Emory International Law Review

Volume 27 | Issue 1

2013

Reconsidering the Purely Jurisdictional View of the Alien Tort Statute

Kedar S. Bhatia

RECONSIDERING THE PURELY JURISDICTIONAL VIEW OF THE ALIEN TORT STATUTE

> *This old but little used section is a kind of legal Lohengrin; although it has been with us since the first Judiciary Act . . . no one seems to know whence it came.*[1]

ABSTRACT

The Alien Tort Statute was enacted by the United States Congress in 1789 and laid dormant for nearly two centuries. After being reanimated in 1980, the statute now allows United States federal courts to hear claims for violations of the law of nations stemming from a wide array of behavior. Such an extraordinary interpretation was far from inevitable, however, and remains on unsteady footing. This Comment argues that the statute should be regarded as purely jurisdictional, rather than as a hybrid provision both granting jurisdiction and authorizing a cause of action. The hybrid model requires judges to balance the specificity and clarity of international law against the practical consequences of recognizing a new cause of action, while the jurisdictional view tasks Congress with making those difficult, complex, and weighty policy decisions. A strictly jurisdictional view of the Alien Tort Statute not only provides a manageable framework for expanding the scope of the statute, but also adheres more closely to well-established views of federal common law. Recent litigation in the Supreme Court and in lower federal courts confirms the need for a new reading of this far-reaching statute.

---

[1] IIT v. Vencap, Ltd., 519 F.2d 1001, 1015 (2d Cir. 1975) (Friendly, J.) (citation omitted).

INTRODUCTION

The Alien Tort Statute[2] is a remarkable provision. This thirty-three word statute, lost for nearly two centuries in the Judiciary Act of 1789[3] and then in Title 28 of the U.S. Code,[4] now allows United States federal courts to hear claims stemming from a range of torture,[5] corporate malfeasance,[6] and human rights abuses[7] anywhere in the world.[8] Modern interpretation of the statute gives it an expansive reach; the statute opens domestic courts to plaintiffs alleging violation of a potentially unlimited number of customs that comprise the law of nations.[9] Due to its breadth, the statute has been touted as a powerful tool for advancing human rights interests around the world.[10] The statute has also been set on autopilot, meaning it will incorporate new human rights abuses as they become part of the law of nations.[11] The law of nations has been notoriously difficult to define, however, leaving courts to lean on a wide range

---

[2] 28 U.S.C. § 1350 (2012) ("The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."). This Comment uses the term "Alien Tort Statute" rather than "Alien Tort Claims Act" to maintain consistency with Supreme Court usage, see, for example, *Samantar v. Yousuf*, 130 S. Ct. 2278, 2282 (2010); *Rasul v. Bush*, 542 U.S. 446, 472 (2004), and because the phrase plainly refers to a portion of the United States Code rather than an act of Congress entitled "Alien Tort Claims Act."

[3] Act of Sept. 24, 1789, ch. 20, § 9, 1 Stat. 73, 77 (1789) (codified as amended at 28 U.S.C. § 1350).

[4] 28 U.S.C. § 1350.

[5] *E.g.*, Kadic v. Karadžić, 70 F.3d 232, 236–37 (2d Cir. 1995).

[6] *E.g.*, Sinaltrainal v. Coca-Cola Co., 578 F.3d 1252, 1263 (11th Cir. 2009).

[7] *E.g.*, Abebe-Jira v. Negewo, 72 F.3d 844, 846, 848 (11th Cir. 1996) (affirming a finding of liability for "torture and cruel, inhuman, and degrading treatment" under 28 U.S.C. § 1350).

[8] *E.g.*, *Sinaltrainal*, 578 F.3d at 1266; *Abebe-Jira*, 72 F.3d at 845–46; *Kadic*, 70 F.3d at 36–37, 242; *see also* Anthony J. Colangelo, *A Unified Approach to Extraterritoriality*, 97 VA. L. REV. 1019, 1026 (2011) ("[T]he relevant context is that the statute authorizes application not of uniquely national law but of international law, which applies everywhere and authorizes extraterritorial jurisdiction."). Following the Supreme Court's decision *in Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491 (U.S. Apr. 17, 2013), where the Court applied the principle of extraterritoriality, significant questions remain about the international scope of the Alien Tort Statute. *See infra* Part I.G.

[9] Sosa v. Alvarez-Machain, 542 U.S. 692, 725 (2004) ("[C]ourts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world . . . .").

[10] *See* Richard L. Herz, *The Liberalizing Effects of Tort: How Corporate Complicity Liability Under the Alien Tort Statute Advances Constructive Engagement*, 21 HARV. HUM. RTS. J. 207, 225 (2008) ("[W]here the political branches have made the broad determination that constructive engagement is the most effective policy for encouraging democratic reform and respect for human rights in a particular nation, [Alien Tort Statute] complicity liability serves a vital role; it ensures that individual corporations are held accountable on a case-by-case basis if they subvert that policy by aiding and abetting rights abuses."); *see also* Jordan J. Paust, *Litigating Human Rights: A Commentary on the Comments*, 4 HOUS. J. INT'L L. 81, 83 (1981).

[11] *Sosa*, 542 U.S. at 714, 732–33. *But see infra* text accompanying notes 218–227 (noting that the Alien Tort Statute provides a cause of action for only a subset of the full "law of nations" used in most contexts).

of definitions when resolving what behavior falls within the contours of the statute.[12]

But such an extraordinary interpretation was far from inevitable[13] and remains on unsteady footing.[14] On its face, the statute merely provides federal courts with "original *jurisdiction* . . . for a tort . . . committed in violation of the law of nations or a treaty of the United States."[15] Recent litigation in the Supreme Court of the United States has reinforced the need to retool this internally inconsistent and ultimately unsatisfying framework.[16] In *Kiobel v. Royal Dutch Petroleum Co.*, a case recently decided by the Supreme Court, briefing by the parties and amici made it more clear than ever that there is crippling confusion over both the theoretical foundation of the statute and its practical application. The parties in *Kiobel* struggled not only with maneuvering within the existing framework for litigating Alien Tort Statute claims, but also with much of the ground-level analysis of customary international law that courts must routinely perform.[17]

---

[12] The Supreme Court has defined the law of nations as "norm[s] of international character accepted by the civilized world . . . ." *Sosa*, 542 U.S. at 725. That Court and others have reached back to a seminal case in international law, *The Paquete Habana*, 175 U.S. 677 (1900), for guidance. *E.g.*, *Sosa*, 542 U.S. at 734; Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 789 (D.C. Cir. 1984) (Edwards, J., concurring); Filartiga v. Pena-Irala, 630 F.2d 876, 880–81 (2d Cir. 1980). Other courts, however, have used either a subset of the sources suggested by *The Paquete Habana* or have branched off into entirely different sources. *See* Howard S. Schrader, Note, *Custom and General Principles as Sources of International Law in American Federal Courts*, 82 COLUM. L. REV. 751, 763–65 (1982) (noting that courts in the United States are increasing their reliance on nonbinding treaties and resolutions to define customary international law).

[13] A symposium on the role of international law in federal courts held by the Virginia Journal of International Law in 2001 serves as a tremendous source of information on the Alien Tort Statute, and the symposium is especially useful because the views expressed therein were unencumbered by the Supreme Court's views on the matter that would come later in *Sosa*. *See* Symposium, *Foreign Courts and Foreign Affairs*, 42 VA. J. INT'L L. 365 (2002).

[14] A symposium held by this Journal in 2004 provided a series of invaluable first-impressions of *Sosa*. *See* Symposium, *Alien Tort Claims After* Sosa v. Alvarez-Machain, 19 EMORY INT'L L. REV. 69 (2005).

[15] 28 U.S.C. § 1350 (2012) (emphasis added).

[16] *See* Kiobel v. Royal Dutch Petroleum Co., No. 10-1491 (U.S. Apr. 17, 2013).

[17] *See* Brief for Petitioners at 43–47, *Kiobel*, No. 10-1491 (U.S. Dec. 14, 2011); Brief for Respondent at 27–43, *Kiobel*, No. 10-1491 (U.S. Jan. 27, 2012). The terms "customary international law" and "law of nations" are *not* interchangeable. *See* Harold J. Berman, *The Alien Tort Claims Act and the Law of Nations*, 19 EMORY INT'L L. REV. 69, 70–71 (2005) (discussing the many differences between the law of nations and customary international law); Joseph Sorrentino, Recent Decision, Flores v. Southern Peru Copper Corp., *343 F.3d. 140 (2d Cir. 2003)*, N.Y. INT'L L. REV., Winter 2004, at 133, 133 n.8 (citing Michael J. Glennon, *Can the President Do No Wrong?*, 80 AM. J. INT'L L. 923, 924–25 (1986); Michael T. Morely, Note, *The Law of Nations and the Offenses Clause of the Constitution: A Defense of Federalism*, 112 YALE L.J. 109, 142–43 (2002)) (noting the differences between the law of nations and customary international law). However, the Supreme Court and other federal courts, as well as many scholars, have used the terms synonymously. *See, e.g.*, Vietnam Ass'n for Victims of Agent Orange v. Dow Chemical Co., 517 F.3d 104, 116 (2d Cir. 2008) ("In

This Comment argues that the statute should be regarded as a purely jurisdictional provision, rather than as a hybrid clause granting jurisdiction *and* authorizing a cause of action. Instead of requiring courts to measure the specificity of international law and gauge the practical consequences of recognizing a new cause of action, the jurisdictional view would require Congress to make those difficult, complex, and weighty policy decisions. A purely jurisdictional view of the statute adheres more closely to well-established views of federal common law and also patches up many of the problems that have arisen in applying the statute. A strictly jurisdictional view of the Alien Tort Statute would also provide a manageable framework for expanding the scope of the statute as new international norms mature.

Part I.A of this Comment provides background information about the competing views of the Alien Tort Statute's origins. Part I.B describes litigation centered on the Alien Tort Statute during the late-seventeenth and early-eighteenth centuries. Parts I.C, I.D, and I.E summarize vitally important cases in the development of Alien Tort Statute jurisprudence, with a particular focus on how those cases treated the jurisdictional view and affected its long-term development. Part I.F discusses the Supreme Court's recent decision in *Sosa v. Alvarez-Machain* and shows how the decision may have been more unsettling than the Court intended. Part II begins by addressing key assumptions of the *Sosa* framework and then shows that *Sosa* failed to properly place the Alien Tort Statute within existing legal frameworks or to explain how it departed from those schemes. Finally, Part III explains how courts can more cleanly resolve contemporary issues in Alien Tort Statute litigation under the jurisdictional view than under the present model.

I. HISTORY OF THE ALIEN TORT STATUTE AND THE PURELY JURISDICTIONAL VIEW

The history of the Alien Tort Statute is a complicated one, but it partially explains the wealth of theoretical problems currently plaguing the statute. First passed in 1789 as part of the Judiciary Act, the statute was mentioned only occasionally during the early years of the republic. Looking at those early

---

the broader context, the law of nations has become synonymous with the term 'customary international law' . . . ."); Kadic v. Karadžić, 70 F.3d 232, 240 (2d Cir. 1995) ("[A]s a definitive statement of norms of customary international law . . . we ruled that '*official* torture is now prohibited by the law of nations.'" (citation omitted) (quoting Filartiga v. Pena-Irala, 630 F.2d 876, 884 (2d Cir. 1980)). *But see, e.g.*, Flores v. S. Peru Copper Corp., 414 F.3d 233, 247 (2d Cir. 2003) ("'[T]he law of nations,' . . . *as used in this statute*, refers to the body of law known as customary international law." (emphasis added) (citations omitted)).

cases can be frustrating; most provide only scraps of information about the original meaning, intent, or purpose of the statute. The statute then went into a long period of dormancy that ended in the 1960s, when federal appellate courts began to mention the statute in passing and, in one case, even claimed jurisdiction under its auspices. This period of revival coincided with a renaissance in the way the United States viewed its international responsibilities, its role in the world, and its need to protect human rights across the globe.

In 1980, the Alien Tort Statute received a galvanizing push from the Court of Appeals for the Second Circuit in the landmark case *Filartiga v. Pena-Irala*.[18] In the wake of that decision, scholars and judges leapt to the challenge of defining the statute and exploring different techniques for applying it to ever-changing situations. After two decades of debate and discussion, the Supreme Court finally stepped into the fray in 2004 with its decision in *Sosa v. Alvarez-Machain*. That decision settled the law in some ways, but in other ways it failed to provide lower courts with the guidance they needed to evaluate some of the most creative claims brought by plaintiffs. The half-measure provided by *Sosa* has resulted in confusion within the lower federal courts, forcing many into contorted positions when evaluating new claims under the statute. When the Court revisited the Alien Tort Statute nearly a decade after *Sosa*, it cut back on the practical application of the Alien Tort Statute but barely addressed doctrinal tension that continues to vex the statute.

A. Enactment and Original Intent

The Alien Tort Statute was passed into law as part of the Judiciary Act of 1789.[19] As it was written, the Act afforded district courts "cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States."[20] The Alien Tort Statute was included in Section 9 of the Judiciary Act, a section primarily dealing with exclusive jurisdiction in federal district courts and admiralty issues.[21] In this

---

[18] 630 F.2d 876 (2d Cir. 1980). In *Filartiga*, the Second Circuit held that, among other things, torture could constitute a violation of the law of nations in certain circumstances and that reading the Alien Tort Statute to provide jurisdiction for that violation of the law of nations did not breach the contours of Article III. *Id.* at 884–87.

[19] Act of Sept. 24, 1789, ch. 20, § 9, 1 Stat. 73, 77.

[20] *Id.*

[21] *Id.*; *see also* Ernest A. Young, *Preemption at Sea*, 67 GEO. WASH. L. REV. 273, 280 (1999).

original form the section closely mirrored language in Article I, Section 8 of the United States Constitution, which authorizes Congress to "define and punish . . . Offences against the Law of Nations."[22]

The intent of the First Congress remains unclear despite the attention of judges and legal scholars.[23] There are at least two general theories of the statute's origins: the citizenship view and the specific tort view. Advocates of the first view, the citizenship theory, believe the Alien Tort Statute was designed to give aliens redress for tort offenses committed by citizens of the United States against aliens *within United States borders*.[24] Under this theory, nations have an affirmative duty to hold their citizens accountable for harms against the citizens of other nations.[25] Proponents of the theory note that the United States had been embarrassed by the inability of its courts to adequately redress claims brought by two foreign diplomats under the Articles of Confederation.[26] The First Congress, following in the footsteps of the Continental Congress, took steps to ensure that the federal courts could provide aliens some form of redress in the United States.[27] This theory relies heavily on the writings of Emmerich de Vattel, particularly his treatise, *The Law of Nations*.[28] In his treatise, Vattel notes that states may ratify the behavior of their citizens through ex ante authorization of private action or through ex post failure to redress the wrongdoing.[29] At the time, the ratification of a citizen's

---

[22] U.S. CONST. art. I, § 8, cl. 10.

[23] *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 718–19 (2004) ("[D]espite considerable scholarly attention, it is fair to say that a consensus understanding of what Congress intended [when it drafted the Alien Tort Statute] has proved elusive."); *see also, e.g.*, JENNIFER K. ELSEA, CONG. RESEARCH SERV., RL32118, THE ALIEN TORT STATUTE, LEGISLATIVE HISTORY AND EXECUTIVE BRANCH VIEWS 8–11 (2003); Anthony J. Bellia Jr. & Bradford R. Clark, *The Alien Tort Statute and the Law of Nations*, 78 U. CHI. L. REV. 445 (2011); Thomas H. Lee, *The Safe-Conduct Theory of the Alien Tort Statute*, 106 COLUM. L. REV. 830 (2006).

[24] *See, e.g.*, Bellia & Clark, *supra* note 23, at 519–20 ("Taken in context at the time it was enacted, the language of the [Alien Tort Statute] did not encompass claims between aliens for acts occurring in other nations' territories because such claims did not involve violations of the law of nations by the United States or its citizens."); *see also id.* at 472–73 ("Of particular relevance to the [Alien Tort Statute], a nation had a duty to prevent its citizens from harming not only ambassadors and public ministers whom it received, but all foreign citizens it admitted within its borders . . . ." (footnote omitted)).

[25] *Id.* at 471–77.

[26] Carlee M. Hobbs, Note, *The Conflict Between the Alien Tort Statute Litigation and Foreign Amnesty Laws*, 43 VAND. J. TRANSNAT'L L. 505, 508 (2010) (discussing the embarrassment that arose when United States federal courts were unequipped to deal with a pair of claims regarding foreign diplomats in the 1780s).

[27] Bellia & Clark, *supra* note 23, at 504–05.

[28] *See, e.g.*, *id.* at 471–77.

[29] *Id.* at 474–75 (quoting 1 EMMERICH DE VATTEL, THE LAW OF NATIONS; OR PRINCIPLES OF THE LAW OF NATURE: APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS bk. II, §§ 77–78, at 145–46 (London, J. Newberry 1759) (1758)).

tort action against an alien transferred liability to the host nation and was grounds for a declaration of war.[30] The Alien Tort Statute could be seen as a direct attempt to ensure that the United States did not offend other nations or, perhaps more importantly, expose itself to a declaration of war.[31]

The second theory—and the one to which the Supreme Court would eventually subscribe—is that the statute was designed to serve as a cause of action for specific torts.[32] Proponents of this theory sometimes start from the premise that the Alien Tort Statute is purely jurisdictional on its face but then argue that the statute was *surely* designed to incorporate some claims at its inception.[33] The Supreme Court has noted that "although the [Alien Tort Statute] is a jurisdictional statute creating no new causes of action, the reasonable inference from the historical materials is that the statute was intended to have practical effect the moment it became law."[34] The Supreme Court concluded that the statute allowed claims for behavior that Sir William Blackstone identified as the principal violations of the law of nations: piracy, violations of safe conduct, and disputes regarding ambassadors.[35] Notably, scholars who subscribe to the specific-tort view of the statute often disagree about which torts the statute intended to cover.[36]

---

[30] *Id.* at 476 (citing 2 VATTEL, *supra* note 29, bk. III, §§ 24–26, at 10–11 (London, J. Coote 1759) (1758)).

[31] State courts were, and remain today, authorized to hear claims by aliens against citizens of the United States, but the First Congress may have been worried about the treatment that foreign nationals, especially British nationals, would receive in state courts. *See* Anthony D'Amato, Editorial Comment, *The Alien Tort Statute and the Founding of the Constitution*, 82 AM. J. INT'L L. 62, 65, 65 n.12 (1988); Lee, *supra* note 23, at 882.

[32] Sosa v. Alvarez-Machain, 542 U.S. 692, 724 (2004).

[33] *See, e.g.*, *id.*

[34] *Id.*

[35] *Id.*; *see also* Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT'L L. 587, 631–32 (2002); Hobbs, *supra* note 26, at 508. *But see* Lee, *supra* note 23, at 836 (arguing that the authors of the Judiciary Act meant to include only matters of safe conduct and not claims related to piracy or ambassadors). For the three primary offenses against the law of nations that Blackstone identified, see 4 WILLIAM BLACKSTONE, COMMENTARIES *68.

[36] *See, e.g.*, Lee, *supra* note 23, at 836 (arguing that only violations of safe conduct were originally covered by the statute); Joseph Modeste Sweeney, *A Tort Only in Violation of the Law of Nations*, 18 HASTINGS INT'L & COMP. L. REV. 445, 447 (1995) (arguing that only a narrow class of prize claims was covered). For a general overview of the statute's origins, see William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the "Originalists,"* 19 HASTINGS INT'L & COMP. L. REV. 221, 225–37 (1996).

B. Early Use

Uncertainty surrounding the original meaning of the statute is partially attributable to the dearth of early litigation involving the statute.[37] While the statute was discussed periodically in cases during the late-eighteenth and twentieth centuries,[38] there were only two successful applications of the statute between 1789 and 1980.[39] The Alien Tort Statute was first cited in a federal opinion in *Moxon v. The Fanny*,[40] which was decided in 1793, just four years after the statute was enacted as part of the Judiciary Act. In *Moxon*, the owners of a British ship that had been seized by a French schooner brought a bill of libel against the captain of the French vessel.[41] The British ship was captured well within the territorial waters of the United States, but the French captain challenged the jurisdiction of United States courts to hear the case, arguing that he was authorized by the French government to capture enemy English ships.[42] The district judge eventually dismissed the bill of libel on jurisdictional grounds, holding that the bill "cannot be called a suit for a tort only, when the property, as well as damages for the supposed trespass, are sought for."[43]

Although the district court declined jurisdiction under the Alien Tort Statute, the case is notable because it demonstrates the tremendous political forces at play in Alien Tort Statute cases. When *Moxon* was decided, the United States had only recently struck an uneasy peace with Great Britain.[44] When France went to war with Great Britain, the United States adopted a

---

[37] *See, e.g.*, Bradley, *supra* note 35, at 588 n.5 (citing thirteen cases from 1793 to 1980 in which a plaintiff unsuccessfully invoked the Alien Tort Statute as a basis for jurisdiction); Kenneth C. Randall, *Federal Jurisdiction over International Law Claims: Inquiries into the Alien Tort Statute*, 18 N.Y.U. J. INT'L L. & POL. 1, 4 n.15 (1985) (citing twenty-one published decisions prior to *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), in which a plaintiff asserted jurisdiction under the Alien Tort Statute).

[38] *Supra* note 37.

[39] The Alien Tort Statute was only upheld as a basis for jurisdiction in two reported cases prior to 1980. Bradley, *supra* note 35, at 588; Randall, *supra* note 37, at 5. The two cases upholding jurisdiction, *Adra v. Clift*, 195 F. Supp. 857, 865 (D. Md. 1961), and *Bolchos v. Darrel*, 3 F. Cas. 810, 810 (D.S.C. 1795) (No. 1607) ("Besides, . . . the 9th section of the judiciary act of congress gives this court concurrent jurisdiction with the state courts and circuit court of the United States where an alien sues for a tort, in violation of the law of nations, or a treaty of the United States . . . .") (citation omitted), were separated by almost a century.

[40] 17 F. Cas. 942 (D. Pa. 1793) (No. 9895).

[41] *Id.* at 942–43.

[42] *Id.* at 943.

[43] *Id.* at 948.

[44] Office of the Historian, *Milestones: 1784-1800—John Jay's Treaty*, U.S. DEP'T STATE, http://history.state.gov/milestones/1784-1800/JayTreaty (last visited April 1, 2013) ("Tensions between the United States and Britain remained high after the Revolutionary War . . . .").

position of neutrality.[45] In *Moxon*, the federal judge reiterated that the United States was "at peace with the king and people of Great Britain."[46] The judge noted that interference with foreign sovereigns and their agents is a power reserved to other branches of government.[47] The court stated that even if the offense was viewed as a violation of the United States' neutrality, "still the question recurs—which is the proper department of the neutral state to inquire into and vindicate this offence?"[48] The court concluded that the judiciary was not equipped to provide a complete remedy and must defer resolution of the case to the political branches.[49]

From 1795 to 1960, the Alien Tort Statute was rarely discussed in any meaningful way. When it was cited, it was often only in passing amidst discussions of concurrent federal and state jurisdiction, like in a pair of state court cases in 1816 and 1819.[50] Apart from those fleeting references and a handful of others,[51] the Alien Tort Statute remained dormant through the nineteenth and much of the twentieth centuries.

C. Abrupt Reanimation in the Twentieth Century

As the Alien Tort Statute lay dormant, the United States went through a series of seismic events that affected the courts and their view of international law. By the time the Alien Tort Statute reemerged from its dormancy in 1960, the political and legal landscape in America had transformed into something entirely foreign to the one in which the statute was enacted. Politically, the United States had evolved from a young nation, committed to neutrality, to an active international superpower, eager to assert its influence abroad.[52] Global

---

[45] Proclamation of Neutrality (April 22, 1793), *reprinted in* 1 AMERICAN STATE PAPERS: FOREIGN RELATIONS 140 (Walter Lowrie & Matthew St. Clair Clarke eds., Washington, D.C., Gales & Seaton 1833), *available at* http://memory.loc.gov/cgi-bin/ampage?collId=llsp&fileName=001/llsp001.db&recNum=4; *see also* David P. Currie, *The Constitution in Congress: The Third Congress, 1793-1795*, 63 U. CHI. L. REV. 1, 4 (1996).

[46] *Moxon*, 17 F. Cas., at 943; *accord id.* at 942.

[47] *See id.* at 947 ("[The judiciary has] none of the powers of peace or war.").

[48] *Id.*

[49] *See id.* ("If this court would assume jurisdiction, and could ascertain our territorial limits and restore the property, the outrage would still remain for the nation to vindicate . . . . Therefore the court could afford but a partial remedy: and it is best to be settled where the whole can be accomplished.").

[50] United States v. Lathrop, 17 Johns. Cas. 4, 9 (N.Y. Sup. Ct. 1819); Hartley v. United States, 4 Tenn. (3 Hayw.) 45, 51 (Tenn. 1816).

[51] *See supra* note 37.

[52] *See* Office of the Historian, *Milestones: 1945-1952—The Early Cold War*, U.S. DEP'T STATE, http://history.state.gov/milestones/1945-1952 (last visited April 1, 2013).

powers mobilized to defend human rights[53] and international organizations like the United Nations were given significant authority to enforce developing human rights norms.[54]

Much had also changed within domestic law. The Supreme Court eviscerated the general federal common law in its landmark decision, *Erie Railroad Co. v. Tompkins*,[55] significantly curtailing the ability of the federal courts to craft their own substantive law.[56] The United States was on the brink of a civil rights revolution that would fundamentally alter the way the government interacted with citizens.[57] Individuals also came to be viewed differently by international custom: They became direct operators of international law alongside states, which had previously been the lone direct participants.[58] Generally speaking, international law had also moved from the subject of niche treatises to a complex, increasingly sophisticated body of

---

[53] MICHAEL FREEMAN, HUMAN RIGHTS: AN INTERDISCIPLINARY APPROACH 32–35 (2002). The nation's involvement in the Nuremberg Trials, for example, marked an important change in the way the United States viewed legal structures around the world. For a sophisticated look at the legacy of the Nuremberg Trials in United States law, see Sandra Coliver, *Bringing Human Rights Abusers to Justice in U.S. Courts: Carrying Forward the Legacy of the Nuremberg Trials*, 27 CARDOZO L. REV. 1689 (2006).

[54] *See* FREEMAN, *supra* note 53, at 42–51.

[55] 304 U.S. 64 (1938).

[56] *See infra* Part II.B.1.i.

[57] *See* CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION 12–13 (1990) ("Between the New Deal and the 1980s the United States witnessed a rights revolution . . . . [I]nspired by the civil rights movement, Congress created regulatory programs as a means of furnishing government protection against the multiple hazards of industrialized society."); *accord id.* at 24–46.

[58] DAVID BEDERMAN, THE SPIRIT OF INTERNATIONAL LAW 89 (2002) ("[T]he real revolution in the subjects of international law has been in the recognition of individuals as capable of both exercising international rights and respecting international obligations. This development, standing alone, has been what transformed a law of nations—the exclusive preserve of states, national interests, and sovereignty—into today's dynamic international law. Persons are no longer the passive objects of international legal action, things on which states act at their whim."). Although Bederman and others saw the evolution of rights as somewhat linear—running from state recognition only to both state and individual recognition—others saw the development of the law in this field as somewhat cyclical. *See, e.g.*, Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 794 (D.C. Cir. 1984) (Edwards, J., concurring) ("That the individual's status in international law has been in flux since section 1350 was drafted explains in part the current mix of views about private party liability. Through the 18th century and into the 19th, writers and jurists believed that rules of international law bound individuals as well as states. In the 19th century, the view emerged that states alone were subjects of international law, and they alone were able to assert rights and be held to duties devolved from the law of nations. Under that view—which became firmly entrenched both in doctrine and in practice—individual rights existed only as rights of the state, and could be asserted, defended or withdrawn by the state. In this century, once again writers have argued that both the rights and duties of international law should be applied to private parties. However, their discussions are more prescriptive than descriptive; they recognize shifts in firmly entrenched doctrine but are unable to define a clear new consensus. And for each article sounding the arrival of individual rights and duties under the law of nations, another surveys the terrain and concludes that there is a long distance to go." (citations omitted)).

law.[59] Not least among the changes in international law was a widespread codification of the law of nations, a trend recognized by scholars as early as the 1910s.[60]

Against that backdrop of change, the Alien Tort Statute received its first substantive mention in a judicial opinion in more than 165 years when, in 1960, the Court of Appeals for the Second Circuit decided *Khedivial Line, S.A.E. v. Seafarers' International Union.*[61] In that case, the Court of Appeals was asked to consider whether the owners of a foreign ship could sue the local chapter of a union for organizing a protest of the ship's workers.[62] In a per curiam opinion, the court briefly considered whether the Alien Tort Statute

---

[59] *See* Symposium, *The Politics of International Regime Complexity*, 7 PERSP. ON POL. 13 (2009); Joel P. Trachtman, *The International Economic Law Revolution*, 17 U. PA. J. INT'L ECON. L. 33, 40–43 (1996) (noting the decline in the private international law). Notably, judges and scholars have wrestled with the role of international law in domestic courts throughout the nation's history. *E.g.*, Hilton v. Guyot, 159 U.S. 113, 163 (1894) ("International law . . . — including not only . . . the law of nations; but also questions arising under . . . private international law . . . — is part of our law, and must be ascertained and administered by the courts of justice . . . ."); The Nereide, 13 U.S. (9 Cranch) 388, 423 (1815) ("[T]he Court is bound by the law of nations, which is a part of the law of the land.").

[60] *See* Ernest Nys, *The Codification of International Law*, 5 AM. J. INT'L L. 871, 885 (1911) ("In the second half of the nineteenth century the idea of the utility of codification in the domain of the relations between states was sustained by publicists, by statesmen, and by learned men devoted to pacific ideas. These latter strove above all for set occasions for holding organized conferences in the different countries, conferences which would result in establishing powerful institutions such as the Permanent International Bureau of Peace and the Interparliamentary Union."); *see also id.* at 882 ("A powerful democratic movement was felt throughout almost the entire European continent in 1848. Among the reforms and advances which were demanded by public opinion were to be found going hand in hand with generous dreams, steps to the realization of which reactionary forces were able doubtless to oppose themselves during some time to come, but which in the end spelt the certainty of final triumph. One of these noble ideas was the codification of judicial rules for the relations of states."). *But see* DAVID J. BEDERMAN, CUSTOM AS A SOURCE OF LAW 117–67 (2010) (arguing that custom is alive and well within the spheres of both public and private international law). *See generally* George W. Wickersham, *The Codification of International Law*, 4 FOREIGN AFF. 237, 242–43 (1926) ("[E]fforts to formulate principles of international law and to secure general agreement upon them by civilized states have been made and are being continued at the present time. A century ago, the great English law reformer, Jeremy Bentham, began to agitate for the codification of international law. Sixty or seventy years after Bentham wrote, David Dudley Field published a code of international law, the inadequacy of which for present uses furnishes suggestions of the difficulties of anticipating the future relations of nations, as well as of making a code from the standpoint of one country alone, to say nothing of the task of reconciling differences of language, and of varying conceptions of legal principles in a code designed to govern all or at least a number of civilized nations."). For more information on the use of international law in United States courts, see INTERNATIONAL LAW IN THE U.S. SUPREME COURT: CONTINUITY AND CHANGE (David L. Sloss et al. eds., 2011).

[61] 278 F.2d 49 (2d Cir. 1960) (per curiam).

[62] *Id.* at 50. The panel consisted of Chief Judge Joseph Edward Lumbard and Judges Leonard Moore and Henry Friendly. *Id.* Judge Friendly would later write the majority opinion in another notable Alien Tort Statute case, *IIT v. Vencap, Ltd.*, 519 F.2d 1001 (2d Cir. 1975).

could provide a sound basis for the injunctive relief sought.[63] Noting first that "[d]espite the age of this section authorities applying it are scant,"[64] the panel went on to reject jurisdiction under the Alien Tort Statute.[65] The decision turned not on whether the law of nations applied to the defendant—at that time the most prominent question in Alien Tort Statute cases—but on whether the law of nations outlawed the defendant's behavior at all.[66] Two important sentences in the per curiam opinion set the stage for future Alien Tort Statute litigation:

> Plaintiff has presented no precedents or arguments to show either that the law of nations accords an unrestricted right of access to harbors by vessels of all nations or that, if it does, this is a right of the foreign national rather than solely of the nation. In any event the law of nations would not require more than comity to the ships of a foreign nation . . . .[67]

In a footnote, the panel cited international law as it exists through custom and treatises, pointedly noting that the United States was not a party to the central international convention on the matter.[68]

Although *Khedivial*'s significance has not been fully embraced by literature discussing the Alien Tort Statute,[69] the case left a lasting legacy in the field. Prior to *Khedivial*, the statute had primarily been used to provide jurisdiction for well-established, easily defined claims.[70] In *Khedivial*, however, the Second Circuit had to first determine whether the tort claim itself existed before it could determine whether a particular plaintiff had jurisdiction to bring suit under the statute.[71] The plaintiff in *Khedivial* asserted jurisdiction based on an innovative tort claim arising under the Alien Tort Statute so, for the first time, a court wrestled with whether a tort existed within the law of nations,

---

63 *Khedivial*, 278 F.2d at 50, 51–52.

64 *Id.* at 52.

65 *Id.* The court also distinguished the only other case that had ever upheld jurisdiction under the statute, *Bolchos v. Darrel*, 3 F. Cas. 810 (D.S.C. 1795) (No. 1607). *Khedivial*, 278 F.2d at 52. The main distinction between the two cases, according to the court in *Khedivial*, is that there was a violation of treaty obligations in *Bolchos* but there was no such violation in *Khedivial*. *Id.*

66 *See Khedivial*, 278 F.2d at 52.

67 *Khedivial*, 278 F.2d at 52 (footnote omitted) (citation omitted).

68 *Id.* at 52 n.1.

69 For instance, *Khedivial* was not mentioned at all in the Supreme Court's first substantive decision on the Alien Tort Statute, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

70 *See, e.g.*, *Bolchos*, 3 F. Cas. at 810 (discussing the Alien Tort Statute in a paragraph devoted exclusively to the jurisdiction of the court).

71 *See Khedivial*, 278 F.2d at 52.

rather than simply deciding whether the law of nations applied to the case before it.[72] Courts would continue to struggle with defining the law of nations for the next fifty years.

Through the rest of the 1960s and into the early 1970s, courts dabbled in the Alien Tort Statute without providing any meaningful guidance on how to identify its boundaries.[73] As a result, courts confronting the statute had the freedom to conjure up innovative tests to determine what behavior was protected by the "law of nations." In 1963, for example, the District Court for the District of Pennsylvania was asked to decide whether a ship's poor condition violated the law of nations.[74] The court held that there was not a violation of the law of nations, and in the process it crafted an especially interesting two-part test that focused on the structural concerns of public international law:

> [T]he conclusion of this court is that the phrase 'in violation of the law of nations,' for the purpose of deciding this issue, means, *inter alia*, at least a violation by one or more individuals of those standards, rules or customs (a) affecting the relationship between states or between an individual and a foreign state, and (b) used by those states for their common good and/or in dealings *inter se*.[75]

In reaching this state action view, the district court considered legal treatises contemporary to the Alien Tort Statute authored by, among others, James Kent and Jean-Jacques Burlamaqui.[76] The state action view was occasionally cited

---

[72] *Id.* at 51, 52.

[73] The most notable case from this period is *Adra v. Clift*, 195 F. Supp. 857 (D. Md. 1961). There, an alien brought suit against his ex-wife for forging their daughter's passport and making other misstatements in the immigration process when she entered the United States with their daughter. *Id.* at 859, 861, 864. The court found that—for only the second time ever—jurisdiction existed under the Alien Tort Statute. *Id.* at 865. Aside from that case, there were only a handful of interesting musings about the statute. *See, e.g.*, Nguyen Da Yen v. Kissinger, 528 F.2d 1194, 1201 n.13 (9th Cir. 1975) ("The illegal seizure, removal and detention of an alien against his will in a foreign country would appear to be a tort and it may well be a tort in violation of the 'law of nations.' . . . We are reluctant to decide the applicability of § 1350 to this case without adequate briefing. Moreover, we are reluctant to rest on it in any event. The complaint presently does not join the adoption agencies as defendants. . . . We are unaware whether such joinder is feasible." (citation omitted)).

[74] Lopes v. Reederei Richard Schroder, 225 F. Supp. 292, 294 (E.D. Pa. 1963).

[75] *Id.* at 297.

[76] *Id.* (citing 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 1 (N.Y., O. Halstead 1826)); *id.* at 296 (citing 1 JEAN-JACQUES BURLAMAQUI, THE PRINCIPLES OF NATURAL LAW 164 (trans. Thomas Nugent, Dublin, John Rice rev. & corr. 5th ed. 1791) (1764)).

in later cases,[77] although neither this test nor any other developed a significant following through the 1970s.

In many ways, confusion regarding the sudden revival of a long-dormant statute was predictable and understandable. Federal courts had been given no guidance by the Supreme Court on the proper interpretation of this arcane statute, but, in the Supreme Court's defense, it had few opportunities to provide meaningful guidance.[78] For the Alien Tort Statute to develop in a meaningful way, a federal court would have to inject force into the statute.

D. A Major Paradigm Shift: Filartiga v. Pena-Irala

The Alien Tort Statute finally received the jolt of energy that it needed in 1980, when the Court of Appeals for the Second Circuit decided the landmark case *Filartiga v. Pena-Irala*.[79] The case began with a suit by Dr. Joel Filartiga, a Paraguayan immigrant living in America, against Norberto Pena-Irala, also a Paraguayan immigrant.[80] Filartiga alleged that Pena, while serving as Inspector General of the local police, had tortured and killed Filartiga's son in Paraguay.[81] Filartiga's daughter learned of Pena's presence in the United States—and the fact that he had overstayed his visa—and notified United States officials.[82] She served Pena with a complaint as he was awaiting deportation in the Brooklyn Navy Yard.[83] Filartiga argued that he had jurisdiction under the Alien Tort Statute because torture, and specifically the brutal torture inflicted on his son, clearly violated the law of nations.[84]

---

[77] *See, e.g.*, Dreyfus v. Von Finck, 534 F.2d 24, 30–31 (2d Cir. 1976) (noting a "general consensus" that the law of nations "deals primarily with the relationship among nations rather than among individuals" and "has been held not to be self-executing so as to vest a plaintiff with individual legal rights").

[78] In the thirty years prior to *Filartiga*, the Alien Tort Statute was only meaningfully discussed in an opinion by the Courts of Appeals six times. Three of those opinions were never appealed to the Supreme Court; Huynh Thi Anh v. Levi, 586 F.2d 625 (6th Cir. 1978); IIT v. Vencap, Ltd., 519 F.2d 1001 (2d Cir. 1975); Khedivial, S.A.E. v. Seafarers' Int'l Union, 278 F.2d 49 (2d Cir. 1960) (per curiam). Three were appealed, but it is unclear whether the Alien Tort Statute was raised in the petitions for writ of certiorari. Benjamins v. British European Airways, 572 F.2d 913 (2d Cir. 1978), *cert. denied*, 439 U.S. 114 (1979); *Dreyfus*, 534 F.2d 24; Abiodun v. Martin Oil Serv., Inc., 475 F.2d 142 (7th Cir.), *cert. denied*, 414 U.S. 866 (1973) (noting that Justice William O. Douglas voted to grant certiorari).

[79] 630 F.2d 876 (2d Cir. 1980).

[80] *Id.* at 878.

[81] *Id.*

[82] *Id.* 878–79.

[83] *Id.* at 879.

[84] *Id.*

In his brief to the Second Circuit, Pena explicitly argued for a jurisdictional view of the Alien Tort Statute. He first argued that Filartiga's claim "cannot be said to 'arise under' any statute of the United States [because a] case does not 'arise under' a jurisdictional statute . . . ."[85] The brief went on to argue that jurisdictional provisions included in the Judiciary Act are categorically not self-executing but instead track the language from the Constitution providing jurisdiction to federal courts over claims defined by Congress.[86] The brief concluded with a lengthy argument about the separation-of-powers concerns raised by judicial intrusion on foreign relations.[87]

The Second Circuit expressly requested the views of the Department of State, which weighed in on behalf of Filartiga.[88] Citing many of the same sources as the plaintiffs, the State Department argued that the evolving law of nations could be enforced in federal court, and that torture by government officials clearly violated the law of nations as it existed in 1980.[89]

A panel of the Second Circuit unanimously held that it had jurisdiction under the Alien Tort Statute.[90] In an opinion authored by Judge Irving Kaufman, the panel employed a definition of the law of nations that had become popular through the landmark Supreme Court decisions *United States v. Smith*[91] and *The Paquete Habana*.[92] The law of nations, according to those cases, could be divined using:

> [T]he customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.[93]

---

[85] Brief of Defendant-Appellee in Support of Judgment of Dismissal at 7, *Filartiga*, 630 F.2d 876 (No. 79-6090), 1979 WL 200206.

[86] *See id.* at 27.

[87] *Id.* at 28–33.

[88] Memorandum for the United States as Amicus Curiae at 1, *Filartiga*, 630 F.2d 876 (No. 79-6090), 1980 WL 340146.

[89] *Id.* at 3.

[90] *Filartiga*, 630 F.2d at 878.

[91] 18 U.S. (5 Wheat.) 153 (1820).

[92] 175 U.S. 677 (1900).

[93] *Filartiga*, 630 F.2d at 880–81 (quoting The Paquete Habana, 175 U.S. 677, 700 (1900)).

The court also relied on *The Paquete Habana* to inform its decision that "courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today."[94] Because the behavior in question—torture in retaliation for Filartiga's political activity—clearly violated the law of nations, the panel held that Filartiga had stated a valid cause of action under the Alien Tort Statute.[95]

In arriving at that conclusion, the panel explicitly dismissed Pena's argument that the Alien Tort Statute was purely jurisdictional. Pena's "extravagant claim" that the "law of nations forms a part of the laws of the United States only to the extent that Congress has acted to define it" fails, the court held, because of "the numerous decisions applying rules of international law uncodified in any act of Congress."[96] The Second Circuit unequivocally adopted customary international law as federal common law,[97] a noteworthy event in the development of international law in United States courts.[98]

If previous Alien Tort Statute decisions had failed to spark meaningful interest within the bar or academia, the ambitious ruling[99] in *Filartiga* put an

---

[94] *Id.* at 881 (citing Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796)).

[95] *Id.* at 884.

[96] *Id.* at 886 (citing Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964); *The Paquete Habana*, 175 U.S. 677; *Ware*, 3 U.S. (3 Dall.) 199).

[97] *Id.* at 885. The wholesale adoption of international custom as federal common law in *Filartiga* is one of the most notable proclamations of the "modern position" that customary international law is part of federal common law. *See* Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modernist Position*, 110 HARV. L. REV. 815, 815, 831–34, 837 (1997). Professors Bradley and Goldsmith describe *Filartiga* as one of the "twin pillars" of the modern position. *Id.* at 849 (arguing that *Filartiga* and the Restatement (Third) of Foreign Relations Law are the central twin pillars of the modern position); *accord id.* at 831.

[98] Bradley & Goldsmith, *supra* note 97, at 851 ("No court prior to *Filartiga* in 1980 ever held that [customary international law] was part of the 'Laws of the United States' within the meaning of Article III . . . .").

[99] The Second Circuit panel in *Filartiga*, well aware of the importance of their decision, did not downplay the significance of their position as they waxed poetic in the final sentences of their unanimous opinion:

> In the modern age, humanitarian and practical considerations have combined to lead the nations of the world to recognize that respect for fundamental human rights is in their individual and collective interest. Among the rights universally proclaimed by all nations, as we have noted, is the right to be free of physical torture. Indeed, for purposes of civil liability, the torturer has become—like the pirate and slave trader before him—*hostis humani generis*, an enemy of all mankind. Our holding today, giving effect to a jurisdictional provision enacted by our First Congress, is a small but important step in the fulfillment of the ageless dream to free all people from brutal violence.

Filartiga, 630 F.2d at 890.

end to that slumber.[100] Almost instantly, academics and judges leapt to the challenge of defining this arcane statute.[101] The significance of the Second Circuit's decision in *Filartiga* was certainly not lost on its contemporary audience, nor have later scholars understated its importance.[102]

The Second Circuit's opinion attempted to settle many of the procedural, jurisdictional, and constitutional questions that had festered in previous cases, including many that would continue to arise over the coming decades. Among those clarifications were holdings that: (1) a broad reading of the statute did not violate various Article III constraints;[103] (2) the law of nations was essentially self-executing;[104] and (3) the law of nations was not limited to the rules of interaction between states.[105] If the Second Circuit's arguments held, as the *Filartiga* court hoped they would, federal courts would be primed to finally define the contours of this long-standing provision. That 28 U.S.C. § 1350 finally had an evocative label—the Alien Tort Statute—did not hurt its popularity.[106] *Filartiga*, "[t]ruly a case of landmark proportions,"[107] set the stage for future litigation surrounding the statute, including the D.C. Circuit's noteworthy opinion four years later in *Tel-Oren v. Libyan Arab Republic*.[108]

---

[100] *E.g.*, Jeffrey M. Blum & Ralph G. Steinhardt, *Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act After* Filartiga v. Peña-Irala, 22 HARV. INT'L L.J. 53 (1981); Farooq Hassan, *International Human Rights Law and the Alien Tort Statute: Past and Future*, 5 HOUS. J. INT'L L. 131 (1982); Lisa A. Rickard, Note, Filartiga v. Pena-Irala*: A New Forum for Violations of International Human Rights*, 30 AM. U. L. REV. 807 (1981). Although *Filartiga* injected significant force into the Alien Tort Statute, some scholars and judges would continue to question whether the Alien Tort Statute was a serious tool for enforcing human rights norms or merely "historical trivia." *E.g.*, Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 791 (D.C. Cir. 1984) (Edwards, J., concurring); Debra A. Harvey, Comment, *The Alien Tort Statute: International Human Rights Watchdog or Simply "Historical Trivia"?*, 21 J. MARSHALL L. REV. 341, 367 (1988) (concluding that the Alien Tort Statute "should not be characterized as an obsolete relic" because it could satisfy an "urgent need" in the world and potentially transform international human rights).

[101] *Supra* note 100.

[102] *E.g.*, David J. Bederman, *Dead Man's Hand: Reshuffling Foreign Sovereign Immunities in U.S. Human Rights Litigation*, 25 GA. J. INT'L & COMP. L. 255, 256 (1995–96) ("In a sense, all current human rights litigation owes its fortune to *Filartiga*."); Curtis A. Bradley, *The Costs of International Human Rights Litigation*, 2 U. CHI. J. INT'L L. 457, 457 (2001) ("International human rights litigation in US courts largely began in 1980, with . . . *Filartiga v. Pena-Irala*."); *see also* KENNETH C. RANDALL, FEDERAL COURTS AND THE INTERNATIONAL HUMAN RIGHTS PARADIGM 33–34 (1990).

[103] *Filartiga*, 630 F.2d at 885.

[104] *See id.* at 886–87.

[105] *Id.* at 885, 890.

[106] *Filartiga* features the first use of the term "Alien Tort Statute" in a published opinion, although the appellee's brief in that case also featured the now-popular phrase. *See* Defendant Appellee's Brief in Support of Judgment of Dismissal at 17, 21, 27, 33, *Filartiga*, 630 F.2d 876 (No. 79-6090), 1979 WL 200206. It is unclear where that term originated, as it also had not been previously used in popular scholarly articles.

[107] RANDALL, *supra* note 102, at 33.

[108] 726 F.2d 774 (D.C. Cir. 1984) (per curiam).

E. Filartiga*'s Progeny:* Tel-Oren v. Libyan Arab Republic

The next major test of the Alien Tort Statute revealed how little the Second Circuit's decision had actually settled the important jurisdictional question surrounding the statute. In *Tel-Oren v. Libyan Arab Republic*,[109] the Court of Appeals for the D.C. Circuit considered a claim brought by several Israeli citizens alleging torture and abuse regarding the infamous Coastal Road Massacre of March 11, 1978.[110] Thirteen armed members of the Palestinian Liberation Organization landed by boat along a highway between Haifa and Tel Aviv in Israel and captured two civilian buses, a taxicab, and a passing car.[111] Over several hours, the terrorists raced down the highway torturing passengers in the bus and shooting anyone in sight, killing thirty-four people and wounding eighty-seven.[112] At the time, it was "the worst terrorist attack in Israel's history."[113] Several survivors brought suit in district court under 28 U.S.C. § 1350, among other statutes.[114]

Judges Harry Edwards, Robert Bork, and Charles Henry Robb released a short, unanimous per curiam opinion affirming the trial court's dismissal of the case for lack of jurisdiction.[115] The panel also released three lengthy, largely divergent concurring opinions that set out each judge's reasons for affirming the trial court. Those concurring opinions would go on to become influential expositions on the different approaches to the Alien Tort Statute.[116] Judge

---

[109] Notably, certiorari was denied after the Court invited the Solicitor General to express the views of the United States. *Compare* 469 U.S. 811 (1984) (order calling for the views of the Solicitor General), *with* 470 U.S. 1003 (1985) (order denying certiorari). The Solicitor General recommended that the Court deny the petition for certiorari, noting that review by the Supreme Court was premature based on the relative lack of case law on the matter and the rapidly changing landscape. Brief for United States as Amicus Curiae at 9–11, Tel-Oren v. Libyan Arab Republic, No. 83-2052 (Jan. 30, 1985); *see also* BETH STEPHENS ET AL., INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS 12 n.51 (2d ed. 2008).

[110] For background information on the Coastal Road Massacre, see *A Sabbath of Terror*, TIME, Mar. 20, 1978, at 25.

[111] *Tel-Oren*, 726 F.2d at 776; *see also A Sabbath of Terror*, *supra* note 110, at 25.

[112] *Tel-Oren*, 726 F.2d at 776; *see also A Sabbath of Terror*, *supra* note 110, at 25.

[113] *A Sabbath of Terror*, *supra* note 110, at 25.

[114] *Tel-Oren*, 726 F.2d at 775. Plaintiffs also sought jurisdiction under 28 U.S.C. §§ 1330, 1331, and 1332. *Id.* Section 1330 provides jurisdiction to federal courts under the Foreign Sovereign Immunities Act, § 1331 provides federal question jurisdiction to federal courts for "all civil actions arising under the Constitution, laws, or treaties of the United States," and § 1332 provides for diversity jurisdiction. 28 U.S.C. §§ 1330–1332 (2012).

[115] *Tel-Oren*, 726 F.2d at 775.

[116] *See, e.g.*, Sosa v. Alvarez-Machain, 542 U.S. 692, 728, 731, 732 (2004) (quoting *Tel-Oren*, 726 F.2d at 813 (Bork, J., concurring); *Tel-Oren*, 726 F.2d at 781 (Edwards, J., concurring)) (citing *Tel-Oren*, 726 F.2d at 774 (per curiam) (noting that the differing approaches to the Alien Tort Statute are not new to the federal

Bork's concurring opinion garnered the most attention; he argued that the Alien Tort Statute should be read as a purely jurisdictional statute.[117] His opinion is also notable as the first time the purely jurisdictional position was adopted in a published opinion. Judge Bork read 28 U.S.C. § 1350 to "only confer[] jurisdiction to adjudicate those [cases] arising from other sources which satisfy its limiting provisions."[118] He had several concerns about the Alien Tort Statute as a cause-of-action-creating statute, but those concerns can largely be grouped into two categories: separation-of-powers concerns and political question concerns.

Judge Bork first took aim at the tendency of courts to aggrandize their own power by expanding their jurisdiction, which violates the principle of separation of powers.[119] He highlighted the long-standing presumption that federal courts will not expand their jurisdiction unless explicitly authorized by clear statutory language.[120] Because the statute "does not embody a legislative judgment that is either current or clear," Judge Bork believed that courts should err on the side of minimizing their own jurisdiction until Congress clearly states otherwise.[121] Second, Judge Bork noted his belief that United States courts were neither permitted nor well-equipped to make significant policy judgments that intertwine with the decision to grant a new cause of action.[122] Creating causes of action in the Alien Tort Statute context is an "impossibility . . . without an initial policy determination of a kind clearly for nonjudicial discretion."[123]

Despite his general reservations about creating new causes of action, Judge Bork acknowledged that the Alien Tort Statute could be read to allow claims that would have fallen under the "law of nations" when the statute was enacted.[124] Citing Blackstone's famous *Commentaries*, Judge Bork noted that principal offenses included: (1) violations of safe conducts; (2) infringement of the rights of ambassadors; and (3) piracy.[125] Although Judge Bork tempered

courts)); Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 150, 155, 164–65, 172, 173 (2d Cir. 2010) (Leval, J., concurring in the judgment), *aff'd on other grounds*, No. 10-1491, slip op. at 1 (U.S. Apr. 17, 2013).

117 *Tel-Oren*, 726 F.2d at 798–99 (Bork, J., concurring).

118 *Id.* at 811 (quoting Montana-Dakota Utils. Co. v. Nw. Pub. Serv. Co., 341 U.S. 246, 249 (1951)).

119 *Id.* at 799.

120 *Id.*

121 *Id.* at 813, 816.

122 *Id.* at 802–03.

123 *Id.* at 803 (quoting Baker v. Carr, 369 U.S. 186, 217 (1962)).

124 *Id.* at 813–15.

125 *Id.* at 813 (quoting 4 BLACKSTONE, *supra* note 35, *68).

his position slightly by allowing for the three original violations, history would remember his opinion for his general approach.[126]

Judge Edwards closely followed the methodology that the Second Circuit in *Filartiga* used. He affirmed the dismissal of the suit because: (1) the law of nations did not clearly prohibit terrorism; and (2) the Alien Tort Statute only applied to states and state actors.[127] Regarding the former, he noted that "nations of the world are so divisively split on the legitimacy of such aggression as to make it impossible to pinpoint an area of harmony or consensus."[128] Regarding the latter, and perhaps the more notable point, Judge Edwards held that torture by non-state actors was not a clearly established violation of international custom.[129] He addressed Judge Bork's jurisdictional claim quickly, noting that:

> The decision in *Filartiga* did not hold that, under section 1350, the law of nations must provide a cause of action—that is, a right to sue—in order to find jurisdiction. The existence of an express or implied cause of action was immaterial to the jurisdictional analysis of the Second Circuit. By focusing on this issue, Judge Bork has skirted the threshold question whether the statute even requires that the law of nations grant a cause of action. I do not believe that the statute requires such a finding, or that the decision in *Filartiga* may be lightly ignored.[130]

Judge Edwards later stepped out from the cover of *Filartiga* and challenged the merits of Judge Bork's argument. While Judge Bork argued that the political questions involved are better left to Congress, Judge Edwards argued that the decision to give political questions to the courts is *itself* a determination best left to Congress.[131] Judge Edwards likewise construed the statute as a mandate from Congress and viewed an abdication of that mandate as improper.[132] Judge Robb filed a comparatively short concurring opinion[133] that focused primarily

---

126 *See, e.g.*, *infra* text accompanying note 171.

127 *Tel-Oren*, 726 F.2d at 775, 795–96 (Edwards, J., concurring).

128 *Id.* at 795.

129 *Id.*

130 *Id.* at 780–81.

131 *See id.* at 789 ("If Congress determined that aliens should be permitted to bring actions in federal courts, only Congress is authorized to decide that those actions 'exacerbate tensions' and should not be heard.").

132 *Id.* at 790 ("I am the first to admit that section 1350 presents difficulties in implementation, but to construe it out of existence on [separation-of-powers] ground[s] is to usurp Congress'[s] role and contravene its will.").

133 *Id.* at 823–27 (Robb, J., concurring).

on "the inherent inability of federal courts to deal with cases such as this one."[134] His functional approach to the Alien Tort Statute stemmed from a belief that courts should not be in the business of determining "the international status of terrorist acts," especially when "such a review forces [courts] to dignify by judicial notice the most outrageous of the diplomatic charades that attempt to dignify the violence of terrorist atrocities . . . ."[135] Judge Robb noted that cases like *Tel-Oren* force courts to make serious diplomatic decisions that should be left to the political branches.[136]

The divergent views laid out in *Tel-Oren* came as a surprise to some scholars and lawmakers. Congress, for its part, sought to ensure that the Alien Tort Statute could provide at least a limited cause of action for certain basic human rights abuses and quickly passed the Torture Victim Protection Act of 1991.[137] The Torture Victim Protection Act—an explicit reaction to the uncertainty created by *Tel-Oren*—provides for a cause of action against individuals alleged to have committed torture or extrajudicial killings.[138] Although the Torture Victim Protection Act provided some individuals with a clear-cut right of action under the Alien Tort Statute, the act generally did little to settle the broader theoretical debate that had raged in *Tel-Oren*.[139]

As a whole, *Tel-Oren* is notable for bringing forth the purely jurisdictional view of the Alien Tort Statute and for bringing several important issues to the forefront of the debate. The fractured panel addressed many of the issues that other federal courts were handling in similar Alien Tort Statute cases, but the *Tel-Oren* judges were unable to reach agreement on the most important

---

134 *Id.* at 823.

135 *Id.*

136 *Id.* at 824 ("Judge Bork's opinion finds it necessary to treat the international status of the P.L.O., and to suggest that the organization bears significantly on the foreign relations of the United States. This is considerably more in the way of official recognition than this organization has ever before gained from any institution of the national government." (citation omitted) (internal quotation marks omitted)).

137 Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992). For information on Congress's reaction to *Tel-Oren*, see Philip Mariani, *Assessing the Proper Relationship Between the Alien Tort Statute and the Torture Victim Prevention Act*, 156 U. PA. L. REV. 1383, 1392–93 (2008).

138 *See* 137 CONG. REC. 2670 (1991) (statement of Sen. Arlen Spector) ("[T]he Terrorism Victim Protection Act of 1991 . . . will provide Federal jurisdiction for victims of torture . . . . One might think . . . it would be unnecessary to have legislation on such a subject, because torture is such a heinous offense . . . that the courts would have jurisdiction without a formal legislative measure. This is necessary because . . . a decision by the court of appeals for the District of Columbia circuit captioned *Tel-Oren* . . . ."); *see also* Bellia & Clark, *supra* note 23, at 460–61.

139 Bellia & Clark, *supra* note 23, at 460–61.

questions. In the decision's wake, courts flirted with the jurisdictional view,[140] but no judges offered a full defense of the jurisdictional view espoused by Judge Bork. Courts failed to coalesce around a single view of the Alien Tort Statute and struggled with its scope and depth in the years following *Tel-Oren*.[141]

F. Eventual Crystallization: Sosa v. Alvarez-Machain

In 2004, the Supreme Court finally took on the Alien Tort Statute. Weighing in 215 years after the statute was originally passed, the Supreme Court found that the Alien Tort Statute was not only a jurisdictional statute, but also permitted a subset of the law of nations to serve as valid causes of action in domestic courts. *Sosa v. Alvarez-Machain* involved a suit by Humberto Alvarez-Machain, a Mexican physician, against Drug Enforcement Agency officials and Mexican nationals who abducted him in his hometown in Mexico.[142] In the late-1980s, the federal government came to believe that Alvarez had been involved with the torture and murder of a Drug Enforcement Agency official in Guadalajara.[143] After he was indicted by a grand jury in 1990, the United States government reached out to the Mexican government for help bringing Alvarez to trial in the United States.[144] The Mexican government refused to help, and the Drug Enforcement Agency hired Mexican nationals, including Jose Francisco Sosa, to abduct Alvarez and bring him to federal authorities located in Texas.[145] Once in the United States, Alvarez moved to dismiss the charges against him, alleging that the United States government had violated the extradition treaty between the United States and

---

[140] *E.g.*, Jaffe v. Boyles, 616 F.Supp. 1371, 1378 (W.D.N.Y. 1985) ("The provisions of 28 U.S.C. § 1350 are jurisdictional; they do not create a cause of action for a plaintiff seeking recovery under a treaty." (citing Dreyfus v. Von Finck, 534 F.2d 24, 28 (2d Cir. 1976)); *see also* Martin H. Redish, *Specific Grants of Federal Question Jurisdiction*, *in* 15 JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE § 104.24[2], at 104-86.16(2)(a) n.1 (3d ed. 2012); 13D CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3585, at 767 n.11 (3d ed. 2008).

[141] *See, e.g.*, Sanchez-Espinoza v. Reagan, 770 F.2d 202 (D.C. Cir. 1985) (labeling the Alien Tort Statute an "obscure section of the Judiciary Act" that "*may conceivably* have been meant to cover only private, nongovernmental acts," but also addressing how the outcome of the case would be similar if the statute covered state acts as well (emphasis added)); Forti v. Suarez-Mason, 672 F. Supp. 1531, 1539 (N.D. Cal. 1987) ("As the cases and commentaries recognize, the history of the Alien Tort Statute is obscure." (citing IIT v. Vencap, Ltd., 519 F.2d 1001, 1015 (2d Cir. 1975)).

[142] Sosa v. Alvarez-Machain, 542 U.S. 692, 697–98 (2004).

[143] *Id.* at 697. Alvarez, a physician, allegedly prolonged the life of the DEA agent "in order to extend the interrogation and torture." *Id.* (citing United States v. Alvarez-Machain, 504 U.S. 655, 657 (1992)).

[144] *Id.* at 697–99.

[145] *Id.* at 698.

Mexico, and that the behavior of the Drug Enforcement Agency constituted "outrageous government conduct."[146] The district court dismissed the indictment and the Ninth Circuit affirmed that decision, but the Supreme Court reversed, holding that the nature of Alvarez's seizure did not affect federal courts' jurisdiction.[147] On remand, his claim was dismissed by the trial judge at the conclusion of the government's case against him.[148] Upon returning to Mexico in 1993, Alvarez brought suit under the Federal Tort Claims Act and the Alien Tort Statute.[149]

The majority opinion, authored by Justice David Souter and joined in various parts by between four and eight of his colleagues, first noted the Alien Tort Statute features many characteristics of a jurisdictional statute, but is ultimately more than purely jurisdictional.[150] The principal argument advanced by the majority is that a purely jurisdictional statute would have been "stillborn" at the time of its creation due to the absence of any specific cause-of-action-granting secondary statute.[151] Because there were no statutes enacted soon after the Alien Tort Statute explicitly authorizing causes of action under the statute, the majority in *Sosa* assumed *some* causes of action must have been built into the statute at the time of its enactment.[152] To solve the conflict between a statute that is jurisdictional but also somehow "live" at the time of enactment, the majority merged arguments from two of the three concurring opinions in *Tel-Oren*.[153] Looking to Judge Bork's opinion, the *Sosa* majority recognized the types of behavior that would violate the law of nations in 1789: piracy, actions against ambassadors, and violations of safe conducts.[154] The Court went one step further and, looking to Judge Edwards' opinion, held that new violations could be covered by the statute if they meet certain heightened requirements:

---

146 *Id.* (quoting *Alvarez-Machain*, 504 U.S. at 658).

147 *Alvarez-Machain*, 504 U.S. at 670.

148 *Sosa*, 542 U.S. at 698.

149 *Id.*

150 *Id.* at 714.

151 *Id.*

152 *See id.*

153 *Compare* Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 813 (D.C. Cir. 1984) (Bork, J., concurring) (noting Blackstone's three original law of nations violations), *and id.* at 788–89 (Edwards, J., concurring) (arguing that the Alien Tort Statute should be read to incorporate developing torts), *with Sosa*, 542 U.S. at 715 (noting the relevance of Blackstone's three original violations and the continuing development of the statute).

154 *Sosa*, 542 U.S. at 715.

> [W]e think courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized.[155]

The Supreme Court's two principal criteria—heightened specificity and widespread acceptance—are both required for recognition of a new tort,[156] but the Court also noted that these two factors are not dispositive of a claim.[157] Recognition of a new cause of action "should (and, indeed must) involve an element of judgment about the *practical consequences* of making that cause available to litigants in the federal courts."[158] In a pair of footnotes,[159] the Court suggested a handful of practical consequences that courts could consider, such as "whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued,"[160] whether a claimant has "exhausted any remedies available in the domestic legal system,[161] and whether "case-specific deference to the political branches" is due.[162]

The Supreme Court's new standard is as notable for what it included as for what it excluded. The Court implicitly dismissed the notion that an international law norm actionable under the Alien Tort Statute had to be "shockingly egregious"[163] or invoke "universal abhorrence."[164] Rather, the Court left open the possibility that a successful claim could be as well-defined and well-accepted as genocide or torture—two paradigmatic international law torts—but not shock the conscience in the same way.[165] The Court also declined to define the law of nations as used in the Alien Tort Statute with any

---

155 *Id.* at 725.

156 *See id.* at 732 ("[W]e are persuaded that federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted." (citing U.S. v. Smith, 18 U.S. (5 Wheat.) 153 n.a, 163–80 (1820)).

157 *See id.* at 732 n.20, 733 n.21.

158 *Id.* at 732–33 (emphasis added).

159 *Id.* at 732 n.20, 733 n.21.

160 *Id.* at 732 n.20.

161 *Id.* at 733 n.21 (citing Brief of Amicus Curiae the European Commission in Support of Neither Party at 24 n.54, *Sosa*, 542 U.S. 692 (No. 03-339), 2004 WL 177036).

162 *Id.*

163 *See, e.g.*, Zapata v. Quinn, 707 F.2d 691, 692 (2d Cir. 1983) ("[The Alien Tort Statute] applies only to shockingly egregious violations of universally recognized principles of international law." (citing Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980)).

164 *See, e.g.*, Linder v. Portocarrero, 963 F.2d 332, 336 (11th Cir. 1992).

165 *See Sosa*, 542 U.S. at 737. The Court noted that its international norm analysis "assumes that Alvarez could establish that Sosa was acting on behalf of a government when he made the arrest, for otherwise he would need a rule broader still." *Id.*

specificity beyond traditional definitions provided by well-known sources like *The Paquete Habana* and Blackstone's *Commentaries*.[166] The Court did, however, fold all international law, both public and private,[167] into the law of nations for the purposes of Alien Tort Statute litigation.[168] Applying the new standard, the Court ruled that the behavior of Drug Enforcement Agency officials in the case before it did not violate the law of nations.[169]

In a concurring opinion, Justice Antonin Scalia agreed with the Court's handling of the three original violations but disagreed with the creation of future violations based on contemporary international law norms.[170] Justice Scalia's arguments closely mirrored Judge Bork's analysis from twenty years prior, but Justice Scalia seemed especially concerned with judges "converting what they regard as norms of international law into American law."[171] The majority did not address Justice Scalia's political question doctrine-esque concerns.[172]

Justice Stephen Breyer wrote his own concurring opinion,[173] which was joined by Justice Ruth Bader Ginsburg,[174] where he added an additional consideration to the laundry-list of factors to use when determining the position of international law. He added that courts should consider "notions of comity that lead each nation to respect the sovereign rights of other nations by limiting the reach of its laws and their enforcement."[175] In Justice Breyer's view, courts should demand procedural *and* jurisdictional consensus before

166 *See id.* at 714–15.

167 For more information on the different types of international law, see, for example, Jack Goldsmith & Daryl Levinson, *Law for States: International Law, Constitutional Law, Public Law*, 122 HARV. L. REV. 1791 (2009).

168 *See Sosa*, 542 U.S. at 714–15.

169 *Id.* at 738 ("Whatever may be said for the broad principle Alvarez advances, in the present, imperfect world, it expresses an aspiration that exceeds any binding customary rule having the specificity we require. Creating a private cause of action to further that aspiration would go beyond any residual common law discretion we think it appropriate to exercise." (footnotes omitted)).

170 *Id.* at 739, 744, 747 (Scalia, J., concurring in part and concurring in the judgment).

171 *Id.* at 750.

172 *See id.* at 728–31 (majority opinion) (addressing Justice Scalia's concurring opinion without mentioning political problems).

173 *Id.* at 760–63 (Breyer, J., concurring in part and concurring in the judgment).

174 Justice Ginsburg authored a concurring opinion that focused on intricacies of the case related to the Federal Tort Claims Act. *Id.* at 751–60 (Ginsburg, J., concurring in part and concurring in the judgment).

175 *Id.* at 761 (Breyer, J., concurring in part and concurring in the judgment).

enforcing international norms.[176] His concurrence foreshadowed concerns raised by the Justices several years later in *Kiobel v. Royal Dutch Petroleum Co.*

In *Sosa*'s wake, courts were left to grapple with a difficult standard for Alien Tort Statute claims. Aside from the three original internationally accepted torts—piracy, violations of safe conduct, and infringement on the rights of ambassadors[177]—the Alien Tort Statute also provided remedies for violations of international law norms that were no less definite and no less accepted in the international community than the original torts.[178] The two required components were supplemented with a seemingly endless number of "practical consequences" that could weigh against enforcing an international norm by way of the Alien Tort Statute.[179]

Furthermore, federal courts were tasked with defining the peripheral characteristics of the Supreme Court's new causes of action. For instance, courts gradually adopted a heightened pleading standard for international law claims brought under the Alien Tort Statute.[180] They also grappled with defining the appropriate statute of limitations for international law torts[181] and whether foreign plaintiffs must exhaust local remedies before bringing claims in the United States.[182] Among the most well-publicized conflicts were heated

---

176 *Id.* at 762 ("Today international law will sometimes similarly reflect 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.").

177 *Id.* at 724 (majority opinion).

178 *See id.* at 732.

179 *Id.*

180 *See, e.g.*, Arndt v. UBS AG, 342 F. Supp. 2d 132, 138 (E.D.N.Y. 2004).

181 *See, e.g.*, Bowoto v. Chevron Corp., 557 F. Supp. 2d 1080, 1099–1100 (N.D. Cal. 2008).

182 *See, e.g.*, Flomo v. Firestone Natural Rubber Co., 643 F.3d 1013, 1025 (7th Cir. 2011); *see also* Ron A. Ghatan, Note, *The Alien Tort Statute and Prudential Exhaustion*, 96 CORNELL L. REV. 1273, 1274 (2011) (arguing that the Ninth Circuit's prudential exhaustion doctrine could reduce the number of claims a plaintiff with a weak nexus to the United States could bring under the Alien Tort Statute). *See generally* Regina Waugh, Comment, *Exhaustion of Remedies and the Alien Tort Statute*, 28 BERKELEY J. INT'L L. 555 (2010) (exploring exhaustion of remedies under international law, which requires seeking relief in the country where the harm occurred, and discussing how that principal would apply to the Alien Tort Statute).

debates over whether the Alien Tort Statute permits corporate liability[183] or liability for aiding and abetting heinous crimes.[184]

G. Limiting Extraterritoriality: Kiobel v. Royal Dutch Petroleum Co.

The Court sought to resolve one of the key questions lingering after *Sosa* when it granted certiorari in *Kiobel v. Royal Dutch Petroleum Co.* in 2011, but the case quickly evolved into a wholesale reconsideration of the Alien Tort Statute. The plaintiffs in *Kiobel* alleged that corporate defendants had committed extrajudicial killings, torture, and forced exile[185]—all claims that are clearly recognized as violations of the law of nations for the purposes of *Sosa*. The Second Circuit panel ruling on *Kiobel* held that, while the alleged crimes likely fell within the scope of the Alien Tort Statute, the case must be dismissed because law of nations does not recognize liability for corporate defendants.[186] The panel's ruling was plainly at odds with the conclusion reached by panels on other circuits, and the Supreme Court granted certiorari to consider the question.[187] The Supreme Court was therefore tasked with deciding an issue it had only briefly noted in *Sosa*[188]: whether corporate defendants could be held liable for atrocities under the Alien Tort Statute.

Both parties and dozens of amici weighed in on the question of corporate liability. At oral argument, however, several Justices challenged the assumption that cases with no obvious ties to the United States could still

---

183 *Compare* Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111 (2d Cir. 2010) (declining to hold corporations liable under the Alien Tort Statute), *aff'd on other grounds*, No. 10-1491 (U.S. Apr. 17, 2013), *with* Doe v. Exxon Mobile Corp., 654 F.3d 11 (D.C. Cir. 2011) (permitting suit against corporations), *and Flomo*, 643 F.3d 1013 (same), *and* Sarei v. Rio Tinto, PLC, 671 F.3d 736 (9th Cir. 2011), *vacated*, No. 11-649, 2013 WL 1704704 (U.S. Apr. 22, 2013) (same), *and* Romero v. Drummond Co., 552 F.3d 1303 (11th Cir. 2008) (same).

184 *Compare* Doe, 654 F.3d 11 (permitting aiding and abetting liability under the Alien Tort Statute), *with* Aziz v. Alcolac, Inc., 658 F.3d 388 (4th Cir. 2011) (declining to recognize aiding and abetting liability), *and* Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244 (2d Cir. 2009) (same). *See generally* Andrei Mamolea, *The Future of Corporate Aiding and Abetting Liability Under the Alien Tort Statute: A Roadmap*, 51 SANTA CLARA L. REV. 79, 120–32 (2011) (reviewing the conflict over aiding and abetting liability under the Alien Tort Statute and under international criminal law).

185 Kiobel v. Royal Dutch Petroleum Co., No. 10-1491, slip op. at 2 (U.S. Apr. 17, 2013).

186 *Kiobel*, 621 F.3d at 145 ("Together, those [international law] authorities demonstrate that imposing liability on corporations for violations of customary international law has not attained a discernible, much less universal, acceptance among nations of the world in their relations *inter se*. Because corporate liability is not recognized as a specific, universal, and obligatory norm, it is not a rule of customary international law that we may apply under the [Alien Tort Statute]." (citation omitted) (internal quotation marks omitted)).

187 132 S. Ct. 472 (mem.) (2011).

188 Sosa v. Alvarez-Machain, 542 U.S. 692, 732 n.20 (2004).

appear in American courts by way of the Alien Tort Statute.[189] Known as the principle of extraterritoriality, this matter had not been addressed in full by Alien Tort Statute cases in the past. The most vocal challenger was Justice Samuel Alito, who only a few minutes into the oral argument stated that, in his view, there was "no particular connection between the events here and the United States."[190] The crux of his concern, as he would later state it, was "what business does a case like [this] have in the courts of the United States?"[191] Chief Justice John Roberts echoed similar sentiments during oral arguments[192] and, once the matter was raised, even Justice Anthony Kennedy seemed interested in reconsidering whether the Alien Tort Statute had geographic boundaries.[193] Notably, neither Chief Justice Roberts nor Justice Alito was on the Court when it decided *Sosa*.[194]

Six days after oral arguments, the Court requested another round of briefing and argument on a new question: "Whether and under what circumstances the Alien Tort Statute, 28 U.S.C. § 1350, allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States."[195] The question of extraterritoriality—whether the Alien Tort Statute has extraterritorial reach—was the subject of another round of briefing by the parties and by several amici.

In a fourteen-page majority opinion, the Court held that the principle of extraterritoriality barred suits like the one in *Kiobel*.[196] Writing for a five-Justice majority, Chief Justice Roberts first acknowledged that the case no longer turned on whether corporate liability was possible, but instead on "whether a claim may reach conduct occurring in the territory of a foreign

---

189 *See* Adam Liptak, *Justices Begin Term by Hearing Case Again*, N.Y. TIMES, Oct. 2, 2012, at A16 ("[At oral argument] it quickly became clear that some of the justices were interested in addressing a broader question.").

190 Transcript of Oral Argument at 7, Kiobel v. Royal Dutch Petroleum Co., No. 10-1491 (U.S. Feb. 28, 2012).

191 *Id.* at 11. Justice Alito would go on to answer his own question: "There's no connection to the United States whatsoever." *Id.* at 12.

192 *E.g.*, *id.* at 8 ("[I]f there is no other country where this suit could have been brought, regardless of what American domestic law provides, isn't it a legitimate concern that allowing the suit itself contravenes international law?").

193 *Id.* at 13–14.

194 *See* Sosa v. Alvarez-Machain, 542 U.S. 692 (2004).

195 Kiobel v. Royal Dutch Petroleum Co., 132 S. Ct. 1738 (2012) (internal quotation marks omitted) (order restoring the case to the calendar for reargument).

196 Kiobel v. Royal Dutch Petroleum Co., No. 10-1491, slip op. at 14 (U.S. Apr. 17, 2013).

sovereign."[197] The Court answered that question in the negative, finding that the "presumption against extraterritoriality applies to claims under the [Alien Tort Statute], and that nothing in the statute rebuts that presumption."[198] At its simplest, the presumption against extraterritoriality is a canon of statutory interpretation that provides that "[w]hen a statute gives no clear indication of an extraterritorial application, it has none."[199]

In light of the presumption, any claims brought under the Alien Tort Statute must "touch and concern" the United States.[200] But it is not enough for a claim to simply affect objects on United States territory, the claims "must do so with sufficient force to displace the presumption against extraterritorial application."[201] The majority did little to clarify the remaining scope of the Alien Tort Statute or to clarify the types of cases that could still proceed under the statute.

In concurring opinions, several Justices weighed in on the future of the Alien Tort Statute. Justice Kennedy noted that "[t]he opinion for the Court is careful to leave open a number of significant questions regarding the reach and interpretation of the Alien Tort Statute."[202] Soon after the opinion was released, some commentators read this concurrence to signal that Justice Kennedy was interested in preserving the Alien Tort Statute in *Filartiga*-type cases, meaning those where the United States was the best venue available or where a strict application of the principle of extraterritoriality may be too harsh.[203]

Justice Alito, who had been by far the most vocal advocate for applying the principle of extraterritoriality during the first round of oral argument in *Kiobel*, wrote to clarify his understanding of how the presumption against extraterritoriality applies to the Alien Tort Statute.[204] In his view, the presumption is rather exacting; it would require that the "*domestic* conduct [be] sufficient to violate an international law norm that satisfies *Sosa*'s

---

197 *Id.* at 4.

198 *Id.* at 13.

199 *Id.* at 4 (quoting Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2878 (2010)).

200 *Id.* at 14; *see also Morrison*, 130 S. Ct. at 2883–84.

201 *Kiobel*, No. 10-1491, slip op. at 14 (citing *Morrison*, 130 S. Ct. at 2883–88).

202 *Id.* at 1 (Kennedy, J., concurring).

203 *See What is Left of the Alien Tort Statute after Kiobel v. Royal Dutch Petroleum? – Podcast*, Federalist Society Podcast (May 13, 2013), *available at* http://www.fed-soc.org/publications/detail/what-is-left-of-the-alien-tort-statute-after-kiobel-v-royal-dutch-petroleum-podcast (comments by Chimène Keitner).

204 *Id.* at 1–2 (Alito, J., concurring).

requirements of definiteness and acceptance among civilized nations."[205] Justice Breyer, writing for himself and three other Justices, authored an opinion concurring in the judgment only, in which he stated that he would not have applied the presumption against extraterritoriality.[206] Instead, he would apply a nexus-type requirement, where a suit could proceed if "(1) the alleged tort occurs on American soil, (2) the defendant is an American national, or (3) the defendant's conduct substantially and adversely affects an important American national interest . . . ."[207]

Kiobel raised as many new questions as it answered. It is clear that the Alien Tort Statute no longer permits "foreign-cubed" cases, or those that have foreign plaintiffs suing foreign defendants for acts committed on foreign soil.[208] "Foreign-squared" cases, however, may still have a future in federal courts under the statute if they touch and concern the United States with sufficient force,[209] including if they feature United States defendants or maybe even United States corporations.

While *Kiobel* significantly pared down the number of claims that could be raised under the Alien Tort Statute, the statute remains a viable tool for plaintiffs to bring claims under the law of nations. *Kiobel* also did little to changing the underlying law of nations analysis outlined in *Sosa*. If a plaintiff can satisfy the exacting nexus requirement, *Sosa* remains at the heart of their substantive claim.

II. ASSESSING THE HYBRID MODEL

Many of the debates that have lingered in the post-*Sosa* era have highlighted shortcomings in the Supreme Court's framework. Despite the best

---

205 *Id.* at 2 (emphasis added).

206 *Id.* at 3–6 (Breyer, J., concurring in the judgment).

207 *Id.* at 1–2.

208 *See* Oona Hathaway, Kiobel *Commentary: The Door Remains Open to "Foreign Squared" Cases*, SCOTUSBLOG (Apr. 18, 2013, 4:27 PM), http://www.scotusblog.com/2013/04/kiobel-commentary-the-door-remains-open-to-foreign-squared-cases; *see also* Donald Childress, Kiobel *Commentary: An ATS Answer with Many Questions (and the Possibility of a Brave New World of Transnational Litigation)*, SCOTUSBLOG (Apr. 18, 2013, 5:03 PM), http://www.scotusblog.com/2013/04/kiobel-commentary-an-ats-answer-with-many-questions-and-the-possibility-of-a-brave-new-world-of-transnational-litigation; Austen Parrish, Kiobel *Insta-Symposium: A More Positive Outlook for International Law*, OPINIOJURIS (Apr. 24, 2013, 2:45 PM), http://opiniojuris.org/2013/04/24/kiobel-insta-symposium-2.

209 Hathaway, *supra* note 208; *see also* Roger Alford, Kiobel *Insta-Symposium: Degrees of Territoriality*, OPINIOJURIS (Apr. 22, 2013, 9:56 AM), http://opiniojuris.org/2013/04/22/kiobel-insta-symposium-degrees-of-territoriality (identifying several types of activity that could touch and concern the United States).

intentions of the majority in *Sosa*, federal courts have struggled to consistently apply the test devised in *Sosa* for creating new causes of action. Without the guidance of a more fully-theorized framework, lower courts have haphazardly developed tests that lack internal coherence and cause disharmony among the circuits.

The Alien Tort Statute is considered both jurisdictional and cause-of-action-granting because the statute provides jurisdiction on its face and subsequently dictates the causes of action that can be brought under that jurisdiction.[210] A purely jurisdictional approach—the one advocated in this Comment—would read the statute as merely jurisdictional, leaving Congress to define claims that could be brought under the statute. This model would rely on Congress to make both the legal decision about whether a claim has become part of the law of nations and the political decision about whether United States foreign policy is best served by recognizing that cause of action in domestic courts.

The principal flaws in the hybrid model are of two kinds: theoretical and practical. The theoretical flaws stem from an atheoretical compromise on the scope of the claims allowable under the statute. Atheoretical decision-making occurs, as it did in *Sosa*, when courts construct functional tests but decline to provide the necessary background information with which to contextualize the new guidelines.[211] Without that necessary context, it is difficult for future courts to build on the new ruling, making confusion—and an eventual full-theorized reconceptualization—inevitable. Atheoretical decision-making occurred in *Sosa* because the Supreme Court largely ignored two important theoretical benchmarks that could have securely positioned the Alien Tort Statute: the principles embodied in *Erie Railroad Co. v. Tompkins* and the presumption against implied private rights of action. Part II.B will address these two available theories and then discuss the harm caused by ignoring them.

On a practical level, the Supreme Court's current model has been a failed experiment in judicial rulemaking and has produced wildly differing results on a number of important questions in lower federal courts. Those courts have struggled to apply the Supreme Court's heightened requirements to the complexities of divining customary international law, and much of the trouble

---

[210] *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 731–33 (2004).

[211] *See infra* text accompanying notes 331–336.

can be traced back to the lack of coherent theory underlying the *Sosa* standard. Courts have also struggled with the *Sosa* standard because of their longstanding structural difficulties with the sources of customary international law.

A purely jurisdictional view of the Alien Tort Statute is preferable to the hybrid model not only because of the latter's flaws, but also because the former would provide a more satisfactory resolution to the debates that currently plague the Alien Tort Statute. A comparison of the two frameworks, and analysis of their respective takes on contemporary debates, is provided in Part IV.

A. Assumptions of the Sosa *Framework*

The hybrid model rests on uncertain theoretical ground. It is therefore worthwhile to first consider the true underpinnings of the model—and the assumptions that the hybrid rests upon—before delving into the costs and benefits of the model itself. The most notable assumption of the hybrid model is its adoption of the revisionist view of customary international law, meaning the statute's purpose and intent constrain the causes of action that can be brought for violating of the law of nations. The model implicitly rejects the competing modern viewpoint, which assumes customary international law is already wholly present in domestic law.

Key questions arising from *Sosa* are how the law of nations *as seen through the lens of the Alien Tort Statute* differs from the law of nations generally,[212] and why the Supreme Court can hold that the Alien Tort Statute is merely jurisdictional[213] but also creates new causes of action.[214] This odd result occurred because the Supreme Court in *Sosa* implicitly adopted a revisionist view of international law, instead of the countervailing modern view. Revisionists believe that customary international law only becomes federal law when Congress affirmatively and clearly sanctions incorporation of

---

[212] *See* Kenneth Anderson, *The Rise of International Criminal Law: Intended and Unintended Consequences*, 20 EUR. J. INT'L L. 331, 350 (2009) ("Whatever exactly the law of nations means as an international law term, it means something different in the hands of American courts [in the context of the Alien Tort Statute] . . . .").

[213] *Sosa*, 542 U.S. at 724 (noting that the Alien Tort Statute is "a jurisdictional statute creating no new causes of action").

[214] *Id.* at 712 ("Although we agree the statute is in terms only jurisdictional, we think that at the time of enactment the jurisdiction enabled federal courts to hear claims in a very limited category defined by the law of nations and recognized at common law.").

international custom.[215] The modern view, by comparison, believes that there has been "a wholesale incorporation of all [customary international law] into domestic law: [Customary international law] just *is* federal law, always and everywhere, and no positive act by a domestic institution is required to make it effective within the domestic legal system."[216]

Although there is some disagreement about whether the Supreme Court adopted the modern or revisionist view of international law in *Sosa*,[217] that the Court relied on the history of the Alien Tort Statute to define the contours of the international law claims which could be brought under the Alien Tort Statute strongly suggests that the Court adopted the revisionist view.[218] The Court adopted customary international law only with the heightened requirements of the Alien Tort Statute, a view entirely consistent with the revisionist position that international law must be affirmatively sanctioned for use in United States courts.[219] If *Sosa* were to represent the modern view, the Court "would have to have meant that international norms failing to meet *Sosa*'s high standard of definiteness were not simply unactionable under the [Alien Tort Statute], but not part of [customary international law] at all."[220] The Court took a more modest approach—and intended a more modest result—by permitting only the international law that was, in its view, authorized by the Alien Tort Statute.[221]

---

[215] Curtis A. Bradley, Jack L. Goldsmith & David H. Moore, Sosa, *Customary International Law, and the Continuing Relevance of* Erie, 120 HARV. L. REV. 869, 886 (2007).

[216] Ernest A. Young, Sosa *and the Retail Incorporation of International Law*, 120 HARV. L. REV. F. 28, 28–29 (2007) (citing Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1561 (1984)); *see also* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 reporters' notes 3, at 50 (1987) (noting that "customary international law in the United States is federal law and its determination by the federal courts is binding on the State courts").

[217] *See* Bradley, Goldsmith & Moore, *supra* note 215, at 871. *Compare* Harold Hongju Koh, *The Ninth Annual John W. Hager Lecture, The 2004 Term: The Supreme Court Meets International Law*, 12 TULSA J. COMP. & INT'L L. 1, 12 (2004) (espousing the modern position), *with* Young, *supra* note 216, at 29 (espousing the revisionist position).

[218] *See* Bradley, Goldsmith & Moore, *supra* note 215, at 902–03.

[219] *See supra* note 215 and accompanying text.

[220] Young, *supra* note 216, at 29.

[221] *Id.* ("If [customary international law] just *is* federal law, then the Alien Tort Statute . . . ought to cover all [customary international law] claims, so long as they also qualify as torts. But *Sosa* rejected this view, holding instead that the [Alien Tort Statute] 'furnish[es] jurisdiction for a relatively modest set of actions . . . .'") (quoting Sosa v. Alvarez-Machain, 542 U.S. 692, 720 (2004)). Paradoxically, the jurisdictional force of the Alien Tort Statute is much broader than the power of courts to sculpt causes of action.

The retail incorporation[222] of customary international law into United States law has limited the applicable customary international law to what was positively authorized by Congress through the Alien Tort Statute.[223] Courts are not only tasked with interpreting whether a particular claim falls within the law of nations—a difficult task in its own right—but they must also decide whether a claim falls within "a narrow set of common law actions *derived from* the law of nations."[224] This particular subset of the conventional law of nations is comprised of those violations that can also be brought in federal court due to their well-defined form and well-accepted status.[225] The statute's other common name, the Alien Tort Claims Act,[226] also provides the impression that the statute itself is creating tort claims.[227]

The hybrid model adopted by *Sosa* was not always the predominant view among courts. Historians have noted that the framers of the Judiciary Act would be surprised to discover that a provision of the Judiciary Act, which focused on the jurisdiction of the federal courts, was itself crafting new causes of action.[228] In *Filartiga*, the Second Circuit "construe[d] the Alien Tort Statute, not as granting new rights to aliens, but simply as opening the federal courts for adjudication of the rights already recognized by international

---

222 The term "retail incorporation" has been most prominently used by Ernest A. Young. *See id.* Young defines the retail incorporation position as the view that "[customary international law] may *become* federal law, but only when federal governmental institutions take positive action to make it so." *Id.* The opposing view, supporting the "wholesale incorporation" of customary international law, is the belief that "[customary international law] just *is* federal law, always and everywhere, and no positive act by a domestic institution is required to make it effective within the domestic legal system." *Id.* at 28–29.

223 *See, e.g.*, *Sosa*, 542 U.S. at 721 (discussing petitioner's argument).

224 *Id.* (emphasis added).

225 *See supra* note 156 and accompanying text.

226 Although 28 U.S.C. § 1350 has been most frequently referred to as the Alien Tort Statute after that term was used throughout *Sosa*, it is still occasionally referred to as the Alien Tort Claims Act. *E.g.*, Douglas M. Branson, *Holding Multinational Corporations Accountable?: Achilles' Heels in Alien Tort Claims Act Litigation*, 9 SANTA CLARA J. INT'L L. 227 (2011); *see also supra* note 2.

227 *See* Bradley, *supra* note 35, at 592–93.

228 *Id.* at 593–94. Curtis Bradley states that it is unlikely that the First Congress intended the Alien Tort Statute to create a cause of action. *Id.* at 593. Bradley refers to William Casto's view that such a construction is "simply frivolous." *Id.* (quoting William R. Casto, *The Federal Courts' Protective Jurisdiction over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467, 480 (1986)) (internal quotation marks omitted). In support of this view, Bradley quotes Representative Fisher Ames's statement that "there is a substantial difference between the jurisdiction of the court, and the rules of decision" during the House debates on the Judiciary Act. *Id.* (quoting 11 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS 1357 (Charlene Bangs Bickford et al. eds., 1992)) (internal quotation marks omitted).

law."[229] *Filartiga* struck a bold modern position, but the framework devised in that case suffered from many of the same flaws as the later *Sosa* framework.[230]

The assumptions and threshold decisions made in *Sosa* have significant consequences for the application of the Alien Tort Statute. The most important assumption is that international law must be incorporated through an affirmative act of Congress, meaning the intent and purpose of the Alien Tort Statute are central to the development of causes of action arising under the law of nations. Pinning the development of federal common law to this ambiguous statute would topple an already trembling framework.

B. Theoretical Flaws in the Hybrid Model

The Alien Tort Statute's theoretical framework—the one patched together in the late-twentieth century and refined by the Supreme Court in 2004—suffers from a wealth of internal inconsistencies. That it causes some confusion is hardly surprising based on its long dormancy,[231] but the statute's modern incarnation is indefensible based on modern views about federal common law and implied private rights of action. The statute's theoretical problems center on the way it expands federal common law without fully rationalizing how the expansive law of nations fits into existing legal theories. There are certainly ways for courts to allow for the development of federal common law, but the Supreme Court in *Sosa* provided scant support for the development of common law here and it provided even less support for lower courts looking to formulate ancillary rules governing constantly evolving international norms. This Part proceeds by first addressing two important, intersecting bodies of law that *Sosa* failed to properly address—the *Erie* doctrine and the presumption against implied private rights of action—and then addresses why failure to properly contextualize *Sosa* makes it an atheoretical framework. It concludes by reviewing the harms of atheoretical rulemaking, particularly for a path-breaking decision like *Sosa*.

---

229 Filartiga v. Pena-Irala, 630 F.2d 876, 887 (2d Cir. 1980).

230 For example, the *Sosa* framework would still require courts to create causes of action out of customary international law, and those courts would still be disregarding the presumption against implied causes of action. *See infra* Parts II.B–C.

231 *See supra* text accompanying notes 52–60 (discussing legal and political events that significantly altered the landscape on which the Alien Tort Statute was originally erected).

1. Sosa*'s Disregard for* Erie *Principles*

The *Sosa* majority does its best to extend the original purpose of the Alien Tort Statute into the modern framework, but the majority fails to properly account for the role that *Erie Railroad Co. v. Tompkins* and its progeny played in reshaping federal judge-made law while the statute lay dormant. Whatever the original purpose of the statute—a matter that is itself hotly contested[232]—*Erie* has significantly narrowed the scope of permissible federal common law to the point that it would be entirely foreign to the drafters of the Alien Tort Statute.[233] The Court paid little heed to this paradigm shift, mentioning *Erie*'s presumption only among a "series of reasons [that] argue for judicial caution" when crafting causes of action under the Alien Tort Statute.[234]

a. The Erie *Framework*

The true scope of *Erie* has been simultaneously over- and undervalued. First-year law students are often told that federal common law has been abolished in the wake of *Erie*,[235] but a panel of scholars might argue that *Erie* did little more than establish that federal courts should apply state law in diversity cases.[236] The true answer lies somewhere in the middle.[237] It is clear that *Erie* abolished *general* common law,[238] but it is equally clear that specific areas of federal common law have survived,[239] and even thrived.[240] Courts

---

232 *See supra* Part I.A.

233 Sosa v. Alvarez-Machain, 542 U.S. 692, 745 (2004) (Scalia, J., concurring in part and concurring in the judgment) ("Post-*Erie* federal common lawmaking (all that is left to the federal courts) is so far removed from that general-common-law adjudication which applied the 'law of nations' that it would be anachronistic to find authorization to do the former in a statutory grant of jurisdiction that was thought to enable the latter.").

234 *Id.* at 725–26 (majority opinion).

235 *See* Michael Steven Green, Erie*'s Suppressed Premise*, 95 MINN. L. REV. 1111, 1112 (2011) (noting the popular misconception that *Erie* flatly overruled *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842)).

236 Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).

237 The disagreement between *Erie* fanatics and their detractors may come down to whether one looks only at the narrow holding of the case or at the way it has been interpreted—or misinterpreted—by courts to stand for a myriad of different holdings. As an initial matter, it is important not to overstate the relatively narrow holding of *Erie*. That case held only that in diversity cases, federal courts should apply state substantive law. *See* Craig Green, *Repressing* Erie*'s Myth*, 96 CALIF. L. REV. 595, 596 (2008). *But see* John Hart Ely, *The Irrepressible Myth of* Erie, 87 HARV. L. REV. 693, 695 (1974) ("Erie is by no means simply a case. Nor would it do it justice to call it a rule or even a principle, for it implicates, indeed perhaps it is, the very essence of our federalism." (footnotes omitted)).

238 *Erie*, 304 U.S. at 78 (plainly stating that "[t]here is no federal general common law").

239 Justice Brandeis' famous line from *Erie*—that "[t]here is no federal general common law," *id.*—is commonly oversimplified. Rather than clarifying that federal courts have no power to craft common law, Justice Brandeis meant only to quash the federal *general* common law:

have established a number of rules restricting the use of federal common law: It should only fill the gaps left by positive federal law[241] or occupy a limited number of statutorily or constitutionally sanctioned enclaves,[242] and it should develop "consistently with the policy choices reflected in extant federal law."[243]

The two forms of federal common law[244]—gap-filling and subject-matter enclaves—are each rooted in their own distinct principles.[245] Gap-filling common law is permitted as a way of ensuring uniform application of essential federal programs and enforcing the proprietary interests of the federal government.[246] The Alien Tort Statute plainly does not fall within the gap-filling exception of the *Erie* presumption. Subject-matter enclaves, on the other

---

> Like *Erie* itself, this phrase had nothing to do with separation of powers or new-myth aversion to federal common law. "Federal general common law" is different from "federal common law." The former refers to a specific kind of judicial decision, exemplified by *Swift*, which arose mainly in diversity cases. "Federal common law" is a vague term covering a broader swath of judicial product. . . . In context, *Erie*'s knell for federal general common law meant only that *Swift* was reversed, and for the Court's listed reasons. The Court did not attack federal common-law policymaking, and the specialized term "federal general common law" had no relevance outside *Swift* and its direct progeny.

Green, *supra* note 235, at 616–17. Justice Brandeis' use of the clarifying term "general" was not an accident. Earlier drafts of the opinion omitted the term, but it was added after the opinion was circulated to other chambers. *See* EDWARD A. PURCELL, JR., BRANDEIS AND THE PROGRESSIVE CONSTITUTION: *ERIE*, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA 106 (2000); *see also* Green, *supra* note 235, at 616 n.111.

240 *See* ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 6.1, at 367 (5th ed. 2007).

241 Bradley, Goldsmith & Moore, *supra* note 215, at 879–80.

242 Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 426 (1964). For further discussion of these types of federal common law, see Tex. Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630 (1981) and Note, *An Objection to* Sosa*—And to the New Federal Common Law*, 119 HARV. L. REV. 2077, 2081–83 (2006).

243 Bradley, Goldsmith & Moore, *supra* note 215, at 880.

244 Federal common law can also be categorized in other ways. Some scholars of federal courts organize common law rulemaking into one class that "defines primary legal obligations" and another that "shapes remedies to enforce primary obligations." RICHARD A. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 608 (6th ed. 2009). That framework highlights the distinction in the Alien Tort Statute context between the somewhat remarkable task of crafting a brand new cause of action—a primary legal obligation—and the more routine task of simply shaping the contours of the remedy for an existing cause of action.

245 Note, *supra* note 242, at 2081–83.

246 CHEMERINSKY, *supra* note 240, § 6.1, at 366; Note, *supra* note 242, at 2081–82. For an example of proprietary interest, see CHEMERINSKY, *supra* note 240, § 6.2 at 370 (discussing federal common law that developed around when loss of a federal check constituted theft). This basis for federal common law is also sometimes known as "interstitial" lawmaking. *E.g.*, Ernest A. Young, *Preemption and Federal Common Law*, 83 NOTRE DAME L. REV. 1639, 1643 (2008); *see also* Kevin R. Johnson, *Bridging the Gap: Some Thoughts About Interstitial Lawmaking and the Federal Securities Laws*, 48 WASH. & LEE L. REV. 879 (1991).

hand, tend to spring forth from either constitutional or statutory authorization and develop in support of more esoteric federal objectives such as foreign policy[247] and policing disputes between states.[248] For example, matters of international relations and foreign policy reside in a post-*Erie* subject-matter enclave—particularly as those topics concern the way nations regulate their interactions with one another and with their constituents.[249] The Supreme Court has noted that common law enclaves are "few and restricted,"[250] and there is a trend among federal courts towards further tightening the contours of subject-matter enclaves.[251] An enclave of common law—like a gap-filling provision—must still be rooted in an affirmative act of Congress, but courts may exercise their judgment when effectuating Congressional intent.[252]

The important question in the Alien Tort Statute context is whether customary international law relating to private rights of action occupies a narrow subject-matter enclave, whether custom is authorized by an explicit statutory provision, or whether it fails to meet the conditions for exemption from *Erie* on either ground.[253] In *Sosa*, the Supreme Court gave a split decision: The statute was jurisdictional on its face,[254] but because it occupied a pre-existing subject-matter enclave—a questionable conclusion—and seemed to signal some sort of affirmative intent—another questionable conclusion—federal common law could develop around the statute.

b. Sosa*'s Marginalization of* Erie

The Court in *Sosa* noted that a positive authorization of congressional intent was required to create an enclave of federal common law related to

---

247 *See* CHEMERINSKY, *supra* note 240, § 6.2.4, at 383–85.

248 *See id.* § 6.2.5, at 385–87.

249 *See* Anthony J. Bellia Jr. & Bradford R. Clark, *The Federal Common Law of Nations*, 109 COLUM. L. REV. 1, 76 ("[F]rom the early decades of the Republic and across changing eras of American legal thought, the Court has continued to enforce what were traditionally considered perfect rights of sovereign nations (or close analogues) as a means of upholding key allocation of powers principles."); *cf.* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 425 (1964) ("[T]he competence and function of the Judiciary and the National Executive in ordering our relationships with other members of the international community must be treated exclusively as an aspect of federal law.").

250 Wheeldin v. Wheeler, 373 U.S. 647, 651 (1963).

251 Bradley, Goldsmith & Moore, *supra* note 215, at 881.

252 *See* CHEMERINSKY, *supra* note 240, § 6.3, at 387.

253 The distinction between these two types of law has been discussed at length and, while most acknowledge that the distinction is a material one, scholars differ on exactly how to distinguish the two. *See, e.g.*, Goldsmith & Levinson, *supra* note 167.

254 Sosa v. Alvarez-Machain, 542 U.S. 692, 724 (2004).

private rights of action.[255] Relying on *Banco Nacional de Cuba v. Sabbatino*, the Court noted the "general practice" of "look[ing] for legislative guidance before exercising innovative authority over substantive law" because "[i]t would be remarkable to take a more aggressive role in exercising a jurisdiction that remained largely in shadow for much of the prior two centuries."[256] Unfortunately, the Court never followed up on the search for legislative guidance, being largely content to state the standard.

If the Court had followed through with its search for positive authorization of an "innovative authority," it would have turned up empty-handed.[257] Private rights of action cannot develop as federal judge-made law because they fail to meet the requirements that the Court has created for erecting a new common law enclave. There is certainly reason to believe that the original drafters of the Judiciary Act meant only to provide federal courts with a broad *cognizance* to hear cases, rather than the authority to craft the causes that were permitted under that grant of jurisdiction.[258] Curtis Bradley[259] and William Casto[260] have independently explored the legal landscape that existed in 1789, and both concluded that the Act was "designed to regulate the structure and jurisdiction of the federal courts, not rights to relief."[261] Casto even went so far as to call the cause of action construction of the Alien Tort Statute "simply frivolous."[262]

Even assuming that the framers of the Judiciary Act held the same "overarching concern that control over international affairs be vested in the new national government"[263] that the Second Circuit had in *Filartiga*, that

---

255 *Id.* at 727.

256 *Id.* at 726.

257 There are two possible sources of *modern* congressional consent to this reading of the Alien Tort Statute. The first is Congress's enactment of the Torture Victim Protection Act of 1991, which can be read to assume the hybrid view of the Alien Tort Statute. *See generally* Mariani, *supra* note 137. Those who want to find consent for the hybrid view could argue Congress passed the Act under the assumption that the Alien Tort Statute granted causes of action and only added a note to § 1350 as a way to clarify the intent of Congress on that specific point of law. A corollary to this principle might be that, by reacting to only one part of the Alien Tort Statute's modern interpretation, Congress has implicitly consented to the rest of the Alien Tort Statute framework developed by federal courts. The second source of modern consent is Congress's relative inaction on the matter of the Alien Tort Statute in the face of the judiciary's general trend of adopting the hybrid view. *See* Blum & Steinhardt, *supra* note 100, at 58. If that view holds true, the fact that Congress has not acted to reverse the federal courts implies congressional consent to the hybrid view.

258 Bradley, *supra* note 35, at 593–97; *see also* Bradley, Goldsmith & Moore, *supra* note 215, at 887–88.

259 Bradley, *supra* note 35, at 593–97.

260 Casto, *supra* note 228.

261 Bradley, *supra* note 35, at 593; *accord* Casto, *supra* note 228, at 478–80.

262 Casto, *supra* note 228, at 479–80.

263 Filartiga v. Pena-Irala, 630 F.2d 876, 887 (2d Cir. 1980).

concern must still be filtered through the intermediate *Erie* formulation. While the remedy for the First Congress' concern may have been to vest federal courts with the jurisdiction to hear a case, and to implicitly provide authority to develop common law pertaining to international norms, federal courts are no longer permitted to exercise that type of independent authority.[264] The equivalent solution to the problem that the Founders may have envisaged would be to give federal courts the jurisdiction to hear claims drafted by Congress, absent explicit authorization to the contrary.[265] Whatever historical support exists for this position is not certain enough to overcome the modern, heightened requirements that the Supreme Court has created when looking for legislative authorization to craft federal judge-made law.[266] In the absence of any clear affirmative authorization from Congress, *Erie* and its progeny caution against the development of those rights as federal common law.

2. Rejection of the Presumption Against Implied Private Causes of Action

The Supreme Court undervalued the longstanding presumption against inferring a private cause of action from the text of the Alien Tort Statute. As a matter of policy, the presumption against implied private causes of action is rooted in principles of separation of powers.[267] Federal courts are reluctant to expand their jurisdiction in the absence of explicit authorization from Congress.[268] This restraint has grown stronger in the face of *Erie* and its progeny.[269] Simply put, courts are no longer "in the free-wheeling days antedating [*Erie*]," where federal common law and implied causes of action could be loosely fashioned at the will of federal judges.[270]

a. The Supreme Court's Narrowing Stance

Despite their general hesitancy to recognize implied private causes of action, courts have occasionally recognized private causes of action in order to

---

264 *See* CHEMERINSKY, *supra* note 240, § 6.3.

265 *See id.*

266 Bradley, Goldsmith & Moore, *supra* note 215, at 879; *see also* notes 250–252 and accompanying text.

267 *Cf.* CHEMERINSKY, *supra* note 240, § 6.3.3, at 392.

268 *Cf. id.*

269 *Id.*

270 Wheeldin v. Wheeler, 373 U.S. 647, 651 (1963); *accord* CHEMERINSKY, *supra* note 240, § 6.3.3, at 393.

effectuate congressional intent.[271] Courts have "taken three different approaches, each more restrictive than the prior, in deciding when to create private rights of action."[272] The first approach—and the one most conducive to development of new implied causes of action—permits recognition of a new cause of action "where it would help effectuate the purpose for a statute and if no legislative history mitigated against authorizing such a remedy."[273] This approach uses the federal common law as an affirmative tool for furthering the federal interest, rather than as the narrow stop-gap measure that is conventional today.[274]

The Supreme Court narrowed the test for implied private causes of action a decade later with a series of cases[275] that culminated with *Cort v. Ash*.[276] In *Cort*, the Supreme Court constructed a four-part test for evaluating new implied causes of action that focuses on tailoring the remedy to the intent of the statute and to the specific plaintiff seeking relief.[277] The test was effective in limiting the adoption of new implied causes of action; the Court, "for the most part, . . . refused to create causes of action" under the new test.[278]

---

[271] CHEMERINSKY, *supra* note 240, § 6.3.3, at 393 ("There is no dispute that the basic inquiry is whether Congress intended, explicitly or implicitly, to create a private right of action."); *see, e.g.*, Cannon v. Univ. of Chi., 441 U.S. 677 (1979); *Wheeldin*, 373 U.S. 647.

[272] CHEMERINSKY, *supra* note 240, § 6.3.3, at 394.

[273] *Id.*

[274] *Compare* J.I. Case Co. v. Borak, 377 U.S. 426, 433 (1964) ("[I]t is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose."), *with* Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 68 (2001)Sosa v. Alvarez-Machain, 542 U.S. 692, 727 (2004) ("[W]e are reluctant to infer intent to provide a private cause of action where the statute does not supply one expressly.").

[275] *See, e.g.*, Sec. Investor Prot. Corp. v. Barbour, 421 U.S. 412, 415 (1975) (declining to recognize a cause of action for professionals looking to attempting to compel agency action); Nat'l R.R. Passenger Corp. v. Nat'l Ass'n of R.R. Passengers, 414 U.S. 453, 464–65 (1974) (declining to recognize a cause of action for passengers under the Amtrak Act).

[276] 422 U.S. 66 (1975).

[277] *Id.* at 78 ("First, is the plaintiff one of the class for whose especial benefit the statute was enacted—that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?" (citations omitted) (internal quotation marks omitted)).

[278] CHEMERINSKY, *supra* note 240, § 6.3.3, at 396. *But cf.* Superintendent of Ins. v. Bankers Life & Cas. Co., 404 U.S. 6 (1971) (recognizing a cause of action arising from a rule promulgated by the Securities and Exchange Commission); Allen v. State Bd. of Elections, 393 U.S. 544 (1969) (recognizing an implied cause of action under the Voting Rights Act of 1965).

Although the *Cort* test significantly narrowed the Court's previous approach,[279] there was nonetheless pressure to further tighten the standard.[280]

The tension between the two positions—one setting a limited but attainable standard for implied causes of action and the other advocating an even narrower standard—came to blows in *Cannon v. University of Chicago*.[281] *Cannon* centered on whether Title IX of the Education Amendments of 1972, which barred discrimination in education opportunities based on gender, provided a cause of action to a woman who was allegedly denied access to medical school based on her gender.[282] The Court held that the statute provided the plaintiff with a valid cause of action because she was "clearly a member of that class for whose special benefit the statute was enacted."[283] Although the case is notable as a rare instance in which the Court crafted a cause of action under the *Cort* standard, it is also notable for Justice Powell's influential dissenting opinion.[284] In his dissenting opinion, Justice Powell argued that the Court should "reappraise [its] standards for the judicial implication of private causes of action" because the *Cort* factors "cannot be squared with the doctrine of separation of powers."[285] Instead, Justice Powell argued the Court should recognize implied causes of action only with "the most compelling evidence of affirmative congressional intent."[286] He declined to use implied causes of action to supplement the purposes of a statute and instead focused on effectuating only the most plainly stated intent of Congress.[287]

Justice Powell's intent-centric approach quickly became the third major approach to implied causes of action. In 1979, the same year the Court decided *Cannon*, it also decided two cases that relied almost exclusively on congressional intent. In *Touche Ross & Co. v. Redington*,[288] decided one month after *Cannon*, the Court declined to adopt a new cause of action under the Securities and Exchange Act, noting "our task is limited solely to determining whether Congress intended to create the private right of action

279 *See* CHEMERINSKY, *supra* note 240, § 6.3.3, at 396.
280 *See, e.g.*, Cannon v. Univ. of Chi., 441 U.S. 677 (1979).
281 *Id.*
282 *Id.* at 680–89.
283 *Id.* at 694.
284 *Cf.* CHEMERINSKY, *supra* note 240, § 6.3.3, at 396.
285 *Cannon*, 441 U.S. at 730 (Powell, J., dissenting).
286 *Id.* at 731.
287 *Id.* at 730–31, 743–46.
288 442 U.S. 560 (1979).

asserted . . . ."[289] Later that year, in *Transamerica Mortgage Advisors, Inc. v. Lewis*,[290] the Court again declined to adopt a new cause of action, concluding that the "dispositive question remains whether Congress intended to create any such remedy."[291] Throughout the 1980s, the Court continued to depreciate the *Cort* framework in favor of a more *Touche Ross*-like approach. Nearly ten years after *Cort* and *Touche Ross*, two Justices on the Court agreed that "[i]t could not be plainer that we effectively overruled the *Cort v. Ash* analysis in [*Touche Ross*]."[292] Regardless of whether *Cort* is formally dead, *Touche Ross* and its tight standard for the recognition of new causes have overtaken *Cort* in the eyes of most federal courts.

The Court continues to adhere closely to the intent of Congress—as seen through the text and structure of legislation[293]—although it has also asked for a remarkable level of specificity before crafting the contours of a private cause of action. In 2001, the Court again declined to adopt a new implied cause of action, but it also looked at factors beyond the sometimes-cryptic intent of Congress.[294] In that case, *Alexander v. Sandoval*, the Court looked for "rights-creating language" in the text of a statute rather than mere legal context supporting an inference of Congressional intent.[295] In defining "rights-creating language," the Court provided two illustrative examples: One portion of the statute in question decreed that "[n]o person . . . shall . . . be subjected to discrimination," while another portion of the statute simply limited federal "agencies to 'effectuat[ing]' rights" created in the previous section.[296] The first section features rights-creating language and is targeted towards individuals, while the second section is simply a directive to federal agencies. The Court also required rights-creating language that could meet contemporary standards for specificity; it "expressly rejected the idea that laws adopted between 1964-

---

289 *Id.* at 568.

290 444 U.S. 11 (1979).

291 *Id.* at 24.

292 Thompson v. Thompson, 484 U.S. 174, 189 (1988) (Scalia, J., concurring in the judgment); *id.* at 188 (O'Connor, J., concurring in part and concurring in the judgment).

293 Alexander v. Sandoval, 532 U.S. 275, 288 (2001) ("We therefore begin (and find that we can end) our search for Congress's intent with the text and structure of Title VI."); *accord id.* ("[L]egal context matters only to the extent it clarifies text."); *see Transamerica Mort. Advisors, Inc.*, 444 U.S. at 16 ("[W]e begin with the language of the statute itself." (citing, *inter alia*, *Touche Ross*, 442 U.S. at 568; Cannon v. Univ. of Chi., 441 U.S. 677, 689 (1979))); *Touche Ross*, 442 U.S. at 569 ("The intent of § 17(a) is evident from its face.").

294 *Sandoval*, 532 U.S. at 284, 293.

295 *Id.* at 288.

296 *Id.* at 288–89 (alterations in original) (internal quotation marks omitted) (quoting 42 U.S.C. §§ 2000d–d-1 (2000)).

1975—the period between [*Case v. Borak*] and *Cort v. Ash*—should be considered under an approach that is more permissive for creating private rights of action."[297]

The modern test then provides a general framework for evaluating new causes of action. Congressional intent appears to be paramount, but courts will only weigh the intent of Congress as it is explicitly filtered through "rights-creating language." Underlying this rigid test are concerns about separation of powers and the role of federal courts in defining rights and providing a specific remedy.

b. The Flaws in Recognizing Implied Causes of Action Under the Alien Tort Statute

The Alien Tort Statute cannot overcome the strict requirements imposed by contemporary analysis of implied rights of action and the policy concerns underlying those requirements. First, the text of the statute is plainly jurisdictional, as the Supreme Court noted in *Sosa*, providing courts with no indication of Congressional intent. Second, the international nature of Alien Tort Statute litigation, and the role those cases play in important political questions, makes the need for Congressional approval even stronger.

The text of the Alien Tort Statute is purely jurisdictional and makes no attempt to grant any rights. The statute itself *mentions* rights of actions—a "civil action by an alien for a tort only"—but the text does little more than grant federal courts with the jurisdiction to hear those claims. The Supreme Court recognized as much in *Sosa*, even noting that "we agree the statute is in terms only jurisdictional . . . ."[298] Of course, the Court then permitted causes of action to spring forth from the statute based on a belief that "at the time of enactment the jurisdiction enabled federal courts to hear claims" arising from a narrow class of torts.[299] The Court has consistently emphasized that, when the text of a statute is unambiguous, that text becomes the alpha and the omega of

---

[297] CHEMERINSKY, *supra* note 240, § 6.3.3, at 399.

[298] Sosa v. Alvarez-Machain, 542 U.S. 692, 712 (2004). In full, the Court said "[a]lthough we agree the statute is in terms only jurisdictional, we think that at the time of enactment the jurisdiction enabled federal courts to hear claims in a very limited category defined by the law of nations and recognized at common law." *Id.*

[299] *Id.*

statutory interpretation.[300] The text does not provide a sufficiently clear expression of intent to form an implied cause of action.

If, however, the Court were to appropriately reach the intent of the statute's drafters as a matter of statutory interpretation, their intent would not make an expansive view of the statute any more certain. Regardless of whether the framers intended for the statute to have some narrow effect upon its passage—a matter that is itself hotly contested[301]—they did not anticipate the type of expansive, forward-looking human rights litigation that is currently the hallmark of the Alien Tort Statute.[302] Ultimately though, the expectations of the First Congress are irrelevant because the text of the statute is plainly jurisdictional. The thirty-three-word statute fails to pass muster under the heightened requirements for textual specificity that the Court alluded to in *Sandoval* because it lacks clear rights-creating language.[303]

The politically sensitive nature of Alien Tort Statute litigation further cautions against inferring rights of action from the opaque text of the statute. Due to the nature of the Alien Tort Statute, litigation under the statute frequently targets foreign leaders[304] and other foreign government officials,[305] leading to involvement from the political branches.[306] Courts have recognized

---

[300] *See, e.g.*, Exxon Mobil Corp. v. Allapattah Serv., Inc., 545 U.S. 546, 568 (2005) ("As we have repeatedly held, the authoritative statement is the statutory text, not the legislative history or any other extrinsic material. Extrinsic materials have a role in statutory interpretation only to the extent they shed a reliable light on the enacting Legislature's understanding of otherwise ambiguous terms.").

[301] *See supra* note 228. *Compare Sosa*, 542 U.S. at 718 ("There is no record of congressional discussion about private actions that might be subject to the jurisdictional provision, or about any need for further legislation to create private remedies; there is no record even of debate on the section."), *with* Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 Am. J. Int'l L. 461, 488 (1989) ("[D]rafters could have envisioned its application in suits brought by aliens against U.S. citizens for torts committed either within the United States or abroad, suits between aliens for a tort committed on U.S. soil and suits between aliens for a tort committed on the high seas." (citations omitted)).

[302] *See, e.g.*, Patti Waldmeir, *An Abuse of Power*, FIN. TIMES, Mar. 14, 2003, at 12 ("In the best traditions of American legal creativity, US plaintiffs' lawyers have revived a dormant 18th-century law and made it their chief weapon in a 21st-century battle over corporate responsibility in an age of globalisation.").

[303] Alexander v. Sandoval, 532 U.S. 275, 288 (2001).

[304] *See, e.g.*, Tachiona v. Mugabe (*Tachiona I*), 169 F. Supp. 2d 259 (S.D.N.Y. 2001), *reconsideration denied*, Tachiona ex rel. Tachiona v. Mugabe (*Tachiona II*), 186 F. Supp. 2d 383 (S.D.N.Y. 2002), *aff'd in part, rev'd in part sub nom.* Tachiona v. United States (*Tachiona III*), 386 F.3d 205 (2d Cir. 2004).

[305] *See, e.g.*, Abebe-Jira v. Negewo, 72 F.3d 844 (11th Cir. 1996).

[306] The State Department and the Office of the Solicitor General are frequently asked to weigh in with their views in Alien Tort Statute cases. *See, e.g.*, 469 U.S. 811 (inviting the Solicitor General to file a brief expressing the views of the United States in *Tel-Oren*). Those departments will also occasionally participate at their own volition as an intervenor or as an amicus party. *See, e.g.*, Brief for the United States as Amicus Curiae in Supporting Petitioners at 1, Kiobel v. Royal Dutch Petroleum Co., No. 10-1491 (Dec. 21, 2011), 2011 WL 6425363 ("The United States has an interest in the proper application of the [Alien Tort Statute]

the need for political intervention in many of these lawsuits and frequently call for the views of the federal government by way of amicus briefs or even appearances at oral argument.[307]

For instance, in *Tachiona v. Mugabe*, the Executive Branch intervened in favor of foreign-leader defendants in an Alien Tort Statute case.[308] In that case, aliens brought suit under the Alien Tort Statute against Zimbabwean President Robert Mugabe, his political party, and other party leaders, alleging acts of torture and terrorism based on plaintiffs' membership in an opposition political party.[309] The Department of State submitted a Suggestion of Immunity in which it argued for immunity on behalf of all individual defendants and Mugabe's political party.[310] The district court dismissed the suit against Mugabe and the individual defendants but allowed the suit to proceed against his political party under the Alien Tort Statute.[311] Immediately prior to a failed motion for reconsideration,[312] the federal government intervened because the outcome of the case had "some potential to implicate United States foreign relations in a manner that the Government could legitimately seek to mitigate by appeal."[313] In the court of appeals, the government was careful to outline the geopolitical ramifications of the lower court decision, alleging that the decision below "could give rise to the perception that the United States does not honor [its] immunity and inviolability, and to resulting complaints or retaliation."[314] That perception, the United States argued, could "deter [foreign leaders] from engaging in diplomatic missions in the United States."[315] The Alien Tort Statute's serious implications for international relations clearly

because such actions can have implications for the Nation's foreign and commercial relations and for the enforcement of international law."); *Tachiona II*, 186 F. Supp. 2d, at 397 (permitting the federal government to intervene in support of a foreign leader, in part because "[a] decision affecting, as perceived by the Government, the treatment of heads of state or foreign ministers visiting the United States, particularly under the circumstances present here, may have some potential to implicate United States foreign relations in a manner that the Government could legitimately seek to mitigate by appeal of this Court's Decision").

307 For example, the Second Circuit requested the views of the State Department in *Filartiga*, the D.C. Circuit requested the views of the Solicitor General in *Tel-Oren*, and the Supreme Court requested the views of the Solicitor General in both *Tel-Oren* and *Sosa*. *Supra* note 109 (noting that the Supreme Court called for the views of the Solicitor General in *Tel-Oren*).

308 *Tachiona III*, 386 F.3d at 209.

309 *Id.*

310 *Id.*

311 *Tachiona I*, 169 F. Supp. 2d at 316, 319.

312 Tachiona ex rel. Tachiona v. Mugabe (*Tachiona II*), 186 F. Supp. 2d 383 (S.D.N.Y. 2002).

313 *Id.* at 397.

314 Brief for Intervenor-Appellant-Cross-Appellee United States at 26, *Tachiona III*, 386 F.3d 205 (Nos. 03-6033 & 03-6043), 2003 WL 24174513.

315 *Id.* at 25.

weigh in favor of requiring explicit Congressional approval for rights of action.[316]

Alien Tort Statute litigation has taken an increasingly political tone and litigants have also increasingly tried to circumvent the political process. There is a growing belief among critics of the Alien Tort Statute that many cases are deliberate attempts to slander corporations or to raise the profile of human right causes.[317] A commentator recently noted that regardless of the Supreme Court's decision in a pending case, litigants may continue to peruse dubious claims under the Alien Tort Statute:

> Even if the Court decides there is no corporate liability, Richard Samp of the Washington Legal Foundation said, the number of Alien Tort Statute suits may not decrease. "Suits will be brought against individual officers," he predicted. "The response to that is it would be a lot harder to win those cases, but these lawsuits have never been about winning but about getting a lot of bad publicity about corporations and building sympathy for the cause plaintiffs are involved in."[318]

Litigation brought under the existing model of the Alien Tort Statute can also be used to circumvent the political branches. In order to show evidence of customary international law, many claims improperly rely on non-binding resolutions or treaties that the United States has not ratified.[319] These cases implicate the separation of powers because the judiciary is enforcing rights in a United States court that are often deliberately not available to domestic citizens.[320]

---

316 *See* Adra v. Clift, 195 F. Supp. 857, 865 (D. Md. 1961) (noting the foreign relations implications of providing a private right of action, but concluding that the weightiness of the decision weights in favor of realizing a cause of action); *cf.* Brandtscheit v. Britton, 239 F. Supp. 652 (N.D. Cal. 1965) (breaking the general rule that there is no federal diversity jurisdiction in a case between a German national and a resident of California because "plaintiff is a citizen of a nation with which it is of the utmost importance that friendly relations be maintained" in light of the Cold War); *supra* text accompanying notes 46–49 (noting the presence of political forces in *Moxon v. The Fanny*, 17 F. Cas. 942 (D. Pa. 1793) (No. 9895)).

317 Marcia Coyle, *Will Alien Tort Case Be Next Citizens United?*, NAT'L L.J. SUP. CT. INSIDER (Feb. 1, 2012), http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202540984798.

318 *Id.*; *accord* Jean-Marie Simon, *The Alien Tort Claims Act: Justice or Show Trials?*, 11 B.U. INT'L L.J. 1 (1993). Taken as a whole, Alien Tort Statute litigation may also have a bias towards liberal political regimes. *Id.* at 78 ("[W]hile human rights organizations have brought at least seven [Alien Tort Statute] lawsuits in the past five years alone, not a single one implicated an official of any leftist government.").

319 Curtis A. Bradley, *Customary International Law and Private Rights of Action*, 1 CHI. J. INT'L L. 421, 428 (2000); *see also infra* Part II.C.2.

320 *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 748–49 (2004) (Scalia, J., concurring) (noting that the Second Circuit in *Kadic v. Karadžić*, 70 F.3d 232 (2d Cir. 1995), relied on the Genocide Convention, which

The presumption against implied causes of action plays an important role in separating the legislative and judicial branches. The presumption ensures both that Congress does not escape accountability for important policy questions and that the judicial branch does not expand its own power by creating a multitude of rights that are enforceable in court. The Alien Tort Statute does not meet the high bar set by the Supreme Court for implied causes of action, and the highly politicized nature of litigation under the statute further cautions against recognition of causes of action. The Supreme Court provided only a cursory discussion of this topic in *Sosa*, leaving lower courts to independently fold the Alien Tort Statute framework into the existing legal landscape.

3. An Atheoretical Framework

Atheoretical decision-making occurs when judges render "fact-based holdings . . . without any explanatory theory" or provide "only the narrowest theoretical grounds for the result reached."[321] There may be benefits to minimalist judicial decision-making,[322] but those benefits are non-existent in the context of the Alien Tort Statute, where a sophisticated understanding of the theoretical framework of the statute is necessary for the proper—and consistent—evolution of the statute.[323] The harms of an atheoretical framework are exacerbated by the Court's failure to place the statute within the existing landscape on the development of federal common law and on the recognition of implied causes of action.

Congress has explicitly said shall not "be construed as creating any substantive or procedural right enforceable by law by any party in any proceeding" (citing the Genocide Convention Implementation Act of 1987, 18 U.S.C. § 1092)).

[321] Heather K. Gerken, *The Costs and Causes of Minimalism in Voting Cases:* Baker v. Carr *and Its Progeny*, 80 N.C. L. REV. 1411, 1413 (2002). For defenses of this approach, see CASS R. SUNSTEIN, ONE CASE AT A TIME 9 (1999); Richard A. Posner, *Conceptions of Legal "Theory": A Response to Ronald Dworkin*, 29 ARIZ. ST. L.J. 377 (1997); Cass R. Sunstein, *From Theory to Practice*, 29 ARIZ. ST. L.J. 389 (1997) [hereinafter Sunstein, *From Theory to Practice*]; Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4 (1996) [hereinafter Sunstein, *Leaving Things Undecided*]. For a criticism of the atheoretical, minimalist position, see Ronald Dworkin, *In Praise of Theory*, 29 ARIZ. ST. L.J. 353 (1997). For a critique of atheoretical decision-making in a specific field of law—election law—see Gerken, *supra*.

[322] SUNSTEIN, *supra* note 321, at 24–54. Sunstein largely divides his arguments in favor of minimalism into two groups: one emphasizes the "democracy-promoting" value of minimalism, *id.* at 24–45, and the other emphasizes the low decision costs, *id.* at 46–54.

[323] *Cf. id.* at 57–60 (discussing when minimalism is especially favorable to "maximalism" and when the opposite may be true).

a. The Debate over "Theory"

The debate over the use of theory in judicial decision-making has divided scholars and judges into two main camps: those that support the theory-embedded[324] view and those that support the atheoretical view.[325] The theory-embedded view sees judicial rulemaking as an opportunity to distill broad principles of legal theory into easily digestible rules of decision.[326] For proponents of the theory-embedded view, every case is an opportunity to refine broad principles of law and to thread those principles through the corpus juris. These principles are not only a useful way to tie bodies of law together, but, as proponents of the fully-theorized position argue, theorizing rules is an inevitable part of folding individual cases into a body of law.[327] As Ronald Dworkin, a leading proponent of the theory-embedded view, phrased it: "[L]aw is theory drenched, and . . . reflective lawyers understand that even though they do not agree on what theory it is drenched in."[328] The theory-embedded camp has been criticized as an impractical intrusion on overworked judges[329] and an unworkable model given the divergence of viewpoints on important first principles.[330]

The minimalist position[331]—which is further divided into the truly anti-theoretical camp and the minimally theorized camp[332]—believes that judges should be "directing their attention to the immediate practical problem posed by any political occasion."[333] Atheoretical rules can be crafted in a number of

---

[324] *See, e.g.*, Dworkin, *supra* note 321, at 354.

[325] *See, e.g.*, Gerken, *supra* note 321, at 1427.

[326] *See* Dworkin, *supra* note 321, at 354.

[327] *See id.* at 371.

[328] *Id.* at 360.

[329] Sunstein, *From Theory to Practice*, *supra* note 321, at 391 ("Judges ordinarily work with principles of a low level of theoretical ambition. Conceptual ascents are relatively rare in law. Like all of us, judges have limited time and capacities, and like almost all of us, judges are not trained philosophers.").

[330] *Id.* at 392 (Minimalism "is particularly important for law within a highly pluralistic culture. It is important because it is a way of promoting stability, reducing strains on time and capacities, and demonstrating mutual respect; it is not very respectful to take on other people's most fundamental commitments when it is not necessary to do so.").

[331] Gerken, *supra* note 321, at 1433. Dworkin refers to this position as the "practical," but still other scholars describe this as the "pragmatic" position. *Compare* Dworkin, *supra* note 321, at 354 (using the term "practical"), *with* Michael Sullivan & Daniel J. Solove, Book Review, *Can Pragmatism Be Radical? Richard Posner and Legal Pragmatism*, 113 YALE L.J. 687 (2003) (using the term "pragmatic").

[332] Gerken, *supra* note 321, at 1433. Gerken labels the groups in a different way, calling the general position the "minimalist" approach and its two variants the "atheoretical" approach and the "minimal theorizing" approach. *Id.*

[333] Dworkin, *supra* note 321, at 354.

ways, some more likely to produce more stable results than others. For instance, minimalist decisions can be narrowly crafted to leave the door open for more coherent theoretical positions in the future.[334] Minimalist decisions can also be shallow, meaning that they develop a new theory on top of existing theory only as much as is necessary to reach a holding, rather than rooting a new theory in fundamental principles of law.[335] Sunstein, in his influential book on minimalist decision-making, notes that the minimalist approach is most appropriate "when the Court is dealing with a constitutional issue of high complexity about which many people feel deeply and on which the nation is in flux (on moral or other grounds)."[336]

Atheoretical decision-making can occur in almost any field of law. An illustrative example is *Baker v. Carr*, the landmark election law case that first established the principle of one person, one vote.[337] In the 1962 case, the Supreme Court leaned on the Equal Protection Clause of the Fourteenth Amendment to bar wildly disproportional congressional districts within Tennessee.[338] The lopsidedness of the facts[339] tremendously affected the Court's ruling because the Court could have constructed almost any test—using almost any language—and arrived at the same judgment. The Court adopted equality as its overriding theory, but the Court almost deliberately did not contextualize its new test within the greater discussion on equality.[340] On a theoretical level,[341] courts were left to guess whether one person, one vote implemented the somewhat vague principle of equality by way of "the antidiscrimination principle," "subordination theory," or any one of the "intermediary theories" that could tie the Court's new test to a more abstract principle.[342] Following *Baker*, courts struggled to apply the one person, one

---

334 SUNSTEIN *supra* note 321, at 10–11.

335 *See id.* at 11–14.

336 *Id.* at 8.

337 369 U.S. 186, 207–08 (1962).

338 *Id.* at 209–10.

339 That state had been using legislative districts that were drawn in 1901, when the urban population was much lower than it was when *Baker* reached the Supreme Court. The disproportionality of the districts was striking; thirty-seven percent of Tennessee citizens lived in districts that elected sixty-one percent of state Senators and forty percent of citizens elected sixty-one percent of the state House of Representatives. *Id.* at 253 (Clark, J., concurring).

340 Gerken, *supra* note 321, at 1413–14.

341 On a practical level, it was equally unclear whether equality meant an equal population, an equal voting-age population, an equal number of actual voters, or an equal share of political power. *Id.*

342 *Id.*; *see also id.* at 1421–27 (listing possible intermediary theories that the Supreme Court either dismissed or ignored).

vote framework to cases with facts more complex than those in *Baker* itself.[343] The Court's rocky foray into atheoretical decision-making in *Baker* bears a striking similarity to the Court's controversial decision in *Sosa*.

While atheoretical decision-making can be a useful mechanism for deciding individual cases without creating the kind of unintended consequences that accompany abrupt shifts in legal theory,[344] it also passes along a burden to future courts that may grapple with the same question[345]—as it did in *Baker*. An incomplete or incoherent judicial framework for developing cases forces future courts to analyze developing questions without the benefit of useful overriding principles.[346] When the Supreme Court decides a case without developing a framework that can guide lower courts or even future Supreme Court decisions, it only puts off an inevitable question of theory that it will be forced to address at some point in the future.[347]

b. The Sosa *Framework as an Example of Atheoretical Decision-making*

The Supreme Court's decision in *Sosa* is a model for atheoretical decision-making and stands to cause many of the same problems that atheoretical decision-making has caused in the past.[348] The arrangement that the Supreme Court forged in *Sosa* was meant to be a convenient, practical combination of the conflicting interpretations that had developed, but the Court failed to properly contextualize the new causes of action it created. Without a proper theory to explain how the statute fit into the surrounding legal landscape, courts were left to inconsistently and haphazardly apply the decision's mandate. A look at the Court's reasoning in *Sosa* and the existing legal landscape provide further explanation.

The Court initially acknowledged that the statute was purely jurisdictional but then backed off of that view when it became apparent that a purely jurisdictional model would have been "stillborn" without Congressional action

---

343 *See, e.g.*, Karcher v. Daggett, 462 U.S. 725 (1983). In *Karcher*, the Supreme Court stuck down a redistricting plan in which "the population of the largest district is less than one percent greater than the population of the smallest district." *Id.* at 727. *Karcher* has been heavily criticized for describing "the injury in circular terms, substitut[ing] general paeans to individualism for concrete doctrinal analysis, and defin[ing] equality in a rigid, mechanical way." Gerken, *supra* note 321, at 1415.

344 SUNSTEIN, *supra* note 321. *See generally* Aaron-Andrew P. Bruhl, *Deciding When To Decide: How Appellate Procedure Distributes the Costs of Legal Change*, 96 CORNELL L. REV. 203 (2011).

345 *See* Gerken, *supra* note 321, at 1427–43.

346 *Id.*

347 *See* Dworkin, *supra* note 321, at 371.

348 *See* Gerken, *supra* note 321, at 1427–43.

beyond the Alien Tort Statute.[349] Finding that position unsavory, the Court was forced then to give the statute some degree of force.[350] It quickly found the initial customary international law violations in Blackstone's works.[351]

Other courts considering the Alien Tort Statute have reached decisions similar to *Sosa* while also providing more theoretical guidance for their position.[352] In *Filartiga*, for example, the Second Circuit interpreted the Alien Tort Statute as flatly jurisdictional[353] and created a sphere of federal common law that was filed by the law of nations.[354] The panel "construe[d] the Alien Tort Statute, not as granting new rights to aliens, but simply as opening the federal courts for adjudication of the rights already recognized by international law."[355] Moving forward, courts were given a simple theoretical underpinning with which to develop law in the area: If behavior violated customary international law, plaintiffs were permitted to invoke Alien Tort Statute jurisdiction to plead their claim.[356]

However, in *Sosa*, the Court's holding that the Alien Tort Statute allows a narrow class of claims was a prudential holding that solved the dispute in *Sosa* but set up a wealth of problems that have plagued lower courts since then. Tempering the literal wording of the statute with practical considerations is a problem primarily because courts lack any guiding theory to balance the two forces. For example, courts and academics have run in circles arguing even the threshold question of whether *Sosa* takes a modernist or revisionist point of view on the Alien Tort Statute, a necessary question when determining whether an international law norm can be brought as a cause of action.

C. Practical Flaws in the Sosa *Framework*

The cracks in the theoretical foundation of the hybrid model might be more easily overlooked if they were not also producing serious problems for lower courts looking to that model for guidance. Chief among those problems is one

---

349 Sosa v. Alvarez-Machain, 542 U.S. 692, 714 (2004) ("Sosa would have it that the [Alien Tort Statute] was stillborn because there could be no claim for relief without a further statute expressly authorizing adoption of causes of action.").

350 *Id.*

351 *Id.* at 714–15.

352 *See, e.g.*, Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980).

353 *Id.* at 890.

354 *Id.*

355 *Id.* at 887; *see also* Bradley, *supra* note 35, at 592.

356 *See* Filartiga v. Pena-Irala, 630 F.2d at 887.

specific to the Alien Tort Statute—the difficulty of creating consistent rules of decision for law of nations claims—and one general to federal courts—the lack of information and lack of expertise with international law.

1. Difficulty Operating within the Sosa *Framework*

Confusion in the lower courts may be a result of the Supreme Court failing to properly define its own test[357] or it may be the result of Court's failure to adopt a test dynamic enough to meet modern needs.[358] The *Sosa* standard has been criticized for not covering human rights offenses that fail to meet the high standard of international torts such as piracy and safe-conduct.[359] At the time the Alien Tort Statute was created, torts such as piracy may have been condemned as widely as genocide and war crimes are today.[360] However, a key distinction between the two classes of customary international law is that the modern "torts" lack a uniform definition between and among nations.[361] Put another way, universal condemnation of appalling crimes means little for the purposes of the Alien Tort Statute because countries differ so widely on their definition of those crimes.[362] The absence of any modern torts does not doom the *Sosa* standard on its face because the framework could simply be interpreted to permit claims arising under Blackstone's original common law torts and modern torts when they eventually reach the same level. However, the Supreme Court explicitly equated several modern torts with Blackstone's,[363] leaving courts to wonder whether modern torts must *actually* rise to the level of the original triplet.[364]

---

[357] Eugene Kontorovich, *Implementing* Sosa v. Alvarez-Machain: *What Piracy Tells Us About the Limits of the Alien Tort Statute*, 80 NOTRE DAME L. REV. 111, 113 (2004) (noting the possibility of "conflicting decisions due to the Court's scant description of the test it envisions").

[358] *Id.* at 156–57 ("[P]iracy had a narrow and precise definition. In contrast, the definitions of the human rights offenses nominated for [universal jurisdiction] are broad and indeterminate, as even supporters of an expanded [universal jurisdiction] concede. This raises the possibility that the availability of [universal jurisdiction] over such conduct would hinge on the political or moral inclinations of the prosecutors and judges; the vagueness of these offenses would at a minimum give judges great discretion in matters pertaining to foreign relations, a discretion traditionally reserved to the political branches.").

[359] *See id.*

[360] *See id.* at 156.

[361] *Id.*

[362] *Id.* Kontorovich goes on to caution "the vagueness of these offenses would at a minimum give judges great discretion in matters pertaining to foreign relations, a discretion traditionally reserved to the political branches." *Id.* at 157.

[363] *Compare* Sosa v. Alvarez-Machain, 542 U.S. 692, 732 (2004) ("Whatever the ultimate criteria for accepting a cause of action subject to jurisdiction under § 1350, we are persuaded that federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350

The Court in *Sosa* recognized that its stiff legal framework—consisting of heightened analysis of customary international law—would not, and could not, list all of the factors necessary for courts to consider when drafting new causes of action.[365] In fact, the majority opinion gave only passing mention to one of the most important factors: the entirely political question of whether certain activity can be adjudicated in United States courts. When the Court mentioned that future courts "should (and, indeed, inevitably must) involve an element of judgment about the practical consequences of making that cause available to litigants," it unwittingly opened the door for future courts to consider a myriad of purely political factors.[366]

2. General Difficulty with International Law

Whether in the context of the Alien Tort Statute or not, federal courts have struggled with the ground-level process of analyzing customary international law. Their troubles are hardly a recent phenomenon; federal courts have long been notoriously poor at divining the true direction of customary international law.[367] The Court of Appeals for the Second Circuit, for example, has been heavily criticized for its handling of customary international law in *Kiobel v. Royal Dutch Petroleum Corp.*[368] The Court of Appeals' conclusion has been controversial, but the criticism aimed at the court's methodology raises a red

---

was enacted."), *with id.* at 762 (Breyer, J., concurring) ("Today international law will sometimes similarly reflect 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." (citations omitted)).

364 Courts have informally split on whether to adopt torts that do not rise to the level of infamy achieved by war crimes and the most heinous human rights violations. While no circuits have explicitly declined to adopt lesser torts, some have been more willing to do so than others. The Ninth Circuit, for example, has allowed a claim for ownership of stolen artwork and the Second Circuit has allowed a claim to proceed for simply doing business with South Africa's apartheid regime. Cassirer v. Kingdom of Spain, 580 F.3d 1048, 1052 (9th Cir. 2009) (ownership of stolen artwork); Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254 (2d Cir. 2007) (conducting business with South Africa's apartheid regime).

365 Kontorovich, *supra* note 357, at 156–57.

366 *Sosa*, 542 U.S. at 732–33.

367 *See* Michelle M. Kundmueller, Note, *The Application of Customary International Law in U.S. Courts: Custom, Convention, or Pseudo-Legislation?*, 28 J. LEGIS. 359, 372–77 (identifying several instances where U.S. courts mistook international agreements and conventions for evidence of state practice, the building block of international custom); *see also* Emily Kadens & Ernest A. Young, *How Customary Is Customary International Law?*, 54 WM. & MARY L. REV. 885, 914 (2013) ("[A] set of difficulties arises . . . from the striking differences between the settings in which customary law traditionally arose and the issues on which it spoke, on the one hand, and the contemporary settings in which advocates of customary international law seek to employ customary norms, on the other.").

368 *See* Brief of Amici Curiae International Law Scholars in Support of Petitioner, Kiobel v. Royal Dutch Petroleum Co., No. 10-1491 (Dec. 21, 2011), 2011 WL 6780141.

flag about the appropriateness of tasking federal judges, at the trial or appellate level, with divining the intricacies of customary international law.[369] A recent decision of the Second Circuit[370] was criticized for incorrectly relying on the text of the Rome Statute of the International Criminal Court to codify customary international law when the statute, by its own terms, does not seek to codify custom.[371] Even *Filartiga*, the landmark human rights case, featured the dubious use of unconventional sources to glean the consensus of customary international law. That case cited, among other sources, two U.N. General Assembly resolutions, non-binding resolutions and treaties, and a survey of national constitutions.[372] Those sources are generally not accepted as valid tools for weighing the view of customary international law[373] and their use creates, at a minimum, a potential for inconsistency among federal courts.

Difficulty with international sources is also attributable to contemporary trends that make gauging international law more difficult than ever. For example, private actors now define international norms more than ever before,[374] making it difficult for courts to apply well-worn techniques to modern circumstances.[375] Adopting a new set of tools for interpreting international law may not be the solution; scholars have noted that international law is fragmenting into a diverse array of subject-matter regimes, each of which is governed by its own set of custom and guiding sources of law.[376]

---

369 *Id.*

370 Khulumani v. Barclay Nat'l Bank, Ltd., 504 U.S. 254 (2007), *aff'd sub nom. due to lack of quorum*, Am. Izuzu Motors, Inc. v. Ntsebeza, 553 U.S. 1028 (2008).

371 Kevin Jon Heller, *The Alien Tort Statute and International Law*, OPINIOJURIS (Sept. 26, 2008, 8:58 PM), http://opiniojuris.org/2008/09/26/the-alien-tort-statute-and-international-law-guest-post; *see* Chimène I. Keitner, *Conceptualizing Complicity in Alien Tort Cases*, 60 HASTINGS L.J. 61, 88 (2008) ("Although the Rome Statute, along with its interpretation and its application by the ICC, will constitute important evidence of state practice and *opinio juris* for the purpose of identifying customary international law norms, they are not dispositive and do not override the cumulative weight of other evidentiary sources."); *see also* Rome Statute of the International Criminal Court art. 10, *done* July 17, 1998, 2187 U.N.T.S. 90 ("Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.").

372 Filartiga v. Pena-Irala, 630 F.2d 876, 882–84 (2d Cir. 1980).

373 DAVID J. BEDERMAN, INTERNATIONAL LAW FRAMEWORKS 44 (3d ed. 2010); *see also* Bradley, Goldsmith & Moore, *supra* note 215, at 901 (criticizing the sources used in *Filartiga*).

374 Paul B. Stephan, *Privatizing International Law*, 97 VA. L. REV. 1573, 1593–617 (2011).

375 *Id.* at 1655–69.

376 *See* Harlan Grant Cohen, *Finding International Law, Part II: Our Fragmenting Legal Community*, 44 N.Y.U. J. INT'L L. & POL. 1049 (2012); *see also* Harlan G. Cohen, *From International Law to International Conflicts of Law: The Fragmentation of Legitimacy*, 104 AM. SOC'Y INT'L L. PROC. 49 (2010).

Although difficulty interpreting international law is not unique to purposes of the Alien Tort Statute,[377] the statute presents its own unique complexities:

> [Courts that decide Alien Tort Statute claims] (constantly citing each other) have gradually built up a hybrid jurisprudence of certain aspects of international criminal law—war crimes, crimes against humanity, and genocide, for example—together with other materials drawn from US civil and tort law, such as corporate liability, aiding and abetting, and similar doctrines. The individual terms of the one-sentence Alien Tort Statute . . . create idiosyncratic pressures on interpretation.[378]

Among those idiosyncrasies is the Supreme Court's unique reconceptualization of the law of nations. Not content to look at either traditional sources of international custom[379] or even the narrow class of *jus cogens*,[380] the Supreme Court required United States courts to craft a unique, intermediary tier of accepted custom.[381] The Supreme Court had the opportunity to latch onto either pre-existing class of international custom, but the new standard breaks from both reasonably well-defined classes. International law scholars and foreign jurists frequently discuss trends in international practice that bring new activity into the realm of customary international law or *jus cogens*,[382] but few have reason to discuss whether those customs meet the specific *Sosa* requirements.[383] United States courts have frequently relied upon academics and other expert sources to survey the international law landscape, and the

---

[377] As a general matter, "there is significant uncertainty today surrounding both the method of customary international law formation and its content. Consequently, there is substantial room for creativity by lawyers and judges." Bradley, *supra* note 102, at 472.

[378] Anderson, *supra* note 212, at 350. Anderson also criticizes the uniqueness of the test crafted by the Supreme Court in *Sosa*:

> Whatever exactly the law of nations means as an international law term, it means something different in the hands of American courts which, under *Sosa*, are required to look not strictly to 'traditional' international sources, such as those stated in the ICJ statute, nor strictly to such concepts as *jus cogens*—but instead, per *Sosa*, to a somewhat altered form of original meaning jurisprudence and what the drafters of the statute meant, along with some 'fundamental' matters of the law of nations.

Id.

[379] *Id.*

[380] *Id. Jus cogens*, sometimes referred to as *ius cogens*, are those international customs that are so well-established in international practice that states may not opt out of them under any circumstances. BEDERMAN, *supra* note 373, at 25.

[381] *Supra* Part II.A.

[382] *See, e.g.*, Al-Adsani v. United Kingdom, 2001-XI Eur. Ct. H.R. 79, 91, 94 (discussing whether certain crimes had reached the level of *jus cogens*).

[383] *Cf., e.g., id.*

creation of the new *Sosa* standard deprives domestic courts of much-needed third-party guidance—especially because it does not seem likely to be adopted in other contexts.[384]

Whether the fault lies with the statute itself, the subject-matter,[385] or with the actors interpreting it, courts are struggling with the sophisticated analysis required to discern the intricacies of customary international law.[386] In light of the *Sosa* framework's theoretical and practical problems, courts have been forced into the unenviable position of crafting causes of action—and all of the peripheral law that goes along with them—from a rigid, short-sighted definition. Without any meaningful theoretical support, courts have been remarkably inconsistent in their holdings on fundamental topics.

III. THE PURELY JURISDICTIONAL VIEW TAKES ON CONTEMPORARY PROBLEMS

The purely jurisdictional view of the Alien Tort Statute would provide a more satisfying framework for addressing at least two major contemporary problems that exist in the hybrid framework. The first is that the statute would conform to other parts of the law and provide a more logically coherent framework. Second, a purely jurisdictional view would help courts accurately and consistently apply customary international law.

Several structural flaws in the Alien Tort Statute were on display during different stages of litigation in *Kiobel*.[387] In that case, the Court of Appeals for the Second Circuit held that corporations could not be held liable under the Alien Tort Statute,[388] creating a circuit split on the question of corporate

---

[384] The Supreme Court's heightened customary international law requirements certainly *could* be used in the context of other federal programs, but the Supreme Court seemed to tie the heightened requirements to the unique legislative history and historical context of the Alien Tort Statute. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 725–727 (2004). The Court's discussion of miscellaneous factors effecting the adoption of new causes of action, *see supra* text accompanying notes 156–162, makes it even less likely that the Alien Tort Statute's standard will be useful in any other contexts.

[385] *Cf.* Harlan Cohen, *Towards a Pluralism of International Law(s)?*, OPINIOJURIS (Dec. 14, 2011, 10:19 AM), http://opiniojuris.org/towards-a-pluralism-of-international-laws (describing "the continued need to break free of the international law paradigm and develop a more pluralistic understanding of regulation across borders").

[386] Anderson, *supra* note 212, at 350.

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

[388] Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 123 (2d Cir. 2010), *aff'd on other grounds*, No. 10-1491 (U.S. Apr. 17, 2013).

liability under the statute.[389] The Second Circuit panel found that "imposing liability on corporations for violations of customary international law has not attained a discernible, much less universal, acceptance among nations."[390] The court primarily relied on the sources of international law detailed in Article 38 of the Statute of the International Court of Justice,[391] including published opinions of international courts, international treaties, and the works of renowned publicists.[392]

The Second Circuit's decision was heavily criticized, both for its substantive outcome and for its methodology. Substantively, the decision was criticized for ignoring general principles of law[393] and for ignoring other important sources of international custom.[394] Methodological questions about the decision cut to the heart of the court's analysis, asking whether the decision "conflate[s] the jurisdictional and cause of action aspects [of the statute]."[395] The debate was no longer only about whether the law of nations permitted corporate liability, but whether United States courts should even look abroad for the answer.[396] In the Supreme Court, much of the debate has centered on that question rather than on the substantive questions of customary international law that have been at the forefront of other cases brought under the Alien Tort Statute.[397] The Court sidestepped the question of corporate liability in *Kiobel*, leaving it open for resolution in later cases.[398]

Confusion over corporate liability is that much more alarming when contrasted with the Court's straightforward experience interpreting with the Torture Victim Protection Act. In fact, the Supreme Court heard oral argument in a case centered around the Torture Victim Protection Act on the same day it

---

389 *Supra* note 183 (listing cases on both sides of the split).

390 *Id.* at 145.

391 Statute of the International Court of Justice art. 38, June 26, 1945, 59 Stat. 1055 [hereinafter ICJ Statute].

392 *Kiobel*, 621 F.3d, at 132–46. Within the meaning of Article 38, "publicists" are renowned scholars and jurists. *Id.* at 132 (quoting ICJ Statute, *supra* note 391, art. 38).

393 *See, e.g.*, Tyler Banks, Comment, *Corporate Liability Under the Alien Tort Statute: The Second Circuit's Misstep Around General Principles of Law in* Kiobel v. Royal Dutch Petroleum Co., 26 EMORY INT'L L. REV. 227 (2012).

394 Brief Amici Curiae International Law Scholars in Support of Petitioners at 17–34, Kiobel v. Royal Dutch Petroleum Co., No. 10-1491 (U.S. Dec. 21, 2013), 2011 WL 6780141.

395 Odette Murray et al., *Exaggerated Rumours of the Death of an Alien Tort? Corporations, Human Rights and the Remarkable Case of* Kiobel, 12 MELB. J. INT'L L. 57, 1, June 2011, at 75 (2011).

396 *Id.*

397 Brief for Petitioners, *Kiobel*, No. 10-1491 (U.S. Dec. 14, 2011), 2011 WL 6396550.

398 *Kiobel*, No. 10-1491, slip op. at 4.

first heard arguments in *Kiobel*, but the tone of the litigation in the two cases could not have been more different. While the corporate liability case quickly morphed into a tremendously complex jurisprudential behemoth,[399] the Torture Victim Protection Act case instantly "seem[ed] very likely to be an easy one for the Court."[400] The Court was tasked with deciding two cases stemming from the Alien Tort Statute: one involving complex analysis of international norms and the other implicating fairly conventional questions of statutory interpretation.

If the Court were to hold that the statute was purely jurisdictional, it would then be up to Congress to formulate a cause of action. Because of the resources, time, and experts available to Congress, that body is better suited to make the difficult, complicated decisions that must be made when new rights are recognized.[401] Congress' relatively straightforward experience with the Torture Victim Protection Act,[402] and courts' unremarkable experience merging it into practice,[403] are a model for how the Alien Tort Statute can be both manageable and incredibly powerful.[404]

CONCLUSION

The Alien Tort Statute's long dormancy and swift reanimation have caused fissures in the framework of the statute that are unlikely to resolve themselves in the near future. The initial round of briefs in *Kiobel* and the recent Torture Victim Protection Act case are archetypal examples of the confusion that has been caused by the Supreme Court's ruling in *Sosa*. The jurisdictional view,

---

399 *See* Lyle Denniston, *Argument Preview: Human Rights Abuses and the Law*, SCOTUSBLOG (Feb. 25, 2012, 12:09 AM), http://www.scotusblog.com/2012/02/argument-preview-human-rights-abuses-and-the-law ("Both sides in the case have labored strenuously to read into *Sosa* very clear support for what each believes an [Alien Tort Statute] complaint must embrace, and their perceptions clearly conflict, but the mere fact that both can do so without making frivolous arguments suggests that *Sosa* is anything but a clear guidepost.").

400 *Id.*

401 *Cf.* Sosa v. Alvarez-Machain, 542 U.S. 692, 726 (2004) ("And although we have even assumed competence to make judicial rules of decision of particular importance to foreign relations, such as the act of state doctrine . . . the general practice has been to look for legislative guidance before exercising innovative authority over substantive law."); *id.* at 731 (welcoming congressional intervention in crafting causes of action).

402 Mariani, *supra* note 137, at 1392–93.

403 *Id.* at 1399.

404 *Id.* at 1385 ("The TVPA, [compared to the Alien Tort Statute,] is a more recent and detailed expression of legislative will, and provides significantly more guidance to those seeking to interpret and apply it. The TVPA creates an explicit cause of action for a narrow set of conduct, precisely defines that conduct, and details the manner in which that cause of action must be pursued. In short, it lacks the fundamental ambiguity that characterizes the [Alien Tort Statute].").

however, could mend many of these problems by leaving Congress to make many of the decisions that currently plague the federal courts. In *Sosa*, the Supreme Court was hesitant to abruptly halt the bulk of Alien Tort Statute litigation. Its hesitancy, however, lead it to a pragmatic result that preserved the modern status quo at the expense of future development.[405]

Inconsistencies—both within the *Sosa* opinion and between that opinion and the greater opus of federal law—have tasked courts with crafting law that ought to be carefully drafted by Congress. Those courts are also thrust into resolving political debates that they are not suited to handle and into incorporating practical concerns that are best left to Congress. An interpretation of the Alien Tort Statute that pushes the statute into Congress' domain would cleanly resolve many of the most difficult problems currently plaguing the Alien Tort Statute. Recent debates over corporate liability and aiding and abetting liability may simply foreshadow deeper concerns over the Alien Tort Statute.

In *Sosa*'s wake, Julian Ku predicted a new wave of Alien Tort Statute litigation: claims targeting the United States government for its own human rights abuses abroad.[406] Regardless of the cause of that movement, courts are not well-equipped to handle the added challenges brought by this new layer of complexity.[407] Not only does this new wave require courts to maneuver more sophisticated corners of customary international law,[408] but it also requires courts to engage directly with a political branch enforcing its dominion over foreign policy—in foreign territory. Without a sturdier theoretical foundation than the current one, courts will continue to struggle with Alien Tort Statute litigation.

KEDAR S. BHATIA*

---

405 *See supra* Part I.E (describing the state of litigation prior to *Sosa*).

406 Julian G. Ku, *The Third Wave: The Alien Tort Statute and the War on Terrorism*, 19 EMORY INT'L L. REV. 105 (2005).

407 *Id.* at 124–26 (outlining the possible conflicts between judicial and executive interpretation of customary international law).

408 Federal courts have heretofore dabbled in the customary international law view of egregious human rights violations, but the latest wave of litigation asks them to address more subtle questions related to the liability of a sovereign in its own domestic courts. *See* Bederman, *supra* note 102, at 258.

* Editor-in-Chief, *Emory International Law Review*; Winner of the W. Richard Smith Founder's Award for Writing Excellence for Best Comment; J.D. Candidate, Emory University School of Law (2013); B.B.A., University of Texas at Austin (2010). The author would first like to thank Professor Jonathan R. Nash for his help with every stage of this Comment and for his endless patience and tremendous expertise. The author would like to thank Professors Kay Levine and Mary Dudziak for their insightful comments, *Emory International Law Review* members Heather Greenfield, Sabina Schiller, and John Odle for their help with the

development and editing of this Comment, and the participants of the Emory Law School Faculty Colloquium Workshop for their observations and suggestions. The author would also like to thank the entire staff of the *Emory International Law Review* for their hard work and stunning commitment to the law review; it has truly been a privilege to work with every member of the law review over the past two years. Finally, the author remains indebted to the late Professor David J. Bederman for his help developing the core ideas of this Comment and for his mentorship throughout the author's time in law school.