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Enforcing Human Rights in U.S. Courts and Abroad: The Alien Tort Statute and Other Approaches

The 2008 Jonathan I. Charney Lecture in International Law

Presented at Vanderbilt University Law School on April 11, 2008

*John B. Bellinger III**

Thank you very much for that kind introduction. And thank you all for having me here at Vanderbilt. I'm delighted to have the opportunity to visit this great university and law school. And I'm particularly grateful to Dean Rubin, and to Professor Newton for arranging my visit. I'd also like to thank Mrs. Sharon Charney for endowing this lecture in honor of her late husband Professor Jonathan I. Charney. As you know, Professor Charney taught at Vanderbilt for many years. He was well known to the Legal Adviser's office as one of the world's foremost experts on maritime law and as author of a leading treatise on the subject. He also served on the original U.S. delegation to the UN Conference on the Law of the Sea.

U.S. foreign policy—under every Administration—involves promoting respect for human rights around the world. Most of you probably know that the State Department spends a great deal of time and effort abroad, persuading foreign governments to change their human rights behavior and administering programs to advance the

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cause of human rights. What many of you may not be aware of, though, is that we are now quite frequently occupied *domestically* with suits by foreign plaintiffs in U.S. courts—often arising from conduct that occurred in other countries and has no significant connection to the U.S., that may not be consistent with our governmental policies for promoting human rights.

That is where I will focus my remarks today—in particular, on the Alien Tort Statute,¹ or ATS, a nearly 220-year-old statute that has been interpreted to allow foreign plaintiffs to bring suit in U.S. courts for violations of international law. The ATS was the subject of a seminal Supreme Court decision in 2004, *Sosa v. Alvarez-Machain*,² which outlined the limited reach of the ATS. Still, ATS litigation continues to present complications for U.S. foreign policy and our efforts to promote human rights.

Let me make several observations regarding the ATS at the outset. The *first* is that ATS litigation continues largely unabated, despite the Supreme Court's attempt in *Sosa* to rein it in. *Second*, the ATS has given rise to friction, sometimes considerable, in our relations with foreign governments, who understandably object to their officials or their domestic corporations being subjected to U.S. jurisdiction for activities taking place in foreign countries and having nothing to do with the United States. *Third*, the development of the scope of the ATS has largely been left to litigants and the courts, without formal involvement from Congress and largely contrary to the views of the Executive. This has been a problem, not least because many recent ATS suits have tended to implicate important aspects of U.S. foreign policy. In the end, there are good reasons for limits on the scope of the ATS, through courts exercising restraint or, if necessary, through legislation. We need to ensure the ATS does not complicate international efforts by the political branches to promote human rights abroad, a cause to which the United States is deeply committed.

But first, some background on the statute. Many of you are likely familiar with the Alien Tort Statute, sometimes referred to as the Alien Tort Claims Act. And you may already know that this is one instance where reading the text of the statute doesn't get you very far. In its entirety, the statute reads: "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."³ The ATS was included by the First Congress in the Judiciary Act of 1789, but in its first 190 years, the statute provided

1. 28 U.S.C. § 1350 (2007).
2. 542 U.S. 692 (2004).
3. 28 U.S.C. § 1350 (2007).

jurisdiction in only two cases,⁴ and why it was enacted is something of a mystery. This led Judge Friendly famously to call the ATS a “legal Lohengrin,” because “no one seems to know whence it came.”⁵

What little we do know about the ATS’s origins suggests that its principal motivation was to provide redress for offenses committed by U.S. persons against foreign officials in the United States.⁶ In the pre-constitutional period, there were concerns that foreigners would not have adequate redress in state courts for wrongs committed against them in violation of the law of nations. Under the law of international responsibility at the time, the U.S. would be held accountable internationally for the failure to provide such redress. The jurisdictional scope of Article III of the Constitution and the enactment of the ATS by the First Congress addressed this issue by providing jurisdiction for foreigners to seek remedies in federal court.

The modern origins of ATS case law date to the Second Circuit’s 1980 decision in *Filartiga v. Peña-Irala*,⁷ which permitted an ATS suit by two Paraguayans living in the U.S. against a former Paraguayan government official (who also was living in the U.S. at the time of the suit) for the torture and killing of a family member in Paraguay. The court held that torture is a violation of the law of nations and that, under the ATS, U.S. courts could decide a torture claim arising in a foreign country. The decision in effect sanctioned use of the ATS for international human rights litigation, and from there, ATS cases in the federal courts grew substantially. After *Filartiga*, federal courts heard myriad suits alleging human rights abuses by individuals, including, notably, a suit brought against the leader of Bosnian-Serb insurgents by citizens of Bosnia-Herzegovina and a suit against former Philippine president Ferdinand Marcos by Philippine nationals.⁸

In the 1980s, most ATS cases tended to involve circumstances like those in *Filartiga*—suits by foreign nationals against officials of their own government for conduct that occurred in a foreign state. By the 1990s, the focus of ATS litigation expanded, with plaintiffs bringing more suits against *private* actors, mainly corporations, for, among other things, aiding and abetting alleged human rights abuses

4. Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT’L L. 587, 588 (2002).

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

6. *See Sosa*, 542 U.S. at 716–18.

7. 630 F.2d 876 (2d Cir. 1980).

8. *See Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995); *In re Marcos Human Rights Litigation*, 978 F.2d 493, 496 n.13 (9th Cir. 1989) (citing *Trajano v. Marcos*, 878 F.2d 1439 (9th Cir. 1989)).

perpetrated by foreign governments.⁹ In all, more than 100 ATS suits have been filed since *Filartiga*.¹⁰

Against this background, the Supreme Court for the first time considered the ATS in its modern incarnation in the 2004 case of *Sosa v. Alvarez-Machain*. In *Sosa*, a Mexican plaintiff alleged that the defendant, also a Mexican national, acted at the direction of the U.S. Drug Enforcement Agency to help abduct the plaintiff in Mexico. The plaintiff was thereafter transferred to the United States, where he was eventually prosecuted by U.S. authorities and acquitted. The plaintiff contended that his forcible abduction in Mexico by the defendant amounted to an arbitrary detention in violation of customary international law.

The Supreme Court ruled that the ATS is only a jurisdictional statute and does not by itself create a cause of action. But the Court also reasoned that the First Congress “understood that the district courts would recognize private causes of action for certain torts in violation of the law of nations.”¹¹ Justice Souter’s opinion for the Court identified three eighteenth-century causes of action as paradigmatic: offenses against ambassadors, violations of “safe conduct”—that is, official permission for a foreigner to travel freely through U.S. jurisdiction—and piracy.¹² The Court also did not foreclose certain additional suits for violations of international law, provided, among other limitations, that the claim “rest[s] on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features [of these paradigmatic offenses].”¹³ Applying this limitation, the Court rejected *Sosa*’s specific claim that international law prohibited “arbitrary detention.”¹⁴

Justice Scalia, in a concurring opinion, would have held that the ATS is a jurisdictional statute and nothing more, and that it does not authorize present-day federal courts to create *any* causes of action for violations of international law.¹⁵ That task would necessarily fall to the Congress.

The Court thus accepted the narrow “jurisdictional” interpretation of the ATS advocated by the Executive Branch but held that the ATS authorized federal courts to recognize certain new causes of action. Significantly, however, the Court identified a number of factors that counseled special “judicial caution” and a

9. See Julian G. Ku, *The Third Wave: The Alien Tort Statute and the War on Terrorism*, 19 EMORY INT’L L. REV. 105, 107–10 (2005).

10. See *id.* at 108–09 & nn.15–16.

11. *Sosa*, 542 U.S. at 724.

12. *Id.* at 720.

13. *Id.* at 725.

14. *Id.* at 733–38.

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

“restrained conception of the discretion a federal court should exercise in considering a new cause of action” under the ATS.¹⁶ Among other things, the Court recognized the “potential implications for the foreign relations of the United States” that “should make courts particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs.”¹⁷ Accordingly, the Court stressed that devising new federal common law causes of action based on international law “should be undertaken, if at all, with great caution.”¹⁸ Justice Souter’s opinion summed up the situation: the door for ATS litigation was “still ajar subject to vigilant doorkeeping.”¹⁹

Notwithstanding the Court’s directive for restraint, almost four years later, litigation has showed no signs of slowing down. Plaintiffs continue to push against the door the Court left “ajar,” arguing for expansive applications of customary international law. Among the suits courts have heard are a suit against an American company for selling Israel bulldozers under a U.S. military assistance program that were eventually used to demolish Palestinian homes; a suit against U.S. chemical companies that manufactured Agent Orange used by the U.S. military as a defoliant during the Vietnam War; a suit against two high-ranking government officials of the United Arab Emirates alleging involvement in abuses of underage camel jockeys; and a suit against a Canadian energy company for aiding and abetting human rights abuses by investing in Sudan.²⁰ The Second and Ninth Circuits, in particular, have proceeded as before. One post-*Sosa* federal court has frankly conceived of its role as that of a “quasi international tribunal[],” dispensing an international law that “supersed[es] and suppl[ies] the deficiencies of national constitutions and laws.”²¹

This continued litigation under the ATS reflects fundamental problems with how lower courts have approached these suits. These problems center on five key issues: *First*, whether the ATS applies extraterritorially—that is, whether a U.S. court can properly apply U.S. federal common law under the ATS to conduct that occurred entirely in the territory of a foreign State. *Second*, even if such a cause of action could properly be recognized, whether exhaustion of

16. *Id.* at 725.

17. *Id.* at 727.

18. *Id.* at 728.

19. *Id.* at 729.

20. *See Corrie v. Caterpillar, Inc.*, 503 F.3d 974 (9th Cir. 2007); *In re Agent Orange Prod. Liability Litig.*, 517 F.3d 76 (2d Cir. 2008); *Mother Doe ex rel. R.M. v. Al Maktoum*, 2007 WL 2209258 (S.D. Fla. July 30, 2007); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 2007 WL 4532798 (D.C. Cir. Nov. 29, 2007).

21. *In re Agent Orange Product Liability Litigation*, 373 F. Supp. 2d 7, 17 (E.D.N.Y. 2005) (citing *LORI FISLER ET AL., INTERNATIONAL LAW CASES AND MATERIALS* 645 (4th ed. 2001)).

adequate and available local remedies in that foreign country should be a prerequisite to bringing an ATS suit. *Third*, whether corporations or other private entities may be held liable under the ATS for aiding and abetting human rights abuses perpetrated by foreign governments. A *fourth* issue is how to apply *Sosa*'s requirement that an international law norm be sufficiently accepted and specific. And *fifth*, in what circumstances should courts dismiss suits based on what *Sosa* referred to as "case-specific deference to the political branches"?

American Isuzu Motors v. Ntsebeza, also known as the *Apartheid* case, which is now in the petition stage before the Supreme Court, exemplifies both some lower courts' resolution of these questions and their approach to the ATS after *Sosa*.²² This suit was brought by former victims of apartheid in South Africa against more than three dozen private corporations for allegedly aiding and abetting human rights abuses committed by the former apartheid regime. In essence, the case seeks to hold those corporations liable for doing business in South Africa during the apartheid era.

In the district court, the post-apartheid government of South Africa filed a statement of interest objecting to the suit and urging its dismissal. The filing stated that the litigation threatened investment in South Africa and interfered with South Africa's resolution of the legacy of apartheid, which was "informed by principles of reconciliation, reconstruction, reparation and goodwill."²³ When the case was still being litigated in the district court, the Supreme Court in *Sosa* took the extraordinary step of singling it out by name in a footnote as possibly appropriate for dismissal based on "case-specific deference to the political branches."²⁴

The district court heeded these cautions, dismissing the suit on the ground that aiding and abetting claims are not actionable under the ATS.²⁵ The Second Circuit reversed, relying in part on the *absence* of any express restriction in the ATS on aiding and abetting liability—this despite the Supreme Court's admonition in *Sosa* that courts exercise restraint and look to positive legislative guidance.²⁶

22. *Am. Isuzu Motors v. Ntsebeza (Apartheid)*, 504 F.3d 254 (2d Cir. 2007), *petition for cert filed*, 76 U.S.L.W. 3603 (U.S. Jan. 10, 2008) (Nos. 05-2141, 05-2326). Subsequent to this address, on May 12, 2008, the Supreme Court affirmed the judgment of the Second Circuit under 28 U.S.C. § 2109. *See* 128 S.Ct. 2424 (2008). That statute provides that when the Court lacks a quorum and a majority of the qualified justices are of the opinion that the case cannot be heard and determined at the Court's next term, the Court shall enter an order affirming the judgment of the court below with the same effect as an affirmance by an equally divided Court. *Id.*

23. *Sosa*, 542 U.S. at 733 n.21.

24. *Id.*

25. *In re South African Apartheid Litig.*, 346 F. Supp. 2d 538, 549–50 (S.D.N.Y. 2004).

26. *Khulumani v. Barclay Nat. Bank Ltd.*, 504 F.3d 254, 254 (2d Cir. 2007).

In February, the United States filed an amicus brief requesting that the Supreme Court grant certiorari in the case to consider whether the ATS allows suits for aiding and abetting and allows U.S. courts to apply U.S. federal common law under the ATS to conduct occurring in a foreign state. If the Supreme Court grants review, the case could be heard as early as this fall.²⁷

The U.S. government's brief urging certiorari in the apartheid litigation is one of many statements of interest and amicus briefs that we have filed post-*Sosa* in those ATS suits that implicate significant U.S. foreign policy interests. Since *Sosa*, we have made such filings in about a dozen cases. Given the nature of the underlying allegations in certain cases, the decision whether to file can be a weighty one.

Our usual practice in these cases has been to make arguments for *general* legal principles concerning ATS litigation and to avoid delving into the underlying merits of any particular case. We have typically argued, as we have in the *Apartheid* case, for limiting ATS litigation by resolving legal issues in light of *Sosa*. These include the issues of extraterritoriality, aiding and abetting, and exhaustion of local remedies. For example, we argued in a Ninth Circuit case that a cause of action does not lie under the ATS for a suit against a British mining company concerning conduct that occurred in Papua New Guinea, and that, in any event, plaintiffs should seek their remedy first in Papua New Guinea, not in federal court in California.²⁸ The Executive has sought to have courts dismiss one case—the suit involving the bulldozers used by the Israelis—based on “case-specific” deference to the political branches, as suggested in *Sosa*.²⁹ Although the bulldozer case was dismissed, these arguments have not always won traction in the lower courts. Still, they remain in play in a number of cases and ultimately their validity will likely be determined by the Supreme Court.

Now let me turn to some of the issues raised by ATS litigation. To start, it has been argued that ATS litigation holds out the possibility of certain benefits. Let me mention three quickly. *First* is that ATS suits can promote accountability and provide a public voice to victims of terrible human rights abuses when no other forum is available, and that allowing claims of human rights abuses to be heard in court helps recognize the dignity of the victims. *Second* is that ATS litigation may help to raise public and political awareness of human rights abuses that might not gain attention otherwise, which, it is said, might have the effect of spurring political action to address ongoing abuses, prevent future abuses, or devise appropriate

27. See *supra* note 22 and accompanying text.

28. See *Sarei v. Rio Tinto*, 487 F.3d 1193 (9th Cir. 2007).

29. *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 978 (9th Cir. 2007).

standards of conduct for corporations. *Third*, ATS litigation might advance U.S. participation in the development of customary international law.

Apart from the fact that they are not legal arguments, and were not the reasons for enactment of the ATS, these suggested benefits also may not be as significant as they might first seem. ATS cases might not be always driven by a simple desire to see justice done; like all private civil litigation, they might sometimes be motivated by other considerations, such as money or politics. Moreover, litigating issues in U.S. courts does not generally promote the development of effective remedial mechanisms in the foreign country concerned. The benefits of having U.S. courts engage in the development of international law are also not altogether clear, because much ATS litigation has focused on defining U.S. *domestic* law and its proper reach. And properly so: the Supreme Court held in *Sosa* that the law to be applied under the ATS is U.S. federal common law. That law governs, for example, the extraterritorial application of the ATS, and also in large part aiding and abetting liability and exhaustion of local remedies. When courts do consider customary international law, there is also a risk that their interpretations could be in tension with those advanced internationally by the Executive Branch. Still, an assessment of the ATS as a matter of policy should consider these issues.

There are also substantial costs to ATS litigation. The important ones are not financial—ATS suits can be expensive to contest, but, so far, ATS litigation has not produced large judgments that can realistically be executed. Indeed, that is one of its weaknesses—it does not provide any effective relief in the vast majority of cases. The real costs, however, fall into two basic categories: what I will call “diplomatic” costs and “democratic” costs.

First, the “diplomatic” costs. Here, I can assure you that foreign governments do not see the ATS as an instance of the United States constructively engaging with international law. Quite the opposite: we are regarded as something of a rogue actor. We are perceived, accurately, as having in effect established an International Civil Court—a court with jurisdiction to decide cases brought by foreigners arising anywhere in the world, by the light only of its own divination of universal law, and through the extraterritorial application of U.S. law concerning rights and remedies. By itself, this can be grating enough to foreign governments. But it is especially so when taken together with both the fact that the U.S. often argues vigorously against the assertion by foreign courts of universal jurisdiction to hear cases involving U.S. officials and the fact that the U.S. has declined to join the International Criminal Court because of concerns about that tribunal’s jurisdiction.

In letters to the State Department or in amicus filings in federal courts, foreign governments consistently argue that the assertion of

U.S. court jurisdiction over cases that have little connection to the United States is inconsistent with customary international law principles and interferes with national sovereignty. Canada, for example—internationally, a strong promoter of human rights and accountability for human rights violations—strongly objected to a case in the Second Circuit against a Canadian energy company for allegedly aiding and abetting human rights abuses in Sudan.³⁰ The UK and Australia, also leading human rights advocates, have similarly argued that the scope of ATS jurisdiction is inconsistent with principles of international law.³¹

When you consider the Sudan case or the *Apartheid* case from other countries' perspective—a good thing to do generally in international law and relations—there is considerable force to these criticisms. Imagine, for example, what the U.S. reaction would be if a Swiss court sought to adjudicate claims brought against U.S. government officials or businesses for Jim Crow-era racial restrictions, or—since (without a statute of limitations) ATS suits can reach far into the past—even for slavery. As much as we might denounce past injustices, most of us would probably take offense at the notion that a Swiss court could hear such a suit and decide it based on the court's own articulation of international law. The United States, after all, has come to terms with and sought to remedy the effects of slavery and Jim Crow laws through domestic measures under acts of Congress and state laws resting on a strong moral consensus of our people—and according to the principles, procedures, and norms of our legal system. From the South African perspective, the *Apartheid* case must look very similar, and it is no wonder that the South African government has asked that the case be dismissed.

Serious diplomatic costs also attend *Filartiga*-type litigation against foreign officials. For example, a series of ATS suits against Chinese officials by Chinese Falun Gong members is an issue of considerable importance to the Chinese government.³² In these suits, plaintiffs have served Chinese officials while they were traveling in the United States on official business, which is the basis for the courts' personal jurisdiction. The diplomatic friction caused by these cases runs directly contrary to one of the reasons for enacting the ATS—to *prevent* harassment of foreign officials in the United States

30. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 2005 WL 2082846, at *1–2 (S.D.N.Y. Aug. 30, 2006).

31. Diplomatic Note from the Embassy of Australia to the U.S. Departments of State and Justice (May 11, 2007); Diplomatic Note from Her Majesty's Embassy to the Department of State (May 11, 2007).

32. Subsequent to this speech, on August 1, 2008, the district court dismissed this suit on the ground that the defendant was immune from service of process as a member of a special diplomatic mission. *See Li Weixum v. Bo Xilai*, 568 F. Supp. 2d 35, 35 (D.D.C. 2008).

and prevent international incidents. And it strikes other countries as hypocritical to entertain such suits at the same time we complain about civil and criminal actions brought against U.S. officials in other countries.

In addition to causing diplomatic friction, ATS litigation also exacts “costs” through the lack of democratic checks and accountability. For one, the ATS places few limits on who may bring suit. By its terms, any “alien” can bring suit, and often suits are brought by aliens who have no presence in, or contacts with, the United States. Unlike criminal cases, which are subject to policy and political checks through the exercise of prosecutorial discretion, *Sosa* has not—at least not yet—provided an effective restriction on the types of claims asserted under the ATS. Indeed, the American bar is actively soliciting alien plaintiffs to open up new areas for ATS claims—for instance, in the area of environmental litigation.

More broadly, the lack of a predicate judgment by the political branches that such suits should be brought is a significant problem. As I noted earlier, Congress, in the text of the ATS, has provided virtually no guidance to courts as to how to define causes of action under U.S. law based on international legal norms. The modern ATS is mainly the product of judicial decision making. This fact was noted by the Supreme Court in *Sosa* and was clearly part of the reason for its “restrained conception” of the statute.

Furthermore, unlike the limited and specific nature of eighteenth-century law-of-nations offenses, such as piracy, international law today has developed significantly and comprises a significant and somewhat unwieldy body of norms. ATS plaintiffs nearly always rely on customary international law. As a practical matter, management of ATS litigation depends on the least politically accountable branch, the Judiciary, interpreting an ill-defined body of law—customary international law—that is the *President’s* responsibility on the international plane and that, unlike statutory or treaty law, is not the product of a formal legislative or executive process.

The text of the ATS does not provide for a formal role for the Executive Branch in ATS litigation. Here, it is worth comparing the role of the Executive in policing the terrorism exception to foreign sovereign immunity. As you probably know, under the Foreign Sovereign Immunities Act, or FSIA, foreign states are immune from suit subject to certain exceptions.³³ In 1996, an exception was added for suits based on acts of terrorism.³⁴ Whatever the terrorism exception’s merits, in enacting it, Congress took some account of the fact that it could complicate the President’s conduct of foreign affairs

33. See 28 U.S.C. §§ 1602–1611 (Supp. 2008).

34. See Pub. L. No. 104-132, § 221(a)(1) (1996).

and gave the Executive an important role in the application of the exception. Rather than permitting suits against any state based on allegations of terrorism, only states designated by the Executive as “state sponsors” of terrorism lost their immunity as to terrorism claims. While litigation under the terrorism exception presents some of the same problems raised by ATS litigation, the fact that the Executive has a role in the scope of that litigation has helped limit potential frictions between the courts and the Executive arising from terrorism-related lawsuits. And, of course, the FSIA exception was the result of an affirmative act of Congress, which has the authority (and political accountability) under the Constitution to define the law of nations and the jurisdiction of the federal courts.

As I have said, the Executive Branch often participates in ATS litigation as an amicus. Such filings are made by the Justice Department in coordination with the State Department and, as appropriate, other components within the Executive Branch. Sometimes, especially in the district courts, filings are made in response to an invitation from the court to express the views of the United States. Those requests are themselves a sign that ATS litigation is putting the courts in the awkward position of adjudicating issues touching on U.S. foreign policy. If an area of the law is fraught with such risks to broader national interests that it requires courts to regularly seek the advice of the Executive Branch, perhaps courts are being asked to delve into matters that are not well suited for litigation in U.S. courts and are more appropriately addressed by other means.

Such case-by-case participation can put the Executive Branch in a difficult spot, too. Foreign governments will continue to press U.S. administrations to weigh in on their behalf in ATS litigation. If the Executive is expected to weigh in when litigation presents foreign policy concerns, courts may come to infer (wrongly) from its silence in other cases that there are no such concerns. In addition, foreign governments may come to regard the Executive’s decisions whether or not to file as a reflection of the United States’ view of its bilateral relationship with that government. Domestically, foreign policy submissions will often be read as partisan support for the activities of foreign governments over the deserving interests of the plaintiff victims.

But despite the problems of case-by-case participation, the Executive Branch has real interests in ensuring that as a matter of policy, ATS litigation does not interfere with its conduct of foreign relations. I have already noted foreign governments’ concerns about the scope of U.S. court jurisdiction under the ATS. In addition, recent ATS suits have been used by litigants to duplicate, replace, or proceed on top of the U.S. government’s systemic efforts to reform foreign government practices or help end foreign conflicts. Often, these suits are brought as class actions for all aliens injured by the challenged

conduct, effectively asking the U.S. courts to serve as administrator of an international claims program for foreign nationals. This is illustrated by the nature of the claims in the *Apartheid* and Falun Gong cases, in which the plaintiff classes potentially comprise millions of South Africans and Chinese, respectively. Cases such as these tend to directly implicate broad U.S. foreign policy concerns.

Without a formal role in the statute, the Executive's participation through statements of interest and amicus briefs is one of the few practical ways that the United States can seek to confine the scope of the ATS in a manner that is faithful both to its limited historical roots and the restrained conception of the ATS explained by the Supreme Court in *Sosa*. Compare, for example, the Torture Victims' Protection Act, or TVPA.³⁵ Congress enacted the TVPA in 1992 to provide an express cause of action for aliens or U.S. citizens to sue for torture or extrajudicial killing committed under the color of foreign law. In enacting the TVPA, Congress included several important provisions requested by the Executive. Accordingly, the statute requires exhaustion of adequate and available local remedies, limits suits to conduct by state actors, and provides for a ten-year statute of limitations. The TVPA is far from perfect, and it can have the effect of thrusting U.S. courts into foreign relations. But it is the result of a legislative process—one that resulted in several limitations in the TVPA that take account of U.S. foreign policy interests. For these reasons, there are fewer occasions for the U.S. to file statements of interest or amicus briefs in TVPA litigation. By contrast, the U.S. government's practice of filing statements of interest and amicus briefs in ATS cases can be understood as a necessary substitute for the fact that there was never a legislative process resulting in an act of Congress creating causes of action for the assorted international norms that plaintiffs have asserted under the ATS.

Going forward, we need to consider how to limit the costs of the Alien Tort Statute—both diplomatic and democratic. A critical first step is to recall the ATS's original purposes of providing foreigners an adequate means of redress for other offenses committed in U.S. territory, and perhaps on the high seas in the case of piracy. ATS actions should be confined to situations that closely resemble the types of suits the First Congress had in mind.

In addition, to the extent causes of action are allowed under the ATS, it would make particular sense to bring the ATS in line with the TVPA by requiring exhaustion of local remedies. It seems odd, for example, that exhaustion is required for claims of torture or extrajudicial killing under the TVPA³⁶ but not for a less heinous

35. 28 U.S.C. §1350.

36. Pub. L. No. 102-256, § 2(b), 106 Stat. 73 (1992).

abuse alleged in an ATS suit. Even if, contrary to the U.S. position, an ATS suit based on conduct in a foreign territory can be entertained, an exhaustion requirement would protect our courts from wading into disputes more appropriately litigated elsewhere and could spur foreign governments to develop their own adequate means of redress.

In *Sosa*, the Supreme Court expressly “welcome[d] any congressional guidance in exercising jurisdiction with such obvious potential to affect foreign relations.”³⁷ A bill introduced by Senator Feinstein in 2005 would have resolved some of the problems I have identified but was withdrawn without the Senate taking any action.

If Congress were to legislate, it could apply a clear statute of limitations for ATS claims and provide precise definitions of authorized causes of action—again, much like the TVPA. A statute of limitations would prevent courts from resurrecting very old controversies that the foreign state has long since put to rest. (Indeed, several courts of appeals have already imported the TVPA’s ten-year statute of limitations into the ATS, and state-law limitations periods are also sometimes borrowed for federal causes of action.)³⁸ Defining causes of action legislatively would lend certainty and accountability to the litigation—judges would no longer be left to divine causes of action in the unfamiliar materials of international law—and such definitions would embody the judgment of Congress and the President as to the content of international law. Another meaningful step might be to prohibit class actions. If Congress were to act, however, it should also proceed cautiously, because of the great potential for suits in U.S. courts regarding conduct in foreign countries to interfere with the nation’s foreign policy.

Beyond the ATS, however, we also need to focus on the many other tools the U.S. government, and in particular the State Department, can use to prevent and redress human rights abuses. Some of these are tools of persuasion—for example, the State Department’s annual human rights reports, which review countries’ human rights practices and focus attention on reported abuses.³⁹ The State Department also conducts quiet and public diplomacy, in bilateral and multilateral fora, and administers a variety of programs intended to foster development of the rule of law in other countries—a critical aspect of preventing and redressing human rights abuses. We also support voluntary multi-stakeholder initiatives to promote

37. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 731 (2004).

38. *See, e.g., Van Tu v. Koster*, 364 F.3d 1196, 1199 (10th Cir. 2004).

39. *See* 2007 Country Reports on Human Rights Practices, U.S. Department of State, <http://www.state.gov/g/drl/rls/hrrpt/2007/> (last visited Dec. 19, 2008).

corporate codes of conduct in the developing world, such as the Voluntary Principles in the Extractive Industries.⁴⁰

At the same time, the United States continues to support holding foreign government officials and other persons criminally accountable when they commit torture or other serious human rights abuses. In the cases of Rwanda and the former Yugoslavia, the United States has supported special international tribunals to try and punish the guilty. In addition, the domestic *criminal* law and jurisdiction of the United States is available to punish torture and genocide. For example, the federal government is currently prosecuting Chucky Taylor, the son of the former Liberian leader Charles Taylor, on charges of torture stemming from abuses perpetrated in July 2002 in Monrovia, Liberia.

We need to continue to foster these and other approaches to enforcing human rights. The problem that human rights enforcement must ultimately address—and for which the ATS is of little avail—is the failure of foreign countries' own *domestic* rule-of-law institutions to prevent and provide redress for abuses. These failures cannot be fixed by any single policy program or lawsuit, and certainly not by making U.S. courts ad hoc claims tribunals. Rather, inculcating a respect for law and human rights takes a sustained and careful effort focused on strengthening legal institutions in foreign states, not necessarily expanding the reach of our own.

40. See Voluntary Principles on Security and Human Rights, <http://www.voluntaryprinciples.org/principles/index.php> (last visited Dec. 19, 2008).