

***SOSA V. ALVAREZ-MACHAIN*¹ AND THE ALIEN TORT STATUTE: HOW WIDE HAS THE DOOR TO HUMAN RIGHTS LITIGATION BEEN LEFT OPEN?**

I. INTRODUCTION

Activists are pulling with all their might to open the door to human rights litigation in the United States federal courts.² At the same time, the Bush administration, multinational corporations, and some members of the Supreme Court are leaning heavily against that door, summoning the weight of history and tradition to keep it shut.³ This struggle exists because of the near-dormant state of the Alien Tort Statute (ATS)⁴ since its enactment as a component of the Judiciary Act of 1789.⁵ Neither the Supreme Court nor Congress has made a thorough determination as to what claims aliens can bring for violation of the “law of nations”⁶ before

1. 542 U.S. 692 (2004).

2. Marcia Coyle, *Justices Open Door with Alien Tort Case*, THE RECORDER, July 8, 2004, at 1 (marking that human rights proponents “lost the battle but won the war” with the Supreme Court’s decision in *Sosa v. Alvarez-Machain* and would persist with other pending Alien Tort Statute suits).

3. Warren Richey, *When Can Foreigners Sue in US Courts?*, THE CHRISTIAN SCIENCE MONITOR, March 30, 2004, at 2 (reporting that the outcome of the *Sosa* case is of “great interest to US-based multinational corporations” that are being increasingly named as defendants in human rights litigation). The suits brought against these multinational corporations under the ATS “allege that the companies are aiding and abetting the human rights abuses of the host government.” *Id.*

4. 28 U.S.C. § 1350 (2000). This legislation is known interchangeably as the Alien Tort Statute, the Alien Tort Claims Act and the Alien Tort Act; throughout this paper it will be referenced as the Alien Tort Statute, or ATS, as is consistent with the Supreme Court’s language in *Sosa*. See *infra* note 24 for both the modern and historical text of the ATS.

5. See *infra* notes 23-26 and accompanying text (providing the language of this Act and explaining its historical context). See also *infra* notes 39-53 and accompanying text (discussing the dormant period of the ATS, beginning shortly after its enactment and extending until the Second Circuit’s decision in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980)).

6. *Black’s Law Dictionary* cross references “law of nations” to the definition of “international law.” BLACK’S LAW DICTIONARY 903 (8th ed. 2004). International law is “[t]he legal system governing the relationships between nations; more modernly, the law of international relations, embracing not only nations but also such participants as international organizations, multinational corporations, nongovernmental organizations, and even individuals (such as those who invoke their human rights or commit war crimes).” *Id.* at 835. The author will primarily refer to this body of law as the “law of nations” rather than “international law” throughout this Note, as it is the language used in the Alien Tort Statute, see *infra* note 24, and in the Supreme Court’s

the federal courts.⁷

The Supreme Court's decision in *Sosa v. Alvarez-Machain*⁸ neither threw the door open nor shut it firmly.⁹ Instead, this decision perpetuates the uncertainty surrounding the ATS by leaving the door slightly ajar, suggesting that the issue will be revisited frequently as human rights issues push to the forefront of the national conscience.¹⁰ *Sosa* acknowledges a remedy for violations of the modern day law of nations without enunciating exactly what that body of law entails.¹¹ The Court gives hope to human rights activists that the ATS will provide a jurisdiction for the adjudication of severe international offenses, while acknowledging that not every international dispute will warrant a cause of action in the federal courts.¹² The Court, cautiously tempering the ATS to a limited application, staves off a potential influx of alien claims to the federal court and, at least temporarily, appeases those corporations who might suffer an adverse effect.¹³ An analysis of the Court's disposition in this case, then, is helpful to gauge the potential outcome of future human rights litigation and to explore the consequences that keeping the door ajar to alien claims might invite.¹⁴

This Note will explore the Alien Tort Statute from its origin in 1789 to the present interpretation of the *Sosa* Court.¹⁵ Part II will focus

decision in *Sosa*. Despite the arguably interchangeable use of these terms, "law of nations" is especially significant to this Note because of the controversy surrounding its meaning and intention.

7. Coyle, *supra* note 2, at 1. As the "first substantive high court decision on the ATS in the statute's history," *Sosa* is the Supreme Court's first attempt to flesh out some of the ambiguous elements of the ATS. *Id.* Congress has yet to bring the scope of the ATS up for discussion. GARY CLYDE HUFBAUER & NICHOLAS K. MITROKOSTAS, AWAKENING MONSTER: THE ALIEN TORT STATUTE OF 1789, 49 (2003) (encouraging review of the ATS by Congress) [hereinafter HUFBAUER & MITROKOSTAS, AWAKENING MONSTER]; Gary Clyde Hufbauer & Nicholas K. Mitrokostas, *International Implications of the Alien Tort Statute*, 16 ST. THOMAS L. REV. 607, 624 (2004) (suggesting the same) [hereinafter Hufbauer & Mitrokostas, *International Implications*].

8. 542 U.S. 692 (2004). See *supra* Section III for the statement of the case.

9. Justice Scalia, in his concurring opinion, urges that the door be firmly shut. *Sosa*, 542 U.S. at 739 (Scalia, J., concurring). The plurality leaves it open slightly. *Id.* at 746.

10. See *infra* notes 90-126 and accompanying text (discussing the plurality's opinion which has this result).

11. See *infra* notes 90-126 and accompanying text (discussing the same).

12. Anthony J. Sebok, *Is the Alien Tort Claims Act a Powerful Human Rights Tool?*, CABLE NEWS NETWORK, July 12, 2004, <http://www.cnn.com/2004/LAW/07/12/sebok.alien.tort.claims/index.html> (last visited March 20, 2006). See *infra* notes 176-182 and accompanying text (discussing the connection between the ATS and potential human rights violations and the controversy surrounding this connection).

13. See *infra* notes 90-126 and accompanying text (presenting the plurality's opinion).

14. See *infra* notes 176-196 and accompanying text (discussing these consequences from three aspects: human rights activists, multinational corporations, and the foreign policy objectives of the United States).

15. See *infra* notes 23-66 and accompanying text (setting forth the history of the ATS).

on the Framers' language and intent, discuss the long lull in the use of the ATS and the impact of *Erie R. Co. v. Tompkins*,¹⁶ and examine a line of cases that reawakened the ATS in the 1980s.¹⁷ Part III explores the elements of the Court's decision in *Sosa v. Alvarez-Machain*: the facts that gave rise to an ATS claim, the plurality's denial of jurisdiction, its dicta regarding potential application of the ATS, and Justice Scalia's concurring opinion endorsing a very narrow and strict approach to the modern ATS.¹⁸ Part IV analyzes the possible interpretations and application of the Court's decision,¹⁹ the efforts of human rights victims and activists to squeeze through the slightly ajar door of the ATS,²⁰ the potential international and economic implications that may result from the Supreme Court's failure to decisively shut the door on ATS litigation,²¹ and the role that Congress should play in redefining the purpose of the ATS.²²

II. THE EVOLUTION OF THE ALIEN TORT STATUTE

A. Formation by the First Congress

In 1789, two years after the ratification of the United States Constitution, the First Congress enacted the Judiciary Act.²³ Among the

16. 304 U.S. 64 (1938). See *infra* notes 39-53 and accompanying text (discussing the idle years of the ATS).

17. See *infra* notes 54-66 and accompanying text (discussing recent application of the ATS).

18. See *infra* notes 67-136 and accompanying text (setting forth a summary of the plurality's opinion and Justice Scalia's separate concurring opinion).

19. See *infra* notes 137-175 and accompanying text (addressing the directions that application of the *Sosa* decision could take).

20. See *infra* notes 176-182 and accompanying text (discussing the same).

21. See *infra* notes 183-196 and accompanying text (discussing the same).

22. See *infra* notes 197-200 and accompanying text (discussing the same).

23. *An Act to Establish the Judicial Courts of the United States*, 1st Cong., 1st Sess., ch. 20 (1789) (available in 1 UNITED STATES STATUTES AT LARGE 73-93 (Richard Peters ed. 1845) [hereinafter First Congress, *Judiciary Act of 1789*]). Article III, Section 1 of the United States Constitution established the Supreme Court and "such inferior Courts as the Congress may from time to time ordain and establish." U.S. CONST. art. III, § 1. "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority." U.S. CONST. art. III, § 2, cl. 1. From this meager framework, the First Congress fleshed out the role of the federal judiciary, defining the structure of the Supreme Court, creating the district and circuit courts, and further refining those instances in which the federal courts have exclusive jurisdiction. First Congress, *Judiciary Act of 1789*, *supra*. See generally Russell G. Donaldson, *Construction and Application of Alien Tort Statute* (28 U.S.C.A. § 1350), *Providing for Federal Jurisdiction Over Alien's Action for Tort Committed in Violation of Law of Nations or Treaty of the United States*, 116 A.L.R. FED. 387 (2004) (presenting an exhaustive overview of the Alien Tort Statute and an analysis of those federal

ways in which this Act expanded the federal judicial powers created in the Constitution, the Act specifically provided jurisdiction for actions brought by aliens for torts only.²⁴ Although legislative history is sparse,²⁵ scholars suspect that Congress included such a provision in the Judiciary Act to serve economic motives and bolster the United States' fledgling presence on the international scene.²⁶ The ATS was the framers' way of "show[ing] European powers that the new nation would not tolerate flagrant violations of the 'law of nations,' especially when victims were foreign ambassadors or merchants."²⁷

court cases which "have construed or applied this statute since its enactment"). Oliver Ellsworth is credited with authoring the First Judiciary Act. William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the "Originalists,"* 19 HASTINGS INT'L & COMP. L. REV. 221, 222 (1996) [hereinafter Dodge, *Historical Origins*]. The Judiciary Act has since been codified in Title 28 of the United States Code. See also William R. Casto, *The Federal Courts' Protective Jurisdiction Over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467, 495 (1986) (describing the non-controversial passage of the ATS).

24. First Congress, *Judiciary Act of 1789*, *supra* note 23, at 76-77. The original language of the Judiciary Act of 1789, Section 9 began: "[t]he district courts shall have, exclusively of the courts of the States . . ." and then proceeded to specify instances in which the federal courts have exclusive jurisdiction. *Id.* The clause which would become known as the Alien Tort Statute (ATS) read: "[The district courts] shall also have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all cases where an alien sues for a tort only in violation of the law of nations or a treaty of the United States." *Id.* at 77. The modern language of the ATS, codified at 28 U.S.C. § 1350 states: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350 (2000). Changes in phraseology were made at various redrafts of the United States Code to reflect language used in the Federal Rules of Civil Procedure. See *id.* at "Historical and Statutory Notes" (noting the substitution of "civil action" for "suits" consistent with the FRCP).

25. Casto, *supra* note 23, at 467 (calling the ATS, its origin and purpose, "obscure"). See also Richey, *supra* note 3, at 2 (nicknaming the *Sosa* case "The Case of the Inscrutable Statute" because of the difficult task before the Supreme Court justices in interpreting a statute where "virtually no information exists explaining why Congress passed the [ATS]").

26. Dodge, *Historical Origins*, *supra* note 23, at 222. See also HUFBAUER & MITROKOSTAS, AWAKENING MONSTER, *supra* note 7, at 3 (noting U.S. response to "flagrant violations" against international figures as a precursor to the enactment of the ATS); John Haberstroh, *The Alien Tort Claims Act & Doe v. Unocal: A Paquete Habana Approach to the Rescue*, 32 DENV. J. INT'L L. & POL'Y 231, 236-37 (2004) (calling the ATS an attempt by the "militarily weak [United States] . . . to gain control over its voice in foreign relations"); Beth Stephens, *Upsetting Checks and Balances: The Bush Administration's Efforts to Limit Human Rights Litigation*, 17 HARV. HUM. RTS. J. 169, 186 (2004) (identifying the crises between the United States and other nations over a series of "notorious incidents" as the need for the ATS). "[D]espite considerable scholarly attention, it is fair to say that a consensus of what Congress intended [by the enactment of the ATS] has proven elusive." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 718-19 (2004).

27. HUFBAUER & MITROKOSTAS, AWAKENING MONSTER, *supra* note 7, at 3. The impetus for the ATS can be traced to a pair of assaults against foreign dignitaries while in the United States. *Id.* See also *infra* note 28 (describing one of these triggering incidents, involving the French Ambassador Marbois). The enactment of the ATS shortly following these incidents demonstrated that even "[e]arly in the history of the republic, Congress was evidently anxious to display

The inclusion of the ATS in the Judiciary Act reflects the First Congress' distrust of the state courts' ability and willingness to properly adjudicate aliens' claims involving the law of nations.²⁸ Having been entrusted with this duty by the Continental Congress in 1781, the state courts were left to their own common law interpretations of the law of nations and with the freedom to punish violations as they saw fit.²⁹ Out of concern for the United States' tenuous international status, the First

American leadership in defending international standards of good behavior." HUFBAUER & MITROKOSTAS, *AWAKENING MONSTER*, *supra* note 7, at 3. William Blackstone "explained that as a matter of municipal policy, a nation's domestic law must implement the law of nations in order to preempt complaints by foreign sovereigns." Casto, *supra* note 23, at 489. Economically speaking, the ATS granted a source of leverage to American merchants doing business internationally. Haberstroh, *supra* note 26, at 237. Suppressed by the "belligerent nations" of the mercantile world, American merchants (and other vulnerable nations) could fight the war for free trade "by means of moral persuasion." *Id.*

28. See Casto, *supra* note 23, at 495 (surmising that the newly convened Congress "surely remembered the Continental Congress' ill-fated law of nations resolution"); Dodge, *Historical Origins*, *supra* note 23, at 234-35 (attributing the passage of the ATS as a means of assuring the law of nations violations would be resolved "regardless of the vagaries of state law"). State courts had demonstrated their unwillingness to provide recourse for wronged aliens. Haberstroh, *supra* note 26, at 239. Among the torts encompassed in the law of nations was the violation of treaties. *Id.* See also First Congress, *Judiciary Act of 1789*, *supra* note 23, at 77 (creating jurisdictions for violation of the law of nations *and treaties*); *infra* note 35 (discussing the widely accepted understanding of what the "law of nations" encompassed). However, the state courts refused to grant justice for one such treaty violation by refusing to aid British creditors in recovering debt promised them in a treaty ending the Revolutionary War. Haberstroh, *supra* note 26, at 239. The ATS would ensure that hostile state courts did not put the nation's security at risk by angering a recent enemy or hinder the economy by angering a world power. *Id.*; Casto, *supra* note 23, at 493 (calling the "possibility that the United States might fail to provide an appropriate sanction or remedy" to law of nations violations "[t]he real foreign affairs problem"). Even where the states acted to remedy a violation of the law of nations, the common law which empowered the state action was not always enough to safeguard the United States against an international predicament. Haberstroh, *supra* note 26, at 239. For example, when a French Ambassador, Francis Barbe Marbois, was threatened in his Philadelphia home by another Frenchman, the Commonwealth of Pennsylvania successfully prosecuted the offender for a violation of the law of nations. *Id.*; Dodge, *Historical Origins*, *supra* note 23, at 229-30; Casto, *supra* note 23, at 491-93. The absence of Pennsylvania common law allowing a corresponding tort claim resulted in a less-than-happy Ambassador Marbois and "international clamor ensued." Haberstroh, *supra* note 26, at 239. Issuing a resolution was the only remedy the federal government could employ to protect national security. *Sosa*, 542 U.S. at 717 n.11. The resolution directed an apology to both Marbois and Louis XVI and an explanation of "'the difficulties that may arise . . . from the nature of a federal union,'" as well as a plea "that 'many allowances are to be made for' the young nation." *Id.* (citing 27 J. OF THE CONT. CONG. 503).

29. Dodge, *Historical Origins*, *supra* note 23, at 226-27. The nation had, from its very start, become concerned with the need to "redress individual violations of the law of nations." *Id.* at 226. See also Stephens, *supra* note 26, at 186 (citing the Continental Congress' frequent attempts to encourage the states to punish these violations, both civilly and criminally, prior to the enactment of the ATS). With this in mind the Continental Congress passed a resolution in 1781 requesting that the states so litigate such law of nations claims. Dodge, *Historical Origins*, *supra* note 23, at 226.

Congress enacted the ATS as a definitive statement that an alien's claim for a violation of the law of nations could be adjudicated in the federal courts, rather than being left to the uncertainty and hostility of the state courts.³⁰ The ATS, while not destroying state common law causes of action for the law of nations, created a concurrent jurisdiction in the federal courts,³¹ thereby assuring aliens – and signaling to world powers – that violations of the law of nations would be redressed in American courts.³²

The “law of nations,” as the Founding Fathers understood the notion, can be traced to the teachings of William Blackstone.³³ Blackstone theorized that “[t]he law of nations is a system of rules,

30. Dodge, *Historical Origins*, *supra* note 23, at 235-36. *See also supra* notes 27-28 (describing the international status motives behind the enactment of the ATS). The potential for inconsistencies in the interpretation of the law of nations from state to state was distressing to the Founding Fathers who sought a consonant interpretation. Dodge, *Historical Origins*, *supra* note 23, at 235. The authors of the Federalist Papers pointed to the need for federal jurisdiction in this instance on the bases of national security and a vibrant economy. *Id.* at 235-36. James Madison blamed the hostility of state courts to the claims of aliens for the lack of “wealthy gentlemen . . . trading or residing among us.” *Id.* at 235 (quoting 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 583 (J. Elliot ed., 2d ed. 1881)). Alexander Hamilton considered the barring of access to courts for the adjudication of these claims “among the just causes of war” and therefore felt that “the federal judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned.” *Id.* at 236 (quoting THE FEDERALIST NO. 80, at 476 (Alexander Hamilton) (Clinton Rossiter ed., 1961)). In practice, the resolution of the Continental Congress was ineffective; it appears only one state passed a law to this effect. *Sosa*, 542 U.S. at 716 (citing FIRST LAWS OF THE STATE OF CONNECTICUT 82, 83 (J. Cushing ed. 1982) (1784 compilation; exact date of Act unknown)). In theory, however, “Congress had done what it could to signal a commitment to enforce the law of nations.” *Id.*

31. *See* First Congress, *Judiciary Act of 1789*, *supra* note 23, at 77; 28 U.S.C. § 1350 (2000).

32. Dodge, *Historical Origins*, *supra* note 23, at 236. “The new Constitution gave Congress the authority to do what it could only recommend to the States in 1781.” *Id.* at 231. *See also* Curtis A. Bradley & Jack L. Goldsmith, III, *The Current Illegitimacy of International Human Rights Litigation*, 66 FORDHAM L. REV. 319, 360 (1997) (identifying the “major impetus” for the ATS as “unredressed attacks on ambassadors in the United States . . . that implicated the U.S. responsibility under international law”); Casto, *supra* note 23, at 481 (explaining that the judicial remedy provided by the ATS was “necessary in order to assuage the anger of foreign sovereigns”).

33. *See* Dodge, *Historical Origins*, *supra* note 23, at 225 (recognizing Blackstone's influence in early American law). William Blackstone, a British lawyer and contemporary of the Founding Fathers, lectured on English law at Oxford in the 1750s. Greg Bailey, *Blackstone in America*, available at <http://earlyamerica.com/review/spring97/blackstone.html> (last visited 4/7/2006). The lectures were later published as *Commentaries on the Laws of England*. *Id.* The Framers discovered their inspiration for the founding documents of the United States in Blackstone's scientific approach to the law. *Id.* *But see* Casto, *supra* note 23, at 505 and 505 n.210 (giving credit for the notion of law of nations to James Wilson, “an influential delegate to the Constitutional Convention”). Wilson lectured on three branches of the law of nations in 1790 and 1791. *Id.* He identified “the law of nations as applied to state” (or the “current international law”), the “law of merchants” (or those laws which governed “private international business transactions”) and the “law maritime” (which encompassed admiralty). *Id.* (internal quotations and footnotes omitted).

deducible by natural reason, and established by universal consent among the civilized inhabitants of the world.”³⁴ Blackstone suggested that “[t]he principle offences against the law of nations . . . are of three kinds; 1. Violation of safe-conducts; 2. Infringement of the rights of ambassadors [sic]; and 3. Piracy.”³⁵ An insight to the intentions behind the ATS can be found in the language of the Continental Congress’ resolution issued to the states as a precursor to the enactment of the Judiciary Act.³⁶

In words that echo Blackstone, the congressional resolution called upon state legislatures to “provide expeditious, exemplary, and adequate punishment” for “the violation of safe conducts or passports, . . . of hostility against such as are in amity, . . . with the United States, . . . infractions of the immunities of ambassadors and other public ministers . . . [and] “infractions of treaties and conventions to which the United States are a party.”³⁷

Consistent with Blackstone’s influence, the First Congress likely intended the federal courts would have jurisdiction over these types of violations by virtue of the ATS.³⁸

34. Dodge, *Historical Origins*, *supra* note 23, at 225-26 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *68).

35. *Id.* at 226. (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *68); Casto, *supra* note 23, at 490 (crediting Blackstone for establishing these primary violations of the law of nations).

36. *Sosa v. Alvarez-Machain*, 542 U.S. at 716 (2004). This resolution dates to 1781, eight years before the drafting of the ATS. *Id.* See *supra* notes 28-29 and accompanying text (discussing the federal government’s urging of the states to adjudicate aliens’ claims).

37. *Sosa*, 542 U.S. at 716 (citing 21 J. OF THE CONT. CONG. 1136-37 (G. Hunt ed. 1912)). The Resolution issued by the First Congress to the states also requested that the states “vest their courts with jurisdiction ‘to decide on offences against the law of nations, not . . . enumerate[d].’” Casto, *supra* note 23, at 490 (quoting 21 J. OF THE CONT. CONG. 1137 (1781) (penultimate resolve)).

38. Dodge, *Historical Origins*, *supra* note 23, at 232. Blackstone’s law had already been absorbed into the common law of the states which the ATS was enacted to centralize. *Id.*

Violations of safe-conducts would typically involve assaults. Violations of the rights of ambassadors could involve assault . . . or trespass and false imprisonment. Acts of piracy could involve assault, trespass, and false imprisonment. Violations of treaties could implicate a variety of torts, but it is apparent that assaults in violation of U.S. neutrality could violate a treaty.

Id. at 232-33.

That portion of the general common law known as the law of nations was understood to refer to the accepted practices of nations in their dealings with one another (treatment of ambassadors, immunity of foreign sovereigns from suit, etc.) and with actors on the high seas hostile to all nations and beyond all their territorial jurisdictions (pirates).

Sosa, 542 U.S. at 749 (Scalia, J., concurring).

B. *Nearly 200 Years of Stagnancy*

Despite apparently pressing reasons for the inclusion of the Alien Tort Statute in the Judiciary Act, the jurisdiction it extended for the tort claims of aliens went essentially unused for nearly 200 years following its enactment.³⁹ Invoked just over twenty times between 1789 and 1980,⁴⁰ the federal courts found jurisdiction under the ATS in only two of those cases.⁴¹ During this period, the ATS had effect as “principally a jurisdictional statute.”⁴² It was thought that “the ATS confided the power in federal district courts to hear tort cases brought by foreigners, but it did not (with limited exceptions) enumerate torts that could be the basis of a lawsuit.”⁴³

39. Haberstroh, *supra* note 26, at 236. “The ATS remained largely unnoticed and unused until 1980.” HUFBAUER & MITROKOSTAS, *AWAKENING MONSTER*, *supra* note 7, at 3. Immediately following the 1789 passage of the ATS, a handful of events confirmed the need for such legislation. Casto, *supra* note 23, at 501. Diplomat-related issues became especially pronounced with the outbreak of war between France and Great Britain in the early 1790s. *Id.* President Washington insisted on the neutrality of Americans toward the hostility, and proclaimed any assistance to either side a violation of the law of nations. *Id.* at 502.

40. Haberstroh, *supra* note 26, at 236; Hufbauer & Mitrokostas, *International Implications*, *supra* note 7, at 609. Two early cases broached the topic of the ATS, but neither relied on the ATS as the basis for jurisdiction. Dodge, *Historical Origins*, *supra* note 23, at 252. In both cases, the ATS “was asserted . . . as a supplement to the district courts’ admiralty and maritime jurisdiction.” *Id.* The 1793 case of *Moxon v. The Fanny*, 17 F. Cas. 942 (D. Pa. 1793) (No. 9895), involved the commandeering of a British ship in U.S. waters by a French privateer. Dodge, *Historical Origins*, *supra* note 23, at 252. The district court dismissed the case on other grounds, but did note parenthetically that the plaintiff’s claim under the ATS could not be maintained, despite its foundation in admiralty and maritime law, because it was not a suit for “tort only.” *Id.* In addition to damages, the claim also prayed for restitution of the ship. *Id.*

41. Hufbauer & Mitrokostas, *International Implications*, *supra* note 7, at 609. In *Bolchos v. Darrel*, 3 F. Cas. 810 (D. S.C. 1795) (No. 1607), the ATS served as the reserve jurisdictional basis for a claim involving another French privateer. Dodge, *Historical Origins*, *supra* note 23, at 253. In this case the French privateer brought an action for the proceeds of the sale of slaves from a Spanish vessel he had captured at sea. *Id.* An agent for the owner of the slaves later recovered the commandeered slaves and sold them. *Id.* The district court held that if it “should refuse to take cognizance of the cause, there would be a failure of justice.” *Bolchos*, 3 F. Cas. at 810. Jurisdiction in the federal courts was established in this case because it was an admiralty claim, *id.*, but, the court also stated:

Besides, as the 9th section of the [J]udiciary [A]ct of [C]ongress gives this court concurrent jurisdiction with the state courts and circuit court of the United States where an alien sues for a tort, in violation of the law of nations, or a treaty of the United States, I dismiss all doubt upon this point.

Id.; Dodge, *Historical Origins*, *supra* note 22, at 253. In 1961, *Adra v. Clift*, 195 F.Supp. 857 (D.Md. 1961) successfully found jurisdiction under the ATS. Hufbauer & Mitrokostas, *International Implications*, *supra* note 7, at 609 n.14.

42. HUFBAUER & MITROKOSTAS, *AWAKENING MONSTER*, *supra* note 7, at 3.

43. *Id.* Although many federal courts eventually began expanding the ATS to include a cause of action for the modern law of nations, most notably in *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980) (holding that torture violated the law of nations such that the ATS provided

C. Customary International Law⁴⁴ and *Erie R. Co. v. Tompkins*⁴⁵

When the First Congress enacted the ATS in 1789, the law of nations existed as part of the general common law.⁴⁶ One-hundred-fifty-years later, in *Erie R. Co. v. Tompkins*,⁴⁷ the Supreme Court struck down the concept of federal common law and required that federal courts use the law of the state in which they are situated.⁴⁸ In theory, the decision in *Erie* should have had a significant impact on the ATS; the law of nations, as understood by the drafters of the ATS, was embodied in general common law.⁴⁹ Likewise, any modern causes of action that the

jurisdiction for an alien's claim against another alien), *see supra* notes 54-66 (focusing on the *Filartiga* decision and related issues), some courts held true to the idea that the ATS did nothing more than "provid[e] a forum, but not a cause of action, for aliens suing in tort." Patrick D. Curran, *Universalism, Relativism, and Private Enforcement of Customary International Law*, 5 CHI. J. INT'L L. 311, 313-14, 314 n.12 (2004). The supporters of this view would likely embrace the interpretation of the ATS as advanced by Judge Robert H. Bork in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (U.S. App. D.C. 1984), *cert. denied*, 470 U.S. 1003 (1985). Judge Bork adhered to a very strict "originalist" interpretation of the ATS. Dodge, *Historical Origins*, *supra* note 23, at 237. Judge Bork's decision, then, is in opposition to the *Filartiga* decision, on the basis of three principles: "(1) that an express cause of action is needed, which the Clause does not provide; (2) that the Clause should be limited to those torts that violated the law of nations in 1789; and (3) that the Clause should be limited to prize cases." *Id.*

44. Customary international law "is one of the principal sources or building blocks of the international legal system." BLACK'S LAW DICTIONARY 835 (8th ed. 2004). It is "[i]nternational law that derives from the practice of states and is accepted by them as legally binding." *Id.*

45. 304 U.S. 64 (1938).

46. *Leading Case: B. Alien Tort Statute*, 118 HARV. L. REV. 446, 451 (2004) [hereinafter *Leading Case*]. The general common law was a "brooding omnipresence recognized rather than created by federal and state judges alike." *Id.* (internal quotation and footnote omitted). The more formal definition of general federal common law is:

[T]he judge-made law developed by federal courts in diversity-of-citizenship cases. Since *Erie*, a federal court has been bound to apply the substantive law of the state in which it sits. So even though there is a 'federal common law,' there is no longer a *general* common law applicable to all disputes heard in federal court.

BLACK'S LAW DICTIONARY 293 (8th ed. 2004).

47. 304 U.S. 64 (1938) (holding that there is no federal common law).

48. *See generally* Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245, 1278-85 (1996) (giving an overview of the *Erie* decision and its general denial of federal common law). There are companion opinions that allow federal common law creation when it is "defined by express congressional authorization to devise a body of law directly." *Sosa*, 542 U.S. at 726 (citing *Textile Workers v. Lincoln Mills of Ala.*, 353 U.S. 448 (1957)). *See also* Paul L. Hoffman & Daniel A. Zaheer, *The Rules of the Road: Federal Common Law and Aiding and Abetting Under the Alien Tort Claims Act*, 26 LOY. L.A. INT'L & COMP. L. REV. 47, 60 (2003) (discussing a caveat to federal common law-making as exemplified in the *Lincoln Mills* case). *See infra* notes 150-165 and accompanying text (debating the intent of the ATS to authorize substantive lawmaking).

49. Bradley & Goldsmith, *supra* note 32, at 331-32 (stating the position that there is "little doubt" that prior to the *Erie* decision, customary international law "had the status of general common law, not federal law"); *see also* Clark, *supra* note 48, at 1280-81 (noting the direct effect of

law of nations concept of the ATS could potentially accommodate would exist in customary international law, akin to the federal common law of the pre-*Erie* courts.⁵⁰ Customary international law, which “results from a general and consistent practice of states followed by them from a sense of legal obligation,”⁵¹ becomes part of the federal common law⁵² if it becomes part of U.S. law at all.⁵³

Erie on the law of nations); see generally Curtis A. Bradley, *The Status of Customary International Law in U.S. Courts - Before and After Erie*, 26 DENV. J. INT'L L. & POL'Y 807, 810 (1998) (analyzing the effect of the *Erie* decision on the use of customary international law by federal courts); Hoffman & Zaheer, *supra* note 48, at 55-59 (offering a discussion of *Erie's* impact on customary international law's place in U.S. courts). But see Gerald L. Neuman, *Sense and Nonsense About Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 FORDHAM L. REV. 371, 374-76 (1997) (refuting Bradley and Goldsmith's contention that customary international law is embodied in federal common law and therefore destroyed with the *Erie* decision). “The Supreme Court has repeatedly recognized disputes implicating foreign relations as one of the areas where the creation of federal common law is justified by an overriding federal interest.” *Id.* at 377.

50. See *infra* notes 90-136 and accompanying text for the Supreme Court's debate on the modern law of nations; see *infra* section IV for the author's analysis of the inclusion of customary international law in the reach of the ATS.

51. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS OF THE UNITED STATES §102 (1987). See generally William J. Aceves, *The Legality of Transborder Abductions: A Study of United States v. Alvarez-Machain*, 3 SW. J. L. & TRADE AM. 101, 138 (1996) (identifying the sources of customary international law as “numerous and includ[ing]: state practice; international legal decisions; treaties and other international legal instruments; the practice of international organizations; national legislation and national legal decisions”).

52. *C.f.* *The Paquete Habana*, 175 U.S. 677, 700 (1900) (holding “[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination”); see also Donald J. Kochan, *The Political Economy of the Production of Customary International Law: The Role of Non-Governmental Organizations in U.S. Courts*, 22 BERKELEY J. INT'L L. 240, 250 (2004) (recognizing *The Paquete Habana* case as the controlling authority allowing international law to be applied in U.S. courts even when the international law has not been ratified as a treaty or similarly given status as a federal law).

53. See Bradley & Goldsmith, *supra* note 32, at 358 (supporting the view that customary international law should not be treated as substantive federal law). But see T. Alexander Aleinikoff, *International Law, Sovereignty, and American Constitutionalism: Reflections on the Customary International Law Debate*, 98 AM. J. INT'L L. 91, 91 (2004) (arguing a novel viewpoint that customary international law “has always – and properly – been viewed as . . . neither federal nor state law but, rather, law to be applied in appropriate cases by federal courts in instances where they otherwise possess jurisdiction.”).

D. *Filartiga v. Pena-Irala*⁵⁴ *Resurrects the Alien Tort Statute*⁵⁵

In 1980, the Second Circuit revived the ATS both as a jurisdictional basis and as creating a cause of action for a violation of the law of nations.⁵⁶ The *Filartiga* decision gave life to the ATS in a way that many argue the Framers never intended.⁵⁷ It was clear that the statute gave the federal courts jurisdiction over alien tort claims,⁵⁸ but up to this point it was unclear whether the statute also had an embedded cause of action.⁵⁹ *Filartiga* and the line of cases that followed it⁶⁰ argued that

54. 630 F.2d 876 (2d Cir. 1980). In 1976, Americo Noberto Pena-Irala (Pena), the Inspector General of the Police in Asuncion, Paraguay, allegedly kidnapped, tortured and killed a Paraguayan youth, Joelito Filartiga, and displayed his corpse to his sister. *Id.* at 878. The Filartiga family was a pronounced opponent of the presidency of Alfredo Stroessner, who had controlled Paraguay since 1954. *Id.* While criminal actions were proceeding slowly in Paraguay, happenstance brought both the alleged offender, Pena, and the sister of the victim, Dolly Filartiga, to reside in the United States. *Id.* Dolly settled in Washington, D.C., and had applied for permanent political asylum after entering the United States on a visitor's visas in 1978. *Id.* Pena and his companion also entered the United States on visitor's visas in 1978 and moved to Brooklyn, New York. *Id.* After learning that Pena had entered the United States, Dolly notified Immigration and Naturalization Service (who subsequently arrested Pena and ordered his deportation) and commenced an action in the Eastern District of New York for the wrongful death of her brother. *Id.* at 879.

55. Gary Clyde Hufbauer and Nicholas K. Mitrokostas use more colorful language to refer to the ATS in the title of their work, *Awakening Monster: The Alien Tort Statute of 1789*, *supra* note 7. The economic impact that certain interpretations of the ATS – when it is invoked to sue multinational corporations – may warrant such a moniker for the ATS. *Id.* at 1. *See infra* notes 183-89 and accompanying text (analyzing the consequences of liberal ATS litigation for multinational corporations).

56. *Filartiga*, 630 F.2d at 890. The Second Circuit determined both that torture violated customary international law and that the law of nations of the ATS included this customary law. *Id.* at 883. Regarding torture, the court declared they “have little difficulty discerning its universal renunciation in the modern usage and practice of nations.” *Id.* The court proceeded to incorporate this customary international law into the “law of nations” language of the ATS. *Id.* at 884. “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.” *Id.* The court thus reversed the lower court's finding that the federal courts had no jurisdiction over the aliens' claim. *Id.* at 890.

57. HUFBAUER & MITROKOSTAS, *AWAKENING MONSTER*, *supra* note 7, at 4. The Second Circuit lent an interpretation to the ATS that updated the language from “law of nations” to “international law.” *See id.* at 3-4.

58. *See supra* note 24 (reciting the original language of the ATS and its modern counterpart). *But see Filartiga*, 630 F.2d at 885-87 (undertaking an analysis of whether Article III of the U.S. Constitution makes the First Congress' authorization of jurisdiction over alien tort claims unconstitutional, and concluding that the ATS was an appropriate exercise of Congress' ability to legislate the jurisdiction of federal courts).

59. Stephens, *supra* note 26, at 186. One school of thought is that the Framers understood the ATS to authorize a cause of action without requiring further legislation by Congress. *Id.* *See also supra* notes 39-43 (discussing the lack of attention given to the ATS by Congress and the courts and the corresponding lack of analysis of the cause of action issue); *supra* note 25 (discussing the lack of legislative history surrounding the ATS and reliance on contemporaneous events to determine the meaning of the ATS).

unless the ATS intended to authorize a cause of action for the law of nations, this clause of the Judiciary Act would have been pointless and powerless.⁶¹ The *Filartiga* decision resolved that the law of nations as contemplated during the United States' formative years would translate to the human rights violations of today.⁶² "This is undeniably an action by an alien, for a tort only, committed in violation of the law of nations."⁶³ *Filartiga* established a precedent in federal courts that "the ATS . . . enables foreigners to sue in U.S. courts for all torts committed in violation of international law, *as international law may be contemporaneously interpreted*."⁶⁴ Following the *Filartiga* decision, "ATS litigation has proliferated in federal courts, embroiling U.S. courts in a broad array of international controversies and incidents ranging from alleged war crimes to terrorist attacks to environmental abuses."⁶⁵

60. A representative sampling of the federal court cases which followed the reasoning of *Filartiga* finding in favor of ATS jurisdiction includes: *Kadic v. Karadzic*, 70 F.3d 232, 236 (2d Cir. 1995) (holding that the federal court had jurisdiction over claims of the alien plaintiffs against the defendant-Bosnian-Serb self-proclaimed leader "for genocide, war crimes, and crimes against humanity in his private capacity"), *cert. denied*, 518 U.S. 1005 (1996), *aff'd sub nom. Doe v. Karadzic*, No. 93 Civ. 1163 (S.D.N.Y. Dec. 3, 1997); *De Blake v. Republic of Arg.*, 965 F.2d 699, 723 (9th Cir. 1992) (allowing aliens' ATS claim for "anti-Semitic, government-sponsored tyranny" and torture to go forward by virtue of a waiver of sovereign immunity), *cert. denied*, 507 U.S. 1017 (1993); *Forti v. Suarez-Mason*, 672 F. Supp. 1531 (N.D. Cal. 1987) (holding that two Argentinians' claims of torture, murder and prolonged arbitrary detention against an Argentinian general amounted to a cause of action under the ATS); *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995) (holding Guatemalan citizens' allegations of torture, arbitrary detentions, summary executions, and disappearances were sufficient to sustain jurisdiction under the ATS); *Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996) (holding that the claims of "torture and cruel, inhuman, and degrading treatment" of Ethiopian citizens against officials in the controlling dictatorship of Ethiopia were actionable under the ATS), *cert. denied*, 519 U.S. 830 (1996); *Jama v. U.S. I.N.S.*, 22 F. Supp. 2d 353 (D.N.J. 1998) (holding that the poor and inhuman treatment given to alien asylum-seekers was actionable under the ATS). *See also generally* Donaldson, *supra* note 23 ("collect[ing] and analyz[ing] the federal court cases which have construed or applied [the ATS] since its enactment.").

61. Stephens, *supra* note 26, at 187-88. An interpretation of the ATS that requires additional legislation for the individual claim of an alien, Stephens argues, is "ahistorical" because it would mean "that Congress intended that the [ATS] create a category of jurisdiction that would remain empty until filled with legislatively enacted claims." *Id.* at 187.

62. HUFBAUER & MITROKOSTAS, AWAKENING MONSTER *supra* note 7, at 3-4. "The core holding of *Filartiga* has been followed by courts around the country: an alien may sue for violations of 'universal, definable and obligatory' international law norms." Stephens, *supra* note 26, at 174.

63. *Filartiga*, 630 F.2d at 887. In the time between the *Filartiga* decision and the Supreme Court's ruling in *Sosa*, there has been "a near-unanimous consensus among federal courts" requiring that an alien's tort claim "involve[] a violation of the 'law of nations,'" which is referred to as customary international law in modern terms. Hoffman & Zaheer, *supra* note 48, at 50.

64. HUFBAUER & MITROKOSTAS, AWAKENING MONSTER, *supra* note 7, at 4 (emphasis in original).

65. Gregory G. Garre, *Coded Message*, THE RECORDER, September 17, 2004, at 4 (explaining that *Filartiga* retrieved the ATS from "historical obscurity" and spawned numerous other ATS

It would not be until *Sosa* that any discussion by the Supreme Court addressed this interpretation of the statute by the federal courts.⁶⁶

III. STATEMENT OF THE CASE

A. *Statement of the Facts*

In 1990, a federal grand jury indicted Humberto Alvarez-Machain (Alvarez), a Mexican physician, for the murder of Enrique Camarena-Salazar, an agent of the U.S. Drug Enforcement Agency (DEA).⁶⁷ The United States District Court for the Central District of California issued a warrant for Alvarez's arrest following the grand jury's indictment, and the DEA sought the Mexican government's help in bringing him to the United States.⁶⁸ Because the Mexican government was either unwilling or unable to comply with the DEA's request for Alvarez's delivery, the DEA hired Mexican nationals to kidnap Alvarez and bring him to the United States where the DEA would have authority to arrest and try Alvarez.⁶⁹ Among those the DEA engaged to seize Alvarez was the petitioner, Jose Francisco Sosa.⁷⁰ In a DEA-approved action, Mexican nationals "abducted Alvarez from his house, held him overnight in a motel, and brought him by private plane to El Paso, Texas, where he was arrested by federal officers."⁷¹

After being acquitted of his criminal charges by the District Court in 1993,⁷² Alvarez returned to Mexico and commenced a civil action in the U.S. District Court for the Central District of California for damages

claims in the federal courts over the next twenty years). *See also supra* note 60 (detailing decisions following *Filartiga*).

66. Garre, *supra* note 65, at 4. The *Sosa* case "signals a new era in the Rip van Winkle life of the ATS." *Id.*

67. *Sosa*, 542 U.S. at 697 (2004). Alvarez had allegedly been involved in Camarena-Salazar's 1985 torture and death in Guadalajara Mexico. *Id.* (citing *United States v. Alvarez-Machain*, 504 U.S. 655, 657 (1992)). The Drug Enforcement Agency (DEA) gathered eyewitness testimony which led officials to believe that Alvarez was present at the place where Camarena-Salazar was killed, and that Alvarez had "acted to prolong the agent's life in order to extend the interrogation and torture." *Id.*

68. *Id.*

69. *Id.*

70. *Id.* at 698.

71. *Id.*

72. *Id.* Citing the outrageous nature of his arrest, Sosa moved to dismiss his indictment with a claim that the method of his arrest violated the extradition treaty between the United States and Mexico. *Id.* The District Court dismissed the criminal case, which the Ninth Circuit upheld. *Id.* The Supreme Court reversed and remanded. *Id.* In 1992, Alvarez was acquitted. *Id.*

suffered during his alleged false arrest.⁷³ Alvarez asserted a claim for damages against the United States under the Federal Tort Claims Act (FTCA),⁷⁴ and a claim against Sosa for a violation of the law of nations, invoking the Alien Tort Statute.⁷⁵ The FTCA allows a suit against the Government for the negligent or wrongful acts or omissions of its employees.⁷⁶ As an alien, Alvarez argued for both jurisdiction and a cause of action under the ATS for his claim against Sosa, also a Mexican national, alleging the nature of his arrest was a violation of the law of nations.⁷⁷

B. Procedural History

Holding that Alvarez's apprehension in Mexico, including the state sponsored transborder abduction and the arbitrary detention, violated customary international law, the district court entered summary judgment against Sosa under the ATS.⁷⁸ Both Alvarez and Sosa appealed to the Ninth Circuit.⁷⁹ First, a three-judge panel, and then the court sitting *en banc* affirmed the judgment and damages awarded on the

73. *Id.* Alvarez named the following defendants in this suit: Sosa, Antonio Garate-Bustament (both a DEA agent and a Mexican national), five unnamed Mexican nationals, the United States, and four DEA agents. *Id.*

74. *Id.* The relevant portion of the FTCA provides:

[T]he district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b)(1) (2000).

75. *Sosa*, 542 U.S. at 698. *See* 28 U.S.C. §1350 (2000); *supra* notes 24-66 and accompanying text (detailing the specific language of the ATS and its evolution over the 200-plus years of its existence).

76. *See supra* note 73 (detailing the liability of the Federal Government under the FTCA). There are numerous instances in which the government is exempt from such liability. *See infra* notes 87-88 (discussing the exceptions relevant to the Government's liability in this case).

77. *Sosa*, 542 U.S. at 698; *see also supra* notes 24-66 for the text of the ATS and a discussion of the evolution of this statute.

78. *Alvarez-Machain v. United States*, 331 F.3d 604, 610-11 (9th Cir. 2003), *rev'd*, 542 U.S. 692 (2004). The district court limited Alvarez's recovery to only the damages he suffered while detained in Mexico. *Id.* at 611. Alvarez's award totaled \$25,000, calculated by federal common law as opposed to Mexican law. *Id.*

79. *Id.* Sosa argued that Alvarez should not have been permitted a cause of action under the ATS, and that the district court erred in not applying Mexican law for the award of damages. *Id.* Alvarez appealed two issues irrelevant to Supreme Court's decision: 1) the United States should not have replaced the DEA agents against whom he also had ATS claims, and 2) his damages should not have been limited to his Mexican arrest. *Id.*

ATS claims.⁸⁰ Under Ninth Circuit precedent,⁸¹ the court held that Alvarez had a cause of action under the ATS.⁸² The Ninth Circuit interpreted the ATS as not only establishing jurisdiction in federal courts for the tort claims of aliens, but also establishing “a cause of action for an alleged violation of the law of nations.”⁸³ The Ninth Circuit further applied the requirement that the law of nations be “specific, universal, and obligatory” in nature broadly enough to encompass Alvarez’s arbitrary arrest and detention claims.⁸⁴ The United States and Sosa appealed the Ninth Circuit’s decision, arguing that the ATS does nothing more than establish jurisdiction in the federal courts.⁸⁵

The district court, on the government’s motion, dismissed Alvarez’s FTCA claims.⁸⁶ After a series of appeals and remands,⁸⁷ the Ninth Circuit ultimately reversed the dismissal of the FTCA claims.⁸⁸ The

80. *Id.* at 611.

81. *See* Trajano v. Marcos, 978 F.2d 493, 499 (9th Cir. 1992) (holding that “acts of official torture violate customary international law,” and concluding that the plaintiff, an alien, had “properly invoke[d] the subject-matter jurisdiction of the federal courts under the [ATS]” in a wrongful death action against Philippine President Ferdinand Marcos and his daughter for the torture and murder of a Philippine citizen); Hilao v. Estate of Marcos, 25 F.3d 1467 (9th Cir. 1994) (holding that the ATS not only establishes jurisdiction in the federal courts, but also creates a cause of action for the violation of the law of nations).

82. *Alvarez-Machain*, 331 F.3d at 612.

83. *Id.* *See also infra* notes 150-165 and accompanying text (discussing the discretion federal courts use to determine these causes of action).

84. *Alvarez-Machain*, 331 F.3d at 619. The Ninth Circuit comments that the “specific, universal, and obligatory” test for law of nations violations is necessary to limit judicial review of international law to only those “that have achieved sufficient consensus to merit application by a domestic tribunal.” *Id.* at 612. *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964), *superseded by* The Foreign Assistance Act of 1961, § 620(e)(2), 22 U.S.C.A. § 2370(e)(2). While arbitrary arrest and detention meet this threshold, Alvarez’s claim of transborder abduction does not rise to this level according to the Ninth Circuit. *Alvarez-Machain*, 331 F.3d at 620; *see also infra* notes 137-149 (discussing the standard proposed by the Supreme Court for the determination of international law use in federal courts).

85. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 699 (2004).

86. *Id.*

87. Alvarez’s FTCA claims had a tumultuous journey through the district and circuit courts. Alvarez’s initial complaint was comprised of both conventional (kidnapping, torture, cruel, inhuman and degrading treatment or punishment, arbitrary detention, assault and battery, false imprisonment, intentional infliction of emotional distress, false arrest, negligent employment, and negligent infliction of emotional distress) and constitutional torts (under the Fourth, Fifth and Eight Amendments for kidnapping, torture, cruel and inhuman and degrading treatment or punishment, denial of adequate medical treatment, and arbitrary detention). *Alvarez-Machain*, 331 F.3d at 610. All of the DEA agents were replaced by the United States as defendant as to the conventional tort claims. *Id.* The District Court denied the United States’ defense that the FTCA claims were time-barred, which the Ninth Circuit affirmed. *Id.* On remand, the United States was granted summary judgment on all of the FTCA claims. *Id.* at 611. On appeal, the Ninth Circuit reversed the dismissal of the FTCA claims. *Id.*

88. *Sosa*, 542 U.S. at 699. 28 U.S.C. § 2680(k) restores sovereign immunity where the

government included an appeal of the FTCA ruling with its request for review of the ATS interpretation.⁸⁹

C. Supreme Court's Decision

1. Plurality

The Supreme Court reversed the Ninth Circuit.⁹⁰ The Court overturned the finding of government liability under the FTCA for the arrest of Alvarez-Machain in Mexico, holding that “the foreign country exception [of the FTCA] bars all claims based on any injury suffered in a foreign country, regardless of where the tortious act or omission occurred.”⁹¹

Government would otherwise be liable under § 1346(b), for those claims “arising in a foreign country.” 28 U.S.C. §2680(k) (2000). The court held that despite the language of the statute, the Government was still liable under the “headquarters doctrine,” which allows a claim to proceed “if harm occurring in a foreign country was proximately caused by acts in the United States.” *Alvarez-Machain*, 331 F.3d at 638. According to the Circuit Court, the “quintessential headquarters claim” is one in which government employees, from the locale of their U.S. offices, “guide and supervise actions in other countries.” *Id.* Because the DEA, from its office in Los Angeles, had coordinated the removal of Alvarez, giving “precise instructions” regarding who should be involved and how Alvarez should be handled, the court maintained the United States liability, stating that “Alvarez’s abduction fits the headquarters doctrine like a glove.” *Id.*

89. *Sosa*, 542 U.S. at 699. The Ninth Circuit had also explored a possible exception under the FTCA for intentional torts, as provided in 28 U.S.C. § 2680(h). *Alvarez-Machain*, 331 F.3d at 639. The Ninth Circuit agreed with the district court that Alvarez’s claim was not excluded by the intentional torts exception because the DEA agents are law enforcement officers within the scope of the FTCA. *Id.* The government did not appeal on this basis and the Supreme Court does not address it in its opinion. *Sosa*, 542 U.S. at 699. The Government also appealed the FTCA claim on the basis that the arrest was not tortious. *Id.* The Government argued that 21 U.S.C. § 878 grants arrest authority to the DEA. *Id.* The Supreme Court did not decide the FTCA issue on that ground. *Id.*

90. *Sosa*, 542 U.S. at 738. Justice Souter delivered the opinion of the court. *Id.* at 697. Justice Scalia (joined by Chief Justice Rehnquist and Justice Thomas) filed a separate concurring opinion as to the issue of the ATS. *Id.* at 739. Justice Ginsburg filed a separate concurring opinion as to FTCA element of the decision (joined by Justice Breyer). *Id.* at 751. Justice Breyer filed his own concurring opinion. *Id.* at 760.

91. *Id.* at 712. The full extent of the Supreme Court’s decision regarding the FTCA claim will not be discussed in this Note, as the author’s focus is on Alvarez’s claims under the ATS. However, a brief consideration of the Court’s holding will be helpful as it is likely the Government will use the shield of the FTCA foreign country exception in the eventuality that a claim is permitted under the ATS and the United States is named as a defendant. See David C. Baluarte, Comment, *Sosa v. Alvarez-Machain: Upholding the Alien Tort Claims Act While Affirming American Exceptionalism*, 12 HUM. RTS. BRIEF 11, 13 (2004) (noting that the FTCA will protect the United States government from exposure to liability under the ATS).

The Court refused to apply the headquarters doctrine to this case, lest it “swallow the foreign country exception whole.” *Sosa*, 542 U.S. at 703. Employing a test of proximate causation, the Court examined the actions of the DEA agents in the United States, and determined that even if

The circuit court's ATS holding – recognizing transborder arrest as a violation of the law of nations and an actionable tort under the ATS – led the Supreme Court to delve into the obscure background of the ATS.⁹² Using the available historical framework of the ATS, the plurality arrived at two conclusions concerning Congress's original intentions for the ATS.⁹³ Justice Souter reasoned that history supports the proposition that the ATS was intended to be a functional statute, which in turn meant the ATS must include some latent cause of action, in addition to the jurisdictional grant.⁹⁴

[T]here is every reason to suppose that the First Congress did not pass the ATS as a jurisdictional convenience to be placed on the shelf for use by a future Congress or state legislature that might, some day, authorize the creation of causes of action or itself decide to make some element of the law of nations actionable for the benefit of foreigners.⁹⁵

Beyond the jurisdictional provisions of the ATS, the Court concluded that history implies “that Congress intended the ATS to furnish jurisdiction for a relatively modest set of actions alleging

the plans made in Los Angeles and Washington were a proximate cause of Alvarez's injuries, they did not subsume the proximate causation of the action that occurred in Mexico. *Id.* at 703-04. The Court also focused on the “arising in” language of 28 U.S.C. § 2680 (k) to mean an exclusion of all claims for injuries which occur in a foreign country. *Id.* at 704-05. Most importantly, the Court cautioned that the foreign country exception was in place to protect the United States against claims where the substantive law of foreign countries must apply, and the headquarters doctrine would undo this safeguard. *Id.* at 705-06.

Justice Ginsburg filed a concurring opinion (joined by Justice Breyer) with regard to the FTCA claim. *Id.* at 751 (Ginsburg, J., concurring). In Justice Ginsburg's view, the “arising in” language of the foreign country exception does not point to the place where the harm occurred, but to the place of the act or omission. *Id.* at 760. The “last significant act or omission rule” determines where the claim “arises.” *Id.* With this in mind, Justice Ginsburg found the Government to be free from liability, because the actions in Mexico were the last significant act causing Alvarez's harm. *Id.*

92. *Sosa*, 542 U.S. at 712-13. To begin his discussion of the ATS and its applicability to the *Sosa* case, Justice Souter employed the literary moniker given to the ATS by Judge Friendly to remark that few indicators of the original framers' intent accompany the “legal Lohengrin.” *Id.* at 718-19. The Court entered this murky area of the law aware of this fact: “despite considerable scholarly attention, it is fair to say that a consensus understanding of what Congress intended has proven elusive.” *Id.*; see *supra* note 25 (discussing the legislative obscurity of the ATS).

93. *Sosa*, 542 U.S. at 719. The Court examined many of the same historic texts and scholarly analyses of the First Congressional era that are examined *supra*, notes 23-38.

94. *Sosa*, 542 U.S. at 719.

95. *Id.* Justice Souter cites the “anxieties of the preconstitutional period,” see *supra* notes 25-38 and accompanying text (sketching the same historical atmosphere which Justice Souter relies on here), as evidence that the statute was meant to have “practical effect.” *Sosa*, 542 U.S. at 719. “There is too much historical record to believe that Congress would have enacted the ATS only to leave it lying fallow indefinitely.” *Id.*

violations of the law of nations.”⁹⁶ It is these inferred causes of action that gave the ATS its limited practical effect.⁹⁷ “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.”⁹⁸

The Court, however, could not infer from the ATS’s history that the concept of the law of nations was meant to be an expanding one.⁹⁹ Justice Souter “found no basis to suspect that Congress had any examples in mind beyond those corresponding to Blackstone’s three primary offenses: violation of safe conducts, infringement of the rights of ambassadors, and piracy.”¹⁰⁰ The plurality reasoned that the Court must be cautious in allowing alien tort claims to fall within the “law of nations” umbrella of the ATS.¹⁰¹ They declined to accept the interpretation advanced by Alvarez – that the ATS was not only jurisdictional, but also a cause of action for wide-sweeping violations of modern international law – deeming such an interpretation “implausible.”¹⁰² However, they also declined to adopt the interpretation that Sosa proposed.¹⁰³ Sosa’s view – that “there could be no relief

96. *Id.* at 720. The Continental Congress’ grappling with its inability to punish infractions of the law of nations is the basis for Justice Souter’s inference that at least some meager meat was stuck to the bones of the ATS. *Id.* at 716 (citing J. Madison, JOURNAL OF THE CONSTITUTIONAL CONVENTION 60 (E. Scott ed. 1893)). See *supra* notes 26-32 and accompanying text for discussion of the Continental Congress’ early attempts to enforce the law of nations.

97. *Sosa*, 542 U.S. at 724. “[T]he reasonable inference from the historical materials is that the statute was intended to have practical effect the moment it became law.” *Id.*

98. *Id.*

99. *Id.* at 725. “[S]ome, but few, torts in violation of the law of nations were understood to be within the common law.” *Id.* at 720.

100. *Id.* at 724. The First Congress’ intention likely was shaped by Blackstone’s theory of the law of nations. *Id.* See *supra* notes 33-38 for a discussion of Blackstone’s influence on the Founding Fathers.

101. *Sosa*, 542 U.S. at 725. Justice Souter outlined five reasons for the Court’s caution: 1) the changed concept of common law since 1789; 2) the “rethinking of the role of the federal courts in making [common law]” (citing the Court’s decision in *Erie R. Co. v. Tompkins*, 304 U.S. 65 (1938) (denying the existence of federal common law), see *supra* notes 46-53 and accompanying text for a discussion of Erie’s impact on the ATS; 3) the Court’s insistence that private rights of action are better created by the legislature; 4) the potential impact on the foreign relations of the United States; and 5) the lack of a congressional mandate to “seek out and define new and debatable violations of the law of nations.” *Id.* at 725-28. See also *infra* note 198 (arguing that Justice Souter’s five concerns should be an incentive for Congress to legislate the ATS claims that can be actionable in U.S. courts).

102. *Sosa*, 542 U.S. at 713. When the ATS authorized “cognizance” over the law of nations to the district courts, “the term bespoke a grant of jurisdiction, not power to mold substantive law.” *Id.*

103. *Id.* “[H]istory and practice give the edge” to the position that “because torts in violation of the law of nations would have been recognized within the common law of the time,” the ATS

without a further statute expressly authorizing adoption of causes of action” – would, in the Court’s opinion, render the ATS “stillborn.”¹⁰⁴ The Court settled that “the statute was intended as jurisdictional in the sense of addressing the power of the courts to entertain cases concerned within a certain subject.”¹⁰⁵

The conclusion that a confined set of causes of action accompanied the ATS would direct the court to analyze those cases that have the good fortune of being actionable under the ATS.¹⁰⁶ The Court began by examining the law of nations at the time of enactment of the ATS,¹⁰⁷ and then referenced an historical text which treated the law of nations as “general norms governing the behavior of national states with each other.”¹⁰⁸ Despite strong authority tending to limit the law of nations to application between states, the Supreme Court adopted Blackstone’s teachings and recognized limited situations in which the law of nations protects individual rights.¹⁰⁹ The Court determined that the intent of the Judiciary Act was that the ATS’s jurisdictional strength be supplemented by causes of action which could arise under the common law.¹¹⁰ According to the Court’s interpretation of the ATS, the common law

was not a moot statute because of the lack of additional legislation to attach causes of action. *Id.*

104. *Id.* at 714. “[T]here is every reason to suppose that the First Congress did not pass the ATS as a jurisdictional convenience to be placed on the shelf.” *Id.* at 719. The Court found “it would have been passing strange” to hold that “Congress would have enacted the ATS only to leave it lying fallow indefinitely.” *Id.* Instead the Court summons what is available in the historical record to breathe life to the drafters’ intentions. *Id.* at 720. See *infra* notes 119-20 and accompanying text (citing the Supreme Court’s insistence that the ATS was meant to have a functional value immediately following its passage, thus requiring an interpretation that some causes of action were contained within the law of nations concept).

105. *Sosa*, 542 U.S. at 714. These cases were limited to a “modest set of actions alleging violations of the law of nations.” *Id.* at 720.

106. *Id.*

107. *Id.* For example, Blackstone formed a broad basis for this understanding. *Id.* See *supra* notes 33-38 and accompanying text for the impact of Blackstone’s writings on the drafters.

108. *Sosa*, 542 U.S. at 714. The law of nations was “the science which teaches the rights subsisting between nations or states, and the obligations correspondent to those nations.” *Id.* (quoting E. DE VATEL, *THE LAW OF NATIONS, PRELIMINARIES* § 3 (J. Chitty et al. trans. ed. 1883)).

109. *Id.* at 720. Traditionally the offenses encompassed in the law of nations were only those that affected “whole states or nations” and not individuals seeking relief in courts.” *Id.* The Court looked again to Blackstone to identify this class of potential plaintiffs under a law of nations claim and to exclude individuals from the traditional understanding. *Id.* However, the Court did not unilaterally preclude an individual’s use of the ATS and law of nations claims. *Id.*

110. *Id.* at 724. The “reasonable inference” was that the framers were relying on the common law to provide a cause of action “for the modest number of international law violations with a potential for personal liability at the time.” *Id.* The Court reaches this conclusion because of its belief that “the statute was intended to have practical effect the moment it became law.” *Id.*

also encompassed claims of individual aliens.¹¹¹ The Court could point to no occurrence in the two centuries since the enactment of the ATS that “categorically precluded the federal courts from recognizing a claim under the law of nations as an element of common law.”¹¹² To limit the scope of the claims that could be brought under the jurisdiction of the ATS, the Court relied on the “present-day law of nations,” and adopted a standard that required the claims to “rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized.”¹¹³

The Court declined to completely cease “judicial recognition of actionable international norms;”¹¹⁴ instead, “the door is still ajar subject to vigilant doorkeeping, and thus open to a narrow class of international norms today.”¹¹⁵ Relying on the precedent of *The Paquete Habana*¹¹⁶ and rejecting complete occlusion by *Erie*,¹¹⁷ the plurality recognized that certain claims could meet their standard.¹¹⁸ The Court preserved an

111. *Id.* The Court reaches this conclusion despite the absence of a “basis to suspect” that Congress had any specific claims in mind beyond those which would have been comprehended from Blackstone’s teachings: “violation of safe conducts, infringements of the rights of ambassadors, and piracy.” *Id.* See *supra* notes 33-38 and accompanying text for the background of Blackstone’s influence on the Framers.

112. *Sosa*, 542 U.S. 724-25. Justice Scalia argued that the plurality misunderstood *Erie*’s effect on the existence of a general federal common law. *Id.* at 744-45 (Scalia, J., concurring). See *infra* notes 127-36 and accompanying text for Justice Scalia’s position. See *also supra* notes 44-53 for background of the *Erie* decision and its effect on the general common law.

113. *Sosa*, 542 U.S. at 725. See *infra* notes 141-49 and accompanying text (analyzing the application of this “international character” standard in federal courts).

114. *Sosa*, 542 U.S. at 729.

115. *Id.* See *infra* note 118 (addressing some of the international norms which the Court accepted as actionable under the ATS).

116. 175 U.S. 677, 700 (1900) (holding that “[i]nternational law is part of our law and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination”). See *supra* note 52 (discussing *The Paquete Habana* precedent permitting international law in U.S. courts).

117. *Sosa*, 542 U.S. at 729 (“*Erie* did not in terms bar any judicial recognition of new substantive rules, no matter what the circumstances, and post-*Erie* understanding has identified limited enclaves in which federal courts may derive some substantive law in a common law way.”). The common law, according to the Court, is not “a discoverable reflection of universal reason.” *Id.* The Court instead described common law in a “positivistic way, as a product of human choice.” *Id.*

118. *Id.* at 730-31. The Court accepts that some modern violations fit within the historic concept of the law of nations, such as in *Filartiga*, in which the district court drew a parallel between torturers and pirates, to couch a cause of action for torture into the ATS-enactment era law of nations. *Id.* at 732. “[F]or the purposes of civil liability, the torturer has become – like the pirate and the slave trader before him – *hostis humani generis*, an enemy of all mankind.” *Id.* (quoting *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980)). The *Tel-Oren* court, which rejected ATS jurisdiction for the claim before the court, see *supra* note 43 (briefly reciting the court’s holding in this case), also espoused a limitation on the ATS agreeable to the *Sosa* court. *Id.*

opportunity for the federal courts to apply international law via the common law; to decide otherwise, even given the decision in *Erie*, “would take some explaining to say now that the federal courts must avert their gaze entirely from any international norm intended to protect individuals.”¹¹⁹ Justice Souter argued that it was preposterous to think the Framers would have anticipated the death of the common law or that they would have allowed this modern shift to incapacitate the federal courts when it came to upholding international law.¹²⁰

The Court, therefore, looked to “historical antecedents” to determine if Alvarez’s claim might pass through the door.¹²¹ The Court determined that Alvarez’s claim for arbitrary arrest and detention did not violate any norm of international law, such that it could support a cause of action under the ATS.¹²² “We do not believe . . . that the limited, implicit sanction to entertain the handful of international *cum* common law claims understood in 1789 should be taken as authority to recognize

That court suggested “the ‘limits of [the ATS]’s reach’ be defined by ‘a handful of heinous actions – each of which violates definable, universal and obligatory norms.’” *Id.* (quoting *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 781 (U.S. App. D.C. 1984) (Edwards, J., concurring), *cert. denied*, 470 U.S. 1003 (1985)).

119. *Id.* at 730. “[O]ur holding today is consistent with the division of responsibilities between federal and state courts after *Erie*.” *Id.* at 731 n.19.

120. *Id.* at 730. Justice Souter wrote, “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.” *Id.*

121. *Sosa*, 542 U.S. at 732. The Court quotes *The Paquete Habana* decision at length because it fully articulates the authority on which the courts can cull customary international law for application in their own courts. *Id.* at 733-34. *The Paquete Habana* instructs:

[W]here there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.

Id. at 734 (quoting *The Paquete Habana*, 175 U.S. 677, 700 (1900)).

122. *Id.* at 738. The Court rejected Alvarez’s arguments that arbitrary arrest and detention is in fact a violation of an international law norm. *Id.* at 735-38. Alvarez cited the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, which the Court held did not “create obligations enforceable in federal courts” and which could not be used by Alvarez to establish an applicable rule of international law. *Id.* at 735. The Court also rejected Alvarez’s argument that arbitrary detention is generally prohibited; the Court reasoned that if such an argument were accepted, “[h]is rule would support a cause of action in federal court for any arrest, anywhere in the world, unauthorized by the law of the jurisdiction in which it took place, and would create a cause of action for any seizure of any alien in violation of the Fourth Amendment.” *Id.* at 736.

the right of action asserted by Alvarez here.”¹²³

The standard adopted by the Court – based on “historical antecedents” – leaves a certain amount of discretion to the lower courts.¹²⁴ The Court conditioned this discretion on an awareness of the ramifications of recognizing actionable violations of international law.¹²⁵ “[T]he determination whether a norm is sufficiently definite to support a cause of action should (and, indeed, inevitably must) involve an element of judgment about the practical consequences of making that cause available to litigants in the federal courts.”¹²⁶

2. Justice Scalia’s Concurring Opinion

Justice Scalia, joined by former Chief Justice Rehnquist and Justice Thomas, filed a concurring opinion to stress his opposition to the plurality’s “reservation of a discretionary power in the Federal Judiciary to create causes of action for the enforcement of international-law-based norms.”¹²⁷ Justice Scalia agreed with the plurality’s ATS analysis with respect to its determination that the statute is jurisdictional only and that the ATS at most authorizes causes of actions under the law of nations purely as understood by the 1789 drafters.¹²⁸ Justice Scalia departed from the plurality, however, in insisting the Court find a case or statute that “*authorizes* that peculiar exception from *Erie*’s fundamental holding

123. *Id.* at 712. Alvarez attempted to bolster his argument that arbitrary arrest and transborder abduction amounted to a violation of the law of nations by presenting non-binding United Nations covenants as an indicator of the widespread acceptance of these torts as violations of international law. *Id.* at 734-35. Despite the evidence produced by Alvarez, the Supreme Court rejected his claims. *Id.* at 738.

[A]lthough it is easy to say that some policies of prolonged arbitrary detentions are so bad that those who enforce them become enemies of the human race, it may be harder to say which policies cross that line with the certainty afforded by Blackstone’s three common law offenses. In any event, the label would never fit the reckless policeman who botches his warrant, even though that same officer might pay damages under municipal law.

Id. at 737.

124. *Id.* at 732. *See infra* notes 151-165 and accompanying text (analyzing the dangers of the discretion left in the hands of the lower courts).

125. *Sosa*, 542 U.S. at 732. *See supra* note 101 (briefly outlining the reasons for Justice Souter’s warning to be aware of consequences attached to the courts’ discretion); *infra* note 198 (providing a more complete recitation of Justice Souter’s reasons and connecting those reasons to the foreign policy concerns of the political branches of the United States).

126. *Sosa*, 542 U.S. at 733.

127. *Id.* at 739 (Scalia, J., concurring). Where Justice Souter allowed the door to remain slightly ajar, Justice Scalia insisted it be firmly shut. *Id.* at 746.

128. *Id.* at 743. Justice Scalia insisted this would have been an appropriate stopping point. *Id.* The Court’s agreement that the ATS is jurisdictional only and does not provide for causes of action in international law would have been sufficient to decide the present case. *Id.*

that a general [federal] common law *does not exist*.¹²⁹ Justice Scalia would require “law of nations” in the ATS to mean “the accepted practices of nations in their dealings with one another” and on the high sea.¹³⁰

Justice Scalia’s dissatisfaction with Justice Souter’s treatment of the ATS is fully embodied in his approach to federal common law and his insistence that the door to that body of law cannot be opened because it was closed in *Erie*.¹³¹ “Because today’s federal common law is not our Framers’ general common law, the question presented by the suggestion of discretionary authority to enforce the law of nations is not whether to extend old-school general-common-law adjudication. Rather, it is whether to create new federal common law.”¹³² Justice Scalia rejected the plurality’s invitation to the lower courts to “create rights where Congress has not authorized them to do so,” especially when the plurality has acknowledged that the ATS is jurisdictional only, and that this was understood both by the 1789 Congress and its modern counterpart.¹³³ Drawing from the precedent already emanating from the federal courts, Justice Scalia predicted that the residual discretion left by the plurality would have “quite terrified” the 1789 drafters of the ATS.¹³⁴ The “illegitimate lawmaking endeavor” will, in Justice Scalia’s opinion, empower the lower courts to be the “principal actors,” with only a “tiny fraction of their decisions” being reviewed by the Supreme Court.¹³⁵ This discretion troubled Justice Scalia because the democratically created American law “does not recognize a category of

129. *Id.* at 744 (emphasis in original). The plurality, Justice Scalia complained, was instead looking for a case or statute that “prevents federal courts from applying the law of nations as part of the general common law.” *Id.* (emphasis in original).

130. *Id.* at 749. Those common laws would encompass the treatment of ambassadors, sovereign immunity, and piracy. *Id.* Justice Scalia noted that these specific law of nations have been incorporated into legislation such that these causes of action may survive despite the destruction of federal common law. *Id.*

131. *Id.* at 746. This is where Justice Scalia disagreed with the plurality’s willingness to keep the door ajar. *Id.* In his analysis, the door had already been shut by *Erie*. *Id.*

132. *Id.*

133. *Id.* at 747. Justice Scalia feared the consequences of this discretion that allows “judicial occupation of a domain that belongs to the people’s representatives.” *Id.* “One does not need a crystal ball to predict that this occupation will not be long in coming, since the Court endorses the reasoning of ‘many of the courts and judges who faced the issues before it reached this Court.’” *Id.* (quoting the plurality’s opinion at 732).

134. *Id.* at 749. Conversely, Justice Scalia is confident that the Framers would have been comfortable with his interpretation of the ATS in the post-*Erie* judicial world. *Id.*

135. *Id.* at 750. If all of the “future conversions of perceived international norms into American law would be approved by [the Supreme Court] itself,” Justice Scalia would still be troubled by the absence of the democratically elected representatives in the process. *Id.*

activity that is so universally disapproved of by other nations that it is automatically unlawful here, and automatically gives rise to a private action for money damages in federal courts.”¹³⁶

IV. ANALYSIS

A. The Role of Customary International Law in Federal Courts

The ATS is in great need of a modern make-over. While Justice Souter and the plurality are comfortable with leaving the door open to re-examination as other international law claims come before the federal courts, Justice Scalia’s closed-door approach is more appropriate until Congress affirmatively legislates which international law and human rights violations – if any – will be actionable under the ATS.¹³⁷ The current reality left by *Sosa* results in three potential courses for the federal courts in ATS litigation: (1) following the spirit of the plurality’s decision by restricting the claims of aliens to those most closely resembling the laws contemplated by the First Congress when it included the phrase “law of nations” in the ATS;¹³⁸ (2) liberally employing the discretion granted by the Supreme Court and squeezing through the slightly ajar door a multitude of human rights claims

136. *Id.* at 751. Justice Scalia’s basis for abhorring the creation of common law by the federal courts was the contradiction it poses to our accepted principle of democratically-chosen law-making bodies. *Id.* He summarized this ideal, lamented the encroachment of the courts into legislative territory and accused the plurality of endorsing the lawmaking behavior of the lower courts:

We Americans have a method for making the laws that are over us. We elect representatives to two Houses of Congress, each of which must enact the new law and present it for approval of a President, whom we also elect. For over two decades now, unelected federal judges have been usurping this lawmaking power by converting what they regard as norms of international law into American law. Today’s opinion approves that process in principle, though urging the lower courts to be more restrained.

Id. at 750.

137. *Id.* at 730 (rejecting the argument that the ATS did not include causes of action because such an interpretation would have rendered the statute non-functioning from its very start).

138. This course would, as the Supreme Court ultimately did, reject claims for more novel human rights claims like the arbitrary arrest claims of Alvarez-Machain. *See, e.g., Sosa*, 542 U.S. at 738. One commentator, however, argues that the Supreme Court erred in not recognizing transborder abductions as a violation of customary international law when Alvarez-Machain’s criminal case was before the Court in 1992. Aceves, *supra* note 51, at 139. *See also* Stephen Fohn, *Do DEA Field Agents Have the Power to Unilaterally Execute a Trans-Border Abduction?: The Ninth Circuit’s Take on Alvarez-Machain v. United States*, 27 HOUS. J. INT’L L. 221, 233 (2004) (analyzing the circumstances and consequences of Alvarez-Machain’s arrest). The Ninth Circuit *did* find Alvarez-Machain’s alleged abduction actionable under the ATS by relying on the precedent of *Martinez v. City of Los Angeles*, 141 F.3d 1373, 1384 (9th Cir. 1998) (holding that arbitrary arrest and detention was actionable under the ATS). *Id.* at 233 n.79.

recognized as customary law and read into the broad term “law of nations” (in the manner of *Filartiga*);¹³⁹ or (3) recognizing the lack of common law to supply modern “law of nations” under the ATS, and rejecting all claims under the ATS until Congress legislates specific causes of action.¹⁴⁰

1. A Norm of International Character, Specific, and Comparable to 18th Century Paradigms¹⁴¹

The Supreme Court preserved some opportunities for future ATS claims by deciding *Sosa* on the basis that the alleged customary international law that Alvarez-Machain relied upon did not achieve a standard of universal specificity and resemblance to the 1789 version of the law of nations.¹⁴² The slightly ajar door of the *Sosa* decision implicitly allowed federal courts to determine which claims might be included in the jurisdiction of the ATS; the plurality declined to establish a body of actionable claims with any precision.¹⁴³ The Supreme Court did place some limitations on the federal courts’ discretion, requiring that those causes of action rest on a “norm of international character accepted by the civilized world and defined with specificity comparable to the features of the 18th century paradigm.”¹⁴⁴ Because the Court did

139. David L. Hudson, Jr., *Foreign Turf: Human Rights Suits Against Corporations Hinge on How Open the Door Is*, 90 A.B.A. J. 20 (2004). The Supreme Court’s ruling in *Sosa* “that potentially opened the door to suits against international corporations has left plenty of room to widen the entranceway.” *Id.* Cases against ExxonMobil, Coca-Cola, Del Monte and DaimlerChrysler “will determine exactly how much give is in the hinges.” *Id.* *C.f. id.* (presenting the alternative interpretation of the Supreme Court’s ruling that it “will dismiss virtually all of the existing cases”).

140. *Leading Case*, *supra* note 46, at 456.

141. *Sosa*, 542 U.S. at 725.

142. *Id.* at 738 (declining to acknowledge transborder abduction as a customary law that could be fitted inside the “law of nations” cause of action of the ATS).

143. Preserving the functionality of the ATS in this way might be considered consistent with the original purpose for the ATS. Anthony D’Amato, Comment, *The Alien Tort Statute and the Founding of the Constitution*, 82 AM. J. INT’L L. 62, 67 (1988). Although the “imperative security interests that animated” the young and relatively defenseless nation to enact legislation that would keep the stronger British and French from resorting to war when civil remedies were unavailable do not concern the United States presently:

[T]he perception that we will deal fairly and impartially with cases having foreign implications, and not make political bargaining chips out of them, is still significant in terms of our national ideals, which include a free economic market, basic political freedoms for all people and willingness to submit to the rule of law.

Id.

144. *Sosa*, 542 U.S. at 745. Those causes of action might “arguably now extend[] to ‘piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps terrorism.’” Casto, *supra* note 23, at 486 (quoting RESTATEMENT OF FOREIGN RELATIONS LAW (REVISED) § 404

not expound beyond merely announcing the standard that should apply, it is difficult to identify which claims the Supreme Court anticipates the federal courts should recognize.¹⁴⁵ The list could include “genocide, extra-judicial killing, torture, war crimes, slavery, and extreme arbitrary detention.”¹⁴⁶ Leaving this door ajar, as proposed by Justice Souter,¹⁴⁷ would supposedly invite only the most widely accepted customary international law into federal courts.¹⁴⁸ Only the closest adherence to this standard by the federal courts would allow the true intent of the ATS Framers to be realized.¹⁴⁹

(Tent. Draft No. 6, 1985)). The current version of the Restatement of Foreign Relations (Third) includes an almost identical list where jurisdiction arises over “certain offenses recognized by the community of nations as of universal concern.” RESTATEMENT OF FOREIGN RELATIONS LAW (THIRD) § 404 (2004). The important distinction here is that these “extensions” to the causes of action under the ATS “appear to be based on specific intentional covenants and agreements rather than customary law.” Casto, *supra* note 23, at 486; *see generally* Russell S. Kerr, *U.S. Supreme Court Leaves “Door Ajar,”* 46 ORANGE COUNTY LAW. MAG. 22, 23 (2004) (discussing the standard imposed by the Court).

145. Eugene Kontorovich, *Implementing Sosa v. Alvarez-Machain: What Piracy Law Reveals About the Limits of the Alien Tort Statute*, 80 NOTRE DAME L. REV. 111, 113 (2004). “Applying this test to a variety of purported new international norms will become a significant subject of litigation in the lower courts in the wake of *Sosa*, litigation that could result in conflicting decisions due to the Court’s scant description of the test it envisions.” *Id.* According to one human rights proponent, who suggests that multinational corporations should have no complaints regarding the new life given to the ATS by the Supreme Court, the violations that can be considered “specific, universal and obligatory” are a “short list.” Jonathan Birchall, *The Limits of Human Rights Legislation: Alien Tort Statute: Jonathan Birchall on How Two Cases Have Tested the Scope of Law Allowing U.S. Companies To Be Sued for Wrongs Committed Overseas*, FINANCIAL TIMES, January 20, 2005, at 13.

146. Birchall, *supra* note 145, at 13.

147. *Sosa*, 542 U.S. at 729.

148. Kerr, *supra* note 144, at 23 (predicting that “[o]nly a few international tort claims brought by foreigners will meet the ‘specificity’ criteria required of *Sosa*”). Drawing from the precedent set by the *Filartiga* court and subsequent decisions, the courts might continue to recognize the customary international laws that include “a universal abhorrence against torture, extra-judicial killings, genocide, prolonged arbitrary, [sic] detentions, disappearances, and slavery.” *Id.* at 24. *But see* Casto, *supra* note 23, at 475 (acknowledging the “serious doubt” as to “whether international law, unassisted by domestic law, creates a tort remedy that may be invoked in domestic courts by private individuals”). A cause of action that the federal courts might recognize under the ATS and by virtue of the *Sosa* decision would be “an international remedy in name only.” *Id.* at 477. Because the remedy would be absorbed into U.S. law in this manner, “[t]o suggest that the remedy is based on international law would be disingenuous.” *Id.*

149. Bradley & Goldsmith, *supra* note 32, at 362. *But see* Kontorovich, *supra* note 145, at 155-56 (theorizing that only piracy can have a modern counterpart in customary international law because it is the only action from the law of nations that was not limited to a “specially protected classes of foreigners”). Following this line of reasoning, because “[m]odern human rights offenses are not substantially ‘comparable’ to piracy, the benchmark offense,” the new customary law norms cannot pass the standard set in *Sosa*. *Id.* at 161.

2. A Restrained Discretion?¹⁵⁰

More troublesome than the flexible standard discussed above is the residual, undefined discretion left to the federal courts by the *Sosa* decision to determine what claims to entertain under the ATS.¹⁵¹ Consistent with the Second Circuit's *Filartiga* decision¹⁵² and the line of cases that followed,¹⁵³ Justice Souter would allow the federal courts to continue to determine when U.S. courts have jurisdiction over various human rights infractions, exposing the U.S. to foreign policy complications long before these cases reach Supreme Court review.¹⁵⁴ This discretion would authorize the "federal courts to define and enforce violations of the law of nations in suits invoking the jurisdiction of the federal courts under the ATS."¹⁵⁵ Because the *Sosa* Court did not definitively close the door to undefined tort claims permitted under the ATS (as Justice Scalia encouraged),¹⁵⁶ the federal courts are now empowered to become the judicial branch of worldwide human rights litigation. By failing to articulate precisely the extent of the ATS's absorption of customary international law, the Supreme Court required difficult determinations by the lower courts regarding the

150. See *supra* note 101 and *infra* note 198 (identifying Justice Souter's five reasons for the exercise of discretion by the lower courts).

151. David D. Caron & Brad R. Roth eds., *International Decision: Scope of Alien Tort Statute – Arbitrary Arrest and Detention as Violations of Custom*, 98 AM. J. INT'L L. 798, 804 (2004). "The *Sosa* decision announces the existence of strict limits to the power of courts to establish international law-based causes of action under the ATS, but does relatively little, in practical terms, to specify those limits." *Id.*

152. See *supra* notes 54-65 and accompanying text (examining *Filartiga*).

153. See *supra* note 60 (listing the cases following *Filartiga* and their holdings).

154. Martin S. Flaherty, *Future and Past of U.S. Foreign Relations Law*, 67 LAW & CONTEMP. PROBS. 169, 173 (2004). "Despite an excess of cautionary rhetoric, the Court in essence upheld modern litigation under the [ATS] . . . the *Sosa* plurality guaranteed that the federal judiciary's duty to engage with international legal standards in ATS suits would continue." *Id.*

155. Garre, *supra* note 65, at 4.

156. See *infra* notes 166-175 and accompanying text (analyzing an interpretation of the ATS consistent with Justice Scalia's concurring opinion). Justice Souter might have been indicating the level of discretion left to the federal courts with the language he used to reject Alvarez-Machain's claim for arbitrary arrest and transborder abduction:

Whatever may be said for the broad principle Alvarez advances, in the present, imperfect world, it expresses an aspiration that exceeds any binding customary rule having the specificity we require. Creating a private cause of action to further that aspiration would go beyond any residual common law discretion we think it appropriate to exercise. It is enough to hold that a single illegal detention of less than a day, followed by the transfer of custody to lawful authorities and a prompt arraignment, violates no norm of customary international law so well defined as to support the creation of a federal remedy.

Sosa, 542 U.S. at 738.

appropriateness of ATS claims.¹⁵⁷

Tempered only by the Supreme Court's standard that the customary law at hand be "accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms,"¹⁵⁸ the federal courts will continue to produce a wide array of decisions that stretch the concept of accepted customary international law.¹⁵⁹ Because the *Sosa* decision failed to delineate a precise expectation of the discretion to be used, conflicting decisions in the lower courts are likely.¹⁶⁰ The lower courts will undoubtedly produce erratic decisions and will allow claims other than those that have genuinely reached the level of customary law.¹⁶¹ In fact,

[E]xperience teaches that the discovery of a new or forgotten judicial power is often marked by efforts to experiment with and, in some cases, abuse that power. Indeed, as a practical matter, lower courts that were willing to infer international law-based causes of action from the pure jurisdictional language of the ATS before *Sosa* may only be emboldened by the court's decision announcing that the federal courts possess an inherent lawmaking authority when it comes to policing the violation of customary international law norms the world over.¹⁶²

The fluidity of the "residual common law discretion" signals hope for human rights advocates,¹⁶³ threatens the deep pockets of multinational corporations,¹⁶⁴ and has elicited opposition by the

157. See *Leading Case*, *supra* note 46, at 446 (lamenting that "Sosa failed to articulate a clear conception of the interaction between customary international law and domestic law, and offers little guidance to lower courts both within ATS doctrine and beyond"). The "rhetoric" of the *Sosa* plurality cautioned against the expansion of the ATS to include claims arising from customary law, but "fail[ed] to clarify one of the most important, and most opaque, elements in the opinion: its articulation of the role of customary international law in U.S. law." *Id.* at 451.

158. *Sosa*, 542 U.S. at 725. See *supra* notes 113-26 and accompanying text (discussing the Court's advisement that the international norms adhere to this standard); see also *supra* notes 142-49 and accompanying text (exploring the usability of the ATS when held strictly to that standard).

159. An indicator of this liberal trend is the line of cases that followed *Filartiga* and preceded *Sosa*. See *supra* note 60 (listing these cases and their holdings).

160. *Kontorovich*, *supra* note 145, at 113.

161. *Leading Case*, *supra* note 46, at 455; *Kontorovich*, *supra* note 145, at 113 (predicting "conflicting decisions" as a result of the "scant description" of the Supreme Court test in *Sosa*).

162. *Garre*, *supra* note 64, at 4.

163. See *Kochan*, *supra* note 52, at 261-64 (suggesting that human rights organizations will embrace the discretion given to the courts and capitalize on this leeway by increasing "customary law outputs" that will bring additional human rights claims under ATS jurisdiction). See *infra* notes 178-182 and accompanying text (discussing the efforts of human rights activists).

164. See *infra* notes 183-189 and accompanying text (discussing the effect ATS litigation will have on multinational corporations).

executive branch of the U.S. government.¹⁶⁵

3. “[T]he deed was done in *Erie*”¹⁶⁶

The federal courts would be giving the ATS its most accurate interpretation by recognizing that the extinction of federal common law also destroyed any causes of action that arise from the customary international law suggested by the “law of nations” in the ATS.¹⁶⁷ Limiting the ATS’s substantive reach would be consistent with the Supreme Court’s other efforts to restrict the “extraterritorial scope” of the courts, which can interfere with the policy considerations of the political branches.¹⁶⁸ This approach would reduce the ATS to a statute

165. Brief for the United States as Respondent Supporting Petitioner, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (No. 03-339). The Solicitor General echoed Justice Souter’s wariness regarding the federal courts continued interference in the lawmaking realm of the political branches, but issued a stronger warning in his brief to the Supreme Court in support of the petitioner *Sosa*. *Id.* at 28.

The inherently indeterminate nature of customary international law makes it a singularly ill-suited basis for the creation of private rights of action. Nor . . . does the idea of judges searching through ungratified treaties and other sources of customary international law documents to discover private rights have anything to recommend to it. Indeed, if courts really had such an extraordinary power, then there would be little point in the close scrutiny given to treaties and other international conventions by the Senate and Executive in determining whether to ratify a treaty.

Id. at 28-29.

166. *Sosa*, 542 U.S. at 746 (Scalia, J., concurring). Justice Scalia argued that there is no “‘door to further independent judicial recognition of actionable international norms’ . . . ‘still ajar subject to vigilant doorkeeping’” because *Erie* had already closed the door to general common law. *Id.* (quoting plurality opinion at 729).

167. See *Casto*, *supra* note 23, at 477 (warning that an attempt to develop this type of international common tort law “would lead the federal courts down a path similar to the one rejected in *Erie*). But see *Leading Case*, *supra* note 46, at 452 (rejecting this position because it ignores “the federal interest in vindicating international law norms as part of a unified foreign policy” and “downplays the extent to which the intent behind the ATS was to empower the federal government to act on such matters”). Justice Scalia might, in the opinion of one observer, be “conflat[ing] a skepticism of the courts’ capacity to recognize modern customary norms with his views of the effects wrought by *Erie* on judicial authority.” *Id.* Justice Scalia’s position that *Erie* precludes customary international law from being a cause of action under the ATS is also flawed in that it is inconsistent with his willingness to recognize claims for the “law of nations” as they existed in 1789. *Id.* at 452-53; see also *supra* notes 33-43 and accompanying text (discussing the Founding Fathers’ concept of “law of nations”).

168. Bradley & Goldsmith, *supra* note 32, at 362. “The plan of the Constitution counsels hesitation.” *Casto*, *supra* note 23, at 482. The exclusive foreign policy role of the presidency and the congress’s responsibility for ratifying treaties and declaring war leaves little room for the judiciary to enjoy a “policymaking role in matters concerning foreign policy.” *Id.* Considering the Court’s other decisions to limit the extraterritorial scope of the courts, Bradley & Goldsmith, *supra* note 32, at 362 n. 233, it seems incongruous that the plurality did not concur with Justice Scalia’s wish to shut the door to international policy making by the courts. See *id.* The ATS invites such a limit on extraterritorial scope in light of these other limiting decisions, and also because the

allowing the claims of aliens only for law of nations violations embedded in the original intent of the Framers: “Violations of safe conduct, infringement of the rights of ambassadors, and piracy.”¹⁶⁹ To do otherwise would perpetuate a modern trend of the federal courts to impinge on the duties more appropriately handled by the other branches of government: in this case making foreign policy decisions better left to the Executive.¹⁷⁰ It is unlikely that the First Congress ever intended the ATS to create “federal substantive rights” or the “federal common law making” that the plurality’s decision authorizes.¹⁷¹ Giving the statute an interpretation that is inconsistent with *Erie* is “a structurally objectionable step.”¹⁷² The ATS should have new life as a viable

international subject matter particularly infringes on the political branches’ role in creating foreign policy. *Id.* Additionally, the 1789 drafters of the ATS would never have considered such liberal discretion in the courts. *Id.*

169. Bradley & Goldsmith, *supra* note 32, at 359. Customary international law cannot be incorporated into the ATS “law of nations” because the eighteenth century understanding of international law would not have included the modern concept of human rights issues that encompasses “the way a foreign nation treats its citizens.” *Id.* Despite the obscure origins of the ATS, there is a strong consensus that the ATS “does not create a statutory cause of action. The statute is purely jurisdictional and the first Congress undoubtedly understood this to be the case.” Casto, *supra* note 23, at 479 (internal footnotes omitted). An alternative school of thought, however, is that customary international law exists outside of the federal common law, and is instead a separate body of substantive law that can be applied in appropriate cases where the court has jurisdiction over an international issue. Aleinikoff, *supra* note 53, at 97.

170. *See supra* note 168 (setting forth the authority which supports this contention).

171. Bradley & Goldsmith, *supra* note 32, at 359. While conceding that there are multiple constructions of the ATS, some of which are “more plausible than others,” these authors suggest that focusing on the original language of the ATS reveals precisely what the First Congress intended: that the district courts have “cognizance” – or jurisdiction – over the claims of aliens, but stops short of granting the courts the power of substantive law making. *Id.* at 358-59. This jurisdiction-only interpretation is bolstered by the modern codification of the ATS at 28 U.S.C. §1350 where jurisdiction is substituted for “cognizance.” Casto, *supra* note 23, at 479. *See generally* 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 (1985) (discussing the jurisdictional aspects of the ATS). *But see* William S. Dodge, *The Constitutionality of the Alien Tort Statute: Some Observations on Text and Context*, 42 VA. J. INT’L L. 687, 689-90 (2002) (arguing that the First Congress could not have realized the need to articulate anything further than jurisdiction because “cause of action” as we understand it today did not exist in the early American legal consciousness) [hereinafter Dodge, *Constitutionality*]. “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.” *Id.* at 690; *see also* Haberstroh, *supra* note 26, at 249. Courts that do not recognize a cause of action in the ATS give the statute an “ahistorical” interpretation. Dodge, *Constitutionality, supra*, at 690. The federal courts that do “read the [ATS] as granting a cause of action,” such as the *Filartiga* court, do so “precisely to eliminate this anachronism.” *Id.*

172. J. Harvey Wilkinson, III, *Our Structural Constitution*, 104 COLUM. L. REV. 1687, 1694 (2004). “[I]n breaching the line between prescriptive and interpretive power, the Court risked a retreat to the [pre-*Erie* era], which assigned to the judiciary, under the guise of federal common law, an impermissible prescriptive task.” *Id.* *But see* Ralph G. Steinhardt, *The Alien Tort Claims Act: Theoretical and Historical Foundations of the Alien Tort Claims Act and Its Discontents: A Reality*

jurisdictional statute in U.S. courts only after Congress codifies those international law causes of action for which jurisdiction can apply.¹⁷³ If a lack of authority for the federal courts to create federal common law were properly acknowledged,¹⁷⁴ the courts could not recognize any causes of action under the ATS, even as extrapolation from the core conceptual basis of the Founder's "law of nations."¹⁷⁵

B. *The Alien Tort Statute's Modern Importance*

Regardless of the interpretation given to the ATS, the efforts of litigators have already resurrected the statute, and it will play a pivotal role in the United States approach to human rights violations, cooperation with multinational corporations, and its own foreign policy.¹⁷⁶ Observers can glean the potential consequences of *Sosa* from the range of amicus curiae briefs filed in the case.¹⁷⁷

Check, 16 ST. THOMAS L. REV. 585, 605 (2004) (attacking the argument that the *Filartiga* line of cases needs to be abrogated).

[T]hose who would gut the [ATS] through judicial interpretation or Congressional repeal offer a non-solution to a non-problem by exaggerating the law of nations as some expansive and amorphous body of law created without the dominant influence of the United States for more than two centuries, underestimating the ability of the courts to derail abusive or frivolous lawsuits, and underestimating the value of the [ATS] in assuring that the United States does not become a safe haven for abusers.

Id.

173. *Leading Case*, *supra* note 46, at 456. The "nebulous" decision in *Sosa* could very well be a "cry for congressional help." *Id.*

174. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 741 (Scalia, J., concurring).

175. This focused interpretation of the ATS would render the statute practically worthless until Congress initiates legislation to expand the statute. *See infra* note 197 (suggesting that Congress does so). Justice Scalia would likely be unwilling to allow ATS as the jurisdictional basis for an alien's claim in federal court unless the famous pirate Blackbeard were named as a defendant.

176. *See infra* notes 178-196 and accompanying text (outlining each of these ways in which the ATS will be implicated). To briefly illustrate the pronounced presence the ATS will have in the coming years, consider one potential alien plaintiff relying on the ATS for jurisdiction in a U.S. federal court: Osama Bin Laden. Jamie Shapiro, Note and Comment, *Aliens' Redress of Grievances Against the United States for International Human Rights Violations*, 10 SW. J. OF L. & TRADE AM. 195, 217 (2003/2004). If ever captured, the number one enemy of the United States could have a claim nearly analogous to the one posited by Alvarez-Machain. *Id.*

177. The organizations that filed briefs are as varied as the potential post-*Sosa* ATS litigation. Writing briefs in support of the Petitioner were: The Pacific Legal Foundation (a nonprofit public interest group providing "a voice in the courts for thousands of Americans who believe in constitutionally grounded government, including adherence to the principles of separation of powers, democratic consent, and limited federal judicial powers.") Brief Amicus Curiae of Pacific Legal Foundation in Support of Petitioner at 1, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (No. 03-339); Professors of International Law, Federal Jurisdiction and the Foreign Relations Law of the United States (a group of law professors with noted expertise in those disciplines), Brief for Professors of International Law, Federal Jurisdiction and the Foreign Relations Law of the United States as Amici Curiae in Support of Petitioner at 1, *Sosa*, 542 U.S. 692 (No. 03-339); the

Washington Legal Foundation (a nonprofit public interest group devoted to issues “involving national security, civil-justice reform and federalism and opposes the expansion of federal-court jurisdiction beyond appropriate statutory and constitutional limits”), the National Fraternal Order of Police (a 310,000 member law enforcement labor organization), and the Allied Education Foundation (a charitable foundation engaged in promoting “education in diverse areas of study, such as law and public policy”), Brief of Washington Legal Foundation, National Fraternal Order of Police, and Allied Educational Foundation as Amici Curiae in Support of Petitioner at 1-2, *Sosa*, 542 U.S. 692 (No. 03-339); the National Association of Manufacturers (“the nation’s largest broad-based industrial trade association,” with many of its members having operations abroad), Brief for the National Association of Manufacturers as Amicus Curiae in Support of Reversal at 1, *Sosa*, 542 U.S. 692 (No. 03-339); and the National Foreign Trade Council (“the premier business organization advocating a rules-based world economy” with over 300 member companies), USA*Engage (a broad-based coalition “concerned about the proliferation of unilateral foreign policy sanctions at the federal, state, and local levels”), the Chamber of Commerce of the United States of America (“the world’s largest business federation” with over three million members doing business in the United States and around the world), the United States Council for Organization in International Investment (“a business advocacy and policy development group” serving as the “American affiliate of the International Chamber of Commerce and International Organization of Employers), the International Chamber of Commerce (the world business organization which represents the chambers of commerce and other business associations of 130 countries, with a goal to “promote multilateral trade among nations in the interest of global prosperity”), the Organization for International Investment (“the largest business association in the United States representing the interests of U.S. subsidiaries of international companies”), the Business Roundtable (“an association of CEOs of leading U.S. corporations . . . committed to vigorous economic growth, a dynamic global economy, and the well-trained and productive U.S. workforce essential for future competitiveness”), the American Petroleum Institute (a 450 member group from “all aspects of the petroleum industry . . . operat[ing] throughout the world as part of their commitment to meet America’s energy needs”), and the US-ASEAN Business Council (“America’s leading private business organization dedicated to promoting increased trade and investment between the United States and the member nations of the Association of Southeast Asian Nations”), Brief for the National Foreign Trade Council, USA*Engage, the Chamber of Commerce of the United States of America, the United States Council for Organization in International Investment, the International Chamber of Commerce, the Organization for International Investment, the Business Roundtable, the American Petroleum Institute, and the US-ASEAN Business Council as Amici Curiae in Support of Petitioner at 1-3, *Sosa*, 542 U.S. 692 (No. 03-339)[hereinafter NFTC et al. Brief].

Those organizations and groups filing briefs in support of the Respondent Alvarez-Machain were: National and Foreign Legal Scholars (75 scholars from nations around the world, “including Australia, Canada, Ireland, Mexico, the Netherlands, New Zealand, the United Kingdom, and the United States”), Brief of Amici Curiae National and Foreign Legal Scholars in Support of Respondents at 1, *Sosa*, 542 U.S. 692 (No. 03-339); Hungarian Jews (plaintiffs in a pending U.S. District Court case alleging claims against the United States under the ATS for failure to return “personal possessions and family heirlooms . . . accepted into protective custody”) and Bougainvilleans (plaintiffs in an ATS case alleging claims of “genocide, war crimes, and crimes against humanity” against a private corporation), Brief of Amici Curiae Alien Friends Representing Hungarian Jews and Bougainvilleans Interests in Support of Respondent at 1, *Sosa*, 542 U.S. 692 (No. 03-339); Professors of Federal Jurisdiction and Legal History (a group of professors with expertise in the relevant areas interested in the “proper understanding and interpretation of the [ATS]”), Brief of Professors of Federal Jurisdiction and Legal History as Amici Curiae in Support of Respondents at 1, *Sosa*, 542 U.S. 692 (No. 03-339); Corporate Social Responsibility Amici (a collection of international groups working “to develop, implement or support mechanisms to improve corporate compliance with human rights standards in the global economy”), Brief of Amici Curiae Corporate Social Responsibility Amici in Support of Respondent at 1, *Sosa*, 542 U.S. 692

1. Human Rights Activists Emboldened

By not seizing the opportunity to forever banish international human rights claims from federal courts, the Supreme Court sustained hope for numerous human rights victims and their supporting organizations.¹⁷⁸ The ATS, when given the interpretation of the

(No. 03-339) [hereinafter CSR Amici Brief]; the Presbyterian Church of Sudan (“an unincorporated association of more than 35,000 members of the Presbyterian faith” that is a plaintiff in a class action ATS case against a Canadian oil company, Talisman Energy, Inc. that allegedly collaborated to commit “genocide, war crimes, extrajudicial murder, forcible displacement, torture and other crimes against humanity” in which “[c]hurches, congregations and ministers are alleged to be particular targets”) and the General Assembly of the Presbyterian Church (U.S.A.) (intending “to support its sister denominations around the world”), Brief for the Presbyterian Church of Sudan and Clifton Kirkpatrick as Stated Clerk of the General Assembly of the Presbyterian Church (U.S.A.) as Amici Curiae in Support of Respondent at 1-2, *Sosa*, 542 U.S. 692 (No. 03-339); Career Foreign Service Diplomats (twenty-eight U.S. Foreign Service members, many of whom served as ambassadors), Brief of Amici Curiae Career Foreign Service Diplomats in Support of Respondent at 1-9, *Sosa*, 542 U.S. 692 (No. 03-339); Women’s Human Rights Organizations (a gathering of numerous U.S. and foreign women’s human rights organizations “working to end impunity for grave violations of human rights of women, to challenge violations, and to support women seeking justice”), Brief as Amici Curiae of Women’s Human Rights Organizations in Support of Respondent at 1, *Sosa*, 542 U.S. 692 (No. 03-339); Human Rights Organizations and Religious Organizations (“dozens of human rights organizations and religious organizations working to protect basic human rights in this country and around the world”), Brief of Amici Curiae International Human Rights Organizations and Religious Organizations in Support of Respondent at 1, *Sosa*, 542 U.S. 692 (No. 03-339) [hereinafter Human Rights Organizations Brief]; International Jurists (“jurists who have served as judges and experts on international human rights bodies around the world”), Brief of Amici Curiae International Jurists in Support of Affirmance at 1, *Sosa*, 542 U.S. 692 (No. 03-339); Surviving family members of the victims of the September 11, 2001 Terrorist Attacks (wishing “to ensure that every survivor of terrorist attacks, and the family members of those who perish in terrorist attacks, regardless of their nationality, are able to pursue civil suits against terrorists”), Brief of Amici Curiae Surviving Family Members of the Victims of the September 11, 2001 Terrorist Attacks in Support of Respondents at 1, *Sosa*, 542 U.S. 692 (No. 03-339); and the World Jewish Congress (“an international federation of Jewish communities . . . that played a leading role in the Holocaust restitution movement, which included litigation using the [ATS]”) and the American Jewish Committee (“a national human relations organization . . . founded to protect the civil rights and religious liberty of Jews”), Brief for the World Jewish Congress and the American Jewish Committee as Amici Curiae in Support of Respondents at 1-2, *Sosa*, 542 U.S. 692 (No. 03-339).

The European Commission (“the executive body of the European Community, a treaty-based international organization that has competence to develop and enforce Community-wide legislation in specified areas of policy”) filed a Brief of Amicus Curiae in Support of Neither Party. Brief of Amicus Curiae the European Commission in Support of Neither Party at 1, *Sosa*, 542 U.S. 692 (No. 03-339).

178. Baluarte, *supra* note 91, at 13. While criticizing the Court for “miss[ing] an opportunity to promote international norms that apply to all countries,” Baluarte urges that activists should not be deterred. *Id.* See also Elizabeth F. Defeis, *Litigating Human Rights Abuses in United States Courts: Recent Developments*, 10 ILSA J. INT’L & COMP. L. 319, 319 (2004) (suggesting that the ATS is “[t]he most utilized legislative device for reaching human rights abuses” and inferring that favorable interpretation of the ATS would preserve this important avenue for addressing human rights issues). *But see* Wynne P. Kelley, Comment, *Citizens Cannot Stand For It Anymore: How*

Filartiga court or Justice Souter's "ajar door" approach, is "a basic tool to apply limited – but binding – standards to corporations in their international operations."¹⁷⁹ The accessibility of federal courts to human rights victims has numerous positives.¹⁸⁰ However, in order to preserve judicial resources and prevent abuse of the federal court system by litigious aliens, the courts must restrict this access by recognizing only those victims of the most widely accepted customary international law violations.¹⁸¹ Human rights activists will seize on to the ATS as a means to redress the violations of the host nations where multinational

The United States' Environmental Actions in Afghanistan and Iraq Go Unchecked by Individuals and Non-Governmental Organizations, 28 FORDHAM INT'L L.J. 193, 227 (2004) (lamenting the narrowness of the *Sosa* decision for its implied preclusion from ATS litigation of potential environmentally related human rights claims with potential damages over \$20 billion).

179. Terry Collingsworth, "Corporate Social Responsibility," *Unmasked*, 16 ST. THOMAS L. REV. 669, 686 (2004). See Sonia Jimenez, Note and Comment, *The Alien Tort Claims Act: A Tool for Repairing Ethically Challenged U.S. Corporations*, 16 ST. THOMAS L. REV. 721 (2004); Gabriel D. Pinilla, Note and Comment, *Corporate Liability for Human Rights Violations on Foreign Soil: A Historical and Prospective Analysis of the Alien Tort Claims Controversy*, 16 ST. THOMAS L. REV. 687 (2004).

180. Human Rights Organizations Brief, *supra* note 177. The human rights organizations' argue in support of a liberally construed ATS because the ATS provides a means of enforcement that is otherwise hard to come by. *Id.* at 2.

Despite the universal condemnation of these human rights violations, perpetrators all too often escape punishment. Finding means to hold perpetrators accountable is a key priority for governments, including the U.S. government, as well as for international and nongovernmental organizations around the world. Domestic and international actors have undertaken varied initiatives, including criminal prosecutions initiated both by public prosecutors and by private individuals, civil litigation, and assorted administrative proceedings. Each state chooses mechanisms appropriate to its local legal system. Civil litigation under the [ATS] is part of a global effort to address impunity and to hold perpetrators of egregious abuses accountable for their actions.

Id.

181. While encouraging a modernized "law of nations" and the use of the ATS for the human rights claims of aliens, one observer warns that enthusiastic human rights activists "may actually threaten the statute, when they attempt to use [ATS] to attack wrongs, such as the softer shades of third-party complicity, which a world consensus has not decided are in violation of customary international law." Haberstroh, *supra* note 26, at 271. Additional concerns surround the economic viability of nations that might be saddled with large damages from ATS litigation. HUFBAUER & MITROKOSTAS, AWAKENING MONSTER, *supra* note 7, at 13. Those countries include Saudi Arabia, Abu Dhabi, Ecuador, Indonesia, Nigeria, Burma, Egypt, Germany, Papua New Guinea, Japan, Guatemala, Colombia, Peru, Sudan, and South Africa. *Id.* Japan and Germany were included in this list because they were exposed to ATS litigation on the basis of their egregious human rights violations during World War II. *Id.* A corollary exists between poverty-stricken nations and a "low regard for human rights, measured against US standards, coupled with limited political and economic freedom." *Id.* Monetary liability in U.S. courts could therefore severely impede these impoverished nations from ever improving their economic situation and, in turn, contribute to their failure to rectify their almost unavoidable (although inexcusable) violations of human rights. *Id.* at 13-14.

corporations are often immersed in human rights predicaments.¹⁸²

2. Multinational Corporations Threatened

The potential litigation against multi-national corporations under the ATS raises concern for American businesses and their continued competitiveness in the global economy.¹⁸³ Despite activists' strong support for federal jurisdiction over human rights violations, concerns emerge as to the impact this course could have on major U.S. corporations, specifically those with multinational operations.¹⁸⁴

182. See *supra* note 60 (detailing the numerous human rights cases brought in federal courts using *Filartiga's* liberal ATS interpretation); see also Hufbauer & Mitrokostas, *International Implications*, *supra* note 7, at 607 (postulating that thousands of Chinese citizens could invoke the ATS – “organized by plaintiffs’ attorneys and supported by international human rights groups” – against multinational corporations for “abetting” China’s alleged human rights violations); Paul Magnusson, *A Milestone for Human Rights*, BUSINESS WEEK, January 24, 2005, at 63 (listing the major U.S. corporations who are, or will likely be, defending ATS suits). “Other defendants include Coca-Cola, Drummond, Occidental Petroleum, and Del Monte Foods.” Magnusson, *supra*. See generally Mark J. Leavy, Note, *Discrediting Human Rights Abuse as an “Act of State”: a Case Study on the Repression of the Falun Gong in China and Commentary on International Human Rights Law in U.S. Courts*, 35 RUTGERS L. J. 749 (2004) (examining the pending companion cases of Chinese plaintiffs directly against the government officials of the People’s Republic of China and relying on the ATS for jurisdiction in U.S. courts). See also Oscar Gonzales, *Attacking the ATS: Prison Abuse Scandal Highlights Need for Access to U.S. Courts*, 20 TX LAW., July 12, 2004 (identifying the already-filed claims of Iraqi prisoners using the ATS as the basis for their jurisdiction for their claims against U.S. private contractors of torture and executions at the infamous Abu Ghraib prison and other Iraqi detention facilities).

183. U.S. companies with direct ties to countries with human rights issues are prone to ATS litigation. HUFBAUER & MITROKOSTAS, AWAKENING MONSTER, *supra* note 7, at 37; see *supra* note 181 (listing the foreign states that are categorized as nations with human rights issues). This includes companies engaged in oil and mineral imports from foreign nations, but also those exporting U.S. goods to the same nations. HUFBAUER & MITROKOSTAS, AWAKENING MONSTER, *supra* note 7, at 16. Even institutions which lend money to those nations may be susceptible. *Id.* at 17. “It is no exaggeration to say that every major international bank is exposed to ATS liability.” *Id.* “[T]he ATS has been transformed from its intended role as a jurisdictional provision applicable to a small class of cases into a serious impediment to companies engaged in international trade, investment, and operations, and a major irritant to the United States in its dealing with other nations.” NFTC et al. Brief, *supra* note 177, at 5. *But see* CSR Amici Brief, *supra* note 177, at 6 (arguing that the multinational corporations exaggerate the effect the ATS will have on their profits and accusing these corporations of interfering with the “substantial precedent demonstrating that the U.S. has been a leader in applying the rule of law to human rights violations”). “The [ATS]’s very limited scope poses absolutely no threat to foreign investment by U.S. companies.” *Id.*

184. See HUFBAUER & MITROKOSTAS, AWAKENING MONSTER, *supra* note 7, at 1-2 (outlining a “nightmare scenario” if the ATS interpretation can reach multinational corporations and warning that “trial lawyers will seek to expand the scope of the ATS . . . to such an extent that investment and trade in developing countries will be seriously threatened”). Because the ATS has only in recent years been suggested as a litigation tool against corporate defendants, it is difficult to ascertain the “potential scope of ATS litigation.” Hufbauer & Mitrokostas, *International Implications*, *supra* note 7, at 615. The possible breadth of claims is comparable to the asbestos

Multinational corporations risk exposure to human rights litigation by virtue of doing business in a country that perpetrates, sponsors, endorses, or even tolerates human rights abuses.¹⁸⁵ If these multinational corporations are subject to alien tort claims, the magnitude of the damages would be noticeable in the U.S. economy.¹⁸⁶ In the minds of the foremost trade and business organizations in the United States, “the erroneous interpretation and expansion of the [ATS] . . . wreaks economic damage.”¹⁸⁷ Corporations are already settling suits¹⁸⁸ to avoid

litigation of the late 20th century. *Id.* “Asbestos spawned the largest mass tort litigation in legal history,” *Id.* at 614, with over 300 corporate defendants named and damages at \$54 billion and growing. *Id.* at 614 n.41.

185. HUFBAUER & MITROKOSTAS, *AWAKENING MONSTER*, *supra* note 7, at 9. Multinational corporations are sued for “aiding and abetting” human rights violations, particularly when sovereign immunity precludes the alien plaintiffs from suing the offending foreign state itself. *Id.* The circuit courts have permitted these aiding and abetting claims against multinational corporations, requiring only that the corporation gave “knowing practical assistance or encouragement which has a substantial effect on the perpetration of the crime.” *Id.* (quoting *Doe v. Unocal Corp.*, 395 F.3d 932, 947 (9th Cir 2002)). The claims against corporations range from “environmental torts, expropriated property claims, and human rights violations committed by host governments.” Konrad L. Cailteux and B. Keith Gibson, “*Alien Tort Statute*” *Shakedown: Court Must Arrest New Attempt to Expand Mischievous U.S. Law*, 20 LEGAL BACKGROUNDER, January 14, 2005. *See generally* Ronen Shamir, *Between Self-Regulation and the Alien Tort Claims Act: On the Contested Concept of Corporate Social Responsibility*, 38 LAW & SOC’Y REV. 635, 637-43 (2004) (laying out the general background of ATS cases against multinational corporations). The claims against corporations are “based on dubious theories of vicarious liability.” Cailteux & Gibson, *supra*. The claims significantly affect the operations of these corporations because “[a]lthough most courts have recognized the impropriety of these suits, and have dismissed the claims, this influx of cases has cost United States corporations significant, unnecessary legal fees, discovery costs, and lost employee time.” *Id.* *But see* Gonzales, *supra* note 182 (arguing that corporations should have had fair warning “all along about the importance of ATS compliance”). Gonzales argues that, rather than focusing their energies on improving human rights conditions, “all corporate America’s energies are focused on advancing anti-ATS arguments that are, generously speaking, suspect.” *Id.*

186. NFTC et al. Brief, *supra* note 177, at 5. The multi-national corporations mobilized to assert their opposition to the inclusion of customary law in the ATS for the Supreme Court’s decision for *Sosa* because they recognized the potential economic impact exposure to ATS litigation would cause them. *See generally* HUFBAUER & MITROKOSTAS, *AWAKENING MONSTER*, *supra* note 7, at 37- 43 (hypothesizing on the economic impact ATS legislation will have in the United States). *But see* Collingsworth, *supra* note 179, at 670 (criticizing the business community because it “simply could not resist going after the [ATS] at full bore at the first opportunity to nip in the bud any prospect that the U.S. companies could possibly be held accountable for human rights violations committed in the course of their international operations”). By “collectively seeking the repeal of the [ATS],” suggests one human rights proponent, “the U.S. multinational business community has repudiated the public trust.” *Id.* at 671.

187. NFTC et al. Brief, *supra* note 177, at 4. The culprits, in the eyes of these business associations, are the human rights activists lobbying for a liberal interpretation of the ATS. *Id.* “Foreign plaintiffs and the lawyers and organizations supporting them – often pursuing thinly disguised political agendas – have adopted the statute as a vehicle to embarrass foreign governments and to pressure businesses to abandon operations in targeted nations.” *Id.* However, the expense of ATS litigation might be a positive component. Emeka Duruigbo, *The Economic Cost of Alien Tort*

the escalating litigation successfully squeezed through the door for alien tort claims against multinational corporations in U.S. federal courts – suggesting that Justice Souter’s slightly ajar door could easily be thrown open.¹⁸⁹

3. U.S. Foreign Policy Implications

The political branches of the U.S. government have much to consider after the Court’s decision in *Sosa*.¹⁹⁰ The continued use of the

Litigation: A Response to Awakening Monster: Alien Tort Statute of 1789, 14 MINN. J. GLOBAL TRADE 1, 30 (2004). “It could be that at the end of the day, society would view the protection of human rights as an overwhelming consideration that trumps business interests, regardless of cost.” *Id.*

188. Magnusson, *supra* note 182, at 63. The most notable of recent ATS suits was settled in early 2005. *Id.* The suit arose from the following summary of events:

In the mid-1990s, reports emerged out of Burma that villagers in the remote Yadana region had been forced by the military to clear jungle for the construction of a \$1.2 billion natural gas pipeline. The allegations were horrendous: To round up workers for the project, the Burmese military had resorted to torture, rape, and murder to enslave villagers, even throwing one woman’s baby in a fire after killing her husband. Before long, U.S. human rights groups had filed suit against Unocal Corp., based in El Segundo, Calif., one of the four pipeline partners, on behalf of 15 unnamed Burmese villagers.

Id. Unocal has allegedly (court gag orders are still in place) settled the suit for \$30 million in damages. *Id.* The settlement is significant because it hints at U.S. corporations accepting responsibility for their involvement in human rights violations. *Id.*; see *Doe v. Unocal Corp.*, 248 F.3d 915 (9th Cir. 2001); see also Shannon O’Leary, *Human Rights Case Sounds Alarm for U.S. Multinationals*, CORPORATE LEGAL TIMES, December, 2004 (similarly summarizing the *Doe v. Unocal Corp.* case and connecting the settlement to other ATS litigation).

189. See generally HUFBAUER & MITROKOSTAS, *AWAKENING MONSTER*, *supra* note 7, at 13 (anticipating litigation of the same magnitude as multi-billion dollar damages of the asbestos cases); Hufbauer & Mitrokostas, *International Implications*, *supra* note 7, at 615 (predicting the same). One observer offers a plan of action for corporations “to mitigate potential backlash while not curbing growth.” Pinilla, *supra* note 179, at 719.

This primarily involves thorough self-assessment and evaluations of local business practices. Once this first step is taken, companies must try to influence partners abroad to meet international human rights standards, much like quality control standards imposed on foreign supply chain partners. If emerging markets prove too enticing and immune from influence, corporations should take steps to create walls clearly separating themselves from irresponsible conduct and players while at the same time reducing the appearance that the commission of these violations is of benefit to corporate entities.

Id. ATS litigation is being lauded for raising awareness of human rights violations in the minds of corporate decision makers. Shamir, *supra* note 185, at 660-61. The ATS, “by forcing the issue of corporations and human rights into the open, already shapes corporate behavior because it forces corporations to reflect upon, if not to institutionalize, human rights-related issues.” *Id.*

190. Although it was initially suggested that the United States itself would be exposed to litigation under the ATS because of the door left open by the Supreme Court, the combination of the ATS issue and the FTCA issue decided in *Sosa* likely will prohibit future claims that directly target the U.S. government. Baluarte, *supra* note 89, at 11; see also *supra* note 90 (outlining the Court’s outcome on the FTCA claim).

ATS in its modern context conflicts with its original purpose such that it may threaten the status of international relations.¹⁹¹ The current administration views the interpretation of the ATS advanced by the *Filartiga* line of cases as dangerous.¹⁹² For an administration that has made considerable attempts to protect businesses and bolster the economy, it follows that it would encourage a narrow and literal interpretation of the ATS.¹⁹³ But, beyond this business-friendly administration's goal of preserving the economy and nurturing a receptive home for large players in that economy, the executive branch seeks to ensure that ATS litigation does not compromise its foreign policy strategies.¹⁹⁴ The "War on Terror" presents additional concerns

191. Reply Brief for the United States as Respondents Supporting Petitioner, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (No. 03-339). The discretion given to the circuits "would grant authority to the courts to engage in a function that the Constitution vests in the political branches" and "would permit the courts effectively to nullify the actions of the political branches in the realm of foreign affairs." *Id.* at 9. Rather than serving as "a shield to protect foreign governmental officials from torts committed in the United States" – the original impetus for the ATS, *see supra* notes 25-30 and accompanying text (discussing the motives for the enactment of the ATS in 1789), – the ATS becomes "a sword to hold them civilly liable for tortious acts that took place abroad." Bradley and Goldsmith, *supra* note 32, at 361. This modern application of the ATS will not, for the most part, "promote amicable inter-national [sic] relations." *Id.* If ATS litigation unfolds as estimated, "the United States will be widely castigated for imposing its brand of justice worldwide." Hufbauer & Mitrokostas, *International Implications*, *supra* note 7, at 625. The civil suits would entail the "American-style justice" of punitive damages and class actions. HUFBAUER & MITROKOSTAS, *AWAKENING MONSTER*, *supra* note 7, at 48. There is also the distinct possibility that the courts' judgments will misrepresent to the international community the United States' stance on controversial topics because

[i]n ATS litigation, U.S. courts are called on to lay blame for international controversies.

The entry of judgment in an ATS case may create the impression to citizens of other countries that the U.S. government has taken sides in an international dispute, which may interfere with the efforts of the executive branch and Congress to calibrate an appropriate foreign policy concerning a particular dispute.

Garre, *supra* note 65 at 4. The judicial branch's "judgment on the actions of a foreign state . . . may well jeopardize sensitive negotiations." HUFBAUER & MITROKOSTAS, *AWAKENING MONSTER*, *supra* note 7, at 48.

192. Stephens, *supra* note 26, at 173. In opposition to the ATS, the White House has sought "to shield human rights abusers from accountability in U.S. Courts and to grant the executive branch the sole power to pick and chose who should be held liable and in what forum." *Id.*; *see also* Leavy, *supra* note 182, at 818 (noting the Bush administration's challenge of jurisdiction in the *Sosa* case).

193. Stephens, *supra* note 26, at 178. Business organizations suggest that ATS litigation will not only disrupt the foreign policy agendas of the United States, but also interfere with its trade policy because the threat of ATS litigation discourages businesses from conducting trade as normal. NFTC et al. Brief, *supra* note 177, at 4. "[T]he Bush Administration [has] argued that companies shouldn't be held to a 'vicarious liability' standard but should instead be held blameless unless involved directly in the crimes." Magnusson, *supra* note 182, at 63; *see also* O'Leary, *supra* note 188, at 68 (suggesting that U.S. corporations "have a powerful ally on its side" in the present presidential administration).

194. Defeis, *supra* note 178, at 322 (2004) (referring to the government position taken in a brief it filed on behalf of another ATS defendant "stating that if the case were allowed to go to trial,

for the Bush administration; in particular, its approach to the handling of prisoners has been highly controversial.¹⁹⁵ Justice Souter was conscious of the fact that ATS litigation would elicit some foreign policy-making by the courts, advising that “[s]ince many attempts by federal courts to craft remedies for the violation of new norms of international law would raise risks of adverse foreign policy consequences, they should be undertaken, if at all, with great caution.”¹⁹⁶

4. Action by Congress

Perhaps the only way to truly remedy the cloudiness of the ATS is for Congress to address it.¹⁹⁷ Justice Souter aptly cautioned against

it would interfere with American foreign policy, and may disrupt the war on terrorism”). *See supra* note 190 (describing some of the potential interference in U.S. foreign affairs).

195. Richey, *supra* note 3, at 2. “[T]he Alien Tort Statute could complicate the Bush administration’s war on terror by subjecting foreign individuals assisting in the detention and questioning of Al Qaeda suspects to potential liability in US courts for alleged human rights abuses conducted in overseas jails and interrogation chambers.” Richey, *supra* note 3, at 2. *See generally* Juan E. Mendez, *Review of David Cole’s Enemy Aliens: Double Standards and Constitutional Freedoms in the War on Terrorism*, 30 J.C. & U.L. 493 (2004) (book review) (highlighting the United States’ obligations under international law specifically related to the detainees of the War on Terror); Ronald J. Riccio, *Court Rules on Power to Detain Prisoners of the War on Terror and on the Limits of the ‘Bush Doctrine,’* 177 N.J.L.J. 321 (2004) (discussing the *Sosa* decision as it relates to the detention of terrorist prisoners). *But see supra* note 190 (discussing the only remote likelihood of the United States becoming directly subject to liability for its own human rights violations under the ATS as a result of the protection afforded by the FTCA). *But see* Gonzales, *supra* note 182 (criticizing the attempt of the government and corporations to immunize themselves “from their misdeeds in foreign lands”). “[I]f we lose sight of the weightiness of underlying ATS claims, all we need to do is glance at those damned Iraqi prisoner photos.” *Id.*

196. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 727-28 (2004). The federal courts, Justice Souter warned, should be “particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs.” *Id.* at 727. It is interesting to note that, while Justice Souter advised caution when the courts tread on the ground of foreign policy-making, he did not specifically instruct the courts to avoid the area altogether. Wilkinson, *supra* note 172, at 1694. Nevertheless, the Court “admonished the federal judiciary to exercise this power in a manner that would not trespass unduly upon the powers of the political branches in foreign affairs.” *Id.* One recent scholar suggests that there is a history of judicial presence in foreign affairs. Ariel N. Lavinbuk, Note, *Rethinking Early Judicial Involvement in Foreign Affairs: An Empirical Study of the Supreme Court’s Docket*, 114 YALE L.J. 855, 886 (2005). Analyzing the types of international issues in which the courts involved themselves might be helpful in identifying “[t]he proper role for courts in foreign affairs.” *Id.* at 896.

197. Hufbauer & Mitrokostas, *International Implications, supra* note 7, at 624. “Whatever the result, only the creator of the beast may put it to proper purpose.” *Id.* “[I]t may prove difficult for the federal courts to arrest the sprawling sweep of ATS litigation in a timely fashion. Hence our core recommendations are addressed to the Congress: legislation can most efficiently correct the unlimited sweep of ATS claims.” HUFBAUER & MITROKOSTAS, AWAKENING MONSTER, *supra* note 7, at 49. At the least, Congress should specify whether the jurisdictional grant of the ATS also “allows for the creation of common law causes of action.” *Leading Case, supra* note 46, at 456. “More specifically, Congress might step in to clarify the scope of its hoary grant of jurisdiction over

policy-making by the courts and recognized that the more appropriate action would be for Congress to make the ATS functional in today's courts without requiring that the federal courts become international legislators.¹⁹⁸ Rather than than asking the courts to decide what the international law is, lobbyists of both human rights groups and multinational corporations¹⁹⁹ could more appropriately devote their energies toward Congress to enact protective legislation.²⁰⁰

V. CONCLUSION

The unique history of the ATS warrants its preservation in the modern structure of our judiciary.²⁰¹ The accepted interpretation of the Founding Fathers' impetus for creating jurisdiction over the claims of aliens for certain international violations is not as prevalent today, but the spirit of their concern continues to resonate in present time.²⁰²

alien tort claims, sparing courts a difficult and uncertain inquiry in every ATS case." *Id.* A proponent of the incorporation of customary international law into the U.S. legal system reminds us "that Congress has the authority to adopt legislation that would make [customary international law] applicable in federal courts" and proposes that Congress does so. Aleinikoff, *supra* note 53, at 91-92. See also Bruce Zagaris, *U.S. Supreme Court Overturns Alvarez-Machain Claim, But Upholds Alien Tort Law*, INT'L ENFORCEMENT LAW REPORTER, September, 2004, (recognizing the most effective way to limit ATS litigation is for Congress to enact legislation to that effect).

198. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 727 (2004). Justice Souter presented five deterrents to the federal courts' recognition of causes of action under the ATS. *Id.* at 725-728. "First, the prevailing conception of the common law has changed since 1789 in a way that counsels restraint in judicially applying internationally generated norms." *Id.* at 725. "Second, along with, and in part driven by that conceptual development in understanding common law has come an equally significant rethinking of the role of the federal courts in making it." *Id.* at 726 (citing *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938)). "Third, this Court has recently and repeatedly said that a decision to create a private right of action is one better left to legislative judgment in the great plurality of cases." *Id.* at 727.

Fourth, the subject of those collateral consequences is itself a reason for a high bar to new private causes of action for violating international law, for the potential implications of foreign relations of the United States of recognizing such causes should make courts particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs.

Id. Lastly, Justice Souter could find "no congressional mandate to seek out and define new and debatable violations of the law of nations, and modern indications of congressional understanding of the judicial role in the field have not affirmatively encouraged greater judicial creativity." *Id.* at 728.

199. See *supra* note 177 for a list (in the form of those that filed amici brief in *Sosa*) of many organizations that would likely join this effort.

200. See generally Gonzales, *supra* note 182 (discussing the focus of energy put into pro- and anti-ATS decisions by the courts).

201. See *supra* notes 23-66 and accompanying text (discussing the historical context of the ATS).

202. See *supra* notes 23-66 and accompanying text (discussing the historical context of the ATS). The United States continues with increasing frequency to be involved in international

However, the long period of stagnancy has raised several issues as to the proper scope of ATS litigation, along with issues that only became cognizable in our modern era: the impact of ATS litigation on multinational corporations and the growing need for adjudication of human rights violations.²⁰³ Until the ATS is definitively contained or fully expanded, human rights victims will continue to find novel arguments to employ the ATS,²⁰⁴ and multinational corporations will endeavor to shield themselves from litigation by arguing for Justice Scalia's strict interpretation of the statute.²⁰⁵ So long as the door to the ATS remains even slightly ajar, numerous attempts to establish jurisdiction in federal courts under the ATS can be expected, as well as great opposition seeking to firmly shut the door to modern ATS claims.

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situations and prides itself in resolving various disputes.

203. *See generally supra* notes 175-200 (discussing the modern issues attached to the ATS).

204. *See supra* notes 176-182 and accompanying text (proposing the ways in which human rights litigation will employ the ATS to correct violations around the world).

205. *See supra* notes 183-189 and accompanying text (suggesting the resistance of U.S. corporations to litigation under the ATS).