ENFORCING INTERNATIONAL CRIMINAL LAW VIOLATION WITH CIVIL REMEDIES: THE U.S. ALIEN TORT CLAIMS ACT

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INTRODUCTION

There are mechanisms and strategies for effective enforcement of international criminal law by civil society. It is no longer correct to conclude that enforcement is the province of nation-states, with civil society as merely the third-party, incidental beneficiary of whatever measures states choose to take, or the victim of their inaction. Individuals, community groups, NGOs, and international organizations, among others, have a pivotal role in monitoring and enforcement of the established and emerging norms, which is not dependent on state support or initiation. Recognition of the vitality and significance of this function of civil society is not only crucial but essential when it is a state or group of states that are the perpetrators of the violations.

This chapter sets forth one of the most widely available and useful of these strategies and mechanisms in the United States, but due regard should also be given to national or localized fora and remedies that may exist in other domestic legal systems. Also generalities about which methods may be most effective are generalities, and the effectiveness of any particular strategy will be largely fact-dependent upon the problem to be addressed. Finally, it must be stressed once again that it is important to proceed on all available fronts, with an integrated strategy that makes full use of international and domestic opportunities. Equally important, one should consult appropriate individual experts when undertaking these strategies.

The Alien Tort Claims Act or Alien Tort Statute ("ATCA" or "ATS") provides U.S. district courts with "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."1 This brief statute, devoid of legislative history, has sparked expansive academic commentary and controversy. In 1991, the Torture Victim Protection Act (TVPA) was passed as an appendix to the ATCA to authorize a civil remedy for any individual, alien or otherwise, for the crimes of torture and extrajudicial killing.2 The ATCA allows only aliens to take advantage of its provisions, but the TVPA has no such restriction on eligible plaintiffs.

As seen in *Beanal* and *Flores*, discussed below, some circuit courts of appeals had been imposing more stringent requirements for recognizing international law violations in ATCA cases even before the U.S. Supreme Court's landmark decision in *Sosa v. Alvarez-Machain.*

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[1] 28 U.S.C. § 1350. An earlier version of this paper will be published as a chapter in volume III of the forthcoming third edition of **Cherif Bassiouni, International Criminal Law**(Brill 2008).

[2] Liability under the TVPA provides: "An individual who, under actual or apparent authority, or color of law, of any foreign nation (1) subjects an individual to torture shall, in a civil action be liable for damages to that individual; or (2) subjects an individual to extrajudicial killing, shall in a civil action be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death." 28 U.S.C. § 1350.

Following *Sosa*, continued, aggressive litigation of these claims has never been important for developing and preserving this avenue for civil enforcement of international criminal law.

The continued dedication and commitment of civil society to societal improvement is at a critical juncture at both the international and domestic levels. At the international level, NGOs have achieved a level of recognition that allows them to move from "behind the scenes" lobbying to formally recognized functions in a number of international fora. International and regional organizations, such as the European Union, have demonstrated a willingness to pursue human rights priorities with recalcitrant states, and the various regional human rights treaties in Africa, the Americas and Europe have made attempts to codify regionally human rights. At the same time, however, a revitalization of national security as a state concern has become for other states a convenient excuse for relaxation or outright rejection of protections, and diversion of national monies to military security rather than societal security

The detrimental impact on human rights protection of the current destabilization of international relations and its "trickle-down impact" on domestic protection is explicitly illustrated in the briefs of the United States Department of Justice in the *Unocal* case before the Ninth Circuit Court of Appeals *en banc*, and even more recently in the United States' supporting petition for certiorari to the United States Supreme Court in *Alvarez-Machain v. Sosa and United States of America*.3 In both briefs, the United States asserts that the Alien Tort Claims Act does not create a private cause of action in federal court, particularly with respect to unratified or non-self-executing treaties and General Assembly resolutions, essentially adopting the separate, concurring opinion of Judge Robert Bork in *Tel-Oren v. Libyan Arab Republic*. The United States necessarily acknowledges that its advocated limitation on the ATCA would render it "superfluous" (in other words, meaningless) given the statutory provision for federal question jurisdiction in 28 U.S.C. section 1331.4 In the *Alvarez-Machain* brief, the United States actively sought review by the Supreme Court to adopt Judge Bork's view of the ATCA, despite agreement in all Circuit Court opinions addressing the issue that the ATCA creates a private cause of action, because "... the importance of the questions concerning the ATS , and the fact that the case law discussed above substantially fleshes out the competing positions on the scope of the ATS that have been adopted by the lower courts, counsel against waiting for a more concrete circuit conflict to materialize...."5 In *Unocal*, the government's brief on appeal to the Ninth Circuit makes the following argument, later repeated with slightly different wording in the *Alvarez-Machain* brief:

> The types of claims that are being asserted today under the ATS are fraught with policy implications. They often involve our courts in deciding suits between foreigners regarding events that occurred with the borders of other nations, and in

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[3] Alvarez-Machain v. United States and Sosa, 331 F.3d 604 (9th Cir. 2003). The brief for the United States in support of the petition for certiorari is available at http://www.usdoj.gov/asg/hriefs/2003/Oresponses/2003-0339.resp.html [hereinafter *Alvarez-Machain* Government Brief].

[4] Brief for the United States of America as Amicus Curiae in *Doe v. Unocal* summarized in *Department of Justice Position in* Unocal *Case*, 97 A.J.I.L. 703-706 [hereinafter *Unocal* Government Brief].

[5] *Alvarez-Machain* Government Brief, *supra* note 1, at 6. The influential concurring opinion of Judge Bork may be found in Tel-Oren v. Libyan Arab Republic, 726 F.2d 777(1984)(Bork, J., concurring).

> the exercise of foreign governmental authority. The ATS has been wrongly interpreted to permit suits requiring the courts to pass factual, moral, and legal judgment on these foreign acts. And, under this Court's approach, ATS actions are not limited to rogues and outlaws. As mentioned above, such claims can easily be asserted against this Nation's friends, including our allies in our fight against terrorism. A plaintiff merely needs to accuse a defendant of, for example, arbitrary detention to support such a claim. Indeed, that approach has already permitted an alien to sue foreign nationals who assisted the United States in its conduct of international law enforcement efforts. *See Alvarez-Machain*, 266 F.3d at 1051 [footnote omitted]. As noted above, this Court's approach to the ATS therefore bears serious implications for our current war against terrorism, and permits ATS claims to be asserted against our allies in that war. Notably, such claims have already been brought against the United States itself in connection with its efforts to combat terrorism. [citing *Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003).6

Thus the war against terrorism has become a covert war against judicial review of even the most fundamental human rights and civil liberties claims, as the government sought to eviscerate the ATCA in *Unocal*, even for such widely recognized human rights violations as slavery and torture.

The Alien Tort Claims Act of 1789 ("ATCA") provides U.S. district courts with "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."7 While the ATCA was rarely invoked for a long stretch of our history, there have been a number of definitive cases in the past 30 years. In *Hilao v. Estate of Marcos*, for example, families whose members had been subjected to torture, summary executions, and disappearances brought an action against the former President of the Philippines for damages. The U.S. Appeals Court for the Ninth Circuit held, in part, that a "suit as an alien for the tort of wrongful death, committed by military intelligence officials through torture

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[6] *Unocal* Government Brief, *supra* note 2, at 21-22. The D.C. Circuit Court of Appeals dismissed the ATCA claims of the Guantanamo Bay detainees in *Al Odah* because they were detained outside the sovereign territory of the U.S., precluding habeas corpus jurisdiction. It did not reach any issue as to the scope of the ATCA. 321 F.3d 1134 (D.C. Cir. 2003). The Court of Appeals' decision was reversed in *Rasul v. Bush*, 542 U.S. 466 (2004) (Stevens, J.) (holding that habeas corpus jurisdiction extends to prisoners held in Guantanamo Bay and that the court could hear the claims under the ATCA).

[7] 28 U.S.C. § 11350. In the landmark case of *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), two Paraguayan citizens brought a wrongful death suit in federal district court against the Inspector General of Police in Asuncion, Paraguay, who lived in the United States. Filartiga's son had been tortured to death allegedly in retaliation for Filartiga's criticism of the Paraguayan government. On appeal, the Second Circuit reversed the district court's finding of lack of subject matter jurisdiction and held that deliberate torture perpetrated under color of official authority violates customary international law, the "law of nations" in the wording of the ATCA. The court recognized that torture perpetrated by public officers is renounced by virtually all nations, and clearly violates the law of nations within the meaning of the ATCA.

prohibited by the law of nations, is within the jurisdictional grant of [the ATCA §] 1350."8 Relying on the landmark case of *Filartiga v. Pena-Irala*, the court found the ATCA "creates a universal cause of action for violations of specific, universal and obligatory international human rights which 'confer []fundamental rights upon all people vis-à-vis their own governments.'"9 Plaintiffs must demonstrate the tortious act involved either violation of a universally recognized norm of international law or tortious conduct in violation of a treaty of the United States.10

In *Kadic v. Karadzic*,11 the U.S. Court of Appeals for the Second Circuit found that individual, non-state actors may be held liable for acts widely recognized as being in violation of international law. In this case, groups of Bosnian refugees sought damages against the self-proclaimed leader of the Bosnian-Serb Republic (then unrecognized by the United States) for acts of genocide, rape, torture, and summary execution, among other violations. The refugees sued under the ATCA and the Torture Victim Prevention Act (the "TVPA"). The district court and the Second Circuit concluded, however, that since the Bosnian-Serb Republic was not a recognized state and therefore Karadzic was not a state actor, the TVPA did not confer subject matter jurisdiction for torture because of its explicit reference to "actual or apparent authority, or color of law." The argument can still be made, however, that "*apparent*" authority, and "*color* of law" within the definition of torture encompass non-state actors with some form of official authority or control short of formal state authority The Second Circuit did acknowledge that the trial court might on remand find that Karadzic was a *de facto* state actor despite the failure of the international community to recognize the Bosnian-Serb Republic. The appeals court was left to determine whether non-state actors could commit other torts "in violation of the law of nations," and found that there are certain acts for which non-state actors may be held liable under modern international law, namely genocide and war crimes.12

After the holding in *Karadzic* applying the ATCA to non-state actors, numerous alien victims filed human rights claims against non-state actors, particularly multinational corporations, and have referred to the ATCA as the basis for the court's jurisdiction.13 Initially, the courts seemed inclined in suits against private individuals to hold that the ATCA can apply to non-state actors.14

In one of the most successful such lawsuits, *Doe v. Unocal Corporation*,15 several Burmese villagers sued under the ATCA, alleging that the corporation had aided and abetted the

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[8] Hilao v. Estate of Marcos, 25 F.3d 1467, 1473 (quoting Estate I, 978 F.2d at 499) (emphasis added).

[9] *Id.* at 1475 (quoting Filartiga v. Pena-Irala, 630 F.2d 876, 885-87).

[10] *See* Virginia A. Melvin, *Case Comment*: Tel-Oren v. Libyan Arab Republic*: Redefining the Alien Tort Claims Act*, 70 MINN. L. REV. 211 (October 1985).

[11] 70 F.3d 232 (2d Cir. 1995).

[12] *See generally* Judith Hippler Bello & Theodore R. Posner, *Alien Tort Claims Act - Genocide - War Crimes - Violations Of International Law By Nonstate Actors*, 90 AM. J. INTL. L. 658 (1996).

[13] *See* Doe v. Unocal, 248 F.3d 915 (9th Cir, 2001); *see also* Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88 (2d Cir. 2000); Bowoto v. Chevron No. C99-2506 (N.D. Cal. filed 27 May 1999).

[14] *See In re* Estate of Ferdinand E. Marcos Human Rights Litig., 978 F.2d 493, 499 (9th Cir. 1992); *see also* Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984).

[15] 395 F.3d 932 (9th Cir. 2002).

military government of Myanmar in using the plaintiffs as forced laborers, and that members of the military had killed, tortured, and raped villagers. These human rights violations were designed to discourage opposition to a pipeline project in the Tenasserim region. Myanmar had granted Total SA., a French oil company, a license to explore coastal gas deposits. The project involved building the Yadana Gas Pipeline Project from the coast through the Tenasserim region to Thailand. Unocal acquired 28 percent of the project from Total.

The court cited the Second Circuit's decision in *Kadic v. Karadzic*[16] for the proposition that ATCA liability may attach to non-state actors. The ATCA, according to the court, not only confers jurisdiction, but also creates a cause of action against non-state actors in some circumstances. As to Unocal's liability for knowingly aiding the violations, the court adopted the reasoning of the International Criminal Tribunal for the former Yugoslavia in *The Prosecutor v. Furundzija*,[17] that the actus reus of aiding and abetting in international criminal law requires practical assistance, encouragement, or moral support that substantially affects the criminal behavior. The court concluded that there were genuine issues of fact as to whether Unocal as a non-state actor satisfied the actus reus and mens rea required under the ATCA for aiding and abetting the state's alleged commission of forced labor, murder, and rape. The court found insufficient evidence, however, to support the torture claims against dismissal. The Ninth Circuit Court of Appeals granted a rehearing *en banc*, vacating the panel decision.[18]

Following the Ninth Circuit Court of Appeals decision to vacate and rehear *en banc Doe v. Unocal Corporation* in February, 2003, Unocal encountered major setbacks in what it hoped would be a dismissal of the case against them. The first major setback was the U.S. Supreme Court decision in *Sosa v. Alvarez-Machain* to uphold the Alien Tort Claims Act.[19] The second major setback came in September 2004, when Unocal's appeal for dismissal was rejected, thus urging the case into the beginning stages of a jury trial.[20] Rather than stand trial, Unocal decided to settle out of court in December 2004.[21] The actual terms of the settlement remained undisclosed, but in a joint statement both parties said that the settlement would compensate the villagers and provide money to develop community programs "to improve living conditions, health care, and education, and protect their rights in the pipeline region."[22]

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[16] 70 F.3d 232, 240 (2d Cir. 1995).

[17] International Tribunal for Yugoslavia, Case No. IT-95-17/1-T (10 December 1998), *available at* http://www.un.org/icty/furundzija/trialcz/judgement/fur_tj 981210e.pdf.

[18] 395 F.3d 978 (9th Cir. 2003).

[19] ASIA TIMES, *Foreign Crimes Come Home to the U.S.*, (16 December 2004), *available at* http://www.atimes.com/atimes/Southeast_Asia/FL16Ae01.html. See also discussion *infra* and *Rasul v. Bush*, 124 S. Ct. 2686 (2004) (holding federal district courts able to exercise jurisdiction over claims filed by aliens under the Alien Tort Statute).

[20] ASIA TIMES, *Foreign Crimes Come Home to the U.S.*, (16 December 2004), available at <http://www.atimes.com/atimes/Southeast_AsiafFL16Ae01.html>.

[21] Robert Benson, Professor of Law at Loyola Law School who specializes in international human rights law, speculated that Unocal "wanted to avoid a trial where humble villagers get on the stand and talks about rape and murder." Mark Lifsher, *Unocal Settles Human Rights Lawsuit over Alleged Abuses at Myanmar Pipeline*, L.A. TIMES, Mar. 22, 2005, at C1.

[22] *Report of Earthjustice: Human Rights and the Environment*, U.N. Commission on Human Rights, 61st Sess. (2005) at 54, *available at* http://www.earthjustice.org/news/display.html?ID=983.

Although neither side would comment on the size of the settlement, Unocal filed suit against its insurance companies for personal injuries coverage in the settlement of the case. The insurance companies, who insure Unocal for up to $60 million, denied the claim, but Unocal sued both its primary and secondary insurers, leading analysts to speculate that the settlement was quite large.23 Attorneys' fees alone are estimated at $15 million.24

Business groups and the Bush administration have heavily criticized the Alien Tort Claims Act. Attorney General John Ashcroft filed a brief to the Ninth Circuit Court of Appeals in the Unocal case broadly stating that United States courts should not allow alien claims under ATCA.25 The Bush administration further indicated that allowing alien claims under the ATCA would complicate foreign policy administration.26

Human rights organizations hope that the settlement in *Unocal* will have an influential impact on the way other big businesses conduct their affairs abroad. With several cases pending in the courts against major US. companies, the impact of *Unocal* may be seen in the near future.27 One difference in the Unocal case, however, was the amount of documentation indicating that the Unocal Corporation knew about the human rights abuses that occurred during the building of the pipeline.28

The announcement of the settlement came just two weeks before Unocal's announcement of a merger with Chevron Texaco, a much larger company facing its own problems in court. There was some speculation that the settlement was part of the merger agreement.29 The courts officially dismissed the case when both parties filed a joint motion to dismiss.30

Unocal follows upon the procedural success of another group of alien litigants challenging the environmental/human rights practices of corporate entities. In Wiwa v. Royal Dutch Shell Petroleum Co.,31 four Nigerians, including three United States residents, sued Royal Dutch Petroleum of the Netherlands and Shell Transport and Trading Company of the United Kingdom.32 Allegedly Shell Nigeria recruited the Nigerian police and military to attack villages

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[23] Daphne Eviatar, *A Big Win for Human Rights*, THE NATION (9 May 2005), *available at* hrtp://www.thenation.com/doc.mhtml?i=20050509&seviatar.
[24] *Id.*
[25] *Id.*
[26] Mark Lifsher, *Unocal Settles Human Rights Lawsuit over Alleged Abuses at Myanmar Pipeline*, L.A. TIMES, 22 March 2005, at C1.
[27] *See, e.g.*, Bowoto v. Chevron Texaco Corp., 312 F. Supp. 1229 (N.D. Cal. 2004); Estate of Rodriguez v. Drummond Co., 256 F. Supp. 2d 1250 (N.D. Ala. 2003); Aldana v. Fresh Del Monte Produce Inc., 305 F. Supp. 2d 1285 (S.D. Fla. 2003). In all three district court cases, plaintiffs' claims under the ATCA were dismissed without prejudice.
[28] Daphne Eviatar, *A Big Win for Human Rights*, THE NATION (9 May 2005), *available at* http://www.thenation.com/doc.mhtml?i=20050509&s=eviatar.
[29] "Without a settlement, Unocal would have doubled Chevron Texaco's potential liability for human rights violations and compounded its public embarrassment." Daphne Eviatar, *A Big Win for Human Rights*, THE NATION (9 May 2005), *available at* http://www.thenation.com/doc.mhtm1?i=2005O5O9&s=eviatar.
[30] Doe v. Unocal Corp., 403 F.3d 708 (9th Cir. 2005).
[31] No. 96 Civ. 8386, 2002 U.S. Dist. LEGIS 3293 (S.D. N.Y. 22 February 2002).
[32] *Id*. at *3.

and suppress opposition to its oil development activities in the Ogoni region.33 In addition, the complaint states that Shell encouraged Nigerian government officials to imprison, torture, and kill plaintiffs and their families, and forcibly took land without adequate compensation while causing pollution of the air and water.34 Shell allegedly gave the Nigerian military money, weapons, vehicles, ammunition, and other logistical support in the village raids.35 On February 22, 2002, the district court rejected almost all of the grounds for dismissal, allowing the case to move to discovery.36 The human rights violations from environmental harm include crimes against humanity against Doe and Owens Wiwa, torture of Doe, cruel, inhuman, and degrading treatment of Doe and Wiwa, violation of the right to peaceful assembly and association for Doe and Wiwa, as well as the rights to life, liberty, and security of person for Doe.37

In denying the motion to dismiss, the court found sufficient the allegations that Royal Dutch/Shell were in collusion with the state of Nigeria, and that the acts of Shell Nigeria were sufficiently attributable to its parent company Royal Dutch/Shell for claims under the Torture Victim Protection Act and ATCA to be brought against the parent company and Brian Anderson, the Nigerian chairman for Royal Dutch/Shell and managing director of Shell Nigeria. The court also rejected the act of state doctrine as warranting dismissal, noting that the public interest outweighed any threat of embarrassment to the Nigerian government.

These pre-*Sosa* ATCA cases in United States federal court are relevant and instructive in several respects. First, the ATCA complaints are establishing a new form of linkage between environmental harm and human rights—the violation of human rights to oppress opposition to environmental degradation.38 Secondly, the law developing the liability of non-state actors conversely sheds light on when nation-state responsibility may be predicated on the acts of non-state actors, either individuals or private corporations.39 Finally, litigation of these international torts of environmental oppression may lay a foundation of expanded use of supranational fora within the United Nations system (e.g., the Committee Against Torture) and outside (e.g., the International Criminal Court and domestic courts for crimes against humanity).40 This last factor has become increasingly important in light of two decisional setbacks to ATCA litigation in which circuit courts have placed more stringent requirements on pleadings when plaintiffs attempt to use human rights arguments to challenge environmental pollution.

In *Beanal v. Freeport-McMoran,*41 the U.S. Court of Appeals for the Fifth Circuit affirmed a district court judge's dismissal of Beanal's claims under the ATCA and TVPA for

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[33] *Id*. at *5.
[34] *Id*. at *4,*41.
[35] *Id*. at *42.
[36] *Id*. at *l01.
[37] *Id.*
[38] *See* Bano v. Union Carbide, 273 F.3d 120 (2d Cir. 2001); Sarei v. Rio Tinto PLC, 221 F. Supp. 2d 1116 (C.D. Cal. 2002), *aff'd, vacated, and rev'd in part on other grounds,* 456 F. 3d 1069(9th Cir. 2006), *reh'g en banc granted by* 499 F.3d 923(2007).
[39] *See, e.g.*, William Aceves, *Affirming the Law of Nations in US. Courts: The* Karadzic *Litigation and the Yugoslav Conflict,* 14 BERKELEY J. INT'L. L. 137 (1996); Peggy Rodgers Kalas, *International Environmental Dispute Resolution and the Need for Access by Non-State Entities,* 12 COLO. J. INT'L. ENVTL. L. & POL'Y 191 (2001).
[40] Doe v. Unocal Nos. 00-56603, 00-57197, Nos. 00-56626, 00-57195.
[41] 197 F.3d 161 (5th Cir. 1999).

environmental pollution and human rights violations, holding that Beanal's pleadings failed to state a claim under Federal Rules of Civil Procedure 12(b)(6). In 1996, Beanal, the leader of the Amungme Tribal Council in Irian Jaya, Indonesia, filed suit against Freeport for alleged violations of international law in connection with Freeport's operation of an open-pit copper, silver and gold mine in Irian Jaya. Specifically, Beanal claimed that Freeport "caused harm and injury to the Amungme's environment and habitat" and "that Freeport's private security force acted in concert with the Republic to violate international human rights."42 The Fifth Circuit addressed each of these issues separately. Beginning with the human rights claim, the court upheld the trial judge's dismissal by noting that Beanal's claims failed to provide adequate notice under Federal Rules of Civil Procedure 8(a). "Beanal's claims are devoid of names, dates, locations, times or any facts that would put Freeport on notice as to what conduct supports the nature of his claims."43

More generally, in upholding the dismissal of Beanal's environmental claims, the court found that Beanal failed to show that Freeport's mining activities violated "any universally accepted environmental standards or norms."44 Specifically, the court stated that international treaties and agreements on which Beanal relied, including the Rio Declaration,45 "merely refer to a general sense of environmental responsibility and state abstract rights and liberties devoid of articulable or discernible standards and regulations to identify practices that constitute international environmental abuses or torts."46 In addition, the court expressed reluctance to impose U.S. environmental policy on other nations, especially when the alleged harms occur entirely within a state's borders without impacting neighboring countries.47

In September, 2003, the U.S. Court of Appeals for the Second Circuit upheld a district court judge's dismissal on similar grounds. In *Flores v. Southern Peru Copper Corporation*,48 ("SPCC") a group of Peruvian plaintiffs brought personal injury claims under the ATCA against SPCC, a U.S. company, alleging that pollution from SPCC's copper mining, refining, and smelting operations caused plaintiffs' or their decedents' lung disease, violating the plaintiffs' "right to life" and "right to health."49 Relying in part on the Fifth Circuit's decision in *Beanal v. Freeport-McMoran*, the Second Circuit upheld dismissal of plaintiffs' claims for failure to state a cause of action on which relief could be granted.50 In so doing, the Flores court provided an in-depth examination of the types of claims it concluded are and are not actionable under international law pursuant to the ATCA.

The court stated that for any ATCA claim to succeed, it must allege a violation of customary international law. As defined by the Second Circuit, customary international law consists only of those clear and unambiguous rules that states universally abide by out of a sense

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[42] *Id*. at 163.
[43] *Id*. at 165.
[44] *Id.* at 166.
[45] Rio Declaration on Environment and Development, 13 June 1992, U.N. Doc. A/CONE 15 1/5 rev. 1 (1992).
[46] *Beanal*, 197 F.3d at 167.
[47] *Id*. at 167.
[48] 343 F.3d 140 (2d Cir. 2003).
[49] *Id.* at 143.
[50] Fed. R. Civ. P. 12(b)(6).

of legal obligation, and mutual concern.51Although based on several international agreements, including the Universal Declaration of Human Rights52 and the Rio Declaration on Environment and Development,53 the court found that the plaintiffs' "right to life" and "right to health" to be "vague and amorphous," far from establishing a "clear and unambiguous" rule of customary international law sufficient to provide a basis for a claim under the ATCA.54 The court quoted *Beanal v. Freeport-McMoran*, noting that international agreements such as these "state abstract rights and liberties devoid of articulable or discernible standards and regulations."55

As for the plaintiffs' specific environmental claims, the court found, as in *Beanal*, no rule of customary international law prohibiting international pollution.56 In response to the plaintiffs' reliance on treaties to demonstrate international agreement, the court held that "a treaty will only constitute *sufficient* proof of a norm of customary international law if an overwhelming majority of States have ratified the treaty, *and* consistently act in accordance with its principles."57 Without providing an example of such a treaty, the court concluded that none of the treaties relied on by the plaintiffs met this standard because they were either not ratified by the United States or Peru or both, and thus not binding; or worse, they failed to provide clear and unambiguous regulations and standards for international pollution.58 The court then dismissed the possibility that any nonbinding international agreement could serve as a source of customary international law, including: non-binding United Nations General Assembly resolutions,59 other multinational declarations, including the Rio Declaration,60 or decisions of multinational tribunals.61

In the wake of *Beanal v. Freeport-McMoran* and *Flores v. Southern Peru Copper Corporation*, enforcing international law under the ATCA, at least in these two circuits, has become much more difficult. In particular, it is clear that plaintiffs must allege violations of specific "articulable or discernible standards and regulations [that] identify practices that constitute international environmental abuses or torts."62 Moreover, as both cases demonstrate these courts are extremely hesitant to impose U.S. environmental standards on other nations via the ATCA, especially when the alleged pollution is purely intranational. Even if a plaintiff succeeds in avoiding dismissal on Federal Rules of Civil Procedure 12(b)(6) grounds, there is no guarantee that the claim would not be dismissed for *forum non conveniens*.63

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[51] *Flores*, 343 F.3d at 154-57.
[52] Universal Declaration of Human Rights, art. 25, G.A. Res. 217(111), U.N. GAOR, 3d Sess., U.N. Doc.A/810, at 71 (1948).
[53] Rio Declaration on Environment and Development, 13 June 1992, U.N. Doe. A/CONF. 15 1/5 rev. 1(1992).
[54] *Flores*, 343 F.3d at 160.
[55] *Id*. (quoting *Beanal*, 197 F.3d at 167).
[56] *Flores*, 343 F.3d at 161-162.
[57] *Id*. at 162-163.
[58] *Id.* at 160-70.
[59] *Id*. at 168.
[60] *Id.* at 169-70.
[61] *Id*. at 170.
[62] *Beanal*, 197 F.3d 161, 167.
[63] *Flores*, 343 F.3d at 172.

In sum, then, despite the notable successes that some plaintiffs have enjoyed in enforcing human rights recognizably protected under the ATCA, even against non-state actors, it appears that enforcing less clearly established human rights, such as the right to a safe and healthy environment, if not completely closed, has been severely restricted at least in these circuits.

SOSA V. ALVAREZ-MACHAIN

In 1985, a Drug Enforcement Administration (DEA) agent was captured while on assignment in Mexico.[64] Over the course of two days, the agent was tortured for information, and ultimately killed.[65] The respondent in Sosa v. Alvarez-Machain was a Mexican doctor the DEA believed responsible for keeping their captured agent alive for the purpose of prolonging his torture and interrogation. In 1990, Dr. Alvarez-Machain (Alvarez) was indicted by a federal grand jury for the torture and murder of the DEA agent. A United States district court then issued a warrant for Alvarez's arrest, but the Mexican government would not extradite him. The DEA approved an operation to take Alvarez into custody in Mexico and bring him to the United States.[66] The DEA hired a group of Mexican nationals to abduct Alvarez from his home; the group held him overnight in a motel, then transferred him by private plane to Texas, where he was arrested by U.S. officials.[67]

The case went to trial in 1992, and Alvarez was acquitted.[68] Upon his return to Mexico, he filed civil suit in U.S. court over the events immediately preceding his arrest and trial.[69] Among others, Alvarez sued petitioner Jose Sosa (who was part of the group that abducted him) and the United States. Alleging that his abduction was a violation of international law, Alvarez's suit included a claim for damages against the United States (under the Federal Tort Claims Act) and a claim for damages against petitioner Sosa (under the Alien Tort Statute).

The District Court dismissed the FTCA claim but awarded summary judgment and money damages to Alvarez on his ATS claim.[70] On appeal to the Ninth Circuit, a three-judge panel affirmed the ATS judgment but reversed the dismissal of the FTCA claim.[71] The case was reheard en banc, with the Ninth Circuit reaching the same conclusion as the three-judge panel.[72]

The Supreme Court then granted certiorari, in the interest of "clarif[ying] the scope of both the FTCA and the ATS."[73]

The Federal Tort Claims Act creates a cause of action "for . . . personal injury . . . caused by the negligent or wrongful act or omission of any employee of the Government while acting

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[64] 542 U.S. 692, 697 (2004).
[65] *Id*.
[66] *Id*. at 698.
[67] *Id*.
[68] *Id*.
[69] *Id*.
[70] Alvarez-Machain v. United States, 1994 U.S. Dist. LEXIS 21702 (D. Cal. 1994).
[71] Alvarez-Machain v. United States, 266 F.3d 1045 (2001).
[72] Alvarez-Machain v. United States, 331 F.3d 604 (CA9 2003) (en banc).
[73] 542 U.S. 692, 699. Certiorari was granted in *Sosa v. Alvarez-Machain*, 540 U.S. 1045 (2003).

within the scope of his office or employment."74 The Alien Tort Statute provides that "[t]he 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."75 The Supreme Court granted cert to resolve two issues. First, was Alvarez's allegation that the DEA orchestrated his abduction from Mexico and subsequent transfer to the United States sufficient to support a claim against the United States for damages under the Federal Tort Claims Act (FTCA)? Second, was he entitled to any remedy under the Alien Tort Statute (ATS)?

The FTCA was drafted and enacted to remove the sovereign immunity of the United States as a defense in tort actions, so that the Government could be liable to private individuals for tortious acts, under certain circumstances. This waiver of sovereign immunity was subject to some exceptions.76 One exception to the sovereign immunity waiver was for claims "arising in a foreign country."77 The first holding of the majority opinion, written by Souter, was that this exception barred claims based on any injury suffered in a foreign country. The Court said that this was regardless of where the tortious act or omission occurred.

The Government argued that the tortious act - Alvarez's abduction - took place in Mexico. Consequently, the claim arose in a foreign country within the meaning of the statutory exception and Alvarez could not bring suit under the FTCA. Alvarez argued his claim did not "arise" in a foreign country because his abduction in Mexico was the result of unlawful planning and direction by DEA operatives in the United States. The Ninth Circuit was persuaded by this line of reasoning.78 The Supreme Court was not.

The Court allowed that the harm in the present case was arguably caused both by action in a foreign country and planning in the United States, but rejected application of the "headquarters doctrine."79 In the Court's analysis, the mere existence of some proximate connection between a breach of duty in the U.S. and the action in the foreign country is not sufficient to prevent the exception to the sovereign immunity waiver from taking effect.80 "It will virtually always be possibly to assert that the negligent activity that injured the plaintiff abroad was the consequence of faulty training, selection or supervision [in the United States]," the majority explained.81 "The headquarters doctrine threatens to swallow the foreign country exception whole[.]"82 Reasonable application of the doctrine requires the domestic behavior be "sufficiently close to the ultimate injury, and sufficiently important in producing it."83 While planning by DEA officials may have been a proximate cause of Alvarez's abduction, other

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[74] 28 U.S.C. § 1346(b)(1). Liability exists "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." *Id*.
[75] 28 U.S.C. § 1350.
[76] 28 U.S.C. § 2680 sets out the various exceptions to the waiver of sovereign immunity.
[77] 28 U.S.C. § 2680(k).
[78] 331 F.3d at 640-641.
[79] 542 U.S. at 702. Courts invoking the "headquarters doctrine" or "headquarters analysis" have not applied § 2680(k) exception to bar suit where an act or omission occurring inside the United States had its operative effect in another country. *See* 542 U.S. 701 n.2 for examples.
[80] 542 U.S. at 702.
[81] *Id*. (citations omitted) (quoting Beattie v. United States, 75 F.2d 91, 119 (CADC 1984)).
[82] 542 U.S. at 702.
[83] *Id*. at 703.

factors - including the conduct of Mexican nationals who carried out the plan, were also proximate causes. An action in the United States might be a legal cause of a consequence abroad, but that did not prevent factors abroad from also being proximate causes of the harm. In such a situation, where the action of headquarters is not the exclusive proximate cause of a given harm, the Court reasoned that the headquarters doctrine did not automatically bar the application of the sovereign immunity waiver exception.84

The Court's rejection was also grounded in its understanding of the legislative intent behind the exception. When the FTCA was passed, in tort cases, courts generally applied the law of the place where the injury occurred85 - where a plaintiff was injured in a foreign country, courts applied foreign law. Legislative history showed that Congress sought to put an end to this by creating the foreign country exception to the FTCA.86 To apply the headquarters doctrine as the Ninth Circuit had, would thwart Congressional intent - an intolerable result.87 Expressing concern over the fact that a good many states still utilized choice of law methodology, the Court found no assurance that foreign substantive law would not be applied if the headquarters doctrine was used by courts to assume jurisdiction for cases against the Government for harm suffered abroad.88 The Court also looked back at the use of "arising in" language in statutes contemporary to the FTCA, and drew the conclusion that Congress understood the language "arising in a foreign country" to mean a claim for some injury occurring in a foreign country.89 The Court's also held that Alvarez could not recover against Sosa under the Alien Tort Statute.90 The ATS allows for recovery for torts committed in "violation of the law of nations or a treaty of the United States,"91 and Alvarez argued that his abduction constituted arbitrary arrest and detention, and that such an arrest was a violation of international norms. The Court made clear that the ATS was, by its terms, a jurisdictional statute, which could be invoked only in cases of a limited set of well-established, universally accepted, and clearly delineated violations of international law.92 Alvarez's claim of arbitrary arrest, however, did not rise to the standard of such a clear and established international law violation that should be recognized under the

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[84] *Id*. at 704.
[85] *Id*. at 705.
[86] *Id*. at 707. The exception "codified Congress's unwillingness to subject the United States to liabilities depending upon the law of a foreign power." *Id*. at 708 (citations omitted) (quoting United States v. Spelar, 338 U.S. 217, 221 (1949)).
[87] "[The] doctrine would have displaced the exception by recasting claims of foreign injury as claims not arising in a foreign country because some planning or negligence at domestic headquarters was their cause." *Id*. at 708.
[88] *Id*. at 710.
[89] *Id*. at 704.
[90] *Id*. at 712.
[91] 28 U.S.C. § 1350.
[92] 542 U.S. at 712. "[W]e think that at the time of enactment the jurisdiction enabled federal courts to hear claims in a very limited category defined by the law of nations and recognized at common law. We do not believe¼the limited, implicit sanction to entertain the handful of international law cum common law claims understood in 1789 should be taken as authority to recognize the right of action asserted by Alvarez here."

common law.93 In the view of the Court, Alvarez invoked only a "general prohibition" against what he characterized as arbitrary detention, and he failed to cite sufficient legal authority to bring this "prohibition" to the level of a binding customary norm.94 "Whatever may be said for the broad principle Alvarez advances," wrote Souter for the majority, "in the present, imperfect world, it expresses an aspiration that exceeds any binding customary rule having the specificity we require."95

Sosa and the United States also argued that Alvarez's claim should fail because no claim for relief could be heard in the absence of a statute expressly authorizing the cause of action. On this point, the majority did not agree with the Government.96 While the statute was jurisdictional, historical context suggested to the Court that the ATS "is best read as having been enacted on the understanding that the common law would provide a cause of action for [a] modest number of international law violations[.]"97 A right of action borne out of the common law could support a suit without Congress expressly passing statutes stating so.

The justices all agreed that there were several reasons to exercise judicial restraint and caution in this area. A consensus existed on the point that it is better left to legislators to create private rights of action in "the great majority of cases."98 Where foreign relations and foreign policy are implicated, the Court felt especially encouraged to leave such decisions to the Legislative and Executive Branches.99 Federal courts should not recognize new claims based on a vague idea of federal "general" common law.100 It was not the responsibility of the courts to "seek out and define new and debatable violations of the law of nations."101 While the majority allowed it might be possible for federal common law to recognize further international norms as judicially enforceable, the Court emphasized that the general practice should be for a judge to look for legislative guidance before exercising substantial discretion in developing substantive law.102

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[93] *Id*. at 725. "[W]e think. . .any claim based on the present-day law of nations [should be required] to rest on a norm of international character accepted by the civilized world and defined with specificity [comparable to the paradigm torts of violation of safe conducts, impinging upon ambassadors, and piracy]."

[94] *Id*. at 736. The Court also took issue with how broadly a rule against arbitrary detention, as Alvarez defined it, would sweep. "His 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."

[95] *Id*. at 738.

[96] *Id*. at 720.

[97] *Id*. at 724.

[98] *Id*. at 727.

[99] *Id*. "It is one thing for American courts to enforce constitutional limits on our own State and Federal Governments' power, but quite another to consider suits under rules that would go so far as to claim a limit on the power of foreign governments over their own citizens, and to hold that a foreign government has transgressed those limits."

[100] *Id*. at 729.

[101] *Id*. at 728.

[102] "For two centuries we have affirmed that the domestic law of the United States recognizes the law of nations. . . .It would take some explaining to say now that federal courts must avert their

The Court was unanimous on the position that the ATS was by its terms a jurisdictional statute, and should be read restrictively to allow personal liability only for a limited number of international law violations. The justices all agreed that Alvarez's claim of arbitrary arrest did not rise to the level of the violations contemplated by the statute. The primary opinion, by Souter, was joined in part by Rehnquist, Stevens, O'Connor, Scalia, Kennedy and Thomas as to the holding that Alvarez was not entitled to recover under the FTCA because the harm occurred in Mexico, and the FTCA barred all claims based on an injury suffered in a foreign country.

The Court's opinion was joined in part by Stevens, O'Connor, Kennedy, Ginsburg, and Breyer with respect to the holding that Alvarez was not otherwise entitled to recover under the ATS on federal common law grounds. The Court reasoned that federal courts should not recognize private causes of action for violations of international law that were less than definitive and far from as universally accepted as those violations Congress had in mind when enacting the ATS.103 It is fair to say that this holding was of special significance to many watching the case develop. As the Court noted in its opinion, many observers hoped that the ATS could be used to bring human rights litigation into the federal courts. The tone and spirit of Souter's opinion cautions against the use of U.S. courts to press every human rights or international law violation under the sun, but the language of the opinion does not shut the door on such claims. Instead, as Scalia's concurrence (discussed below) notes, the Court's opinion only calls for courts to be more "vigilant" as to the types of claims they recognize.104

Justices Ginsburg and Breyer wrote separately to concur with the Court's judgment and to concur in part. Ginsburg's concurrence, joined by Breyer, agreed with the majority on Alvarez's ATS claims but expressed the position that Alvarez's FTCA was better rejected on an alternate understanding of 28 USCS § 2680(k). Ginsburg differed from the Court on the reading of "arising in" and believed the words to refer to the location of the act or omission complained of, not the "place of injury" as the Court read them.105 Ginsburg felt the exception would be more effectively and correctly applied "by directing attention to the place where the last significant act or omission occurred, rather than to the United States where some authorization, support, or planning may have taken place.106 The Court could have reached the same result, using much of the same reasoning, but having applied a clearer standard (this "last significant act or omission" rule) to determine that Mexico was the place where the claim at hand properly arose.

Breyer wrote separately to opine that an additional consideration for recognizing a norm of international law under the ATS should be whether the exercise of jurisdiction would be consistent with notions of comity. Comity is the principle that each nation should "respect the

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gaze entirely from any international norm intended to protect individuals." *Id*. at 730. A cause of action could be had where the norm met the Court's standard.

[103] The ATS holding in Sosa is more narrow than it appears on first reading. "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," Souter wrote in the Court's opinion. 542 U.S. at 738. The Court does not say that arbitrary arrest and detention may never rise to the level of a violation of an international norm. On the facts at hand, however, the Court did not find a clear violation of any international norm.

[104] 542 U.S. at 729. "[T]he door is still ajar subject to vigilant doorkeeping[.]"

[105] *Id*. at 752.

[106] *Id*. at 760.

sovereignty of other nations by limiting the reach of its own laws and their enforcement."[107] The internationalist view is that in an increasingly connected and interdependent world, the courts have some duty to "help assure. . . laws of different nations will work together in harmony."[108] According to Breyer, international law today sometimes reflects "not only substantive agreement as to certain universally condemned behavior, but also procedural agreement that universal jurisdiction exists to prosecute a subset of that behavior. That subset includes torture, genocide, crimes against humanity, and war crimes."[109] That no such procedural consensus exists over arbitrary arrest and detention was additional support, wrote Breyer, for the idea that the ATS did not recognize the claim Alvarez advanced.

Scalia's concurrence, which was joined by Rhenquist and Thomas, began by crediting much of Souter's opinion for the majority.[110] However, Scalia dissented strongly on one point and believed it should be subtracted - the holding that federal courts could ever recognize new claims rooted in violations of international-law-based norms. Scalia rejected the "reservation of a discretionary power in the Federal Judiciary" to create a new private cause of action for enforcement of any norm not expressly contemplated by legislators when the ATS was enacted.[111] It was not the role of the judiciary to make new law, as the judiciary was "neither authorized nor suited to perform" such a task.[112] Scalia, long a proponent of judicial restraint, emphasized Court precedent that jurisdictional grants are not grants or delegations of any authority to the courts to make new law.[113]

The primary point of contention between Scalia and the Court is over the proper understanding of federal common law. In Scalia's view, modern federal courts have no power to recognize any common law claim based in international law. While federal courts may have had this power at one time, the Supreme Court held in Erie that all law was derived from either the federal or state government.[114] Post-Erie, Scalia argued, federal courts had no "general" common law to look to in creating new causes of action for violations of international-law-based norms. The majority of the Court rejected this position. Instead, the Court's opinion recognized that post-Erie, the federal common law still included aspects of the old general common law that had been within the power of the federal government.[115] Recognition of the law of nations had always been an area of such federal control, so, the Court reasoned, federal courts could under limited circumstances recognize new causes of action to enforce international law norms.[116]

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[107] *Id*. at 761.
[108] *Id*. at 761.
[109] *Id*. at 762, citations omitted.
[110] *Id*. at 739.
[111] *Id*. at 739.
[112] *Id*. at 739.
[113] *Id*. at 744.
[114] Erie R. Co. v. Tompkins, 304 U.S. 64 (1938).
[115] 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."
[116] *Id*. at 731. "While we agree with Justice Scalia to the point that we would welcome any congressional guidance in exercising jurisdiction with such obvious potential to affect foreign relations, nothing Congress has done is a reason for us to shut the door to the law of nations entirely. It is enough to say that Congress may do that at any time (explicitly, or implicitly by

Scalia also suggested that while the majority opinion talked the talk of judicial restraint and strict interpretation, it did not walk the walk. The "verbal formula" that the Ninth Circuit applied in deciding that Alvarez's abduction reached the level of a violation of an international norm was that it constituted a violation of a binding norm (against arbitrary arrest and detention) that was "universal, obligatory, and specific."117 That the Court's opinion endorsed this same standard, instead of making clear that there is never authority to use federal common law to make new law based on international norms, is "hardly a recipe for restraint in the future,"118 Scalia warned. Activists and victims would continue to bring their human rights claims to court, and seek to convince the lower courts that a universally accepted and well defined norm had been violated. After all, Alvarez had managed to convince the Ninth Circuit that his capture violated a binding customary norm. And not every case, Scalia warned, would make it to the Supreme Court for oversight and correction.

To some extent, it remains to be seen how lower courts will react to Sosa, insofar as its ATS-related holdings are concerned. Federal courts may take heed of the majority's admonishment to exercise greater restraint in recognizing causes of action, and be the vigilant gatekeepers Souter called for. Or federal courts may, as Scalia feared, see only an open invitation to go about creating new substantive law based on alleged "international norms" that many could see as subject to debate.

To paraphrase Mark Twain, the anticipated death of the ATCA before the U.S. Supreme Court in *Sosa v. Alvarez-Machain119* was greatly exaggerated. The Supreme Court refused to limit the reach of the ATCA to the very limited category of international law claims understood in 1789, as urged by the U.S. Solicitor General. The Court concluded that no development in the two centuries since its passage had categorically precluded federal courts from recognizing a claim under the law of nations as part of U.S. common law. Although requiring that enforceable norms of custom under the ATCA be norms accepted by the civilized world and defined with the specificity of the recognized 1789 norms, this limitation need not be interpreted as any more demanding than that previously formulated by the lower courts or, in fact, required for recognition generally of a norm as custom under international law (although environmental advocates should pay close attention to the possible procedural limitations which the opinion suggests in footnotes might play a more important role in limiting ATCA actions in the future). The decision, despite much cautionary language and dismissal of Sosa's particular claim, confirms the availability of the ATCA for victims of serious violations of international law that may include plaintiffs who tie environmental degradation to well established human rights abuses.120

In pertinent part, *Sosa v. Alvarez-Machain121* held that the Alien Torts Statute (ATS) does not provide new causes of action, but, rather, is merely a jurisdictional statute under which

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treaties or statutes that occupy the field) just as it may modify or cancel any judicial decision so far as it rests on recognizing an international norm as such."

[117] *Id*. at 748.

[118] *Id*. at 748.

[119] 542 U.S. 692 (2004).

[120] *See* Human Rights First, Press Release: *Supreme Court Denies Claim of Alvarez-Machain, but Upholds Important Human Rights Law* (29 June 2004), *available at* http://www.humanrightsfirst.org/media/2004_alerts/0629.htm.

[121] 542 U.S. 692 (2004).

individuals can seek redress for various common law violations of international law.122 According to the Court, new causes of action can come to be recognized under the ATS if the claim is "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 features of the 18th century paradigms we have recognized."123 But, the Court said that federal courts should exercise "great caution" when considering new causes of action and maintain "vigilant doorkeeping."124

Since *Sosa* was decided in 2004, many courts have discussed the decision and treated the decision positively. In the cases that have treated *Sosa* favorably, courts have frequently invoked *Sosa* to bar the claims being pursued. As of April 11, 2007, twenty ATCA-specific cases had cited *Sosa* in their opinions. Of these cases, only seven cited *Sosa* as dispositive of whether the case could proceed or be dismissed. Of those seven cases, all were dismissed. Only one ATCA case, *Sarie v. Rio Tinto*[125] has proceeded post-*Sosa*. Of all the 163 cases citing *Sosa*, only thirty-three cited *Sosa* as the basis for dismissal. Therefore, at this point, *Sosa* appears to have effectuated little change in the percentage of cases dismissed compared to pre-*Sosa*.

One of the reasons courts have given for barring these claims has centered on the notion of what constitutes a norm of international law, as emphasized by the *Sosa* Court. For example, in *Bancoult v. McNamara*,[126] former residents of the Chagos Archipelago and their descendants sued individual employees of the United States and the government, seeking compensation for their forced removal to make way for a United States naval base. The plaintiffs alleged that the defendants had blocked the plaintiffs' return to Chagos after traveling outside the archipelago, imposed an embargo restricting the flow of food and supplies to Chagos, and physically corralled and boarded the remaining population on overcrowded ships, to be taken off the archipelago.[127] The plaintiffs argued that they could invoke a waiver of immunity against the defendants for purposes of 28 U.S.C. §2679(2)(B)—providing a waiver of immunity when federal officials or employees violate a statute of the U.S. under which such action against an individual is otherwise authorized—because the defendant had violated the ATS by committing torts in violation of the laws of nations.[128] However, the court concluded that the plaintiffs had failed to satisfy the exception under 28 U.S.C. §2679(2)(B), reasoning that for §2679(2)(B) to apply, based on Sosa, the ATS would have to create substantive rights or duties that could be violated for purposes of the Westfall Act.[129] The court emphasized that in light of *Sosa*, which held that the ATS was strictly a jurisdictional statute available to enforce a small number of international norms, the ATS did not create such substantive rights or duties.[130]

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[122] *Id*. at 694.
[123] *Id*. at 2761-62.
[124] *Id*. at 2763-64.
[125] 456 F.3d 1069 (9th Cir. 2006).
[126] 370 F. Supp. 2d 1 (D.D.C. 2004), *aff'd*, 445 F.3d 427 (D.C. Cir. 2006).
[127] *Id*. at *4.
[128] *Id*.
[129] *Id*. at *10. The Westfall Act generally confers upon all federal officers and employees immunity for their negligent and wrongful acts or omissions while acting within the scope of their office of employment. *Id*.
[130] *Id*. at *9.

Explaining this application *of Sosa* further, in *Bowoto v. Chevron Corp*.,131 the court stated: "*Sosa* requires that an international law norm be definite and accepted before a court may recognize a cause of action under the ATS. Because an integral feature of international law is that it is only binding on specific defendants, allowing a private party to be held liable based upon notions of 'color of law' developed in this country would blur the applicability of the obligations that international law imposes."132 In *Bowoto*, individuals injured or killed by the Nigerian military, when it was called in by the Chevron Corporation to intervene in a protest against Chevron's oil practice, filed suit against the corporation, seeking to hold it liable for the actions of the Nigerian military.133 Specifically, the plaintiffs alleged "crimes against humanity" and numerous other violations of international law under the ATS, such as summary execution, and torture. While the court allowed the plaintiffs' "crimes against humanity" claims to proceed under the ATS, it determined that the defendant could not be held liable, directly or indirectly, for the remaining alleged violations of international law, stating: "The … violations of international law alleged in plaintiffs' complaint do not involve those norms of customary international law that apply to private parties … so state action is required for plaintiffs to pursue these claims under the ATS."134

Again, in *Abdullahi v. Pfizer, Inc*.,135 the court relied on Sosa's restrictive paradigm to bar claims asserted under the ATS. In Abdullah, plaintiffs brought a class action, alleging that the defendant administered experimental antibiotics to Nigerian minors, resulting in grave injuries and death.136 The plaintiffs asserted that this was a violation of international law recognized by the ATS137; in support of this contention, the plaintiffs cited the Nuremburg Code, the Declaration of Helsinki, Article 7 of the ICCPR and the Universal Declaration of Human Rights.138 The court, however, held that none of these create jurisdiction under ATS:139

the Nuremburg Code does not give rise to a private right of action, nor has it been adopted by either the U.S. or the international community;140 the Declaration of Helsinki is a statement of policy, expressing aspirations, not obligations;141 Article 7 of the ICCPR was ratified by the U.S. on the understanding that it is not self- executing;142 the Universal Declaration of Human Rights is also aspirational, rather than binding.143 Given *Sosa*'s restrictive holding, the court was unwilling to "forge broad aspirational language into customary international law."144

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131 No. C 99-02506 SI, 2006 WL 2455752 (N.D. Cal. Aug. 22, 2006).
132 *Id*. at *6.
133 *Id*. at *1.
134 *Id*. at *5.
135 No. 01 Civ. 8118(WHP), 2005 WL 1870811 (S.D.N.Y. 2005).
136 *Id*. at *2-3.
137 *Id*. at *3.
138 *Id*. at *11.
139 *Id*. at *11.
140 *Id*. at *12.
141 *Id*. at *12.
142 *Id*. at *13.
143 *Id*. at *13.
144 *Id*. at *13.

In *South African Apartheid Litigation*,145 three groups of plaintiffs brought actions, on behalf of individuals who suffered damages as a result of crimes of apartheid in South Africa. The plaintiffs alleged that the apartheid regime relegated Africans to substandard living conditions and maintained a "brutal and vicious policy of repression."146 Specifically, the plaintiffs alleged that murder, arbitrary arrests, sexual and physical abuse, and torture were commonplace.147 The defendants did business in South Africa and supplied resources, such as technology, money, and oil, to the South African government and the entities that controlled the government, during the period in which the plaintiffs claimed the aforementioned crimes had taken place; many of the resources provided by the defendants were used by the apartheid regime to further its policies of oppression and persecution of the African majority.148 The plaintiffs alleged, among other things, that multinational corporations which did business in apartheid South Africa, violated international law and, thus, were subject to suit in federal district court under the ATS.149 The court held that *Sosa* "dispose[d] of the issues raised" by the plaintiff's motions,150 that the defendants did not engage in state action; the court was not persuaded by the plaintiff's argument that the defendants' aiding and abetting international law violations was itself an international law violation, universally accepted as a legal obligation.151 Overall, the court decided that, under the framework set forth in *Sosa*, doing business in apartheid South Africa was not a violation of international law that would support jurisdiction in federal court under the ATS; there was no "subject matter jurisdiction under the ATS, and thus all claims thereunder, including those for human rights violations, crimes against humanity, unfair labor practices, and all other premised under international law" had to be dismissed.152

Frazer v. Chicago Bridge and Iron153 presents another such example. In that case, the plaintiff, the personal representative for the estate of Emmanuel Frazer, brought an action for negligence and negligence per se, under the ATS. The plaintiff alleged the following: Frazer had been employed as a welder/carpenter by Canillion Caribbean United on a job site in Trinidad and Tobago that was managed by the defendant; the defendant had required employees, including Frazer, to work at night on a rickety scaffold without a safety engineer on site; Frazer had fallen to his death from a scaffold when a crane operator hit the scaffold with a cement shutter.154 The court concluded that, based on the *Sosa* standard, the plaintiff had not submitted evidence that entitled him to relief under the law of nations.155 Specifically, the court found that the plaintiff had failed to cite any provision of the Organization of American States (OAS) treaty—of which both the United States and Trinidad and Tobago were members—that either imposed or

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145 346 F. Supp. 2d 538 (S.D. N.Y. 2004), aff'd in part and vacated in part, Khulumani v. Barclay Nat. Bank Ltd., 504 F.3d 254 (2nd Cir. 2007), aff'd, American Isuzu Motors, Inc. v. Ntsebeza, 76 U.S.L.W. 3405 (2008). See the text accompanying note 289 *infra*.
146 *Id*. at 544.
147 *Id*.
148 *Id*.
149 *Id*. at 538.
150 *Id*. at 547.
151 *Id*. at 549.
152 *Id*. at 554.
153 No. Civ.A. H-05-3109, 2006 WL 801208 (S.D. Tex. March. 27, 2006).
154 *Id*. at *1.
155 *Id.* at *5.

recognized occupational safety and health standards as a matter of international law, and this was fatal to the plaintiff's claim.[156]

In *Aldana v. Del Monte Fresh Produce, N.A., Inc.*,[157] Guatemalan labor unionists sued the owner of a Guatemalan banana plantation under the Alien Tort Act (ATA), claiming that the defendant participated in torture and other human rights violations; specifically, the plaintiffs claimed that they had had their lives threatened while being hostage at gunpoint for eight hours and described these allegations as "intentionally inflicted pain and suffering" in their complaint.[158] With regard to the plaintiffs' allegations of torture, the court held that they did not meet the statutory elements of torture under the ATS: "[t]he only specified acts of physical violence we can discern from the complaint involve pushing, shoving and having one's hair pulled. The court did not understand these acts to constitute severe pain or suffering."[159] The court also held that the plaintiff's non-torture claims were not actionable under the ATS: "[b]ased largely on our reading of *Sosa* … [w]e see no basis in law to recognize Plaintiff's claim for cruel, inhuman, degrading treatment or punishment … *Sosa* explains that the International Covenant did not create obligations enforceable in federal courts."[160]

Finally, in *Taveras v. Taveras*,[161] a father filed a suit against his ex-wife and the mother of his children under the International Child Abduction Remedies Act (ICARA), seeking the return of the parties' children whom the mother had abducted from the Dominican Republic. The court held that the ATS did not provide the district court with jurisdiction over the father's claims.[162] Specifically, the court relied on the *Sosa* framework in concluding that the father's allegations did not qualify as a law of nations; for example, the court took notice of the fact that the complaint contained no allegation that the children were in any danger or had experienced abuse of any type.[163]

Cases since *Sosa* also demonstrate that fashioning a claim that falls within the framework set forth by Sosa is not always sufficient to withstand dismissal. Even when acknowledging that the plaintiff's claims do fit within the framework established by *Sosa*, some courts have still withheld ATS jurisdiction on other grounds.

In *Mujica v Occidental Petroleum Corp.*,[164] Columbian citizens brought suit against an oil company and a private security firm under the TVPA and ATS.[165] Plaintiffs alleged that the companies provided Columbian military with assistance on a raid that resulted in the deaths of Columbian citizens.[166] The plaintiffs alleged five bases for claims under the ATS: (1) extrajudicial killing and violation of laws of war, (2) torture, (3) crimes against humanity, cruel, inhuman, and degrading treatment, and (4) war crimes.[167] In evaluating whether or not these

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[156] *Id*. at *6.
[157] 416 F.3d 1242 (Fla. 2005).
[158] *Id*. at 1245.
[159] *Id*. at 1253.
[160] *Id*. at 1247.
[161] 397 F. Supp. 2d 908 (S.D. Ohio 2005), *aff'd*, 477 F.3d 767 (6th Cir. 2007).
[162] *Id*.
[163] *Id*. at 915.
[164] 381 F. Supp. 2d 1164 (C.D. Cal. 2005).
[165] *Id*. at * 1169.
[166] *Id*. at * 1168 -1169.
[167] *Id*. at *1178.

claims were sufficiently definite and accepted among civilized nations under the *Sosa* paradigm, the court held that, "like the respondent in *Sosa*, the plaintiffs may show that the norms that are a basis of the ATS claim have attained the status of binding customary international law.'"[168] The court held that all five bases for claims under the ATS meet this standard.[169] However, in deciding that not all five claims should proceed, the court considered Sosa's two concerns for the practical consequences of new causes of action for these types of cases: "(1) the extent to which recognizing an ATS claim would allow foreign plaintiffs to pursue the claim in U.S. courts and (2) the extent to which recognizing an ATS claim would unnecessarily duplicate remedies provided through other federal laws."[170] Bearing these considerations in mind the court held that cruel, inhuman and degrading punishment should be dismissed while the other claims should not be.[171]

In *Hereros v. Deutsche Afrika-Linien GMBLT & Co*.,[172] members of the Herero tribe in the Republic of Namibia sought relief "as a consequence of the genocidal destruction of the Herero Tribe."[173] The defendant, a German corporation and shipping line, was the principal shipping and port activities entity in German South Africa between 1890 and 1915.[174] The plaintiffs alleged that in pursuing its commercial activities it enslaved and perpetrated atrocities upon the plaintiffs; specifically, the plaintiffs claimed that the defendant brutally employed slave labor and ran its own concentration camp.[175] Despite recognizing that the atrocities perpetrated against the plaintiffs constituted "crimes against humanity," offensive to the law of nations, the court granted the defendant's motion to dismiss:

> [P]laintiffs must contend with daunting problems in meeting the fundamental demands of litigation. For example, there is the amount of time that has passed since these acts occurred, then the difficulty of identifying through witnesses who exactly committed them, which persons suffered them, how plaintiffs have the right to assert those victims' right, and even how damages might be apportioned … this Court is convinced that the presence of such fundamental trouble undoes the structural soundness of the ATS claim and renders it ill-defined and unsuitable to support the creation of a federal remedy under the restrictions of *Sosa*.[176]

In *Harbury v. Hayden*,[177] the widow of a Guatemalan rebel leader, who was allegedly tortured and killed in Guatemala by C.I.A. agents, brought an action against the C.I.A., the Department of State, the National Security Council, and other individual federal government employees. The plaintiff alleged various claims arising under international and common law; specifically, the plaintiff brought the following claims against the C.I.A.: intentional infliction of emotional distress—for causing and conspiring to cause her husband's imprisonment, torture,

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[168] *Id*. at *1178.
[169] *Id*. at *1178-1182.
[170] *Id*. at *1182.
[171] *Id*. at * 1183.
[172] No. Civ.A.05-1872(KSH), 2001 WL 182078 (D. N.J. Jan. 24, 2006), *aff'd*, 32 F. App'x. 90 (3rd Cir. 2007).
[173] *Id*. at *1.
[174] *Id*.
[175] *Id*.
[176] *Id*. at *11.
[177] 444 F. Supp. 2d (D.C. Cir. 2006), *aff'd*, 522 F.3d 413 (D.C. Cir. 2008).

and execution—and negligent supervision—resulting in her husband's false imprisonment, assault and battery, and wrongful death.178 "All of Plaintiff's counts … are based on injuries suffered by her husband in Guatemala … [b]ecause all remaining claims in this lawsuit are based on injuries sustained by [Plaintiff's husband] in Guatemala … Plaintiff's derivative claims must be dismissed in their entirety pursuant to *Sosa*."179

In *Doe v. Exxon Mobil Corporation*,180 Indonesian citizens brought suit against oil companies, alleging that they aided and abetted civil rights abuses of the Indonesian army by hiring components to guard a natural gas pipeline, in violation of the ATS. Specifically, the plaintiffs alleged genocide, torture, crimes against humanity, arbitrary detention, extrajudicial killing, and sexual violence.181 The court reasoned that, in assessing whether the plaintiffs had stated a claim under the ATS, in light of *Sosa*, the court had to conduct a searching merits-based inquiry; the court determined that, "defendants cannot be held liable for violations of international law on a theory that they aided and abetted the Indonesian military in committing these acts."182 The court concluded both that consideration of the plaintiffs' claim under the ATS would impermissibly intrude into Indonesian internal affairs and that Plaintiffs' failure to sufficiently allege joint action by Defendants and the military (i.e. exercise of influence by Defendants over the military) precluded ATS liability.183

Similarly, in *Presbyterian Church of Sudan v Talisman Energy, Inc*.,184 residents of Sudan brought suit against a Canadian energy corporation and the government of Sudan to get compensation for genocide, crimes against humanity, and other violations of international law.185 The defendants moved for judgment on the pleadings, arguing that under the *Sosa* standard, corporate liability for serious human rights abuses, and secondary liability theories of aiding and abetting conspiracy to commit serious human rights abuses are not sufficiently definite or accepted in international law.186 The court rejected the motion, holding that *Sosa* "explicitly contemplates the existence of corporate liability under customary international law"187 and "described the need to consider whether the violation of a 'given norm' incurs international liability 'if the defendant is a private actor such as a corporation.'"188 In early 2006, Talisman filed a motion for summary judgment on two grounds: (1) liability for a conspiracy claim under the ATS required a goal of committing genocide or an aggressive war, and (2) the plaintiffs failed to identify any evidence that showed Talisman had provided substantial assistance to the Sudan Government in committing genocide, crimes against humanity and war crimes.189 The court granted summary judgment, but the *Sosa* decision did

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178 *Id*. at 24.
179 *Id*. at 21.
180 393 F. Supp. 2d 20 (D.C. Cir. 2005).
181 *Id*. at 22.
182 *Id*. at 24.
183 *Id*. at 27.
184 374 F. Supp. 2d 331 (S.D.N.Y. 2005).
185 *Id.* at 333.
186 *Id*. at 334.
187 *Id*. at 335.
188 *Id*.
189 453 F. Supp. 2d 633 (S.D.N.Y. 2006).

not play a major part in the court's reasoning.[190]

In *Doe v. Qi*,[191] Falun Gong practitioners brought actions against local government officials of the People's Republic of China, alleging that the defendants' acts violated the ATCA. Among the alleged violations—torture; cruel, inhuman, or degrading treatment; arbitrary detention, crimes against humanity; interference with freedom of religion and belief—the plaintiffs included arrest and detention in prison facilities, labor camps, and mental hospitals, brutal beatings, starvation, and electric shock and other forms of torture.[192] The court found that only the individualized human rights claims for torture, cruel, inhuman, and degrading treatment, under the TVPA, and arbitrary detention, under the ATS, were justiciable; but the broader claims of genocide and "crimes against humanity" were nonjusticiable.[193] Specifically, the court declined to adjudicate claims of genocide and "crimes against humanity" because those claims would have required the court to evaluate the policy or practice of the foreign state.[194]

In *Igartua-De La Rosa v. United States*,[195] United States citizens, who were residents of Puerto Rico, brought an action claiming that their inability to vote in United States presidential elections ran contrary to the international obligations of the United States. In rejecting this claim, the First Circuit determined that customary international law did not require the U.S. to allow its citizens residing in Puerto Rico to vote in presidential elections. In support of its conclusion, the court reasoned that the plaintiffs' claim was not based on the violation of an international norm, as mandated by the Sosa Court: "*Sosa* refused to recognize as a norm of customary international law the notion of protection against arbitrary arrest. Yet the claim rejected in *Sosa* was a model of precision compared to [the plaintiffs'] present claim. If there exists an international norm of democratic government, it is at a level of generality so high as to be unsuitable for importation into domestic law."[196]

POLITICAL QUESTION DOCTRINE

Sosa, interpreted by courts as advancing a high level of deference to the executive branch of the U.S. government, has been employed by various courts to limit ATS jurisdiction under the political question doctrine.

In *Alperin v Vatican Bank*,[197] victims of crimes—alleged to have occurred during the second World War—and their descendants sued a foreign bank alleging that the bank profited from looting and slave labor.[198] In evaluating the political question doctrine, the court used the

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[190] The Southern District of New York found that *Sosa* was a "starting point" and it quoted language about the law of nations, specifically "a claim under the 'present-day law of nations' may form the basis for an ATS claim only to the extent it rests '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' that Congress had in mind when it enacted the ATS." *Presbyterian Church*, 453 F. Supp. 2d at 663 (quoting *Sosa*, 542 U.S. at 725).

[191] 349 F. Supp. 2d 1258 (N.D. Cal. 2004).

[192] *Id*. at 1266-67.

[193] *Id*. at 1306.

[194] *Id*. at 1311.

[195] 417 F.3d 145 (1st Cir. (Puerto Rico) 2005).

[196] *Id*. at 151.

[197] 410 F.3d 532 (9th Cir. 2004).

[198] *Id*. at 538.

Baker test, and considered *Sosa* under the fourth part of the test: "whether it would be impossible for the court to resolve the Property claims without expressing a lack of respect for the political branches."199 The court recognized that *Sosa* had held that courts should heavily consider the Executive Branch's view on the case's impact on foreign policy but concluded that this consideration did not preclude adjudication as the State Department had decided not to intervene so the Court did not need to evaluate the State Department's position.200

In *Whiteman v Dorotheum GMBH & CO KG*,201 the plaintiffs filed a putative class action against Austria for the confiscations of property, alleged to be part of past Nazi victimization.202 The court held that the claims were nonjusticiable under the political question doctrine.203 In so finding, the court was partly motivated by Sosa's "directing 'case-specific deference' to the expressed foreign policy interests of the United States."204 Given *Sosa*'s high level of deference, the court held that dismissal was appropriate where: "(1) the Executive Branch has exercised its authority to enter into executive agreements respecting the resolution of those claims; (2) the US Government (a) has established through an executive agreement an alternative international forum for considering the claims in question, and (b) has indicated that, as a matter of foreign policy, the alternative forum is superior to litigation; and (3) the US foreign policy advanced by the executive agreement is substantially undermined by the continuing pendency of the claims."205

In *"Agent Orange" Product Liability Litigation v. Dow Chemical Company*,206 Vietnamese nonprofit groups and individual Vietnamese citizens brought an action against U.S. chemical companies, under the ATS, for violations of federal, state and international law caused by the manufacture of toxic herbicides during the Vietnam War.207 In holding that the allegations were insufficient to state claims for violations of international law and war crimes, the court reiterated the caution the Sosa opinion established with regard to hearing cases that could interfere with international relations.208 "Where, as here, the precise subject matter at issue has been the subject of diplomatic negotiations, Sosa's cautionary notes are particularly applicable, and no federal common law cause of action should be recognized."209 Also, the court recognized that *Sosa* urged future courts to examine the "practical consequences of making that case available to litigants in federal courts."210 Here, the court found these consequences overwhelming, finding particularly that the claims would "interfere with the US's ongoing bilateral relationship with Vietnam."211

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199 *Id*. at 555.
200 *Id*. at 557. *See also* Gross v. German Found. Indus. Initiative, 456 F. 3d 363 (3d Cir. 2006)(case proceeds due in part to no formal suggestion of U.S. interest).
201 431 F.3d 57 (2d Cir. 2003).
202 *Id*. at 61.
203 *Id*. at 57.
204 *Id*. at 59.
205 *Id*. at 60-61.
206 373 F. Supp. 2d 7 (E.D.N.Y. 2005), *aff'd*, 517 F.3d 104 (2d Cir. 2008).
207 *Id*. at 7.
208 *Id*. at 47-48.
209 *Id*. at 48.
210 *Id*. at 47.
211 *Id*. at 47.

SOSA CONSIDERED, BUT NOT DETERMINATIVE

Although its effect has been far-reaching and highly-influential, *Sosa* has not had a determinative influence in every case in which is has been considered. For example, in *Pugh v. Socialist People's Libyan Arab Jamahiriya*[212] the court only considered *Sosa* tangentially. In that case, family members of the victims of Flight 772, which exploded in 1989, brought an action against Libya, for violating the TVPA.[213] The plaintiffs claimed that the act of blowing up an airliner was a crime sufficiently well defined to fall within the *Sosa* paradigm.[214] However, the court differentiated this claim from those considered in *Sosa* on the grounds that the plaintiffs asserted jurisdiction under the FSIA (Foreign Sovereign Immunities Act), while the *Sosa* Court had been concerned with claims arising under the ATS.[215]

Another example of similar reasoning is *Enahoro v. Abubakar*.[216] Nigerian nationals brought a suit against a former Nigerian general and alleged that they had suffered grave human rights abuses in Nigeria; the alleged abuses included claims of torture (such as flogging), arbitrary detention, cruel, inhuman and degrading treatment, false imprisonment, assault and battery, intentional infliction of emotional distress, and wrongful death.[217] Considering the jurisdictional element of the ATS in the context of the *Sosa* decision, the court admitted that the plaintiffs' allegations fell into two primary categories—torture and killing—both of which the *Sosa* Court specifically recognized as violations of the law of nations.[218] However, the court reasoned that, although there was no explicit statement to the effect in *Sosa*, Congress provided the Torture Victim Protection Act (TVPA) with the intent that claims such as the torture and killing claims brought by the plaintiffs be brought under it—the court continued: "It is hard to imagine that the Sosa Court would approve of common law claims based on torture and extrajudicial killing when Congress has specifically provided a cause of action for those violations and has set out how those claims must proceed."[219]

SUCCESSFUL CLAIMS

Despite the various situations in which courts have employed *Sosa* to bar ATS claims, certain claims have been allowed to proceed. *Sarie v Rio Tinto*[220] is an example of one such case. The *Sarie* court held that claims for war crimes, violations of law of war, racial discrimination and for violations of the U.N. Convention on the Law of Sea could form a basis for ATS claims.[221] The court held that *Sosa* did not change the test set forth in *Re Estate of Ferdinand Marcos*, stating that "the [ATS] 'creates a cause of action for violations of specific, universal and obligatory international human rights standards which confer fundamental rights

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[212] No. Civ.A.02-02026 HHK, 2006 WL 2384915 (D.D.C. May 11, 2006).
[213] *Id*. at *1.
[214] *Id*. at *13.
[215] *Id*. at *14.
[216] 408 F.3d 877 (7th Cir. 2005).
[217] *Id*. at 879.
[218] *Id*. at 884.
[219] *Id*. at 886.
[220] 456 F.3d 1069 (9th Cir. 2006).
[221] *Id*. at 1079.

upon all people vis a vis their own governments."222 In support of this interpretation the court cited Scalia's concurring opinion in Sosa: "the verbal formula … applied by the Ninth Circuit to determine whether [ATS] claims jurisdiction lies in the same verbal formula that the Court explicitly endorses."223 Under the *Ferdinand Marcos* test, the court found that all of the plaintiff's claims properly form the basis for ATCA claims.224 The Court also held that, while they recognized the need to give serious weight to the State Department, as advanced in *Sosa*, this factor would not be enough to dismiss the case.

Three women plaintiffs also recently succeeded in their suit against a former Haitian warlord, Emmanuel Toto Constant. The plaintiffs sued Constant for damages arising from the defendant's order to followers to rape the women and slash their breasts. The court found Constant liable to torture, attempted extrajudicial killing and crimes against humanity and ordered Constant to pay $19 million in damages.225

Apart from an Alien Tort Claims Act court action discussed above, a common law tort action might be another way to hold the U.S. government accountable for environmental degradation abroad. In the case of the United States, the U.S. government's waiver of sovereign immunity with respect to tort suits is limited to the terms of the Federal Tort Claims Act, 28 U.S.C. Sections 1346(b) and 2671-2680. This results in less room for challenging government actions and decision-making than tortious acts of individual government employees.226

GENERAL LITIGATION OBSTACLES

Although domestic courts are authorized to enforce customary international because of their authority under the ATCA, significant obstacles stand in the way of enforcement. These obstacles are addressed only briefly, because ultimately the difficulties they pose are very fact-specific.

Unfortunately, however, these limitations—some jurisdictional others discretionary—often provide all the reason a judge needs to avoid deciding a controversial, highly politicized cases.

Act of State Doctrine

One such highly amorphous, discretionary limitation is the act of state doctrine. The act of state doctrine refers to the position that United States courts may not question the domestic actions of another nation under the principle of sovereignty. The key case describing the act of state doctrine, *Banco Nacional de Cuba v. Sabbatino227* identifies four factors that a court must consider in deciding whether the act of state doctrine applies: (1) the degree of international consensus as to whether the act violates the law of nations; (2) the implications for foreign relations; (3) the continued existence of the accused government; and (4) whether the foreign state was acting in the public interest.228

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[222] *Id*. at 1078.
[223] *Id*. at 1077.
[224] *Id*. at 1079.
[225] *See Topics in Brief: Federal Court Awards Damages Against Haitian Warlord*, 12 INT'L L. UPDATE 218 (Nov. 2006).
[226] *Sarie*, 456 F.3d at 1079.
[227] 376 U.S. 398 (1964).
[228] *See*

In *Doe v. Unocal*,229 an act of state issue arose when the court had to decide whether the "Myanmar Military violated international law in order to hold Unocal liable for aiding and abetting that conduct." In examining the four factors of the act of state doctrine, the court determined: (1) there was international consensus that the crimes the military was accused of were violations of international norms; (2) the implications for foreign relations were not strong considerations as the U.S. had already denounced the Myanmar Military's actions; (3) the Myanmar government was still in existence; and (4) the violations of international human rights were not in the public interest. For these four reasons, the court determined that the act of state doctrine did not apply. Importantly, this case was later vacated and a rehearing was granted.

An act of state issue also arose in *Presbyterian Church of Sudan v. Talisman Energy, Inc*.230 when Talisman moved to dismiss under the doctrine. The court refused reasoning that: (1) the court could adjudicate official government acts of Sudan because they involve gross violations of human rights; (2) adjudication would not hinder U.S. foreign policy because Congress had already determined that the Sudan committed gross human rights violations; (3) standards of behavior under international law were "judicially-ascertainable." For these reasons the court refused to dismiss under the act of state doctrine.

In *Doe v. Qi,231* the court considered the application of the act of state doctrine to the human rights violations alleged to have been committed by local government officials in an effort to repress the Falun Gong movement in the People's Republic of China; initially, the court found that the alleged acts were sufficiently attributable to the government of China so as to constitute an act of the state.232 The court framed the issue as whether the analysis of the act of the state doctrine applied to conduct, as that alleged in this case, that is a violation of domestic law but nonetheless ratified by the national government.233 In addressing the issue, the court determined that it is essential to an act of a state that the conduct be "wholly unratified by the nation's government"234 Concluding that the defendants' acts were not wholly ungratified, the court applied the *Sabbatino* analysis.235 Finally, the court held: "the touchstone of the act of state doctrine is the risk of interfering with the conduct of foreign relations by coordinate branches of government. That this suit is brought against sitting officials aggravates that risk. Hence, the second and third factors coalesce to counsel strongly against assertion of jurisdiction. However, because the risk of interfering with the Executive Branch is minimal were this Court to enter declaratory judgment, particular if, as discussed below, that judgment is limited to the individual claims brought by the Plaintiffs, the Court concludes that the act of state doctrine bars plaintiffs' claim for damages and injunctive relief but not their claim for declaratory relief."236

The case of *Mujica v. Occidential Petroleum Corp.*,237 arose from a bombing in Santo Domingo, Colombia. The plaintiffs, residents of Santo Domingo, lost many members of their

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229 395 F.3d 932 (9th Cir. 2002).
230 244 F. Supp. 2d 289 (S.D.N.Y. 2003).
231 349 F. Supp. 2d 1258 (N.D. Cal. 2004).
232 *Id.* at 1293.
233 *Id*.
234 *Id.* at 1294.
235 *Id.* at 1296.
236 *Id*. at 1306.
237 381 F. Supp. 2d 1164 (2005).

family as a result of the bombing, and one of the plaintiffs had been personally injured.[238] In bringing suit against an American corporation, the plaintiffs claimed that the defendant and the Colombian Air Force (CAF) had carried out the bombing as part of a raid orchestrated for the purpose of providing security for one of the defendant's business interests (i.e. protecting its oil pipeline in Colombia), rather than on behalf of the Colombian government.[239] The court, having dismissed all of the plaintiffs' claims except for their ATS claim, considered whether the act of state doctrine barred the court's adjudication of the remaining claim.[240] Weighing the *Sabbatino* factors, the court concluded that the act of state doctrine did not apply to this case; specifically, it held that the second factor, which weighed in favor of the doctrine's application, was outweighed by the first and fourth factors, which weighed against its application.

The continuing importance of the doctrine outside of the ATS, however, is exemplified in Glen v. Club Mediterranee.[241] The Eleventh Circuit Court of Appeals affirmed dismissal of Club Med's unjust enrichment and trespass claims predicated on their assertions of ownership of beachfront property under the Helms-Burton Act, which property had been expropriated by Cuba in 1959. The plaintiffs claimed that the Act which created a statutory cause of action for trafficking in confiscated Cuban property owned by U.S. nationals precluded application of the act of state doctrine. Emphasizing the U.S. presidents had consistently suspended the availability of such lawsuits, the court determined that evaluating the plaintiffs' claims under Florida law would require the court to pass on the legality of Cuba's expropriation in exactly the manner precluded by Sabbatino, and that the Helms-Burton Act did not in any way change that preclusion of review.

Foreign Sovereign Immunities Act (FSIA)

Sovereign immunity ensures that a state will not be subjected to the courts of another co-equal state. This doctrine is not as broadly protective as it once was, and the Supreme Court has held that the only way in which states may be sued under the ATCA is through one of the exceptions to immunity in the FSIA.[242] Foreign states or officials are generally not protected for commercial acts or torts.[243] Subject to certain exceptions contained in the language of the Act, the Foreign Sovereign Immunities Act ("FSIA") immunizes foreign states from the jurisdiction of United States courts. FSIA defines "foreign state" as an "agent or instrumentality" of a foreign sovereign. Questions arise, however, as to whether an individual official qualifies as an "agent or instrumentality." In *Trajano v. Marcos*,[244] the court found that the FSIA may exclude individual officials from the immunity. Although this finding is consistent with *Filartiga v. Pena-Irala*, the court in *Trajano* modified it by claiming it would extend immunity to an

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[238] *Id.* at 1169.
[239] *Id.* at 1168.
[240] *Id.* at 1188.
[241] 450 F.3d 1251(11th Cir. 2006).
[242] Mary Ellen O'Connell, *Symposium; Enforcement and the Success of International Environmental Law*, 3 IND. J. GLOBAL LEGAL STUD. 47 (1995).
[243] *See* The Foreign Service Immunity Act of 1976, 28 U.S.C. §§ 1330, 1602-11; Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428(1989).
[244] 978 F.2d 493 (9th Cir. 1992).

individual acting within his official capacity and not exceeding the scope of his authority.[245] In *Hilao v. Estate of Marcos*, the court found that Marcos' acts of torture were not within his official mandate, nor were they governmental or public acts, and therefore could not be considered acts of a state for the purposes of sovereign immunity.[246] As one commentator has suggested, "It is not a stretch to assert that domestic courts are just as capable of holding foreign sovereigns to international law as the sovereign's own courts.[247]

In February of 2007 a federal district judge refused to dismiss a high-profile ATCA lawsuit filed against the Government of Sudan by families of sailors killed in the terrorist bombing of the USS Cole. In *Rux v. Sudan*,[248] Sudan is alleged to be responsible for giving support to al-Qaeda during the planning and implementation of the USS Cole bombing. The FSIA provides an exception to state immunity for suits against foreign states when the plaintiff is seeking damages from certain acts of state-sponsored terrorism.[249] The lawsuit proceeds to trial in March 2007 and potential damages are as high as $105 million, although the judge has indicated that damages may be limited to economic losses by the Death on the High Seas Act.[250] The judge concluded that the appropriate statute of limitations was 10 years, not 3 years as contended by Sudan, and that most likely U.S. law rather than the law of Yemen or Sudan would apply because a U.S. ship was attacked. Sudan has chosen not to take any position in the case on the merits thus far.

The terrorism exception to the FSIA also includes an exception for hostage-taking. The District of Columbia Circuit Court examined this exception in the case of *Simpson v. Socialist People's Libyan Arab Jamahiriya*,[251] finding that the plaintiff, in his or her initial pleadings, did not need to allege that that hostage-taker broadcasted his intended purpose to a third party.[252] The Court of Appeals determined that the FSIA definition of "hostage-taking" focuses on the state of mind of the hostage-taker, rendering it unnecessary to demonstrate that the defendant's purpose was communicated to a third party.

Yet another recent FSIA case in the U.S Court of Appeals for the Eleventh Circuit addressed whether an individual could sue the Government of Peru to recover a $5 million reward for providing information about a fugitive.[253] The court found that by eliciting help from outside the country, Peru had engaged in commercial activity. Under the FSIA, there is an exception to immunity when "the action is based upon a commercial activity carried on in the United States by the foreign state."[254]

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[245] *See* Michelle M. Meloni, *Regional Report: The Alien Tort Claims Act: A Mechanism for Alien Plaintiffs to Hold Their Foreign Nations Liable for Tortious Conduct*, 5 DETROIT C.L.J. INT'L L. & PRAC., 349 (1996).
[246] *Hilao*, at 1469-73.
[247] O'Connell, *supra* note 242, at 60.
[248] 461 F.3d 461 (2006).
[249] *Id*. at 466.
[250] *Sudan Loses Bid to Quash USS Cole Suit*, MSNBC.COM (Feb. 27, 2007).
[251] 470 F.3d 356 (D.C. Cir. 2006).
[252] *Id*. at 360 - 61.
[253] Guevara v. Republic of Peru, 468 F.3d 1289 (11th Cir. 2006).
[254] 28 U.S.C. § 1605(a)(2).

Administrative Procedure Act (APA)

The APA is useful in overcoming immunity in that it provides an immunity waiver, allowing suits against the United States.[255] Plaintiffs in *Rosner v. United States* invoked this waiver to apply property laws to U.S. military actions in Austria at the close of World War II.[256] Plaintiffs' property was originally confiscated in Hungary by the Nazis and shipped to Germany on what is known as the "Gold Train."[257] American soldiers intercepted the train in Austria and held it there for several months before determining that ownership could not be restored; the property was subsequently sold, distributed, and/or requisitioned.[258] The court ruled that if plaintiffs can prove that the military action was not during a time of war and thus not protected under the APA's military-authority exception, plaintiffs were entitled to a full accounting and return of their property.[259]

Plaintiffs invoke the APA in many of these cases to establish their right to review of "final agency action" for which there is no other adequate remedy.[260] The right to this review allows a plaintiff to challenge activities occurring abroad when those activities are the result of final agency action; however, it is difficult to determine that an action is final, and cases are often dismissed for lack of ripeness. For instance, in *Sabella v. United States*,[261] plaintiffs sought injunctive relief preventing enforcement of an International Dolphin Conservation Act ("IDCA") provision banning the use of purse seine nets on vessels operated by persons subject to U.S. jurisdiction.[262] Plaintiffs claimed jurisdiction under the APA on the grounds that a letter from the National Oceanic and Atmospheric Administration's General Counsel stating the probability of the IDCA's application to the vessel in question was a final agency action.[263] The court determined that the letter was not a "final" action,[264] yet the extraterritorial application of the IDCA would likely have come under the court's jurisdiction otherwise.

Standing

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[255] *See* 5 U.S.C. § 702.
[256] Rosner v. United States, 231 F. Supp. 2d 1202, 1211(2002).
[257] *See id*. at 1204 - 1205.
[258] *See id*. at 1205.
[259] *See id*. at 1212, 1218.
[260] 5 U.S.C. § 704.
[261] 863 F. Supp. 1 (1994).
[262] *See id.* at 2
[263] *See id.* at 3.
[264] *See id.* at 5.

Standing poses another obstacle to domestic enforcement. The United States Supreme Court addresses standing under the U.S. Constitution's Article III requirement that the Court may only decide a "case or controversy."265 The Court has determined that, for citizens bringing environmental suits, the constitution requires: (1) an injury in fact (actual or imminent), (2) a causal connection between the injury and the alleged conduct, and (3) that the Court's decision could offer relief or redress.266 "Injury in fact" has been defined by the Court to include recreational or aesthetic damage along with traditional economic or physical damage, although "[i]t requires that the party seeking review be himself among the injured."267 Many courts find that in order for an international law to be the basis of a cause of action, the cause must be clearly implied,268 or even explicit, as seen in *Beanal* and *Flores*.269

Forum non conveniens

Forum non conveniens allows courts to dismiss suits for being inconvenient to that forum. Many courts find suits "inconvenient" because they include application of international law, which is often not the law usually applied by the court.270 Furthermore, many courts refuse to decide cases involving what they deem to be "political questions" or matters touching on foreign affairs.271 In *Hilao*, however, the court refused to dismiss the case on *forum non conveniens* grounds because the Marcos family held assets in the U.S.272

In *Aguinda v. Texaco, Inc*.,273 the Second Circuit dismissed a class action suit brought by citizens of Ecuador and Peru claiming the oil company damaged the environment and caused personal injuries by polluting the rainforests and rivers. The court in *Aguinda* dismissed partly on grounds of *forum non conveniens*, finding Texaco had adequately demonstrated "(1) that there exists an adequate alternative forum, and (2) that the ordinarily strong presumption favoring the plaintiff's chosen forum is overcome by a balance of the relevant factors of private and public interest weighing heavily in favor of the alternative forum."274 *Aguinda* stands as an example of the uphill battle many environmental plaintiffs face when filing a suit in a domestic court concerning injuries inflicted abroad by domestic companies.

A decision out of the Northern District of California, however, provides some useful arguments against dismissal on *forum non conveniens* grounds, positing that such claims against

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265 *See* Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992). In *Lujan*, an environmental group challenged a statute that failed to include certain extraterritorial applications of the Endangered Species Act.

266 504 U.S. 555, at 560-61.

267 *See* Sierra Club v. Morton, 405 U.S. 727, 734-35 (1972).

268 *Id*. O'Connell also gives the example of *Committee of US. Citizen Living in Nicaragua v. Reagan*, 859 F.2d 929 (D.C. Cir. 1988) (holding the group had no cause of action to enforce judgments of the ICJ with which Reagan failed to comply by ordering military interference in Nicaragua).

269 Beanal v. Freeport-McMoran, Inc., 197 F.3d 161 (5th Cir. 1999); Flores v. Southern Peru Copper Corporation, 343 F.3d 140 (2d Cir. 2003).

270 O'Connell, *supra* note 242, at 69.

271 *Id*.

272 *Id*. at 63.

273 142 F. Supp. 2d 534 (S.D.N.Y. 2001), *aff'd*, 303 F.3d 470 (2d Cir. 2002).

274 *Id*. at 538.

domestic companies are particularly suitable for resolution by its own domestic courts, despite the extra- territorial nature of the injury. In May 1999, several Nigerian citizens brought suit against the Chevron Corporation of California claiming that human rights abuses resulted from the response by Chevron and the Nigerian military to an effort of local residents to protect the environment and human health. The plaintiffs allege that Chevron provided helicopter, boat, and personnel support and paid the Nigerian military to violently attack the peaceful occupation of an offshore oil rig by local residents in May 1998. The attack killed two protestors and injured hundreds of others. The protestors were demanding that Chevron meet with community leaders to discuss the destruction of the delta environment caused by oil exploitation activities. The plaintiffs are seeking damages and injunctive relief under the Alien Tort Claims Act275 and under California state law.

On June 16, 2000, Judge Charles Legge of the U.S. District Court for the Northern District of California denied Chevron's *forum non conveniens* motion and ordered discovery to proceed.276 Using the reasons for his decision in two earlier bench rulings on April 7, 2000, and May 12, 2000, Judge Legge found that "there are at least two categories of allegations here that do fall within the norms of international law, and that is the torture and summary execution and the prolonged arbitrary detention."277 He emphasized California has an interest in "regulating the conduct of corporations that are headquartered here, even if the conduct of the corporations is overseas."278 On June 16, 2000, Judge Legge filed a written order denying Chevron's motion to dismiss, and also granted the plaintiffs' request to file a newly amended complaint. The defendant's second motion for summary judgment was denied in 2004 and the case is proceeding to trial.279

The Supreme Court in the 2006-07 terms unanimously decided one of its few decisions regarding the doctrine of *forum non* conve*niens* . In *Sinochem International Co. Ltd. v. Malaysia International Shipping Corp.*,280 Malaysia International filed suit against Sinochem in a U.S. court after Sinochem alleged that Malaysia International had falsely backdated a bill and caused a Malaysia International ship to be arrested in a Chinese port. The issue that went up to the U.S. Supreme Court was whether a district court needed to determine it had jurisdiction before dismissing a case of *forum non conveniens* grounds, a point of disagreement between the federal courts of appeals. The Court held in its narrow decision that jurisdiction need not be established for a district court to dismiss an action on *forum non conveniens* grounds.

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[275] 28 U.S.C. § 1350.

[276] Bowoto v. Chevron, No. C-99-2506 (N.D. Cal. 16 June 2000) (order denying defendant's motion to dismiss; granting in part and denying in part plaintiffs' motion to amend; and denying defendants countermotion for sanctions).

[277] Transcript of Proceedings at 9:12-15, Bowoto v Chevron No. C-99-2506 (N.D. Cal. 12 May 2000).

[278] Transcript of Proceedings at 12:17-19,Bowoto v Chevron No. C-99-2506 (N.D. Cal. 7 April 2000).

[279] 312 F. Supp. 2d 1229 (N.D. Cal. 2004).

[280] 127 S. Ct. 1184 (2007).

CONCLUSION: THE UNCERTAIN FUTURE OF THE ATCA

Domestic strategies may yet be the most valuable and viable alternative to international ones for holding accountable a non-state actor acting under the auspices of or in collusion with a state. The recent decisions in *Beanal* and *Flores* and the rehearing in *Unocal* suggest, however, that a human right not widely recognized as jus cogens will not be cognizable under the ATCA unless other, more universally and unequivocally recognized human rights are violated by the challenged actions whether those of a nation-state or nonstate actor. In most cases, this impediment can be addressed by careful reformulation of a complaint to encompass any clearly recognized human rights violations—such as torture, forced labor, and various forms of abuse directed to identifiable, protected groups.

Utilization of both domestic and international fora and laws is the most effective way to compel recognition of international criminal law at all levels of authority. What, then, does the future hold for the Alien Tort Claims Act in enforcement of human rights generally, and international criminal law specifically?

As difficult as it is to determine empirically, the above analysis of cases after the U.S. Supreme Court's decision in *Sosa* demonstrates that the Court's decision has done little to impede or alter the number of cases brought or their outcomes under the ATCA. In this respect, Justice Scalia's dissent has proven to be correct: the Court's opinion did little to change the approach the lower federal courts had taken prior to the opinion in determining what human rights claims were sufficiently concrete and cognizable to proceed and which were not. The negligible impact of *Sosa* is entirely appropriate as it is, quite objectively, a case the Supreme Court under its traditional criteria for granting certiorari should not have taken in the first place. It was a case taken unwisely by the Court in response to an aggressive promotion of certiorari by the Justice Department in an attempt to eviscerate, through strained statutory interpretation, a long-established congressional enactment despite near universal interpretation of its fundamental criteria for cognizable human rights claims in the federal courts of appeals. The irony of this frustrated initiative in conservative judicial activism is demonstrated in the schizophrenic nature of the opinion itself. Having taken the case to resolve a conflict in ideology rather than precedent, the first half of the opinion reads as a condemnation of the far-reaching potential of the act, only to conclude that the act should be interpreted more or less as it has been by the federal courts since the *Filartiga* decision in 1980. That is precisely what the lower courts have done in response, citing the decision only to rely on prior pre- Sosa circuit court precedents to determine which human rights have sufficiently coalesced into a widely recognized customary human rights norm for the case to withstand a motion to dismiss. At that juncture procedurally, having survived a motion to dismiss, the outcome in any given case depends far more on the ability of the plaintiffs and their attorneys to muster the difficult- to- obtain factual support for demonstrating both the alleged violations and the involvement of the purported perpetrators.

Future utilization of the ATCA to protect human rights is not as secure as the above analysis might suggest. A significant impediment to the ATCA lurks in the footnotes of the *Sosa* opinion which has received little attention. In Part C of the opinion in which the Court sets forth the standards for assessing whether a particular claim is sufficiently definite and accepted to be a

cognizable claim, the Court adds, "And the determination of 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."281 This sentence is transparent judicial code for judges still being able to decide, in their substantial discretion, to use one of a number of judicial loopholes for refusing to decide a case the judge considers unwise, politically awkward, or perhaps just too difficult to manage. If there were any question as to whether or not this is what the Court's opinion is suggesting, that question is laid to rest by footnote 21 which comes at the end of that sentence.

There are two such "practical" openings for judicial discretion mentioned in footnote 21. One is the virtually indefinable, and thus open-ended, political question doctrine. Some federal judges have found straightforward questions of treaty interpretation to be untouchable political questions, while others have waded into very deep and murky waters of international law on highly politicized, multi-branch controversies. The Court's footnote refers by way of example to the class actions then pending in federal court against a number of corporations for their assistance to the regime of apartheid, despite the positions of both South Africa and the United States that these cases interfere with South Africa's policy and structural mechanisms for truth and reconciliation rather than so-called "victor's justice." To make its antipathy to such cases even more manifest, the Court contends that "in such cases, there is a strong argument that federal courts should give serious weight to the Executive Branch's view of the case's impact on foreign policy."282 Having rebuffed the executive branch's initiative to eviscerate the ATCA, the Court opens another door to executive branch influence in a more temporal way, which will depend on that branch's receptiveness or lack of receptiveness to human rights advocacy in U.S. courts generally as well as in a case specifically. Although it might be easy and perhaps generally corect to assume that a politically conservative executive poses more danger to utilization of the ATCA in federal courts, there is an ever-present temptation for a United States president to assume she is better equipped and more constitutionally authorized to address a political question than a federal court judge however legal in nature the issue might be. If nothing else, this footnote indicates that discretionary judicial decisions to dismiss cases as political questions are virtually immune from reversal as an abuse of discretion, particularly if the executive branch, or perhaps any of its allies, recommend dismissal. More significantly on a practical level, the Supreme Court's notation of the doctrine is implicit authorization for any federal judge who considers international law to be "foreign law" not suitable for adjudication in United States' federal courts to dismiss an ATCA case under the essentially irreversible shield of the political question doctrine.

The political question doctrine, however, has for some time now posed this shifting threat

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281 542 U.S. at 732-33 (Footnotes 20 and 21 omitted).

282 *Id*. Six months after the *Sosa* decision in December of 2004, the consolidated cases were dismissed against the multinational corporations on the grounds that aiding and abetting was not a sufficiently recognized theory of liability under international law to hold them responsible. In Re South African Apartheid Litigation, 346 F. Supp. 2d 538 (S.D.N.Y. 2004), discussed in text accompanying notes 145-152. The case was appealed to the Second Circuit Court of Appeals, and was criticized in both the *Boweto* and *Presbyterian Church* cases discussed *supra.* For the ultimate outcome in the case, see the text accompanying note 289 *infra.*

to meaningful, objective enforcement of international law as United States law in the federal courts. In that sense, the Court has merely provided a reminder to federal judges of its open-ended availability with an extra dose of Supreme Court approval. Far more problematic is the other possible limitation in that footnote on utilization of the ATCA -- exhaustion of remedies. As another example of a principle which may limit the availability of customary international law in the federal courts, the Supreme Court refers to the *amicus curiae* brief of the European Commission which argues that "basic principles of international law require that before asserting a claim in a foreign forum, the claimant must have exhausted any remedies available in the domestic legal system, *and perhaps in other fora such as international claims tribunals."* 283 The efficiency and advisability of exhaustion of remedies is generally acknowledged *within the context of two stable, comparable domestic legal systems and in some international legal systems based on primacy and not complementarity.* Exhaustion of remedies as a prerequisite to filing of an ATCA claim, however, does not fit either of these models, and would pose a substantial pre-filing hurdle, the complexity of which whatever its formulation would make determination of cognizable human rights claims seem simple by comparison. First and foremost with the diversity of legal systems globally, the Commission's assertion that exhaustion is a basic principle of international law transferable to the ATCA is highly debatable. Is there a norm of exhaustion so widely required that it is customary international law, or, even less likely, so common to most legal systems that it is a general principle of international law that would require its application as part of international law in a United States federal court? Are the parameters of its application so clear under international law (given the Court's concerns about the federal courts having to apply unclear international norms), or so clearly intended for application by Congress under the ATCA, that a United States federal court must require exhaustion of remedies in foreign courts or international fora before it may act on the authority granted to it by Congress to decide such cases? In the highly developed(and unusually so)European system for regional enforcement of human rights, exhaustion may certainly be a regional customary norm, but can that apply even to a domestic remedy in the United States, which itself still refuses to recognize the jurisdiction of either the Inter-American Commission or Inter-American Court of Human Rights over it under the American regional human right system? Presumably, even if such a doctrine were recognized, it would include the corollary principle that exhaustion need not be sought if is futile to do so, a principle that would preclude the requirement in many cases in which relief is sought under the ATCA precisely because the country in which the violations occurred is unable or unwilling to remedy the violations, or may even be a participant in the violations. Moreover, what would exhaustion of remedies mean in the divergent circumstances which can arise under the ATCA? How much of a "remedy" is enough? Is a truth commission or a government investigation, even if assumed to be legitimate, a sufficient remedy? A token remedy of civil damages in a legal system that places little value on a single human life, as occurred in the *Bhopal* litigation?

These questions only begin to address the complexities of imposing an exhaustion requirement on the ATCA in terms of its formulation requiring exhaustion in the country in which the alleged violations occurred. On a comparative law level, would an ATCA plaintiff have to demonstrate that the international law violation cannot be remedied in any domestic forum in which it could be adjudicated? Given that *Sosa* has limited ATCA claims to those

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283 *Id*.(emphasis added).

considered to trigger universal jurisdiction under international law, what domestic fora have to be exhausted? Would the myriad domestic law doctrines which are often used to preclude domestic adjudication as a discretionary matter, such as the United States' own political question doctrine, preclude an ATCA claim when there has been nothing remotely resembling a determination on the merits? If the possibility of a remedy in international fora is thrown into the mix, the exhaustion requirement is hopelessly indeterminable. How much identity of parties is necessary? Would the sometimes obscure and lengthy remedies available in the United Nations human rights system which end in a report be mandatory for the potential ATCA plaintiff? Is the harsher remedy of a criminal sanction an always adequate replacement for the civil damages remedy of the ATCA? Could the successful *Karadzic* case even have been brought during the 15 years that the International Court of Justice was considering the genocide case brought by Bosnia-Herzegovina against the former federal republic of Yugoslovia? The extraordinary sensitivity and political difficulty of a United States federal court evaluating the adequacy of of remedies in any domestic or international forum is far more troublesome than the difficulties presented by evaluating the illegality of the apartheid regime absent resort to the political question doctrine. Yet the Court says it would "certainly" consider the requirement of exhaustion of remedies "in an appropriate case." During the oral arguments in *Sosa*, Justice Breyer in particular seemed receptive to the limitations proposed in the European Commission's *amicus* brief, asking several questions regarding exhaustion and referring to the brief with unusually apparent approval. As one of the more liberal judges remaining on the Court(although admittedly one with a strong administrative procedure bent), Justice Breyer's possible support of such a limitation could some day pose a crippling blow to the availability of the ATCA to human rights plaintiffs. It is a safe assumption from his dissent that Justice Scalia and other Justices joining him, openly hostile to the federal courts' incorporation of "foreign law" into United States law and to going beyond the "plain language" of statutes to add statutory qualifications based on congressional intent, will not hesitate to do so when the outcome is to preclude ATCA litigation.

The case which may well bring the exhaustion requirement to the Supreme Court was recently decided. As discussed above, 284 a three-judge panel of the Ninth Circuit Court of Appeals in 2006 in *Sarei v. Rio Tinto*285 upheld claims of Papua New Guinea residents of war crimes, violations of the laws of war, racial discrimination, and violations of the Law of the Sea Convention against a multinational mining company for conspiring with the state to quash a miners' rebellion, explicitly stating that *Sosa* had not changed the test for cognizable ATCA claims previously stated by the Ninth Circuit in *In Re Estate of Ferdinand Marcos.*286 The mining company petitioned for rehearing. In an issue of first federal appellate impression,287

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284 See text accompanying notes 220-224 *supra.*

285 456 F.3d 1069 (9th Cir. 2006).

286 Discussed in text accompanying notes 8-10.

287 In Enahoro v. Abubakar, 408 F.3d 877(7th Cir. 2005), *cert. denied*, 546 U.S. 1175(2006) discussed in the text accompanying notes 216-219, the court of appeals held that claims of torture and extrajudicial killing could only be brought by aliens as well as U.S. citizens under the TVPA, and thus the plaintiffs were also required to exhaust their remedies as required explicitly by the TVPA. In dissent, Judge Cudahy disagreed that the TVPA was after its enactment the exclusive mechanism for claims of torture and extrajudicial killing brought by aliens, and noted

the Ninth Circuit Court of Appeals concluded that there is no requirement of an exhaustion of local remedies under the ATCA. Specifically noting the language in footnote 21 of *Sosa* that such a requirement could be considered "in an appropriate case," the court said that it lacked the authority to impose such a requirement under the ATCA. The court of appeals determined that insofar as the ATCA(unlike the TVPA) did not explicitly require exhaustion: (1)nothing in the ATCA's legislative history indicated the Congress intended for exhaustion to be required; and (2) that Congress' explicit inclusion of exhaustion in the TVPA if anything demonstrated that Congress viewed the ATCA as not requiring exhaustion, because otherwise requiring exhaustion in the TVPA would have been unnecessary. As to whether exhaustion should be read into the ATCA by the court as a matter of judicial discretion, the court of appeals relied quite correctly on *Sosa* for the proposition that the federal courts should not read into the ATCA susbstantive norms of customary international law lacking in clarity and universal acceptance, much less a procedural norm at best established as custom in the context of a few regional and international tribunals requiring exhaustion in a domestic forum(as opposed to the ATCA context of a domestic court evaluating the adequacy of remedies in other domestic courts or international fora).288

On May 13, 2008, the looming threat to the ATCA of the political question doctrine nearly materialized before the U.S. Supreme Court, in the very case the Court in footnote 21 noted as a likely example of a case in which the doctrine would warrant dismissal. After the federal district court dismissed the consolidated cases predicated on corporate complicity in the South African apartheid regime on the grounds that the theory of aiding and abetting was not sufficiently recognized under international law, the Second Circuit Court of Appeals reversed allowing the case to proceed, but directed the district court to consider grounds for dismissal it

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that even if exhaustion of remedies were required under the ATCA, pursuit of such remedies in Nigeria would have been futile. *Id.* at 892 (J. Cudahy, dissenting). No other court has concluded that the passage of the TVPA preempted aliens from bringing claims of torture and extrajudicial killing under the ATCA, and the decision has been criticized and rejected by other courts since. The legislative history of the TVPA demonstrates as clearly as legislative history ever does that the TVPA was intended by Congress to expand upon the ATCA by giving U.S. citizens a right to bring such claims in federal court as well as aliens, not that the TVPA was intended to restrict the reach of the ATCA for aliens with respect to such claims. The majority makes no mention of any of the legislative history of the TVPA. The majority opinion on this point is a extremely brief, woefully ill-reasoned, outcome-directed opinion, symptomatic of the ideological threat to the ATCA discussed in this conclusion. It will hopefully continue to be an anomaly in the Seventh Circuit Court of Appeals in limiting the availability of the ATCA on the most horrendous claims of human rights abuse.

[288] 487 F. 3d 1193 (9th Cir. 2007), *withdrawing* 456 F.3d 1069 (9th Cir. 2006). The court of appeals also held that the district court erred in dismissing all of the claims as political questions, and the racial discrimination claim under the act of state doctrine, despite a State Department Statement of Interest that the litigation would have a negative impact on the government's conduct of foreign relations. The court vacated for reconsideration of the district court's dismissal of the plaintiffs' UNCLOS claim under the act of state doctrine, and its dismissal of the racial discrimination and UNCLOS claims under the international comity doctrine. On August 20, 2007, the Ninth Circuit Court of Appeals voted for the case to be reheard en banc, and that the panel opinion should not be cited as precedent. 499 F. 3d 923 (9th Cir. 2007).

previously had not considered, including the political question doctrine. Ironically given the complicity nature of the case, financial and personal conflicts of four of the nine justices precluded a quorum of Justices able to decide whether to grant certiorari to reconsider the Second Circuit decision. In American Isuzu Motors, Inc. v. Ntsebeza, No. 07-919, therefore, the outcome of the inability of the Court to consider the appeal is the same as a tie vote–the Supreme Court non-decision makes no law and sets no precedent. The apparent reasons for recusal were Justices Alito's, Breyer's, and Roberts' ownership of stock in defendant companies, and the employment of Justice Kennedy's son with another defendant company.289

More optimistically and at the same time more cynically, the ATCA has garnered support from a new and influential source, the American class-action personal injury bar. Until relatively recently, ATCA cases were the exclusive province of human rights organizations and like-minded academics who sought to illuminate human rights abuses, with little or no hope of financial recovery against individual defendants with no resources or unobtainable resources. Renegade governments who did have deep pockets (often due to their human rights abuses) were immune from recovery under the Foreign Sovereign Immunities Act. Several legal developments, however, have made the pursuit of ATCA claims more potentially profitable. The labyrinthian provisions of the FSIA have made it easier for claims against a government to withstand a motion to dismiss, often all that is necessary to negotiate a settlement, financial or otherwise, against governments who are concerned about their international profile. The exception to immunity for state-sponsored terrorism has subjected other rogue states to ATCA claims for substantial monetary amounts at least potentially subject to seizure as foreign assets. Perhaps most importantly, the inroads human rights advocates have made in holding multinational companies responsible for human rights violations as accomplices to governmental violations have made substantial monetary settlements a possibility against corporations who cannot afford to be associated with slave labor and torture. Finally, the inequities of global wealth distribution have created a cadre of individual human rights violators with financial resources equivalent to many nations and multinational corporations.

One example of this new direction in ATCA litigation is the class action case pending in Miami federal district court by class-action lawyers representing thousands of camel jockeys from South Asia and Africa against individual sheiks living in the United Arab Emirates. The case alleges that thousands of boys were abducted, enslaved, and forced to ride racing camels for entertainment. The defendants, the ruler of Dubai and the finance minister of the U.A.R., have denied any liability. Jurisdiction in the United States is predicated on their property holdings in Florida and Kentucky.290 Although criticism of the involvement of the class-action firms as greed over principle appears to be common among human rights organizations and academics, the *realpolitik* of the ATCA at this point in time necessitates widespread support beyond its usual constituencies. The resources necessary for ATCA litigation are substantial, particularly after a case has withstood a motion to dismiss. Many of these resources in the past have come indirectly from academic institutions, and even more from large firms in any event who have

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289 Linda Greenhouse, "Conflicts for Justices Halt Appeal in Apartheid Case," N.Y.Times, A14, col. 5-6(May 13, 2008).

290 Adam Liptak, "Class Action Firms Extend Reach to Global Rights Cases," N.Y.Times, A27, cols. 1-4.

been involved through the good auspices of their attorneys doing pro bono work. Presumably neither would have objected to reimbursement of their considerable expenses if such reimbursement had been available. Although class-action lawyers might be involved in the hope of profits rather than reimbursement, it is nevertheless safe to say that a class-wide monetary settlement in a high-profile case against prominent defendants, whether wealthy individuals, a state with foreign assets, or a multinational corporation, has more of an actual impact on human rights compliance than a case by one individual against another or against a state that is morally and financially bankrupt. While the debate continues between the pragmatic advantages of the class-action bar's involvement and the ideals to be served the ATCA, hopefully all those who utilize the ATCA will recognize their common interest in its preservation. The biggest threat to the ATCA is not what it says on its face, or what Congress intended in 1789 or subsequently, as a matter of objective and principled legal analysis, but what limitations its opponents would impose upon it as a matter of political ideology, even when reaching such an outcome means betraying their own self-proclaimed axioms of legal construction.