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# SPINNING SOSA: FEDERAL COMMON LAW, THE ALIEN TORT STATUTE, AND JUDICIAL RESTRAINT

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## I. INTRODUCTION

Debate has raged in recent years concerning the relationship of federal common law to customary international law.<sup>1</sup> That debate has focused on the role of federal common law generally after the Supreme Court’s 1938

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<sup>1</sup> 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) [hereinafter *Customary International Law as Federal Common Law*]; Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824, 1826 (1998); Gerald L. Neuman, *Sense and Nonsense About Customary International Law: A Response to Professors Bradley & Goldsmith*, 66 FORDHAM L. REV. 371 (1997); Jordan J. Paust, *Customary International Law and Human Rights Treaties are the Law of the United States*, 20 MICH. J. INT’L L. 301-02, 306 (1999); Beth Stephens, *The Law of the Land: Customary International Law as Federal Law After Erie*, 66 FORDHAM L. REV. 393 (1997).

decision in *Erie R.R. v. Tompkins*<sup>2</sup> and how, in particular, the role of customary international law in federal decision making may have changed following that decision. Attacking what they refer to as the “modern position,” Professors Curtis Bradley and Jack Goldsmith are largely responsible for setting off the current disagreement. The “modern position” is defined by them as the “proposition that customary international law (CIL) is part of this country’s post-*Erie* federal common law.”<sup>3</sup> They argue that “[i]f CIL has the status of federal common law, it presumably preempts inconsistent state law pursuant to the Supremacy Clause and provides a basis for Article III ‘arising under’ jurisdiction. It may also bind the President under Article II’s Take Care Clause.”<sup>4</sup> Apparently regarding these as undesirable consequences, Bradley and Goldsmith reject the “modern position” as “founded on a variety of questionable assumptions” and as “in tension with fundamental constitutional principles.”<sup>5</sup> They conclude that “CIL should not have the status of federal common law.”<sup>6</sup>

Much of the controversy surrounding the role of customary international law has played out in the context of cases brought under the Alien Tort Statute (“ATS”).<sup>7</sup> Since the Second Circuit’s decision in *Filartiga v. Pena-Irala* in 1980,<sup>8</sup> the federal courts generally have allowed claims asserting ATS liability based upon violations of customary international law.<sup>9</sup> As discussed later in this article, the revisionists had made the ille-

<sup>2</sup> *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).

<sup>3</sup> Bradley & Goldsmith, *Customary International Law as Federal Common Law*, *supra* note 1 at 816.

<sup>4</sup> *Id.* at 817.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* Note that the Bradley/Goldsmith critique regarding customary international law as federal common law is part of a much broader revisionist view of international law, which views that law as removing power from “the hands of those [they] think should have it (the political branches and state governments, chief among them) and gives it to those who should not (international institutions and unelected federal judges). . . .” Oona A. Hathaway & Ariel N. Lavinbuk, *Rationalism and Revisionism in International Law*, 119 HARV. L. REV. 1404, 1406 (2006), reviewing JACK L. GOLDSMITH AND ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (Oxford University Press, 2005); *see also* Curtis A. Bradley, *A New American Foreign Affairs Law?*, 70 U. COLO. L. REV. 1089 (1999).

<sup>7</sup> 28 U.S.C. § 1350 (2000). Note that cases and commentators have over the years used different titles for this statutory provision, so that one might see it variously referred to as the Alien Tort Claims Act (ATCA), the Alien Tort Act (ATA), as well as the Alien Tort Statute (ATS). The Supreme Court seems to have settled on the last term, as does this article.

<sup>8</sup> *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

<sup>9</sup> *See infra* notes 18-32 and accompanying text.

gitimacy of this use of the ATS pivotal to their critique.<sup>10</sup> One of these cases finally made its way to the United States Supreme Court recently<sup>11</sup> and the Court was faced with determining the core issue of whether the ATS was merely a jurisdictional grant or if it also provided a substantive private right of action based upon a violation of customary international law.<sup>12</sup> In resolving this issue, the Court in essence rejected the entire Bradley/Goldsmith critique.<sup>13</sup>

This article will focus upon the aftermath of *Sosa* – the reaction of both courts and commentators. In particular, it will review the response of some of the Bradley/Goldsmith revisionists to the Supreme Court’s decision and the fate of their core argument. This review will inform the analysis of the Court’s view of federal common law in this area and the rhetoric of judicial restraint it employed in its decision. This article concludes that while the Court employs language of judicial restraint in the *Sosa* decision, its actual holding and the test it adopted foretell a less restrained use of customary international law and federal common law in the federal courts.

## II. THE ALIEN TORT STATUTE IN FEDERAL COURTS

The Alien Tort Statute was included in the First Judiciary Act but was utilized only twice in its first 200 years of existence to establish federal subject matter jurisdiction.<sup>14</sup> Modern use of the statute and its association with human rights claims dates from 1980 and *Filartiga v. Pena-Irala*.<sup>15</sup> In that landmark decision, the court allowed two Paraguayan plaintiffs to bring an action against a Paraguayan defendant for the torture death of a relative.<sup>16</sup> The Second Circuit relied upon the Alien Tort Statute, which 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

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<sup>10</sup> See, e.g., Bradley & Goldsmith, *The Current Illegitimacy of International Human Rights Litigation*, 66 *FORDHAM L. REV.* 319 (1997) (hereinafter *The Current Illegitimacy*).

<sup>11</sup> *Sosa v. Alvarez-Machain*, 542 U.S. 692, 712 (2004).

<sup>12</sup> *Id.*

<sup>13</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.” Ralph G. Steinhardt, *Laying One Bankrupt Critique to Rest: Sosa v. Alvarez-Machain and the Future of International Human Rights Litigation in U.S. Courts*, 57 *VAND. L. REV.* 2241, 2254 (2004).

<sup>14</sup> See *Adra v. Clift*, 195 F. Supp. 857 (D. Md. 1961) (a child custody dispute between two aliens); *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).

<sup>15</sup> *Filartiga v. Pena-Irala*, 630 F.2d 876, 876 (2d Cir. 1980).

<sup>16</sup> *Id.* at 878.

nations or a treaty of the United States.”<sup>17</sup> The district court had dismissed the action for lack of subject matter jurisdiction, relying on dicta in two prior Second Circuit cases which seemed to exclude a nation’s treatment of its own citizens from the definition of “law of nations.”<sup>18</sup>

The court of appeals reversed and held: “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. Thus, whenever an alleged torturer is found and served with process by an alien within our borders, § 1350 provides federal jurisdiction.”<sup>19</sup> In reaching its decision, the court focused on whether the alleged conduct violated the law of nations, which the court equated with customary international law. The court cited the Supreme Court’s decision in *The Paquete Habana*<sup>20</sup> and concluded:

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 they treat.<sup>21</sup>

The Court examined evidence of the international norm prohibiting the use of official torture, including The United Nations Charter,<sup>22</sup> The Universal Declaration of Human Rights,<sup>23</sup> a subsequent General Assembly Resolution declaring that “the Charter principles of which are embodied in this Universal Declaration constitute basic principles of international law,”<sup>24</sup> The Declaration on the Protection of All Persons from being subject to Torture,<sup>25</sup> The American Convention on Human Rights, Art. 5,<sup>26</sup> The International Covenant on Civil and Political Rights,<sup>27</sup> and The European Convention for the Protection of Human Rights and Fundamental Freedoms.<sup>28</sup> The Court concluded that “[a]lthough torture was once a routine concomitant of criminal interrogations in many nations, during the modern and hopefully more enlightened era it has been universally renounced. . . . There now exists an international consensus that

<sup>17</sup> 28 U.S.C. § 1350.

<sup>18</sup> *Filartiga*, 630 F.2d at 880.

<sup>19</sup> *Id.* at 878.

<sup>20</sup> *Id.* at 880-81; *The Paquete Habana*, 175 U.S. 677, 700 (1900).

<sup>21</sup> *Filartiga*, 630 F.2d at 880-81.

<sup>22</sup> June 26, 1945, 59 Stat. 1031.

<sup>23</sup> G.A. Res. (217A) (III) (Dec. 10, 1948).

<sup>24</sup> G.A. Res. 2625 (XXV) (Oct. 24, 1970).

<sup>25</sup> G.A. Res. 3452, 30 UN GAOR Supp. (No. 34) 91, U.N. Doc. A/1034 (1975).

<sup>26</sup> American Convention on Human Rights, 1144 U.N.T.S. 143.

<sup>27</sup> G.A. Res. 2200 (xxi) A, U.N. Doc. A/6316 (Dec. 16, 1966).

<sup>28</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221.

recognizes basic human rights and obligations owed by all governments to their citizens.”<sup>29</sup>

Through the more than twenty years since *Filartiga*, the federal courts have allowed an expanding category of private rights of action based on serious violations of customary international law norms, including: claims of torture, genocide, war crimes, crimes against humanity, summary execution, arbitrary detention and disappearance.<sup>30</sup> The courts have recognized that such claims may be brought against individuals acting under color of state authority<sup>31</sup> and individuals who were non-state actors.<sup>32</sup> Claims against corporations have also been recognized as valid.<sup>33</sup>

The cases finding jurisdiction under the ATS have struggled at times with various procedural and substantive aspects of applying this unusual statute. Obvious issues such as the possible relevance of *forum non conveniens* have been addressed.<sup>34</sup> The courts have also addressed concerns surrounding separation of powers, for example, whether the political question doctrine precludes the exercise of jurisdiction in some or all of the ATS cases.<sup>35</sup> The courts have also had occasion to consider whether the Act of State Doctrine, “under which courts generally refrain from judging acts of a foreign state within its territory,”<sup>36</sup> precludes application of the ATS in a given case.<sup>37</sup> The courts have generally rejected a broad

<sup>29</sup> *Filartiga v. Pena-Irala*, 630 F.2d 876, 884 (2d Cir. 1980).

<sup>30</sup> *See, e.g., Abebe-Jira v. Negewo*, 72 F.3d 844, 847-48 (11th Cir. 1996) (torture); *Kadic v. Karadzic*, 70 F.3d 232, 242-44 (2d Cir. 1995) (torture and genocide); *Doe v. Islamic Salvation Front*, 993 F. Supp. 3, 5-6 (D.C. 1998) (torture, summary execution, and other crimes against humanity); *Xuncax v. Gramajo*, 886 F. Supp.162, 183-84) (D. Mass. 1995) (torture, summary execution, disappearance, and arbitrary detention); *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1535, 1552 (N.D. Cal. 1987) (torture, summary execution and prolonged arbitrary detention).

<sup>31</sup> *See, e.g., Forti*, 672 F. Supp. at 1548.

<sup>32</sup> *See, e.g., Kadic*, 70 F.3d at 239.

<sup>33</sup> *See, e.g., Doe v. Unocal*, 963 F. Supp. 880, 883-884, 887 (C.D. Cal 1997) (denying motion to dismiss). This case resulted in a settlement in December 2004 after a decision by the Ninth Circuit that would have allowed the case to go forward. *See also, Bowoto v. Chevron Texaco Corp.*, 312 F. Supp. 2d 1229, 1233 (N.D. Cal. 2004); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 296 (S.D.N.Y. 2003); *Wiwa v. Royal Dutch Petroleum*, 226 F.3d 88, 92 (2d cir. 2000).

<sup>34</sup> *See, e.g., Wiwa*, 226 F.3d at 103.

<sup>35</sup> *See, e.g., Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 779, 824-25 (D.C. Cir. 1984) (opinions of Judges Bork and Robb).

<sup>36</sup> *Kadic*, 70 F.3d at 250.

<sup>37</sup> *Id.* at 249-50. “Disputes implicating foreign policy have the potential to raise political issues, although, as the Supreme Court has wisely cautioned, ‘it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.’” *Id.* (citing *Japan Whaling Ass’n v. Am. Cetacean Society*, 478 U.S. 221, 229-230 (1986) (quoting *Baker v. Carr*, 369 U.S. at 211.)).

based objection to the ATS based upon separation of powers concerns.<sup>38</sup> The federal courts have also had to consider, in determining their power to hear ATS cases, whether the statute is constitutional and whether, if so, it provides a cause of action as well as federal subject matter jurisdiction.<sup>39</sup>

Moreover, there is the additional question of what constitutes “a tort in violation of the law of nations.” The lower courts had reached a level of consensus on the last question, what legal standard should be used in determining whether the statutory language applies. The courts agreed that it is not every act in violation of international law that would be sufficient under § 1350. Rather, an “international tort” must be one involving an act that violates a norm that is “specific, universal and obligatory.”<sup>40</sup>

The constitutionality of the Alien Tort Statute has not raised much dispute in federal courts.<sup>41</sup> The lower courts have raised (and some have grappled with) the question of whether the ATS is a purely jurisdictional statute or whether it also provides a cause of action.<sup>42</sup> Generally speaking, courts have found or assumed that § 1350 provides for both jurisdiction and a cause of action.<sup>43</sup>

The last development that should be addressed as a part of a consideration of the history of the ATS in federal court is Congressional enactment of the Torture Victim Protection Act of 1991 (TVPA).<sup>44</sup> This statute was

<sup>38</sup> See, e.g., *Kadic*, 70 F.3d at 248; *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1544 (N.D. Cal. 1987); *Siderman de Blake v. Argentina*, 965 F.2d 699, 707 (9th Cir. 1985).

<sup>39</sup> See, e.g., *In re Estate of Marcos*, 25 F.3d 1467, 1474-75 (9th Cir. 1994); *Abebe-Jira v. Negewo*, 72 F.3d 844, 847 (11th Cir. 1996); *Xuncax v. Gramajo*, 886 F. Supp. 162, 179 (D. Mass. 1995). See also, Pamela J. Stephens, *Beyond Torture: Enforcing International Human Rights in Federal Courts*, 51 SYRACUSE L. REV. 941, 971 (2001).

<sup>40</sup> See, e.g., *Doe v. Unocal*, 395 F.3d 932 (9th Cir. 2002). See also, *Forti*, 672 F. Supp. at 1539-40 (finding that such a tort “must be one which is definable, obligatory (rather than horatory), and universally condemned” and applying that test to dismiss two alleged torts under the ATS). And note, courts have not been reluctant to dismiss ATS claims that did not meet such a standard. See, e.g., *Flores v. Southern Peru Copper Corp.*, 343 F.3d 140, 172 (2d Cir. 2003) (finding environmental claims insufficiently established).

<sup>41</sup> See generally, *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

<sup>42</sup> See, e.g., *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 801 (D.C. Cir. 1984) (Bork, concurring); *Siderman de Blake*, 965 F.2d at 713; *Forti*, 672 F. Supp. at 1538-39.

<sup>43</sup> See, e.g., *Alvarez-Machain v. United States*, 331 F.3d 604, 612, 641 (9th Cir. 2003), in which the Ninth Circuit Court of Appeals held that the Alien Torts Act “not only provides federal courts with subject matter jurisdiction, but also creates a cause of action for an alleged violation of the law of nations.” *But see*, *Xuncax*, 886 F. Supp. at 183 for an interesting discussion and the court’s conclusion that “reading § 1350 as essentially a jurisdictional grant only and then looking to domestic tort law to provide the cause of action mutes the grave international law aspect of the tort, reducing it to no more (or less) than a garden variety municipal tort.”

<sup>44</sup> Pub. L. No. 102-256, 106 Stat., 28 U.S.C. § 1350 (1992).

enacted as implementing legislation under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.<sup>45</sup> This Act answers the “cause of action” question above for a narrow range of acts. It provides a federal cause of action for damages “against any individual who, under actual or apparent authority or under color of law of any foreign nations, subjects any individual to torture or extrajudicial killing.”<sup>46</sup> The TVPA requires the claimant to have exhausted remedies “in the place in which the conduct giving rise to the claim occurred” prior to bringing the federal suit<sup>47</sup> and has a ten year statute of limitations.<sup>48</sup> The Act also provides definitions of “extrajudicial killings” and “torture” based upon the Torture Convention.<sup>49</sup>

In comparing the TVPA with the ATCA, it is worth noting that “[t]he TVPA is both broader than and narrower than the Alien Tort Claims Act . . . in some respects. For example, while the ATCA is limited to actions brought by aliens, the TVPA would extend a civil remedy to U.S. citizens as well, who might have been tortured abroad.”<sup>50</sup> The TVPA is narrower than the Alien Torts Act in its narrowed categories of claims. “However . . . the clearly expressed legislative intent was that the TVPA not act to limit potential claims under the ATCA. The Senate Report states ‘claims based on torture or summary execution do not exhaust the list of actions that may appropriately be covered by § 1350. Consequently, that statute should remain intact.’”<sup>51</sup> There is very little case law focusing upon the TVPA alone as a basis for jurisdiction.<sup>52</sup>

### III. THE FEDERAL COMMON LAW CONUNDRUM

The debate regarding federal common law is also a significant part of *Sosa*’s history. At the heart of the question of whether the ATS creates a cause of action (in addition to subject matter jurisdiction) is the broader question of the relationship between customary international law and federal common law. Is customary international law a part of the federal common law? There appears to be general accord, even by the revision-

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<sup>45</sup> Convention Against Torture, 1465 U.N.T.S. 65 (1984); S. Doc. No. 100-20 (1988).

<sup>46</sup> 28 U.S.C. § 1350 (2000).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> Stephens, *Beyond Torture*, *supra* note 39 at 953.

<sup>51</sup> *Id.* at 953-954 (quoting S. Rep. No. 102-249, at 5 (1991)).

<sup>52</sup> *But see* Enahoro v. Abubakar, 408 F.3d 877, 884-885 (7th Cir. 2005) (holding that plaintiffs could not assert claims of torture and extrajudicial killing as common law violations under the ATS generally and were instead required to assert such claims under the TVPA, which has superseded the ATS with respect to these specific claims).

ists, that prior to *Erie Railroad Co. v. Tompkins*,<sup>53</sup> customary international law (often referred to as “law of nations”) was a part of the general common law, binding upon state and federal courts. Once *Erie* famously held that there was “no federal general common law,”<sup>54</sup> it was necessary to determine the role of customary international law in the federal courts.

The conventional view regarding this question is that customary international law is a special type of federal common law, not “general” common law.<sup>55</sup> One of the earliest proponents of this view was Professor Philip Jessup, who concluded that *Erie* had “no direct application to international law.”<sup>56</sup> He further asserted that “[a]ny question of applying international law in our courts involves the foreign relations of the United States and can thus be brought within a federal power.”<sup>57</sup> Most academics agreed with this view, as did the Supreme Court<sup>58</sup> and the Restatement (Third) of Foreign Relations Law.<sup>59</sup>

In a series of articles beginning in 1997, Professors Curtis Bradley and Jack Goldsmith critiqued the preceding view, labeling it the “modern position.” However, as Professor Dodge has pointed out, “it is in fact no more modern than their own view that customary international law should be considered state law. Both views try to fit customary international law into the post-*Erie* framework.”<sup>60</sup> The Bradley/Goldsmith critique centers upon the differing impact of incorporating customary international law into federal common law pre and post-*Erie*. Prior to the

<sup>53</sup> 304 U.S. 64 (1938).

<sup>54</sup> *Id.* at 78.

<sup>55</sup> This view is also referred to as “traditional”, Steinhardt, *supra* note 13, or “orthodox”, William Dodge, *Bridging Erie*, 12 TULSA J. COMP. & INT’L L. 87 (2005).

<sup>56</sup> Jessup, *The Doctrine of Erie v. Tompkins Applied to International Law*, 33 AM. J. INT’L L. 740, 741 (1938).

<sup>57</sup> *Id.* at 743.

<sup>58</sup> See *Banco Nacional v. Sabbatino*, 376 U.S. 398 (1964). On this issue, the Supreme Court has said:

[A]bsent some congressional authorization to formulate substantive rules of decision, federal common law exists only in such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases. In these instances our federal system does not permit the controversy to be resolved under state law, either because the authority and duties of the United States as sovereign are intimately involved or because the interstate or international nature of the controversy makes it inappropriate for state law to control.

*Texas Industries v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981).

<sup>59</sup> § 111, comment d (1987).

<sup>60</sup> Dodge, *supra* note 55. Bradley and Goldsmith explain their use of “the term ‘modern’ to signify that widespread endorsement of this view occurred only recently.” Bradley & Goldsmith, *Customary International Law as Federal Common Law*, *supra* note 1.

Supreme Court's decision in that case, a customary international law rule would be applied by federal and state courts as a part of the general common law. As such, customary international law "lacked the supremacy, jurisdictional, and other consequences of federal law. *Erie*, of course, abrogated general common law and led to the creation of a common law that does possess the characteristics of federal law."<sup>61</sup> Increasingly, the level of concern with respect to applying customary international law as federal common law is the growth in customary international laws, particularly in the human rights area, post-*Erie*.<sup>62</sup>

The Bradley/Goldsmith critique rests on several key arguments. First, they believe that "*Erie* requires federal courts to identify the sovereign source for every rule of decision. Because the appropriate 'sovereigns' under the U.S. Constitution are the federal government and the States, all law applied by federal courts must be either federal law or state law."<sup>63</sup> Second, they conclude from this first point that "a federal court can no longer apply CIL in the absence of some domestic authorization to do so, as it could under the regime of general common law."<sup>64</sup>

The third lesson to be drawn from *Erie*, according to Bradley and Goldsmith, is that "courts 'make' law when they engage in common law decision making,"<sup>65</sup> which supported the "Court's conclusion that the development of an independent general common law by federal courts was 'an unconstitutional assumption of powers.'"<sup>66</sup> This conclusion "undermines the assertion by Professor Henkin—central to his claim that CIL can trump a prior inconsistent federal statute—that judges 'find' rather than 'make' CIL."<sup>67</sup> Bradley and Goldsmith's final point is that "*Erie* did not eliminate the lawmaking of federal courts—it changed them."<sup>68</sup> *Erie* rejected federal court development of general common law as a form of *unauthorized* lawmaking. Thus, "federal judicial lawmaking is consistent with *Erie* if it is legitimately authorized."<sup>69</sup>

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<sup>61</sup> Bradley & Goldsmith, *Customary International Law as Federal Common Law*, *supra* note 1 at 820-21.

<sup>62</sup> *Id.* at 827-828, Bradley & Goldsmith point out that for the 25 years after *Erie*, neither scholars nor courts focused on the common law status of customary international law. This they largely attributed to the relative scarcity of customary international law, that the issues raised by customary international law rarely were raised in state courts and lastly, human rights law was undeveloped. *Id.*

<sup>63</sup> *Id.* at 852.

<sup>64</sup> *Id.* at 852-53.

<sup>65</sup> *Id.* at 854

<sup>66</sup> *Id.* (quoting *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting)).

<sup>67</sup> *Id.* (citing LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 137 (Oxford University Press 1996)).

<sup>68</sup> *Id.* at 855.

<sup>69</sup> *Id.*

It is upon this latter point that the Bradley/Goldsmith critique regarding customary international law rests, and it is also upon this point that the critics of that critique most often rest.<sup>70</sup> Application of the ATS has provided the context for this current battle over customary international law as federal common law. Since the Second Circuit's decision in *Filar-tiga*,<sup>71</sup> courts applying the ATS have found that it incorporates customary international law as part of federal common law to create a substantive cause of action.<sup>72</sup> In fact, the ATS raises two separate questions regarding customary international law. First, does customary international law as such provide the content of a violation under the ATS's language "a tort in violation of the law of nations," satisfying the subject matter jurisdiction requirements of the Act? Second, should the court imply from that a private right of action under federal common law for a plaintiff so injured? Most of the cases merged these two questions, finding that the ATS creates both jurisdiction and a substantive cause of action by way of a violation of customary international law.<sup>73</sup>

In their initial article, Bradley and Goldsmith leave open the possibility that ATS claims might survive their critique, saying that "rejection of the modern position would not necessarily spell the end for *Filar-tiga*-type litigation for two reasons."<sup>74</sup> First, there may be justifications other than the modern position for the constitutionality of the ATS. Second, and more important to Bradley and Goldsmith, "Congress retains the power to remedy any Article III problem by legislating human rights norms into federal law."<sup>75</sup> In subsequent articles however, their position hardens and they grow more hostile to the idea of ATS suits.<sup>76</sup> They describe what is at issue in the ATS cases as the "new CIL," international law which "has developed to regulate to some extent the ways in which nations treat their citizens."<sup>77</sup> This law is found largely in "a series of multilateral human rights treaties and several non-binding United Nations General Assembly Resolutions, most notably the Universal Dec-

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<sup>70</sup> See, e.g., Koh, *supra* note 1.

<sup>71</sup> 630 F.2d 876 (2d Cir. 1980).

<sup>72</sup> See, e.g., Abebe-Jira v. Negewo, 72 F.3d 844, 847-48 (11th Cir. 1996).

<sup>73</sup> See *supra* note 39.

<sup>74</sup> The authors offer an example, stating that "one could perhaps interpret the ATS's jurisdictional grant as authorizing federal courts to create federal common law rules of tort liability in cases brought by aliens based on the courts' interpretation of CIL; ATS cases would therefore arise under this federal law for purposes of Article III." Bradley & Goldsmith, *Customary International Law as Federal Common Law*, *supra* note 1 at 872.

<sup>75</sup> *Id.* at 873. See, e.g., the Torture Victim Protection Act, 28 U.S.C. § 1350 (note).

<sup>76</sup> See, e.g., Bradley & Goldsmith, *The Current Illegitimacy*, *supra* note 10; Bradley, *The Costs of International Human Rights Litigation*, 2 CHI. J. INT'L L. 457 (2001); Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT'L L. 587 (2002).

<sup>77</sup> Bradley & Goldsmith, *The Current Illegitimacy*, *supra* note 10 at 327.

laration of Human Rights.”<sup>78</sup> The United States has not ratified all of the treaties involved, and those it has ratified are subject to several reservations, understandings and declarations (RUDs), including that the treaties will not be enforceable domestically.<sup>79</sup> Bradley and Goldsmith attack the derivation of CIL and federal common law from these treaties. They note: “[t]he modern position claim that CIL is to be applied as federal common law thus ‘compensate[s] for the abstinence of the United States vis-a-vis ratification of international human rights treaties’. It permits federal courts to accomplish through the back door of CIL what the political branches have prohibited through the front door of treaties.”<sup>80</sup>

Their critique of ATS jurisdiction rests on three arguments. First, “*Erie’s* repudiation of the general common law background against which the ATS was enacted means that the progressive reading of the ATS would not only extend jurisdiction to completely different types of international law claims, but it would also read the ATS, in contrast to its original design, to apply this new CIL of human rights *as federal law*.”<sup>81</sup> This, as they have pointed out elsewhere, has “profound . . . implications for state law, federal question jurisdiction and possibly the legality of presidential actions that go far beyond anything could have been contemplated by the First Congress.”<sup>82</sup> The second argument Bradley and Goldsmith make is that the “general agreement that a significant purpose of the ATS was to ensure that the United States complied with its obligations under international law by providing redress for certain violations of the law of nations.”<sup>83</sup> But, the authors argue, modern usage is not consistent with that purpose, since there is “no general duty under international law to provide civil remedies in its courts for human rights violations committed abroad by foreign government officials against aliens.”<sup>84</sup> The third argument against modern use of the ATS rests on the extra-territorial nature of the claims under that statute: “federal courts exercising jurisdiction under the ATS create causes of action and remedies as a matter of United States federal law to govern the activities of foreign government officials on foreign soil.”<sup>85</sup> Bradley and Goldsmith thus summarize:

In sum, dramatically changed circumstances between 1789 and 1980 when combined with (a) the ATS’s textual suggestion that it concerns only jurisdiction, (b) the implausibility of a cause of action or *Lincoln Mills* interpretation of the ATS as an original matter and (c)

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<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 330.

<sup>80</sup> *Id.* at 330-31.

<sup>81</sup> *Id.* at 360.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 361.

the fact that the ATS lay practically dormant for nearly 200 years, lead us to the conclusion that the ATS cannot support the modern practice.”<sup>86</sup>

The response to the Bradley/Goldsmith critique was swift and generally negative.<sup>87</sup> Leading the opposition, Professor Harold Koh charges:

Under each of the authors’ stated criteria – history and doctrine, separation of powers, federalism and democratic values – their position is untenable and certainly far less credible than the traditional view they assail. Even a cursory review makes clear that Bradley and Goldsmith have proposed a rather startling nonsolution to a nonproblem.<sup>88</sup>

Professor Koh first argues that the revisionist view rests on a “serious misreading of two landmark Supreme Court cases: *Erie Railroad Co. v. Tompkins* and *Banco Nacional de Cuba v. Sabbatino*.”<sup>89</sup> As the previous discussion has shown, the Bradley/Goldsmith interpretation of these two cases is key to their critique. The difficulty with that interpretation is their insistence that *Erie* effects a “near complete ouster of federal courts from their traditional role in construing customary law norms. But nothing in Justice Brandeis’s opinion suggests that he intended to unseat more than a century of settled law on that question.”<sup>90</sup> *Erie*, of course, did hold that diversity jurisdiction did not alone “authorize the federal courts to make a general federal common law of tort.”<sup>91</sup> But, as Professor Koh argues, customary international law is unlike state tort law in several important aspects. First, Justice Brandeis stated that the “federal courts lack power to fashion common law tort rules . . . because Congress has no power to declare substantive rules of common law applicable in a [s]tate.”<sup>92</sup> However, Koh points out that Congress has enumerated power to define and punish offenses against the law of nations and has exercised that power in a variety of statutes. Thus, “no one could similarly claim that federal courts lacked power to make federal common law rules with respect to international law.”<sup>93</sup> Second, *Erie* clearly reflects a determination that state law govern substantive law because “the scheme of our Constitution envisions an allocation of law-making functions between state and federal legislative processes which is undercut if the federal judiciary

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<sup>86</sup> *Id.* at 363.

<sup>87</sup> See, e.g., Koh, *supra* note 1; Ryan Goodman & Derek P. Jinks, *Filartiga’s Firm Footing: International Human Rights and Federal Common Law*, 66 *FORDHAM L. REV.* 463, 468 (1997); Neuman, *supra* note 1; Stephens, *supra* note 1.

<sup>88</sup> Koh, *supra* note 1 at 1827.

<sup>89</sup> *Id.* at 1830. See also, the discussion in Neuman, *supra* note 1 at 377.

<sup>90</sup> Koh, *supra* note 1 at 1831.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

can make substantive law affecting state affairs beyond the bounds of congressional legislative power in this regard.”<sup>94</sup> However,

[W]ith respect to international and foreign affairs law, the Constitution envisions no similar role for state legislative or judicial process. Federal judicial determination of most questions of customary international law transpires not in a zone of core state concerns. . .but in a foreign affairs area, in which the Tenth Amendment has reserved little or no power to the states.<sup>95</sup>

Third, if questions of customary international law were left to state courts, it would render them essentially unreviewable by the U.S. Supreme Court. Moreover, “[s]uch unreviewability would have raised the specter that multiple variants of the same international law rule could proliferate among the several states.”<sup>96</sup>

The Supreme Court did not address the issue of whether customary international law would be considered federal or state law until the *Sabbatino* decision in 1964.<sup>97</sup> In his opinion for the Court, Justice Harlan concluded that an “issue concerned with 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>98</sup> Moreover, the Court since *Sabbatino* has acknowledged that there is a “foreign affairs” enclave of federal law in which the creation of federal common law is appropriate.<sup>99</sup>

Regarding the Bradley and Goldsmith separation of powers argument, opponents of their view point out that both pre and post-*Erie*, Supreme Court decisions have enforced customary international law norms.<sup>100</sup> Even *Sabbatino*, which acknowledged that separation of powers concerns were at the heart of the act of state doctrine, also indicated that those concerns would not preclude the courts from considering international law questions. In fact, the Court held “the greater the degree of codifica-

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<sup>94</sup> *Id.* (citing *Hanna v. Plumer*, 380 U.S. 460, 474-75 (1965) (Harlan, J., concurring)) (emphasis in original).

<sup>95</sup> *Id.* at 1831-32.

<sup>96</sup> *Id.* at 1832.

<sup>97</sup> See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964). See also, *Goodman & Jinks*, *supra* note 87 at 490-92 (considering in detail *Sabbatino*'s relevance to the issue of customary international law as federal common law).

<sup>98</sup> *Sabbatino*, 376 U.S. at 425.

<sup>99</sup> See, e.g., *Boyle v. United Technologies Corp.*, 487 U.S. 500, 504 (1988) (“But we have held that a few areas, involving uniquely federal interests, *Texas Industries v. Radcliff Materials*, 451 U.S. 630, 640 (1981), are so committed by the Constitution and the laws of the United States to federal control that state law is preempted and replaced, where necessary by federal law of a content prescribed (absent explicit statutory directive) by the courts – so-called ‘federal common law.’”).

<sup>100</sup> See, e.g., *Koh*, *supra* note 1 at 1833-41.

tion or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it . . . .”<sup>101</sup>

In addition, critics of the revisionist position also find the Bradley/Goldsmith federalism argument to be weak. From the earliest days of the Republic, the Executive, Legislative and Judicial branches of the federal government have all recognized that power over foreign affairs vests in the federal government<sup>102</sup> and that that power was never derived from the states.<sup>103</sup> Moreover, contrary to the Bradley and Goldsmith assertion that application of customary international law by the federal courts is “inconsistent with the Supreme Court’s modern federalism jurisprudence,”<sup>104</sup> certainly “nothing in that jurisprudence speaks to ‘restoring’ to the states external foreign affairs powers that were not reserved to them by the Tenth Amendment and several of which—like the treaty, compact and agreement powers—were specifically removed from the states by other constitutional provisions.”<sup>105</sup>

Lastly, the general Bradley/Goldsmith attack on customary international law as federal common law rests on a “democracy” argument: “unelected federal judges apply customary international law made by the world community at the expense of the state prerogatives. In this context, of course, the interests of the states are neither formally nor effectively represented in the lawmaking process.”<sup>106</sup> Critics of this view have pointed out that customary international law has been applied by federal courts since the earliest days of this country, without concern that this was inconsistent with democratic principles.<sup>107</sup> Further, judges in all U.S. jurisdictions, state and federal, frequently apply laws their “constituents” have had no say in under constitutionally approved choice of law rules.<sup>108</sup>

#### IV. *SOSA V. ALVAREZ-MACHAIN*

The U.S. Drug Enforcement Agency (DEA) authorized a kidnapping of Alvarez-Machain in Mexico by defendant-petitioner Sosa and other Mexican nationals. Alvarez-Machain was wanted by the DEA to stand trial in the U.S. for his alleged complicity in the torture and death of a DEA agent. After his acquittal on all charges, Alvarez-Machain filed a civil suit against the U.S. government under the Federal Tort Claims Act,

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<sup>101</sup> Sabbatino, 376 U.S. at 428.

<sup>102</sup> Koh, *supra* note 1 at 1846. See also, Stephens, *supra* note 1 at 400-08.

<sup>103</sup> See, e.g., U.S. v. Curtiss-Wright Export Corp., 299 U.S. 304, 318 (1936).

<sup>104</sup> Koh, *supra* note 1 at 1848.

<sup>105</sup> *Id.*

<sup>106</sup> Bradley & Goldsmith, *Customary International Law as Federal Common Law*, *supra* note 1 at 868.

<sup>107</sup> Koh, *supra* note 1 at 1852.

<sup>108</sup> *Id.* at 1853.

and against Sosa under the Alien Tort Statute.<sup>109</sup> The District Court granted the government's motion to dismiss on the FTCA claim, but granted a summary judgment for the plaintiff and \$25,000 in damages on the ATS claim. The Ninth Circuit affirmed the district court ruling on the ATS claim, but reversed the dismissal of the FTCA. On a rehearing *en banc*, the court of appeals reached the same conclusions.<sup>110</sup> The Supreme Court reversed both.<sup>111</sup>

Justice Souter wrote the majority opinion. In a portion of the opinion, joined by all members of the Court, Souter addressed the threshold issue of whether the ATS is merely a grant of subject matter jurisdiction or in addition was meant to create a cause of action. The ATS, as passed by the first Congress as part of the Judiciary Act of 1789, provided that the federal 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."<sup>112</sup> In first addressing this issue, the Court focused on both the language of the statute and its placement in section nine of the Judiciary Act. As to the former, the Court noted that "the ATS gave the district courts 'cognizance' of certain causes of action, and the term bespoke a grant of jurisdiction, not power to mold substantive law."<sup>113</sup> As to the latter, the Court observed that "[t]he fact that the ATS was placed in §9 of the Judiciary, a statute otherwise exclusively concerned with federal court jurisdiction, is itself support for its strictly jurisdictional nature."<sup>114</sup> In conclusion, the Court held that "the statute was intended as jurisdictional in the sense of addressing the power of the courts to entertain cases concerned with a certain subject."<sup>115</sup>

Having drawn the conclusion that the ATS was meant to be a grant of jurisdiction, the Court had to grapple with Sosa's argument that the "ATS was stillborn because there could be no claim for relief without a further

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<sup>109</sup> *Sosa v. Alvarez-Machain*, 542 U.S. 692, 697-99 (2004).

<sup>110</sup> *Sosa v. Alvarez-Machain*, 331 F.3d 604, 641 (9th Cir. 2003). Regarding the ATS claim, the court of appeals said that "[the ATS] not only provides federal courts with subject matter jurisdiction, but also creates a cause of action for an alleged violation of the law of nations." *Id.* at 612.

<sup>111</sup> The FTCA claim was rejected by the Supreme Court as falling within an exception to the FTCA waiver of sovereign immunity for claims "arising in a foreign country." 28 U.S.C. § 2680 (k). For a full discussion of the Court's rationale, see *Sosa*, 542 U.S. 699-712.

<sup>112</sup> Judiciary Act of 1789, Sep. 24, 1789, 1 Stat. 79 § 9(b). In its current form the ATS reads: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350.

<sup>113</sup> *Sosa*, 542 U.S. at 713 (citing ALEXANDER HAMILTON, THE FEDERALIST NO. 81, 447, 451 (J. Cooke ed. 1961) (using "jurisdiction" interchangeably with "cognizance").

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 714.

statute authorizing adoption of causes of action.”<sup>116</sup> After a lengthy discussion of the nature of the law of nations in 1789,<sup>117</sup> and the Framers’ response to that law in the Constitution, the Court ultimately rejected the petitioner’s argument and instead drew two inferences from that history, which tend to support a contrary view:

First, there is every reason to suppose that the First Congress did not pass the ATS as a jurisdictional convenience to be placed on the shelf for use by a future Congress or state legislature that might, some day, authorize the creation of causes of action or itself decide to make some element of the law of nations actionable for the benefit of foreigners . . . There is too much in the historical record to believe that Congress would have enacted the ATS only to leave it lying fallow indefinitely.

The second inference to be drawn from the history is that Congress intended the ATS to furnish jurisdiction for a relatively modest set of actions alleging violations of the law of nations. Uppermost in the legislative mind appears to have been offenses against ambassadors . . . violations of safe conduct were probably understood to be actionable, and individual actions arising out of prize captures and piracy may well have also been contemplated.<sup>118</sup>

In light of this history, the Court concluded that “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.”<sup>119</sup>

In Part IV of the Court’s opinion, Justice Souter, writing for himself and five other members of the Court<sup>120</sup> elaborated upon the conclusion that the First Congress “understood that the district courts would recognize private causes of action in violation of the law of nations.”<sup>121</sup> It was the Court’s assumption that Congress did not have any causes of actions in mind “beyond those torts corresponding to Blackstone’s three primary offenses: violation of safe conducts, infringements of the rights of ambassadors and piracy.”<sup>122</sup> In addition, the Court found “that no development

<sup>116</sup> *Id.*

<sup>117</sup> *See id.* at 715-17.

<sup>118</sup> *Id.* at 719-20.

<sup>119</sup> *Id.* at 724.

<sup>120</sup> *See id.* at 724-38. Justices Stevens, O’Connor, Kennedy, Ginsberg and Breyer also sided with the majority. *Id.* at 695.

<sup>121</sup> *Sosa*, 542 U.S. at 724-25.

<sup>122</sup> *Id.* at 725.

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 (CA 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.”<sup>123</sup>

In light of those assumptions, the Court concluded that good reasons exist for “a restrained conception of the discretion”<sup>124</sup> to be exercised by a federal court in considering whether to recognize a new cause of action under the ATS. The Court said federal 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.”<sup>125</sup>

The Court identified five reasons that support judicial caution in this area: First, the prevailing view of the common law has changed since 1789. It is no longer, as Justice Holmes described it, “a transcendental body of law outside of any particular state but obligatory within it unless and until changed by statute.”<sup>126</sup> The more modern understanding is that “the law is not so much found or discovered as it is either made or created.”<sup>127</sup> The second reason that advises restraint, according to the Court, is that in addition to a change in understanding of the nature of the common law, there “has come an equally significant rethinking of the role of the federal courts in making it . . . .”<sup>128</sup> The Court does acknowledge that *Erie’s* pronouncement of the death of general federal common law did leave the federal courts free to fashion “federal common law rules in interstitial areas of particular interest.”<sup>129</sup> The third reason for restraint is that the Court has previously and “repeatedly” said that the creation of private rights of action is one that is “better left to legislative judgment in the great majority of cases.”<sup>130</sup> Fourth, the Court reasoned that there are “collateral consequences of making international rules privately actionable”<sup>131</sup> that should argue for judicial restraint. The Court had concerns both about potential implications for the foreign relations of the United States and the possibility of impinging upon the political branches in their managing of foreign affairs. The Court noted, “[s]ince many attempts by

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<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* (quoting *Black & White Taxicab v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting)).

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 726 (citing *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938)).

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 727.

<sup>131</sup> *Id.*

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.”<sup>132</sup> The fifth and last reason offered by the Court was the lack of a congressional mandate to seek out and define new violations of the law of nations.<sup>133</sup> In fact, the Court noted, “the Senate has expressly declined to give the federal courts the task of interpreting and applying international human rights law, as when its ratification of the International Covenant on Civil and Political Rights declared that the substantive provisions of the document were not self-executing.”<sup>134</sup>

In light of its concerns, the Court posited a test for the recognition of private causes of action under § 1350 that would “not recognize private claims . . . with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted.”<sup>135</sup> The Court then cited approvingly language from several post-*Filartiga* cases which require acts “which violate[ ] definable, universal and obligatory norms”<sup>136</sup> or “violations . . . of a norm that is specific, universal, and obligatory”.<sup>137</sup> On the facts of this case, the Court found that plaintiff has failed to establish that his arbitrary arrest has attained that status.<sup>138</sup> The Court reasoned that to the extent that arbitrary detention violates international law, it “requires a factual basis, beyond relatively brief detention in excess of positive authority.”<sup>139</sup> The Court concluded that it need not define what the term “prolonged detention” encompasses, stating “[i]t is enough to hold that a single illegal detention of less than a day, followed by the transfer to lawful authorities and a

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<sup>132</sup> *Id.* at 727-28.

<sup>133</sup> *Id.* at 728. The Court did recognize the “clear mandate” of the Torture Victim Protection Act of 1991, but notes that its authority “is confined to specific subject matter, and although the legislative history includes the remark that §1350 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 . . . , Congress as a body has done nothing to promote such suits.” *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 732.

<sup>136</sup> *Id.* (citing *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 781 (D.C. Cir. 1984) (Edwards, J., concurring)).

<sup>137</sup> *Id.* (citing *In re Estate of Marcos Human Rights Litigation*, 25 F.3d 1467, 1475 (9th Cir. 1994)).

<sup>138</sup> *Id.* at 738. The Court rejects Alvarez’s argument “that his arrest was arbitrary and as such forbidden by international law not because it infringed the prerogatives of Mexico, but because no applicable law authorized it.” *Id.* at 735-36.

<sup>139</sup> *Id.* at 737. (“A state violates international law if, as a matter of ‘state policy’, it practices, encourages or condones . . . prolonged arbitrary detention.” Restatement (3d) of Foreign Relations Law of the United States § 702 (1987)).

prompt arraignment, violates no norm of customary international law so well defined as to support the creation of a federal remedy.”<sup>140</sup>

Justice Scalia, joined by the Chief Justice and Justice Thomas, concurred in part and concurred in the judgment. Scalia’s principal reason for writing separately was to object to what he calls 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.”<sup>141</sup> In considering this issue, Scalia first reviewed the distinction between general common law and post-*Erie* common law set out in the preceding section of this article<sup>142</sup> and noted that “*Erie* affected the status of the law of nations in federal courts not merely by the implication of its holding but quite directly, since the question decided in *Swift* turned on the ‘law merchant’ then a subset of the law of nations.”<sup>143</sup>

Scalia’s disagreement with the Court’s opinion rests upon that distinction. In his view the “new” federal common law, post-*Erie* “is made, not discovered” and therefore “federal courts must possess some federal-common-law-making authority before undertaking to craft it.”<sup>144</sup> He argued that a jurisdictional grant, such as the Court has found the ATS to be, does not “in and of itself give rise to authority to formulate federal common law.”<sup>145</sup> He did acknowledge that this rule against finding substantive lawmaking power in a mere jurisdictional grant is subject to exceptions and he cites *Bivens* as perhaps the exception providing the closest analogy to the present case.<sup>146</sup>

All of this demonstrates that the Court was correct, in Scalia’s view, in finding the ATS a purely jurisdictional statute, creating no new causes of action, but incorrect in allowing federal district courts to create such new causes of action. In distinguishing this case from *Bivens*, which sought to

<sup>140</sup> *Id.* at 738. (“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 his treatment violated a norm as “specific, universal and obligatory” as the “18th century paradigms we have recognized.” *Id.* 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.” Steinhardt, *supra* note 13 at 2281).

<sup>141</sup> *Sosa*, 542 U.S. at 739 (Scalia, J. concurring).

<sup>142</sup> *Id.* at 739-742; *see supra*, notes 51-67 and accompanying text.

<sup>143</sup> *Sosa*, 542 U.S. at 741 (Scalia, J. concurring).

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 741-42.

<sup>146</sup> *Id.* at 742 (citing *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971)). But Justice Scalia notes that “while *Bivens* stands, the ground supporting it has eroded. For the past 25 years, ‘we have consistently refused to extend *Bivens* liability to any new context’ . . . *Bivens* is ‘a relic of the heady days in which this Court assumed common-law powers to create causes of action.’” *Id.* (quoting *Correctional Services Corp. v. Malesko*, 534 U.S. 61, 75 (2001) (Scalia, J., concurring)).

enforce a command of the U.S. Constitution, he pointed out that “[i]n modern international human rights litigation of the sort that proliferated since *Filartiga v. Pena-Irala* . . . a federal court must first *create* the underlying federal command. . . . In Benthamite terms, creating a federal 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.”<sup>147</sup>

In reaching his conclusions, Scalia made several points regarding his view of the implications of the Court’s decision. While he agreed with many of the Court’s cautionary principles,<sup>148</sup> he disagreed that these are “reasons why courts must be circumspect in use of their extant general-common-law-making powers.”<sup>149</sup> Instead, he argued, these “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 actions for violations of customary international law.”<sup>150</sup> In his view the formula applied by the Court to determine whether an international norm should be incorporated into federal common law (and thus provide the basis for implying a private right of action) was insufficient to limit the exercise of discretion by the lower courts. In fact, he acknowledges that is essentially the test already being used by the lower courts. Scalia further noted, “[e]ndorsing the very formula that led the Ninth Circuit to its result in this case hardly seems to be a recipe for restraint in the future.”<sup>151</sup> Moreover, he also indicates that he thinks that the Court’s decision necessarily means that a post-*Erie*, federal common law rule would “arise under” the laws of the United States for purposes of general federal question jurisdiction (essentially rendering moot § 1350).<sup>152</sup>

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<sup>147</sup> *Id.* at 743 (citing Professor Meltzer’s view that “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.” Michael Meltzer, *Customary International Law, Foreign Affairs, and Federal Common Law*, 42 VA. J. INT’L L. 513, 519 (2002)).

<sup>148</sup> *Sosa*, 542 U.S. at 746-47.

<sup>149</sup> *Id.* at 747.

<sup>150</sup> *Id.*

<sup>151</sup> *See id.* at 748.

<sup>152</sup> *See id.* at 745, n.\*. But, see the Court’s brief dismissal of the latter conclusion: “Our position does not, as Justice Scalia suggests, imply that every grant of jurisdiction to a federal court carries with it an opportunity to develop common law (so that the grant of federal-question jurisdiction would be equally as good for our purposes as § 1350) . . . Section 1350 was enacted on the congressional understanding that courts would exercise jurisdiction by entertaining some common law claims derived from the law of nations; and we know of no reason to think that federal-question jurisdiction was extended subject to any comparable congressional assumption. Further, our holding today is consistent with the division of

Apparently believing that the Court had done little more than endorse the *Filartiga* line of ATS cases, Scalia concluded that “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>153</sup>

Justice Breyer concurred in the majority’s view of the ATS. However, he added one further consideration to those expressed by Justice Souter: “I would ask whether the exercise of jurisdiction under the ATS is consistent with those notions of comity that lead each nation to respect the sovereign rights of other nations by limiting the reach of its laws and their enforcement.”<sup>154</sup> What he seems to be suggesting is that the Court’s substantive standard for identifying an international norm sufficient to be incorporated into federal common law (and hence available as the basis for implying a private right of action) should also include a procedural aspect.<sup>155</sup> Breyer also noted, “substantive uniformity does not *automatically* mean that universal jurisdiction is appropriate.”<sup>156</sup> Breyer would require courts to consider not only whether the international norm has “a content as definite as, and an acceptance as widespread as, those that characterized 18th century international norms prohibiting piracy,” but that States have agreed that each State has universal jurisdiction to prosecute for violations of such norms.<sup>157</sup> Breyer further stated, “[t]oday international law will sometimes similarly reflect not only substantive agreement as to certain universally condemned behavior but also procedural agreement that universal jurisdiction exists to prosecute a subset of that behavior . . . [t]hat subset includes torture, genocide, crimes against humanity, and war crimes.”<sup>158</sup> Though the universal jurisdiction of which he speaks is jurisdiction to criminally prosecute, Breyer asserts that jurisdiction necessarily encompasses civil liability as well.<sup>159</sup> It is not clear how Breyer would implement such a “consideration.” This standard

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responsibilities between federal and state courts after *Erie*. . . as a more expansive common law power related to 28 U.S.C. § 1331 might not be.” *Id.* at 731, n.19.

<sup>153</sup> *Id.* at 750.

<sup>154</sup> *Id.* at 761 (Breyer, J. concurring in part and concurring in the judgment).

<sup>155</sup> *Id.* at 761-62.

<sup>156</sup> *Id.* at 760 (emphasis in original).

<sup>157</sup> *Id.* at 762.

<sup>158</sup> *Id.* at 760.

<sup>159</sup> *Id.* at 762-63. “That consensus concerns criminal jurisdiction, but consensus as to universal criminal jurisdiction itself suggests that universal tort jurisdiction would be no more threatening. That is because the criminal courts of many nations combine civil and criminal proceedings, allowing those injured by criminal conduct to be represented, and to recover damages, in the criminal proceeding itself.” See Beth Stephens, *Translating Filartiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations*, 27 YALE J. INT’L L. 1 (2002).

would render several “torts” recognized by the lower courts unavailable for treatment under the ATS. Thus, Breyer’s opinion would narrow the causes of action that might be brought under the ATS. He seems to be saying something quite different from the Court’s opinion with regard to Alvarez-Machain’s particular claim. Souter suggests, not that arbitrary detention is not a well recognized and accepted norm of international law, but rather that Alvarez-Machain *on the facts* has failed to demonstrate a violation of that norm.<sup>160</sup> Breyer’s position, however, appears to require that a norm be subject to universal criminal jurisdiction before it would be considered to be a norm sufficiently well accepted to be incorporated into the federal common law and subject to ATS jurisdiction. Thus, he concluded that “arbitrary arrest” (which is how he characterizes Alvarez-Machain’s claim) is not subject to such “procedural consensus” and therefore “that lack of consensus provides additional support for the Court’s conclusion that the ATS does not recognize the claim at issue here. . . .”<sup>161</sup> The further implications of this position remain to be explored.<sup>162</sup>

## V. LET THE SPIN BEGIN: ANALYZING *SOSA*

The first wave of scholarly and judicial reactions to the *Sosa* opinion is in and the “spinning” has begun.<sup>163</sup> While the line between interpretation and “spin” may be a fine one, several “revisionist” commentators seem to have crossed it while attempting to salvage something from *Sosa*. They argue that the Court did not actually say what it said, that the Court did not actually mean what it said, or, that the Court would have said something different had it used a different approach (i.e. an approach contrary to the approach being asserted by the pre-*Sosa* revisionists). This section will examine the various post-*Sosa* responses and offer a critique of their methodology, substance and conclusions.

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<sup>160</sup> However, this is not necessarily completely clear from the Court’s opinion. See Ralph Steinhardt, *supra* note 13 at 2280.

<sup>161</sup> 542 U.S. at 763.

<sup>162</sup> “Of the three paradigmatic offenses that were ‘probably on the minds of the men who drafted the ATS’ –violations 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 depredation, or the nationality of the actor.” Steinhardt, *supra* note 13 at 2267.

<sup>163</sup> “[S]pin is a usually pejorative term signifying a heavily biased portrayal in one’s own favor of an event or situation that is designed to bring about the most positive result possible. . .spin’ often, though not always, implies disingenuous, deceptive and/or highly manipulative tactics to sway audiences away from widespread (and often commonsense) perceptions.” Wikipedia, [http://en.wikipedia.org/wiki/public\\_relations#spin](http://en.wikipedia.org/wiki/public_relations#spin) (last visited Oct. 9, 2007)

A. *The Court Did Not Hold What It Appeared to Hold (or Did Not Mean It if It Did).*

As the preceding sections of this article illustrate, in *Sosa* the Supreme Court found that although the ATS is by its terms a jurisdictional statute, Congress intended at the time of its enactment that it would provide jurisdiction for “a relatively modest set of actions alleging violations of the law of nations.”<sup>164</sup> After extensive discussion of the Act’s history, the evolution of federal common law, the current status of customary international law as a part of the law and several considerations urging caution and judicial restraint, the Court concludes that it has judicial discretion to recognize “actionable international norms” under the ATS. The court stated that, “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.”<sup>165</sup> The Court gives further content to that “narrow class” by indicating 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 paradigm familiar when § 1350 was enacted.”<sup>166</sup> The Court then cites with approval the Filartiga standard for assessing the validity of private claims.<sup>167</sup>

Some commentators responded to the Court’s opinion as if it had worked a significant restriction upon or narrowing of ATS jurisprudence.<sup>168</sup> Amongst the most forceful of these commentators is Professor

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<sup>164</sup> 542 U.S. at 720. (“Uppermost in the legislative mind appears to have offenses against ambassadors. . . , violations of safe conduct were probably understood to be actionable. . . , and individual actions arising out of prize captures and piracy may well have also been contemplated.”) *Id.* at 719-720 (citing An Act for the Punishment of Certain Crimes Against the United States, § 8, 1 Stat. 113-114 (murder or robbery, or other capital crimes, punishable as piracy if committed on the high seas), and § 28, at 118 (violation of safe conducts and assaults against ambassadors punished by imprisonment and fines described as “infractions against the law of nations”)).

<sup>165</sup> *Id.* at 729.

<sup>166</sup> *Id.* at 732.

<sup>167</sup> *Id.* at 732; *See* Filartiga v. Pena-Irala, 630 F.2d 876, 890 (2d Cir. 1980) (“[F]or purposes of civil liability, the torturer has become – like the pirate and the slave trader before him – *hosti humani generis*, an enemy of all mankind.”). *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 781 (D.C. Cir. 1984) (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 Litigation*, 25 F.3d 1467, 1475 (9th Cir. 1994) (“Actionable violations of international law must be of a norm that is specific, universal and obligatory.”).

<sup>168</sup> *See, e.g.,* Ehren J. Brav, *Opening the Courtroom Doors to Non-Citizens: Cautiously Affirming Filartiga for the Alien Tort Statute*, 46 HARV. INT’L L.J. 265 (2005); Benjamin Berkowitz, *Sosa v. Alvarez-Machain: United States Courts as Forums for Human Rights Cases and the New Incorporation Debate*, 40 HARV. C.R. -

Kontorovich, who argues that the *Sosa* Court has in effect created a “historical test” for ATS claims that rests upon six characteristics of the piracy offense. It is only those international norms which meet this multipart test that will satisfy the *Sosa* test, and Professor Kontorovich concludes that modern human rights offenses do not. As he puts it, “[c]omparing piracy to modern international law norms reveals that new causes of action under the ATS cannot be created without abandoning the fidelity to the historical paradigm mandated by the Court. The ‘door’ that *Sosa* leaves ‘ajar subject to vigilant doorkeeping’ has nothing behind it.”<sup>169</sup>

My argument is not with the six characteristics that Professor Kontorovich cites,<sup>170</sup> nor is it with his conclusion that these characteristics “allowed piracy to become and remain a universally cognizable offense against the law of nations.”<sup>171</sup> Instead, I disagree with his assumption that the Supreme Court intended to base all claims under the ATS on international norms which met each feature of the test.

Professor Kontorovich asserts that the *Sosa* Court holds that: “[f]or specific international law norms to be actionable, Congress must pass specific implementing legislation.”<sup>172</sup> Kontorovich does not, however, cite specific language in the opinion for this proposition, which seems to contradict the Court’s holding.<sup>173</sup> He acknowledges that the Court recog-

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C.L. L. REV. 289 (2005); Eugene Kontorovich, *Implementing Sosa v. Alvarez-Machain: What Piracy Reveals About the Limits of the Alien Tort Statute*, 80 NOTRE DAME L. REV. 111 (2004) (“What Piracy Reveals”). But See, Harold Hongju Koh, *The Ninth Annual John W. Hager Lecture, The 2004 Term: The Supreme Court Meets International Law*, 12 TULSA J. COMP. & INT’L L. 1 (2005); Ralph Steinhardt, *supra* note 12; Beth Stephens, *Sosa v. Alvarez-Machain: “The Door is Still Ajar” for Human Rights Litigation in U.S. Courts*, 70 BROOKLYN L. REV. 533 (2005).

<sup>169</sup> Kontorovich, *What Piracy Reveals*, *supra* note 168 at 115 (citing 542 U.S. at 729).

<sup>170</sup> *Id.* at 114-15 (“First, piracy was a crime in the municipal law of all nations. . . .Second, piracy had a narrow and universally agreed on definition. . . .Third, all nations made piracy punishable by death. . . .Fourth, and perhaps most importantly, pirates were private actors who had refused the protection of their home states by failing to obtain a letter of marque, an easily-secured authorization that would make their conduct perfectly legal. . . .Fifth, piracy occurred on the high seas. While this did not make traditional jurisdiction limitations moot, it did make conventional enforcement difficult, and thus U.J. [Universal Jurisdiction] might seem an attractive auxiliary to domestic prosecution. Finally, pirates indiscriminately attacked the ships of all nations as they were not constrained by ties of national loyalty or the limitations contained in a letter of marque. Thus maritime states had a particularly strong interest in punishing pirates because their ships could fall prey to them and all states would be economically harmed by disruptions of international commerce.”)

<sup>171</sup> *Id.* at 114.

<sup>172</sup> *Id.* at 120.

<sup>173</sup> *See id.*

nizes a narrow set of violations that are directly actionable under the ATS and that these are not limited to the violations that existed at the time the ATS was enacted.<sup>174</sup> However, Professor Kontorovich confuses the reasons for which the Court refers to *piracy* with the *substantive and procedural requirements* of piracy.<sup>175</sup> The Court is quite specific about the reasons for which it is analogizing to customary international law offenses in 1789, and those reasons do not include a requirement that new norms under the ATS correspond in all substantive and jurisdictional aspects to those of piracy. The majority opinion did not even single out piracy among the 18th century offenses, nor did Justice Breyer in the manner which Professor Kontorovich suggests.<sup>176</sup>

The Court made it clear that it looks to 18th century international law violations for a limited purpose: “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.”<sup>177</sup> It is quite a stretch (or spin) to construe that language to require any modern claim under the ATS to meet all the elements of one of those 18th century norms—piracy.

Moreover, Professor Kontorovich unpersuasively attempts to reason backwards from the two other 18th century norms cited by the Court: safe conduct and offenses against ambassadors. He argues that because neither of these offenses are similar to modern human rights claims, the Court could not have meant them to be relevant to the determination of whether a modern claim exists under the ATS.<sup>178</sup> Unfortunately for Professor Kontorovich’s argument, the Supreme Court does in fact refer to all three of the above offenses, not for their particular “features” or specific elements, but for their widespread acceptance and definite content.<sup>179</sup>

<sup>174</sup> *Id.* at 120-121.

<sup>175</sup> *See id.* at 132. *And see*, *United States v. Smith*, 18 U.S. 153 (1820) in which the Supreme Court sought to determine “whether the crime of piracy is defined by the law of nations with reasonable certainty.”

<sup>176</sup> *See* Kontorovich, *What Piracy Reveals*, *supra* note 168 at 132.

<sup>177</sup> *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004).

<sup>178</sup> *See* Kontorovich, *What Piracy Reveals*, *supra* note 168 at 131. He supports this conclusion with a carefully edited quote from Justice Breyer’s opinion: “[T]o qualify for recognition under the ATS a norm of international law ‘must share the features that characterized 18th century norms prohibiting piracy.’” [emphasis added]. The actual full quote is “The Court says that to qualify for recognition under the ATS a norm of international law must have a content as definite as, and an acceptance as widespread as, those that characterized 18th century international norms prohibiting piracy.” 542 U.S. at 760 (Breyer, J., concurring).

<sup>179</sup> Nor do I think it is a fair reading to characterize Justice Breyer’s concurrence as “focus[ing] on the special relevance of piracy to ATS litigation” as Kontorovich does. *What Piracy Reveals*, *supra* note 168 at 135. Instead, Breyer refers to piracy as an

Justice Scalia is of that opinion as well. After arguing that the Court has erred in leaving the federal courts with discretion to find new causes of action under the ATS and explicitly basing his argument on the Bradley and Goldsmith view,<sup>180</sup> he concludes that the Court has endorsed a test that is essentially that of *Filartiga* and the lower court cases following that case:

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>181</sup>

In sum, the Court said what it meant and appears to have meant what it said.

### B. *The Court Would Have Said Something Different If It Were Answering a Different Question*

Interestingly, the “revisionists” got a full airing of their critique. The Supreme Court considered each pillar of their argument—the positivist requirements of *Erie*, separation of powers, federalism and democracy arguments and essentially rejected them all (or at least found them insufficient to support the revisionist conclusions). Revisionists did win a “skirmish;” as the Court agreed the ATS was a purely jurisdictional statute and the immediate “battle” before the Court, in that Alvarez-Machain was found to have no claim on the facts. But they appear to have lost the war.<sup>182</sup> After years of arguing against the “modern position” on a very formalistic basis and after having lost this argument before the Supreme Court, at least two scholars who support the revisionist view of federal common law now argue that the Court incorrectly considered only the formalistic argument. Had it considered a more “functional” argument (one not presented to it), they argue that the Court would in all likelihood have decided otherwise.<sup>183</sup>

Professors Ku and Yoo acknowledge that the revisionist challenge to the traditional approach has been formalistic, resting upon “statutory and

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example of universal jurisdiction. Kontorovich also conveniently fails to mention that Justice Breyer’s “approach” would recognize ATS jurisdiction over “torture, genocide, crimes against humanity and war crimes.” 542 U.S. at 762 (Breyer, J., concurring).

<sup>180</sup> See 542 U.S. at 750. (Scalia, J. , concurring in part and concurring in the judgment).

<sup>181</sup> *Id.*

<sup>182</sup> See Ku & Yoo, *infra* note 183, at 166.

<sup>183</sup> See Julian Ku & John Yoo, *Beyond Formalism in Foreign Affairs: A Functional Approach to the Alien Tort Statute*, 2004 SUP. CT. REV. 153-154 (2004). See also, the authors description of this battle at 166-67.

constitutional text and history.”<sup>184</sup> Although they acknowledge that the *Sosa* decision rejects this argument, they argue that, had the Court considered the functional approach, the result would have been the opposite. This argument is problematic. First, the authors must assume a “statutory purpose” for the ATS: one which favors “the development and enforcement of international law.”<sup>185</sup> Second, they argue that the *Sosa* Court actually adopted the recent critique of the “modern position,” but preserved a federal court role in developing and enforcing CIL because of an “unspoken recognition of the power of the policy goals behind the modern position.”<sup>186</sup> Third, they assume that none of the “functional” concerns they raise were actually taken into consideration by the Court, which is not the case.<sup>187</sup> And finally, their “functional” assessment rests upon one pillar of the revisionists’ formalistic argument: Customary international law is general common law, left to the state courts after *Erie*.<sup>188</sup> This argument is rejected by the *Sosa* Court for “functional” as well as “formal” reasons.

While acknowledging that the *Sosa* Court itself “concludes that the ATS’s purpose is to provide a remedy for CIL violations that have achieved universal consensus,”<sup>189</sup> a purpose emphasized by the Court’s endorsing only a narrow range of claims that may be pursued under the ATS, Ku and Yoo go on to state what they think is the “real” purpose of the statute.<sup>190</sup> This purpose is “to promote the development and enforcement of international law itself.”<sup>191</sup> The authors offer very little support for their view that this is actually *a* purpose or *the* purpose embraced by the *Sosa* Court. The authors flatly state: “[a]lthough the *Sosa* Court did not explicitly embrace this view, its endorsement of lower federal court decisions expanding the scope of the ATS supports this broader purpose.”<sup>192</sup> One is left with the impression that this purpose is designed to illustrate the result sought by the authors under the functional approach: the demonstration that the purpose sought to be achieved by the Supreme Court is in fact better left to the Executive Branch.<sup>193</sup>

Professors Ku and Yoo also attempt to argue that the *Sosa* Court actually agreed with and adopted the revisionist position, but just could not

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<sup>184</sup> *Id.* at 155.

<sup>185</sup> *Id.* at 181.

<sup>186</sup> *Id.* at 155.

<sup>187</sup> *See id.* at 181; *see also supra* notes, 181-185.

<sup>188</sup> *See id.* at 201.

<sup>189</sup> *Id.* at 178.

<sup>190</sup> *Id.* at 179-180.

<sup>191</sup> *Id.* at 180.

<sup>192</sup> *Id.*

<sup>193</sup> *Id.* at 181. (“So today we can say, after *Sosa*, that the ATS promotes a national policy in favor of the development and enforcement of international law. It remains unusual, however, in foreign affairs because it is delegated to the federal courts, rather than the political branches.”) *Id.*

bring itself, for “policy” reasons, to reach the logical conclusion that followed. This is clearly not true. The one piece of revisionist argument that the Court adopted is the conclusion that the ATS is a purely jurisdictional statute.<sup>194</sup> From there on it is all downhill for the revisionists. The Court rejected the revisionist argument that *Erie* rendered CIL a part of general common law left to the States to develop and enforce, which is key to Yoo and Ku’s argument. Instead, the Court traced a long history of federal courts applying customary international law, both pre- and post-*Erie*, and reiterates that federal courts still have the power to make federal common law “in interstitial areas of particular federal interest”<sup>195</sup> and retain “competence to make judicial rules of decision of particular importance to foreign relations.”<sup>196</sup> The opinion notes that:

*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>197</sup>

The Court cited with seeming approval Professor Jessup’s view that *Erie* was never intended to alter the ability of federal courts to deal with customary international law.<sup>198</sup> After reviewing the application of customary international law as federal common law over the centuries, the Court concluded that “[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>199</sup> It also would take some explaining to make those statements and conclusions an acceptance of the revisionist view of federal common law and its relationship to customary international law.

With regard to separation of powers questions, the Supreme Court, while recognizing a role for the executive branch, refused to apply any kind of *per se* rule that would require deference to the political branches. The Bush Administration supported the petitioner *Sosa* before the Supreme Court, attempting to argue that matters of National Security and the Executive’s ability to deal with foreign affairs would be threatened by allowing the federal courts to provide a remedy for human

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<sup>194</sup> See *supra* notes 111-114 and accompanying text.

<sup>195</sup> *Sosa v. Alvarez-Machain*, 542 U.S. 692, 726 (2004).

<sup>196</sup> *Id.*

<sup>197</sup> *Id.* at 729 (citation omitted).

<sup>198</sup> *Id.* at 730, n. 18. (“*Sabbatino* itself did not directly apply international law . . . but neither did it question the application of that law in appropriate cases, and it further endorsed the reasoning of a noted commentator who had argued that *Erie* should not preclude the continued application of international law in federal courts.”).

<sup>199</sup> *Id.*

rights violations in other countries.<sup>200</sup> Even in the face of that argument, the Court left discretion to create these private rights of action in the hands of federal judges. The Court did recognize that “the general practice has been to look for legislative guidance before exercising innovative authority over substantive law”<sup>201</sup> and that “this Court has recently and repeatedly said that a decision to create a private right of action is one better left to legislative judgment in the great majority of cases.”<sup>202</sup> It also recognized that:

[the] possible collateral consequences of making international rules privately actionable argue for judicial caution . . . 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.<sup>203</sup>

But the Court found some direction from the First Congress which enacted the ATS with (the Court found) the expectation that it would apply to certain existing offenses under the law of nations, and notes that in the twenty plus years since *Filartiga* Congress has not only not overturned the federal courts’ actions, but actually responded approvingly in the TVPA.<sup>204</sup>

## VI. WHERE THINGS REALLY STAND AFTER *SOSA*

### A. *What the Court Intended to Hold in Sosa*

Justice Scalia is certainly correct in his characterization of the majority’s decision in *Sosa*.<sup>205</sup> His position is that the Court purports to adopt a narrow and restrained view of the use of CIL to create federal common law claims, but in fact adopts as its standard the language that led to the

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<sup>200</sup> See Reply Brief for the United States as Respondent Supporting Petitioner at 19, *Sosa v. Alvarez-Machain* 2004 WL 577654 (U.S.) (“[C]onstruing a statute to have extraterritorial effect would be likely to intrude on matters pertaining to the conduct of foreign affairs by the political branches”).

<sup>201</sup> 542 U.S. at 726.

<sup>202</sup> *Id.* at 727.

<sup>203</sup> *Id.*

<sup>204</sup> See *id.* at 728, which provides:

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*, 670 F.2d 876 (2d Cir. 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 (D.C. Cir. 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.

*Id.* at 731.

<sup>205</sup> See *id.* at 739-751.

proliferation of ATS cases in the lower courts.<sup>206</sup> This leads necessarily to the question of what the Court has adopted here – is it a narrow test or a broad test? I would suggest it may be both. The Court has fashioned two roles for the federal courts in applying the ATS, both relying upon federal common law. The first role is to ascertain whether there has been a tort in violation of customary international law. This goes to the question of federal subject matter jurisdiction and requires the federal court to determine what customary international law is and whether there has been a violation of the relevant norm. You will recall that the Court in *Sosa* initially concluded that the ATS was a purely jurisdictional statute, but one which Congress enacted knowing that certain common law causes of action establishing personal liability would fall within its ambit. Accepting that members of Congress would have understood the evolving nature of CIL, the Court goes on to recognize that violations of this new CIL may also fall within ATS jurisdiction. It is as to this part of the analysis that the Court adopts the “definite, universal and obligatory” test to which Justice Scalia objected. He found the test overly broad in that it encourages the federal courts to expand the international norms that fall within ATS jurisdiction.

It is only when such a norm is established that the Court should proceed to perform its second role, which is to make the determination as to whether a private right of action should be implied under federal common law.<sup>207</sup> Because the *Sosa* court found that the plaintiff had failed to establish that such an international norm had been violated, it never considered whether such a norm would have supported the creation of a private right of action. Though indirectly dependent upon the international law norm, this second step in the ATS analysis arguably is essentially dependent on domestic law doctrine.<sup>208</sup>

Because the Court never reached the second question, it never clarified the role that its five “considerations” counseling judicial restraint are to play. The remainder of this section will consider two possible approaches regarding these considerations (and the other “practical consequences” of finding such a private right of action that the Court suggests are relevant). In addition, the case law post-*Sosa* will be analyzed in order to see if it reveals any emerging consensus as to the application of the ATS.

The starting point is my conclusion that Justice Souter’s opinion, in particular Part IV of the opinion, is not a model of judicial opinion writing.<sup>209</sup> There are many instances in which the sprawling nature of the

<sup>206</sup> See *supra* notes 120-133 and accompanying text.

<sup>207</sup> See *id.* at 738, n. 30. The Court asserted that only when such a clear and universal norm is established will it consider “even the possibility of a private right of action.” *Id.*

<sup>208</sup> See, e.g., *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971); *Texas Indus. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981).

<sup>209</sup> *Sosa*, 542 U.S. at 724-739.

opinion and the various footnote digressions make the Court's intentions less than clear and perhaps contribute to the "spinning" identified in the preceding section. Nonetheless, let me suggest two possible approaches regarding the Court's language of judicial restraint. The first would be that the Court raised the cautionary principles, considered them and then devised a "test" or a "standard" that is meant to encompass those considerations. So by concluding that a definite and obligatory norm of CIL exists, the violation of that norm would give rise to a private right of action. The second approach would use the definite and obligatory test to establish only the question of subject matter jurisdiction, while the cautionary principles would then go to the question of whether the court should recognize a private right of action.

B. *The Five Considerations are Subsumed into the "Specific, Universal and Obligatory" Test:*

In terms of the Court's opinion, the argument for this approach is largely structural. The Court set out the five considerations it thought would counsel judicial restraint and then discussed the need to derive a standard or set of standards for assessing the claim before it.<sup>210</sup> The opinion goes on to say, somewhat oddly, that:

[w]hatever 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

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<sup>210</sup> See *id.* at 725-27. In summary, the Court indicates that these reasons: . . . argue for judicial caution when considering the kinds of individual claims that might implement the jurisdiction conferred by the early statute. First, the prevailing conception of the common law has changed since 1789 in a way that counsels restraint in judicially applying internationally generated. . . . Second, along with, and in part driven by, that conceptual development in understanding common law has come an equally significant rethinking of the role of the federal courts in making it. *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938) . . . Third, this Court has recently and repeatedly said that a decision to create a private of action is one better left to legislative judgment in the great majority of cases . . . While the absence of congressional action addressing private rights of action under an international norm is more equivocal than its failure to provide such a right when it creates a statute, the possible collateral consequences of making international rules privately actionable argue for judicial caution . . . Fourth, the subject of those collateral consequences is itself a reason 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 cause should make courts particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs . . . The fifth reason is particularly important in light of the first four. We have no congressional mandate to seek out and define new and debatable violations of the law of nations, and modern indications of congressional understanding of the judicial role in the field have not affirmatively encourage greater judicial creativity.

and acceptance among civilized nations that the historical paradigms familiar when § 1350 was enacted.<sup>211</sup>

The opening phrase of that quote seems to suggest the Court is leaving to another day what the “ultimate criteria” for such a claim might be.

An argument against this approach is that it comes perilously close to the holding in some pre-*Sosa* cases that the ATS provides both subject matter jurisdiction and a cause of action.<sup>212</sup> The Court clearly rejected this position in its opinion, but if one can establish subject matter jurisdiction and a private right of action by establishing the violation of a norm meeting the definite content and acceptance test, then it is hard to see the difference - and Justice Scalia’s worst fears may prove true.

C. *The Five Considerations as a Separate Step in Determining Whether a Private Right of Action Exists*

This approach would provide for a two step analysis in which a Court would first establish that federal subject matter jurisdiction existed under § 1350 by establishing the violation of a norm of customary international law that meets the specific, universal and obligatory standard. Then, that threshold test having been met, the court would go on to consider whether it should create a private right of action based upon Supreme Court jurisprudence regarding the creation of such a right and taking into account the five considerations which would operate as potential constraints upon the court’s exercise of its discretion.

This approach at least gives some weight to the Court’s language of judicial restraint and would, one hopes, result in a jurisprudence in the ATS area that is consistent with the Court’s other case law regarding private rights of action. A few things argue against this approach, including the existing case law in the ATS area which the Court cites with approval in *Sosa* and which recognizes private claims without such an analysis. Those cases seem to offer the possibility of the recognition of such rights on a basis more generous than that found in the Court’s general jurisprudence regarding private rights of action. In addition, the Court’s own language at various points in the opinion seems to merge the jurisdiction and private right of action issues, or at least fails to make it clear that the Court views these as entirely separate considerations.<sup>213</sup>

There is, moreover, footnote 21 in *Sosa* and the language of the opinion to which it refers.<sup>214</sup> After having set out the standard by which it will evaluate Alvarez-Machain’s claim, and noting that it is consistent with the reasoning in several lower court cases,<sup>215</sup> the Court adds: “and the deter-

<sup>211</sup> *Sosa*, 542 U.S. at 732.

<sup>212</sup> See *supra* note 30.

<sup>213</sup> See 542 U.S. at 732.

<sup>214</sup> See *id.*

<sup>215</sup> *Id.*

mination whether a norm is sufficiently definite to support a cause of action should (and, indeed, inevitably must) involve an element of judgment about the practical consequences of making that cause available to litigants in the federal courts.”<sup>216</sup> These “practical consequences” are not spelled out, but in footnote 21, the Court states “[t]his requirement of clear definition is not meant to be the only principle limiting the availability of relief in the federal courts for violations of customary international law, though it disposes of this action.”<sup>217</sup> The Court goes on to raise two other “principles” that might limit the availability of relief in specific cases: exhaustion of domestic remedies and a “policy of case-specific deference to the political branches.”<sup>218</sup> Several things are odd about this language. First, if the “five considerations” are to serve as limitations on a plaintiff’s private right of action, then it certainly seems redundant to say that the clear definition requirement is not the “only principle limiting the availability of relief in the federal courts for violations of customary international law.”<sup>219</sup> Second, the footnote appears to raise these “principles” as limiting the test which this two-step analysis would arguably apply only to the question of subject matter jurisdiction (though this is one of the places in the opinion where the Court does not clearly separate the jurisdictional from the private right of action question). Two possible explanations for this juxtaposition exist: first, that the two principles raised do go to the question of jurisdiction; or that the first approach is correct and the specific, universal and obligatory test establishes both subject matter jurisdiction and a cause of action, subject to this type of limitation.

#### D. *The Post-Sosa Case Law*

Obviously, not enough time has passed since the decision in *Sosa* to say definitively whether a consensus is developing in the lower courts regarding its application. However, several ATS cases have been decided in both the districts courts and the courts of appeals and provide an interesting sense of the early judicial response to *Sosa*. Many of the cases acknowledged that the ATS and TVPA may give plaintiffs a private right of action for violations of CIL.<sup>220</sup> These cases referred to *Sosa* and to the

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<sup>216</sup> *Id.* at 732-733.

<sup>217</sup> *Id.* at 733, n. 21.

<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

<sup>220</sup> *See, e.g.,* *Aldana v. Del Monte*, 416 F.3d 1242 (11th Cir. 2005); *Arce v. Garcia*, 400 F.3d 1340 (11th Cir. 2005); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 2005 WL 2082846 (S.D.N.Y.); *Chavez v. Carranza*, 413 F. Supp. 2d 891 (W.D. Tenn. 2005); *Doe v. Saravia*, 348 F. Supp. 2d 1112 (E.D. Cal. 2004); *Mujica v. Occidental Petroleum*, 381 F. Supp. 2d 1164 (C.D. Cal. 2005); *JAMA v. U.S.I.N.S.*, 343 F. Supp. 2d 338 (D.N.J. 2004).

Court's holding that new causes of action may be recognized,<sup>221</sup> but also noted the Court's cautionary language and possible constraints on the exercise of judicial discretion.<sup>222</sup> Most of these cases do not, however address the "five considerations" in determining whether<sup>223</sup> a claim exists under the ATS, and in fact proceed much as the first approach above suggests – finding a specific, universal and obligatory norm of CIL which has been violated and then finding based on that violation that a private right of action exists, often with no real discussion of that determination. There is not a case yet which extensively analyzes the private right of action piece of the *Sosa* approach.

There is also a handful of cases that did not allow an ATS claim to go forward on a variety of grounds.<sup>224</sup> Interestingly, it is difficult to see the impact of *Sosa* on these rulings, though of course the Supreme Court is quoted extensively in most of them. But for the most part they would, I think, have been decided the same way pre-*Sosa*. Most of them turn on the plaintiffs' failure to establish a definite, obligatory norm of customary international law.<sup>225</sup> The possible exception is the *Enahoro* case, which relies heavily on the language of the *Sosa* case to conclude that the TVPA completely supplants the ATS with regard to claims for torture and extra-judicial killing.<sup>226</sup> This means, according to the *Enahoro* court, that these claims may only be brought under the TVPA and are subject to its limita-

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<sup>221</sup> See, e.g., *Aldana*, 416 F.3d at 1246 ("According to the Court, causes of action under the ATA are not static; new ones may be recognized. . . .").

<sup>222</sup> *Id.* at 1246-47 ("But the Court said the federal courts should exercise 'great caution' when considering new causes of action and maintain 'vigilant doorkeeping' . . . thus [opening the door] to a narrow class of international norms [recognized] today.").

<sup>223</sup> There will occasionally be reference to pre-*Sosa* precedent as supporting this position. See, e.g., *Aldana*, 416 F.3d at 1250.

<sup>224</sup> See, e.g., *Enahoro v. Abubakar*, 408 F.3d 877 (7th Cir. 2005); *Weiss v. American Jewish Committee*, 335 F. Supp. 2d 469 (S.D.N.Y. 2004); *Arndt v. UBS AG*, 342 F. Supp. 2d 132 (E.D.N.Y. 2004); *In re South African Apartheid Litigation*, 346 F. Supp. 2d 538 (S.D.N.Y. 2004); *Hwang Geum Joo v. Japan*, 413 F.3d 45 (D.C. Cir. 2005).

<sup>225</sup> See, e.g., *Weiss*, 335 F. Supp. 2d at 476-77 (finding plaintiffs failed to plead a tort in violation of customary international law in seeking to prevent the building of a memorial in a former death camp, which might have itself desecrated the site); *Arndt*, 342 F. Supp. 2d at 139 (finding German plaintiffs did not identify any principle of international law that they rely on in an attempt to sue German corporations which allegedly profited under the Nazi regime); *In re South African Apartheid*, 346 F. Supp. 2d at 548 (finding "none of the theories pleaded by plaintiffs support jurisdiction under the ATCA" in their attempt to sue corporations which had done business with the former government).

<sup>226</sup> See *Enahoro*, 408 F.3d at 884-85.

tions regarding exhaustion and the statute of limitations, as well as the definitions of the substantive claims provided by the TVPA.<sup>227</sup>

In summary, there are four aspects of the post-*Sosa* jurisprudence we can definitively observe from the case law thus far. First, no case has found that there is good subject matter jurisdiction under the definiteness test, and then used the “five considerations” to find no cause of action (approach number 2 in the preceding section). Second, to the contrary, language in several cases suggests that something like approach number one is being followed.<sup>228</sup> Third, no case has rejected a prior, clearly-established norm creating a cause of action.<sup>229</sup> Fourth, no new causes of action have been recognized. The language of caution and judicial restraint appears in several of the cases, suggesting that a certain “chilling effect” may operate with regard to the creation of new claims.

## VII. CONCLUSION

In conclusion, I would like to propose a “third approach” which combines features of the first two approaches outlined above, but which I think comes closest to reflecting both the intention of the Supreme Court in *Sosa* and the reality of what the lower courts are doing. The Court appears to be giving significant weight to the determination of whether a claim being asserted rests “on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th century paradigms we have recognized.”<sup>230</sup> Remember that under the “18th century paradigms” to which the Court refers, the ATS, as a jurisdictional statute, was nonetheless held to be applicable to certain existing international norms to which personal liability was attached. In my view, while the Court seemingly wants to keep the notions of jurisdiction and cause of action separate, it has at a minimum created a presumption that once such a norm is established and is shown to have been violated, not only does ATS subject matter jurisdiction exist, but a substantive cause of action exists as well. In accord with this model, the Court reserves to the federal courts a measure of discretion in deciding whether to hear such a case. The exercise of this discretion might entail weighing of the five considerations, as well as the practical consequences of such a case proceeding. This discretion, of course, leaves open

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<sup>227</sup> See *id.*; but see, *supra* note 211 and accompanying text (rejecting *Enahoro* court’s view and finding subject matter jurisdiction and private rights of action for torture or extrajudicial killing or both under the ATS).

<sup>228</sup> Especially interesting is language in *Aldana v. Del Monte*, 416 F.3d at 1250. “In *Abebe-Jira*, 72 F.3d 844, 847-48 (11th Cir. 1996), we construed the Alien Tort Act as conferring both a forum and a private right of action. Noting in *Sosa* changes this conclusion; in fact, it confirms it.”

<sup>229</sup> A couple of cases rejected what might be valid international norms based upon the facts of the case (much like *Sosa*). See, e.g., *Aldana*, 416 F.3d at 1246-47.

<sup>230</sup> *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724 (2004).

the possibility of a court's rejecting a claim based upon other considerations, such as the act of state doctrine, the political question doctrine or *forum non conveniens*. Such an approach does give a dual purpose to the specificity and acceptance test which the Court has posited, but the test itself (as cases over the last twenty-five plus years have demonstrated) provides ample restraint by limiting the international law cases heard by the federal courts to those alleging the most egregious and universally condemned violations.