providing an overview of foreign official immunity). The international law governing the immunity of states themselves is also unclear, although states have gradually coalesced around customary international law norms that grant states immunity in the domestic courts of other states for public acts, but not private

foreign ministers are granted absolute immunity while in office,[313] while treaties afford broad immunity to diplomats and somewhat lesser protections to consuls and to diplomatic and consular staff.[314] In the absence of a treaty or clear agreement on customary international law, the scope of immunity of other foreign officials is less settled; each state applies its own understanding of the appropriate rules, usually some version of its interpretation of the obligations imposed by customary international law.[315]

States have explicitly waived official immunity through treaties, as in the Statute of the International Criminal Court (ICC), which states that immunity will not bar prosecution before the ICC.[316] A broad U.N. treaty governing official immunity, designed to codify existing customary international law and finalized in 2004, has received only fourteen of the thirty ratifications necessary for it to come into force[317] and seems to have stalled.[318] The Convention would generally afford immunity to officials for acts taken within their official authority.[319] Treaty negotiators rejected a proposal to specify that official immunity did not extend to conduct that violated international human rights norms, after concluding that a human rights exception was "not ripe enough" for codification.[320] In the years since those negotiations,

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or commercial acts, a doctrine known as the "restrictive theory." *See* Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 486–89 (1983) (noting that the U.S. adopted the restrictive theory in 1952); HAZEL FOX, THE LAW OF STATE IMMUNITY 201, 530 (2d ed. 2008) (explaining that the doctrine has been widely adopted, but that states vary widely in how they draw the line between public and private acts).

313 *See* Arrest Warrant of 11 Apr. 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, ¶¶ 51–58 (Feb. 14).

314 *See* Vienna Convention on Diplomatic Relations art. 31, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95 (stating that diplomats enjoy immunity from criminal jurisdiction and from most civil jurisdiction); Vienna Convention on Consular Relations art. 43, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 (stating that consuls are generally immune from jurisdiction for "acts performed in the exercise of consular functions").

315 Stephens, *supra* note 312, at 2691–92. Most states do not even have domestic statutes governing foreign state immunity. *Id.* at 2691 n.142 (citing sources indicating that only about a dozen states had enacted domestic statutes governing foreign sovereign immunity).

316 Rome Statute of the International Criminal Court art. 27, July 17, 1997, 2187 U.N.T.S. 90, *available at* http://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf ("Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.").

317 U.N. Convention on Jurisdictional Immunities of States and Their Property, Dec. 2, 2004, G.A. Res. 59/38, U.N. Doc A/59/38 [hereinafter U.N. Convention on Jurisdictional Immunities]. For the status of signatures and ratifications, see U.N. Convention on Jurisdiction, *Status*, UNITED NATIONS, http://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=III-13&chapter=3&lang=en (last visited Jan. 24, 2014).

318 Most states took action within the first few years after the text was finalized, and only one has acted within the past two years. *See* U.N. Convention on Jurisdictional Immunities, *supra* note 317.

319 *Id.*

320 FOX, *supra* note 312, at 140 (citing Chairman's report).

support for such an exception has grown.[321] In the absence of a treaty or other definitive statement of the law, however, the international law governing foreign official immunity for human rights abuses remains unsettled. Beyond treaties, governments and commentators disagree about whether and to what extent customary international law has recognized that some international law violations are not official acts and, therefore, that officials who commit those violations are not entitled to immunity.[322]

The question of official immunity most often arises in domestic criminal prosecutions, when local courts prosecute foreign officials for international crimes committed in another state. Those cases reflect a growing acceptance that officials are not entitled to immunity for some conduct that violates international law.[323] In a recent report, a Special Rapporteur appointed by the International Law Commission to study criminal immunity noted that the scope of immunity for "official acts" has been "hotly debated," but recognized support for the view that officials are not entitled to immunity for some international crimes.[324]

The application of immunity to civil litigation has also been contested. U.S.-style civil lawsuits are rare outside the United States.[325] But distinguishing between civil and criminal proceedings is problematic, given that many domestic legal systems differ in how they draw the line between criminal and civil liability, and many civil law systems permit those injured by a crime to litigate their claim for damages as part of a criminal proceeding.[326]

The uncertain state of foreign official immunity in international law is mirrored by a similar uncertainty in U.S. law.

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321 Fox noted that the draft of the Convention was largely completed in the early 1990s, and that the failure to include a human rights exception may reflect a now-outdated view of international law that failed to capture changes in the international community's approach to immunity and human rights violations. *Id.* at 3–4 (concluding that the Convention sets a common international standard for "private law and commercial transactions," but, pointedly, not acts in violation of human rights norms).

322 For an overview of this debate, see Curtis A. Bradley & Laurence R. Helfer, *International Law and the U.S. Common Law of Foreign Official Immunity*, 2010 SUP. CT. REV. 213, 233–49.

323 *Id.* at 238 ("[A] growing number of international and national courts have abrogated the conduct immunity of former heads of state as well as current and former lower-level officials from *criminal* investigations and prosecutions for *jus cogens* violations, especially where international law provides a basis for exercising universal jurisdiction."); *id.* at 235–48 (reviewing evidence of growing acceptance of exception to immunity for at least some international crimes).

324 Special Rapporteur, U.N. Int'l Law Comm'n, Preliminary Report on the Immunity of State Officials from Foreign Criminal Jurisdiction, ¶ 67, U.N. Doc. A/CN.4/654 (May 31, 2012); *see also id.* ¶¶ 34–35, 45, 48–50, 68.

325 Bradley & Helfer, *supra* note 322, at 240–45, 246–48; Beth Stephens, *Translating* Filártiga*: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations*, 27 YALE J. INT'L L. 1, 6–17 (2002).

326 Bradley & Helfer, *supra* note 322, at 246–47; Stephens, *supra* note 325, at 19–21.

2. Foreign Official Immunity in ATS Cases

Within the United States, foreign state and most foreign official immunity claims were governed by common law until 1976. Special rules governed heads of state, diplomats, and consuls.[327] In the few cases involving other foreign government officials, the courts generally denied immunity for unlawful acts or acts outside the scope of the official's authority, but did grant immunity when a claim would lead to a rule enforceable against the state.[328]

The Foreign Sovereign Immunities Act (FSIA), enacted in 1976, codified the restrictive theory as applied to foreign states and their agencies or instrumentalities.[329] Despite the lack of any reference to foreign officials, and over the consistent objections of the executive branch,[330] several courts held that the statute applied to government officials as well as to the state itself.[331] This FSIA immunity had little impact on ATS claims for over two decades, however, because the courts held that egregious human rights abuses fell outside an official's lawful authority and were thus not entitled to immunity. In cases involving human rights abuses committed in the Philippines, for example, the Ninth Circuit held that the FSIA would not immunize the

327 *See supra* notes 313–15 and accompanying text. For an overview of head-of-state immunity, see Lewis S. Yelin, *Head of State Immunity as Sole Executive Lawmaking*, 44 VAND. J. TRANSNAT'L L. 911 (2011).

328 For a discussion of the cases, see Stephens, *supra* note 312, at 2675–78; *see also* Chimène I. Keitner, *Officially Immune? A Response to Bradley and Goldsmith*, 36 YALE J. INT'L L. ONLINE 1, 3 (2010); Chimène I. Keitner, *The Common Law of Foreign Official Immunity*, 14 GREEN BAG 2d 61 (2010). As summarized in the *Restatement (Second) of Foreign Relations Law*, which was issued in 1965 and replaced in 1987, state officials "do not have immunity from personal liability even for acts carried out in their official capacity, unless the effect of exercising jurisdiction would be to enforce a rule against the foreign state." RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 66 cmt. b (1965).

329 28 U.S.C. §§ 1330, 1602–1611 (2006).

330 *See* Brief for the United States of America as *Amicus Curiae* in Support of Affirmance at 9–18, Matar v. Dichter, 563 F.3d 9 (2d Cir. 2009) (No. 07-2579) [hereinafter U.S. *Dichter* Brief] (reaffirming the executive branch's consistent view that individual immunity is governed by the common law, not by the FSIA); *Sovereign Immunity Decisions of the Department of State, May 1952 to Jan. 1977*, *in* 1977 DIG. U.S. PRAC. INT'L L. 1017, 1020 (Michael Sandler et al. eds.) ("[T]he Foreign Sovereign Immunities Act does not deal with the immunity of individual officials, but only that of foreign states and their political subdivisions, agencies and instrumentalities.").

331 The Ninth Circuit first applied the FSIA to an individual official in *Chuidian v. Philippine Nat'l Bank*, 912 F.2d 1095, 1103, 1106 (9th Cir. 1990) (holding that the FSIA applied to an individual official "for acts committed in his official capacity," but not for "acts beyond the scope of his authority"). Four circuits agreed with *Chuidian*. *See In re* Terrorist Attacks on Sept. 11, 2001, 538 F.3d 71, 81 (2d Cir. 2008); Keller v. Cent. Bank of Nigeria, 277 F.3d 811, 815 (6th Cir. 2002); Byrd v. Corp. Forestal y Industrial de Olancho, 182 F.3d 380, 388 (5th Cir. 1999); El-Fadl v. Cent. Bank of Jordan, 75 F.3d 668, 671 (D.C. Cir. 1996). Two circuits held that the FSIA did not govern the immunity of foreign officials. *See* Yousuf v. Samantar, 552 F.3d 371, 379–83 (4th Cir. 2009), *aff'd*, 560 U.S. 305 (2010); Enahoro v. Abubakar, 408 F.3d 877, 881–83 (7th Cir. 2005).

defendant for acts "outside the scope of [the official's] authority,"[332] and that "acts of torture, execution, and disappearance were clearly acts outside of [Ferdinand Marcos's] authority as President."[333] The court concluded that "the illegal acts of a dictator are not 'official acts' unreviewable by federal courts."[334]

During this same time period, foreign governments did not publicly request immunity on behalf of former officials facing ATS litigation or otherwise claim that the officials had been acting within their authority; some governments affirmatively disavowed the challenged conduct by waiving any immunity claimed by the officials.[335] In *Doe I v. Liu Qi*, however, a case against a former Chinese official, the government of China asserted that the defendant had acted "in accordance with the power entrusted to [him] under [the] Chinese Constitution and law," and that his conduct should be immune from the jurisdiction of U.S. courts.[336] The court in that case rejected immunity because the acts alleged—torture and arbitrary detention—violated Chinese law.[337] Although the U.S. government submitted the Chinese government's statement to the court, it did not file its own suggestion for immunity in the *Liu Qi* case.[338]

Two cases filed against former Israeli officials in 2005 challenged the apparent consensus that some acts were never entitled to immunity. In each case, the Israeli government submitted a letter stating that anything the defendant did "in connection with the events at issue" in the lawsuit was done "in the course of his official duties."[339] In *Dichter*, the U.S. government supported the claim for immunity in a lengthy brief that argued that the defendant was protected by common law immunity.[340] In the face of this assertion

332 Trajano v. Marcos (*In re* Estate of Marcos), 978 F.2d 493, 497 (9th Cir. 1992) (discussing claims against Imee Marcos-Manotoc, daughter of Ferdinand Marcos).

333 Hilao v. Estate of Marcos (*In re* Estate of Marcos), 25 F.3d 1467, 1472 (9th Cir. 1994).

334 *Id.* at 1471.

335 *See supra* note 188 (listing cases in which foreign governments waived the immunity of their former officials).

336 Statement of the Government of the People's Republic of China on "Falun Gong" Unwarranted Lawsuits at 3, 5, attached to Notice of Filing of Original Statement by the Chinese Gov't, Doe v. Qi, 349 F. Supp. 2d 1258 (N.D. Cal. 2004) (No. C-02-0672 (EMC)), *available at* http://www.asser.nl/upload/documents/DomCLIC/Docs/NLP/US/LiuQi_StatementPRC_DistrictCourt_26-9-2002.pdf.

337 *Qi*, 349 F. Supp. 2d at 1283–88.

338 In a thorough analysis of the multiple cases filed against Chinese government officials starting in 2000, Jacques deLisle concluded that, although the Chinese government complained about the litigation, its impact on Chinese-U.S. relations was actually minimal. *See* deLisle, *supra* note 255, at 483–98.

339 *See* Matar v. Dichter, 563 F.3d 9, 11 (2d Cir. 2009) (quoting Letter from Daniel Ayalon, Ambassador to the U.S., State of Isr., to the U.S. State Dep't (n.d.)); Belhas v. Ya'alon, 515 F.3d 1279, 1282 (D.C. Cir. 2008) (quoting Letter from Daniel Ayalon, Ambassador to the U.S., State of Isr., to Nicholas Burns, Under Sec'y for Political Affairs, U.S. State Dep't (Feb. 6, 2006)).

340 U.S. *Dichter* Brief, *supra* note 330.

from a powerful and close ally of the United States, without considering whether the acts were lawful under Israeli or international law, both federal courts found the defendants to be immune. The *Belhas* court held that the acts fell within the defendant's official authority and were therefore immunized under the FSIA,[341] while the Second Circuit in *Dichter* found the acts protected by common law immunity.[342]

In 2010, in *Samantar v. Yousuf*,[343] the Supreme Court reviewed the long-standing split in the circuits about the applicability of the FSIA to foreign official immunity. The Court held unanimously that the FSIA did not apply to foreign government officials, but noted that officials might be protected by common law immunity—just as the U.S. government had argued since the 1976 passage of the FSIA.[344]

The *Samantar* decision left two major issues unresolved: what conduct by foreign officials would be entitled to common law immunity, and the role of the executive branch in the immunity determination. Both of those issues became problematic on remand in *Samantar*. The Department of State informed the district court that Samantar was not entitled to immunity, resting its decision on the absence of a recognized government in Somalia to assert immunity and the fact that Samantar was a long-time resident of the United States.[345] The submission also stated that the court was obligated to defer to the executive branch's conclusion about immunity.[346] The district court then denied immunity.[347] On appeal from that decision, the Fourth Circuit held that it was not obligated to defer to the executive branch,[348] but reached the same conclusion, denying immunity because it found that violations of *jus cogens* norms are not entitled to immunity.[349] Samantar peti-

341 *Belhas*, 515 F.3d at 1283–84.

342 *Matar*, 563 F.3d at 13–14.

343 130 S. Ct. 2278 (2010).

344 *Id.* at 2292–93. Concerns about immunity for the former officials of U.S. allies, such as Israel, and U.S. officials themselves, were a major focus of the Supreme Court briefing in *Samantar*. *See, e.g.*, Brief of the American Jewish Congress as Amicus Curiae in Support of Petitioner, Samantar v. Yousuf, 560 U.S. 305 (2010) (No. 08-1555), 2009 WL 4693843, at *42–44 (highlighting the vulnerability of Israeli officials without immunity); Brief of Former Attorneys General of the United States as Amici Curiae in Support of Petitioner, *Samantar*, 560 U.S. 305 (No. 08-1555), 2009 WL 4693844, at *9–17 (arguing that limiting immunity at home will weaken immunity for U.S. officials abroad); Brief for the United States as Amicus Curiae Supporting Affirmance, *Samantar*, 560 U.S. 305 (No. 08-1555), 2010 WL 342031, at *22–23 (highlighting concerns about treatment of U.S. officials abroad).

345 Statement of Interest of the United States at *8–9, Yousuf v. Samantar, No. 1:04CV1360 (LMB/JFA), 2011 WL 7445583 (E.D. Va. Feb. 15, 2011).

346 *Id.* at *2–6.

347 *Samantar*, No. 1:04CV1360 (LMB/JFA), 2011 WL 7445583, *aff'd*, 699 F.3d 763 (4th Cir. 2012).

348 *Samantar*, 699 F.3d at 777.

349 *Id. Jus cogens* norms, also known as a "preemptory norms" of international law, are "rules of international law recognized by the international community of states as peremptory, permitting no derogation." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF

tioned for certiorari review of that decision. The executive branch filed a statement urging the Supreme Court to grant review, vacate the decision, and remand the case to the Fourth Circuit because it disagreed with both the refusal to give absolute deference to the views of the executive branch and the holding that *jus cogens* violations are not entitled to immunity.[350] The Supreme Court denied the petition for certiorari without comment.[351]

Both of these pending issues have been central to the decades of controversy over the ATS. Once again, ATS claims triggered basic questions about the substance of international law and who has the power to define and enforce that law. And once again, the executive branch offered its view that, within the U.S. domestic legal system, it alone should determine who can be held liable for what violations of international law. [352] Despite extensive ATS litigation and the voluminous commentary on the statute, these fundamental questions about international law remain unresolved.

The next subsection addresses the debate over the immunity claims of former U.S. government officials accused of human rights violations, in both U.S. and foreign courts.

3. Immunity and U.S. Government Officials

In the battle over the modern application of the ATS as a means of imposing international law restraints on government actors and multinational corporations, the U.S. government has achieved unparalleled success in shielding itself, its employees, and its contractors from review.

Almost all ATS claims against the U.S. government and its officials have been dismissed on preliminary motions.[353] Prior to 2001, most claims involved conduct within the United States.[354] In one notable exception, *Sanchez-Espinoza v. Reagan*, Nicaraguan citizens in 1982 filed ATS claims against U.S. officials for torture, executions, and other violations of interna-

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THE UNITED STATES § 102 cmt. k (1987). *Jus cogens* norms are "subject to modification only by a subsequent norm of international law having the same character." *Id.*

350 Brief for the United States as Amicus Curiae, Samantar v. Yousuf, 134 S. Ct. 897 (2013) (No. 12-1078), at *22–24.

351 *Samantar*, 134 S. Ct. 897 (mem.).

352 For an extended analysis of the role of the executive branch in immunity decisions, concluding that the courts should give respectful consideration to its views, but not defer to them, see Ingrid Wuerth, *Foreign Official Immunity Determinations in U.S. Courts: The Case Against the State Department*, 51 VA. J. INT'L L. 915, 967–75 (2011). *See also* Stephens, *supra* note 312, at 2711–14.

353 For two exceptions, both involving immigrants detained in U.S. facilities, see *Papa v. United States*, 281 F.3d 1004, 1011–13 (9th Cir. 2002) (reversing dismissal of claim by family of immigrant killed while in detention), and *Jama v. United States*, 22 F. Supp. 2d 353, 372 (D.N.J. 1998) (dismissing claims against INS based on sovereign immunity but refusing to dismiss claims against INS officials sued in their individual capacity); the claims against the INS officials later settled, Jama v. United States, 343 F. Supp. 2d 338, 353 (D.N.J. 2004)).

354 *See, e.g.*, Brancaccio v. Reno, 964 F. Supp. 1, 2 (D.D.C 1997), *aff'd*, 1997 WL 634544 (D.C. Cir. Sept. 24, 1997) (No. 97-5136); Bagguley v. Bush, 953 F.2d 660, 661 (D.C. Cir. 1991).

tional law.[355] The D.C. Circuit, in an opinion authored by then-Judge Scalia and joined by then-Judge Ginsburg, concluded that, in the absence of an explicit waiver, sovereign immunity barred all ATS claims against the officials for acts undertaken in their official capacity.[356]

After the September 11, 2001 attacks, a steady stream of lawsuits challenged the U.S. response to the attacks, many of them relying in part on the ATS. Detainees and their families sued the U.S. government, current and former U.S. officials, and corporations working with the government for prolonged detention, torture and other abusive treatment, and renditions to foreign states.[357] The government's litigation strategy was a legal version of "shock and awe"[358]: it used all tools available to stop the lawsuits at the start so that it could avoid having to answer the factual allegations. That tactic has been overwhelmingly successful: cases against U.S. government defendants have been dismissed based on a range of arguments, including lack of standing,[359] new pleading requirements,[360] immunity,[361] and the government's assertion that the litigation would expose state secrets.[362]

Post-September 11 lawsuits against the U.S. government itself were unlikely to succeed; the federal government is immune from suit unless it has explicitly waived immunity.[363] The Federal Tort Claims Act waives immunity for injuries caused by a U.S. employee acting within the scope of employment if a private person would be liable under the law of the place where events occurred.[364] That waiver contains several exceptions, however, that preclude

355 770 F.2d 202, 206 (D.C. Cir. 1985); *see also* Schneider v. Kissinger, 412 F.3d 190, 193–98 (D.C. Cir. 2005) (dismissing claims arising out of murder of Chilean general during the 1971 military coup in Chile on the basis of the political question doctrine).

356 *Sanchez-Espinoza*, 770 F.2d at 207.

357 For an overview of these cases, see generally Stephen I. Vladeck, *The New National Security Canon*, 61 Am. U.L. Rev. 1295 (2012).

358 Shock and awe refers to the military concept of an attack aimed at devastating the enemy through the use of rapid, overwhelming force. *See* Harlan K. Ullman & James P. Wade, Jr., Shock and Awe: Achieving Rapid Dominance 12, 19 (1996).

359 Al-Aulaqi v. Obama, 727 F. Supp. 2d 1, 35 (D.D.C. 2010) (dismissing plaintiff's claims for lack of standing).

360 Ashcroft v. Iqbal, 556 U.S. 662, 680–83 (2009) (finding that allegations connecting senior government officials to abuses were not "plausible").

361 Ali v. Rumsfeld, 649 F.3d 762, 770–78 (D.C. Cir. 2011) (dismissing on basis of qualified and absolute immunity); Rasul v. Myers, 563 F.3d 527, 530 (D.C. Cir. 2009) (dismissing claims on basis of qualified immunity).

362 Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070, 1083 (9th Cir. 2010). As exemplified by *Jeppesen*, lawsuits against U.S. government contractors for abuses committed after September 11 have not had much more success than those against the government or government officials. Courts have dismissed cases on multiple grounds, including state secrets and preemption. Some contractor cases have settled. See, for example, *In re XE Services Alien Tort Litig.*, 665 F. Supp. 2d 569 (E.D. Va. 2009), which settled in 2010. *See* Liz Sly, *Iraqis Say They Were Forced to Take Blackwater Settlement*, L.A. Times (Jan. 11, 2010), http://articles.latimes.com/2010/jan/11/world/la-fg-iraq-blackwater11-2010jan11.

363 "Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit." FDIC v. Meyer, 510 U.S. 471, 475 (1994).

364 28 U.S.C. § 1346(b)(1) (2006).

most human rights claims, including exceptions for claims based on discretionary acts,[365] intentional torts,[366] or combat activities,[367] and for claims arising in a foreign country.[368]

Although U.S. officials are not automatically granted the same wide-ranging immunity as the government itself,[369] the 1977 Westfall Act authorizes the government to substitute itself in place of a government official when that official acted within the scope of employment.[370] As a result of substitution, the official is dismissed from the lawsuit, leaving the government, with the protection of its presumption of immunity, as the defendant. The standard for when an act is within the scope of employment is quite broad. The District of Columbia Circuit, which hears most claims against U.S. government officials, has held that the standard permits substitution when the employee is sued for any conduct "arising out of a dispute that was originally undertaken on the employer's behalf," including intentional torts.[371] In cases involving human rights abuses, the courts have rejected the

365 *Id.* § 2680(a).

366 *Id.* § 2680(h).

367 *Id.* § 2680(j).

368 *Id.* § 2680(k).

369 Historically, U.S. officials sued for acts taken while employed by the government were personally liable, even if implementing government policies approved by their supervisors. Starting in the late nineteenth century, the courts gradually extended immunity to particular categories of officials, for particular acts. Stephens, *supra* note 312, at 2699; *see also* Karen Lin, *An Unintended Double Standard of Liability: The Effect of the Westfall Act on the Alien Tort Claims Act*, 108 COLUM. L. REV. 1718, 1722–23 (2008).

370 Federal Employees Liability Reform and Tort Compensation Act, 28 U.S.C. § 2679 (2006) ("Westfall Act").

The Westfall Act does not permit substitution for claims alleging violations of certain federal statutes or of the Constitution. *Id.* § 2679(b)(2) (stating that the substitution procedure does not apply to claims for a violation of the Constitution or "for a violation of a statute of the United States under which such action against an individual is otherwise authorized"). Courts have held that the statutory exception does not apply to ATS claims, because the cause of action for such claims is not created by the statute itself. *See* Alvarez-Machain v. United States, 331 F.3d 604, 631 (9th Cir. 2003) (en banc), *rev'd on other grounds*, 542 U.S. 692 (2004).

Post-September 11 constitutional claims have been dismissed on the basis of qualified immunity. *See* Ali v. Rumsfeld, 649 F.3d 762, 770 (D.C. Cir. 2011) ("Qualified immunity shields a government official from civil liability if his conduct 'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" (citation omitted)); Rasul v. Myers, 563 F.3d 527, 530 (D.C. Cir. 2009) (holding that the Fifth and Eighth Amendment rights of Guantanamo detainees were not clearly established at the time of their confinement and torture). In addition, courts have dismissed claims of extraordinary rendition, abusive interrogation, and other mistreatment while in military detention under the doctrine that bars constitutional claims when "special factors counsel hesitation." *See, e.g.*, Vance v. Rumsfeld, 701 F.3d 193 (7th Cir. 2012); Doe v. Rumsfeld, 683 F.3d 390 (D.C. Cir. 2012); Arar v. Ashcroft, 585 F.3d 559 (2d Cir. 2009).

371 Council on Am. Islamic Relations v. Ballenger, 444 F.3d 659, 664 (D.C. Cir. 2006) (quoting Weinberg v. Johnson, 518 A.2d 985 (D.C. 1986), in which the D.C. Court of Appeals held that an employee at a laundromat acted within the scope of employment when he shot a customer during a dispute about laundry). For a critique of the applica-

argument that the substitution statute was not intended to protect against egregious wrongful conduct. In *Rasul*, for example, the district court held that "torture is a foreseeable consequence of the military's detention of suspected enemy combatants,"[372] a decision upheld on appeal.[373]

U.S. government officials have consistently expressed concern about the impact of ATS claims on the potential liability of U.S. officials in foreign courts. In 1980, executive branch discussions about how to respond to the *Filartiga* litigation mentioned the danger of reciprocal lawsuits.[374] The U.S. government's suggestion that the *Filartiga* court consider the doctrine of *forum non conveniens*[375] may have been intended in part to protect U.S. officials in comparable situations: applying *forum non conveniens*, foreign courts would not assert jurisdiction over claims against U.S. officials if a case would be more appropriately litigated in the United States. Later administrations continued to emphasize concern about claims against U.S. officials in foreign courts as an important objection to ATS claims.[376] In the debates that preceded the enactment of the Torture Victim Protection Act (TVPA), the administration of George H.W. Bush stated that foreign states might retaliate against the United States by filing suits against U.S. officials.[377]

As with many of the disputes about the ATS, the concern about reciprocal suits seemed largely abstract and rather farfetched for the first two

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tion of the substitution procedure to wrongful acts such as torture, see Elizabeth A. Wilson, *Is Torture All in a Day's Work? Scope of Employment, the Absolute Immunity Doctrine, and Human Rights Litigation Against U.S. Federal Officials*, 6 RUTGERS J.L. & PUB. POL'Y 175, 201 (2008).

372 Rasul v. Rumsfeld, 414 F. Supp. 2d 26, 34 (D.D.C. 2006), *aff'd sub nom.* Rasul v. Myers, 563 F.3d 527 (D.C. Cir. 2009).

373 Rasul v. Myers, 512 F.3d 644, 660 (D.C. Cir.), *vacated*, 555 U.S. 1083 (2008), *aff'd after remand*, 563 F.3d 527 (D.C. Cir. 2009) (holding that allegations of "serious criminality" did not alter the conclusion that the defendants' conduct fell within the scope of employment).

374 In a letter to members of Congress that responded to a request that the executive branch submit a brief to the Second Circuit in the *Filartiga* case, the Solicitor General expressed concern about "the implications a filing by the United States on this subject would have for the treatment of our own nationals in foreign courts." Letter from Wade H. McCree, to Congressman Toby Moffet, *supra* note 73, *reprinted in* ACEVES, *supra* note 69, at 539–40; *see also* Owen Address, *supra* note 74 ("If our courts were to pass judgment on the conduct of foreign officials, arguably the courts of other countries would assert jurisdiction over traveling American officials and accuse them of an open-ended range of perceived abuses.").

375 U.S. *Filartiga* Brief, *supra* note 27, at 25 n.48. Under the doctrine of *forum non conveniens*, a court can dismiss a case if another forum is available and, after a review of several public and private interest factors, the court concludes that the case would be more appropriately litigated in the alternative forum. *See* 14D CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3828 (3d ed. 2007).

376 Statement of Interest of the United States at 8, Doe v. Qi, 349 F. Supp. 2d 1258 (N.D. Cal. 2004) (No. C-02-0672 (EMC)), *available at* http://www.hrlf.net/LiuQi_Statement_of_Interest_of_the_US_44.pdf; *see also* Supplemental Brief for the United States as Amicus Curiae in Partial Support of Affirmance at 1–2, Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2013) (No. 10-1491) [hereinafter U.S. Supplemental *Kiobel* Brief].

377 TVPA SENATE REPORT, S. REP. NO. 102-249, at 15 (1991) (Minority Report).

decades of modern ATS litigation. Congress apparently rejected the concern in 1992, when it voted to enact the TVPA. As a practical matter, in addition to the protection offered by the doctrine of *forum non conveniens*, the political might of the U.S. government generally insulates U.S. officials.

Post-September 11, the prospect of claims against U.S. officials in foreign courts seemed somewhat less fanciful. The U.S. government formally adopted the legal position that neither international law nor U.S. domestic law imposed constraints on the mistreatment of foreign detainees.[378] U.S. government officials engaged in abuses that were widely viewed as violations of international law, including the prohibitions on torture and arbitrary detention.[379] Although the U.S. government had engaged in torture and other violations of international law long before September 11, 2001,[380] the Bush Administration, rather than denying the conduct, defended its right to act as it saw fit.[381] Moreover, the post-September 11 abuses were widely documented and publicized around the world, and multiple international bodies criticized the U.S. actions as violations of international law.[382] Given that U.S. courts were closed to victims seeking remedies for abusive treatment, U.S. officials were hard-pressed to argue that domestic remedies were adequate.[383] Despite the political and legal uproar, however, U.S. pressure successfully blocked efforts to sue or prosecute former U.S. officials in foreign courts.[384] After criminal charges were filed against several former U.S. offi-

378 *See* David Luban, *Liberalism, Torture, and the Ticking Bomb*, 91 VA. L. REV. 1425, 1453–60 (2005) (discussing the contents and implications of the Bush Administration's torture memoranda).

379 *See* José E. Alvarez, *Torturing the Law*, 37 CASE W. RES. J. INT'L L. 175, 175–79, 222–23 (2006) (describing the Bush Administration's torture memoranda as excusing torture and "tortur[ing] the rule of law").

380 For a detailed history of the U.S. government's use of torture as a feature of both foreign policy and domestic law enforcement, see generally John T. Parry, *Torture Nation, Torture Law*, 97 GEO. L.J. 1001 (2009).

381 As Parry points out, denial has been only one part of the response to public reports of torture in U.S. history. As an example of a common three-part response, Parry quotes then-Secretary of War Elihu Root responding to reports of the use of the "water cure" by U.S. soldiers in the Philippines by first denying that it happened; then explaining that if it did happen, it was the fault of the uncivilized enemy; and, finally, suggesting that it was not really so bad. *Id.* at 1007.

382 *See, e.g.*, U.N. Comm. Against Torture, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Conclusions and Recommendations of the Committee Against Torture, ¶¶ 13–30, May 1–19, 2006, U.N. Doc. CAT/C/USA/CO/2, 36th Sess. (2006), *available at* http://www.state.gov/documents/organization/133838.pdf (expressing concern about allegations of torture and other human rights violations by U.S. government officials and about lack of redress for victims of those abuses).

383 At around the same time, efforts to investigate past abuses by U.S. officials also gained momentum. In 2001 and 2002, for example, Henry Kissinger faced several efforts to detain and question him about abuses in South America and Southeast Asia. For an account of the legal proceedings faced by Kissinger, see JACK GOLDSMITH, THE TERROR PRESIDENCY: LAW & JUDGMENT INSIDE THE BUSH ADMINISTRATION 51–59 (2007).

384 Michael Slackman, *Officials Pressed Germans on Kidnapping by C.I.A.*, N.Y. TIMES, Dec. 9, 2010, at A10, *available at* http://www.nytimes.com/2010/12/09/world/europe/09wiki

cials, U.S. government pressure led both Belgium and Spain to amend statutes that had granted their courts broad jurisdiction over crimes committed abroad.[385]

Through their opposition to these cases in both U.S. and foreign courts, the executive branch—in particular, the second Bush Administration—forcefully rejected any judicial role in the enforcement of international law.

4. Official Accountability for Human Rights Violations

ATS cases against former government officials personalize the struggle over the power to define and enforce international human rights norms. Individuals are sued in foreign courts for actions taken while employed by the state—actions that, in most cases, were authorized by their government, even though unlawful under both domestic and international law. The officials claim immunity, insisting that, because only their own governments have authority to judge their conduct, they should be immune from criminal prosecution or civil liability in a foreign state.

Advocates of ATS litigation and similar enforcement mechanisms deny that immunity applies to these unlawful human rights violations. They insist that because human rights violations, by definition, are illegal, such acts are outside the lawful authority of a government official and cannot trigger official immunity. They insist that human rights violations can be punished and deterred only by imposing international law limits on the behavior of the officials of their own and foreign governments. Finally, they view the possibility that some enforcement efforts might turn out to be unfounded as an acceptable cost of those limits.

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leaks-elmasri.html; Giles Tremlett, *Wikileaks: US Pressured Spain over CIA Rendition and Guantánamo Torture*, GUARDIAN (Dec. 1, 2010, 4:30 PM), http://www.theguardian.com/world/2010/nov/30/wikileaks-us-spain-guantanamo-rendition.

In one prominent exception, U.S. officials were convicted *in absentia* for the extraordinary rendition of a Muslim cleric who was kidnapped off a street in Milan, Italy in 2009. In July 2013, a CIA official who was convicted in the case was detained in Panama on an international arrest warrant, but was subsequently released and returned to the United States. *See* Jim Yardly, *Italy: Former C.I.A. Chief Requests Pardon for 2009 Rendition Conviction*, N.Y. TIMES, Sept. 14, 2013, at A7, *available at* http://www.nytimes.com/2013/09/14/world/europe/italy-former-cia-chief-requests-pardon-for-2009-rendition-conviction.html.

Despite the slim chances that a civil lawsuit or criminal prosecution would actually proceed, some former U.S. officials may have been sufficiently concerned about the risk of litigation or prosecution that they chose not to travel abroad. *See, e.g.*, Peter Finn, *Bush Trip to Switzerland Called off Amid Threats of Protests, Legal Action*, WASH. POST. (Feb. 6, 2011), www.washingtonpost.com/wp-dyn/content/article/2011/02/05/AR2011020503752.html; Rene Lynch, *Dick Cheney Cancels Trip to Canada, Saying It's Too Dangerous*, L.A. TIMES (Mar. 13, 2012), http://articles.latimes.com/2012/mar/13/nation/la-na-nn-dick-cheney-canada-20120313.

385 *See Spanish Congress Enacts Bill Restricting Spain's Universal Jurisdiction Law*, CTR. FOR JUSTICE AND ACCOUNTABILITY, http://www.cja.org/article.php?id=740 (last visited Feb. 7, 2014); *Belgium: Universal Jurisdiction Law Repealed*, HUMAN RIGHTS WATCH, Aug. 2, 2003, http://www.hrw.org/en/news/2003/07/31/belgium-universal-jurisdiction-law-repealed.

Others are less sanguine about the impact of litigation against state officials. They emphasize the disruptive effect of private or foreign efforts to judge government conduct. Relying as well on the traditional, state-centered approach to international law, they argue that only the state has the authority to judge the conduct of its officials, and, therefore, to determine whether an act is within that official's lawful authority.

Jack Goldsmith forcefully presented the argument against legal accountability in his 2007 book, *The Terror Presidency*, in which he labeled efforts to hold government officials accountable through lawsuits, including ATS litigation, or through judicial investigations, a form of "lawfare."[386] Goldsmith explained that, while working for the U.S. Department of Defense in 2002, he wrote a memo on lawfare, which he defined as "the strategy of using or misusing law as a substitute for traditional military means to achieve an operational objective."[387] Listing some of those who had employed this strategy, he lumped together "[e]nemies like Al Qaeda," who complained that the United States had violated human rights and the laws of war; European and South American allies, who entertained the possibility of prosecuting U.S. and other government officials; and a "human rights industry" that endorsed the concept of universal jurisdiction.[388] He emphasized the seriousness of the threat posed by lawfare:

> In the past quarter century, various nations, NGOs, academics, international organizations, and others in the "international community" have been busily weaving a web of international laws and judicial institutions that today threatens [U.S. government] interests. The [U.S. government] has seriously underestimated this threat. . . . Unless we tackle the problem head-on, it will continue to grow. The issue is especially urgent because of the unusual challenges we face in the war on terrorism.[389]

The danger, he asserted, is that vague international law provisions are used as the basis for "virulent criticism of U.S. military actions" and as "rhetorical weapons."[390] Efforts to enforce international criminal law through international criminal courts, Goldsmith wrote, are "an attempt by militarily weak nations . . . to restrain militarily powerful nations."[391] He both rejected the concept of international law as a restraint on the conduct of governments and sought to delegitimize efforts to enforce such restraints.[392]

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386 GOLDSMITH, *supra* note 383, at 53–70.

387 *Id.* at 58 (quoting Charles J. Dunlap, Jr., Air Combat Command Staff Judge Advocate, Address at the Air and Space Conference and Technology Exposition: The Law of Armed Conflict (Sept. 12, 2005)).

388 *Id.* at 58–59.

389 *Id.* at 60.

390 *Id.*

391 *Id.* at 61.

392 For an equally strident accusation that human rights litigation is a form of illegitimate warfare, designed to weaken governments and government officials as they strive valiantly to protect against terrorism and other evils, see *Lawfare: The Use of the Law as a Weapon of War*, THE LAWFARE PROJECT, http://www.thelawfareproject.org/what-is-lawfare.html (last visited Feb. 14, 2014).

What Goldsmith omitted was any mention of the impact that illegal government actions have on innocent victims around the world: detainees tortured and held for years in abysmal conditions at Guantanamo despite abundant evidence that they had done nothing wrong, civilians killed as "collateral damage" by U.S. attacks, and immigrants to the United States detained, abused, and deported because they are Arab or Muslim.[393] In the absence of any discussion of the pain inflicted on innocent victims, however, it is impossible to evaluate the cost that immunity imposes on those targeted and on the rule of law.[394]

From a human rights perspective, allowing government officials to decide if and when they should be held accountable is like leaving the fox to guard the chicken coop. When democratic accountability fails, who will protect the citizens of an abusive government if the only judges of the legality of a state official's conduct are officials of that same state? Who will protect the citizens of other countries from the extraterritorial actions of a military superpower?

Equally troubling, government officials concerned about their own liability might tend to favor protections for other officials, to protect themselves as well. The Bush Administration offered one glaring example of this prob-

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In a remarkable ten-page section of a later book, Goldsmith appeared to wrestle with conflicted feelings about legal challenges to U.S. government policies, which he continued to label "lawfare." JACK GOLDSMITH, POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11, at 223–33 (2012). Goldsmith grudgingly acknowledged that such litigation was not abusive or illegitimate, *id.* at 226, and actually credited legal challenges with pushing the various branches of the federal government to enunciate rules of law to govern counter-terrorism operations, *id.* at xi–xiii. But he reaffirmed his view that private legal organizations have engaged in "vicious attacks on government officials," *id.* at 227, replete with "vivid, reputation-harming charges," *id.* at 230, and focused repeatedly on the pain inflicted on government officials when their conduct is subject to judicial scrutiny.

393 *See, e.g.*, INT'L HUMAN RIGHTS AND CONFLICT RESOLUTION CLINIC AT STANFORD LAW SCH. AND GLOBAL JUSTICE CLINIC AT NYU SCH. OF LAW, LIVING UNDER DRONES: DEATH, INJURY, AND TRAUMA TO CIVILIANS FROM US DRONE PRACTICES IN PAKISTAN (2012), *available at* http://www.livingunderdrones.org/report/; CTR. FOR HUMAN RIGHTS AND GLOBAL JUSTICE (NYU SCH. OF LAW) AND ASIAN AM. LEGAL DEF. AND EDUC. FUND, UNDER THE RADAR: MUSLIMS DEPORTED, DETAINED, AND DENIED ON UNSUBSTANTIATED TERRORISM ALLEGATIONS (2011), *available at* http://aaldef.org/UndertheRadar.pdf; Conor Friedersdorf, *Former State Department Official: Team Bush Knew Many at Gitmo Were Innocent*, THE ATLANTIC (April 26, 2013, 8:15 AM), *available at* http://www.theatlantic.com/politics/archive/2013/04/former-state-department-official-team-bush-knew-many-at-gitmo-were-innocent/275327/ (concluding that fifty-to-sixty percent of the Guantanamo detainees were probably innocent).

394 As Baher Azmy has pointed out, even if executive branch policies were lawful, some U.S. officials made serious, consequential mistakes in implementing those policies; innocent civilians were hurt by those mistakes; the vast majority of the officials responsible for their injuries have not been sanctioned; and the bar on litigation against either the officials or the U.S. government has prevented the victims from obtaining compensation. Baher Azmy, *An Insufficiently Accountable Presidency: Some Reflections on Jack Goldsmith's* Power and Constraint, 45 CASE W. RES. J. INT'L L. 23, 55–61 (2012). By contrast, the Canadian, British, and Macedonian governments have apologized and paid compensation to individuals injured in operations conducted jointly with the U.S. government. *Id.* at 56–58.

lem, with its authorization of the torture of post-September 11 detainees, followed by the torturers' claims of immunity because their actions had been authorized by the government. U.S. history, both before and after September 11, offers many more.[395]

Immunity is central to the struggle over the power to define and enforce international law. Once again, the controversy over ATS litigation implicates one of the key issues underlying the modern debate over international law.

V. EXTRATERRITORIALITY, *KIOBEL*, AND STATE LAW CLAIMS

The initial grant of certiorari review in *Kiobel* seemed straightforward, given that the circuit courts had split on the sole question posed by the case: whether the courts can recognize ATS claims against corporate defendants.[396] The battle over corporate ATS accountability had been raging since the late 1990s, when the first corporate-defendant cases were filed. The Supreme Court scheduled *Kiobel* for oral argument on the same day that it heard the related question as to whether the TVPA applied to corporations.[397]

At oral argument, however, the discussion quickly veered to a distinct issue: whether the ATS affords jurisdiction over claims that arise in the territory of foreign states.[398] *Kiobel* involved claims by citizens of Nigeria against foreign corporations for events that took place in Nigeria. The extraterritorial application of the ATS had been raised and debated for several years, most pointedly in a Bush Administration brief filed in *Sosa*.[399] But the Court in *Sosa* declined to address the claim that the statute did not apply to international law violations committed outside of U.S. territory. Although not a formal part of the *Sosa* holding, the Court must have considered and rejected that argument; the fact that the events at issue in *Sosa* took place in Mexico was an essential feature of the case, which turned in large part on whether U.S. law enforcement officials had the authority to hire agents to seize Alvarez-Machain in a foreign country and bring him into the United States. Justice Ginsberg referred to *Sosa* when extraterritoriality was raised at the first

395 *See* Parry, *supra* note 380.

396 *See supra* note 292 (citing cases).

397 *See* Mohamad v. Palestinian Auth., 132 S. Ct. 1702, 1710–11 (2012) (holding that the TVPA does not authorize a cause of action against corporations).

398 Less than sixty seconds into oral argument, Justice Kennedy asked why the case was in U.S. courts, given that the claims involved "extraterritorial human rights abuses to which the [United States] has no connection." Transcript of Oral Argument at *3–4, Kiobel v. Royal Dutch Petroleum Co., 132 S. Ct. 472 (2011) (No. 10-1491), 2012 WL 628670. As explained earlier, *Kiobel* did not decide the corporate-defendant issue, but the opinions suggested that the Court found that the ATS does authorize claims against corporations. *See supra* note 295.

399 *See* U.S. *Sosa* Brief, *supra* note 172, at 46–50.

Kiobel oral argument, stating her view that *Sosa* had decided that extraterritorial ATS claims were viable.[400]

What changed between *Sosa* and *Kiobel*? The Rehnquist Court gave way to the Roberts Court. Justice O'Connor retired and was replaced by Justice Alito. That change left just five of the six votes in the *Sosa* majority on the Court. Justice Kennedy, viewed by all observers as the swing vote in *Kiobel*, had joined a majority opinion in *Morrison* that strengthened the presumption against extraterritoriality, requiring explicit statutory language to overcome the presumption.[401] The *Morrison* decision was only the latest in a string of Supreme Court cases that limited access to the courts to seek redress for corporate and government misconduct.[402] With a relentless, alarmist drumbeat, the business community complained that ATS cases allowed private litigants to hold corporations liable for foreign governments' human rights abuses simply because they were doing business in those foreign states—a fear that fit neatly within the anti-litigation framework increasingly in favor at the Court. Finally, the heated clashes over judicial and executive powers that contributed to the *Sosa* decision had cooled considerably with the end of the Bush Administration.

The significance of the *Kiobel* decision for cases with different facts, particularly the impact of Justice Kennedy's key fifth vote for the majority opinion, remains hotly contested. The majority opinion concluded by noting that claims that "touch and concern the territory of the United States . . . with sufficient force" will "displace the presumption against extraterritoriality." This point was followed by the observation that "mere corporate presence" is insufficient to displace that presumption. The opinion gave no indication of what contacts with the United States would be sufficient. Justice Kennedy's separate concurrence praised the majority for being "careful to leave open a number of significant questions." Justice Alito wrote separately to endorse a "broader standard" that would have barred claims based on violations that occur outside U.S. territory and expressed regret that the majority had adopted a "narrow approach."[403]

Professor Wuerth has suggested that Justice Kennedy refused to endorse a holding that the ATS did not apply unless the human rights violations at issue occurred within the United States, forcing the majority to adopt a "narrow approach" and to clarify that its holding did not go so far as Justice Alito

400 *See* Transcript of Oral Argument, *supra* note 398, at *13. Justice Ginsburg interrupted an exchange about the extraterritorial application of the ATS to say: "That sounds very much like *Filártiga*. And I thought that . . . *Sosa* accepted that *Filártiga* would be a viable action under the [alien] tort claims act." *Id.*

401 Morrison v. Nat'l Austl. Bank, 130 S. Ct. 2869, 2878 (2010); *see id.* at 2891 (Stevens, J., concurring) (arguing that the majority in *Morrison* altered the presumption against extraterritoriality by looking only at the statutory text, rather than considering "'all available evidence about the meaning' of a provision when considering its extraterritorial application, lest we defy Congress' will" (quoting Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155, 177 (1993))).

402 *See supra* note 170.

403 *Kiobel*, 133 S. Ct. at 1669–70 (Alito, J., concurring).

would have preferred.[404] Limited to that holding, the Supreme Court did little more than define one limit on an ATS cause of action. *Kiobel* held that the ATS does not permit recognition of a claim (1) filed by foreign citizens, (2) against foreign citizens, (3) based solely on extraterritorial conduct, (4) when, as in *Kiobel* itself, the defendant has only a "mere corporate presence" in the United States. But *Kiobel* also told us that claims that "touch and concern" the United States with greater force do support recognition of a cause of action.

As the crucial fifth vote, Justice Kennedy's short concurring opinion offers potential guidance. He wrote that cases that are not covered by the "*reasoning and holding*" of *Kiobel* are not necessarily foreclosed. The *holding* of *Kiobel* is narrow, perhaps, if Professor Wuerth's hypothesis is correct, at Justice Kennedy's insistence. The reference to the *reasoning* of *Kiobel* provides additional clarification. The majority opinion reasoned that the presumption against extraterritoriality serves "to protect against unintended clashes between our laws and those of other nations which could result in international discord"[405] and to avoid "unwarranted judicial interference in the conduct of foreign policy."[406] The majority also stressed that there is nothing in the history surrounding passage of the ATS that suggests that it was intended to assert jurisdiction beyond what would be asserted by other nations.[407] The first of these concerns is easily applied to ATS litigation. Some cases precipitate clashes between U.S. and foreign law, provoke international tension, and prompt objections from the executive branch. However, many cases do not, because the foreign state where the events took place is silent or affirmatively supports the litigation, and the U.S. executive branch expresses no concerns about the foreign policy impact of the case.[408]

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404 *See* Ingrid Wuerth, Kiobel v. Royal Dutch Petroleum Co.*: The Supreme Court and the Alien Tort Statute*, 107 AM. J. INT'L L. 601, 607–09 (2013) (discussing the ambiguities in the majority opinion).

405 *Kiobel*, 133 S. Ct. at 1664 (majority opinion) (citing EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991)).

406 *Id.*

407 The majority opinion suggested that, at the time the statute was enacted, at a minimum, nations recognized authority to assert jurisdiction over claims based on violations occurring at sea or within U.S. territory, and violations committed by U.S. citizens, at least when such acts violated a treaty. *See id.* at 1666–67 (discussing incidents occurring within the United States); *id.* at 1167 (discussing claims for piracy); *id.* at 1667–68 (discussing claims involving conduct by U.S. citizens in violation of a treaty); *id.* at 1668 (concluding that "there is no indication that the ATS was passed to make the United States a uniquely hospitable forum for the enforcement of international norms," or to become the moral guardian of the world).

408 *See, e.g.*, Mamani v. Berzain, 654 F.3d 1148, 1151 (11th Cir. 2011) (noting the Bolivian government's waiver of immunity); Paul v. Avril, 812 F. Supp. 207, 210–11 (S.D. Fla. 1993) (accepting government of Haiti's waiver of all immunities); Statement of Interest of the United States, Nat'l Coal. Gov't of the Union of Burma v. Unocal, Inc., 176 F.R.D. 329 (C.D. Cal. 1997) (No. 96-6112), *reprinted in* Exhibit A, *Nat'l Coal. Gov't*, 176 F.R.D. at 362 (stating that adjudication of the claims "[w]ould not prejudice or impede the conduct of U.S. foreign relations with the current government of Burma"); Statement of Interest of

The second prong of the "reasoning" of *Kiobel*, the need to avoid excessive assertions of jurisdiction, requires an analysis of international law and the practice of foreign states. Justice Breyer's concurring opinion did just that, applying international law to determine what claims are properly brought in the United States. He concluded that three categories of cases fit within the bounds of international law: when the tort occurs on U.S. territory, the defendant is a U.S. national, or the defendant has sought safe haven in the United States.[409] Justice Breyer's opinion, of course, received only four votes. But he did answer a question that was posed and intentionally left unanswered by the majority, and did so in a manner that is consistent with the concerns that the majority expressed. His standard is likewise consistent with *Sosa*, with the lower court decisions cited with approval in *Sosa*, and with the approach suggested by the executive branch in its amicus brief in *Kiobel*.[410] Viewed as an elaboration of the issues raised by Justice Kennedy, Justice Breyer's concurring opinion could inform application of a *Sosa-Kiobel* ATS standard going forward.

To the extent that *Kiobel* restricts federal jurisdiction over claims arising from human rights abuses in foreign states, litigants are likely to turn to state courts for redress.[411] Most international law violations also constitute both common law torts and torts under the laws of the place where the events took place. If a state court has personal jurisdiction over the defendant, plaintiffs can litigate the international law claims as transitory torts. State law claims will raise complicated choice of law issues that are beyond the scope of this Article, including the definitions of the substantive norms, statutes of limitation, theories of liability, and damages. But rejecting federal jurisdiction over such claims will bring our courts full circle, back to the concerns that spurred passage of the ATS, 225 years ago: claims touching upon sensitive issues of foreign affairs will once again be litigated in state courts, subject to the vagaries of the laws of the fifty states.

Conclusion

When I began to work on ATS cases in 1990, I was perplexed by all the fuss about the statute. I had returned to the United States in 1989 after living for six years in Nicaragua, where I was deeply immersed in the politicized use of human rights as a tool in the deadly U.S.-directed war against the Nicara-

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the United States, Kadic v. Karadžić, 70 F.3d 232 (2d Cir. 1995) (Nos. 94-9035, 94-9069) (stating that the district court erred in dismissing the complaint and that the case did not raise a non-justiciable political question).

409 *Kiobel*, 133 S. Ct. at 1674 (Breyer, J., concurring).

410 U.S. Supplemental *Kiobel* Brief, *supra* note 376, at 6–13.

411 For a discussion of state law claims for human rights abuses, see generally Paul Hoffman & Beth Stephens, *International Human Rights Cases Under State Law and in State Courts*, 3 U.C. Irvine L. Rev. 9 (2013).

guan government.[412] I was surrounded by exiles from Chile, Argentina, Uruguay, Honduras, El Salvador, and Guatemala who had fled their home countries to escape detention, torture, disappearance, and death. I had no illusions about the power of a handful of lawsuits to have a significant impact on this machinery of evil. I also had no illusions about the good faith of governments, or the willingness of government officials either to respect human rights themselves or to hold other governments accountable for their abusive behavior. I assumed that powerful defendants would make every effort to overturn successful ATS precedents and would eventually succeed.

I began to litigate ATS cases with enthusiasm, nevertheless, because I saw the value of small steps toward human rights accountability. Those who consider ATS victories insignificant because they are "merely" symbolic miss the importance of symbolism. Dolly Filártiga knows that she won the case filed on behalf of her brother, even though her family has been unable to collect the damage award.[413] Helen Todd took satisfaction from having caused one of the generals responsible for her son's death in East Timor to flee from the United States.[414] Other plaintiffs gained strength and empowerment from the opportunity to tell their stories in court. And the communities represented by individual plaintiffs gained strength from their victories—and, at times, just from the fact that survivors of abuses had the audacity to file suit.[415]

Beyond the impact on individual lives, ATS claims are part of the global accountability movement that both made them possible and built upon their successes. In Europe, criminal prosecutions based on universal jurisdiction followed a pattern similar to ATS civil litigation, with ambitious efforts to prosecute foreign government officials followed by statutory amendments that blocked further prosecutions.[416] Despite the pushback in both the United States and Europe, the past thirty years have seen unprecedented efforts to hold accountable those who violate human rights: criminal prose-

412 I worked for a human rights organization while in Nicaragua, where my assignments included monitoring human rights abuses committed both by the U.S.-supported "contra" and by the Nicaraguan government.

413 *See* Filártiga, *supra* note 126 (quoting Dolly Filártiga's description of her family's lawsuit as "an enormous victory" for human rights and the pursuit of justice).

414 Todd v. Panjaitan, No. 92-12255-PBS, 1994 WL 827111 (D. Mass. Oct. 26, 1994) (issuing judgment for $14 million against an Indonesian general in suit by the mother of a man killed in a massacre by Indonesian troops in East Timor).

415 One of my favorite indications of the impact of an ATS case was a Guatemalan newspaper published the day after *Xuncax v. Gramajo* was filed, with a banner front-page headline that said "Gramajo Sued" ("Gramajo Demandado"). Colleagues in Guatemala at the time reported that members of the beleaguered Guatemalan human rights community took satisfaction from the mere fact that a newspaper reported that a member of the feared Guatemalan military establishment had been sued for human rights violations.

416 *See generally* Luc Reydams, *The Rise and Fall of Universal Jurisdiction*, *in* ROUTLEDGE HANDBOOK OF INTERNATIONAL CRIMINAL LAW 337 (William A. Schabas & Nadia Bernaz eds., 2010), *available at* http://ssrn.com/abstract=1553734; *see also* Eugene Kontorovich, Kiobel *Surprise: Unexpected by Scholars but Consistent with International Trends*, 89 NOTRE DAME L. REV. 1671, 1682–86 (2014).

cutions in international tribunals and domestic courts, civil claims in domestic courts, and recommendations and decisions from multiple international organizations and human rights courts, commissions, councils, and committees. Although these proceedings have produced only a small number of enforceable judgments, they have all contributed to the implementation of international human rights norms by strengthening substantive norms, highlighting the role of non-state actors in enforcing those norms, putting corporations and government officials on notice that they may be held accountable for abuses, and increasing global awareness of the potential consequences of human rights violations.[417]

The strengths and weaknesses of ATS litigation mirror those of international human rights law and international law in general. Although states have endorsed human rights norms, they are willing to accept only the most minimal mechanisms to enforce those norms. Similarly, ATS cases were relatively noncontroversial as long as all they produced was strong rhetoric about the importance of human rights norms. The response to the cases changed dramatically when the ATS threatened to generate enforceable judgments against defendants with significant economic and political power. Efforts to strengthen enforcement of human rights norms through the ATS or any other mechanisms are stifled by the anti-regulation, anti-enforcement climate that dominates today, both within the United States and globally.

ATS litigation was never as powerful as its supporters hoped or its opponents feared. But it has been successful as a modest effort to impose some accountability for a small number of human rights violations. The vehemence of the backlash against these cases indicates just how committed states and corporations are to avoiding scrutiny and accountability. As long as those with legal and economic power fail to offer meaningful opportunities to obtain redress, victims and survivors of human rights abuses will continue to seek means to obtain justice.

417 *See generally* Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181 (1996) (explaining compliance with international law as the result of a complex set of interactions among governments, international institutions, and non-state actors).