3-1-2009

Who Watches the Watchmen: Vigilant Doorkeeping, the Alien Tort Statute, and Possible Reform

Keith A. Petty

Recommended Citation
Available at: http://digitalcommons.lmu.edu/ilr/vol31/iss2/2
Who Watches the Watchmen?
“Vigilant Doorkeeping,” the Alien Tort Statute, and Possible Reform

KEITH A. PETTY

I. INTRODUCTION

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

1. For exemplary articles underlying this debate and the role of CIL in U.S. jurisprudence, see, e.g., Ralph G. Steinhardt, Laying One Bankrupt Critique to Rest: Sosa v. Alvarez-Machain and the Future of International Human Rights Litigation in U.S. Courts, 57 VAND. L. REV. 2241 (2004); Beth Stephens, Upsetting Checks and Balances: The Bush Administration’s Efforts to Limit Human Rights Litigation, 17 HARV. HUM. RTS. J. 169 (2004) (arguing that the executive’s opposition to ATS claims is not entitled to judicial deference); Lea Brilmayer, Federalism, State Authority, and the Preemptive Power
The U.S. Supreme Court in *Sosa v. Alvarez-Machain* warned that claims filed under the ATS continue to be subject to "vigilant doorkeeping." In spite of this warning, the courts do not seem interested in playing the role of watchmen, nor well-equipped to juggle the competing interests at stake in ATS litigation. The struggle between plaintiffs seeking to broaden the scope of the ATS, and defendants' attempts—often supported by the executive branch—to limit actionable claims, is unlikely to be resolved by the judiciary. ATS cases have yet to establish a coherent jurisprudence.

Who, then, watches the watchmen? Or, in other words, who will give the courts guidance? In several cases, the judicial branch has called out for assistance from the political branches. When ATS litigation touches on foreign policy concerns, e.g., suits against foreign heads of state, input from the executive branch may be solicited. In other cases, less connected to foreign affairs, however, the executive may offer guidance that is not followed. A

---


4. *Sosa*, 542 U.S. at 731 ("welcom[ing] any congressional guidance in exercising jurisdiction with such obvious potential to affect foreign relations"). *See, e.g.,* Alexander v. Sandoval, 532 U.S. 275, 286 (2001) ("Like substantive federal law itself, private rights of action to enforce federal law must be created in Congress."). *See also* Bellinger, supra note 3.


6. For a discussion of deference to the executive in ATS cases based on specific and foreseeable harm to U.S. foreign policy interests, see Margarita S. Clarens, *Deference,*
coherent framework for ATS claims is needed, and it must come from the legislature.

Congress is best suited to clarify the scope of actionable claims under the ATS through its constitutional authority to "define and punish . . . Offences against the Law of Nations." This article outlines the legal underpinnings of ATS actions and the need for reform. Part II discusses the history of ATS litigation and the difficulties inherent in limiting causes of action rooted in CIL. The four primary subjects of ATS litigation, from *Filartiga* to the present, are discussed in detail in Part III. Whether reform to the ATS is necessary is discussed in Part IV, which outlines several mechanisms of judicial deference and recognizes that, in spite of these safeguards, reform is in fact necessary. This article concludes by recommending that the Alien Tort Statute be amended to mirror the CIL violations specified in the Third Restatement of Foreign Relations Law, and to permit input from the executive in cases that are likely to impact American foreign relations.

II. HISTORY OF THE ATS AND THE APPLICATION OF CUSTOMARY INTERNATIONAL LAW

A. Alien Tort Statute Litigation from 1789–2004

The Alien Tort Statute first appeared as a clause in the Judiciary Act of 1789. In its most current form, the ATS provides: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." While the origins of the ATS remain unclear, the historical context implies that the Statute's "principal motivation was to provide redress for offenses committed by U.S. persons against foreign officials in the United States."
The ATS remained largely dormant for almost two centuries, until the case of Filartiga v. Pena-Irala in 1980. The plaintiffs in that case were relatives of a Paraguayan national who successfully sued a Paraguayan police official responsible for the kidnapping, torture, and death of their son. While human rights advocates rightfully celebrated this decision as a clear victory, questions remained as to whether the ATS was merely jurisdictional, or whether it provided an independent cause of action for human rights violations.

The jurisdictional issue for the Second Circuit was clear. The ATS did not create new rights for aliens, but opened up “the federal courts [to] adjudication of the rights already recognized by international law.” According to one commentator, “[t]he court in Filartiga did not hold... that either CIL itself or the ATS created the plaintiffs’ cause of action.” The strictly jurisdictional nature of the ATS is further supported by its placement in the Judiciary Act, which established the jurisdiction and structure of federal courts. Nevertheless, during the twenty-four years

inconsistencies would clearly have significant foreign policy implications for the fledgling union. Id. See also Sosa, 542 U.S. at 714-16 (citing Republica v. De Longchamps, 1 U.S. 111 (O. T. Phila. 1784)). In addition, the Sosa court quotes the writings of James Madison: “[t]he Continental Congress was hamstrung by its inability to ‘cause infractions of treaties, or of the law of nations to be punished.’” JAMES MADISON, JOURNAL OF THE CONSTITUTIONAL CONVENTION 60 (E. Scott ed., 1893). Sosa, 542 U.S. at 716.


13. Id. at 878-79.
15. Filartiga, 630 F.2d at 887.
16. Bradley et al., Customary International Law, supra note 1, at 888.
17. Id. at 887. There is little legislative history to explain the origins of the ATS and how it fits into the Judiciary Act. For a detailed analysis of the history of the ATS, see Thomas H. Lee, The Safe Conduct Theory of the Alien Tort Statute, 106 COLUM. L. REV.
following Filartiga, the debate over whether the ATS merely provided federal courts with jurisdiction or created independent causes of action would remain.

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

The dilemma between jurisdiction and substance was due in part to the Filartiga Court, which left the door open for ATS claims based on violations of the “law of nations.” The scope of the law of nations can be interpreted rather broadly, as discussed in greater detail below. In fact, Filartiga refuted the argument

830 (2006) (arguing that only “safe conducts” violations were actionable under the ATS in 1789).
18. Bellinger, supra note 3, at 5-6.
21. Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995); In re Estate of Marcos (In re Marcos I), Human Rights Litig., 25 F.3d 1467, 1475 (9th Cir. 1994).
23. In this article, the phrase “law of nations” is used interchangeably with “Customary International Law,” that is, international norms that develop from sufficient State practice, when States act out of a sense of legal obligation to do so. The “law of nations,” however, is a term of art unique to the U.S. constitutional legal system. See U.S. CONST. art. I, § 8, cl. 10 (“The Congress shall have Power . . . To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations”).
24. Filartiga, 630 F.2d at 886.
that the law of nations may only be designated by Congress under the "Define and Punish" clause. Courts in subsequent cases were left with the daunting task of identifying which law of nations norms were embodied in the federal common law, and, therefore, actionable under the ATS. It was not until 2004, twenty-four years after the Filartiga decision, that the Supreme Court set limits to ATS claims in Sosa v. Alvarez-Machain.


In the seminal decision of Sosa v. Alvarez-Machain, the Supreme Court affirmed the jurisdictional nature of the ATS, but left several key issues unresolved. On jurisdiction, the Court provided, "In sum, we think the statute was intended as jurisdictional in the sense of addressing the power of the courts to entertain cases concerned with a certain subject." The Court added, however, that historically "federal courts could entertain claims once the jurisdictional grant was on the books, because torts in violation of the law of nations would have been recognized within the common law of the time." Therefore, according to the Court, the ATS was purely jurisdictional, but allowed the courts to entertain causes of action under federal common law.

The next challenge, as highlighted by the Court, is defining actionable claims under the ATS—the "scope" of ATS causes of action. The Sosa Court provided some guidance by stating, "[W]e think courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the

---

26. Historically, applying international law to federal causes of action has not been problematic. Numerous cases apply rules of international law that are not law codified by Congress. See, e.g., Ware v. Hylton, 3 U.S. (3 Dall.) 199, 281 (1796) ("When the United States declared their independence, they were bound to receive the law of nations, in its modern state of purity and refinement."); The Paquete Habana, 175 U.S. 677 (1900); Banco Nacional De Cuba v. Sabbatino, 376 U.S. 398 (1964); The Nereide, 9 Cranch 388, 13 U.S. 388, 423 (U.S.N.Y.) (1815) (stating U.S. courts are "bound by the law of nations, which is a part of the law of the land"); United States v. Smith, 18 U.S. 153, 158-60 (1820); THE FEDERALIST No. 3, at 22 (John Jay) (Bourne ed., 1901).
27. See generally Sosa, 542 U.S. 692.
28. Id.
29. Id. at 714.
30. Id.
features of the 18th-century paradigms we have recognized.” The eighteenth century paradigms recognized by the Court include norms against the “violation of safe conducts, infringement of the rights of ambassadors, and piracy.” The Court recognized, in addition to the three norms governing State conduct, the overlapping protective norms which are “rules binding individuals for the benefit of other individuals.” This reading of applicable international law is embraced by a human rights approach to ATS litigation, which will be discussed in greater detail below. Even based on Sosa’s guidance, however, the scope of ATS claims remains an ill-defined battleground for litigants.

The sources of law used to define actionable violations of the law of nations are similarly problematic. The drafters of the ATS did not help matters by leaving few signs of legislative intent. The Constitution puts the historical law of nations in context in the “Define and Punish” clause, which provides: “The Congress shall have Power... To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations.” In light of this provision, Congress in 1789 may have been targeting piracy, as well as other norms of the law merchant through the ATS. The three wrongs recognized in Sosa rely on similar historical sources, but the question remains, which legal pronouncements legitimately define the modern law of nations?

C. The Scope of Actionable ATS Claims

After Sosa, the door to actionable claims under the ATS was kept ajar, subject to vigilant doorkeeping by the federal courts. But just how far open is this door and which claims should be permitted to enter? The answers to these questions lay at the heart of unraveling the modern ATS puzzle. To begin, the plain language of the ATS grants jurisdiction over violations of the law

31. Id. at 725.
32. Id. at 724 (citing 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 68 (1769)).
33. Id. at 715.
34. Id. at 724 (stating that “we have found no basis to suspect Congress had any examples in mind beyond those torts corresponding to Blackstone’s three primary offenses”).
36. Engle, supra note 11, at 6 n.25-26 (citing Al Odah v. United States, 321 F.3d 1134, 1148 (D.C. Cir. 2003) (for prize jurisdiction)).
37. Sosa, 542 U.S. at 729.
of nations. Therefore, one must undertake an analysis that determines: (1) What potential actions fall within customary international law and (2) which of these norms are as "accepted by the civilized world and defined with a specificity comparable" to how safe conducts, rights of ambassadors, and piracy were in 1789.

According to generally accepted definitions, customary international law "results from a general and consistent practice of states followed by them from a sense of legal obligation." The question then becomes, how do we determine which CIL principles are as fully recognized as those that were actionable in 1789? The Supreme Court alluded to this issue in United States v. Smith. In discussing the interpretation of a statute prohibiting piracy, the Court noted, "[o]ffences, too, against the law of nations, cannot, with any accuracy, be said to be completely ascertained and defined in any public code recognized by the common consent of nations," suggesting the common law must be relied upon to define some understood, but unenumerated, offenses.

The application of CIL in U.S. courts triggers a visceral response in some. According to the "revisionists," CIL has the status of federal common law only when there is authorization to treat it as such under the Constitution, a statute, a treaty, or an executive proclamation. This reasoning follows from the post-Erie interpretation that federal common law, to the extent it still

39. Sosa, 542 U.S. at 725.
40. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987). See also Statute of the International Court of Justice art. 38(1)(b), 59 Stat. 1055, 1060 (1945) (stating that international custom is a source of law that can be applied by the international Court of Justice "as evidence of a general practice accepted as law"). The ICJ recognizes "the general principles of law recognized by civilized nations" as a source of law. Id. at art. 38(1)(c). It could be argued that certain general principles, which may not have ripened into customary law, support ATS claims. That discussion, however, is beyond the scope of this article.
41. Sosa, 542 U.S. at 725, 737-38. See also Bradley et al., Customary International Law, supra note 1, at 897 n.146 (arguing that the CIL claims available under the ATS are much more limited than CIL in the general international law sense. ATS CIL violations are a "subset of all CIL violations.").
42. Smith, 18 U.S. at 153.
43. Id. at 159.
44. See Weisburd, supra note 1; Trimble, supra note 1. See generally Bradley et al., Customary International Law, supra note 1, at 870-71.
exists, must be grounded in actual federal law.\textsuperscript{45} The Supreme Court notes that “[l]ike substantive federal law itself, private rights of action to enforce federal law must be created in Congress.”\textsuperscript{46} In fact, some cases suggest the Court “has also adopted a restrictive approach in recent years to the judicial recognition of private rights of action under federal statutes and the Constitution.”\textsuperscript{47}

The “modernists” take a different approach, arguing that CIL has the status of self-executing federal common law and is to be applied without implementing legislation.\textsuperscript{48} This argument appeals to the universal nature of the law of nations, which many suggest should be interpreted by States in a similar fashion, rather than through the bifurcated process of implementing domestic legislation. Under this paradigm, a broader interpretation of CIL is warranted. In fact, at least one commentator argues that the development of CIL has accelerated as a result of State participation in multilateral intergovernmental organizations and the proliferation of non-governmental organizations.\textsuperscript{49} Under this view, rather than limit actionable ATS claims, they should be expanded.

This interpretation, however, runs afoul of the very heart of the \textit{Sosa} decision. As stated by the Court, “We have no congressional mandate to seek out and define new and debatable violations of the law of nations, and modern indications of congressional understanding of the judicial role in the field have not affirmatively encouraged greater judicial creativity.”\textsuperscript{50} Environmental torts are an example of a failed attempt to create a


\textsuperscript{46} \textit{Alexander}, 532 U.S. at 286.


\textsuperscript{48} Bradley et al., \textit{Customary International Law}, supra note 1, at 870-71 (citing \textit{Henkin, supra note 1, at 1561}; \textit{Kadic}, 70 F.3d at 246; \textit{In re Marcos II}, 978 F.2d at 502; \textit{RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S. §§ 111 cmt. d}, 115 cmt. e; \textit{Brilmayer, supra note 1, at 295, 303-04, 332 n.109}; \textit{Koh, supra note 1, at 1846-47}.

\textsuperscript{49} \textit{Steinhardt, supra note 1, at 2265 n.108}.

\textsuperscript{50} \textit{Sosa}, 542 U.S. at 728 (rejecting national constitutions and part of the Restatement as sources of defining arbitrary detention as a CIL violation actionable under ATS).
new violation of the law of nations in the courts. The Second Circuit denied jurisdiction over an environmental claim brought under the ATS, noting “environmental torts are unlikely to be found to violate the law of nations.” Without congressional action, others will continue to claim new and creative law of nation violations under the ATS.

The different interpretations as to the scope of CIL remain contentious. Verifying which of these norms have been established with the same certainty as the eighteenth century law of nations violations is more difficult still. Nevertheless, one may certainly use federal common law as a gap-filler, particularly when the applicable CIL norm under an ATS claim cannot be found in a federal statute or treaty. As the next section discusses, defining CIL norms absent legislation becomes nearly impossible as long as the “modernist” and “revisionist” views on applicable sources of law remain irreconcilable.

**D. Sources Providing Evidence of Customary International Law**

The sources of law relied upon as evidence of CIL norms represents a continual struggle. In determining causes of action for violations of international law, it seems that a broad survey of foreign and international law sources would effectively indicate the State practice. This issue, however, remains particularly divisive in the courts and the academy.

---

52. Ajuindo v. Texaco, 303 F.3d 470, 476 (2d Cir. 2002). *See also* Bano v. Union Carbide, 273 F.3d 120, 122 (2d Cir. 2001); Beanal, 197 F.3d at 166-67; Jota v. Texaco, 157 F.3d 153, 155-57 (2d Cir. 1998).
The *Filartiga* Court relied on a wide range of sources to determine the CIL claim at issue.\(^{55}\) Seeking evidence that torture existed as a law of nations violation comparable to those recognized in 1789, the Court utilized State pronouncements,\(^{56}\) the United Nations Charter,\(^{57}\) the Universal Declaration of Human Rights,\(^{58}\) treaties not yet ratified by the United States,\(^{59}\) and foreign constitutions. Later, courts relied less on State pronouncements and consensus, and gave greater weight to actual State practice.\(^{60}\)

*Sosa* suggested a more stringent test in applying CIL than the lower courts.\(^{61}\) Defining accepted norms by the civilized world to the same degree as violations of safe conduct, infringement of the rights of ambassadors, and piracy in 1789,\(^{62}\) the Court refocused on the practice of States and gave little validity to other international sources. Specifically, the Court gave little weight to the Universal Declaration of Human Rights (UDHR)\(^{63}\) and the International Covenant on Civil and Political Rights (ICCPR),\(^{64}\) which, although ratified, never became self-executing nor enforceable in U.S. courts.\(^{65}\) The Court also rejected national constitutions (consensus prohibiting arbitrary detention is a norm, but highly general),\(^{66}\) an International Court of Justice case (different international norms and detention was more severe and longer),\(^{67}\) and federal case law

---

55. *Filartiga*, 630 F.2d at 881-84.
56. *Id.* at 884.
57. *Id.* at 881.
58. *Id.* at 882.
59. *Id.* at 883-84.
61. See, e.g., *Sosa*, 542 U.S. at 724-25. See also Bradley et al., *Customary International Law, supra* note 1, at 900 n.169 (citing *In re Marcos I*, 25 F.3d at 795 and Presbyterian *Church of Sudan*, 244 F. Supp. 2d at 305 as examples of pre-*Sosa* lower court decisions mistakenly relying on the Restatement as a source of CIL violations actionable under the ATS).
65. 138 CONG. REC. S4781-01, art. III(1); *Sosa*, 542 U.S. at 735.
66. *Sosa*, 542 U.S. at 737 n.27.
67. *Id.*
(more assertive view expressed on federal judicial discretion on CIL claims than the Supreme Court takes). One of the more profound statements issued by the Court referenced the ICCPR, which the United States has ratified. The Court noted that there existed an implication that "the presence of a norm in the ICCPR no longer provides significant evidence of a CIL cause of action in ATS cases."  

The invasive nature of applying international and foreign sources used in constitutional interpretation concerns some scholars. But should we not, contrary to these concerns, welcome a new era of "judicial globalization," as suggested by others? The truth lies somewhere between these opposing views.

In order to remain a leader in guiding the development of international legal norms, the United States would benefit from an interpretation of the law of nations that took the practice of other nations into account. For example, the principles enshrined in the UDHR—a document co-authored by Eleanor Roosevelt—have undoubtedly become part of customary international law. In fact, several Supreme Court cases cite the UDHR as a measure to judge other norms.

Similarly, the Sosa decision short-changed the ICCPR. Not only has the United States ratified the ICCPR, many consider it the embodiment of several important customary international human rights standards. Recall that providing consistent federal remedies for law of nations violations served as the founders' primary foreign relations concern and was the rationale behind the ATS in 1789. Utilizing sources recognized by the global community as reflecting customary international law norms would follow that intent.

68. Id.
69. Bradley et al., Customary International Law, supra note 1, at 899 (citing Aldana v. Del Monte Fresh Produce, N.A., Inc., 416 F.3d 1242, 1247 (11th Cir. 2005) (disapproving pre-Sosa district court decisions that had relied on the ICCPR)).
70. MARTIN S. FLAHERTY, SEPARATION OF POWERS IN A GLOBAL CONTEXT, IN JUDGES, TRANSITION, AND HUMAN RIGHTS 12 (John Morrison et al. eds., 2007) (citing Anne-Marie Slaughter, Judicial Globalization, 40 VA. J. INT'L L. 66 (2004)).
73. See supra Part II.A. and text accompanying note 10.
The "modernists" have welcomed the Supreme Court's reliance on international legal sources in recent years. Nonetheless, the "judicial globalization" honeymoon may be short-lived in light of cases such as Medellin. This debate is a direct reflection of the inability to resolve the scope of CIL norms actionable under the ATS, and the sources of law used to prove the viability of these norms in ATS cases.

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

III. CURRENT SUBJECTS OF ATS LITIGATION

The subject areas currently being litigated under the ATS fall into four primary categories. First, there are the traditional Filartiga-like cases in which the law of nations violator/torturer is found within the territorial United States. Second, there are claims against foreign governments, challenging their internal policies as they relate to their own citizens. The third, and most active field in ATS litigation, is the corporate aiding and abetting liability cases. Finally, a new area of litigation that will likely grow in coming years relates to U.S. officials being sued for actions taken in the context of the so-called War on Terror. Each of these areas raises

---


75. Medellin v. Texas, 128 S. Ct. 1346, 1357 n.3 (2008). The significance of the Medellin decision cannot be overlooked. This Court, in particular, seems unlikely to extend private rights of action for ill-defined CIL violations without implementing legislation of those norms.

76. See, e.g., the debate over CIL as applied in the international humanitarian law context in the ICRC CIL Report and the U.S. State Department Reply. See ICRC STUDY, supra note 54; Bellinger & Haynes, US Response, supra note 54.
considerable issues in its own right absent guiding legislation from Congress.

A. When Human Rights Violators Are in the United States

The *Filartiga* case was the first, and best, example of a foreign official found in the United States who could be served with an ATS claim by another foreign national. 77 This type of claim, while seemingly in line with U.S. human rights objectives, 78 raises concerns over whether the United States intended for the ATS to be used between two foreign parties, particularly when the conduct in question has little to no connection to the United States.

While certain policy considerations should be taken into account, the law clearly allows for these actions. The Court held that Congress has the authority, under the “arising under” clause, to confer jurisdiction on U.S. courts for claims brought by foreign plaintiffs against foreign defendants. 79

Proponents of these actions argue that Congress not only recognized this form of extraterritorial extension of human rights claims, but “approved and expanded the court’s ruling in *Filartiga*." 80 Supporting this argument is the enactment of the Torture Victims Protection Act (TVPA). 81 To be clear, “[t]he TVPA creates a cause of action against one who commits torture or extrajudicial killing and was intended to codify judicial decisions recognizing such a cause of action under the Alien Tort Claims Act.” 82 There is no doubt in the case of foreign officials who subject an individual to torture or extrajudicial killing, 83 that the TVPA—over the ATS—now controls the field. 84

According to the legislative history, but not the language of the TVPA, the statute also applies to “anyone with higher

---

77. See generally *Filartiga*, 630 F.2d 876
80. Engle, *supra* note 11, at 17 (citing *Kadic*, 70 F.3d at 243).
83. TVPA, § 2.
84. Enahoro v. Abubakar, 408 F.3d 877, 884 (7th Cir. 2005).
authority who authorized, tolerated or knowingly ignored those acts. Subsequent cases have applied the same standard and even extended a "command responsibility" theory of liability usually reserved for war crimes. In *Hilao v. Estate of Marcos*, the Ninth Circuit relied on a post-WWII military tribunal case referenced in the Senate report, as well as the Statute of the International Criminal Tribunal for the former Yugoslavia to develop its tort-based command responsibility theory. Although it is well established in the United States that civil actions for conduct underlying criminal offenses are allowed, juxtaposing theories of liability from the criminal side to the civil is at times problematic. In this instance, the courts come dangerously close to confounding the laws of war, as utilized in war crimes prosecutions, with civil liability for acts occurring in the absence of an armed conflict. While "the goal of international law regarding the treatment of noncombatants in wartime... is similar to the goal of international human rights law," we should not overextend the similarities between this aspiration and the goals of the ATS. In contrast to the codification and congressional intent behind the TVPA, the ATS is not as well-defined and, according to *Sosa*, must only permit claims as universally accepted as those existing under the federal common law in 1789.

The extraterritorial application of the TVPA is another area of concern shared with ATS litigation. The Senate Majority and Minority Reports to the TVPA sharply disagreed as to the scope of these claims. The majority embraced the extraterritorial component of the act, while the minority cautioned against such an expansive application of U.S. federal law. The Minority Report, for example, questioned whether the Convention Against Torture—as understood and ratified by the United States—


87. *Hilao*, 103 F.3d. at 777.

88. *Id.*

89. *Id.*


91. See BRADLEY & GOLDSMITH, FOREIGN RELATIONS, supra note 85, at 521-22; (citing S. REP. NO. 102-249 (1991)).

92. *Id.*
contemplated an extraterritorial extension of civil liability for torture claims as provided for in the TVPA. President George H.W. Bush expressed similar misgivings when he signed the TVPA into law, stating, “U.S. courts may become embroiled in difficult and sensitive disputes in other countries, and possibly ill-founded or politically motivated suits, which have nothing to do with the United States and which offer little prospect of successful recovery.”

Rather than expand available claims, the TVPA has several limitations in the scope of its application. The most obvious limit under the TVPA is that it only creates a cause of action for two specific offenses: torture and extrajudicial killing. The statute also requires an exhaustion of local remedies prior to utilizing U.S. courts, and there is a ten-year statute of limitations. Similarly, just as these limits relate more to the nature of the subject matter within the TVPA, the requirement that it be by an “individual” suggests that imputing liability requires a certain amount of State action, although it is an open question as to how much. This holds true in spite of certain protections for States under the Foreign Sovereign Immunities Act (FSIA), as discussed below.

B. Suits Against Foreign Officials

The drafters of the ATS, mindful of the founders' concerns, likely sought a unified approach to complying with international law and avoiding conflicts with other nations. The question remains whether contemporary use of the ATS is consistent with that purpose. Several issues arose as suits against foreign officials became a burgeoning area of litigation, including: the extent to which U.S. municipal law was intended to govern the conduct of

---

93. Id.
95. TVPA, § 2.
96. TVPA, § 2(b).
97. TVPA, § 2(c).
98. TVPA, § 2(a). See Engle, supra note 11, at 20 (discussing when state action is required).
99. Sosa, 542 U.S. at 750 (providing “[t]he notion that a law of nations, redefined to mean the consensus of states on any subject, can be used by a private citizen to control a sovereign’s treatment of its own citizens within its own territory is a 20th century invention of internationalist law professors and human-rights advocates.” (Scalia, J., concurring in part and concurring in the judgment)).
other States; the impact these suits have on U.S. foreign relations; and whether this form of ATS litigation interferes with the prerogatives of the executive branch.

Historically, the integrity of a sovereign was sacrosanct, and courts were reluctant to become involved in how States treat their citizens. According to a Second Circuit Court case in 1976 dealing with reparations to a Jewish survivor of Nazi Germany whose property was confiscated by the State, “[t]here is a general consensus... that [international law] deals primarily with the relationship among nations rather than among individuals.” 100 Well before this case, however, the individual was becoming a subject in international law. 101 The development of international human rights and international criminal law began in earnest after World War II—most notably the prosecution of Nazi war criminals at the Nuremburg military tribunal and the adoption of the Universal Declaration of Human Rights—and continues today. 102 In the early twenty-first century, there can be no doubt that “how a state treats individual human beings... is a matter of international concern and a proper subject for regulation by international law.” 103

The recognition of the individual as a subject of international law does not clarify the extent to which “our courts [should] sit in judgment of the conduct of foreign officials in their own countries with respect to their own citizens.” 104 Largely because foreign relations fall within the purview of the political branches, there are certain limits on filing claims against States and foreign officials in U.S. courts.

The Foreign Sovereign Immunities Act (FSIA), 105 for example, is the only way in the United States to gain jurisdiction over a foreign sovereign. 106 The general rule is that the foreign State is immune from liability for its sovereign acts unless there is a waiver of immunity, or if the State is engaged in commercial

---

100. Drefus v. Von Finck, 534 F.2d 24, 30-31 (2d Cir. 1976).
102. Id.
activity. A waiver of immunity may be implied, but this is strictly construed against the private plaintiff. Commercial acts, referred to as *acto jure gestionis* in the international context, are actionable against the State if the act occurred, or has direct effects, in the United States.

The courts must exercise caution when interpreting a claim that pierces sovereign immunity, as the consequences could have diplomatic significance. Judge Ginsburg, in *Princz v. Fed. Republic of Germany*, wisely noted:

>We think that something more nearly express [than the FSIA implied waiver provision] is wanted before we impute to the Congress an intention that the federal courts assume jurisdiction over the countless human rights cases that might well be brought by the victims of all the ruthless military juntas, presidents-for-life, and murderous dictators of the world, from Idi Amin to Mao Zedong. Such an expansive reading of § 1605 (a)(1) would likely place an enormous strain not only upon our courts but, more to the immediate point, upon our country's diplomatic relations with any number of foreign nations. In many if not most cases the outlaw regime would no longer even be in power and our Government could have normal relations with the government of the day—unless disrupted by our courts, that is.  

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

Not unlike the Sovereign State, foreign officials are afforded immunity in certain circumstances. Ministers and heads of state once enjoyed absolute immunity during their term in office. Once their term is complete, State officials enjoy qualified immunity, and in some instances, no immunity at all if their

---


108. *Id.* at 1149, 1151 (where immunity was not implicitly waived, even though the acts in question related to *jus cogens* norms).


actions relate to commercial activity or takings.\textsuperscript{113} There is no immunity for acts committed that are illegal under the law of the State.\textsuperscript{114}

Following the \textit{Filartiga} decision, some judges were concerned that the ATS was being interpreted to allow "our courts [to] sit in judgment of the conduct of foreign officials in their own countries with respect to their own citizens."\textsuperscript{115} In \textit{Sampson v. Fed. Republic of Germany}, this notion was taken to its limit when the Seventh Circuit reasoned that in spite of alleged violations of \textit{jus cogens} norms,\textsuperscript{116} there is no obligation to remedy such violations.\textsuperscript{117} Proponents of this type of ATS action claim that precluding a cause of action for human rights abuses goes against the doctrine that "every right, when withheld, must have a remedy."\textsuperscript{118} As discussed below, actions under the ATS may not be the only remedy available to victims of human rights violations.

The State Department, often partnering with the Department of Justice, advocates that the political solution to violating States must take precedence over a judicial solution.\textsuperscript{119} The former legal advisor to the Secretary of State, John Bellinger, has expressly raised concerns over the extraterritorial application of U.S. laws as seen in ATS cases, and the undermining effect this has on the executive's diplomatic policies.\textsuperscript{120} In ATS cases, the State Department often submits "statements of interest" to the Court asking for dismissal based on political considerations.\textsuperscript{121} These

\begin{thebibliography}{99}
  \bibitem{} Sugarman v. Aeromexico, 626 F.2d 270, 273-74 (3d Cir. 1980) (citing Letter of Jack B. Tate, Acting Legal Adviser, Department of State, to Acting Attorney General Philip B. Perlman (May 19, 1932), reprinted in 26 Dep't of State Bull 984, 984-85 (1952)).
  \bibitem{} See generally \textit{Filartiga}, 630 F.2d at 876.
  \bibitem{} \textit{Tel-Oren}, 726 F.2d 774 at 813 (Judge Bork, concurring).
  \bibitem{} \textit{Sampson}, 250 F.3d 1145 at 1150.
  \bibitem{} Marbury v. Madison, 5 U.S. (1 Cranch) 137, 147 (1803) (citing \textit{WILLIAM BLACKSTONE 3 COMMENTARIES} 109).
  \bibitem{} Bellinger, \textit{supra} note 3.
  \bibitem{} \textit{Id.}
\end{thebibliography}
statements draw sharp criticism from commentators and human rights advocates.\textsuperscript{122}

The courts, however, do not always rely on executive branch statements in ATS cases involving foreign sovereigns and officials. Utilizing the immunity theories, the political question doctrine, the act of state doctrine, and \textit{forum non conveniens}, the courts have some tools available to preclude suits that are not properly before them.\textsuperscript{123} While some argue that these tools of abstention or judicial deference allow for "vigilant doorkeeping," many frivolous claims are permitted to slip through, particularly in the corporate litigation context.

\textbf{C. Corporate Cases}

There is no better microcosm in which to view the relentless debate surrounding the application of the ATS than in cases involving corporate liability.\textsuperscript{124} It has been noted that "[b]oth the scholarship provided by those in the field of human rights gazing at [multi-national enterprises] and the scholarship offered by those gazing back the other way from [corporations] to human rights is startling in its positivistic approach."\textsuperscript{125}

The most controversial theory of liability for corporations under the ATS is seen in the aiding and abetting cases.\textsuperscript{126} Even though there is no indication in the language of the ATS itself of


\textsuperscript{126} See e.g., Doe I v. Unocal Corp., (\textit{Unocal Appeal}), 395 F.3d 932, 947 (9th Cir. 2002).
third party liability for violations of the law of nations, many argue that multi-national corporations must be held accountable for their alleged complicity in cases of human rights abuse. To allow such claims, however, would greatly expand the “modest number” of claims under ATS suggested by Sosa. Moreover, innovative interpretations of ATS claims should be left to Congress. Under the ATS and the standards articulated in Sosa, aiding and abetting liability for corporations does not meet the “definite content and acceptance among civilized nations.” In Sosa the court focused on the ATS standard—whether international law norms were universal enough to allow suits against different parties to include corporations.

Not only is it doubtful that the ATS extends to aiding and abetting liability, the sources evidencing such liability are problematic. For example, in the Apartheid Litigation case, the Court found the international sources to be inadequate for ATS purposes. Furthermore, relying on non-binding decisions of international criminal tribunals as evidence of aiding and abetting liability in CIL is erroneous. The international criminal tribunals do not create binding sources of law and are concerned with criminal, rather than civil matters. The gap between what Sosa declined to consider enforceable ATS claims for arbitrary arrest and detention applies doubly to aiding and abetting liability—there are far fewer sources to confirm the status of aiding and abetting as a CIL claim.

If this theory of liability holds, then a significant number of defendants in the United States will be subject to ATS jurisdiction, in part, because corporations have more assets and are better targets of litigation. Far from being a noble tool combating human

128. Sosa, 542 U.S. at 724.
129. Id. at 732.
130. Id. at 724-28.
132. Id. at 138 (citing In re S. African Apartheid Litig., 346 F. Supp. 2d 538 (S.D.N.Y. 2004), rev’d sub nom Khulumani v. Barclay Nat’l Bank Ltd., 504 F.3d 254, (2d Cir. 2007)). In contrast, see Steinhardt, supra note 1, at 2286 n.204 (citing international criminal tribunals as evidence that corporations may be held liable under an aiding and abetting theory).
rights abuse, ATS litigation in this context is likely based more on politics and greed. Furthermore, it has been U.S. policy to object to the use of aiding and abetting liability to combat transnational crime.

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

In the context of ATS litigation, the lower courts are in conflict over whether aiding and abetting liability for human rights abuses is a common law claim consistent with Sosa. Some courts held that when Congress has not explicitly provided for aiding and abetting liability for private actors, it should not be implied. In other cases, the courts relied on the fact that significant human rights violations were at stake, and based their decisions, in part, on international common law. Ultimately, the uncertainty in the ATS aiding and abetting jurisprudence must be clarified by Congress. As one commentator notes, "Whether corporations should be liable for aiding and abetting violations of customary international law is an issue that will need to be addressed in the first instance by the political branches."

136. Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc., 128 S. Ct. 761, 769 (2008) ("The § 10(b) implied private right of action [under the Securities Exchange Act of 1934, 15 U.S.C.S. § 78j(b)] does not extend to aiders and abettors. The conduct of a secondary actor must satisfy each of the elements or preconditions for liability; and we consider whether the allegations here are sufficient to do so.").
139. Bradley et al., Customary International Law, supra note 1, at 929.
Others do not see a need to reform the ATS, as it is considered a useful tool in combating gross international human rights violations. Corporations, they argue, must share liability with the violating States from which they derive significant monetary gain. There should be little doubt that “certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals.” It follows that “corporations may be liable for violations of international law.” Even conceding this point, it is one thing to hold corporations liable for offenses they actually commit and still another to hold them liable as a third party, removed from the law of nations violation itself.

Proponents of this view argue that courts must have flexibility in evidentiary tests and may find a nexus between corporate and state conduct under a “color of law” theory. Under this theory, “[a] private individual acts under color of law within the meaning of [42 U.S.C. § 1983] when he acts together with state officials or with significant aid.” But the jurisprudence underpinning this theory of third party liability is plagued with inconsistencies.

Courts have held that private parties may be found liable for State conduct when the act “in law [is] deemed to be that of the State,” when there is significant aid from the State, or when there is a “substantial degree of cooperative action” between the State and private actor. Other cases have held that sharing a “common unconstitutional goal,” or merely a close financial

141. Kadic, 70 F.3d at 239. See also In re Marcos II, 978 F.2d at 499; Carmichael v. United Techs. Corp., 835 F.2d 109, 113-14 (5th Cir. 1988).
142. Presbyterian Church of Sudan, 374 F. Supp 2d at 308. See generally Steinhardt, supra note 1, at 2286 n.204.
143. Smith, 18 U.S. at 159. See generally Steinhardt, supra note 1, at 2289-90.
144. Kadic, 70 F.3d at 245.
relationship, is enough to impute liability.\textsuperscript{150} Given the incongruent results in the “color of law” cases, there seems to be little chance that they are as sufficiently well-defined as the causes of action under the laws of nations in 1789.

Ultimately, aiding and abetting liability fails the test set out in \textit{Sosa}. Not only is this theory of liability not as well recognized as the eighteenth century paradigm, but these cases run a serious risk of interfering with U.S. foreign policy similar to the cases against foreign officials. As mentioned by John Bellinger, former Legal Advisor to the Department of State, several States—many of which are leaders in international human rights—have objected to ATS claims filed against their corporations.\textsuperscript{151}

\textbf{D. Suits Against U.S. Officials Post-9/11}

Yet another area of litigation under the ATS is emerging. The most recent cases concern U.S. government actions during the “war on terror.” Here, cases include challenges to the legality of military commissions to try detainees held at Guantanamo Bay, Cuba and others involving allegations of torture, arbitrary detention, and unlawful rendition.\textsuperscript{152} Under the Alien Tort Statute, only the claimant need be an alien, not the defendant.\textsuperscript{153} Also, the Federal Tort Claims Act partially waives sovereign immunity, but leaves an exception for claims “arising in a foreign country.”\textsuperscript{154} Therefore, U.S. government officials, and former officials, are potentially open to liability.

Nonetheless, it remains unlikely that these cases will be successful under the ATS after \textit{Sosa}. At present, it is uncertain which of these claims, if any, were as specifically defined as those in 1789. Furthermore, the practical consequences of any of these

\textsuperscript{150} Jatoi v. Hurst-Euless-Bedford Hosp. Auth., 807 F.2d 1214, 1221-22 (5th Cir. 1987), modified on denial of reh’g, 819 F.2d 545 (5th Cir. 1987), cert. denied, 484 U.S. 1010 (1988).
\textsuperscript{151} Bellinger, supra note 3, at 17 (referencing objections made by Canada, Australia, and the United Kingdom against claims filed against their corporations under the ATS).
\textsuperscript{153} 28 U.S.C. § 1350.
actions could have a severe impact on the political branches’ ability to undertake a robust foreign policy.

While the applicability of CIL in the U.S. constitutional context raises many questions, it should not be necessary for the executive to engage in a guessing game when tackling significant foreign policy issues. In the many potential claims arising under the ATS it is unclear whether the president may disregard CIL when there is no statute or treaty behind the CIL norm. The Supreme Court expressly provided that CIL should be applied “where there is no treaty, and no controlling executive or legislative act or judicial decision.” On the other hand, some argue that “[i]f CIL is not automatically domestic federal law, then it is hard to see how it is binding on the President as part of the ‘Laws’ that he must faithfully execute under Article II.”

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

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

155. For cases where CIL could not override controlling executive acts, see Barrera-Echavarria v. Rison, 44 F.3d 1441, 1451 (9th Cir. 1995); Gisbert v. U.S. Attorney Gen., 988 F.2d 1437 (5th Cir. 1993); Garcia-Mir v. Meese, 788 F.2d 1446 (11th Cir. 1986). For a case where CIL binds the president at least absent official presidential act, see In re Agent Orange Prod. Liab. Litig., 373 F. Supp. 2d 7, 109-10 (E.D.N.Y. 2005).
156. The Paquete Habana, 175 U.S. 677, 700 (1900).
157. Bradley et al., Customary International Law, supra note 1, at 931.
IV. IS THERE A NEED FOR REFORM? JUDICIAL DEFERENCE AND PRACTICAL CONSEQUENCES: THE DOOR RESTS WIDE OPEN

While the need for amending the ATS seems self-evident to some, to others the judiciary has established ample safeguards to prevent overly broad and political interpretations of the law of nations. Theories of judicial deference to the political branches are already subject to certain limits. These include the political question doctrine and the restrictions established by the Sosa decision with regard to political consequences of ATS litigation. 159

A. Judicial Deference

The political question doctrine sets some limits on the types of cases that the judiciary will hear. 160 Thus, nearly every case brought under the ATS will be challenged on the grounds of a non-justiciable political question. In a recent case, Sarei v. Rio Tinto, the Ninth Circuit rejected the defendant's claims that the case involved a non-justiciable political question. 161 In a two-to-one decision, the court denied the defendant's motion to dismiss based on the political question doctrine established in Baker v. Carr. 162 The Court did not consider the executive's statement of interest which stated that "continued adjudication of the claims... would risk a potentially serious adverse impact on the peace process [in Papua New Guinea], and hence on the conduct of our foreign relations." 163

In Matar v. Dichter, the Court dismissed a claim against a former Israeli official, who allegedly committed war crimes and crimes against humanity by carrying out Israeli policy in Gaza. 164 The Court based its dismissal on the grounds that the Israeli official was acting in his official capacity at all times in question,

---

159. Sosa, 542 U.S. 692.
161. Sarei v. Rio Tinto, PLC, 487 F.3d 1193 (9th Cir. 2007), reh'g granted, 499 F.3d 923 (9th Cir. 2007).
162. Baker v. Carr, 369 U.S. 186 (1962) (establishing the six factors for non-justiciable political questions and holding that the political question doctrine should apply when there are no judicially manageable standards for the court to apply).
163. Sarei, 487 F.3d at 1205-06. See also Sarei v. Rio Tinto, PLC, 550 F.3d 922 (9th Cir. 2008) (remanding to the District Court for the limited purpose of determining whether there is a requirement for plaintiffs to exhaust local remedies).
Who Watches the Watchmen?

and the acts were clearly political in nature and non-justiciable under the political question doctrine.\textsuperscript{165}

In spite of the judiciary's own policies of deference, it is uncertain that judge-made policies alone will be sufficient to filter out frivolous ATS claims. Unfortunately, there is no bright line distinction between non-justiciable political questions and otherwise actionable claims. As stated in the \textit{Achille Lauro} case, the political question doctrine concerns political questions, not political cases.\textsuperscript{166}

Similarly, the act of state doctrine was meant to keep the courts out of foreign affairs controversies. The doctrine arises where the relief sought or the defense asserted requires a court in the United States to declare invalid the official acts of a foreign sovereign performed in its own territory.\textsuperscript{167} In determining the applicability of the doctrine, courts have considered whether the foreign sovereign acted in the public interest.\textsuperscript{168}

The Restatement makes it clear that U.S. courts will not review the official acts of foreign governments taken within their own territory so long as any injury arose from a law or official policy.\textsuperscript{169} This doctrine is of particular relevance here when one of the primary applications of ATS cases concern foreign governments.\textsuperscript{170} As common sense dictates, however, violating regimes will not designate their acts of human rights abuses as official State policy. Therefore, the act of state doctrine does filter certain ATS cases, but in a limited capacity.

\textit{Forum non conveniens} is another method of keeping ATS cases with few connections to the United States out of the federal courts.\textsuperscript{171} Yet for the defendant in ATS human rights cases, it can be extremely difficult to prove that an adequate alternative forum exists.\textsuperscript{172} This and other discretionary doctrines like it are insufficient to add clarity—both to plaintiffs and defendants alike—to actionable ATS claims.

In spite of the doctrines of judicial deference already in place—perhaps also as a result of them—the \textit{Sosa} Court was wary

\begin{itemize}
\item \textsuperscript{165} \textit{Id.}
\item \textsuperscript{166} Klinghoffer v. S.N.C. Achille Lauro, 937 F.2d 44, 49 (2d Cir. 1991).
\item \textsuperscript{167} Banco Nacional De Cuba v. Sabbatino, 376 U.S. 398, 416 (1964).
\item \textsuperscript{168} Doe v. Unocal Corp. (\textit{Unocal I}), 963 F. Supp. 880, 893 (C.D. Cal. 1997).
\item \textsuperscript{169} \textit{RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S.} \textsection 443.
\item \textsuperscript{170} See, e.g., \textit{Kadic}, 70 F.3d at 232; \textit{Unocal Appeal}, 395 F.3d at 932.
\item \textsuperscript{171} See, e.g., Ajuindo v. Texaco, 303 F.3d 470 (2d Cir. 2002).
\item \textsuperscript{172} See Steinhardt, \textit{supra} note 1, at 2278.
\end{itemize}
of an adventurous judiciary carving out new causes of action under the ATS where none previously existed. It is clear that the Supreme Court in the majority of cases favors the creation of private rights of action by the legislature, not the courts. Even now, the courts appear to have no congressional mandate to define new, debatable violations of the law of nations.

B. Practical Consequences

Paramount among the concerns in ATS cases are the potential implications for U.S. foreign relations. In fact, the Sosa Court reiterates the authority of the executive and legislature to manage foreign affairs. As stated in Sosa, "[T]he determination whether a norm is sufficiently definite to support a cause of action should (and, indeed, inevitably must) involve an element of judgment about the practical consequences of making that cause available to litigants in the federal courts." The courts look to the political branches in most cases dealing with foreign affairs. For example, in head of state immunity cases, some courts go by the congressional authority under FSIA, while others ask for executive branch authorization. In all cases, courts look, at least to some degree, for political branch authorization. The lack of congressional guidance in ATS cases demands an even greater deference to executive branch interests.

173. Sosa, 542 U.S. at 731-32.
174. Id. at 726-27 (citing Correctional Services Corp. v. Malesko, 534 U.S. 61, 68 (2001); Alexander v. Sandoval, 532 U.S. 275, 286-87 (2001)).
175. Sosa, 542 U.S. at 726.
176. Id. at 732-33. See also Kiobel v. Royal Dutch Petrol. Co., 456 F. Supp. 2d 457, 462 n.4 (S.D.N.Y. 2006) (suggesting that Sosa "may have intended to convey that in addition to considering whether a norm has sufficient definiteness and acceptance, a court should consider practical consequences of allowing it to be the subject of suit in federal court") (emphasis in original).
Those arguing against limits on the application of the ATS readily push for an expansive reading of CIL. 179 Is CIL not our law which the executive must enforce? In support of this proposition, many cite the Paquete Habana case out of context. 180 While it is true that international law is our law, the Court goes on to explain that international law is U.S. law absent a controlling executive or legislative act. 181 Similarly, under the Charming Betsy canon of statutory interpretation, many argue that the ATS should be read not to conflict with international law principles. 182 Again, the correct application is to read ambiguous statutes in a light that does not contradict international law to the extent possible. 183 Congress needs to enact an unambiguous ATS amendment in order to remove any doubt as to the scope of actionable claims.

Similar to these historic cases, the Sosa court stated that “[f]or two centuries we have affirmed that the domestic law of the United States recognizes the law of nations.” 184 Based on the Sosa opinion, U.S. courts can recognize CIL, but that does not incorporate CIL into domestic law, let alone make it federal law. This simply means that U.S. law “can take account of CIL” independent of the modern position. 185

At least one commentator, however, argues that even prior to the Paquete Habana, the Court foreclosed the notion that “customary international law depended for its domestic enforceability on statutory authorization.” 186 It is further argued that CIL is self-executing, and no affirmative legislation is needed to apply it in U.S. courts. 187

179. See Steinhardt, supra note 1, at 2259, n.76 (stating that “customary international law remains an area in which no affirmative legislative act is required to ‘authorize’ its application in U.S. courts”).
180. Id.
181. See The Paquete Habana, 175 U.S. at 700.
182. Steinhardt, supra note 1, at n.181.
183. See generally Murray v. Schooner Charming Betsy (Charming Betsy), 6 U.S. (2 Cranch) 64 (1804).
185. Bradley et al., Customary International Law, supra note 1, at 907.
186. Steinhardt, supra note 1, at 2259 (citing Hylton, 3 U.S. (3 Dall.) at 209 (1796); De Longchamps, 1 U.S. (1 Dall.) 111 (1784)).
187. Henkin, supra note 1, at 1561.
Putting this view in perspective, to date Congress has incorporated limited CIL provisions. Moreover, political branches have placed strict limits on international human rights norms and their ratification—arguing that they do not want these norms to be the basis of private litigation.

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

For example, the Sosa Court, in discussing the Apartheid Litigation cases, warned that “[i]n such cases, there is a strong argument that federal courts should give serious weight to the executive branch’s view of the case’s impact on foreign policy.” In cases that involve U.S. treaty obligations or treaties between two foreign sovereigns, the courts have historically deferred to the executive.

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

---

188. Sosa, 542 U.S. at 726.
189. Id. See Bradley et al., Customary International Law, supra note 1, at 902.
190. See generally Steinhardt, supra note 1, at 2251, n.35-38.
192. Sosa, 542 U.S. at 734 n.21.
the legislative and executive branches in managing foreign affairs.”

C. The Time Is Right For Reform

The executive branch is vocal in ATS cases. As mentioned above, the U.S. Department of State, frequently in conjunction with the U.S. Department of Justice, files letters, briefs and statements of interest in ATS cases that might impact U.S. foreign relations. In contrast, Congress has remained silent for nearly 220 years. The time is right to provide legislative guidance to the courts who serve as the “vigilant doorkeepers” to human rights claims under the ATS.

The Supreme Court in *Sosa* stated, “[W]e would welcome any congressional guidance in exercising jurisdiction with such obvious potential to affect foreign relations . . . .” Following *Sosa*, some lower courts still craved guidance. As noted in the Apartheid Litigation case,

While it would have been unquestionably preferable for the lower federal courts if *Sosa* had created a bright-line rule that limited the ATCA to those violations of international law clearly recognized at the time of its enactment, the Supreme Court left the door at least slightly ajar for the federal courts to apply that statute to a narrow and limited class of international law violations beyond those well-recognized at that time.

195. *Id.* at 8. As one example, Mr. Bellinger cites a series of ATS suits filed by Chinese Falun Gong members against Chinese officials who were traveling through the United States on official business. “The diplomatic friction caused by these cases runs directly contrary to one of the reasons for enacting the ATS—to prevent harassment of foreign officials in the United States and prevent international incidents.” *Id.* at 18-19.

196. Many commentators criticize this practice. *See, e.g.*, Baxter, *supra* note 122, at 808. *See also* Stephens, *supra* note 1, at 169-70 (arguing that executive opposition to ATS claims is not entitled to judicial deference).


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

In this regard, the extraterritorial application of U.S. law in ATS cases remains troubling for both the executive and foreign governments. On one hand, the executive is put in a difficult spot by pressure from foreign governments to act on their behalf in these cases. Silence from the executive could be interpreted by the Court to mean there are no foreign policy concerns. Conversely, foreign States could interpret this to mean that the United States cares less about their relations. Moreover, statements of interest could be read as political support for the activities of States over the legitimate interests of plaintiff victims. There should be a provision in an updated ATS providing for deference to the political branches in certain cases. This is consistent with recent foreign relations cases.

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

The executive, for one, should not be put in the unenviable position of possibly violating CIL. Currently, the courts are split on whether the executive is bound by CIL as controlling federal law. The plaintiff must establish the norm at issue as defined

200. See generally Bellinger, supra note 3, at 10-12.
201. Id. (mentioning that, in spite of the Sosa Court singling this case out by name, the Second Circuit reversed the District Court dismissal of Isuzu Motors v. Ntsebeza, also known as the Apartheid Litigation. The Supreme Court denied certiorari. 128 S. Ct. 2424 (2008) (mem.).)
204. BRADLEY & GOLDSMITH, FOREIGN RELATIONS, supra note 85, at 499 (citing the following cases for the proposition that the executive may violate CIL, Barrera-Echavarria v. Rison, 44 F.3d 1441, 1451 (9th Cir. 1995); Gisbert v. United States Attorney General, 988 F.2d 1437, 1448 (5th Cir. 1993); Garcia-Mir v. Meese, 788 F.2d 1446, 1454-55 (11th Cir. 1986) (relying heavily on Paquete Habana that CIL is to be used in U.S. courts “only where there is no treaty and no controlling executive or legislative act or judicial
with the specificity of Sosa’s eighteenth century paradigms. Even human rights proponents agree that such standard of proof is vague and ill-supported by case law. In light of the reluctance to create new theories of liability without political branch interpretation, legislative guidance, informed by the executive, would take the guess-work of ATS cases out of the hands of litigants and the judiciary.

Finally, by passing legislation there would no longer be the debate about applicable CIL norms and the proper sources to use as evidence of these norms. As previously mentioned, Congress has the constitutional authority to define and punish offenses against the law of nations. By revising the ATS for the purposes of clarification, there will be no need to denigrate valued international law sources such as the UDHR or the ICCPR, or engage in philosophical arguments about the meaning of Paquete Habana. An updated ATS will be the controlling legislation which, rather than supplant CIL norms, will compliment internationally recognized human rights standards. This will “ensure the ATS does not complicate international efforts by the political branches to promote human rights abroad, a cause to which the United States is deeply committed.”

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

---

205. Steinhardt, supra note 1, at 2261.
207. See generally Bellinger, supra note 3, at 27.
208. U.S. CONST. art. I, § 8, cl. 10 ("The Congress shall have Power ... To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations.").
209. Bellinger, supra note 3, at 3.
210. See supra, Part IV.A.
211. Id.
212. Id.
when the CIL norm at issue could not be proven with the requisite specificity.  

Furthermore, it is argued, the ATS is an effective tool for combating human rights violations. These suits advance the cause in several ways, to include: (1) promoting accountability and providing a voice to victims of abuse (particularly when there is no other forum), (2) raising public awareness of human rights abuse, which could potentially encourage political and preventative measures, and (3) advancing U.S. development of CIL norms.

In spite of the best intentions of ATS advocates, many of these arguments are policy driven, and based less in the law. Moreover, not every suit filed under the ATS is motivated by justice, but by money and politics. No matter how capable the federal courts are, the fact remains that they are calling out for congressional guidance in these cases.

As stated above, Congress has not spoken on the issue and has set no limitation on the type of suits permissible under the ATS. Moreover, there is currently no formal role for the executive in ATS litigation. This is in sharp contrast to the role of the executive in terrorism cases, as they fall under the FSIA. Under the Anti-Terrorism and Effective Death Penalty Act (amending the FSIA), States designated as sponsors of terrorism by the executive may be sued. This is an exception to the FSIA, which


214. See, e.g., Steinhardt, supra note 1, at 2247.


216. See Steinhardt, supra note 1, at 2278 ("The balance of public and private factors is similarly left to the sound discretion of the court and determined ad hoc.") (emphasis added).

217. See, e.g., Guinto, 654 F. Supp. at 281 ("... we are constrained to a large extent by the customs and usages of international law"). See also Sosa, 542 U.S. at 744-46 (Scalia, J., concurring) (explaining that the Court cannot create new federal common law causes of action); Bellinger, supra note 3, at 7 ("That task would necessarily fall to the Congress.").

218. See Bellinger, supra note 3, at 24 ("Without a formal role in the statute, the Executive's participation through statements of interest and amicus briefs is one of the few practical ways that the United States can seek to confine the scope of the ATS...").

Who Watches the Watchmen?

generally bars suits against foreign States. The key here is participation in foreign affairs issues by both branches. Congress established the parameters of the cause of action, and took into account the concerns of the executive, by allowing it to designate certain States as sponsors of terror, thereby stripping them of FSIA immunity.

In contrast, under the ATS there has only been judicial decision making, which has been referred to as a “democratic cost.” Unlike statutory or treaty law, ATS law is now largely judicially based. The time for legislative clarity is now.

V. CONCLUSION AND RECOMMENDATIONS FOR REFORM

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

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

221. Bellinger, supra note 3, at 21 (discussing the 1996 exception to FSIA). But see Ketchel, supra note 197, at 214-15 (comparing the invocation of the political question doctrine in FSIA cases v. ATS cases, arguing for a legislative solution to prevent executive “abuse” of the political question doctrine).
223. Ketchel, supra note 197, at 214.
224. Steinhardt, supra note 1, at 2290.
225. Papa v. United States, 281 F.3d 1004, 1012-13 (9th Cir. 2002).
similar cause of action under the foreign State's laws, then the
district courts may exercise jurisdiction.\textsuperscript{227}

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

The Restatement (Third) of Foreign Relations Law provides
that "[a] state has jurisdiction to define and prescribe punishment
for certain offenses recognized by the community of nations as of
universal concern."\textsuperscript{228} In drafting the revised statute, it would be
wise to stay true to the customary international law norms
specified in the Restatement itself. This is not only an indication of
issues of universal concern, but is also well regarded in the
domestic and international legal academy.

The Restatement lists the following violations of the law of
nations: genocide, slavery or slave trade, murder or causing the
disappearance of individuals, torture or other cruel, inhumane, or
degrading treatment or punishment, prolonged arbitrary
detention, systematic racial discrimination or a consistent pattern
of gross violations of internationally recognized human rights.\textsuperscript{229}

While not all of the violations listed above are as well defined
as others,\textsuperscript{230} it is within the authority of Congress to define the law
of nations violations that are enforceable through a private right of
action.\textsuperscript{231} There is a colorable argument to be made, however, that
each of these violations falls within CIL. The norms may not be as
well defined as safe passages, ambassadorial protections, and
piracy, but they need not be. A significant aspect behind the
amended statute is to do away with the eighteenth century
paradigm puzzle. With a law on the books, the debate over scope
and sources will end.

\textsuperscript{227}Id.
\textsuperscript{228}Id. at § 702.
\textsuperscript{229}Id. at § 404.
\textsuperscript{230}See generally Dhooge, supra note 131, at 141 (arguing that only torture,
extrajudicial killing, genocide, slavery and slave trading are sufficiently well defined to
satisfy the standards of the ATS). To maintain clarity in the proposed amended statute, it
might be helpful to omit the language "consistent pattern of gross violations of
internationally recognized human rights." On the other hand, it could be argued that this
phrase serves as a catch-all for future human rights violations that develop into customary
international law norms.
\textsuperscript{231}U.S. CONST. art. 1, § 8, cl. 10 ("The Congress shall have power . . . To define . . .
Offences against the Law of Nations.").
Finally, by adding a simple provision to the statute allowing for case by case deference to the executive when cognizable foreign policy interests are at stake, the judiciary will be able to determine just how much weight to give statements of interest. This is consistent with cases such as *Altmann*, *Garamendi*, and, of course, *Sosa*.

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

232. For a discussion of deference to the executive in ATS cases based on specific and foreseeable harm to U.S. foreign policy interests, see Claren's, supra note 6.