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## Laying One Bankrupt Critique to Rest: "Sosa v. Alvarez-Machain" and the Future of International Human Rights Litigation in U.S. Courts

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# Laying One Bankrupt Critique to Rest: *Sosa v. Alvarez-Machain* and the Future of International Human Rights Litigation in U.S. Courts

*Ralph G. Steinhardt\**

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In offering a form of civil redress to the victims of international human rights violations, litigation under the Alien Tort Statute<sup>1</sup> (“ATS”) has come to reflect in microcosm the ways that international law and practice have changed in the last half century. Specifically, the successful ATS cases since the Second Circuit’s seminal decision in *Filártiga v. Peña-Irala*<sup>2</sup> illustrate the blurring of certain structural distinctions that had long given international law its characteristic shape, especially the distinctions between public and private international law, between treaties and custom, between state and nonstate actors, between international and domestic law, and between

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1. 28 U.S.C. § 1350 (2000) [hereinafter referred to as ATS, Act, or Section 1350]. The ATS, a short and once obscure provision of the First Judiciary Act of 1789, Judiciary Act, ch. 20, § 9, 1 Stat. 73, 77 (1789), provides that “[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” Section 1350 has also been referred to as the “Alien Tort Claims Act,” but nothing of substance turns on the manipulation of the popular name, and in this Article, I will follow the Supreme Court and refer to the provision as the “Alien Tort Statute.” *Sosa v. Alvarez-Machian (Alvarez-Machain II)*, 124 S. Ct. 2739, 2746 (2004).

The original version of the Alien Tort Statute provided in relevant part that the district courts shall “have 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.” *Id.* Until the early twentieth century, the term “law of nations”—now supplanted by the term “customary international law”—was used to denote the customary rules and obligations that regulated interactions between states and certain aspects of state interaction with individuals. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111, Introductory Note (1987).

2. 630 F.2d 876 (2d Cir. 1980). In *Filártiga*, a Paraguayan national was tortured to death by Peña-Irala, the Inspector General of Police in Asuncion. *Id.* at 878. Peña came to the United States, where Dolly Filártiga, the victim’s sister, and Joel Filártiga, the victim’s father, invoked the ATS and sought damages. *Id.* at 878-79. The Filártigas were plainly aliens, and death by torture was plainly a tort, so the only litigated issue was whether a government’s torture of its own citizens constitutes a “violation of the law of nations” or not. *Id.* at 880. The trial court dismissed the case citing the traditional rule that a state’s treatment of its own nationals was not within the reach of international law. *Id.* at 878. The Second Circuit reversed, holding that deliberate torture under color of official authority violates international law. *Id.* One distinguished commentator has considered the *Filártiga* decision to be the international human rights movement’s *Brown v. Board of Education*, Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2366 (1991), but as shown below there is good reason to resist the analogy between these two dramatic moments in American legal history

*lex lata* and *lex ferenda*.<sup>3</sup> But in the aftermath of the epochal attacks of September 11, 2001, the modest progress made by international human rights litigators in *Filártiga* and its progeny has been threatened by the same forces that undermine the recognition of domestic civil rights, particularly through the executive branch's broad claims to law-free zones of power.

The broadest critiques of the ATS have been that the private litigation of human rights violations complicates the war on terrorism, that it amounts to "plaintiffs' diplomacy" by interfering with executive branch prerogatives in foreign affairs, and that it threatens to impose a uniquely American form of liability on multinational corporations for their alleged complicity in human rights violations by the governments with which they do business. The narrower critique has centered on the more technical assertion that the ATS is purely jurisdictional and provides no private right of action; in other words, Congress must adopt additional legislation implementing an international human rights norm before it can be litigated under Section 1350. The ATS has also provided fresh context for decades-old battles over the constitutional status of international law, the scope of the self-executing treaty doctrine, and the problem of proving the content of customary international law.<sup>4</sup>

3. See Ralph G. Steinhardt, *The Internationalization of Domestic Law*, in *THE ALIEN TORT CLAIMS ACT: AN ANALYTICAL ANTHOLOGY* 3, 5-28 (Ralph G. Steinhardt and Anthony D'Amato eds., 1999).

4. See, e.g., Donald J. Kochan, *The Political Economy of the Production of Customary International Law: The Role of Non-governmental Organizations in U.S. Courts*, 22 *BERKELEY J. INT'L L.* 240, 241 (2004) (arguing that the ATS creates self-interested incentives for the production of international law); Gary Clyde Hufbauer & Barbara Oegg, *Reconciling Political Sanctions with Globalization and Free Trade: Economic Sanctions: Public Goals and Private Compensation*, 4 *CHI. J. INT'L L.* 305, 327-28 (2003) (cautioning that an increase in ATS litigation could mean disinvestment in developing markets by multinational corporations on a large scale); Curtis A. Bradley, *The Costs of International Human Rights Litigation*, 2 *CHI. J. INT'L L.* 457, 458 (2001) (discussing the hidden political and economic costs of ATS litigation); David J. Bederman, *International Law Advocacy and Its Discontents*, 2 *CHI. J. INT'L L.* 475, 476 (2001) (responding to issues raised by Professor Bradley and arguing that "far from being an elitist, moralist, and legalist phenomenon, ATS litigation may actually reflect the very best in American foreign policy values."); Elliot J. Schrage, *Judging Corporate Accountability in the Global Economy*, 42 *COLUM. J. TRANSNAT'L L.* 153, 153 (2003) (arguing that U.S. interests are buttressed by holding multinational corporations accountable for human rights violations in U.S. Courts); Beth Stephens, *Upsetting Checks and Balances: The Bush Administration's Efforts to Limit Human Rights Litigation*, 17 *HARV. HUM. RTS. J.* 169, 170 (2004) (analyzing the Bush administration's opposition to ATS litigation); Aric K. Short, *Is the Alien Tort Statute Sacrosanct? Retaining Forum Non Conveniens Human Rights Litigation*, 33 *N.Y.U. J. INT'L L. & POL.* 1001, 1004 (2001) (arguing that the doctrine of *forum non conveniens* should be retained and utilized by the courts in ATS litigation); Michael D. Ramsey, *International Law as a Part of Our Law: A Constitutional Perspective*, 29 *PEPP. L. REV.* 187, 188-89 (2001) (exploring the "international-law-as-federal-law" debate); Marisa Anne Pagnattaro, *Enforcing International Labor Standards: The Potential of the Alien Tort Claims Act*, 37 *VAND. J. TRANSNAT'L L.* 203, 209

In *Sosa v. Alvarez-Machain* (*Alvarez-Machain II*),<sup>5</sup> the Supreme Court resolved the most basic of these issues, but muddled others likely to arise in future litigation. To the extent that it adhered to doctrine dating to the founding of the Republic, the Court effectively put alien tort litigation where it was after *Filártiga* and before exaggerated interpretations of the ATS by its critics gained a patina of academic legitimacy. The Court's analysis was largely consistent with the lower courts' routine approach to ATS cases—distinguishing frivolous from meritorious claims under international law,<sup>6</sup> allowing the latter to proceed to trial and judgment<sup>7</sup>, and, in appropriate circumstances, dismissing cases under the Foreign Sovereign Immunities Act, the act of state doctrine, or *forum non conveniens*.<sup>8</sup>

For over two centuries, the ATS has rarely but consistently been interpreted to authorize the federal courts to hear and resolve claims of violations of the law of nations sounding in tort without further Congressional action, including in recent years violations of fundamental, well-defined human rights, such as the right to be free from torture and genocide. Since 1984, some defendants have argued that an additional express cause of action should be required for suits under the ATS,<sup>9</sup> but every lower court to address the argument had rejected it,<sup>10</sup> and the Supreme Court had consistently denied *certiorari*

(2004) (arguing that the ATS should be used as a way of giving force to international labor agreements); Michael G. Collins, *The Diversity Theory of the Alien Tort Statute*, 42 VA. J. INT'L L. 649, 651 (2002) (arguing that the ATS should not be read as requiring alienage diversity in all cases).

5. 124 S. Ct. 2739 (2004). In *United States v. Alvarez-Machain*, (*Alvarez-Machain I*), the Supreme Court ruled that the bilateral extradition treaty between the United States and Mexico did not prohibit the abduction of a Mexican national from Mexican territory for trial in the United States on charges that arose in Mexico. 504 U.S. 669, 670 (1992). In *Alvarez-Machain II*, as detailed below, the Court endorsed the interpretation of the ATS adopted in *Filártiga* and its progeny, which allowed claims for tortious violations of international norms that are "specific, universal, and obligatory." 124 S. Ct. at 2766. The Court did not question any case in which this standard had been found to be satisfied, other than the arbitrary arrest claim advanced by Alvarez-Machain himself, which the Supreme Court rejected. *Id.* at 2769.

6. See *infra* notes 93-110 and accompanying text.

7. See, e.g., *Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996); *In re Estate of Marcos Human Rights Litig.*, 978 F.2d 493 (9th Cir. 1992); *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322 (N.D. Ga. 2002); *Cabello Barrueto v. Fernandez-Larios*, 205 F. Supp. 2d 1325 (S.D. Fla. 2002).

8. See *infra* Part II.B.4.

9. At least two circuit judges, writing only for themselves in cases separated by twenty years in a single circuit, have accepted this argument. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 798-99 (D.C. Cir. 1984) (Bork, J., concurring), *cert. denied*, 470 U.S. 1003 (1985); *Al Odah v. United States*, 321 F.3d 1134, 1145-47 (D.C. Cir. 2003) (Randolph, J., concurring), *rev'd on other grounds*, *Rasul v. Bush*, 124 S. Ct. 2686, 2698-99 (2004) (holding that district court had jurisdiction to hear the Habeas Corpus and ATS claims of some foreign nationals held by the United States' military at the Guantanamo Bay Naval Base).

10. *Papa v. United States*, 281 F.3d 1004, 1013 (9th Cir. 2002); *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 103-06 (2d Cir. 2000), *cert. denied*, 532 U.S. 941 (2001); *Beanal v.*

in those cases. The necessity of an additional cause of action was, however, the controlling issue in *Alvarez-Machain II*, and the Court held conclusively that no additional statutory cause of action was necessary to bring *Filártiga*-like actions under ATS. This was precisely as the lower courts had uniformly held. Citing *Filártiga* repeatedly with approval, the Supreme Court also adopted a strict rule of evidence for proving a “violation of the law of nations or a treaty of the United States” that is entirely consistent with the body of lower court decisions under the ATS, requiring that the norm be “specific, universal, and obligatory.”<sup>11</sup> In addition, by clarifying that the courts of the United States have the doctrinal machinery necessary to protect themselves *ad hoc* from frivolous or inconvenient litigation and from cases that unacceptably compromise the constitutional powers of the executive branch, the Court rejected the argument from *Sosa* and his *amici*, including the government, that these case-by-case concerns erected some prophylactic barrier to ATS litigation.

But if the court concluded that the hard-line critique of the ATS was more caricature than portrait, it also expressed itself through a rhetoric of restraint, cautioning courts against an expansive reading of the statute and requiring courts in future litigation to determine which human rights claims “rest on the 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.”<sup>12</sup> As shown below, that sense of caution is nothing new; it reflects traditional best practices in the irreducibly impressionistic process by which courts have proved the content of customary international law for centuries. It assures that *Alvarez-Machain II* will provoke more litigation than it resolved,

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Freeport-McMoran, Inc., 197 F.3d 161, 165 (5th Cir. 1999); *Abebe-Jira*, 72 F.3d at 848, *cert. denied*, 519 U.S. 830 (1996); *Kadic v. Karadzic*, 70 F.3d 232, 241 (2d Cir. 1995), *cert. denied*, 518 U.S. 1005 (1996); *Hilao v. Estate of Marcos*, 25 F.3d 1467, 1475-76 (9th Cir. 1994), *cert. denied*, 513 U.S. 1126 (1995); *In re Estate of Marcos Human Rights Litigation*, 978 F.2d 493, 503 (9th Cir. 1992), *cert. denied*, 508 U.S. 972 (1993); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 320 (S.D.N.Y. 2003); *Estate of Rodriguez v. Drummond, Co.*, 256 F. Supp. 2d 1250, 1258 (N.D. Ala. 2003); *Cabello*, 157 F. Supp.2d at 1365 (S.D. Fla. 2001); *Iwanowa v. Ford Motor Co.*, 67 F. Supp.2d 424, 441-43 (D.N.J. 1999); *Jama v. Immigration Naturalization Serv.*, 22 F. Supp. 2d 353, 362-63 (D.N.J. 1998); *Doe v. Islamic Salvation Front*, 993 F. Supp. 3, 7 (D.D.C. 1998); *Xuncax v. Gramajo*, 886 F. Supp. 162, 179 (D. Mass. 1995); *Paul v. Avril*, 812 F. Supp. 207, 212 (S.D. Fla. 1993); *Forti v. Suarez-Mason*, 694 F. Supp. 707, 709 (N.D. Cal. 1988).

11. *Sosa v. Alvarez-Machian (Alvarez-Machain II)*, 124 S. Ct. 2739, 2765-66 (2004).

12. *Id.* at 2765.

especially given the ongoing evolution of international human rights law.<sup>13</sup>

On the other hand, the Court also introduced a profoundly retrograde element by offering a counter-historical interpretation of certain human rights instruments that is at odds with the evolved position of the courts and the U.S. government. As a consequence, the Court misapplied its own evidentiary standard to the conduct at issue in the case, finding that the norm prohibiting Alvarez-Machain's abduction and arrest did not yet qualify as a binding obligation under "the law of nations or a treaty of the United States." In short, when the Court broke with its own traditions, it innovated implausibly and with unfortunate results.

Given the aggressive positions staked out by Sosa and his *amici* against *Filártiga*, human rights activists may consider *Alvarez-Machain II* a victory in the sense that escaping a fire is a victory (even as it was squarely a defeat for Alvarez-Machain himself), but the impact of the decision on future litigation remains a matter of reasoned speculation. After a brief orientation to the litigation itself in Part I, this Article locates *Alvarez-Machain II* within the traditional international jurisprudence of the Court, especially with respect to its foundational decision in *The Paquete Habana*.<sup>14</sup> The Article then identifies the issues that *Alvarez-Machain II* resolved and describes the likely trajectory of issues that remain open for further development by the courts, including the possibility of aiding-and-abetting liability and corporate liability for complicity in human rights abuse. In the aftermath of the decision, Congress, having already expanded the ATS once,<sup>15</sup> may be invited to legislate answers to the questions that remain under the statute after *Alvarez-Machain II*.

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13. See *Filartiga v. Peña-Irala*, 630 F. 2d 876, 881 (2d Cir. 1980) ("[C]ourts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today."). As Justice Story observed in *United States v. La Jeune Eugenie*, 26 F. Cas. 832, 846 (D. Mass. 1822), "[i]t does not follow, . . . that because a principle cannot be found settled by the consent or practice of nations at one time, it is to be concluded, that at no subsequent period the principle can be considered as incorporated into the public code of nations."

14. 175 U.S. 677 (1900).

15. The Torture Victim Protection Act of 1991, 28 U.S.C. § 1350, extended *Filártiga* to U.S. citizens with certain procedural limitations, but Congress clearly endorsed the possibility of ATS claims beyond the *Filártiga* claims and saw no need to alter the statute to accommodate them: "claims based on torture or summary executions do not exhaust the list of actions that may appropriately be covered by section 1350. *That statute should remain intact to permit suits based on other norms that already exist or may ripen in the future into rules of customary international law.*" H.R. Rep. No. 367, 102nd Cong. 1st Sess., pt 1 (1991) (emphasis supplied). It cannot be argued that subsequent legislative history is controlling authority in determining a prior Congress's intent, but the Supreme Court has observed that subsequent action by Congress "should not be rejected out of hand as a source that a court may consider in the search for legislative intent." *Andrus v. Shell Oil Co.*, 446 U.S. 657, 666 n.8 (1980).

This Article closes with a legislative proposal to assure that the ATS remains a viable, modest vehicle for the vindication of international human rights, by balancing the interests of human rights plaintiffs, the government, and defendants.

### I. THE ALVAREZ-MACHAIN LITIGATION

On April 2, 1990, Dr. Humberto Alvarez-Machain was abducted from his medical office in Guadalajara, Mexico, held incommunicado and transported to El Paso, Texas, where he was arrested the next day for his alleged participation in the torture and murder of Kiki Camarena, a federal drug enforcement agent, and Camarena's pilot, Alfredo Zavala-Avelar. According to the record in the case, whatever authorization existed for this operation came from the Deputy Administrator of the Drug Enforcement Administration ("DEA") and not from the President of the United States, the Attorney General, the Secretary of State, or any other member of the cabinet. According to his own sworn testimony, not even then-DEA Administrator Jack Lawn was aware of the operation.<sup>16</sup> Despite subsequent characterizations by the government, the motivation for the operation was the extraterritorial enforcement of U.S. criminal law and not the neutralization of a terrorist threat or any other national security concern.<sup>17</sup> The United States never initiated a request for the extradition of Dr. Alvarez-Machain under the bilateral Extradition Treaty between Mexico and the United States. The government of Mexico formally protested the kidnapping,<sup>18</sup> and both

16. Alvarez-Machain v. United States, 331 F.3d 601, 642 n.1 (9th Cir. 2003), *reversed by* 124 S. Ct. 2739 (2004).

17. The war on terrorism has been prosecuted through transnational abductions without raising the same legal concerns because even a state-sponsored abduction does not violate "the law of nations or a treaty of the United States" if it occurs *inter alia* on the high seas or other territories beyond any state's national jurisdiction, *see, e.g.*, United States v. Yunis, 924 F.2d 1086, 1094 (D.C. Cir. 1991) (stating that the FBI and the Navy are authorized to assist in the arrest of a terrorism suspect in international waters); or with the consent of the territorial state, *see, e.g.* Kasi v. Angelone, 300 F.3d 487, 499-500 (4th Cir. 2002), *cert denied*, 537 U.S. 1025 (2002) (Pakistan did not object to the abduction of a terrorist suspect); United States v. Walczak, 783 F.2d 852, 856-57 (9th Cir. 1986) (upholding a search by United States Customs agents conducted at a Canadian airport pursuant to an international agreement between the United States and Canada); or without the participation of the United States government, *see, e.g.*, United States v. Verdugo-Urquidez, 856 F.2d 1214, 1216 (9th Cir. 1988) (defendant arrested by Mexican officials); United States v. Toscanino, 500 F.2d 267 (2d Cir. 1974) (U.S. agents not directly involved in abduction). Ironically, much of the Bush Administration's attack on the ATS in the context of terrorism derives from Judge Robert Bork's separate concurrence in a 1984 case, dismissing an ATS claim in which plaintiffs attempted to recover damages from terrorists for a terrorist attack. Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 798 (D.C. Cir. 1984) (Bork, J., concurring).

18. Brief for the United Mexican States as Amicus Curiae in Support of Affirmance, United States v. Alvarez-Machain, 504 U.S. 655 (1992) (No. 91-712), *reprinted in* 31 I.L.M. 934 (1992).



the federal district court and the court of appeals directed that Dr. Alvarez-Machain be repatriated because the abduction violated the treaty.<sup>19</sup>

The Supreme Court reversed (*Alvarez-Machain I*).<sup>20</sup> Writing for the majority, Chief Justice Rehnquist concluded that the extradition treaty did not by its terms prohibit state-sponsored kidnapping as an alternative to formal extradition procedures. Nor did the norms of territorial integrity in customary international law support an inferred prohibition in the treaty, since these norms—which prohibit the exercise of enforcement authority by one state in the territory of another without consent—were insufficiently related to the conduct at issue and were within the executive branch's discretion to protect or not. The majority concluded that, because there was no underlying treaty violation, the judiciary lacked authority to inquire into the circumstances under which Dr. Alvarez-Machain was brought to this country, an asserted consequence of the *Ker-Frisbie* doctrine of federal common law.<sup>21</sup>

Once it had been determined that Dr. Alvarez-Machain could not successfully challenge the means of his rendition, he went to trial in United States District Court in Los Angeles. On December 14, 1992, Judge Edward Rafeedie, who had sentenced other defendants to life in prison for their roles in the death of Camarena and Zavala-

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19. *United States v. Caro-Quintero*, 745 F. Supp. 599, 614 (C.D. Cal. 1990), *aff'd sub nom.*, *United States v. Alvarez-Machain*, 946 F.2d 1466, 1467 (9th Cir. 1991).

20. *United States v. Alvarez-Machain*, 504 U.S. 655, 670 (1992).

21. *Ker v. Illinois*, 119 U.S. 436 (1886); *Frisbie v. Collins*, 342 U.S. 519 (1952). Far from fitting within the *Ker-Frisbie* line of cases, the decision in *Alvarez-Machain I* actually represented a radical expansion of the doctrine, which had evolved almost exclusively in the context of interstate abductions, not state-sponsored international abductions. In *Ker*, a U.S. citizen who had fled to Peru to escape embezzlement charges was forcibly returned to the United States by a private security guard. *Id.* at 438-39. Though the guard carried extradition papers within the framework of the 1870 extradition treaty between the United States and Peru, the seizure itself was made outside the formal treaty procedures, and the U.S. government was not involved in any way in *Ker's* kidnapping, unlike *Alvarez-Machain's* case; indeed, according to the Court itself, *Ker's* abduction "was a clear case of kidnapping within the dominion of Peru, without any pretense of authority under the treaty or from the government of the United States." *Ker*, 119 U.S. at 443. In addition, unlike Mexico in *Alvarez-Machain I*, neither Peru nor Chile, which partially occupied Peru at the time, protested the abduction. Charles Fairman, *Ker v. Illinois Revisited*, 47 AM. J. INT'L L. 678, 685 (1953). *Frisbie* and its progeny involved instances of abductions in which neither a treaty nor international law generally was even peripherally involved. Under the United States Constitution and the Extradition Act, States of the Union lack the discretion to decline the extradition of their citizens solely on the basis of their citizenship. U.S. CONST. art. IV; 18 U.S.C. § 1382 (2002). They had in other words given up the very rights of sovereignty asserted by Mexico in *Alvarez-Machain I*. Logically, no line of cases dealing with domestic kidnappings or kidnappings without government participation can determine the effect of a state-sponsored violation in violation of another state's territorial sovereignty.

Avelar,<sup>22</sup> directed a verdict of acquittal, noting that the prosecution of Dr. Alvarez-Machain was based on “wild speculation” and “hunches” that did not add up to sufficient evidence of his participation in the crime.<sup>23</sup> After his acquittal, Dr. Alvarez-Machain invoked the ATS and sued Francisco Sosa, a former Mexican police officer who had been one of the kidnappers and who was then in the federal witness protection program.<sup>24</sup>

The facts concerning Alvarez-Machain’s treatment during the abduction were disputed at trial, but it was not disputed that he was taken from his medical office, driven away in an unmarked car, held against his will in a motel in another town, prevented from contacting his family until after he reached the United States, and finally turned over to waiting DEA agents in Texas the following day.<sup>25</sup> The district judge did not find Dr. Alvarez-Machain’s testimony about his physical treatment credible but awarded him \$25,000 in damages because he had suffered emotional distress as the result of a kidnapping “in violation of the law of nations or a treaty of the United States.” A three-judge panel of the Court of Appeals for the Ninth Circuit affirmed,<sup>26</sup> and the *en banc* panel narrowly affirmed, finding that Alvarez-Machain’s international human rights, especially his right to be free of arbitrary arrest and detention, had been violated.<sup>27</sup> Rejecting the analysis advanced by Sosa, and the government as *amicus*, not one of the eleven *en banc* judges, including the five

22. See, e.g., *United States v. Lopez-Alvarez*, 970 F.2d 583, 586-87 (9th Cir. 1992); *United States v. Zuno-Arca*, 25 F. Supp. 2d 1087, 1124 (C.D. Cal. 1998).

23. *Alvarez-Machain v. Sosa*, 331 F.3d 604, 610 (9th Cir. 2003) (*en banc*).

24. It had been conceded that Sosa acted under color of official authority, *United States v. Caro-Quintero*, 745 F. Supp. 599, 609 (C.D. Cal. 1990), but his motion to have the United States substituted as defendant under the Westfall Act, 28 U.S.C. § 2679 (2000), was denied, and he did not appeal that disposition. The United States was substituted as a defendant for all of the other individual defendants, and the Ninth Circuit Court of Appeals ruled *en banc* that federal officers and the United States can only be sued for torts in violation of the law of nations under the Federal Tort Claims Act, 28 U.S.C. § 2679(b)(1), which waives sovereign immunity in suits “for . . . personal injury . . . resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment.” *Alvarez-Machain* 331 F.3d at 631. The Supreme Court ruled that the FTCA’s exception for claims “arising in a foreign country,” 28 U.S.C. § 2680(k) (2000), bars claims based on any injury suffered in a foreign country, regardless of where the tortious act or omission occurred, thereby rejecting the so-called “headquarters doctrine,” under which various circuit courts had found the foreign country exception inapplicable to planning and direction decisions made by government agents in the United States. *Sosa v. Alvarez-Machain (Alvarez-Machain II)*, 124 S. Ct. 2739, 2754 (2004).

25. *United States v. Caro-Quintero*, 745 F. Supp. 599, 603 (C.D. Cal. 1990).

26. *Alvarez-Machain v. United States*, 266 F.3d 1045, 1064 (9th Cir. 2001).

27. *Alvarez-Machain*, 331 F.3d at 641 (9th Cir. 2003) (*en banc*).

dissenters, adopted the argument that an explicit cause of action was required in addition to the grant of jurisdiction in the ATS.

The case returned to the Supreme Court, which reversed on other grounds. The Court concluded that the ATS was a purely jurisdictional statute that created no new causes of action, but it did not follow, as the government had urged, that Congress was required to take additional action before the statute could be invoked. "There is too much in the historical record to believe that Congress would have enacted the ATS only to leave it lying fallow indefinitely."<sup>28</sup> To the contrary:

[F]ederal courts could entertain claims once the jurisdictional grant was on the books, because torts in violation of the law of nations would have been recognized within the common law at the time. . . . The jurisdictional grant is best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time.<sup>29</sup>

The contemporaneous historical record, especially the writings of Blackstone, suggested that these norms included the "violation of safe conducts, infringement of the rights of ambassadors, and piracy."<sup>30</sup> By citing *Filártiga* with approval, the Court established that ATS actions are no longer limited to those specific wrongs, though their legal status in the late 18th-century clearly informs the rule of evidence that should govern future ATS proceedings:

[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 and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized.<sup>31</sup>

The Court did not identify a defining characteristic of these "18th-century paradigms," nor did it define the "ultimate criteria for accepting a cause of action subject to jurisdiction under §1350,"<sup>32</sup>

28. *Alvarez-Machain II*, 124 S. Ct. at 2758-59.

29. *Id.* at 2761. Contrary to the Supreme Court's assertion, Alvarez-Machain did not argue that the ATS qualified "as authority for the creation of a new cause of action for torts in violation of the law of nations," a position the Court then dismiss as "implausible." *Id.* at 2755. Instead, Alvarez-Machain took the position that the ATS "authorizes the federal courts to hear and resolve claims of tortious violations of the law of nations without further Congressional action." Brief for the Respondent at 7, *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739 (2004) (No. 03-339). "Nor is it unusual, unprecedented, imprudent, or unconstitutional for federal courts to fashion common law principles to govern those aspects of [ATS] litigation not governed by the express Congressional incorporation of tort law and the 'law of nations.'" *Id.* at 29. These positions are entirely consistent with the Court's analysis, which makes its articulation of a more aggressive argument and its attribution of the argument to Alvarez-Machain particularly tendentious.

30. *Alvarez-Machain II*, 124 S. Ct. at 2761.

31. *Id.* at 2761-62.

32. *Id.* at 2765.

preferring instead to approve the formulations in various lower court decisions and opinions.<sup>33</sup>

The Court grounded the inherently discretionary judgment about the actionable norms of international law in the common law making powers and traditions of the federal judiciary, clarifying again that the pronouncement in *Erie R. Co. v. Tompkins* that “[t]here is no federal general common law”<sup>34</sup> should not be over interpreted. Although *Erie* requires the federal courts to be cautious “before exercising innovative authority over substantive law”<sup>35</sup> without legislative guidance, the Court has repeatedly explained that an entirely legitimate federal common law exists in various “havens of specialty”<sup>36</sup> or interstitial areas of particular federal interest,<sup>37</sup> including international law.<sup>38</sup> Thus, the Court in *Alvarez-Machain II* both adhered to *Erie*’s conception of limited judicial power to articulate federal “general” common law and established that the courts’ derivation of certain international human rights norms in ATS litigation would not violate the separation of powers. Certainly, nothing in *Alvarez-Machain II* questions, let alone undermines, the legitimacy of *Filártiga*, because the threshold evidentiary rule as to the content of international law, namely the prohibition of torture, had been fully satisfied in that case.

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33. *Id.* at 2765-66 (citing: *Filártiga*, (“[F]or purposes of civil liability, the torturer has become--like the pirate and slave trader before him--hostis humani generis, an enemy of all mankind”); *Tel-Oren, supra*, at 781 (Edwards, J., concurring) (suggesting that the ‘limits of section 1350’s reach be defined by ‘a handful of heinous actions--each of which violates definable, universal and obligatory norms’); see also *In re Estate of Marcos Human Rights Litig.*, 25 F.3d 1467, 1475 (C.A.9 1994) (“Actionable violations of international law must be of a norm that is specific, universal, and obligatory.”); see also *infra* text accompanying notes 93-110.

34. 304 U.S. 64, 78 (1938).

35. *Alvarez-Machain II*, 124 S. Ct. at 2762.

36. *Id.*

37. *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 726 (1979) (stating that priority of liens stemming from federal lending programs must be determined by federal law fashioned by the federal courts); *Textile Workers v. Lincoln Mills of Alabama*, 353 U.S. 448, 457 (1957) (stating that jurisdictional grant allows federal common law to govern the interpretation of collective bargaining agreements).

38. See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 424-26 (1964) (stating that federal common law determines the scope of the act of state doctrine, which bars courts from inquiring as to the propriety of acts of a foreign government within its own territory); *Texas Indus., Inc. v. Radcliffe Materials, Inc.*, 451 U.S. 630, 641 (1981) (stating that “international disputes implicating . . . our relations with foreign nations” qualify as one of the “narrow areas” in which “federal common law” survives *Erie*). See generally Phillip C. Jessup, *The Doctrine of Erie Railroad v. Tompkins Applied to International Law*, 33 AM. J. INT’L L. 740, 743 (1939) (“It would be as unsound as it would be unwise to make our state courts our ultimate authority for pronouncing the rules of international law.”).

In oracular language that is certain to be quoted by both plaintiffs and defendants in future ATS cases, however, the Court observed that:

[T]he judicial power should be exercised on the understanding that the door is still ajar subject to vigilant doorkeeping, and thus open to a narrow class of international norms today. *Erie* did not in terms bar any judicial recognition of new substantive rules, no matter what the circumstances, and post-*Erie* understanding has identified limited enclaves in which federal courts may derive some substantive law in a common law way. For two centuries we have affirmed that the domestic law of the United States recognizes the law of nations.<sup>39</sup>

The Court said that it would “welcome any congressional guidance in exercising jurisdiction with such obvious potential to affect foreign relations” and made it clear that criteria other than the nature of the asserted norm might affect the justiciability of a case, including a potential exhaustion-of-remedies requirement and statements of interest from the executive branch.<sup>40</sup> Critically, the litigation position of the United States in *Alvarez-Machain II*—that the ATS complicated its political life and the war on terrorism—did not create a *per se* barrier to *Filártiga*-like actions.

Immediately following *Alvarez-Machain II*, some ATS activists declared that they had won the war and lost the battle—the ATS had been preserved against its most concerted attack in a quarter-century, but *Alvarez-Machain* had lost his case. According to the Court, the norm at the heart of *Alvarez-Machain*’s claim was insufficiently specific to apply unambiguously to his case. As the court reasoned, the norm against arbitrary arrest was contained in two international instruments—the Universal Declaration of Human Rights (“UDHR” or “the Declaration”)<sup>41</sup> and the International Covenant on Civil and Political Rights (“ICCPR”)<sup>42</sup>—which, “despite their moral authority, have little utility under the standard set out in this opinion.”<sup>43</sup> Because the Declaration was non-binding at its inception and because the ICCPR was understood to be non-self-executing at the time of its ratification by the United States, they “cannot establish the relevant

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39. *Alvarez-Machain II*, 124 S. Ct. at 2764. Even though modern conceptions of law—including common law and international law—differ markedly from the natural law orientation of the late eighteenth century, fidelity to legislative supremacy compelled the Court in *Alvarez-Machain II* to preserve the ATS by adapting the original understanding to modern times: “We think it would be unreasonable to assume that the First Congress would have expected federal courts to lose all capacity to recognize enforceable international norms simply because the common law might lose some metaphysical cachet on the road to modern realism.” *Id.* at 2765.

40. *Id.* at 2764 n.21.

41. G.A. Res. 217A (III), U.N. GAOR, 3d Sess., U.N. Doc. A/810 (1948).

42. G.A. Res. 2200A (XXI), U.N. GAOR, Supp. No. 16, at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171.

43. *Alvarez-Machain II*, 124 S. Ct. at 2767.

and applicable rule of international law.”<sup>44</sup> Nor was the Court convinced that the prohibition of arbitrary arrest as applied to Alvarez-Machain had attained the status of customary international law. To arrive at this conclusion it had to deploy a strategic recharacterization of Alvarez-Machain’s claim, viewing it as the assertion that the arrest was arbitrary solely because no applicable law authorized it and not because it infringed the sovereignty of Mexico:

Alvarez thus invokes a general prohibition of “arbitrary” detention defined as officially sanctioned action exceeding positive authorization to detain under the domestic law of some government, regardless of the circumstances.<sup>45</sup>

As shown below, this amounts to a “strawman” version of Alvarez-Machain’s actual claims, and the Court had little difficulty dismantling it, finding the implications of such a norm “breathtaking.”<sup>46</sup>

The more persuasive rationale for the Court’s result may rest in its analysis of Section 702 of the RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (1987), which lists a customary international human rights norm against *prolonged* arbitrary detention. According to the Court:

Any credible invocation of a principle against arbitrary detention that the civilized world accepts as binding customary international law requires a factual basis beyond relatively brief detention in excess of positive authority . . . 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. . . . [A] single illegal detention of less than a day, followed by a transfer of custody to lawful authorities and a prompt arraignment, violates no norm of customary international law so well defined as to support the creation of a federal remedy.<sup>47</sup>

The separate opinions in *Alvarez-Machain II* do nothing to undermine the majority’s endorsement of the *Filártiga* paradigm. To the contrary, they preclude the repetition of certain arguments by those who would attempt to dismantle the ATS in the future. In his separate concurrence, for example, Justice Breyer endorsed the majority’s limitations on the recognition of a civil cause of action under the ATS but would add the requirement that the norm fall

44. *Id.* As discussed below, the Court’s handling of these authorities is erroneous and remarkably anachronistic. See *infra* text accompanying note 188.

45. *Alvarez-Machain II*, 124 S. Ct. at 2768.

46. *Id.* (“His rule . . . would create an action in federal court for arrests by state officers who simply exceed their authority; and for any violation of any limit that the law of any country might place on the authority of its own officers to arrest.”). *Id.* For a discussion of Alvarez-Machain’s actual claim under international law, see *infra* text accompanying notes 181-182.

47. *Id.* at 2768-69 (emphasis supplied).

within the universal criminal jurisdiction of states.<sup>48</sup> That no other member of the Court endorsed such a requirement means that the inclusion of a norm within a state's universal jurisdiction may be one factor to consider in determining the norm's actionability under the ATS, but it is neither necessary nor sufficient to satisfy the standard. Similarly, the partial concurrence of Justice Scalia, Chief Justice Rehnquist, and Justice Thomas forcefully disputed the majority's "reservation of a discretionary power in the Federal Judiciary to create causes of action for the enforcement of international-law-based norms," and concluded:

In today's latest victory for its Never Say Never Jurisprudence, the Court ignores its own conclusion that the ATS provides only jurisdiction, wags a finger at the lower courts for going too far, and then—repeating the same formula the ambitious lower courts *themselves* have used—invites them to try again.<sup>49</sup>

By making the self-styled "revisionist" approach to customary international law central to his analysis, and by obtaining the votes of only two additional justices, Justice Scalia effectively demonstrates that the revisionist critique of the ATS was unpersuasive and had finally been laid to rest.<sup>50</sup>

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48. *Id.* at 2782-83 (Breyer, J., concurring).

49. *Id.* at 2776 (Scalia, J., concurring).

50. Sosa's interpretation of the ATS had tracked the argumentation of the academic "revisionists" on the status of customary international law as law of the United States, without acknowledging the failure of this critique to convince any court that their position is correct. For examples of this "revisionist" critique, see generally Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997); Curtis Bradley, *The Costs of International Human Rights Litigation*, 2 CHI. J. INT'L L. 457 (2001); Curtis Bradley, *The Status of Customary International Law in U.S. Courts—Before and After Erie*, 26 DENV. J. INT'L L. & POL'Y 807 (1998); John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955 (1999); John C. Yoo, *Treaties and Public Lawmaking: A Textual and Structural Defense of Non-Self-Execution*, 99 COLUM. L. REV. 2218 (1999); Michael D. Ramsey, *International Law as Part of Our Law: A Constitutional Perspective*, 29 PEPP. L. REV. 187 (2001). *But see* Ryan Goodman & Derek P. Jinks, *Filártiga's Firm Footing: International Human Rights and Federal Common Law*, 66 FORDHAM L. REV. 463, 513 (1997) (arguing that the Torture Victim Protection Act serves as enabling legislation for the ATS, whether or not implementation is necessary); Harold Hungju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824, 1828-29 (1998) (rejecting the "revisionist" requirement that an unambiguous federal statute or treaty enable customary international law); Gerald L. Neuman, *Sense and Nonsense About Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 FORDHAM L. REV. 371, 371-72 (1997) (same). As noted above, the "revisionist" critique, which had generated multiple academic conferences and publications, was never accepted by any lower court with an ATS case before it.

## II. A RETURN TO FIRST PRINCIPLES

A. *Paquete Habana* and the Traditional Domestic Status of Customary International Law

*Alvarez-Machain II* may be viewed as an unremarkable reaffirmation of the traditional doctrine, famously articulated in *Paquete Habana*, that “[i]nternational law is part of our law and must be ascertained and administered by courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination.”<sup>51</sup> But *Sosa* and the government had invoked *Paquete Habana* for two considerably more radical propositions of law that undergirded their broad argument that *Erie* illegitimizes the application of customary international law in *Filártiga* and its progeny. According to *Sosa* and his *amici*, *Paquete Habana* meant that the courts of the United States could resort to the law of nations *only* to resolve “otherwise authorized actions,” such as actions in federal maritime jurisdiction, and that customary norms are binding *only* when the President assents to the application of the norm.<sup>52</sup> When the courts go beyond these limitations, the argument continued, they violate the basic limitations on the creation of federal common law articulated in *Erie*.

These arguments are no longer viable after *Alvarez-Machain II*, because both the Court of Appeals and the Supreme Court explicitly reaffirmed the orthodox legitimacy of international law as law of the United States. In short, *Alvarez-Machain II* repudiates the revisionist view of international law according to which ATS human rights actions were intrinsically illegitimate.<sup>53</sup>

To understand the doctrinal consequences of the *Alvarez-Machain II* Court’s careful reconciliation of *Erie* and *Paquete Habana*, it is necessary to recall the facts of *Paquete Habana*. On April 21, 1898, the Secretary of the Navy instructed Admiral William Sampson, then commanding the North Atlantic Squadron, to blockade the entire north coast of Cuba.<sup>54</sup> The next day, the President proclaimed that the United States would maintain the blockade “in pursuance of the

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51. 175 U.S. 677, 700 (1900).

52. Brief of Petitioner at 29, 40-43, *Sosa v. Alvarez-Machain (Alvarez-Machain II)*, 124 S. Ct. 2379 (2004) (No. 03-339).

53. See Bradley & Goldsmith, *supra* note 50, at 855-58 (criticizing the use of federal common law to develop norms of international law); Curtis A. Bradley & Jack L. Goldsmith, *The Current Illegitimacy of International Human Rights Litigation*, 66 FORDHAM L. REV. 319 (1997) (attacking the constitutionality and wisdom of ATS litigation).

54. *Paquete Habana*, 175 U.S. 677, 712-13 (1900).



laws of the United States, and the law of nations applicable in such cases.”<sup>55</sup> On April 25, Congress declared war on Spain and declared that a state of war had existed for four days.<sup>56</sup> On April 26, the President proclaimed that “it [was] desirable that such war should be conducted upon principles in harmony with the present views of nations and sanctioned by their recent practice . . . .”<sup>57</sup> That recital was followed by specific declarations of certain rules for the conduct of the war by sea, but the proclamation was silent on whether civilian fishing vessels might be seized as prize.<sup>58</sup> By that time, American gunboats had already seized two civilian fishing vessels flying the Spanish flag: the *Paquete Habana* and the *Lola*.<sup>59</sup> On April 28, Admiral Sampson telegraphed the Secretary of the Navy, seeking permission to seize the crews of Spanish fishing vessels as prisoners of war on the ground that they were:

. . . excellent seamen, belonging to the maritime inscription of Spain, who have already served in the Spanish navy, and who are liable to further service. . . . [T]hese trained men are naval reserves, have a semi-military character, and would be most valuable to the Spaniards as artillerymen . . . .<sup>60</sup>

On April 30, the Secretary of the Navy replied: “Spanish fishing vessels attempting to violate the blockade are subject, with crew, to capture, and any such vessel or crew considered likely to aid the enemy may be detained.”<sup>61</sup> Both fishing vessels were brought by their captors into Key West and later condemned by the District Court for the Southern District of Florida as prize, “the court not being satisfied that as a matter of law, without any ordinance, treaty, or proclamation, fishing vessels of this class are exempt from seizure.”<sup>62</sup> Each vessel was then sold at auction, and the masters of the vessels—acting on behalf of the crew and the owners—appealed to the Supreme Court.<sup>63</sup>

The Court ruled that the captures were unlawful and without probable cause, because the law of nations had evolved to the point that domestic coastwise fishing vessels, when plying their trade, were exempt from seizure as prize in times of war and because

55. Proclamation No. 6, 30 Stat. 1769, 1769 (Apr. 22, 1898).

56. *Paquete Habana*, 175 U.S. at 712-13.

57. Proclamation No. 8, 30 Stat. 1770, 1770-71 (Apr. 26, 1898).

58. *Paquete Habana*, 175 U.S. at 712-13.

59. *Id.*

60. *Id.*

61. *Id.* at 712.

62. *Id.* at 679.

63. *Id.* at 712. At the Supreme Court, the United States was represented by the Assistant Attorney General, and the captors were represented separately, although nothing in the report of the case treats their submissions separately from that of the government. *Id.* at 678.

international law applied in United States courts even in the absence of Congressional enactment:

International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. *For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and as evidence of these, to the works of jurists and commentators who by years of labor, research, and experience have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.*<sup>64</sup>

The Court affirmed the award of compensatory damages and denied the claim for punitive damages.<sup>65</sup> Three justices dissented on the ground that no international exemption rule had been proved to their satisfaction and because the court should not review “action which must be treated as having been taken in the ordinary exercise of discretion in the conduct of war.”<sup>66</sup>

The Court’s careful invocation of *Paquete Habana* in *Alvarez-Machain II* demonstrates that the *Filártiga* court’s approach to international law and the ATS after *Erie* was entirely correct, as subsequent courts had routinely held. Indeed, it is possible to identify multiple propositions that the Court’s reaffirmation of *Paquete Habana* necessarily entails.

First, it establishes that the executive branch’s conduct of wartime operations is justiciable when subcabinet federal officers violate the law of nations. The government had argued in *Paquete Habana* that discretionary executive decisions in wartime should not be reviewed or “revised” by the courts. Only the dissent agreed, noting that “the rule is that exemption from the rigors of war is in the control of the Executive. He is bound by no immutable rule on the subject. It is for him to apply, or to modify, or to deny altogether such immunity as may have been usually extended.”<sup>67</sup>

The majority found the case fully justiciable; indeed, the Court felt itself not only authorized but obliged to apply the law of nations to Admiral Sampson’s decision to seize the vessels. That disposition was fully consistent with the admonition many years later in *Baker v. Carr*<sup>68</sup> that the political question doctrine should apply when there are

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64. *Paquete Habana*, 175 U.S. at 700 (emphasis supplied); see also *Talbot v. Janson*, 3 U.S. (3 Dall.) 133 (1795); *United States v. Smith*, 18 U.S. (5 Wheat.) 153 (1820); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

65. *Paquete Habana*, 175 U.S. at 714.

66. *Id.* at 715 (Fuller, C.J., dissenting).

67. *Id.* at 721 (Fuller, C.J., dissenting).

68. 369 U.S. 186, 226-28 (1962).

no judicially manageable standards for the court to apply. Obviously as the policy element displaces the legal element of the case, it becomes progressively non justiciable, but the converse is also true: when there are legal standards to apply, there is progressively less reason not to adjudicate the case. The fact that the *Paquete Habana* court was sitting as the nation's highest prize court does not reduce the significance of this decision, given the breadth of the court's ruling that "[i]nternational law. . . must be ascertained and administered by courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination."<sup>69</sup> There is no suggestion whatever that only maritime or prize courts are courts "of appropriate jurisdiction;" indeed, the bulk of the court's jurisdictional discussion said nothing about prize or maritime jurisdiction, addressing instead the meaning of then-recent legislation that established the circuit courts of appeal and altered the Supreme Court's appellate jurisdiction.<sup>70</sup>

Second, a "controlling executive act" can displace the law of nations and determine the rule of decision in a case, but not every unlawful action by any member of the executive branch qualifies *ipso facto* as a "controlling executive act."<sup>71</sup> If Admiral Sampson's decision to seize the Spanish fishing crew had qualified as a "controlling executive act," the case would have come out precisely the other way. Nor can it be said that the President's proclamation controlled the case, since the proclamation was explicit on several articles of war but said nothing about fishing vessels. In addition, the government had argued in *Paquete Habana* that the exemption norm was simply a matter of comity and not law—a position with some authority behind it from the Napoleonic Wars. The Supreme Court was not convinced and rejected that position in these terms:

"[T]he period of a hundred years which has since elapsed is amply sufficient to have enabled what originally may have rested in custom or comity, courtesy or concession, to grow, by the general assent of civilized nations into a settled rule of international law.<sup>72</sup>" As a consequence, the challenged executive action—involving a seizure of individuals in both *Alvarez-Machain* and *Paquete Habana*—need not

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69. *Paquete Habana*, 175 U.S. at 700.

70. See *id.* at 683 (interpreting the Act of March 3, 1891, 2 Stat. 244, as "nowhere impos[ing] a pecuniary limit upon the appellate jurisdiction, either of this court or of the circuit court of appeals, from a district or Circuit Court of the United States.").

71. Immediately after declaring that international law "must be ascertained and administered by courts of appropriate jurisdiction," the *Paquete Habana* Court said: "[f]or this purpose, where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations . . ." 175 U.S. at 700.

72. *Id.* at 694.

be treated as a “controlling executive act” if undertaken by a subordinate federal officer. Equally important, the government’s litigation position is not dispositive in the Court’s effort to define the content of international law.

Third, *Alvarez-Machain II*— via *Paquete Habana*—confirms (albeit without defining) the status of the law of nations in U.S. domestic law. The Court’s interpretation of the ATS in *Alvarez-Machain II* turned on the proposition that the law of nations, as an enclave of federal common law, survived *Erie* and authorizes the federal courts to hear cases and frame remedies under the Act as they would any other common law cause of action, subject to a heightened burden of proof. In this regard, *Alvarez-Machain II* confirms *Paquete Habana*’s axiomatic proposition that “international law is part of our law”<sup>73</sup> and does not require further implementation by statute, treaty, or executive proclamation to be binding in domestic courts. The *Paquete Habana* Court never referred to some cause of action provided by Congress under which those seized in violation of the law of nations could recover compensatory damages from the United States. Even before *Paquete Habana*, the Court had conclusively foreclosed the argument that customary international law depended for its domestic enforceability on statutory authorization.<sup>74</sup> In *The Nereide*, for example, the Supreme Court confirmed that customary international law created enforceable rights even in the absence of Congressional enactment or codification:

If it be the will of the government to apply to Spain any rule respecting captures which Spain is supposed to apply to us, the government will manifest that will by passing an act for the purpose. *Till such an act be passed, the Court is bound by the law of nations which is a part of the law of the land.*<sup>75</sup>

Customary international law was and remains an area in which no affirmative legislative act is required to “authorize” its application in U.S. courts.<sup>76</sup>

73. *Id.* at 700. This axiom of American law has been questioned by a court only once in over a century. In *Sampson v. Federal Republic of Germany*, 250 F.3d 1145, 1159 n.4 (7th Cir. 2001), Judge Manion suggested in a footnote that the common law on which *Paquete Habana* and *United States v. Smith* rested was part of the federal general common law recognized in *Swift v. Tyson* and rejected by *Erie*. The Supreme Court in *Alvarez-Machain II*, following *Filártiga*, *Kadic*, and *Marcos, inter alia*, reasonably rejected the necessary and untenable implication that international law is really state law. 124 S. Ct. at 2765-66.

74. See, e.g., *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 209 (1796); *Respublica v. De Longchamps*, 1 U.S. (1 Dall.) 111 (1784).

75. 13 U.S. (9 Cranch) 388, 423 (1815) (emphasis supplied).

76. See Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1561 (1984) (“International law. . . is ‘self-executing’ and is applied by courts in the United States without any need for it to be enacted or implemented by Congress.”).

Fourth, *Alvarez-Machain II* reestablishes that it is the province of the courts to determine when rules of comity or courtesy develop into binding norms of customary international law, even if the executive branch argues otherwise in a particular case. The opinion in *Paquete Habana* demonstrates that the law of nations can and must evolve, and that courts, in construing and applying the law as it evolves, assure that the law of the United States conforms to current international standards. As a result, far from embarrassing the executive branch in the conduct of foreign relations by consulting international standards, the common law courts reinforce the assumption that this nation does not violate international standards with impunity:

By an ancient usage among civilized nations, beginning centuries ago and gradually ripening into a rule of international law, coast fishing vessels, pursuing their vocation of catching and bringing in fresh fish, have been recognized as exempt, with their cargoes and crews, from capture as prize of war.<sup>77</sup>

Crucially, the norm existed not only “in the absence of any treaty or other public act,”<sup>78</sup> but also independently of the litigation position of the executive branch, which had argued that the exemption norm was strictly a matter of courtesy or humanitarianism and was distinctly not law. As the Court has shown, there can be no blanket rule of abject deference to the executive branch in the determination of rules of international law.

Fifth, *Paquete Habana* established a strict evidentiary standard for finding a customary norm, which *Alvarez-Machain II* adapted to the ATS. According to the *Paquete Habana* court, because there was “no complete collection of the instances illustrating” the norm, it was “worth the while to trace the history of the rule, from the earliest accessible sources, through the increasing recognition of it, with occasional setbacks, to what we may now justly consider as its final establishment in our own country and generally throughout the civilized world.”<sup>79</sup> In a methodologically telling display of historical erudition, the Court traced the actual practice of states with regard to coastwise fishing vessels to treaties and other forms of state practice dating to the early fifteenth century.<sup>80</sup> The Court also carefully considered apparent exceptions to the putative norm:

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77. *Paquete Habana*, 175 U.S. at 686 (emphasis supplied).

78. *Id.* at 708.

79. *Id.* at 686.

80. The Court's meticulous historical research confirms that the finding of custom is not a license for judicial creativity in ATS cases or any other context. In order fully to prove the content of the norm, the Court considered *inter alia* the edicts and practices of King Henry IV of England (1403); a treaty of 1521 between Emperor Charles V and Francis I of France; Dutch

Since the United States became a nation, the only serious interruptions, so far as we are informed, of the general recognition of the exemption of coast fishing vessels from hostile capture, arose out of the mutual suspicions and recriminations of England and France during the wars of the French Revolution.<sup>81</sup>

The Court concluded, however, that these apparent exceptions had been overcome by the consistency of state practice in the intervening decades: “[T]he period of a hundred years which has since elapsed is amply sufficient to have enabled what originally may have rested in custom or comity, courtesy or concession, to grow, by the general assent of civilized nations into a settled rule of international law.”<sup>82</sup> Evidently, advocates who would advance a customary international law argument must first offer the court a compelling tutorial in legal history.

With adjustments for the demise of natural law conceptions and the expansion of human rights norms since World War II, that is precisely the kind of history the Supreme Court expects successful plaintiffs to proffer in future ATS litigation. In particular, plaintiffs must prove that their claims “based on the present-day law of nations . . . 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 [the courts] have recognized.”<sup>83</sup> By offering only *examples* of cases that would satisfy this rule of evidence, rather than defining the rule itself or cataloging the actionable norms, the Court signaled its expectation that the lower courts would address these claims case-by-case. An ostensive definition is better than no definition, but it remains for future cases to determine which human rights norms pass the test, a task that is undertaken in the next section.

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edicts in 1536; a French compilation of maritime law dated 1661; agreements between Louis XIV and the States General of Holland in 1675; a directive of June 5, 1779, in which Louis XVI ordered his commanders to exempt English fishermen from seizure; a treaty between the United States and Prussia dated 1785 and repeated in later treaties with Prussia dated 1799 and 1828; a treaty between the United States and Mexico in 1848; the practice of the belligerents in the Crimean War (1854); and the practice of the belligerents in conflicts between France and Austria (1859), France and Germany (1870), and Japan and China (1894). *Id.* at 686-700.

81. *Id.* at 691.

82. *Id.* at 694.

83. *Sosa v. Alvarez-Machain (Alvarez-Machain II)*, 124 S. Ct. 2739, 2762 (2004).

*B. Traditional Approaches to the Implication of a Cause of Action Under the ATS*

1. "The 18th-Century Paradigms We Have Recognized": Best Practices in Determining the Actionable Content of International Law

*Alvarez-Machain II* reaffirms *Paquete Habana's* methodical approach to customary international law and thereby offers courts critical guidance in applying the ATS in the future. On each international law issue presented in *Paquete Habana*, the Court looked for and found redundancy: state practice, treaties in consistent form, statements and actions by governments, decisions of domestic prize courts in various nations, and jurists summarizing the practice of states and attesting to its legal status. Similarly, in *United States v. Smith*,<sup>84</sup> cited with approval in *Alvarez-Machain II*, the Court determined that piracy had been defined by the law of nations "with reasonable certainty" using similarly redundant authorities: "What the law of nations on this subject is, may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law."<sup>85</sup> What follows in *Smith* is an encyclopedic analysis of these authorities in various nations and languages.

In determining that international law prohibited a state from torturing its own citizens, the *Filártiga* court engaged in a similarly methodical and eclectic evidentiary process. It gave probative but evidently not dispositive weight to a submission from the executive branch in which the Departments of Justice and State assured the court that "a refusal to recognize a private cause of action in these circumstances might seriously damage the credibility of our nation's commitment to the protection of human rights."<sup>86</sup> The court also considered the practice of states, including the condemnation of torture in diplomatic exchanges and in the laws, constitutions, and high court decisions of the various nations, which reinforced the position of the United States government.<sup>87</sup> The court's conclusion was also grounded in the prohibition of torture in various treaties around the world, invoked not because they were binding on the

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84. 18 U.S. (5 Wheat.) 153, 160-61 (1820).

85. *Id.* at 160-61.

86. Memorandum for the United States, *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980) (No. 79-6090), reprinted in 19 I.L.M. 585, 604 (1980) [hereinafter Memo for U.S. in *Filártiga*].

87. *Filártiga v. Peña-Irala*, 630 F.2d 876, 884 (2d Cir. 1980).

United States but because they qualified as evidence that other nations of the world considered torture illegal.<sup>88</sup> Additionally, international organizations had adopted various resolutions and declarations in consistent form, addressing legal issues, and accepted by consensus or without significant opposition, establishing the illegality of torture.<sup>89</sup> Similarly authoritative were the submissions of publicists that were consistent with the conclusion from these other sources that a state's treatment of its own citizens was no longer a matter of legitimate political diversity and had become a matter of international law.<sup>90</sup> As in *Paquete Habana*, the *Filártiga* court also addressed the appearance of exceptions, noting that some states did commit torture, but declined to allow that behavior—generally unacknowledged and undefended—to undermine the legitimacy of the international prohibition of torture; indeed, the defenses offered by governments accused of torture constituted additional evidence of an entrenched state practice establishing the illegality of torture.<sup>91</sup>

Notably, these various authorities were not binding upon the United States, but they were not for that reason deemed irrelevant. Instead, they were authoritative in the impressionistic process of determining the content of the law of nations and offered probative evidence of the underlying norm. Furthermore, no government objected to the approach or the result in *Filártiga*, suggesting that the court's reliance on these sources did not lead the court into error on the dispositive issue of whether torture violated the "law of nations or a treaty of the United States."<sup>92</sup> At bottom, the key principle—derived from the *Paquete Habana* and reaffirmed in *Alvarez-Machain II*—is that the law of nations is a modest body of law that can only be proven in the unusual circumstances of universality and redundancy.

Despite hyperbolic assertions to the contrary,<sup>93</sup> lower courts had routinely dismissed ATS cases that did not satisfy this high burden of

88. *Id.* at 883-84.

89. *Id.* at 882-83.

90. *Id.* at 879 n.4.

91. *Id.* at 884.

92. 28 U.S.C. § 1350.

93. See, e.g., GARY CLYDE HUFBAUER & NICHOLAS K. MITROKOSTAS, *THE AWAKENING MONSTER: THE ALIEN TORT STATUTE OF 1789*, at 1, 37-42, 45-48 (2003) (suggesting that the Alien Tort Statute will create a "nightmare" that will cripple international trade and foreign direct investment). The courts of the United States have had considerably less difficulty than some academics think they should have had in giving content to custom. See, e.g., Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 U. CHI. L. REV. 1113, 1148-51, 1167 (1999) (outlining common logical fallacies made by courts and commentators when inducing customary international law); J. Patrick Kelly, *The Twilight of Customary International Law*, 40 VA. J. INT'L L. 449, 469-79 (2000) (describing and criticizing the process of judicially recognizing customary international norms).



proof even before the decision in *Alvarez-Machain II*. In *Flores v. Southern Peru Copper Corp.*, for example, the Second Circuit ruled that environmental torts are not in violation of customary international law.<sup>94</sup> In *Hamid v. Price Waterhouse*, the Ninth Circuit determined that garden-variety fraud is not a violation of the law of nations,<sup>95</sup> and similar conclusions have been reached with respect to transnational defamation,<sup>96</sup> full First Amendment freedoms,<sup>97</sup> and the fairness of state lottery distribution systems.<sup>98</sup> Seven years after the decision in *Filártiga*, the American Law Institute adopted the RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, which laid out a then-current catalogue of customary human rights norms. The list generated no opposition from foreign states or from the U.S. government itself and therefore offers an authoritative starting point for giving content to the actionable core of the ATS. According to the Restatement, a state violates international law if, as a matter of state policy, it practices, encourages, or condones (a) genocide, (b) slavery or slave trade, (c) the murder or causing the disappearance of individuals, (d) torture or other cruel, inhuman, or degrading treatment or punishment, (e) prolonged arbitrary detention, (f) systematic racial discrimination, or (g) a consistent pattern of gross violations of internationally recognized human rights.<sup>99</sup>

Legal and political developments since 1987, when the RESTATEMENT was adopted, suggest additional abuses that should be added to this modest and well-defined list of international human rights violations, including, *inter alia*, certain acts of terrorism, war crimes, crimes against humanity, human trafficking, non-*refoulement* of refugees, and violations of religious freedom. It is a mistake to assume, however, that courts have or ever had a "free hand" to make up norms of customary law and enforce them through the ATS. To the contrary, courts have sustained jurisdiction under Section 1350 only for certain egregious violations of international human rights law in addition to torture: disappearances;<sup>100</sup> war crimes;<sup>101</sup> genocide;<sup>102</sup> cruel, inhuman, and degrading treatment—including sexual

94. 343 F.3d 140, 172 (2d Cir. 2003).

95. 51 F.3d 1411, 1418 (9th Cir. 1995).

96. *Maugein v. Newmont Mining Corp.*, 298 F. Supp. 2d 1124, 1130 (D. Colo. 2004).

97. *Guinto v. Marcos*, 654 F. Supp. 276, 281 (S.D. Cal. 1986).

98. *Zapata v. Quinn*, 707 F.2d 691, 692 (2d Cir. 1983).

99. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (1987).

100. *See, e.g., Forti v. Suarez-Mason*, 694 F. Supp. 707 (N.D. Cal. 1988).

101. *See, e.g., Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322 (N.D. Ga. 2002).

102. *See, e.g., Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995); *Mushikiwabo v. Barayagwiza*, No. 94 Civ. 3267 (JSM), 1996 WL 164496 (S.D.N.Y. Apr. 9, 1996).

assault;<sup>103</sup> arbitrary detention;<sup>104</sup> and crimes against humanity.<sup>105</sup> Thus, the repeated rhetoric of caution in *Alvarez-Machain II*—referring for example to the enforceability of “only a very limited set of claims”<sup>106</sup> or “the modest number of international law violations with a potential for personal liability”<sup>107</sup>—is a new restriction on ATS litigation only according to those litigants and critics who had overstated its threat.

Consistent with *Paquete Habana* and its progeny, courts with ATS cases should consult the range of evidence to determine whether a universal practice of condemnation exists,<sup>108</sup> whether the prohibitive norm is “reasonably”<sup>109</sup> well-defined, and whether states behave in a consistent pattern out of a sense of legal obligation. If any one of those demanding criteria is not satisfied, subject matter jurisdiction under Section 1350 should fail. As noted by one court in one highly-politicized ATS case, “[u]niversally recognized norms of international law provide judicially discoverable and manageable standards for adjudicating suits brought under the Alien Tort Act, which obviates any need to make initial policy decisions of the kind normally reserved for nonjudicial discretion.”<sup>110</sup>

At the same time, arguments for more restrictive evidentiary standards should continue to be rejected. The Supreme Court’s analysis in *Alvarez-Machain II* forecloses, for example, the argument

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

104. See, e.g., *Paul v. Avril*, 901 F. Supp. 330 (S.D. Fla. 1994).

105. See, e.g., *Estate of Cabello v. Fernandez-Larios*, 157 F. Supp. 2d 1345 (S.D. Fla. 2001).

106. *Sosa v. Alvarez-Machain (Alvarez-Machain II)*, 124 S. Ct. 2739, 2759 (2004).

107. *Id.* at 2761.

108. The courts will necessarily confront the fact that international law making processes have remained no more constant since the eighteenth century than have the substantive norms of international law. The process of customary law formation has been accelerated for example by the concentration of state practice in multilateral inter governmental organizations and the proliferation of non governmental organizations. In addition, contemporary international law no longer fits cleanly into the dyadic logic that requires a norm to be either binding or irrelevant. As noted in *Filártiga*, there is an intermediate category in which international instruments like resolutions and declarations of the United Nations may be deemed “authoritative” even if they are not directly “binding.” *Filártiga v. Peña-Irala*, 630 F.2d 876, 883 (2d Cir. 1980) (quoting EGON SCHWELB, HUMAN RIGHTS AND THE WORLD COMMUNITY 70 (1964)).

109. *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160 (1820). No treaty or international agreement defined the crime of piracy when *Smith* was decided, so the Court necessarily consulted “the works of jurists, writing professedly on public law; or . . . the general usage and practice of nations; or . . . judicial decisions recognising and enforcing that law.” *Id.* at 160-61. Applying the evidentiary standard and method later adopted in *Paquete Habana* and *Filártiga*, the *Smith* court found a consensus that piracy was a “crime of a settled and determinate nature” and that “whatever may be the diversity of definitions, in other respects, all writers concur in holding that robbery of forcible depredations upon the sea, *animo furandi* [i.e., with the intention to steal], is piracy.” *Id.* at 161 (emphasis supplied).

110. *Kadic v. Karadzic*, 70 F.3d 232, 249 (2d Cir. 1995).

that the category of actionable claims under the ATS is limited to violations of *jus cogens*, or peremptory norms of international law from which no derogation is permitted.<sup>111</sup> Within the body of customary international law, a handful of principles is so fundamental that they invalidate treaties to the contrary, and this subset of customary norms is deemed *jus cogens*. These natural law norms are in principle exempt from the traditional consent and practice dynamics that create and displace custom, and the concept and content of *jus cogens* have been controversial for precisely that reason.<sup>112</sup>

Sosa, like some other ATS defendants prior to *Alvarez-Machain II*, had attempted to graft the *jus cogens* test onto the ATS, and it is predictable that litigants may again attempt to collapse the "specific, universal, and obligatory" standard in *Alvarez-Machain II* into the considerably more restrictive *jus cogens* standard. But none of the courts to which this limiting principle has been offered has adopted it. *Paquete Habana* itself establishes that a customary norm need not qualify as *jus cogens* in order to be justiciable generally: the government's interference with domestic coastwise fishing vessels in time of war violated an established customary international norm, but there was no demonstration that those actions also satisfied the extraordinary test of *jus cogens*.<sup>113</sup> The very language of the ATS,

111. Originally, *jus cogens* was a doctrine of Roman contract law, holding that the freedom of contract was necessarily limited by certain natural law principles of good morals and public justice. Its related meaning in contemporary international law is established by comment k in Section 102 of the RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES:

Some rules of international law are recognized by the international community of states as peremptory, permitting no derogation, and prevailing over and invalidating international agreements and other rules of international law in conflict with them. Such a peremptory norm is subject to modification only by a subsequent norm of international law having the same character.

See also *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 715 (9th Cir. 1991) (citing *Comm. of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 940 (D.C. Cir. 1988)). Under Article 53 of the Vienna Convention on the Law of Treaties, May 23, 1969, art. 53, 1153 U.N.T.S. 331, 334, 8 I.L.M. 679, 699:

[A] peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

112. MARK JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 62-66 (3d ed. 1999) (discussing the *jus cogens* debate between the legal positivists on one hand, who rely exclusively on state consent for the making of international law, and the natural law school of international law on the other hand, whose adherents accept the idea of a fundamental necessary law which all states are obliged to observe, regardless of their consent).

113. According to Section 102 of the RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW:

Some rules of international law are recognized by the international community of states as peremptory, permitting no derogation, and prevailing over and invalidating international agreements and other rules of international law in conflict with them.

with its reference to “the law of nations or a treaty of the United States” shows that Congress adopted a high, but not the highest and most controversial, jurisdictional threshold. No court that has been offered the *jus cogens* gloss on the statute has adopted it, other than to observe that a *jus cogens* violation may be sufficient to satisfy the “specific, universal, and obligatory” standard, but it is not a necessary precondition for the actionability of the norm.<sup>114</sup> To the contrary, the “specific, universal, and obligatory” standard enables courts to distinguish genuinely customary norms from merely idiosyncratic or aspirational norms, and the first courts to articulate that test did so precisely to guide these sometimes difficult judgments.<sup>115</sup>

The “18th-century paradigms” endorsed by the *Alvarez-Machain II* court also foreclose the argument of several recent ATS defendants that an act must be within the universal criminal jurisdiction of states in order to qualify as an actionable tort under the ATS. Clearly, many of the torts recognized to be “in violation of the law of nations or a treaty of the United States” are also criminalized domestically (and now internationally),<sup>116</sup> but, here too, a sufficient condition should not be confused with a necessary condition. Of the three paradigmatic offenses that were “probably on the minds of the

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Such a peremptory norm is subject to modification only by a subsequent norm of international law having the same character.

RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, § 102 cmt. K. See Vienna Convention, May 23, 1969, art. 53, 1155 U.N.T.S. 331, 334.

114. *Hilao v. Estate of Ferdinand Marcos*, 103 F.3d 789, 795 (9th Cir. 1996) (“*Hilao I*”); see also *Martinez v. City of Los Angeles*, 141 F.3d 1373, 1383 (9th Cir. 1998) (ruling that arbitrary arrest and detention were actionable under the ATS without demonstrating that the prohibition on such conduct rose to the level of *jus cogens*). Similarly, in *Hilao II*, the court explicitly noted that torture is “prohibited not only by a specific, universal, and obligatory norm but by one that reaches the level of *jus cogens*.” 103 F.3d at 794. That language would be incomprehensible if the “specific, universal, and obligatory” criteria referred only to *jus cogens*. Contrary to Sosa’s argument, there was no conflict among the circuits on this point. In *Flores v. Southern Peru Copper Corp.*, 343 F.3d 140 (2d Cir. 2003), the Second Circuit affirmed that ATS claimants were only required to allege a violation of customary international law. *Flores* involved an ATS claim against a private corporation for environmental degradation. The court engaged in traditional customary law analysis and made no mention of any additional requirement to plead or prove *jus cogens* norms to satisfy the ATS.

115. *Guinto v. Marcos*, 654 F. Supp. 276, 280 (S.D. Cal. 1986) (holding that First Amendment rights are not so universal as to be a part of the law of nations); *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1539-40 (N.D. Cal. 1987) (requiring that a norm be universally accepted and defined for the purposes of the ATS) (citing Jeffrey Blum & Ralph Steinhardt, *Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act After Filartiga v. Pena-Irala*, 22 HARV. INT’L L.J. 53, 87-90 (1981)).

116. Congress has criminalized a variety of offenses against the law of nations, and U.S. courts have exercised criminal jurisdiction over violations of international law since the founding of the nation. See, e.g., *United States v. Smith*, 18 U.S. (5 Wheat.) 153 (1820) (piracy); *Republica v. DeLongchamps*, 1 U.S. (1 Dall.) 111 (1784) (assault on foreign consul); *Henfield’s Case*, 11 F. Cas. 1099 (C.C.D. Pa. 1793) (breach of neutrality).

men who drafted the ATS<sup>117</sup>—violation of safe conducts, infringement of the rights of ambassadors, and piracy—only the last was typically prosecuted wherever the perpetrator could be found and regardless of the nationality of the victim, the place of the depredation, or the nationality of the actor.<sup>118</sup> The criminalization of acts with neither a territorial nor a national nexus is characteristic of universal criminal jurisdiction, and the fact that the preferred paradigm included both “universal” and “non universal” crimes perhaps explains why, among the Justices deciding *Alvarez-Machain II*, only Justice Breyer analyzed the ATS in these terms.<sup>119</sup> It was well understood in 1789 that civil and criminal liability could but need not arise out of the same act. According to Blackstone’s COMMENTARIES, “for. . . assault, battery, wounding, and mayhem, an indictment may be brought *as well as an action*; and frequently both are accordingly prosecuted; the one at the suit of the crown for the crime against the public, the other at the suit of the party injured, to make him a reparation in damages.”<sup>120</sup> The common law tort remedy was necessarily more fluid than the criminal prosecution and was not dependent on codification: “Wherever the common law gives a right or prohibits an injury, it also gives a remedy by action; and therefore, wherever a new injury is done, a new method of remedy must be pursued.”<sup>121</sup> *A fortiori*, an actionable wrong under the ATS need not lie within every nation’s universal criminal jurisdiction.

## 2. Inferring Private Rights of Action from Statutes

In the course of litigating *Alvarez-Machain II*, *Sosa* and the government had argued at length that *Alexander v. Sandoval*<sup>122</sup> and its progeny blocked litigation under the ATS until Congress adopted a

117. *Sosa v. Alvarez-Machain (Alvarez-Machain II)*, 124 S. Ct. 2739, 2756 (2004).

118. *Smith*, 18 U.S. (5 Wheat.) at 162 (referring to “the general practice of all nations in punishing all persons, whether natives or foreigners, who have committed [piracy] against any persons whatsoever, with whom they are in amity”).

119. 124 S. Ct. at 2783 (Breyer, J., concurring):

[R]ecognition of universal jurisdiction in respect of a limited set of norms is consistent with principles of international comity. That is, allowing every nation’s courts to adjudicate foreign conduct involving foreign parties in such cases will not significantly threaten the practical harmony that comity principles seek to protect. That consensus concerns criminal jurisdiction, but consensus as to universal criminal jurisdiction itself suggests that universal tort jurisdiction would be no more threatening.

120. 2 WILLIAM BLACKSTONE COMMENTARIES \*123 (emphasis supplied).

121. 3 *Id.* \*23. Chief Justice Marshall referred to this passage in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803), quoting Blackstone; he wrote, “it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy, by suit or action at law, whenever that right is invaded.”

122. 532 U.S. 275, 286-87 (2001).

separate statute creating a particular right of action. Squarely presented with that argument, the Court cited *Sandoval* not as a prophylactic barrier to ATS litigation but as a cautionary signal that “a decision to create a private right of action is one better left to legislative judgment in the great majority of cases.”<sup>123</sup> The Court was clearly right to reject any interpretation of the *Sandoval* criteria that would render the ATS meaningless in the absence of additional implementation by Congress.

At the threshold, *Sandoval* and its progeny establish that a statute that focuses on the individuals protected implies an intent to confer rights on a particular class of persons.<sup>124</sup> In other words, “[f]or a statute to create private rights, its text must be phrased in terms of the persons benefited.”<sup>125</sup> By offering a civil remedy to aliens who are victimized by tortious violations of international law, the ATS clearly does identify a “class of persons protected” rather than a “person regulated.”<sup>126</sup> In contrast to the administrative “methods of enforcement” provided by the statute in *Sandoval* and similar cases, the ATS also clearly refers to a mode of enforcement—money damages—that is quintessentially judicial. In addition, the statute does not focus on regulating an agency or providing funds to some recipient, a condition that may bar the inference of a private right of action.<sup>127</sup> *Sandoval* does require “‘rights creating’ language,”<sup>128</sup> and it cannot be argued that the ATS “creates” rights, given the clarity with which the Court announced in *Alvarez-Machain II* that the statute was purely jurisdictional. But the reference to “rights-creating language” is obligatory in a Section 1983 case like *Sandoval*, because the legislation refers to statutory or constitutional rights and not, as in the ATS, to common law rights of action. To extend this one *Sandoval* criterion from statutory rights to torts is a literalism that would undermine a conceptual basis of tort law that goes back centuries.<sup>129</sup>

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123. *Sosa v. Alvarez-Machain (Alvarez-Machain II)*, 124 S. Ct. 2739, 2762-63 (2004).

124. 532 U.S. at 289.

125. *Gonzaga University v. Doe*, 536 U.S. 273, 274 (2002).

126. *Sandoval*, 532 U.S. at 289.

127. *Id.* at 289.

128. *Id.* at 288.

129. See, e.g., Robert J. Kacsorowski, *The Common-Law Background of Nineteenth-Century Tort Law*, 51 OHIO ST. L.J. 1127, 1199 (1990) (“One fundamental moral principle of tort was that one who violated community standards of reasonable behavior and injured another was morally and therefore legally bound to compensate the victim.”); see also John Henry Wigmore, *Responsibility for Tortious Acts: Its History*, in 3 ASSOC. AMER. LAW SCHOOLS, SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 474-573 (1909) (arguing that tort law began under a principle of strict liability, regardless of fault).

That the ATS was, for purposes of *Sandoval*, essentially “rights-incorporating,” even if it was not “rights-creating,” is evident from the transitory tort doctrine, with which the framing generation was entirely familiar. Under this doctrine, anyone who committed a tort was under an obligation to make reparations for it wherever he or she went. The Supreme Court traced the transitory tort doctrine to Lord Mansfield’s opinion in *Mostyn v. Fabrigas*,<sup>130</sup> noting:

The courts in England have been open in cases of trespass other than trespass upon real property, [i.e. civil torts] to foreigners as well as to subjects, and to foreigners against foreigners when found in England, for trespasses committed within the realm and out of the realm, or within or without the king’s foreign dominions.<sup>131</sup>

In these actions, “[t]he theory of the foreign suit is that, although the act complained of was subject to no law having force in the forum, it gave rise to an obligation, which, like other obligations, follows the person and may be enforced wherever the person may be found.”<sup>132</sup> The Framers understood that transitory torts would have fallen within each state’s general jurisdiction, and the state courts regularly exercised this power,<sup>133</sup> protecting each state’s legitimate interest in the resolution of disputes brought within its borders. The framers of Section 1350 understandably endorsed the option of bringing into federal court that subset of transitory torts that implicated the law of nations or the provisions of U.S. treaties, which would assure some measure of uniformity in a matter of fundamentally national interest.<sup>134</sup> There was no indication

130. 1 Cowp. 161 (1774).

131. *McKenna v. Fisk*, 42 U.S. 241, 249 (1843).

132. *Slater v. Mex. Nat’l R.R. Co.*, 194 U.S. 120, 126 (1904); *see also* *Dennick v. R.R. Co.*, 103 U.S. 11, 18 (1880) (recognizing transitory tort doctrine).

133. *See, e.g.*, *Pease v. Burt*, 3 Day 485, 488 (Conn 1806) (“[A]ll rights of a personal nature are transitory. A right to personal property; a right to a personal action, whether founded on a contract, or on tort . . . extend to, and may be exercised, and enforced in, any other civilized country, where the parties happen to be.”); *Stout v. Wood*, 1 Blackf. 71, 72 (Ind. 1820) (“The principle of transitory actions we conceive to be this: as soon as one person becomes liable in such action to another . . . that liability attaches to the person, and follows him wherever he goes.”); *Watts v. Thomas*, 5 Ky. (2 Bibb) 458, 458 (1811) (transitory torts “may be brought wherever the defendant may be found”); *Taxier v. Sweet*, 2 U.S. (2 Dall.) 81, 84 (Pa. 1766) (“[A]ll transitory actions are triable anywhere.”).

134. The foreign affairs preemption doctrine does not suggest that state courts would be incompetent to apply the law of nations to transitory tort cases brought within their personal jurisdiction by the presence of the tortfeasor. Recent decisions of the Supreme Court have found foreign affairs preemption in only two circumstances. First, preemption is appropriate in the presence of an extensive and detailed federal statutory regime which would be compromised by the application of state law. *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 372 (2000) (“When Congress intends federal law to ‘occupy the field,’ state law in that area is preempted. And even if Congress has not occupied the field, state law is naturally preempted to the extent of any conflict with a federal statute.”) (internal citations omitted). In contrast to the Federal Burma law at issue in *Crosby*, nothing in the ATS purports to “occupy the field”; indeed, the ATS

whatsoever that these rights of recovery did not exist in the absence of a statute “creating” them. As a consequence, the core jurisprudence under the ATS after *Filártiga* is as consistent with *Sandoval* as it is with *Paquete Habana*.<sup>135</sup>

### 3. Simultaneously Limiting and Protecting the Creation of Federal Common Law

In the Supreme Court, *Sosa* objected to any interpretation of the ATS that empowered the courts to develop federal common law by implementing the law of nations through appropriate civil remedies, citing *Texas Industries, Inc. v. Radcliff Materials, Inc.* for the proposition that “[t]he vesting of jurisdiction in the federal courts does not in and of itself give rise to authority to formulate federal common law.”<sup>136</sup> The more complete analysis of *Radcliff Materials* would acknowledge that it unanimously recognized the “need and authority in some limited areas to formulate what has come to be known as ‘federal common law,’ ” especially in cases where a “federal rule of decision is ‘necessary to protect uniquely federal interests,’ ” including “our relations with foreign nations.”<sup>137</sup> Similarly in *Banco Nacional de Cuba v. Sabbatino*, the Court felt “constrained to make it clear that an issue concerned with a basic choice regarding the 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.”<sup>138</sup> *Sosa* had interpreted *Sabbatino* exclusively as a rule of deference to the political branches, but nothing in *Sabbatino* suggested that the political branches have plenary and exclusive control over the law of nations as they do over the law of the United States. Primacy is not exclusivity,

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essentially assured that there would be the option of a federal forum for aliens’ tort claims in violation of international law. In addition, nothing in the ATS is necessarily inconsistent with state court jurisdiction over torts in violation of the law of nations, so long as the state courts apply international law where it is relevant. Second, preemption is also appropriate in the presence of extensive executive negotiations and agreements that would be compromised by the application of state law. *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 416-17 (2003). In *Garamendi*, the Supreme Court found that California’s Holocaust Victim Insurance Relief Act was preempted by the post-World War II agreements negotiated by the president and by his contemporary efforts to facilitate the work of the International Commission on Holocaust Era Insurance Claims. *Id.* at 427-29. Although it is conceivable that such negotiations would derail particular cases, there is no similar body of prior or continuing executive negotiation that would preempt state court jurisdiction over all ATS-like claims.

135. See *supra* Part II.A.

136. 451 U.S. 630, 640-41 (1981).

137. *Id.* (citing *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 426 (1964)).

138. 376 U.S. 398, 425 (1964).



and the Framers certainly never understood that the federal judiciary's power to construe customary international law was subordinate to the concurrent authority of the political branches.<sup>139</sup> In Justice Souter's words, "[I]t would take some explaining to say now that federal courts must avert their gaze entirely from any international norm intended to protect individuals."<sup>140</sup> Even when Congress is silent, the Court may apply federal common law "necessarily informed both by international law principles and by articulated congressional policies."<sup>141</sup>

The Supreme Court's treatment of federal common law before and after *Radcliffe Materials* confirms the propriety of *Alvarez-Machain II*: the law of nations is an enclave where federal rules are required not only to protect uniquely federal interests but also to carry out Congressional intent.<sup>142</sup> In contrast to *Miree v. DeKalb County*,<sup>143</sup> for example, the uniquely federal interest in the coherent treatment of international legal issues is sufficiently compelling to displace state law: the "rules of international law should not be left to divergent and perhaps parochial state interpretations."<sup>144</sup> Congressional intent is no

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139. Indeed, in other ATS cases, the Executive Branch has endorsed the power of the courts to apply the strict standards of customary international law and thereby to develop federal common law. See, e.g., Memo for U.S. in *Filártiga*, *supra* note 86, at 606 n.4 ("Customary international law is federal law, to be enunciated authoritatively by the federal courts."). Congress expressed a similar understanding in the legislative history of the Torture Victim Protection Act, S. REP. No. 102-249, at 6 n.6 (1991) ("International human rights cases predictably raise legal issues—such as interpretations of international law—that are matters of Federal common law and within the particular expertise of Federal courts.").

Sosa and the government as *amicus curiae* stressed the Constitutional power of Congress to "define and punish offences against the law of nations," Brief of Petitioner at 8, *Sosa v. Alvarez-Machain (Alvarez-Machain II)*, 124 S. Ct. 2379 (2004) (No. 03-339); Brief of United States as Respondent Supporting Petitioner at 8, *Sosa v. Alvarez-Machain (Alvarez-Machain II)*, 124 S. Ct. 2379 (2004) (No. 03-339), and doubtless Congress can statutorily specify those offences or correct judicial "errors" in that regard, but it can also take the halfway step of directing federal courts to hear cases where such offences are alleged, as in the ATS itself. *Ex parte Quirin*, 317 U.S. 1, 26-28 (1942).

140. *Sosa v. Alvarez-Machain (Alvarez-Machain II)*, 124 S. Ct. 2739, 2764-65 (2004).

141. *First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 623, 628 n.20 (1983) (citing, *inter alia*, the International Court's decision in *Case Concerning The Barcelona Traction, Light & Power Co. (Belg. v. Spain)*, 1970 I.C.J. 3 (Feb. 5), for international standards of corporate law).

142. Paul L. Hoffman & Daniel A. Zaheer, *The Rules of the Road: Federal Common Law and Aiding and Abetting Under the Alien Tort Claims Act*, 26 LOY. L.A. INT'L & COMP. L. REV. 47, 54-55 (2004).

143. 433 U.S. 25, 30 (1977) (holding that the interests of the United States in connection with certain federal Aviation Administration grants would not be burdened by allowing state law to determine whether third-party beneficiaries could sue).

144. *Sabbatino*, 376 U.S. at 425. See also THE FEDERALIST NO. 3, at 15 (John Jay) (Jacob E. Cooke ed., 1961):

less dispositive than the intrinsically federal interest in transnational matters: citing *Textile Workers Union of America v. Lincoln Mills of Alabama*,<sup>145</sup> many ATS courts have found the jurisdictional grant of Section 1350 to be evidence of Congress's intent to authorize the fashioning of a body of federal law for the enforcement of international legal standards,<sup>146</sup> and nothing in *Alvarez-Machain II* undermines that analysis. To the contrary, the Court carefully articulates the First Congress's intent in adopting the ATS in 1789, especially the reality that the statute must have had effect from the moment of its enactment and did not suddenly spring into meaning two centuries later with the adoption of the Torture Victim Protection Act.

The famous dictum of Justice Brandeis in *Erie Railroad Co. v. Tompkins* that "[t]here is no federal general common law"<sup>147</sup> is entirely too thin a reed to support the claim that the courts must await permission from the political branches before consulting and applying the law of nations. Nothing in *Erie* suggested that the Supreme Court intended to displace more than a century of precedent and practice that treated the law of nations as a legitimate and salutary example of federal common law.<sup>148</sup> In addition, by following

Under the national government, treaties . . . as well as the laws of nations, will always be expounded in one sense . . . whereas adjudications on the same points and questions in thirteen States . . . will not always accord or be consistent . . . The wisdom of the convention in committing such questions to the jurisdiction and judgment of courts appointed by and responsible only to one national government cannot be too much commended.

THE FEDERALIST NO. 80, at 536 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) ("cases arising upon treaties and the laws of nations . . . may be supposed proper for the federal jurisdiction."). The federal courts' concurrent jurisdiction with the states under the original ATS at least maintained the option of uniform interpretations of international law. The hostility of state courts to aliens' claims was no less a concern. See Wythe Holt, *"To Establish Justice": Politics, the Judiciary Act of 1789, and the Invention of the Federal Courts*, 1989 DUKE L.J. 1421, 1440-53 (1989) (outlining the States' hostility to the peace treaty ending the Revolutionary War).

145. 353 U.S. 448 (1957).

146. See, e.g., *Abebe-Jira v. Negewo*, 72 F.3d 844, 848 (11th Cir. 1996) (citing *Lincoln Mills*, 353 U.S. 448; (other citations omitted):

[W]e conclude that the Alien Tort Claims Act establishes a federal forum where courts may fashion domestic common law remedies to give effect to violations of customary international law. Congress, of course, may enact a statute that confers on the federal courts jurisdiction over a particular class of cases while delegating to the courts the task of fashioning remedies that give effect to the federal policies underlying the statute.

*Xuncax v. Gramajo*, 886 F. Supp. 162, 182 (D. Mass. 1995) ("[A]s daunting a task as it may be to fashion a remedy from the 'amorphous body' of international law, it is hardly out of scale with similar challenges federal courts have successfully addressed in the past.") (citing *Lincoln Mills*, 353 U.S. 448).

147. 304 U.S. 64, 78 (1938).

148. Jessup, *supra* note 38, at 741-43. This article is cited with approval in *Sosa v. Alvarez-Machain (Alvarez-Machain II)*, 124 S. Ct. 2739, 2764 n.18 (2004).

the revisionist approach to customary international law, Sosa had attempted to extend *Erie* from its diversity context to the ATS, which would mean, in the absence of some supplemental legislation, that “the law to be applied in any case is the law of the State.”<sup>149</sup> But that in turn would raise the prospect of the chaos in international relations that the drafters of the Constitution thought they had avoided<sup>150</sup> and that the modern Supreme Court has repeatedly disapproved.<sup>151</sup>

So counter historical a result on such slender authority is easily avoided: in the ATS, Congress authorized the federal courts to hear and decide cases involving tortious violations of the law of nations guided by the Supreme Court’s traditional criteria for proving the content of customary international law. As is the case in many other contexts, including 42 U.S.C. Section 1983, Congress did not supply detailed rules to govern the litigation of such cases. Thus, to make this grant of decision making authority effective, the federal courts in ATS cases must derive federal common law rules to govern such issues as statutes of limitation, standing to sue, exhaustion of remedies, third party complicity, and the like. This delegation is not extraordinary, nor does it threaten the separation of powers. Congress remains free at any time to disapprove of common law rules of decision or even the entire grant of decision making authority in the ATS.

#### 4. Applying the Doctrines of Diffidence

Sosa and the government had argued that implying a cause of action under the ATS would interfere with the conduct of foreign affairs by the political branches and the executive’s efforts to protect national security. They raised the prospect that a ruling in favor of Alvarez-Machain would empower terrorists who had been kidnapped on order of the President to sue the President or his delegates.<sup>152</sup> U.S.

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149. *Erie*, 304 U.S. at 78.

150. 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, 235-36 (1996) (suggesting that the Alien Tort Clause was enacted out of concern for uniform interpretation of international law and a fear that state courts would be hostile to aliens’ claims); William S. Dodge, *The Constitutionality of the Alien Tort Statute: Some Observations on Text and Context*, 42 VA. J. INT’L L. 687, 707-08 (2002) (arguing that the Framers understood the need for federal jurisdiction over cases involving international law).

151. See, e.g., *American Ins. Ass’n v. Garamendi*, 539 U.S. 396, 427 (2003) (holding that California’s Holocaust Victim Insurance Relief Act interferes with the National Government’s conduct of foreign relations and is consequently preempted by federal law). *Id.* at 1145-46 (Randolph, J., concurring).

courts would be converted into a court of claims for the world as foreign governments were sued directly by real or alleged victims of human rights abuse. Multinational corporations would be obliged in U.S. courts to defend their actions anywhere in the world, even if the real parties-in-interest and all the relevant evidence were abroad.

In *Alvarez-Machain II*, the Supreme Court observed Sosa's "parade of horrors" and determined that these potential difficulties did not warrant overturning *Filártiga* and its progeny. To the contrary, the Court felt lower courts should retain their ability to dispose of particularly sensitive cases through mechanisms such as the political question doctrine, the act of state doctrine, diplomatic immunity, and *forum non conveniens*, among others.<sup>153</sup> Certainly nothing in the ATS or its history suggests that foreign governments allied to the United States in the war on terrorism could be sued under the statute, because the Foreign Sovereign Immunities Act<sup>154</sup> ("FSIA") provides the exclusive means of suing foreign governments and their agencies or instrumentalities;<sup>155</sup> unless the plaintiff could bring a claim that fell within the explicit exceptions to immunity laid out by Congress in the FSIA, the foreign state and its agencies and instrumentalities could not be sued in a U.S. court. Nor could U.S. employees or contractors be sued individually for participating in actions authorized by the President, because the Westfall Act allows the United States to be substituted for such defendants,<sup>156</sup> meaning in

152. Brief of Petitioner at 38-40, *Sosa v. Alvarez-Machain (Alvarez-Machain II)*, 124 S. Ct. 2379 (2004) (No. 03-339); Brief of United States as Respondent Supporting Petitioner at 45-46, *Sosa v. Alvarez-Machain (Alvarez-Machain II)*, 124 S. Ct. 2379 (2004) (No. 03-339)

153. See, e.g., *Ahmed v. Hoque*, No. 01 Civ. 7224(DLC), 2002 WL 1964806 (S.D.N.Y. Aug. 23, 2002) (dismissed on grounds of diplomatic immunity); *Sarei v. Rio Tinto PLC*, 221 F. Supp. 2d 1116, 1185-86 (C.D. Cal. 2002) (act of state doctrine barred adjudication of environmental tort and racial discrimination claims); *United States v. Noriega*, 746 F. Supp. 1506, 1539-40 (S.D. Fla. 1990) (legality of military invasion of Panama to capture defendant was unreviewable political question). The political question doctrine barred the adjudication of *Hwang Geum Joo v. Japan*, 172 F. Supp. 2d 52, 64-67 (D.D.C. 2001), in which the district court dismissed a case filed by female sex slaves or "comfort women" against the government of Japan on grounds of foreign sovereign immunity and the political question doctrine, but the Court of Appeals, clearly understanding the limits of the political question doctrine affirmed on the basis of foreign sovereign immunity alone. *Hwang Geum Joo v. Japan*, 332 F.3d 679, 687 (D.C. Cir. 2003). *Al Odah v. United States*, 321 F.3d 1134, 1147 (D.C. Cir. 2003), was resolved in the government's favor under *habeas* principles. The ATS claim in that case was dismissed, because, according to the Court of Appeals, ATS actions cannot be brought against federal officials. *Id.* at 1144-45. No other member of the panel joined Judge Randolph's separate concurrence, in which he criticized the ATS in dicta.

*Id.* at 1145-46 (Randolph, J., concurring).

154. 28 U.S.C. § 1330 (2000).

155. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989).

156. 28 U.S.C. § 2679 (2000).

turn that their liability, if any, lies under the Federal Tort Claims Act, not the ATS.

Even in principle, these doctrines of diffidence cannot be converted into a prophylactic barrier to ATS litigation. With respect to the political question doctrine, for example, the Supreme Court has observed that "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance,"<sup>157</sup> noting that courts routinely distinguish between cases in which there are no judicially manageable standards and cases in which clear customary and conventional international legal standards provide the rule of decision.<sup>158</sup> Equally important, according to the executive branch itself, there are circumstances in which *not* adjudicating ATS claims would compromise the foreign relations of the United States:

[B]efore entertaining a suit alleging a violation of human rights, a court must first conclude that there is a consensus in the international community that the right is protected and that there is a widely shared understanding of the scope of this protection. When these conditions have been satisfied, there is little danger that judicial enforcement will impair our foreign policy efforts. To the contrary, a refusal to recognize a private cause of action in these circumstances might seriously damage the credibility of our nation's commitment to the protection of human rights.<sup>159</sup>

ATS actions case-by-case can serve the long-term political interests of the nation, because *not* adjudicating human rights cases, and thereby offering abusers a form of safe haven, can dramatically compromise U.S. foreign relations, as Iranian revolutionaries demonstrated in 1979 by seizing the U.S. embassy and scores of hostages when the former Shah of Iran entered the United States under apparent U.S. protection.

The act of state doctrine, under which U.S. courts will decline to determine the legality of a foreign government's official acts taken within its own territory, can bar particular ATS cases, if the plaintiff's injury was directly caused by a foreign government's law or official

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157. *Baker v. Carr*, 369 U.S. 186, 211 (1962).

158. *See, e.g., Comm. of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 932, 934 (D.C. Cir. 1989) (stating that the political question doctrine, with its "shifting contours and uncertain underpinnings" and its "susceptibility to indiscriminate and overbroad application," cannot displace whatever legal standards apply "particularly to the extent that appellants seek to vindicate personal rights rather than to conform America's foreign policy to international legal norms.").

159. Memo for U.S. in *Filártiga*, *supra* note 86, at 604. Emmerich de Vattel, the leading eighteenth-century publicist on the law of nations, *United States Steel Corp. v. Multistate Tax Comm.*, 434 U.S. 452, 462 n.12 (1978), underscored that providing a private remedy for foreigners injured by violations of international or domestic law was an essential means of reducing friction between nations. 2 EMMERICH DE VATTEL, *THE LAW OF NATIONS*, ch. 6, §§ 71, 78 (Joseph Chitty ed., 1852).

policy.<sup>160</sup> However, the act of state doctrine can pose no *per se* barrier to the inference of a cause of action from international human rights law. The courts have limited the doctrine to shield only official acts, by a government in power, in pursuit of a public purpose,<sup>161</sup> and the fact that foreign governments are unlikely to claim human rights abuse as official policy suggests that the doctrine need not derail ATS cases in the *Filártiga* model. Nor is the doctrine applicable when the court can apply international law norms adopted by a clear consensus among states, because “the courts can then focus on the application of an agreed principle to circumstances of fact rather than on the sensitive task of establishing a principle not inconsistent with the national interest or with international justice.”<sup>162</sup>

Similarly, the *forum non conveniens* doctrine is too fact-dependent to erect a prophylactic bar to ATS actions. The plaintiff's choice of forum is generally entitled to respect, but *forum non conveniens* permits the court in narrow circumstances to dismiss the claim even if jurisdiction over the claim is proper. The *forum non conveniens* inquiry proceeds in two stages: first the court must consider whether an adequate alternative forum exists,<sup>163</sup> and, if so, the court must balance a series of factors involving the private interests of the parties in maintaining the litigation in the competing

160. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 443, 444. In *Banco Nacional de Cuba v. Sabbatino*, the Supreme Court declined to adopt any “inflexible and all-encompassing rule,” noting that deference is appropriate only when judicial resolution of the case “may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere.” 376 U.S. 398, 423, 428 (1964).

161. See *W.S. Kirkpatrick & Co. v. Evtl. Tectonics Corp.*, 493 U.S. 400, 406-10 (1990) (holding that the act of state doctrine did not apply where the validity of a foreign sovereign act was not at issue); *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 695-705 (1976) (“It is the position of the United States . . . that repudiations by a foreign sovereign of its commercial debts should not be considered to be acts of state beyond legal question in our courts.”); *Republic of the Philippines v. Marcos*, 862 F.2d 1355, 1360-61 (9th Cir. 1988) (*en banc*), cert. denied, 490 U.S. 1035 (1989) (holding that the act of state doctrine did not apply where there was no evidence that the defendants' acts were acts of state); *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1545-46 (N.D. Cal. 1987) (refusing to apply the act of state doctrine where it was unclear whether “adjudication of the plaintiffs' claims will necessarily entail considering the legality of official acts of a foreign state”).

162. *Sabbatino*, 376 U.S. at 428; see also RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 443 cmt. c (“A claim arising out of an alleged violation of fundamental human rights . . . would . . . probably not be defeated by the act of state doctrine, since the accepted international law of human rights is well established . . .”).

163. A *forum non conveniens* motion “may not be granted unless an adequate alternative forum exists,” and, in general, “[a]n alternative forum is ordinarily adequate if the defendants are amenable to service of process there and the forum permits litigation of the subject matter of the dispute.” *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 n.22 (1981).

forum, and any public interests at stake.<sup>164</sup> Both steps engage the court in an intensely *ad hoc* assessment of the facts in each case. In an ATS human rights case, for example, it may be difficult for the defendant to prove that an adequate alternative forum exists in the state where the abuse occurred, but that showing can and has been made in some cases.<sup>165</sup> The balance of public and private factors is similarly left to the sound discretion of the court and determined *ad hoc*.<sup>166</sup> Equally important (and quite apart from the fact-dependency of the doctrine), *forum non conveniens* cannot justify a blanket refusal to infer a cause of action from international human rights law: first because the burden rests on the defendant to prove that the factors tilt “strongly” in favor of trial in a foreign forum, and, second, because the ATS, as supplemented by the Torture Victim Prevention Act, reflects

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164. Under *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947), private interests include “the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of the premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive.”

Public interest considerations include administrative difficulties associated with court congestion; the unfairness of imposing jury duty on a community with no relation to the litigation; the interest in having localized controversies decided at home; and avoiding difficult problems in conflict of laws and the application of foreign law. *Id.* at 508-09.

165. “If the plaintiff shows that conditions in the foreign forum plainly demonstrate that ‘plaintiffs are highly unlikely to obtain basic justice therein,’ ” a defendant’s *forum non conveniens* motion must be denied. *Abdullahi v. Pfizer, Inc.*, No. 01 CIV. 8118, 2002 WL 31082956, at \*8 (S.D.N.Y. Sept. 17, 2002) (citation omitted), *reversed and remanded*, 77 Fed. Appx. 48, 52 (2d Cir. 2003). Compare *Eastman Kodak Co. v. Kavlin* 978 F. Supp. 1078 (S.D. Fla. 1997) (corruption in Bolivian justice system precluded dismissal of action on *forum non conveniens* grounds), with *Aguinda v. Texaco, Inc.*, 303 F.3d 470 (2d Cir. 2002) (courts of Ecuador provided adequate alternative forum for citizens’ claims, and balance of private and public interest factors weighed strongly in favor of trial in Ecuadorian courts, warranting conditional dismissal on *forum non conveniens* grounds).

166. Compare *Flores v. Southern Peru Copper Corp.*, 253 F. Supp. 2d 510, 541-44 (S.D.N.Y. 2002) (both private and public interest factors weighed heavily in favor of dismissal under *forum non conveniens* of Peru residents’ ATS action against American company alleging pollution-caused health problems from company’s mining operations in Peru), with *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 101-08 (2d Cir. 2000) (reversing and remanding district court’s conditional *forum non conveniens* dismissal of ATS action against Dutch company for complicity in human rights abuses in Nigeria).

As noted by one district court in the immediate aftermath of *Alvarez-Machain II*, “[T]he Supreme Court’s recent decision in *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739 (2004), does not undermine [this court’s prior] determination that the burden on the defendant is substantially outweighed by the plaintiff’s interest in obtaining relief, and that the United States has a strong interest in vindicating violations of established human rights. New York also has an interest in ensuring that companies doing business in the state adhere to recognized norms of international law.” *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, No. 01 Civ. 9882(DLC), 2004 WL 1920978, at \*2 (S.D.N.Y. Aug. 27, 2004) (citation omitted).

a powerful U.S. policy interest in providing a forum for the adjudication of international human rights abuses.<sup>167</sup>

In *Alvarez-Machain II*, the Court refused either to exaggerate the threat of *Filártiga*-like actions or to undervalue the discretionary doctrines available to derail the most troubling cases. In doing so, the Court declined Sosa's invitation to transform case-specific concerns into a rationale for nullifying the ATS altogether. Ultimately, we may wonder how a handful of human rights cases can complicate the life of the State Department in ways that are intolerable, when the Supreme Court's decisions in such cases as *Alvarez-Machain I*,<sup>168</sup> *Aerospatiale*,<sup>169</sup> *Hartford Insurance*,<sup>170</sup> or even *Sabbatino*<sup>171</sup> provoked considerably more political and diplomatic controversy than any of the human rights cases that had the ATS critics so exercised.

Lower courts with ATS cases are obliged to be "vigilant doorkeep[ers]," according to Justice Souter in *Alvarez-Machain II*, but as this Part has shown, the standards for vigilance have been the law of the United States for decades, if not centuries.

### III. RETROGRADE INNOVATION IN APPLYING THE INTERNATIONAL NORM AGAINST ARBITRARY DETENTION

Not all of the analysis in *Alvarez-Machain II* fits into the mainstream of American jurisprudence. In holding that Alvarez-Machain's claims for arbitrary arrest did not satisfy its evidentiary rule, the Supreme Court at best introduced uncertainty where none existed before. The physical security of persons against arrest and imprisonment without due process of law has long been considered a basic human right and a fundamental principle of liberal democracy, codified in every comprehensive universal and regional human rights

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167. See, e.g., *Wiwa*, 226 F.3d at 100.

168. *United States v. Alvarez-Machain (Alvarez-Machain II)*, 504 U.S. 655, 657 (1992) (holding that a criminal defendant brought to the United States via abduction "may be tried in federal district court for violations of the criminal law of the United States.").

169. *Societe Nationale Industrielle Aerospatiale v. U.S. District Court*, 482 U.S. 522, 538-40 (1987) (stating that the Hague Convention did not deprive the court of "the jurisdiction it otherwise possessed to order a foreign national party before it to produce evidence physically located within a signatory nation.").

170. *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 769-770 (1993) (holding that "the principle of international comity does not preclude District Court jurisdiction over foreign conduct").

171. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 421-39 (1963) (holding that the act of state doctrine precludes U.S. courts from inquiring into the validity of decrees by the Cuban government expropriating American property).



instrument<sup>172</sup> and affirmed in national constitutions around the world.<sup>173</sup> Indeed, the prohibition against the arbitrary arrest and detention of persons is a cornerstone of international human and civil rights law, rooted in an Anglo-American tradition that dates back to the Magna Carta and is likewise embodied in the Bill of Rights.<sup>174</sup> Human rights organizations, intergovernmental organizations, and national leaders, including those in the United States, routinely condemn authoritarian states, such as Cuba, Iran, and Burma (Myanmar) for arbitrarily arresting and detaining persons.<sup>175</sup> Domestic courts that have addressed this issue have repeatedly held that the arbitrary arrests and detention violate international law.<sup>176</sup>

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172. See Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., at 71, U.N. Doc. A/810 (1948) ("No one shall be subject to arbitrary arrest, detention, or exile.") [hereinafter UDHR]; the International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. GAOR, Supp. No. 16, at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, 175 [hereinafter ICCPR]; the European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222, 226, E.T.S. No. 5 (1950) [hereinafter European Convention]; the American Convention on Human Rights, O.A.S.T.S. No. 36, at 1, O.A.S. Off. Rec. OEA/Ser.L/V/II.23, doc. 21 re. 6 (1979), Art. 7(3) [hereinafter American Convention]; the African Charter on Human and Peoples' Rights, entered into force Oct. 21, 1986, OAU Doc. CAB/LEG/67/3/Rev. 5, Art. 6.

173. M. Cherif Bassiouni, *Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions*, 3 DUKE J. COMP. & INT'L L. 235, 260-61 (1993) (The prohibition against arbitrary arrest is found in "at least 119 national constitutions"). The U.S. Department of State recognizes 192 independent countries in the world. U.S. DEPT OF STATE, BUREAU OF INTELLIGENCE AND RESEARCH FACT SHEET (2003).

174. Bassiouni, *supra* note 173, at 254. Over 119 states, including the United States and all the major constitutional democracies, provide against arbitrary arrest or detention in their own constitutions. *Id.* at 261 & n.117.

175. See, e.g., *United States-Cuba Economic Relations: Hearing Before the Comm. on Finance*, 108th Cong. 49-50 (2003) (prepared statement of Alan Larson, Undersecretary, United States Department of State) ("The Cuban Government has responded to the Cuban people's democratic aspirations with a troubling further crackdown on fundamental freedoms. . . the Cuban government routinely engages in arbitrary arrests and detentions of human rights advocates"); Gilbert Laurin (Canada), *UN Addressing Third Committee*, M2 PRESSWIRE, Nov. 11, 2003:

[I]n Iran, little progress had been made, especially in terms of freedom of expression, arbitrary detention and torture, and that the State Peace and Development Council continued to deny to the people of Burma the exercise of their human rights and fundamental freedoms. . . . Canada was deeply disturbed that the physical integrity of the person remained under severe attack, with the deplorable use of torture, arbitrary arrest and detention, and extrajudicial killings in places such as Nigeria.

176. See, e.g., *Martinez v. City of Los Angeles*, 141 F.3d 1373, 1384 (9th Cir. 1998) ("[T]here is a clear international prohibition against arbitrary arrest and detention."); *Siderman de Blake v. Argentina*, 965 F.2d 699, 717 (9th Cir. 1992) (identifying *jus cogens* norm against prolonged arbitrary detention); *Comm. of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 941 (D.C. Cir. 1988) (same); *De Sanchez v. Banco Central de Nicar.*, 770 F.2d 1385, 1397 (5th Cir. 1985) (stating that arbitrary detention violates the law of nations); *Xuncax v. Gramajo*, 886 F. Supp. 162, 184-85 (D. Mass. 1995) (stating that torture, summary execution, disappearance, and arbitrary detention violate international law); *Paul v. Avril*, 901 F. Supp. 330, 335 (S.D. Fla.

Taken together, this is evidence of an international consensus supporting the norm against arbitrary arrest and detention that is no less compelling than the norm against torture recognized by the *Filártiga* court.

It would be incongruous to interpret *Alvarez-Machain II* as though it undermined the normative status of the right to be free of arbitrary arrest and detention; indeed, when the Supreme Court announced its decision in *Alvarez-Machain II*, it had already determined that detainees in the war on terrorism had a fundamental right to challenge the legality of their detention and that the detention camp at Guantanamo Bay was not a “law-free zone.”<sup>177</sup> Rather, the Court carefully limited its holding to the narrow facts of this case: “a single illegal detention of less than a day, followed by a transfer of custody to lawful authorities and a prompt arraignment, violates no norm of customary international law so well defined as to support the creation of a federal remedy.”<sup>178</sup> At no point did the Court declare that the arrest and detention of Alvarez-Machain had been lawful, only that he had failed to prove that his treatment violated an international norm as “specific, universal, and obligatory” as the “18th-century paradigms we have recognized.”<sup>179</sup> The distinction is crucial, because it preempts the *a fortiori* argument in future cases that virtually no human rights norms are actionable under the ATS if the norm against arbitrary arrest and detention is not.

Narrow as the Court’s holding was, it was erroneous in two essential respects. First, as alluded to earlier, it rested on a misleading recharacterization of Alvarez-Machain’s argument. The Supreme Court claimed that respondent “invoke[d] a general prohibition on ‘arbitrary’ detention defined as officially sanctioned action exceeding positive authorization to detain under the domestic law some government, regardless of the circumstances.”<sup>180</sup> Alvarez-Machain’s actual claim—that his abduction and transportation to the United States violated U.S., Mexican, and international law—was considerably more specific: it alleged that the abduction fell outside

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1994) (upholding damage award for injuries caused by arbitrary detention); *Forti v. Suarez Mason*, 672 F. Supp. 1531, 1541 (N.D. Cal. 1987) (“There is case law finding sufficient consensus to evince a customary international human rights norm against arbitrary detention.”).

177. *Rasul v. Bush*, 124 S. Ct. 2686, 2699 (2004) (holding that aliens detained at the Guantanamo Bay Naval Base had the right to challenge the legality of their detentions in federal court); *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2649-50 (2004) (holding that a citizen detainee had the right to challenge his “enemy combatant” status in federal court).

178. *Sosa v. Alvarez-Machain (Alvarez-Machain II)*, 124 S. Ct. 2739, 2769 (2004).

179. *Alvarez-Machain II*, 124 S. Ct. at 2762.

180. *Id.* at 2768.

the DEA's statutory arrest authority<sup>181</sup> and violated the Mansfield Amendment's explicit prohibition on DEA participation in extraterritorial arrests.<sup>182</sup> In addition, Alvarez-Machain argued that no country may lawfully exercise police powers in the territory of another without the latter's consent.<sup>183</sup> The Court of Appeals had ruled *en banc* that the norm prohibiting such abductions was not actionable under the ATS and that, contrary to the panel decision,<sup>184</sup> there was no international customary norm barring transborder abductions.<sup>185</sup> The failure of the Supreme Court to revisit those conclusions of the *en banc* court, combined with its own dismissal of the arbitrary arrest and detention claim, mean that the norms of both territorial integrity<sup>186</sup> and individual human rights have been compromised, at least in the context of this one extraordinary case.

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181. The DEA authorization statute, 21 U.S.C. § 878 (2004), provides that

[a]ny officer or employee of the Drug Enforcement Administration . . . may . . . (3) make arrests without warrant (A) for any offense against the United States committed in his presence, or (B) for any felony, cognizable under the laws of the United States, if he has probable cause to believe that the person to be arrested has committed or is committing a felony . . . .

Nothing in the statute authorizes extraterritorial arrests. Both the *Foley Brothers* presumption against the extraterritorial reach of U.S. law, *Foley Bros. v. Filardo*, 336 U.S. 281 (1949) (denying application of a work-day law to work performed outside of the country), and the *Charming Betsy* principle requiring statutes to be construed in conformity with international law, *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804) (awarding restitution for a ship and cargo confiscated while in violation of a trade embargo with France), cut against any interpretation of Section 878 that would allow non consensual extraterritorial arrests.

182. The Mansfield Amendment, 32 U.S.C. § 2291(c) (2004), expressly prohibits federal employees from "directly effect[ing] an arrest in any foreign country as part of any foreign police action with respect to narcotics control efforts." The absence of authority is reinforced by the legislative history of the amendment. The Senate Foreign Relations Committee Report stated that "[i]t is the Committee's intent that 'police action,' as used in this provision is meant to prohibit U.S. narcotics agents abroad from engaging in actions involving the use of force and actions involving the arrest of foreign nationals—whether unilaterally . . . or as members of teams involving agents or officials of other foreign governments." Internal Security Assistance & Arms Control Act, S. 2662, 94th Cong. § 55 (1976).

183. As emphasized by Justice Story in *The Apollon*, a case involving a U.S. seizure of a foreign vessel in a Spanish port: "It would be monstrous to suppose that our revenue officers were authorized to enter into foreign ports and territories, for the purpose of seizing vessels which had offended against our laws. It cannot be presumed that Congress would voluntarily justify such a clear violation of the law of nations." 22 U.S. (9 Wheat.) 362, 370-71 (1824). The RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 432(2) is no less categorical: "A state's law enforcement officers may exercise their functions in the territory of another state only with the consent of the other state, given by duly authorized officials of that state."

184. *Alvarez-Machain v. United States*, 266 F.3d 1045, 1050 (9th Cir. 2001).

185. *Alvarez-Machain v. United States*, 331 F.3d 604, 620 (9th Cir. 2003) (*en banc*).

186. As noted by Professor Henkin, "When done without consent of the foreign government, abducting a person from a foreign country is a gross violation of international law and gross disrespect for a norm high in the opinion of mankind. It is a blatant violation of the territorial

The second essential error of the Court was its unexplained dicta dismissing claims based on the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.<sup>187</sup> The Court returned to a conception of the Declaration that is anachronistic by several decades, inconsistent with the Court's precedent,<sup>188</sup> and contrary to the favorable invocation of *Filártiga*, which had considered the Declaration authoritative if non-binding evidence of a widely accepted norm. Similarly, the decision to ignore the provisions of the ICCPR because it is understood to be non-self-executing is a careless expansion of a dubious doctrine that the Supreme Court has long limited and which has not prevented lower courts with ATS cases from giving that treaty evidentiary weight in determining the content of custom.<sup>189</sup> Nothing in *Alvarez-Machain II* suggests that those prior decisions were wrong; indeed, the Court cites some of them with approval.<sup>190</sup>

It is one thing to deprive Alvarez-Machain of an individual remedy under the ATS because the facts—a state-sponsored extraterritorial seizure by independent contractors based on a grand jury indictment and federal arrest warrant, which took less than twenty-four hours and did not result in any physical injury—did not establish a significant violation of the norm against arbitrary arrest and detention. It is considerably more injudicious to suggest without explanation that the norm is questionable because of its inclusion in the Declaration and the ICCPR.

#### IV. THE NEXT FRONTIER IN ALIEN TORT LITIGATION

The first significant battle over the interpretation of *Alvarez-Machain II* will come in a variety of cases testing whether corporate actors may be liable under the ATS for their complicity in human rights abuses by the government with which they do business.<sup>191</sup>

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integrity of another state . . .” Louis Henkin, *A Decent Respect to the Opinions of Mankind*, 25 J. MARSHALL L. REV. 215, 231 (1992).

187. *Sosa v. Alvarez-Machain* (*Alvarez-Machain II*), 124 S. Ct. 2739, 2767 (2004).

188. See, e.g., *Zemel v. Rusk*, 381 U.S. 1, 15 n.13 (1965) (quoting the Universal Declaration of Human Rights in the interpretation of the requirements of due process); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 161 n.16 (1963) (citing the Universal Declaration as evidence of norm against statelessness); *Dandridge v. Williams*, 397 U.S. 471, 520 n.14 (1970) (citing UDHR Article 25 as informative “on the issue of whether there is a ‘right’ to welfare assistance”).

189. See, e.g., *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1345 n.2 (N.D. Ga. 2002); *Hilao v. Estate of Marcos*, 103 F.3d 789, 794 (9th Cir. 1996); *Filártiga v. Peña-Irala*, 630 F.2d 876, 884 (2d Cir. 1980).

190. *Alvarez-Machain II*, 124 S. Ct. 2766.

191. See, e.g., *In re Nazi Era Cases Against German Defendants Litig.*, 129 F. Supp. 2d 370 (D.N.J. 2001) (dismissing claim against a German company and its two American subsidiaries

Many such cases have been dismissed on jurisdictional, political, or factual grounds, and others have been derailed under the *forum non conveniens* doctrine.<sup>192</sup> Especially in the context of cases arising out of World War II against Japanese and German government entities or corporations, the treaties ending the war have been interpreted to render additional compensation or reparations a matter for the executive branch.<sup>193</sup> If anything, the corporate cases that have actually been decided reaffirm that the courts have the necessary tools to distinguish non justiciable or frivolous claims from those that are meritorious.

No part of *Alvarez-Machain II* turned on the circumstances under which a corporation faces liability for a breach of international law, but the government and a coalition of business interests had urged the Court to interpret the ATS so as to bar such actions.<sup>194</sup> The Court implicitly rejected the propositions that corporations are *in principle* immune from liability under international law or that the prospect of abusive lawsuits required a narrow interpretation of the ATS. Instead, the Court reasoned only that “the determination whether a norm is sufficiently definite to support a cause of action” is “related [to] whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual.”<sup>195</sup> For these purposes, the Court contrasted torture, which does require

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for Holocaust reparations); *Presbyterian Church of Sudan v. Talisman Energy*, 244 F. Supp. 2d 289 (S.D.N.Y. 2003) (suit against an oil company for allegedly collaborating with the government to commit genocide); *Abdullahi v. Pfizer*, No. 01 Civ. 8118, 2002 WL 31082956 (S.D.N.Y. Sept. 17, 2002) (suit against pharmaceutical company for administering dangerous, experimental medicine without informed consent); *Bodner v. Banque Paribas*, 114 F. Supp. 2d 117 (E.D.N.J. 2000) (suit against several banks for their complicity in accepting deposits of assets that had been converted from French Holocaust victims); *Doe v. Unocal*, 963 F. Supp. 880 (C.D. Cal. 1997) (*Unocal I*), 110 F. Supp. 2d 1294 (C.D. Cal. 2000) (*Unocal II*), *on appeal*, Nos. 00-56603, 00-57197, 00-56628, 00-57195, 2002 WL 31063976 (9th Cir. 2002) (suit against an oil company for allegedly committing “atrocities” on nearby farmers). As of this writing, the Ninth Circuit Court of Appeals has reheard the case *en banc* and directed the parties to brief the effect of *Alvarez-Machain II*. *Doe v. Unocal, reh’g en banc granted, opinion vacated*, No. 00-56603, 00-56628, 2003 WL 359787 (9th Cir. Feb. 14, 2003). The prospect of civil liability is one part of a larger corporate responsibility movement, and much of what follows draws on the analysis in Ralph G. Steinhardt, *Corporate Responsibility and the International Law of Human Rights: The New Lex Mercatoria*, in *NON-STATE ACTORS AND HUMAN RIGHTS* (Philip Alston ed., 2005).

192. *E.g.*, *In re South African Apartheid Litigation*, 346 F. Supp. 2d 538 (S.D.N.Y. 2004); *Aguinda v. Texaco, Inc.*, 303 F.3d 470 (2d Cir. 2002).

193. *See, e.g.*, *Sarei v. Rio Tinto*, 221 F. Supp. 2d 1116 (C.D. Cal. 2002). *Cf. Joo v. Japan*, 332 F.3d 679 (D.C. Cir. 2003), *vacated and remanded* 124 S. Ct. 2835 (2004).

194. *See* Brief of *Amici Curiae* for the National Foreign Trade Council et al. in Support of Petitioner, *Sosa v. Alvarez-Machain (Alvarez-Machain II)*, 124 S. Ct. 2379 (2004) (No. 03-339).

195. *Sosa v. Alvarez-Machain (Alvarez-Machain II)*, 124 S. Ct. 2739, 2766 n.20 (2004).

state action in order to be a violation of international law,<sup>196</sup> with genocide, which does not.<sup>197</sup> The Court also noted a particular set of pending class actions “seeking damages from various corporations alleged to have participated in, or abetted, the regime of apartheid that formerly controlled South Africa,” but rather than decide that all such cases were beyond the reach of the ATS, the Court declared instead that “[i]n such cases, there is a strong argument that federal courts should give serious weight to the Executive Branch’s view of the case’s impact on foreign policy.”<sup>198</sup>

For centuries, the imposition of individual liability for certain international wrongs (e.g., piracy) has generated little controversy. Certainly the framers of the First Judiciary Act of 1789 had little doubt that private citizens who infringed the rights of ambassadors or diplomats could be sued under Section 1350.<sup>199</sup> Pirates, the exemplar of intended defendants under the ATS, were not always or necessarily considered state actors, but there was never any question that their actions violated international law; indeed, one of the earliest exercises of jurisdiction under the ATS involved an unlawful seizure of property by a non state actor.<sup>200</sup> The statute subsequently provided jurisdiction over a child custody dispute that involved a breach of the law of

196. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. GAOR, Mtng. No. 93, at pt. I, Art. I, U.N. Doc. A/RES/39/46 (1984).

197. Article IV of the Genocide Convention for example requires that persons committing genocide be punished, “whether they are constitutionally responsible rulers, public officials or private individuals. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951).

198. *Alvarez-Machain II*, 124 S. Ct. at 2766 n.21. Consistent with prior decisions, the Court’s formulation of the deference standard in *Alvarez-Machain II* both protects and limits the power of executive suggestion. In applying the act of state doctrine, for example, a majority of the Supreme Court would give considerable but not conclusive weight to the views of the executive branch. *First Nat’l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 767-70 (1972). In matters of treaty interpretation, by contrast, the executive’s submissions are entitled to “great weight.” *Sumitomo Shoji American, Inc. v. Avagliano*, 457 U.S. 176, 184-85 (1982). But the courts cannot in the name of the separation of powers surrender their authority to determine what the law is. In *The Paquete Habana*, 175 U.S. 677, 685-86 (1900), the result—reversing a decree of condemnation in prize—compromised in principle the executive’s conduct of maritime war. In that case, the executive had stated its willingness to be bound by the law of nations, but its interpretation of these obligations, based on its stance in the war and in the litigation, was plainly not the same as the Court’s and was not considered persuasive, let alone determinative. Our “cultural commitment to judicial oversight,” Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1307 (1976), places a heavy burden of justification on those who would carve out any *per se* categories of judicial incompetence in protecting individuals’ rights.

199. *Alvarez-Machain II*, 124 S. Ct. at 2757.

200. *Bolchos v. Darrell*, 3 F. Cas. 810 (D.S.C. 1795) (stating that ATS jurisdiction exists for French citizens’ restitution claim for seized slaves).

nations.<sup>201</sup> In settings other than *Alvarez-Machain II*, the executive branch has concluded that corporations are in principle capable of violating the law of nations or a treaty of the United States for purposes of the ATS,<sup>202</sup> and that conclusion is consistent with well-established international norms to which the United States has given its assent. Specific treaties establish that private actors may be punished for acts of genocide, slavery, and war crimes.<sup>203</sup> These regimes do not distinguish between natural and juridical individuals, and corporations that engage in the slave trade or commit acts of genocide or provide corporate cover for war crimes would not as a matter of law be exempt from liability. "Certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals."<sup>204</sup>

This suggests that there are at least two distinct circumstances in which a corporation (or any other private actor) might bear

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201. *Adra v. Clift*, 195 F. Supp. 857, 862-63 (D. Md. 1961).

202. *See, e.g.*, 26 Op. Att'y Gen. 250, \*4-\*5 (1907) (concluding that aliens injured by a private company's diversion of water in violation of a bilateral treaty between Mexico and the United States could sue under the ATS); *see also* 1 Op. Att'y Gen. 57, 59 (1975) (concluding that liability for violations of international law under the ATS would extend to those "committing, aiding, or abetting" the tort).

203. *See, e.g.*, Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, Art. IV, 78 U.N.T.S. 277, 280; common Article 3 of the Geneva Conventions similarly binds non state actors when they are parties to an international armed conflict; Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Feb. 2, 1956, 6 U.S.T. 3114, T.I.A.S. 3362, 75 U.N.T.S. 31; Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Feb. 2, 1956, 6 U.S.T. 3217, T.I.A.S. 3363, 75 U.N.T.S. 85; Convention Relative to the Treatment of Prisoners of War, Feb. 2, 1956, 6 U.S.T. 3316, T.I.A.S. 3364, 75 U.N.T.S. 135; Convention Relative to the Protection of Civilian Persons in Time of War, Feb. 2, 1956, 6 U.S.T. 3516, T.I.A.S. 3365, 75 U.N.T.S. 287.

204. *Kadic v. Karadzic*, 70 F.3d 232, 239 (2d Cir. 1995); *accord* *Trajano v. Marcos*, 978 F.2d 493, 499 (9th Cir. 1992) (stating that official acts of torture violate international law). In *Carmichael v. United Techs. Corp.*, 835 F.2d 109, 113-14 (5th Cir. 1988), the Court of Appeals assumed without deciding that the ATS confers jurisdiction over private parties who conspire in, or aid an abet, official acts of torture. After World War II, the Nuremberg tribunal found a number of German nationals guilty of internationally criminal activity that took corporate form. *See, e.g.*, *United States v. Alfried Felix Alwyn Krupp von Bohlen und Halbach* ("The Krupp Case"), in 9 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 1327 (1950-52); *United States v. Carl Krauch* ("The Farben Case"), in 8 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 1179 (1950-52); *United States v. Friedrich Flick* ("The Flick Case"), in 6 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 1187 (1950-52). In collecting and assessing this and related international authority, the court in *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 308 (S.D.N.Y. 2003), concluded that "a considerable body of United States and international precedent indicates that corporations may be liable for violations of international law." Nothing in *Alvarez-Machain II* qualifies, contradicts, or undermines this conclusion.

international responsibility: (1) a category of *per se* wrongs, in which the corporation—like any individual—commits one of that narrow class of wrongs identified by treaty or custom as not requiring state action to be considered wrongful; and (2) a category of contextual wrongs, in which the corporation's conduct is sufficiently infused with state action as to engage international standards. To date, no corporation has been found liable under the ATS under either theory, but both remain viable in the aftermath of *Alvarez-Machain II*, despite the strong position staked out by business groups as *amici curiae*.

In attempting to articulate a sound basis for the second category of wrongs, many U.S. courts have turned to the “color of law” jurisprudence adopted by U.S. courts under 42 U.S.C. Section 1983.<sup>205</sup> Unfortunately, the Supreme Court itself has acknowledged that these decisions “have not been a model of consistency.”<sup>206</sup> In one case, the Court premised Section 1983 liability only on a nexus “sufficiently close” that the state’s exercise of “coercive power” or its “significant encouragement, either overt or covert,” necessitates that the private actor’s conduct “must in law be deemed to be that of the state.”<sup>207</sup> In another case, the Court concluded that a private actor acts under color of law if “he has acted with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State.”<sup>208</sup> In other cases, courts have considered whether there is “a substantial degree of cooperative action” between the state and the

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205. 42 U.S.C. § 1983; see *Wiwa v. Royal Dutch Petroleum*, No. 96 CIV. 8386(KMW), 2002 WL 319887, at \*13 (S.D.N.Y. Feb. 28, 2002)(citations omitted):

“A private individual acts under color of law within the meaning of section 1983 when he acts together with state officials or with significant state aid.” The relevant test . . . is the “joint action” test, under which private actors are considered state actors if they are “willful participant[s] in joint action with the state or its agents.” “Where there is a substantial degree of cooperative action between the state and private actors in effectuating the deprivation of rights, state action is present.”

*Kadic v. Karadzic*, 70 F.3d 232, 245 (2d Cir. 1995), *cert. denied* 116 S. Ct. 2524 (1996) (“The ‘color of law’ jurisprudence under 42 U.S.C. Sec. 1983 is a relevant guide to whether a defendant has engaged in official action for purposes of jurisdiction under the Alien Tort Act.”). *Accord Hilao v. Marcos*, 25 F.3d 1467, 1476, *cert. denied*, 115 S. Ct. 934 (1995).

206. *George v. Pacific-CSC Work Furlough*, 91 F.3d 1227, 1230 (9th Cir. 1996) (citing *Leebron v. Nat’l R.R. Passenger Corp.*, 513 U.S. 374 (1995)).

207. *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982).

208. *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725 (1961) (“[T]he State has so far insinuated itself into a position of interdependence with [the private party] that it must be recognized as a joint participant in the challenged activity.”); *accord NCAA v. Tarkanian*, 488 U.S. 179, 192 (1988) (citations omitted):

[T]he question is whether the State was sufficiently involved to treat that decisive conduct as state action. This may occur if the State creates the legal framework governing the conduct; if it delegates its authority to the private actor; or sometimes if it knowingly accepts the benefits derived from unconstitutional behavior.



private actor in effecting the deprivation of rights,<sup>209</sup> or whether the state and private actors “share a common, unconstitutional goal.”<sup>210</sup> Some courts have concluded that a close financial relationship between the private party and the state is sufficient to satisfy the “color of law” requirement.<sup>211</sup> Some require instead a “symbiotic relationship,” a “close nexus,” or a “conspiracy” between them.<sup>212</sup> When the Ninth Circuit Court of Appeals attempted to summarize the law, it declared that “[t]he Supreme Court has articulated four distinct approaches to the state action question: public function, state compulsion, nexus, and joint action.”<sup>213</sup> Problems in applying each of these tests remain.

For purposes of the ATS, the lowest common denominator among these various approaches is that vicarious or strict liability is not the proper standard, meaning that a corporation’s mere presence in a country where human rights abuse occurred is no more plausible as a ground of liability than is its mere presence in an American city where the police beat citizens on account of their race. The law of proximate cause remains intact under the ATS, and, where it can be demonstrated *inter alia* that a company entered into business agreements with a government, intending and understanding either actually or constructively that human rights would be violated for profit, the burden of persuasion rests on those who would carve out an exception to the ATS for corporate conduct. There is certainly no rule that corporations, regardless of their relationship with a government, enjoy immunity for their state-like or state-related activities, as when they interrogate detainees, provide public security, work weapons systems in armed conflict, or run prisons.

In developing the federal common law to govern the corporate cases, courts are required under *Alvarez-Machain II* to determine “whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued.”<sup>214</sup> With respect to the

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209. *Gallagher v. Neil Young Freedom Concert*, 49 F.3d 1442, 1453 (10th Cir. 1995).

210. *Cunningham v. Southlake Ctr. for Mental Health, Inc.*, 924 F.2d 106, 107 (9th Cir. 1991); *accord Fonda v. Gray*, 707 F.2d 435, 437 (9th Cir. 1983) (“A private party may be considered to have acted under color of state law when it engages in a conspiracy or acts in concert with state agents to deprive one’s constitutional rights.”).

211. *Jatoi v. Hurst-Eutess-Bedford Hosp. Auth.*, 807 F.2d 1214, 1221-22, *modified on denial of reh’g*, 819 F.2d 545 (5th Cir. 1987), *cert. denied*, 484 U.S. 1010 (1988).

212. *Lugar v. Edmondson Oil*, 457 U.S. 922, 941 (1982) (stating that private actor, in attaching property through self-help, was a state actor).

213. *George v. Pacific-CSC Work Furlough*, 91 F.3d 1227, 1230 (9th Cir. 1996). Thus for example, “[u]nder the joint action approach, private actors can be state actors if they are wilful participant[s] in joint action with the state or its agents. An agreement between government and a private party can create joint action.” *Id.* at 1231 (internal quotations and citations omitted).

214. *Sosa v. Alvarez-Machain (Alvarez-Machain II)*, 124 S. Ct. 2739, 2766 n.20 (2004).

*per se* category of wrongs, international law clearly does extend liability to corporations for certain extraordinary wrongs. With respect to the contextual wrongs, courts should follow the evidentiary discipline of *Filártiga* and its progeny, by considering the statutes and jurisprudence of international criminal tribunals,<sup>215</sup> the full range of the practice of states in adopting “human rights conditionality” in their domestic law, international regulatory standards for corporations, the transnational *lex mercatoria* that corporations have adopted for themselves,<sup>216</sup> and “general principles of law recognized by civilized nations.”<sup>217</sup> This would include command responsibility, aiding-and-abetting liability for torts or civil law delicts,<sup>218</sup> and Section 1983-like nexus standards in the various nations. At the same

215. Article 7 of the statute for the International Criminal Tribunal for the Former Yugoslavia and Article 6 of the statute for the International Criminal Tribunal for Rwanda impose individual criminal responsibility upon persons who have “planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution” of the crimes specified in the statute. Statute of the International Criminal Tribunal for the Former Yugoslavia, Art. 7, U.N.S.C. Res. 827, U.N. SCOR, 48th Sess., at art. 5, U.N. Doc. S/RES/827 (1993), *reprinted* in 32 I.L.M. 1192 (1993), *amended* by U.N.S.C. Res. 1166, U.N. SCOR, 53rd Sess., 3878th mtg., U.N. Doc. S/RES/1166 (1998); Statute of the International Criminal Tribunal for Rwanda, Art. 6, U.N.S.C. Res. 955, U.N. SCOR, 49th Sess., at art. 3, U.N. Doc. S/RES/955 (1994). The decisions of these tribunals may also suggest the contours of indirect civil liability under the ATS. As noted by the court in *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 323 (S.D.N.Y. 2003): “With regard to the level of aid, international law, as reflected in the judgments of the International Criminal Tribunal for the former Yugoslavia, appears to have settled on a requirement that assistance be ‘direct and substantial.’” *See, e.g., Prosecutor v. Furundzija*, IT-95-17/1-PT (Dec. 10, 1998), at 249, 252:

[T]he Trial Chamber holds the legal ingredients of aiding and abetting in international criminal law to be the following: the *actus reus* consists of practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime. The *mens rea* required is the knowledge that these acts assist the commission of the offence. If [an individual] gives some sort of assistance and support with the knowledge . . . that torture is being practised, then the individual may be found guilty of aiding and abetting in the perpetration of torture.

216. *See Steinhardt, supra* note 191.

217. These “general principles” are one source of international law under the Statute of the International Court of Justice. I.C.J. STAT., art. 38. One potential source of constructive redundancy is the continental notion of *Drittwirkung*, under which private parties may be found to have violated certain constitutional rights of citizens, even if the constitution primarily limits the conduct of the state and its actors. *See generally* ANDREW CLAPHAM, HUMAN RIGHTS IN THE PRIVATE SPHERE 179-82 (1993); *Case of X and Y v. The Netherlands*, 91 Eur. Ct. H.R. (ser. A) (1985).

218. Several courts have determined that aiding-and-abetting liability is established in international law and is therefore available under the ATS. *Presbyterian Church of Sudan*, 244 F. Supp. 2d at 320-24; *Barrueto v. Larios*, 205 F. Supp. 2d 1325, 1333 (S.D. Fla. 2002); *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1355-56 (N.D. Ga. 2002); *Bodner v. Banque Paribas*, 114 F. Supp. 2d 117, 128 (E.D.N.Y. 2000); *accord Hilao v. Estate of Marcos*, 103 F.3d 767, 776 (9th Cir. 1996) (approving jury instruction allowing former head of foreign state to be held liable under the ATS upon finding that he “directed, ordered, conspired with or aided the military” in committing abuses).

time, the courts must be careful not to erect an evidentiary test that international law cannot satisfy. As noted by the Supreme Court, “[o]ffen[s]es . . . against the law of nations, cannot with any accuracy, be said to be completely ascertained and defined in any public code recogni[z]ed by the common consent of nations.”<sup>219</sup> The proper question is whether a “specific, universal, and obligatory” norm exists, not whether the details of its domestic enforcement are the same around the world and in international institutions:

While it is demonstrably possible for nations to reach some consensus on a binding set of principles, it is both unnecessary and implausible to suppose that, with their multiplicity of legal systems, these diverse nations should also be expected or required to reach consensus on the types of actions that should be made available in their respective courts to implement those principles.<sup>220</sup>

Under *Alvarez-Machain II*, the courts must be vigilant that a particular international norm exists before implying a cause of action to enforce it under the ATS, but it must avoid requiring an “unnecessary and implausible”<sup>221</sup> consensus on the details of domestic enforcement.

#### V. A STATUTORY PROPOSAL

In *Alvarez-Machain II*, the Supreme Court announced that it would “welcome any congressional guidance in exercising jurisdiction with such obvious potential to affect foreign relations.”<sup>222</sup> The lower courts repeatedly have found significance in the fact that Congress had a clear opportunity to revise or restrict the ATS and did the opposite in the Torture Victim Protection Act.<sup>223</sup> It is also significant that the Bush Administration’s hostility to the ATS has yet to lead it to introduce legislation repealing or modifying the statute. But legislation could serve the interests of both plaintiffs and defendants, as well as the judiciary, by codifying both the rule of evidence at the heart of *Alvarez-Machain II* and the reasonable limitations courts have placed on claims and defenses.

Attached as an annex to this Article is a proposed statute, “The Human Rights Abuse Compensation and Deterrence Act,” which

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219. *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 159 (1820).

220. *Xuncax v. Gramajo*, 886 F. Supp. 162, 180 (D. Mass. 1995).

221. *Id.*

222. *Sosa v. Alvarez-Machain (Alvarez-Machain II)*, 124 S. Ct. 2739, 2765 (2004).

223. *See Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 105 (2d Cir. 2000), *cert. denied*, 532 U.S. 941 (2001); *Abebe-Jira v. Negewo*, 72 F.3d 844, 848 (11th Cir. 1996); *Kadic v. Karadzic*, 70 F.3d 232, 241 (2d Cir. 1995); *Hilao v. Estate of Marcos*, 25 F.3d 1467, 1475 (9th Cir. 1994), *cert. denied*, 513 U.S. 1126 (1995); *Cabello v. Fernandez-Larios*, 157 F. Supp. 2d 1345, 1365 (S.D. Fla. 2001); *Doe v. Islamic Salvation Front (FIS)*, 993 F. Supp. 3, 7 (D.D.C. 1998).

draws on existing statutes and the coherent jurisprudence under the ATS to define the actionable core of future human rights cases. Adapting both the Torture Victim Protection Act, *supra*, and the Anti-Terrorism Act,<sup>224</sup> *inter alia*, the statute would establish jurisdiction, venue, and a cause of action for such wrongs as genocide, slavery or slave trade, extrajudicial killing, causing the disappearance of any person, torture, crimes against humanity, war crimes, arbitrary detention, or other gross violations of internationally recognized human rights, each of which is carefully defined in Section 6 in light of prevailing international standards and practices. It may be necessary to adapt an “escalator” clause to accommodate human rights as they evolve in the future, much as the right to be free of torture or racial discrimination evolved in the post-war world.<sup>225</sup>

Section 3 of the statute establishes the scope of liability for individuals, both natural and juridical, who commit any of these wrongs. In addition to imposing liability for intentionally committing the defined abuses, the statute would impose liability for ordering, soliciting, or inducing the commission of the wrong, and it adopts the dominant standard for aiding and abetting liability,<sup>226</sup> namely that the defendant “materially assists in the commission of [the] tort with the knowledge that such assistance will directly and substantially contribute to the commission of the tort.” This restriction protects corporations that may coexist or cooperate with abusive regimes but that are not factually connected to those regimes’ repressive conduct.<sup>227</sup> Section 3 also codifies the international consensus on command responsibility.

Section 4 specifies three limitations on human rights actions: an exhaustion of domestic remedies requirement, a ten-year statute of limitations, and a codified version of the *forum non conveniens* doctrine. Consistent with existing doctrine and the TVPA, the plaintiff need only exhaust remedies that are “adequate and available,” meaning that the requirement can be waived by the court if, for example, the foreign courts do not or cannot guarantee due process for the claimant, or if seeking relief in the foreign country

224. 18 U.S.C. §§ 2331, 2333-35 (2004).

225. *Filártiga v. Peña-Irala*, 630 F.2d 876, 882 (2d Cir. 1980).

226. *See, e.g., Halberstam v. Welch*, 705 F.2d 472 (D.C. Cir. 1983) (discussing common law theories of aiding and abetting and conspiracy); *Burnett v. Al Baraka* 274 F. Supp. 2d 86, 104 (D.D.C. 2003) (allowing a suit against financiers of Al Qaeda to proceed under the ATS, TVPA, and ATA as well as common law claims based on the allegation that “al Qaeda committed a wrongful act that caused injury to the plaintiffs and that [defendants] knowingly financed al Qaeda in the furtherance of international terrorism”).

227. *See Steven R. Ratner, Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443, 502-04 (2001).

would be dangerous to the claimant.<sup>228</sup> The statute of limitations is also modeled on the TVPA, is similarly subject to the traditional tolling doctrines, and reflects the recognized principle of international law that there can be no statute of limitations for certain egregious violations of human rights.<sup>229</sup> The *forum non conveniens* provision synthesizes the doctrine as applied to date in ATS cases, including the rebuttable presumption that the plaintiff's choice of forum will be respected except in compelling circumstances.<sup>230</sup>

The proposed legislation has the virtue and the vice of compromise: defendants get notice of the abusive behavior that is actionable, and the scope of their liability is defined and thus limited. In addition, certain recurring defenses explicitly limit the actionability of the underlying norms. Plaintiffs, on the other hand, get a clarity that will be useful in fending off abusive or repetitive pretrial motions and the assurance that corporations that engage in abusive behavior in either the *per se* category or the contextual category may be found liable.

## VI. CONCLUSION

Dean Harold Koh has provocatively considered *Filártiga* the human rights movement's *Brown v. Board of Education*,<sup>231</sup> and both decisions do illustrate the power and the limits of achieving social change through civil litigation. Both cases reflected and accentuated a rights consciousness. Both seemed revolutionary; yet both were entirely consistent with traditional doctrines of American jurisprudence. If *Brown* was the antidote to the Marxist view of law, *Filártiga* was the antidote to the "pure sovereignty" view of international law. Both *Brown* and *Filártiga* rested in part on the support of the executive branch, but, in *Alvarez-Machain II*, the Bush Administration asked the Court to eviscerate the ATS, the irony being lost on no one that a conservative Department of Justice would

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228. Inter-Am. Ct. H.R., *Exceptions to the Exhaustion of Internal Remedies* (Art. 46(1), 46(2)(a) and 46(2)(b) American Convention of Human Rights), Advisory Opinion OC-11/90 of Aug. 10, 1990 (Ser. A) No.11, ¶ 36.

229. See e.g., Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, Nov. 6, 1968, 754 U.N.T.S. 73 (entered into force Nov. 11, 1970); European Convention on the Non-Applicability of Statutory Limitation to Crimes Against Humanity and War Crimes, Jan. 25, 1974, Europ. T.S. No. 82 (not yet entered into force). See also Rome Statute of the International Criminal Court, July 17, 1998, art. 29, U.N. Doc. 32/A/Conf.183/9, reprinted in 37 I.L.M. 999 ("The crimes within the jurisdiction of the Court shall not be subject to any statute of limitations.").

230. E.g., *Abdullahi v. Pfizer*, 7 Fed. Appx. 48 (2d Cir. 2003); *Wiwa v. Royal Dutch Petroleum*, 226 F.3d 88 (2d Cir. 2000), cert. denied 532 U.S. 941 (2001).

231. See Koh, *supra* note 2, at 2366.

attempt—without going through Congress first—to gut a statute as old as the Constitution itself. Of course, one was a unanimous decision of the Supreme Court applying the “better angels” of American constitutional principle, and the other was decided by a three-judge panel of the Second Circuit, applying international law as incorporated into a then-obscure statute. But the principal difference in my view is that international human rights litigation has no Thurgood Marshall. *Brown* was the result of a centrally planned strategy, carefully executed over decades. International human rights litigation in the aftermath of *Filártiga* is a “buzzing, blooming confusion,” in which the potential for massive recoveries has led to the filing of cases that may trigger to a backlash where only the costs of the ATS—and not its value—get attention.

*Alvarez-Machain II* offers a modest, crucial, and timely endorsement of the *Filártiga* paradigm. The Court criticized not a single final decision under the ATS, other than the *Alvarez-Machain* litigation itself, and cited with approval a number of decisions that adhere to *Filártiga*'s principles. Its dicta regarding the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights were unnecessary and potentially damaging, but the internal contradiction between that dicta and the Court's approval of *Filártiga* suggests that the lower courts need not share or replicate the Supreme Court's peculiar hostility to international law. Perhaps the best that can be said is that *Alvarez-Machain II* was not the international human rights movement's *Brown*, but it did avoid being the movement's *Plessy v. Ferguson*.

## ANNEX

*The Human Rights Abuse Compensation and Deterrence Act*

An Act to carry out obligations of the United States under the United Nations Charter and other international agreements pertaining to the protection of human rights by establishing a civil action for recovery of damages from an individual who engages in violations of treaties of the United States and customary international law.

Be it enacted by the Senate and House of Representatives of the United States of American in Congress assembled,

## SECTION 1. SHORT TITLE.

This Act may be cited as the "The Human Rights Abuse Compensation and Deterrence Act."

## SECTION 2. ESTABLISHMENT OF CIVIL ACTION.

Any individual who suffers a tort in violation of a treaty of the United States or of customary international law— including genocide, slavery or slave trade, extrajudicial killing, causing the disappearance of persons, torture, crimes against humanity, war crimes, arbitrary detention,<sup>232</sup> or other gross violations of internationally recognized

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232. The proposed statute adopts the international standards governing arbitrary detention, but the definition is also sufficiently expansive to include state-sponsored transboundary abductions. The executive branch, in settings other than its litigation positions in *Alvarez-Machain I* and *II*, has consistently recognized that extraterritorial abductions by government agents violate international law. The former Legal Advisor to the Department of State testified before Congress that "[f]orcible abductions from a foreign state clearly violate this principle" of sovereignty and that "the United States has repeatedly associated itself with the view that unconsented arrests violate the principle of territorial integrity." *FBI Authority to Seize Suspects Abroad: Hearing Before the Subcomm. Civil & Constitutional Rights of the House Jud. Comm.*, 101st Cong. (1989) [hereinafter "Oversight Hearings"]. When the Soviet Union attempted to kidnap a Soviet citizen within the territory of the United States, the State Department, drawing on the customary understanding among states, declared that "the Government of the United States cannot permit the exercise within the United States of the police power of any foreign government." 19 DEPT OF STATE BULL.1948, at 251. Similarly, the Justice Department's Office of Legal Counsel, addressing a hypothetical strikingly similar to the Alvarez-Machain incident ten years before the fact, concluded that "it appears to be the case that a forcible abduction, when coupled with a protest by the asylum state, is a violation of international law." Extraterritorial Abduction by the Federal Bureau of Investigation, 4B Op. Off. Legal Couns. 543 (1980). There is no evidence that the Department of Justice or any other Executive department has repudiated this conclusion as a matter of international law. See Oversight Hearings, *supra*, at 20-21 (Barr statement), at 34-37 (Sofaer statement). The Barr Opinion, 13 Op. Off. Legal Couns. 195, concluded that the President or the Attorney General has the authority under U.S. domestic law to order the extraterritorial arrest of foreign criminal suspects, even though such an arrest would be in violation of principles of customary international law. The opinion, however, accepts the premise that state-sponsored abductions in foreign countries violate international law and

human rights—or his or her estate, survivors, heirs, or representative, has a cause of action and may sue therefore in any appropriate district court of the United States.

### SECTION 3. LIABILITY.

(a) Individual liability—An individual, either natural or juridical, shall be liable for a tort in violation of a treaty of the United States or of customary international law if that individual:

(1) intentionally commits such a tort, severally or jointly with or through another actor, regardless of whether that other actor is subject to the jurisdiction of the court;

(2) orders, solicits, or induces the commission of such a tort;

(3) aids, abets or otherwise materially assists in the commission of such a tort with the knowledge that such assistance will directly and substantially contribute to the commission of the tort;

(4) in any other way intentionally contributes to the commission of such a tort by a group of persons acting with a common purpose, if made with knowledge of the purpose of the group.

(b) Responsibility of commanders and other superiors.

(1) A military commander or person effectively acting as a military commander shall be liable for torts as defined by this Act committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

(A) that military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such torts; and

(B) that military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

(2) With respect to superior and subordinate or contract relationships not described in paragraph (1), a superior shall be liable for torts as defined by this Act committed by subordinates or contractors under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates or contractors, where:

(A) the superior either knew, or, owing to the circumstances at the time, should have known, or consciously disregarded information which clearly indicated, that the subordinates or contractors were committing or about to commit such torts;



(B) the torts concerned activities that were within the effective responsibility and control of the superior; and

(C) the superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

#### SECTION 4. LIMITATIONS.

(a) Exhaustion of Domestic Remedies.— A court shall decline to hear a claim under this Act if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred.

(b) Statute of Limitations.— No action shall be maintained under this section unless it is commenced within 10 years after the cause of action arose. This section shall not apply to actions based on claims that are not subject to limitations under international law.

(c) Forum non conveniens.— The district court shall not dismiss any action brought under section 2 of this Act on the grounds of the inconvenience or inappropriateness of the forum chosen, unless —

(1) the action may be maintained in a foreign court that has jurisdiction over the subject matter and over all the defendants; and

(2) that foreign court is significantly more convenient and appropriate; and

(3) that foreign court offers a remedy which is substantially the same as the one available in the courts of the United States.

The court may grant relief under this subsection subject to any condition(s) it deems appropriate.

#### SECTION 5. JURISDICTION AND VENUE.

Any civil action under section 2 of this Act against any individual may be brought in the district court of the United States for any district where any defendant is subject to personal jurisdiction.

#### SECTION 6. DEFINITIONS.

(a) GENOCIDE—For the purposes of this Act, the term “genocide” means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such:

(1) killing members of the group;

(2) causing serious bodily or mental harm to members of the group;

(3) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(4) imposing measures intended to prevent births within the group;

(5) forcibly transferring children of the group to another group.

(b) **SLAVERY or SLAVE TRADE.**— For the purposes of this Act:

(1) the term “slavery” means the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised, including but not limited to:

(A) debt bondage, or the status or condition arising from a pledge by a debtor of his personal services or of those of a person under his control as security for a debt, if the value of those services as reasonably assessed is not applied towards the liquidation of the debt or the length and nature of those services are not respectively limited and defined;

(B) serfdom, or the condition or status of a tenant who is by law, custom or agreement bound to live and labor on land belonging to another person and to render some determinate service to such other person, whether for reward or not, and is not free to change his status;

(C) any institution or practice whereby:

(i) a woman, without the right to refuse, is promised or given in marriage on payment of a consideration in money or in kind to her parents, guardian, family or any other person or group; or

(ii) the husband of a woman, his family, or his clan, has the right to transfer her to another person for value received or otherwise; or

(iii) a woman on the death of her husband is liable to be inherited by another person;

(D) any institution or practice whereby a child or young person under the age of 18 years, is delivered by either or both of his natural parents or by his guardian to another person, whether for reward or not, with a view to the exploitation of the child or young person or of his labor.

(E) forced or compulsory labor, or knowingly providing or obtaining the labor or services of a person (1) by threats of serious harm to, or physical restraint against, that person or another person; or (2) by means of any scheme, plan, or pattern intended to cause the person to believe that, if the person did not perform such labor or services, that person or another person would suffer serious harm or physical restraint; or (3) by means of the abuse or threatened abuse of law or the legal process;

(2) the term “slave trade” means and includes all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a person acquired with a view to being sold or exchanged; and, in general, every act of trade or transport in slaves by whatever

means of conveyance. "Slave trade" also includes trafficking in persons.

(A) For purposes of this Act, "trafficking in persons" shall mean the recruitment, transportation, transfer, harboring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or the removal of organs.

(i) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (b)(2)(A) of this section shall be irrelevant where any of the means set forth in subparagraph (b)(2)(A) have been used.

(ii) The recruitment, transportation, transfer, harboring or receipt of a child or young person under the age of 18 for the purpose of exploitation shall be considered "trafficking in persons" even if this does not involve any of the means set forth in subparagraph (b)(2)(A) of this article.

(c) TORTURE.— For the purposes of this Act:

(1) the term "torture" means any act committed by an individual who, under actual or apparent authority, or color of law, of any foreign nation, directed against an individual in the offender's custody or physical control, by which severe pain or suffering (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind; and

(2) mental pain or suffering refers to prolonged or intense mental harm caused by or resulting from—

(A) the intentional infliction or threatened infliction of severe physical pain or suffering;

(B) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality;

(C) the threat of imminent death; or

(D) the threat that another individual will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.

(d) **EXTRAJUDICIAL KILLING.**— For the purposes of this Act, the term “extrajudicial killing” means a deliberate killing, committed by an individual who, under actual or apparent authority, or color of law, of any foreign nation, not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples. Such term, however, does not include any such killing that, under international law, is lawfully carried out under the authority of a foreign nation.

(e) **CRIMES AGAINST HUMANITY.**— For the purposes of this Act, an individual is liable for committing a “crime against humanity” when, as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack, commits any of the following predicate acts:

(1) murder;

(2) extermination, including the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;

(3) enslavement, meaning the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;

(4) deportation or forcible transfer of population, meaning forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;

(5) imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;

(6) torture, meaning the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;

(7) rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity, where “forced pregnancy” means the unlawful confinement, of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out

other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;

(8) persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court, where "persecution" means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;

(9) enforced disappearance of persons, meaning the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time;

(10) other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

(f) **WAR CRIMES.**— For the purposes of this Act, the term "war crimes" means grave breaches of the Geneva Conventions of August 12, 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

(1) willful killing;

(2) torture or inhuman treatment, including biological experiments;

(3) willfully causing great suffering, or serious injury to body or health;

(4) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;

(5) compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;

(6) willfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;

(7) unlawful deportation or transfer or unlawful confinement;

(8) taking of hostages.

(g) **ARBITRARY DETENTION.**— For the purposes of this Act, the term "arbitrary detention" means a detention of an individual not pursuant to law. A detention is arbitrary if it is supported only by a general warrant, or is not accompanied by notice of charges; if the

person detained is not given early opportunity to communicate with family or to consult counsel; or is not brought to trial within a reasonable time.

(h) GROSS VIOLATIONS OF INTERNATIONALLY RECOGNIZED HUMAN RIGHTS.— For the purposes of this Act, the term “gross violations of internationally recognized human rights” means serious, persistent, or systematic violations of those rights that are universally accepted and that no government would admit to violating as state policy.

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