

**NO LONGER LITTLE KNOWN
BUT NOW A DOOR AJAR:
AN OVERVIEW OF THE EVOLVING AND
DANGEROUS ROLE OF THE ALIEN TORT
STATUTE IN HUMAN RIGHTS AND
INTERNATIONAL LAW JURISPRUDENCE**

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I. INTRODUCTION

Human rights' and other international law activists have long worked to add teeth to their tasks. Their endeavors are increased in value to the extent enforcement options exist for alleged violations of international norms and rights. Documents generated to purport to establish international law gain in value in relation to their acceptance as authority in judicial decisions. Symbolic and aspirational efforts have a certain bite when employed on the ground or in public relations to advance human rights goals against allegedly "bad actors." Persuasive statements and condemnations by "international" bodies can go a long way to influencing the actions of nation-states and corporations operating abroad – yet litigation options present an entirely different tool.

The possibility of imposing legal, judicially enforceable liability standards for violations of such purported international norms may be a much more powerful tool for such activists than mere statements of desire. Thus, when courts or other tribunals begin to recognize causes of action and remedies for violations of these international norms and rights, then the power, persuasion, and influence of expansionist international law advocates become more potent.

One of the most interesting avenues for such enforcement has been the Alien Tort Statute ("ATS").¹ Old but little known²

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until very recent years, the Alien Tort Statute has become the primary vehicle for injecting international norms and human rights into United States courts – against nation-states, state actors, and even private individuals or corporations alleged to actually or in complicity or conspiracy been responsible for supposed violations of international law. The federal Alien Tort Statute (or Alien Tort Claims Act (“ATCA”)),³ 28 U.S.C. § 1350, has seen an interesting evolution in the past twenty-five years after remaining almost entirely dormant for nearly two hundred years since its passage with the Judiciary Act of 1789.

This Article provides an overview of the ATS evolution (or revolution), discusses the most recent significant development in the evolution arising from some long-awaited guidance from the U.S. Supreme Court, and briefly sets forth the bases for concern that injecting international law into United States jurisprudence presents a number of dangers – on constitutional, legal, policy, and economic grounds. Whether recent developments at the U.S. Supreme Court have curbed the procession of the ATS human rights revolution or simply added further indeterminacy into its progression is still up for debate. Quotes from a *Wall Street Journal* article sum up the varying interpretations of the next wave of the ATS evolution in light of recent Supreme Court opinions:

Robin Conrad, a senior vice president of the U.S. Chamber of Commerce’s litigation arm, said the 45-page decision [by the U.S. Supreme Court in June 2004] is “riddled with mixed signals” and ambiguous language. . . .

. . . Daniel Petrocelli, outside counsel for Unocal, said the Supreme Court decision represents a “sound rejection” of the way that human-rights groups have been using the Alien Tort law. . . .

. . . .

. . . “We think that business’s and government’s effort to eliminate the statute as a basis for relief was defeated,” said Jennifer Green of the New York-based Center for Constitutional Rights.⁴

Recent developments at the Supreme Court, discussed later, may

Brandon Fuller for his assistance in preparation for portions of this Article.

¹ 28 U.S.C. § 1350 (2000).

² Judge Friendly has described the Act as an “old but little used section [that] is a kind of legal Lohengrin; although it has been with us since the first Judiciary Act, no one seems to know whence it came.” *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975) (citation omitted) (holding fraud not a violation of international law).

³ See Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT’L L. 587 (2002) (explaining that “Alien Tort Statute” is preferable to “Alien Tort Claims Act” if one believes that § 1350 does not create a cause of action).

⁴ Robert S. Greenberger & Pui-Wing Tam, *Human-Rights Suits Against U.S. Firms Curbed*, WALL ST. J., June 30, 2004, at A-3.

indeed shape the debate but have certainly not fully resolved the judicially acceptable breadth of ATS litigation with sufficient clarity.

Given its increasing prominence today, many are shocked that such an old law with prolonged dormancy has seen such new life and debate. The ATS grants the federal courts subject-matter jurisdiction over cases in which an alien sues for a tort only committed in violation of the law of nations.⁵ The ATS provides: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."⁶ This grant exists apart from both federal question⁷ and diversity⁸ jurisdiction, as well as from jurisdiction over admiralty, maritime and prize cases.⁹ There is little evidence of Congress's legislative intent in relation to the ATS. The Senate debates over the Judiciary Act of 1789 were not recorded and the provision is never mentioned in the debates of the House of Representatives.¹⁰

Until June 2004, in the case of *Sosa v. Alvarez-Machain*,¹¹ neither the U.S. Supreme Court nor Congress had provided any useful guidance for the application of the ATS.¹² Prior to 1980, jurisdiction under the ATS was hardly exercised – only two cases

⁵ 28 U.S.C. § 1350 (2000). For annotation based histories of ATS litigation, see Russell G. Donaldson, *Construction and Application of Alien Tort Statute* (28 U.S.C.A. §1350), *Providing for Federal Jurisdiction Over Alien's Action for Tort Committed in Violation of Law of Nations or Treaty of the United States*, 116 A.L.R. FED. 387 (2005); CHARLES ALAN WRIGHT & ARTHUR R. MILLER, 14A FEDERAL PRACTICE AND PROCEDURE § 3661.1 (2005).

⁶ 28 U.S.C. § 1350 (2000). The original Act, enacted by the First Congress, read: "[The district courts] shall also 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." Judiciary Act of Sept. 24, 1789, ch. 20, sec. 9, 1 Stat. 73, 76-77.

⁷ 28 U.S.C. § 1331 (2000).

⁸ 28 U.S.C. § 1332 (2000). The original statute granting diversity jurisdiction did not equate "aliens" with "citizens." Thus, one might argue that the First Congress intended only to give aliens the same opportunity as citizens would receive under diversity jurisdiction, at least in relation to torts. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 813-14 (D.C. Cir. 1984) (Bork, J., concurring).

⁹ 28 U.S.C. § 1333 (2000).

¹⁰ See *Tel-Oren*, 726 F.2d at 812 (Bork, J., concurring) (citing 1 ANNALS OF CONG. 782-833 (J. Gales ed., 1789)). For a discussion of the case, see generally Debra A. Harvey, Comment, *The Alien Tort Statute: International Human Rights Watchdog or Simply 'Historical Trivia'?*, 21 J. MARSHALL L. REV. 341, 349-52 (1988); Kenneth Marc Schneider, Note, *Hanoch Tel-Oren: The Retreat From Filartiga*, 4 CARDOZO L. REV. 665 (1983).

¹¹ See *infra* Part II.

¹² See E. Hardy Smith, Note, *Federal Jurisdiction Under the Alien Tort Claims Act: Can This Antiquated Statute Fulfill Its Modern Role?*, 27 ARIZ. L. REV. 437, 438 (1985). For a discussion of Supreme Court cases that have addressed issues of international law, see generally Paul B. Stephan III, *International Law in the Supreme Court*, 1990 SUP. CT. REV. 133 (1990).

involved its application.¹³ Therefore, for over 200 years this statute remained essentially unaccessed, unused, and largely unknown.

The evolution of ATS litigation began in 1980 when the ATS was raised from dormancy, and a federal appeals court found that suits based on customary international law for human rights abuses could be entertained under the ATS.¹⁴ It expanded most notably again in 1995 when a federal appeals court held that quasi-public and even private actors might be bound by customary international law for certain egregious violations.¹⁵ It evolved further in 1997 when a federal district court held that a private corporation was subject to ATS jurisdiction for alleged human rights abuses abroad.¹⁶ Since then, dozens of lawsuits against private actors – principally corporations – have been filed. Since the U.S. Supreme Court finally addressed the ATS in part in 2004, the continued evolution and the form that evolution will take is now in flux awaiting future applications in light of the Supreme Court's limited guidance provided by its interpretation of the ATS in *Sosa v. Alvarez-Machain*.¹⁷

Principally – under the ATS – United States district and

¹³ See *Adra v. Clift*, 195 F. Supp. 857 (D. Md. 1961) (child custody dispute between two aliens; wrongful withholding of custody is a tort, and defendant's falsification of child's passport to procure custody violated the law of nations); *Bolchos v. Darrel*, 3 F. Cas. 810 (D.S.C. 1795) (No. 1607) (suit for restitution of three slaves who were on board a Spanish ship seized as a prize of war; treaty of France superseded the law of nations; § 1350 alternative basis of jurisdiction). Because a tort must be found to be the type which violates the law of nations before jurisdiction will be granted, some cases prior to 1980 considered application of the ATS, but found the alleged tort did not meet the law of nations threshold. See *Huynh Thi Anh v. Levi*, 586 F.2d 625, 629 (6th Cir. 1978) (no generally accepted international rule granting custody of children to grandparents); *Benjamins v. British European Airways*, 572 F.2d 913, 916 (2d Cir. 1978) (negligence law not part of the law of nations), *cert. denied*, 439 U.S. 1114 (1979); *Dreyfus v. Von Finck*, 534 F.2d 24, 30 (2d Cir. 1976) (wrongful confiscation of property not part of the law of nations), *cert. denied*, 429 U.S. 835 (1976); *IIT v. Vencap, Ltd.*, 519 F.2d at 1015 (fraud not violative of international law); *Abiodun v. Martin Oil Serv., Inc.* 475 F.2d 142, 145 (7th Cir. 1973) (fraud not violative of the law of nations); *Khedivial Line, S.A.E. v. Seafarers' Int'l Union*, 278 F.2d 49, 51-52 (2d Cir. 1960) (illegal picketing not in violation of international law); *Valanga v. Metro. Life Ins. Co.*, 259 F. Supp. 324, 328 (E.D. Pa. 1966) (breach of contract not in violation of the law of nations); *Damaskinos v. Societa Navigacion Interamericana, S.A., Panama*, 255 F. Supp. 919, 923 (S.D.N.Y. 1966) (negligence law not part of the law of nations); *Lopes v. Reederei Richard Schroder*, 225 F. Supp. 292, 297 (E.D. Pa. 1963) (unseaworthiness doctrine not part of the law of nations).

¹⁴ *Filartiga v. Pena-Irala*, 630 F.2d 876, 877 (2d Cir. 1980).

¹⁵ *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995), *cert. denied*, 518 U.S. 1005 (1996).

¹⁶ *Doe I v. Unocal Corp.*, 963 F. Supp. 880 (C.D. Cal. 1997) (upholding subject matter jurisdiction under ATS based on allegations that an American oil company, acting in concert with the Burmese government, committed various civil and human rights abuses), *aff'd in part & rev'd in part*, 395 F.3d 932 (9th Cir. 2002), *rehearing en banc granted, opinion vacated by Doe v. Unocal Corp.*, 395 F.3d 978 (9th Cir. 2003).

¹⁷ 124 S. Ct. 2739 (2004). For brief summaries of the decision, see *Supreme Court Interpretations of Alien Tort Claims Act*, 98 AM. J. INT'L L. 845 (2004); Brad R. Roth, *Sosa v. Alvarez-Machain*, 98 AM. J. INT'L L. 798 (2004).

appeals courts have, with increasing frequency, recognized various treaties, as well as resolutions, understandings, declarations, proclamations, conventions, programmes, protocols, and similar forms of inter- or multi-national “legislation” as evidence of a body of “customary international law” enforceable in domestic courts, particularly in the area of tort liability. These instruments, referred to herein as customary international law outputs (“CILOs”), are seen by some courts as evidence of norms that bind not only nations and state actors, but also private individuals. ATS plaintiffs often allege “a veritable cornucopia of international law violations”¹⁸ stuffed with a feast of potentially applicable customary international law outputs in an attempt to establish liability. As this Article examines the waves of ATS litigation, the question becomes how courts will treat CILOs in their attempt to analyze customary international law complaints.

Such enforceability of customary international law outputs has occurred in U.S. courts even where such customary international law outputs have not been codified or otherwise adopted by the U.S. Congress. As a *Washington Post* editorial recently opined, reading the ATS to generally allow suits based on a judge’s determination of customary international law

not only misconstrues its text and likely purpose, but it also creates serious problems of democratic governance. Courts have found bases for suit not only in treaties to which the president and Senate have agreed but in nonbinding U.N. General Assembly resolutions and even in international instruments the government has rejected.¹⁹

Surely then, rule of law issues, let alone other constitutional or prudential concerns, abound when one considers the appropriate role for international “law” in the judicial system.

Several commentators have chimed in on this ATS evolution – although surprisingly the evolution (or revolution) has only captured the public eye in very recent years, long after the federal courts began shaping and expanding the role of customary international law since it arrived principally on the litigation scene twenty-five years ago. I hypothesize that this lack of attention was a result of (1) a limited, although growing, impact; and (2) because early cases were morally easy to justify – the nastiest of the nastiest in the world community were being held accountable for their dastardly deeds. But with any evolution that begins with easy facts and great sympathies, there is an evolutionary tendency for legal doctrines and

¹⁸ In re South African Apartheid Litigation, 346 F. Supp. 2d 538, 548 (S.D.N.Y. 2004).

¹⁹ *Human Rights in Court*, WASH. POST, Apr. 6, 2004, at A20.

pronouncements to then expand and create more questionable foundational rules and assumptions that require a more critical examination of the appropriate application of certain principles – herein principally the scope and role of international “law” in domestic adjudication.²⁰

As a *Financial Times* columnist stated in a March 14, 2003 article: “US plaintiffs’ lawyers have revived a dormant 18th-century law and made it their chief weapon in a 21st-century battle over corporate responsibility in an age of globalisation.”²¹ This evolution is occurring “[i]n the best traditions of American legal creativity.”²² Conversely, as one international labor activist

²⁰ I am amazed that when I first started analyzing this issue in 1997, I was able to compile the complete literature specifically related to the topic in a couple of binders. Now, it takes a couple of large file cabinets at least. This is simply personal evidence of the dramatic, recent, and spiraling interest in the use of the ATS. Once thought obscure, the ATS is no longer little known (nor little examined in the courts, academic scholarship, and the popular press). Further personal evidence of the change in interest involves inquiries in the late 1990’s to those potentially subject to ATS liability. Such parties, in my personal experience, were largely ambivalent to raise concerns regarding potential liability. The awareness and concern regarding ATS liability – from my personal experiences and observations – has dramatically risen in the past four years or so. This underscores my observation that evolutionary legal developments have a tendency to mutate in manners that are not immediately recognizable or not immediately financially understood. Yet, when it comes to tort liabilities, there is often an evolutionary tendency to expand the reach of liable parties and actionable claims. Failures to recognize this fact often cause parties not faced with the immediacy of potential liability to remain complacent in attempting to shape that evolution. Thus, again, doctrines developed in early waves of ATS jurisprudence against clearly bad and unsympathetic defendants, and then again evolved in further waves to expand the reach of liability. Anticipation of evolution (especially in tort liability) has not been, in my experience, a particularly well-honed skill within business practice. One role as the lawyer-as-counselor, however, should always be to at least raise awareness of potentially predictable results of evolutionary trends and the anticipation of its potential, future reach.

²¹ Patti Waldmeir, *An Abuse of Power*, FIN. TIMES, Mar. 14, 2003, at 12.

²² *Id.* In commenting on the ongoing ATS suit against Unocal, *The Economist* in its April 24, 1999 issue described the potential implications of this new trend in tort litigation: “The next big test will be whether the Alien Tort Claims Act can be used against companies as well as individuals.” *To Sue a Dictator*, THE ECONOMIST, Apr. 24, 1999, at 26. And, if companies begin losing in this emerging field of litigation, it could “provide a major headache for many American companies operating abroad.” *Id.* When discussing an award against Serbian leader Karadzic, an August 2000 *Washington Post* editorial called the new line of ATS human rights’ cases “troubling” as “proceed[ing] under an ill-conceived but now well-accepted reading of a 1789 law that . . . is a modern graft on a largely moribund statute; international human rights law did not exist in the 18th century.” *Lawsuits and Foreign Policy*, WASH. POST, Aug. 12, 2000, at A20.

Furthermore, a staff reporter from the *Corporate Legal Times* summed up the current situation with the following headline in October 2002: “No Longer Satisfied With Destroying the Reputations of Corporations That Get Entangled in Human Rights Abuses Overseas, Activist Groups are Seeking Retribution in U.S. Courts.” See Robert Vosper, *Conduct Unbecoming; No Longer Satisfied With Destroying the Reputations of Corporations That Get Entangled in Human Rights Abuses Overseas, Activist Groups are Seeking Retribution in U.S. Courts*, CORP. LEG. TIMES, October 2002, at 35. In November 2002, it has been opined in the *Financial Times* that the current ATS jurisprudential trend presents a “danger that the US judicial system will become the world’s civil court of first resort.” Thomas Niles, *The Very Long Arm of American Law*, FIN. TIMES, Nov. 6, 2002, at 15.

spearheading many of these “creative” lawsuits has claimed, the ATS is a “vital tool for preventing corporations from violating fundamental human rights.”²³ There is a growing awareness and growing debate regarding the appropriateness of using U.S. courts to extraterritorially enforce supposedly internationally accepted norms and impose liability for violations of such norms by overseas actors, in overseas venues, and otherwise subject to overseas laws and regulations.

A *Washington Post* editorial raised concerns when it juxtaposed care for human rights from the vehicles used to protect them as not necessarily mutually consistent: “You don’t have to be indifferent to human rights abuses to have misgivings about this reading [of the ATS], because it creates troubling problems for democratic government and permits the courts to interfere excessively in the conduct of foreign policy.”²⁴ This statement underscores the distinction between believing in the advancement of human rights, but perhaps disputing whether U.S. courts constitute the appropriate forum for such efforts.

A backdrop to the ATS discussion is the debate over the proper invocation of international “law” or foreign laws as persuasive or informing authority for the general interpretation of United States domestic law. Most notably are three U.S. Supreme Court cases that have stimulated the debate – *Lawrence v. Texas*,²⁵ *Atkins v. Virginia*,²⁶ and *Roper v. Simmons*.²⁷

There are several problems with this trend toward enforceability and applicability of “customary international law” or otherwise “foreign” law in U.S. courts. The litigation trend has infirmities related to the Constitution, foreign policy, national security, and the public policies supporting economic development and its concomitant effect on the advance of democracy and political liberty. These concerns have been

As the *Legal Times* reported recently, suits against corporations in U.S. courts for alleged violations of customary international law constitutes, according to the U.S. Chamber of Commerce, “‘global forum shopping,’ in which foreigners resort to U.S. courts, with their favorable class action and discovery rules, to litigate over alleged human rights abuses overseas by U.S. corporations. ‘The U.S. is increasingly becoming the jurisdiction of choice for opportunistic foreign plaintiffs,’ says Chamber President Thomas Donohue.” Tony Mauro, *Justices Debate Alien Tort Law*, LEG. TIMES, April 5, 2004, at 8.

²³ TERRY COLLINGSWORTH, INTERNATIONAL LABOR RIGHTS FUND, THE ALIEN TORT CLAIMS ACT – A VITAL TOOL FOR PREVENTING CORPORATIONS FROM VIOLATING FUNDAMENTAL RIGHTS (2003), available at <http://www.laborrights.org/publications/ATCA.pdf>.

²⁴ *Old Law, New Questions*, WASH. POST, July 20, 2004, at A16.

²⁵ 539 U.S. 558 (2003).

²⁶ 536 U.S. 304 (2002).

²⁷ 125 S. Ct. 1183 (2005).

previously addressed by this author²⁸ and others,²⁹ and the principal goal of this Article is to reexamine some of these concerns in light of the ongoing ATS evolution, especially as sparked by recent and original pronouncements from the U.S. Supreme Court on the interpretation and role of the ATS.

II. THE FIRST FOUR PRINCIPAL WAVES IN THE ATS EVOLUTION

Rather than rehash previous and substantial literature in this field (including presentation of specific case facts), I will briefly summarize what I will in this Article – and have in the past – identified as the five principal waves in the evolution of ATS litigation. Although there are many cases of interest, this analysis is limited to the “milestone” cases in each wave of evolution.

The ATS cases have generally followed a continuously-expanding five-wave trend: The first wave was disuse and dormancy; the second was the acceptance of liability under the ATS for official state acts, including its recognition as a statute providing both jurisdiction and a cause of action and liability evidenced by noncompliance with customary international law outputs; and the third was the movement toward an acceptance that quasi-state, and, indeed, private individuals, could be liable for violations of customary international law. The fourth wave in ATS jurisprudence, discussed in the next subpart, involves suits against private individuals and corporations. The fifth wave involves the first guidance from the U.S. Supreme Court, so the idea of expansive evolution and predictions for the future of ATS evolution remain a bit indeterminate.

As stated, wave one was that of dormancy. For over 200 years, therefore, the ATS remained essentially unaccessed – or “dormant” in the parlance of literature in this field. In essence, it remained ink that had never before been copied, applied, or undried.

²⁸ 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 (2004); Donald J. Kochan, Note, *Constitutional Structure as a Limitation on the Scope of the “Law of Nations” in the Alien Tort Claims Act*, 31 CORNELL INT'L L.J. 153 (1998); Donald J. Kochan, *After Burma: Like the Massachusetts Law, the Alien Tort Claims Act Allows Improper Interference in U.S. Foreign Policy*, LEGAL TIMES, Aug. 21, 2000, at 54; Donald J. Kochan, *Foreign Policy, Freelanced: Suits Brought Under Alien Tort Claims Act Undermine Federal Government's Authority*, THE RECORDER (San Francisco), Aug. 23, 2000, at 5; Donald J. Kochan, *Rein in Alien Claims Act: Reconstituted ‘Law of Nations’ Standard Needs Defining by Congress*, FULTON COUNTY DAILY REP., Aug. 24, 2000, at 6.

²⁹ See, e.g., Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 834-36 (1997); Bradley, *supra* note 3.

But some lawyers thought out of the box and used the ATS to move forward the possibility that human rights might have a role in, and courts could be a vehicle for, extraterritorial litigation within the United States. And, the second wave was born.

In 1980, the U.S. Court of Appeals for the Second Circuit agreed with these creative lawyers. In *Filartiga v. Pena-Irala*,³⁰ the U.S. Court of Appeals for the Second Circuit breathed life and spurred evolutionary growth for the ATS from its previously dormant status.³¹ Dolly Filartiga, a citizen of the Republic of Paraguay, sued Americo Norberto Pena-Irala, formerly an Inspector General of Police of Paraguay, for allegedly kidnapping, torturing, and killing her brother while in office.³² The alleged actions took place in Paraguay.³³ The district court dismissed the action for lack of subject matter jurisdiction.³⁴ The Second Circuit reversed and remanded, holding that deliberate torture by state officials violates international law, and that alleging such torture creates jurisdiction under the ATS.³⁵ The decision sparked a multi-wave movement in which the strength of the ATS grew in the civil enforcement of international norms within the United States, even for extraterritorial actions. The court found that the ATS created jurisdiction *and* provided a cause of action.

The *Filartiga* Court held that “deliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human rights, regardless of the nationality of the parties.”³⁶ The ATS was applied in the modern

³⁰ 630 F.2d 876 (2d Cir. 1980). For general discussions of the case and its approach, see, for example, Jeffrey M. Blum & Ralph G. Steinhardt, *Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act After Filartiga v. Peña-Irala*, 22 HARV. INT'L L.J. 53 (1981); Farooq Hassan, Note, *A Conflict of Philosophies: The Filartiga Jurisprudence*, 32 INT'L & COMP. L.Q. 250, 256 (1983); Mark P. Jacobsen, Comment, 28 U.S.C. 1350: A Legal Remedy for Torture in Paraguay?, 69 GEO. L.J. 833, 834, 849 (1981); Donald Johnson, Jr., *Filartiga v. Pena-Irala: A Contribution to the Development of Customary International Law by a Domestic Court*, 11 GA. J. INT'L & COMP. L. 335 (1981); Dean Rusk, *A Comment on Filartiga v. Pena-Irala*, 11 GA. J. INT'L & COMP. L. 311 (1981); Michael C. Small, Note, *Enforcing International Human Rights Law in Federal Courts: The Alien Tort Statute and the Separation of Powers*, 74 GEO. L.J. 163 (1985); Louis B. Sohn, *Torture as a Violation of the Law of Nations*, 11 GA. J. INT'L & COMP. L. 307 (1981); Gabriel M. Wilner, *Filartiga v. Pena-Irala: Comments on Sources of Human Rights Law and Means of Redress for Violations of Human Rights*, 11 GA. J. INT'L & COMP. L. 317 (1981).

³¹ Judge Robb of the U.S. Court of Appeals for the D.C. Circuit described the *Filartiga* approach as “judicially will[ing] that statute a new life.” *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 827 (D.C. Cir. 1984) (Robb, J., concurring).

³² *Filartiga*, 630 F.2d at 878.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

context of human rights for the first time. Furthermore, *Filartiga* established that modern concepts of “international law” were coterminous with previous concepts of the “law of nations,” and that this international law is an evolving concept to be ascertained by the courts.³⁷ The Second Circuit held that courts ascertaining the law of nations “must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today.”³⁸

This second wave invited multiple lawsuits against states and state actors. Nonetheless, during this evolution, a few hiccups occurred. Perhaps the most significant was *Tel-Oren v. Libyan Arab Republic*, decided by the U.S. Court of Appeals for the D.C. Circuit.³⁹ Representatives of persons killed in a civilian bus in Israel, along with the injured survivors of the attack, sued the Libyan Arab Republic, the Palestine Liberation Organization, the Palestine Information Office, the National Association of Arab Americans, and the Palestine Congress of North America.⁴⁰ The plaintiffs claimed the defendants committed multiple tortious acts in violation of international law.⁴¹

The panel at the D.C. Circuit agreed unanimously that the court lacked jurisdiction over the plaintiffs’ causes of action.⁴² Each judge, however, wrote a separate concurring opinion, each with a different rationale. Judge Edwards, adhering to *Filartiga*, contended that violations of the law of nations are a narrow category reserved to “a handful of heinous actions – each of which violates definable, universal and obligatory norms,”⁴³ and that the alleged actions in this case did not trigger such jurisdiction.⁴⁴ Edwards, however, held open the possibility that the judiciary should exercise jurisdiction in cases where a proper cause of action satisfies the requirements of the ATS.⁴⁵

³⁷ *Id.*

³⁸ *Id.*

³⁹ 726 F.2d 774 (D.C. Cir. 1984) (per curiam), *cert. denied*, 470 U.S. 1003 (1985). For a discussion of the case, see generally Debra A. Harvey, Comment, *The Alien Tort Statute: International Human Rights Watchdog or Simply ‘Historical Trivia’?*, 21 J. MARSHALL L. REV. 341, 349-52 (1988); Kenneth Marc Schneider, Note, *Hanoch Tel-Oren: The Retreat From Filartiga*, 4 CARDOZO L. REV. 665 (1983).

⁴⁰ *Tel-Oren v. Libyan Arab Republic*, 517 F. Supp. 542, 544-45 (D.D.C. 1981). For a discussion of the district court opinion, see generally Eileen Rose Pollock, *Terrorism as a Tort in Violation of the Law of Nations*, 6 FORDHAM INT’L L.J. 236 (1982).

⁴¹ *Tel-Oren*, 517 F. Supp. at 544.

⁴² *Tel-Oren*, 726 F.2d at 775.

⁴³ *Id.* at 781 (Edwards, J., concurring).

⁴⁴ See generally *id.* at 775-98. See also *Beanel v. Freeport-McMoran, Inc.*, 969 F. Supp. 362 (E.D. La. 1997) (accepting a broader scope of the law of nations, which included action by private individuals, but dismissing for failure to state a claim under the ATS upon which relief can be granted).

⁴⁵ *Tel-Oren*, 726 F.2d at 789 (Edwards, J., concurring).

In his concurrence, Judge Robb relied primarily on the political question doctrine, explaining that an exercise of jurisdiction would improperly involve the judiciary in foreign affairs – an area beyond its expertise and one dangerously risking interference with the province of the political branches.⁴⁶ In addition, Judge Robb rejected the *Filartiga* formulation for ascertaining international law under the ATS⁴⁷ and, in the process, rejected the holding of *The Paquete Habana*.⁴⁸ Citing Chief Justice Fuller's dissent in *The Paquete Habana*,⁴⁹ Judge Robb stated that:

Courts ought not to serve as debating clubs for professors willing to argue over what is or what is not an accepted violation of the law of nations. Yet this appears to be the clear result if we allow plaintiffs the opportunity to proceed under § 1350. . . . The typical judge or jury would be swamped in citations to various distinguished journals of international legal studies, but would be left with little more than a numbing sense of how varied is the world of public international "law".⁵⁰

With the absence of congressional guidelines to inform the interpretation of the ATS's application or purpose, Judge Robb opined that the judiciary had no cognizance under the statute.⁵¹

Judge Bork, also concurring in a separate opinion, found that the ATS provided only jurisdiction at best and did not provide a separate, private cause of action for violations of international law.⁵² Judge Bork proclaimed that even if international law provides rules of decision, it does not automatically provide causes of action.⁵³ When there exists "sufficient controversy of a politically sensitive nature about the content of any relevant international legal principles" involved in the litigation, Bork opined that it is improper to adjudicate those claims in light of separation of powers principles.⁵⁴ Finally, Judge Bork extended his opinion to argue that the meaning of "law of nations" in the

⁴⁶ *Id.* at 823 (Robb, J., concurring).

⁴⁷ *Id.* at 827 ("We ought not to cobble together for [the ATS] a modern mission on the vague idea that international law develops over the years. Law may evolve, but statutes ought not to mutate.")

⁴⁸ *Id.* at 827.

⁴⁹ 175 U.S. 677, 720 (1900) (Fuller, J., dissenting) (stating that it was "needless to review the speculations and repetitions of writers on international law Their lucubrations may be persuasive, but are not authoritative").

⁵⁰ *Tel-Oren*, 726 F.2d at 827 (Robb, J., concurring).

⁵¹ *Id.*

⁵² *Id.* at 799 (Bork, J., concurring).

⁵³ *Id.* at 811.

⁵⁴ *Id.* at 808. Judge Bork further stated, "[a]djudication of those claims would require the analysis of international legal principles that are anything but clearly defined and that are the subject of controversy touching 'sharply on national nerves.'" *Id.* at 805 (citing *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1963)).

ATS should be limited to the types of offenses understood to constitute the whole of international law at the Founding.⁵⁵

Many creative lawsuits followed *Filartiga* and *Tel-Oren*, some successful and some not. But in what this author identifies as wave three, the ATS evolution opened up some new opportunities for liability. The expansion of the judicial application of the ATS reached new heights in 1995 with the *Kadic v. Karadzic* decision.⁵⁶ The plaintiffs in *Kadic* were Croat and Muslim citizens of Bosnia-Herzegovina,⁵⁷ alleging that they were victims, and representatives of victims, of various atrocities including rape, torture, and summary executions by the Bosnian-Serb military forces.⁵⁸ The suit was brought against Karadzic, in his capacity as the President of the Bosnian-Serb faction. The district court dismissed the case for lack of subject-matter jurisdiction.⁵⁹ The Second Circuit reversed this ruling⁶⁰ and, as a result, significantly expanded the jurisdiction conferred by, and scope of, the ATS – at least within the Second Circuit.⁶¹

The Second Circuit held that the ATS applies to actions by state actors *or* even private individuals that are in violation of the most egregious portions of law identified as customary international law.⁶² According to the court in *Kadic*, state action is not necessary for a cognizable violation of the law of nations to exist.⁶³ The court expanded upon the principles it enunciated in *Filartiga*, noting that international law is constantly evolving. It

⁵⁵ *Id.* at 807-808.

⁵⁶ 70 F.3d 232 (2d Cir. 1995), *reh'g denied*, 74 F.3d 377 (2d Cir. 1996), *cert. denied*, 518 U.S. 1005 (1996). Judge Newman highlighted the odd nature of the case in his opinion: "Most Americans would probably be surprised to learn that victims of atrocities committed in Bosnia are suing the leader of the insurgent Bosnian-Serb forces in a United States District Court in Manhattan." *Id.* at 236. Several case notes and articles have been published on the *Kadic* opinion. See, e.g., Judith Hippler Bello et al., *International Decision*, 90 AM. J. INT'L L. 658 (1996); David S. Bloch, *Dangers of Righteousness: Unintended Consequences of Kadic v. Karadzic*, 4 TULSA J. COMP. & INT'L L. 35, 47 (1996) (arguing that while international law litigation in U.S. courts is generally good, *Kadic* itself "muddies international law, weakens American diplomacy and strengthens the very outlaws it is intended to attack"); Pamala Brondos, Note, *International Law—The Use of the Torture Victim Protection Act as an Enforcement Mechanism*, 32 LAND & WATER L. REV. 221 (1997); Amy E. Eckert, Note, *Kadic v. Karadzic: Whose International Law?*, 25 DENV. J. INT'L L. & POL'Y 173 (1996) (concluding *Kadic* went too far); Alan Frederick Enslen, Note, *Filartiga's Offspring: The Second Circuit Significantly Expands the Scope of the Alien Tort Claim Act with Its Decision in Kadic v. Karadzic*, 48 ALA. L. REV. 695 (1997); Justin Lu, Note, *Jurisdiction over Non-State Activity under the Alien Tort Claims Act*, 35 COLUM. J. TRANSNAT'L L. 531 (1997).

⁵⁷ *Kadic*, 70 F.3d at 236.

⁵⁸ *Id.* at 236-37.

⁵⁹ *Id.*

⁶⁰ *Id.* at 251.

⁶¹ See Charles F. Marshall, *Re-framing the Alien Tort Act After Kadic v. Karadzic*, 21 N.C. J. INT'L L. & COM. REG. 591, 597 (1996).

⁶² *Kadic*, 70 F.3d at 239.

⁶³ *Id.*

consulted a similar list of authorities to ascertain the norms of contemporary international law, as it had in the past.⁶⁴ The court relied upon various international conventions, declarations, and resolutions to determine that the acts alleged – including genocide, torture, and rape – constituted violations of generally accepted norms of international law and were, therefore, cognizable violations under the ATS.⁶⁵

Wave three did not end at the jurisdictional boundaries of the Second Circuit. Others followed. In 1996, two significant decisions expanded the geographical scope of ATS expansion. In *Abebe-Jira v. Negewo*, the U.S. Court of Appeals for the Eleventh Circuit affirmed a decision awarding compensatory and punitive damages for “torture and cruel, inhuman, and degrading treatment, pursuant to the Alien Tort Claims Act.”⁶⁶ The Eleventh Circuit determined that the ATS “establishes a federal forum where courts may fashion domestic common law remedies to give effect to violations of customary international law.”⁶⁷

The U.S. Court of Appeals for the Ninth Circuit revisited its application of the ATS⁶⁸ in 1996, with two decisions (from appeals addressing different issues) in the case of *Hilao v. Estate of Marcos*.⁶⁹ Opponents of the Marcos regime in the Philippines alleged they were victims of torture. Applying its earlier test that “[a]ctionable violations of international law [under the ATS] must be of a norm that is *specific*, universal, and obligatory,”⁷⁰ the Ninth Circuit found that the international norm against torture and arbitrary detention was sufficiently specific to be actionable under the ATS.⁷¹

The *Kadic* decision was the precipice for what I will call wave four in the ATS evolution. Throughout the 1980s and early

⁶⁴ *Id.* at 238-39.

⁶⁵ *Id.* at 241-44.

⁶⁶ 72 F.3d 844, 845 (11th Cir. 1996).

⁶⁷ *Id.* at 848.

⁶⁸ See *Trajano v. Marcos* (In re Estate of Ferdinand E. Marcos Human Rights Litigation), 978 F.2d 493, 501-03 (9th Cir. 1992) [hereinafter *Estate I*], *cert. denied*, 508 U.S. 972 (1993); *Hilao v. Marcos* (In re Estate of Ferdinand E. Marcos Human Rights Litigation), 25 F.3d 1467, 1472-74 (9th Cir. 1994) [hereinafter *Estate II*], *cert. denied*, 513 U.S. 1126 (1995). For a discussion of *Trajano v. Marcos*, see Sung Teak Kim, Note, *Adjudicating Violations of International Law: Defining the Scope of Jurisdiction Under the Alien Tort Statute*—*Trajano v. Marcos*, 27 CORNELL INT'L L.J. 387 (1994).

⁶⁹ 103 F.3d 767 (9th Cir. 1996) [hereinafter *Estate III*]; 103 F.3d 789 (9th Cir. 1996) [hereinafter *Estate IV*]. See also *Doe I v. Unocal Corp.*, 963 F. Supp. 880 (C.D. Cal. 1997) (upholding subject matter jurisdiction under ATS based on allegations that an American oil company, acting in concert with the Burmese government, committed various civil and human rights abuses).

⁷⁰ *Estate IV*, 103 F.3d at 794 (citing *Estate II*, 25 F.3d at 1475)(first alteration in original).

⁷¹ *Id.*

1990s, several suits were brought against multinational corporations for alleged violations of customary international law. These suits were largely unsuccessful, but a significant turning point occurred in 1997 when a federal district court in California issued its decision in the case of *Doe I v. Unocal Corp.*, upholding subject matter jurisdiction under the ATS based on allegations that an American oil company, acting allegedly in concert with the Myanmar/Burmese government, committed various civil and human rights abuses.⁷²

That case was then reviewed in a 2002 opinion by the U.S. Court of Appeals for the Ninth Circuit, when the circuit court reversed in part a decision by the district court to grant a motion for summary judgment in favor of Unocal.⁷³ There, the circuit court held that sufficient evidence existed to support the plaintiffs' allegations – accusing Unocal of aiding and abetting forced labor, murder, rape, and torture, committed by the Myanmar/Burmese government – to allow the case to proceed to trial.⁷⁴ The court again took a broad view of international law, citing many customary international law outputs to which the United States is not a party or for which the United States has adopted no implementing legislation. Moreover, the court saw the application of international law as superior to state, federal, or foreign law.⁷⁵ It reasoned that international law was a *preferable* law of first application:

Application of international law – rather than the law of Myanmar, California state law, or our federal common law – is also favored by a consideration of the factors listed in the Restatement (Second) of Conflict of Laws § 6 (1969). First, “the needs of the . . . international system[]” are better served by applying international rather than national law. Second, “the relevant policies of the forum” cannot be ascertained by referring—as the concurrence does—to one out-of-circuit decision which happens to favor federal common law and ignoring other decisions which have favored other law, including international law Third, regarding “the protection of justified expectations,” the “certainty, predictability and uniformity of result,” and the “ease in the determination and application of the law to be applied,” we note that the standard we adopt today from an admittedly recent case nevertheless goes back at least to the Nuremberg trials and is similar to that of the Restatement (Second) of Torts Finally, “the basic polic[y] underlying the particular field of law” is to provide tort

⁷² 963 F.Supp. 880 (C.D. Cal. 1997), *aff'd in part & rev'd in part*, 395 F.3d 932 (9th Cir. 2002).

⁷³ See *John Doe I v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002), *vacated and reh'g en banc granted*, 395 F.3d 978 (9th Cir. 2003), *district court opinion vacated* by 403 F.3d 708 (9th Cir. 2005).

⁷⁴ *Id.* at 954-55.

⁷⁵ *Id.* at 948-49.

*remedies for violations of international law. This goal is furthered by the application of international law, even when the international law in question is criminal law but is similar to domestic tort law . . .*⁷⁶

The court's holding was an endorsement of a sweeping reach for the ATS. This case has been the subject of additional appeals, decisions, and, apparently, settlement agreements. Nonetheless, the foundation of various court holdings including *Unocal* – that corporations may be liable for violations of human rights under theories of customary international law – is the critical consequence of this case and the most significant and defining moment for the fourth wave of ATS litigation.

Since the original 1997 *Unocal* decision, scores of new lawsuits against private corporations have been filed.⁷⁷ For a wide range of alleged wrongs and in a wide range of countries, cases have been brought against Abercrombie & Fitch, BHP, Chevron, Coca-Cola, Del Monte, Dole, Drummond Coal, ExxonMobil, The Gap, J.C. Penney Co., Levis Strauss, Nike, Pfizer, Rio Tinto, Shell, Siemens, Southern Peru Copper Corporation, Target, Texaco, Total, Union Carbide, Unocal – just to name a few.⁷⁸ Some of these cases involve aiding-and-abetting or vicarious liability theories; still others say that corporations should be responsible under customary international law for direct and independent corporate actions. The possibility of large judgments or substantial settlements have driven many of these litigations, and the plaintiffs' bar has latched itself on to these potential new torts and the concomitant potential for settlements or judgments. There is some evidence of an intent to dispute, but also some evidence of early "caving" into settlements due to the indeterminacy of these new theories of liability under the ATS.⁷⁹ A broad range of suits have also been filed against state actors in the past few years.⁸⁰ The assumption of utility behind ATS litigation – by plaintiffs, trial lawyers, and human rights' advocates – has been fueled by the evolution of liability acceptance that has, to date, increased the pool of potential defendants.⁸¹

⁷⁶ *Id.* at 949 (citations omitted) (footnote omitted) (emphasis added) (alterations in original).

⁷⁷ See generally, e.g., Vosper, *supra* note 22.

⁷⁸ See generally *id.*

⁷⁹ See generally *id.*

⁸⁰ See generally *id.*

⁸¹ A selection of recent opinions follows: *Rasul v. Bush*, 124 S. Ct. 2686 (2004) (holding that a district court was not barred from hearing claims based on the ATS; Justice Scalia's dissent notes that the ATS claim was not raised in the petition for certiorari); *Igartua-De La Rosa v. United States*, 386 F.3d 313, 319 n.17 (1st Cir. 2004) (mentioning ATS in a footnote regarding US courts application of the ICCPR under ATS); *Mohammad v. Bin Tarraf*, No. 02-7627, 2004 U.S. App. LEXIS 19874 (2nd Cir. 2004)

There have indeed been significant defeats in some courts in the attempt to expand the scope of supposed international “law” liability under the ATS. The question becomes whether such defeats demonstrate a restraint, or are simply a temporary setback, or speed bump, in the increased evolution of liability in the face of a continuing effort to promote private, civil enforcement of supposed international norms. Additional suits will undoubtedly be filed as a result of this fourth wave of ATS jurisprudence, and the question becomes whether further avenues for civil enforcement of international norms will follow the expansive nature of these first few waves or whether the next wave will limit civil enforcement. Much depends on how lower courts interpret the pivotal, first impression opinion by the U.S. Supreme Court on the ATS in 2004.

III. WAVE FIVE: THE U.S. SUPREME COURT FINALLY SPEAKS:
IS THE EVOLUTION OF ATS LITIGATION NOW MORE CERTAIN OR
LESS CERTAIN? DIRECTIONED OR LESS-DIRECTIONED?

For the first time in 215 years, the Supreme Court finally had something to say about the ATS in its opinions in *Rasul v. Bush*⁸² and *Sosa v. Alvarez-Machain*⁸³ – both opinions in June 2004. What it actually said, I do not confess to clearly know, and I fear lower courts will be caught in a similar state of confusion. Nonetheless, this Part will attempt to summarize the opinion and its potential implications for the future evolution of ATS

(Canadian resident brought action for tort claims under ATS); *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227 (11th Cir. 2004) (plaintiff's claim against German banks for stolen items during the Nazi era could not be sustained under ATS because plaintiff was a US citizen); *Van Tu v. Koster*, 364 F.3d 1196 (10th Cir. 2004) (Vietnamese plaintiffs' claims against US soldiers under the ATS were dismissed because of the statute of limitations); *Bano v. Union Carbide Corp.*, 361 F.3d 696 (2nd Cir. 2004) (citizens of India brought claim against US chemical plant for injuries stemming from a toxic disaster); *Adbullahi v. Pfizer, Inc.*, No. 02-9223, 2003 U.S. App. LEXIS 20704 (2nd Cir. 2003) (Nigerian plaintiffs sued Pfizer for CCPR violations under ATS and the appellate court reversed a district court dismissal for forum non conveniens); *Flores v. Southern Peru Copper Corp.*, 343 F.3d 140 (2d Cir. 2003) (Peruvian plaintiffs' claims of local, intranational environmental pollution were not actionable under the ATCA because such pollution does not violate CIL); *Aranda v. Department of Social and Health Services*, No. 03-15056, 2003 U.S. App. LEXIS 15227 (9th Cir. 2003) (dismissal of a prisoner's ATCA claim was upheld under the 10-year statute of limitations); *Hwang Geum Joo v. Japan*, 332 F.3d 679 (D.C. Cir. 2003) (female plaintiffs from Asian countries brought claim against Japan under ATCA, but court dismissed for lack of jurisdiction over a foreign sovereign); *Soudavar v. Islamic Republic of Iran*, No. 02-7129, 2003 U.S. App. LEXIS 11661 (D.C. Cir. 2003) (plaintiff's claims dismissed for lack of jurisdiction under FSIA); *United States v. Yousef*, 327 F.3d 56, 103 n.37 (2nd Cir. 2003) (ATS cited in a footnote stating that the idea that scholarly opinions do not create CIL is consistent with past interpretations of the ATS); *Deutsch v. Turner Corp.*, 317 F.3d 1005 (9th Cir. 2003) (World War II slave labor claims were barred under ten-year statute of limitations).

⁸² 124 S. Ct. 2686 (2004). For a brief summary of the decision, see David L. Sloss, *Rasul v. Bush*, 98 AM. J. INT'L L. 788 (2004).

⁸³ 124 S. Ct. 2739 (2004).

litigation.

In *Rasul v. Bush*, the U.S. Supreme Court concluded without significant commentary that the district court below had jurisdiction to hear ATS claims brought by individuals in U.S. military custody at Guantanamo Bay.⁸⁴ As Justice Scalia (joined by Chief Justice Rehnquist and Justice Thomas) pointed out in dissent, however, the ATS controversy was not even raised in the appeal for the Court's review.⁸⁵ The ruling added little to our understanding of the ATS evolution.

Far more interesting and substantive was the U.S. Supreme Court's decision in *Sosa v. Alvarez-Machain* – involving the abduction and transportation to the United States of a Mexican national, Alvarez, at the instigation of U.S. Drug Enforcement Agency ("DEA") officials.⁸⁶ Alvarez sued the United States and the abductor, Sosa, under the Federal Tort Claims Act ("FTCA") and the ATS respectively.⁸⁷ Putting aside the FTCA claims, for purposes of this Article, the most important holding was that the U.S. Supreme Court decided that Alvarez was not entitled to recover damages from Sosa under the ATS.⁸⁸ This was the first

⁸⁴ 124 S. Ct. at 2698.

⁸⁵ The ATS jurisdictional issue "is not presented to us. The ATS, while invoked below, was repudiated as a basis for jurisdiction by all petitioners, either in their petition for certiorari, in their briefing before this Court, or at oral argument. See Pet. for Cert. in No. 03-334, p. 2, n.1 ("Petitioners withdraw any reliance on the Alien Tort Claims Act."); Brief for Petitioners in No. 03-343, p. 13; Tr. of Oral Arg. 6." *Id.* at 2710 n.6 (Scalia, J. dissenting).

The lower court opinion was more interesting. In March 2003, Judge Raymond Randolph of the Court of Appeals for the D.C. Circuit wrote a concurring opinion in the lower opinion, *Al Odah v. United States*, which seriously questioned the expansive reach of recent ATS judicial recognition. 321 F.3d 1134 (D.C. Cir. 2003). *Al Odah* (on appeal to the Supreme Court, *Rasul*) involved habeas corpus petitions brought against the United States by detainees in Guantanamo Bay, Cuba, that the D.C. Circuit ultimately rejected. *Id.* The detainees premised part of their claims on the ATS and international law. The majority opinion did not address the ATS or its proper interpretation, but Judge Randolph's concurring opinion in *Al Odah* did address that issue. His opinion constitutes one of very few judicial opinions to question the legitimacy of modern ATS application, and will undoubtedly serve as motivation for more critical judicial examination of the ATS in forthcoming decisions. In *Al Odah*, Judge Randolph questioned many of the premises upon which ATS jurisprudential expansion has been based for the past twenty-three years. Randolph opined, "To have federal courts discover [customary international law] among the writings of those considered experts in international law and in treaties the Senate may or may not have ratified is anti-democratic and at odds with principles of separation of powers." *Id.* at 1148, (Randolph, J., concurring).

In a similar interesting development in *United States v. Yousef*, the Second Circuit on April 4, 2003, in a lengthy opinion, also called into question, and, some argue, took a newly restrictive view of the appropriate sources that courts may look to when attempting to define customary international law. 327 F.3d 56 (2d Cir. 2003) (holding *inter alia* that the United States could exercise extraterritorial criminal jurisdiction over defendants who were charged with attempted plane bombing in Southeast Asia).

⁸⁶ 124 S. Ct. at 2739.

⁸⁷ *Id.* at 2746-47.

⁸⁸ *Id.* at 2754-55.

time the U.S. Supreme Court had substantively decided an ATS claim.

The Supreme Court held principally that “we agree the [ATS] is in terms only jurisdictional, [but] we think that at the time of enactment the jurisdiction enabled federal courts to hear claims in a very limited category defined by the law of nations and recognized at common law.”⁸⁹ Thus, although the majority opinion recognizes that the ATS is purely jurisdictional, it acknowledges that federal courts may recognize some international norms as enforceable law in some situations – a sort of endorsement for tort actions based on a “we know it when we see it” mentality. The *Sosa* opinion is, therefore, a lesson in ambiguity and incapable of informing the next steps in the ATS evolution.

The Court endorsed a discretion-based framework that hardly provides clear guidance to lower courts addressing ATS cases and indeed may empower such courts to exercise such discretion to serve their own, personal interpretations of which international norms should or should not be recognized as “enforceable.” This is especially true because, although the Supreme Court demanded “caution,” it nonetheless accepted the ideas adopted in earlier wave cases that international law is part of “Our law,” that international law evolves, and that there are a number of sources that courts should reference to identify customary international law including the works of jurists and scholars in the field (persons often biased by the self-perpetuation of their field). The majority in *Sosa* simply says “don’t go too far,” but the door is still ajar and you can go somewhere. No academic predictions can possibly have currency with such marsh-like judicial guidance.

The Supreme Court held that the ATS is jurisdictional in nature but that the federal courts could then recognize causes of action in common law similar in character to, but not limited to, the international “wrongs” understood in 1789.⁹⁰ Given its significance and groundbreaking consideration after 215 years, this author will quote from the U.S. Supreme Court’s opinion at length.

The primary holding of the Supreme Court in *Sosa* was that the ATS is a jurisdictional statute but causes of action for

⁸⁹ *Id.* at 2754.

⁹⁰ “Whatever the ultimate criteria for accepting a cause of action subject to jurisdiction under §1350, we are persuaded that federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when §1350 was enacted.” *Id.* at 2765.

violations of “international law” may still be considered:

In sum, although the ATS is a jurisdictional statute creating no new causes of action, the reasonable inference from the historical materials is that the statute was intended to have practical effect the moment it became law. 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.

We think it is correct, then, to assume that the First Congress understood that the district courts would recognize private causes of action for certain torts in violation of the law of nations, though we have found no basis to suspect Congress had any examples in mind beyond those torts corresponding to Blackstone’s three primary offenses: violation of safe conducts, infringement of the rights of ambassadors, and piracy. We assume, too, that no development in the two centuries from the enactment of §1350 to the birth of the modern line of cases beginning with *Filartiga v. Pena-Irala*, 630 F.2d 876 (C.A.2 1980), has categorically precluded federal courts from recognizing a claim under the law of nations as an element of common law; Congress has not in any relevant way amended §1350 or limited civil common law power by another statute. Still, there are good reasons for a restrained conception of the discretion a federal court should exercise in considering a new cause of action of this kind. Accordingly, we think courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized.⁹¹

Thus, the Supreme Court set certain standards but did not close the door to modern ATS litigation as it has evolved in the first four waves.

The Supreme Court nonetheless called for great caution in light of the potential for international law jurisprudence to interfere with foreign affairs’ responsibilities of the elected branches. It called for:

a high bar to new private causes of action for violating international law, for the potential implications for the foreign relations of the United States of recognizing such causes should make courts particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs Since many attempts by federal courts to craft remedies for the violation of new norms of international law would raise risks of adverse foreign policy consequences, they should be undertaken, if at all, with great caution.⁹²

⁹¹ *Id.* at 2761-62.

⁹² *Id.* at 2763. “[J]urisdiction was originally understood to be available to enforce a small number of international norms that a federal court could properly recognize as

At best, the Supreme Court's *Sosa* opinion created a rule of "great caution in adapting the law of nations to private rights,"⁹³ but "[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."⁹⁴

The true ambiguity in guidance is underscored by the majority proceeding to state that, when confronted with ATS claims, "the 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."⁹⁵ "Good fences make good neighbors."⁹⁶ Good doors make good barriers against intrusions. But, the *Sosa* opinion does not much advise the nature of the locks necessary or advisable to control inappropriate invasions of supposed international law into U.S. courts. It does little to define this "narrow class" and who and what claims can have a key and get through that door.⁹⁷

Despite "caution," some words of the *Sosa* majority seemed

within the common law enforceable without further statutory authority." *Id.* at 2764.

⁹³ *Id.* at 2764.

⁹⁴ *Id.* at 2764-65.

⁹⁵ *Id.* at 2764.

⁹⁶ Robert Frost, *Mending Wall*, in COLLECTED POEMS, PROSE, & PLAYS 39, 39-40 (Literary Classics of the U.S. 1995) (1914).

⁹⁷ For a sampling of some recent decisions applying, interpreting, and sometimes struggling with the *Sosa* decision's ATS approach, see *Alperin v. Vatican Bank*, 2005 WL 878603 (9th Cir. Apr. 18, 2005) (Nos. 03-15208, 03-16166) (extensive discussion of *Sosa* and refusing to dismiss WWII claims because they, allegedly, could interfere with the powers and deference of the political branches); *In re Agent Orange Product Liability Litigation*, 2005 WL 729177, 2 (E.D.N.Y. Mar. 28, 2005) (No. MDL 381, 04-CV-400) (extensive discussion of *Sosa*, ultimately holding that herbicide manufacturers were not entitled to government contractor defense in claims that use of the herbicide violated international law and constituted a war crime, but the allegations were insufficient to state claims for violations of international law and war crimes); *In re South African Apartheid Litigation*, 346 F. Supp. 2d 538, 546 (S.D.N.Y. 2004) (suit against corporations for actions in South Africa dismissed because corporations were not state actors and did not violate the law of nations); *Doe v. Rafael Saravia*, 348 F. Supp. 2d 1112 (E.D. Cal. 2004) (interpreting ATS and *Sosa* to hold for plaintiffs against El Salvadoran paramilitary troops); *Jama v. INS*, 343 F. Supp. 2d 348 (D.N.J. 2004) (holding that contract guards used by INS were not entitled to summary judgment on ATS claims for alleged mistreatment of asylum seekers under their care); *Arndt v. UBS AG*, 342 F. Supp. 2d 132, 138 (E.D.N.Y. 2004) (recognizing *Sosa* established a high standard, determining that plaintiffs did not make out a claim against German companies regarding holocaust claims); *Weiss v. American Jewish Committee*, 335 F. Supp. 2d 469, 475 (S.D.N.Y. 2004) (recognizing an "opening" from *Sosa* to find common law international law claims, using *Sosa*'s "caution" to find against Holocaust descendants seeking preliminary injunction against actions near death camp); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 226 F.R.D. 456, 469 (S.D.N.Y. 2005) (after extensive discussion of ATS history denying class certification in case regarding Sudanese plaintiffs and a Canadian defendant); *Mohammad v. Bin Tarraf*, 114 Fed. Appx. 417, 419 (2d Cir. 2004) (because the ATS allows suits "regardless of the existence of a close United States connection," court granted pro se plaintiff an opportunity to amend his complaint to include an ATS claim).

to have no problem with, and in fact endorsed, the expansionist evolution of ATS jurisprudence described in the first four waves:

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. Later Congresses seem to have shared our view. The position we take today has been assumed by some federal courts for 24 years, ever since the Second Circuit decided *Filartiga v. Pena-Irala*, 630 F.2d 876 (C.A.2 1980), and for practical purposes the point of today's disagreement has been focused since the exchange between Judge Edwards and Judge Bork in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (C.A.D.C.1984). Congress, however, has not only expressed no disagreement with our view of the proper exercise of the judicial power, but has responded to its most notable instance by enacting legislation supplementing the judicial determination in some detail.⁹⁸

Notwithstanding these pronouncements, the *Sosa* Court found Alvarez's claim for unlawful abduction in violation of international law unconvincing.⁹⁹

In *Sosa*, Justice Scalia concurred in part and concurred in the *Sosa* judgment but opined separately (joined by Chief Justice Rehnquist and Justice Thomas). Some of his most poignant pronouncements challenging the majority are presented below.

First, Justice Scalia questioned the idea of federal common law based on international law as it has burgeoned in the past 25 years:

In modern international human rights litigation of the sort that has proliferated since *Filartiga v. Pena-Irala*, 630 F.2d 876 (C.A.2 1980), a federal court must first *create* the underlying federal command. But "the fact that a rule has been recognized as [customary international law], by itself, is not an adequate basis for viewing that rule as part of federal common law." . . . In Benthamite terms, creating a federal

⁹⁸ 124 S. Ct. at 2765.

While we agree with Justice SCALIA to the point that we would welcome any congressional guidance in exercising jurisdiction with such obvious potential to affect foreign relations, nothing Congress has done is a reason for us to shut the door to the law of nations entirely. It is enough to say that Congress may do that at any time (explicitly, or implicitly by treaties or statutes that occupy the field) just as it may modify or cancel any judicial decision so far as it rests on recognizing an international norm as such.

Id.

⁹⁹ *Id.* at 2769.

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

Id. (footnotes omitted).

command (federal common law) out of “international norms,” and then constructing a cause of action to enforce that command through the purely jurisdictional grant of the ATS, is nonsense upon stilts.¹⁰⁰

Justice Scalia emphasized the general rejection of federal “common law” since *Erie R. Co v. Tompkins* and so questioned a general acceptance of federal recognition of common international law.¹⁰¹

Justice Scalia also questioned the interference with Congress and foreign relations associated with judicial recognition of customary international law claims.¹⁰² He opined that asking judges to define international laws applicable in United States courts threatens democratic principles:

To be sure, today’s opinion does not itself precipitate a direct confrontation with Congress by creating a cause of action that Congress has not. But it invites precisely that action by the lower courts, even while recognizing (1) that Congress understood the difference between granting jurisdiction and creating a federal cause of action in 1789, . . . (2) that Congress understands that difference today, . . . and (3) that the ATS itself supplies only jurisdiction, In holding open the possibility that judges may create rights where Congress has not authorized them to do so, the Court countenances judicial occupation of a domain that belongs to the people’s representatives. One does not need a crystal ball to predict that this occupation will not be long in coming, since the Court endorses the

¹⁰⁰ *Id.* at 2772 (Scalia, J., concurring) (citations omitted) (alterations in original).

¹⁰¹ *Id.* at 2772-73 (citing *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938)). Scalia explained:

The Court masks the novelty of its approach when it suggests that the difference between us is that we would “close the door to further independent judicial recognition of actionable international norms,” whereas the Court would permit the exercise of judicial power “on the understanding that the door is still ajar subject to vigilant doorkeeping.” . . . The general common law was the old door. We do not close that door today, for the deed was done in *Erie*. . . . Federal common law is a *new* door. The question is not whether that door will be left ajar, but whether this Court will open it.

Id. at 2773-74 (Scalia, J., concurring) (citations omitted).

¹⁰² *Id.* at 2774 (Scalia, J., concurring). Justice Scalia stated the following:

[M]any attempts by federal courts to craft remedies for the violation of new norms of international law would raise risks of adverse foreign policy consequences.” . . . “Several times, indeed, the Senate has expressly declined to give the federal courts the task of interpreting and applying international human rights law.” . . . These considerations are not, as the Court thinks them, reasons why courts must be circumspect in use of their extant general-common-law-making powers. They are reasons why courts cannot possibly be thought to have been given, and should not be thought to possess, federal-common-law-making powers with regard to the creation of private federal causes of action for violations of customary international law.

Id. (alterations in original) “The Second Circuit, which started the Judiciary down the path the Court today tries to hedge in, is a good indicator of where that path leads us: directly into confrontation with the political branches.” *Id.* at 2775 (Scalia, J., concurring).

reasoning of “many of the courts and judges who faced the issue before it reached this Court,” including the Second and Ninth Circuits.¹⁰³

Justice Scalia thus concurred in the result but not the reasoning of the *Sosa* majority which he felt left open too much discretion to federal courts and too much potential interference with the prerogatives of the political branches.

The idea that a potential endorsement of the expansionist evolution of ATS litigation was endorsed or enabled by the *Sosa* majority concerned Justice Scalia:

The notion that a law of nations, redefined to mean the consensus of states on *any* subject, can be used by a private citizen to control a sovereign’s treatment of *its own citizens* within *its own territory* is a 20th-century invention of internationalist law professors and human-rights advocates.¹⁰⁴

Justice Scalia expanded his analysis by concluding that the *Sosa* majority had left the expansionist agenda open for further endeavors in international tort liability:

We Americans have a method for making the laws that are over us For over two decades now, unelected federal judges have been usurping this lawmaking power by converting what they regard as norms of international law into American law. Today’s opinion approves that process in principle, though urging the lower courts to be more restrained. This Court seems incapable of admitting that some matters—*any* matters—are none of its business 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.¹⁰⁵

So, Justice Scalia reached the same conclusion as this author – *Sosa* emphasizes “caution” but offers little else to know where courts can or should go in this fifth wave of ATS litigation.¹⁰⁶ All we really can discern from *Sosa* is that courts must be cautious

¹⁰³ *Id.* at 2774 (Scalia, J., concurring) (citations omitted). Scalia questioned:

Does this Court truly wish to encourage the use of a jurisdiction-granting statute with respect to which there is “no record of congressional discussion about private actions that might be subject to the jurisdictional provision, or about any need for further legislation to create private remedies; [and] no record even of debate on the section,” . . . to override a clear indication from the political branches that a “specific, universal, and obligatory” norm against genocide is *not* to be enforced through a private damages action? Today’s opinion leads the lower courts right down that perilous path.

Id. at 2775 (Scalia, J., concurring) (citations omitted) (alteration in original).

¹⁰⁴ *Id.* at 2776 (Scalia, J., concurring).

¹⁰⁵ *Id.* (Scalia, J., concurring).

¹⁰⁶ Justices Ginsburg and Breyer also filed concurrences in *Sosa*, but focused on the FTCA claims rather than substantively disputing the majority’s ATS discussion.

in invoking international liability under the ATS, but courts can entertain ATS lawsuits and indeed decide whether there is a cause of action recognizable in any particular case.

IV. BEYOND THE ATS: THE INCREASING INFUSION OF INTERNATIONAL OR FOREIGN LAW IN DOMESTIC JUDGMENTS

Aside from ATS litigation, there is a growing debate about the invocation and citation of international “law” or foreign law to inform the domestic decisions on United States law. This raises many of the same concerns related to acceptance, invocation or recognition of some superceding foreign authority involved in ATS litigation.

Three recent Supreme Court cases have been the primary focus of this debate – *Atkins v. Virginia*,¹⁰⁷ *Lawrence v. Texas*,¹⁰⁸ and *Roper v. Simmons*.¹⁰⁹ Each involved decisions of U.S. domestic law, but the decisions were infused by foreign and international law by at least a few justices.

In *Atkins v. Virginia*,¹¹⁰ the Court invalidated laws providing that the mentally retarded could be sentenced to death, using in part foreign authorities. In footnotes, the majority cited the opinion of the “world community” to support its conclusion.¹¹¹ The Court relied, in part, on an amicus brief filed by the European Union, concluding that “within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved.”¹¹² Unsurprisingly, Justice Scalia (joined by Chief Justice Rehnquist and Justice Thomas) dissented and disagreed with the Court’s invocation of extraterritorial authority. Scalia stated in dissent:

[T]he Prize for the Court’s Most Feeble Effort to fabricate “national consensus” must go to its appeal (deservedly relegated to a footnote) to the views of assorted professional and religious organizations, members of the so-called “world community,” and respondents to opinion polls [I]rrelevant are the practices of the “world community,” whose notions of justice are (thankfully) not always those of our people. “We must never forget that it is a Constitution for the United States of America that we are expounding. . . . [W]here there is not first a settled consensus among our own people, the views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the

¹⁰⁷ 536 U.S. at 304.

¹⁰⁸ 539 U.S. at 558.

¹⁰⁹ 125 S. Ct. at 1183.

¹¹⁰ *Atkins*, 536 U.S. at 316.

¹¹¹ *Id.* at 316 n.21.

¹¹² *Id.*

Constitution.”¹¹³

Justice Scalia’s dissent contributed to a growing debate as to the appropriateness of world views to influence domestic law.

Lawrence v. Texas involved overturning a Texas statute barring same-sex sodomy. Writing for the majority, Justice Kennedy, cited as authority a decision by the European Court of Human Rights permitting homosexual conduct as evidence of a lack of consensus on such conduct’s illegality.¹¹⁴ Again, Justice Scalia (joined by Chief Justice Rehnquist and Justice Thomas) dissented, in part related on the Court’s reference to foreign authorities. Here, Justice Scalia stated in dissent:

In any event, an “emerging awareness” is by definition not “deeply rooted in this Nation’s history and tradition[s],” as we have said “fundamental right” status requires. Constitutional entitlements do not spring into existence . . . because *foreign nations* decriminalize conduct. The *Bowers* majority opinion *never* relied on “values we share with a wider civilization,” . . . but rather rejected the claimed right to sodomy on the ground that such a right was not “deeply rooted in *this Nation’s* history and tradition,” “. . . *Bowers’* rational-basis holding is likewise devoid of any reliance on the views of a “wider civilization,” . . . The Court’s discussion of these foreign views . . . is therefore meaningless dicta. Dangerous dicta, however, since “this Court . . . should not impose foreign moods, fads, or fashions on Americans.”¹¹⁵

According to Justice Scalia, national law should not be dependent on international or foreign views.

The most recent Supreme Court debate over the invocation of international or foreign law came in the March 2005 decision in *Roper v. Simmons*.¹¹⁶ *Roper* held that the Constitution forbids the imposition of the death penalty on juvenile offenders – those under age 18 when their crimes were committed.¹¹⁷ The Court relied substantially on the supposed views of the “international community” on the matter.¹¹⁸

Dissenting in *Roper*, Justice Scalia (in an opinion joined by Chief Justice Rehnquist and Justice Thomas) was scolding in his disagreement with the Court’s reliance on foreign sources to reach their conclusion.¹¹⁹ For example, Justice Scalia found

¹¹³ *Id.* at 347-48 (Scalia, J., dissenting) (quoting *Thompson*, 487 U.S., at 868-869, n.4 (Scalia, J., dissenting)) (citations omitted) (alteration in original).

¹¹⁴ 539 U.S. at 573.

¹¹⁵ *Id.* at 598 (Scalia, J., dissenting) (quoting *Foster v. Florida*, 537 U.S. 990 (2002) (Thomas, J., concurring in denial of certiorari)) (alterations in original).

¹¹⁶ 125 S. Ct. at 1183.

¹¹⁷ *Id.* at 1200.

¹¹⁸ *Id.* at 1198-1200.

¹¹⁹ *See id.* at 1217-30 (Scalia, J., dissenting).

reliance on some international consensus entirely inappropriate in setting domestic constitutional standards:

More fundamentally, however, the basic premise of the Court's argument—that American law should conform to the laws of the rest of the world—ought to be rejected out of hand. In fact the Court itself does not believe it. In many significant respects the laws of most other countries differ from our law—including not only such explicit provisions of our Constitution as the right to jury trial and grand jury indictment, but even many interpretations of the Constitution prescribed by this Court itself.¹²⁰

After describing multiple court rulings that would need to be overturned if the Court were to consistently rely on foreign sources of authority, Justice Scalia continued:

The Court should either profess its willingness to reconsider all these matters in light of the views of foreigners, or else it should cease putting forth foreigners' views as part of the *reasoned basis* of its decisions. To invoke alien law when it agrees with one's own thinking, and ignore it otherwise, is not reasoned decisionmaking, but sophistry.¹²¹

In essence, Justice Scalia argued that the Court's invocation of international and foreign authorities is selective and inappropriate.

Also dissenting in *Roper*, Justice O'Connor nonetheless rejected Justice Scalia's rebuke regarding reference to international or foreign law. Justice O'Connor explained that international and foreign law has a role in U.S. jurisprudence:

I disagree . . . that foreign and international law have no place in our Eighth Amendment jurisprudence. Over the course of nearly half a century, the Court has consistently referred to foreign and international law as relevant to its assessment of evolving standards of decency Obviously, American law is distinctive in many respects But this Nation's evolving understanding of human dignity certainly is neither wholly isolated from, nor inherently at odds with, the values prevailing in other countries. On the contrary, we should not be surprised to find congruence between domestic and international values, especially where the international community has reached clear agreement—expressed in international law or in the domestic laws of individual countries—that a particular form of punishment is inconsistent with fundamental human rights.¹²²

Thus, although Justice O'Connor disagreed with the majority, she failed to reject its reliance on international and foreign laws as authority to inform constitutional interpretation.

¹²⁰ *Id.* at 1226 (Scalia, J., dissenting).

¹²¹ *Id.* at 1228 (Scalia, J., dissenting) (footnote omitted).

¹²² *Id.* at 1215-16 (O'Connor, J., dissenting) (emphasis omitted) (citations omitted).

Beyond the docket, this debate has also reached the podium where several Supreme Court Justices have recently expressed their views on the use of international law in interpretation and decisions of U.S. law. For example, several U.S. Supreme Court Justices have delivered presentations on the topic.¹²³ Justices Scalia and Breyer even engaged in an unprecedented debate on the use of international law in U.S. jurisprudence, which was broadcasted on C-SPAN.¹²⁴ There is no doubt that the role of international law in domestic jurisprudence is increasing in its application and its controversy.

V. THE DANGERS OF INVOKING INTERNATIONAL LAW IN DOMESTIC JURISPRUDENCE

Although sympathies run high in many allegations of human rights abuses, there are several dangers in allowing these disputes and allegations to be decided in U.S. courts. Limitations beyond mere "caution" should be directed toward the federal courts. This Part briefly summarizes the principal dangers raised by involving U.S. courts in issues of international "law".

The first and most fundamental objection to an expansionist view of international law in U.S. jurisprudence is a constitutional one. Article III of the United States Constitution does not give federal judges unlimited authority to fashion a federal common law based on international norms.¹²⁵ Moreover, attempts by Article III courts to do so necessarily interfere with the constitutional prerogatives of the elected branches (the Executive

¹²³ See, e.g., Ruth Bader Ginsburg, Address to the American Constitution Society, *Looking Beyond Our Borders: The Value of a Comparative Perspective in Constitutional Adjudication*, (Aug. 2, 2003) (transcript available at http://www.humanrightsfirst.org/us_law/inthecourts/Ginsburg_transcript_080203.pdf); Ruth Bader Ginsburg, *Looking Beyond Our Borders: The Value of a Comparative Perspective in Constitutional Adjudication*, 40 IDAHO L. REV. 1 (2003); Stephen Breyer, Address at the American Society of International Law, *The Supreme Court and the New International Law* (Apr. 4, 2003) (transcript available at http://www.humanrightsfirst.org/us_law/inthecourts/Supreme_Court_New_Interl_Law_Just_Breyer%20.pdf); Sandra Day O'Connor, Remarks to the Southern Center for International Studies, (Oct. 28, 2003) (transcript available at http://www.humanrightsfirst.org/us_law/inthecourts/SOUTHERN_CENTER_INTERNATIONAL_STUDIES_Justice_O%27Connor.pdf); Sandra Day O'Connor, Keynote Address, Proceedings of the Ninety-Sixth Annual Meeting of the American Society of International Law (Mar. 16, 2002) (transcript available at http://www.humanrightsfirst.org/us_law/inthecourts/ASIL_Keynote_Add_2002_Just_O%27Connor.pdf)

¹²⁴ *Justices Debate International Law on TV*, WASH. POST, Jan. 13, 2005, (transcript available at <http://domino.american.edu/AU/media/mediarel.nsf/1D265343BDC2189785256B810071F238/1F2F7DC4757FD01E85256F890068E6E0?OpenDocument>); Antonin Scalia, Keynote Address: Foreign Legal Authority in the Federal Courts, (2004), in 98 ASIL PROC. 305.

¹²⁵ See generally, e.g., Donald J. Kochan, Note, *Constitutional Structure as a Limitation on the Scope of the "Law of Nations" in the Alien Tort Claims Act*, 31 CORNELL INT'L L.J. 153 (1998); Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT'L L. 587 (2002).

and Congress) and thereby raise serious separation of powers issues.

The second problematic issue involves foreign policy and control over national security.¹²⁶ To the extent private plaintiffs are allowed to sue nation-states or corporations acting in concert with such states for alleged human rights' abuses, judicial decisions necessarily make pronouncements regarding the appropriate behavior of foreign countries. This could embroil the United States elected branches in unwanted controversy and remove their negotiating options and discretion on the world stage.

The next principal objection to expansive ATS litigation is based on rule of law concerns. Courts are too often relying on customary international law outputs that lack the formal elements or intentions as enforceable law. Often, customary international law outputs are intended only as aspirational or symbolic rather than drafted as enforceable legal obligations or with the intent of creating liability.¹²⁷ Once these CILOs are used as evidence of enforceable customary international law obligations and liabilities, courts under the ATS mutate the purpose, intention, and effect of such international outputs. Furthermore, reliance on extraterritorial "law" is a run around Congress's ability, prerogative, and responsibility to define U.S. law. Indeed, some cases have relied on certain CILOs despite direct evidence of Congress's intent that such documents *not* create legal obligations or liabilities.

When courts have discretion to look beyond the U.S. Code to fashion international law actions, there is a serious danger to the rule of law and the sanctity of the concept that the law is known and ascertainable by persons subject to it. Congress has failed to ratify the vast majority of human rights treaties sponsored by the United Nations.¹²⁸ This record indicates a general

¹²⁶ See generally, e.g., Donald J. Kochan, *After Burma*, LEGAL TIMES, Aug. 21, 2000, at 54.; Donald J. Kochan, *Foreign Policy, Freelanced*, THE RECORDER (San Francisco), Aug. 23, 2000, at 5.; Donald J. Kochan, *Rein in Alien Tort Claims Act: Reconstituted Law of Nations Standard Needs Defining by Congress*, FULTON COUNTY DAILY REPORT, Aug. 24, 2000.

¹²⁷ See Kochan, *supra* note 125, at 182-87. For example, "The simple fact is that this [Universal] Declaration [of Human Rights] was not drafted or proclaimed to serve as law." Dean Rusk, *A Comment on Filartiga v. Pena-Irala*, 11 GA. J. INT'L & COMP. L. 311, 313 (1981) Rusk also quoted Eleanor Roosevelt, Chairman of the Commission on Human Rights, who stated when presenting the Declaration to the U.N. General Assembly, stating that "[i]t is not and does not purport to be a statement of law or of legal obligation. It is . . . a common standard of achievement . . ." *Id.* at 313 & n.7 (quoting XIX Bulletin, Dep't St. Bull., Dec. 19, 1948, No. 494, at 751). Despite this, courts in cases like *Filartiga* and *Kadic* relied on the UDHR and other CILOs crafted under similar means and intentions.

¹²⁸ See Mark P. Jacobsen, Comment, *28 U.S.C. 1350: A Legal Remedy for Torture in*

unwillingness on the part of the United States to recognize broad principles of human rights as controlling legal authority.¹²⁹ For the courts to ignore this reality and insist that these documents form a foundation for ascertaining the “law of nations” component of the ATCA is to harm Congress in two ways. First, it ignores Congress’s power to refrain from codifying certain principles or norms into U.S. law. Second, it restricts congressional power to legislate in a manner contrary to these principles or norms. By proclaiming that this principle or norm is universal and binding upon all states (or all states and some private individuals), the court is stating that an obligation Congress has been specifically unwilling to accept will now bind the United States and its Congress.

The final principal objection involves the concept of economic development and its concomitant contribution to the advancement of human rights and democracy.¹³⁰ If corporate investment is chilled because of potential international “law” liability, one of the major contributions to economic development, democracy, and the enhancement of human rights is chilled as well. As private companies increasingly become subject to ATS suits, such suits threaten to discourage the very overseas investment and development that helps expand individual liberty, human rights, and democracy abroad. Discouraging foreign investment by advancing new liabilities may actually hinder the advancement of human rights in developing countries.

Paraguay?, 69 GEO. L.J. 833, 834, 847-48 (1981) (describing the “amorphous law of nations” and arguing that the application of the ATCA is “restricted . . . by difficulty in defining when an act is governed by the law of nations”; and “[T]he Senate has been unwilling to extend international law to encompass the protection of human rights”). See also Donald Johnson, Jr., *Filartiga v. Pena-Irala: A Contribution to the Development of Customary International Law by a Domestic Court*, 11 GA. J. INT’L & COMP. L. 335, 336-37 (1981) (arguing “[t]he difficulty of the task [of defining international law] is made more obvious by the wide variance among academic specialists in the field in approaching the sources of international law,” and describing the “often nebulous law represented by the usage and practice of nations”).

¹²⁹ See Jacobsen, *supra* note 128, at 849. Jacobsen states:

The Senate has refrained thus far from ratifying . . . numerous . . . human rights treaties, thereby expressing an unwillingness to create any internationally recognized legal protections for human rights. The Senate’s primary concern has been that the treaty provisions might intrude upon the sovereignty of nations and of the United States in particular.

Id. See also Bradley & Goldsmith, *supra* note 29, at 869 (stating that, “[f]ar from authorizing the application of the new CIL [customary international law] as domestic federal law, the political branches have made clear that they do not want the new CIL to have domestic law status”).

¹³⁰ See, e.g., Marc A. Miles *et al.*, INDEX OF ECONOMIC FREEDOM (2005) (arguing and documenting that market-based investment is directly correlated with the advancement of economic freedom and other human rights).

VI. CONCLUSION

The ATS and the use of international law in litigation has been in a rapid state of evolution for the past twenty-five years. This Article has attempted to provide a brief overview of the ATS evolution and the issues involved in the infusion of international law into domestic jurisprudence, with additional clarity and debate provided by other authors and presenters involved.

Only recently have scholars and other commentators taken serious notice of the ATS revolution. Some hoped that the Supreme Court would add clarity to the evolution in *Sosa*, but instead it has simply left the door ajar cautioning good doorkeeping.¹³¹ The ATS is no longer little known, but its future is unknown. Only Congress or more concrete guidance from the U.S. Supreme Court can truly define the ATS's future. Where the ATS door will swing in the future remains uncertain.

¹³¹ As one District Court echoed when struggling to interpret *Sosa*:

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

In re South African Apartheid Litigation, 346 F. Supp. 2d 538, 547 (S.D.N.Y. 2004).