

**THE VIABILITY OF GUANTÁNAMO BAY DETAINEES' ALIEN
TORT STATUTE CLAIMS SEEKING DAMAGES FOR
VIOLATIONS OF THE INTERNATIONAL LAW AGAINST
ARBITRARY DETENTION**

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I. INTRODUCTION

Faithful adherence to the United States Constitution's separation of powers doctrine is most uncertain when national security is threatened. During these times, when expediency and unwavering resolve are generally considered paramount, the balance of national power, largely as a consequence of public support, has historically shifted in one direction—toward the executive.¹ This shift in national power reduces the effectiveness of the power of the other governmental branches, and renders unstable the national power structure. Aside from the natural unsteadiness generated by a power imbalance, such a shift causes the nation to feel tremors for years to come because the contours of the recalibrated powers are often ill-defined. As a result, a struggle for the right to define the provisional scope of our governmental powers during difficult times emerges and manifests itself, most conspicuously, in the courtroom. The courtroom becomes the center of attention as individuals urge judicial review of violations of rights on the basis of executive action, while the executive argues to foreclose review of such claims on the basis of broad executive power in times of national insecurity. This Comment analyzes the consequences and implications of one such struggle: the

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¹ See Newshour with Jim Lehrer Transcript, Presidential Power, Dec. 24, 2001, available at http://www.pbs.org/newshour/bb/white_house/july-dec01/hist_12-24.html. For a discussion on the constitutional scope of presidential power during national insecurity, see John C. Yoo and Neil J. Kinkopf, What are the Limits of Presidential Power? at http://www.legalaffairs.org/webexclusive/debateclub_presidentialpower1105.msp (last visited February 24, 2007).

disposition of arbitrary detention claims brought by Guantánamo Bay detainees under the Alien Tort Statute (ATS).²

While courts have been open to habeas relief claims brought by those detained by the United States in Guantánamo as part of the “War on Terror,”³ they have been closed to ATS claims against the government for violations of fundamental human rights prohibited by international law.⁴ Thus, these claims have been dismissed without substantial review.⁵ In such cases, the courts have deferred to the executive, holding that sovereign immunity and military authority bar judicial review of executive action in war time.⁶ However, even if courts were to consider detainee ATS claims of arbitrary detention on their merits (that is, if they were to decide whether arbitrary detention is a violation of the law of nations and, if so, whether such a violation had occurred in the case at hand), *Sosa v. Alvarez-Machain*⁷ has given many reasons to believe that the courts may not deem arbitrary detention a violation of the law of nations.⁸

The ATS provides that “[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”⁹ Similar to the broad language suggested by the ATS text, the United States Court of Appeals for the Second Circuit in *Filartiga v. Pena-Irala*¹⁰ broadly interpreted the ATS, finding that an alien may bring a civil action in United States federal courts for any violation of the law of nations, as evidenced by “the general assent of civilized nations” or

² Judiciary Act of 1789, ch. 20, § 9(b), 1 Stat. 73, 77 (codified at 28 U.S.C. § 1350 (1789)).

³ See *Rasul v. Bush*, 542 U.S. 466, 485 (2004) (holding that federal courts have jurisdiction to determine “the legality of the Executive’s potentially indefinite detention of individuals who claim to be wholly innocent of wrongdoing”).

⁴ See, e.g., *In Re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 480–81 (D.C. Cir. 2005); *Khalid v. Bush*, 355 F. Supp. 2d 311, 326 n.19 (D.D.C. 2005); *Al Odah v. United States*, 321 F.3d 1134, 1150 (D.C. Cir. 2003) (Randolph, J., concurring), *aff’d*, 321 F.3d 1134 (D.C. Cir. 2003); *Rasul v. Bush*, 215 F. Supp. 2d 55, 64 n.11 (D.D.C. 2002), *rev’d on other grounds*, 542 U.S. 466 (2004) (denying federal courts jurisdiction over habeas relief claims brought by aliens in the Executive’s detention).

⁵ See, e.g., cases cited *supra* note 4.

⁶ See, e.g., cases cited *supra* note 4.

⁷ 542 U.S. 692 (2004).

⁸ See generally Eugene Kontorovich, *Implementing Sosa v. Alvarez-Machain: What Piracy Reveals about the Limits of the Alien Tort Statute*, 80 NOTRE DAME L. REV. 111, 115 (2004) (arguing that “[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 paradigms mandated by [*Sosa*]”).

⁹ 28 U.S.C. § 1350 (1789).

¹⁰ 630 F.2d 876 (2d Cir. 1980).

U.S. treaty.¹¹ In *Sosa*, however, the Supreme Court of the United States narrowly interpreted the ATS, purporting to severely limit the substantive claims that may be brought under the statute.¹²

In Part II, this Comment explains the development of the ATS in U.S. courts. This section discusses the historical context and purpose of the ATS, the advent of the modern approach to the ATS as first espoused in *Filartiga* and the Supreme Court's recent interpretation of the Statute in *Sosa*. It also identifies the analytical differences between the approaches used in *Filartiga* and *Sosa* to interpret the ATS in this section. Part III discusses the standards set out in *Sosa*, the international law condemnation of arbitrary detention and the implication of *Sosa* on the substantive rights for detainees held indefinitely in Guantánamo Bay as "enemy combatants," to bring ATS claims for arbitrary detention. Finally, pursuant to the application of the *Sosa* standard of analysis, the Comment concludes in this section that the prohibition against arbitrary detention is an actionable law of nations under the ATS. Additionally, it further concludes that the Guantánamo Bay detentions are arbitrary according to the law of nations because the law of nations requires access to procedural protections for such detainees. Next, in Part IV, the Comment discusses the issue of sovereign immunity as a bar to ATS litigation. This section concludes that sovereign immunity does not provide a bar to these ATS claims because the "military authority" exemption to the Administrative Protection Act (APA) waiver of sovereign immunity does not apply when the complaint arises from the military's engagement of non-state actors beyond the field of battle.¹³ Additionally, it reaches this

¹¹ See *id.* at 880–81 (quoting *The Paquete Habana*, 175 U.S. 677, 694 (1900)).

¹² *Sosa*, 542 U.S. at 745–49.

¹³ It is also arguable that the recently enacted Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (the "MCA") bars detainee ATS actions against United State officials. Section 5(a) of the MCA provides:

IN GENERAL – No person may invoke the Geneva Conventions or any other protocol thereto in any habeas corpus or other civil action or proceeding to which the United States, or a current or former officer, employee, member of the Armed Forces, or other agent of the United States is a party as a source of rights in any court in the United States or its States or territories.

Id. However, many arguments can be made to challenge the application of the MCA to detainee ATS claims, especially pending claims. For instance, it can be argued that the section 5(a) does not apply retrospectively to pending ATS cases because, unlike numerous other provisions therein, it does not expressly state that it applies to pending cases. See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2765 (2006) ("A familiar principle of statutory construction . . . is that a negative inference may be drawn

conclusion because the prohibition against arbitrary detention is a fundamental human right at international law from which no derogation is permitted. In conclusion, this Comment asserts that the Bush Administration overreaches in its attempt to foreclose judicial review of the Guantanamo detainees' arbitrary detention claims under the ATS. Additionally, it posits that the Bush Administration's policy with respect to the ATS is short-sighted because, in an attempt to achieve absolute protection against claims of international law violations, it abandons the United States' central role in shaping international human rights law. This Comment proposes instead that federal courts fulfill their constitutional responsibility by asserting their authority to review substantive ATS claims against state action carried out by government actors.

II. THE DEVELOPMENT OF THE ATS IN THE COURTS

A. *Historical Context and Purpose of the ATS*

The origins of the ATS are largely uncertain because the debate in the Senate over the Judiciary Act of 1789, which contains the ATS, was not recorded and the recorded debate in the House made no mention of the ATS.¹⁴ Nevertheless, the historical context of its enactment suggests that the ATS arose in response to Constitutional Convention delegates' concern "with establishing and distributing authority in the federal government, rather than in the states, over matters affecting foreign relations," which was thought to be crucial for the establishment and survival of a new nation.¹⁵ In furthering this

from the exclusion of language from one statutory provision that is included in other provisions of the same statute."). This conclusion is supported in the fact that Congress rejected the Bush Administration-sponsored bill, which contained a general provision providing for retroactive application of the entire Act. Bringing Terrorists to Justice Act of 2006, S. 3861, 109th Cong. § 9 (placed on calendar in Senate, Sept. 8, 2006). Even if section 5 is found to be unambiguously prospective, however, it would likely fail to overcome the "presumption against retroactive legislation," which can only be overcome when its "language compels this result." *Landgraf v. USI Films Products*, 511 U.S. 244, 272 (1994); *see also* *INS v. St. Cyr*, 533 U.S. 289, 316–17 (2001) ("Cases where this Court has found truly 'retroactive' effect adequately authorized by statute have involved statutory language that was so clear that it could sustain only one interpretation."). Thus, assuming that Congress did have the authority to strip the federal courts of jurisdiction over ATS claims brought by detainees, it is by no means clear that the MCA strips the courts of jurisdiction over pending ATS claims.

¹⁴ 1 ANNALS OF CONG. 782–833 (J. Gales ed., 1789).

¹⁵ Kenneth C. Randall, *Federal Jurisdiction over International Law Claims: Inquires into the Alien Tort Statute*, 18 N.Y.U. J. INT'L L. & POL. 1, 11 (1985).

end, the delegates “understood the importance of international law.”¹⁶ They knew that a “young nation’s ability to maintain peaceful relations would depend largely on its compliance with the law of nations and with its treaty obligations.”¹⁷ Historical investigation also reveals that “the drafters [of the Judiciary Act] thought it necessary to confer jurisdiction in the federal courts over actions involving aliens” because such actions commonly affected foreign relations and because of the belief that the United States should take responsibility for its injuries to aliens.¹⁸ More generally, the drafters of the Judiciary Act may have conferred jurisdiction in the federal courts over actions involving aliens because federal law governs immigration and naturalization.¹⁹

It was not unusual for Congress at the time to enact a statute that would provide federal courts with jurisdiction over causes of action arising from violations of the laws of nations because the law of nations had been considered part of the common law.²⁰ This sentiment, which provides a general motive for the ATS enactment, was echoed more than 100 years later, in *Paquete Habana*,²¹ where the Supreme Court of the United States held that “international law is part of our law and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination.”²² Thus, it is not surprising that Congress did not expend considerable time debating the merits of the ATS in federal courts.

¹⁶ *Id.* at 12 (“By the eighteenth century, the law of nations was part of the law of England and thus applied to the colonies With American independence in 1776, English law in the colonies—including the law of nations—was ‘received’ as common law in America.”).

¹⁷ *Id.*

¹⁸ *Id.* at 15–17.

¹⁹ U.S. CONST. art. I, § 8.

²⁰ See *Filartiga v. Pena-Irala*, 630 F.2d 876, 886 (2d Cir. 1980) (“The law of nations forms an integral part of the common law. . . . [I]t became a part of the common law of the United States upon the adoption of the Constitution. Therefore, the enactment of the Alien Tort Statute was authorized by Article III”); see also *Republica v. De Lonchamps*, 1 U.S. (1 Dall.) 113, 116 (1784) (applying the law of nations protecting the personhood of ambassadors in a prosecution of a person who had assaulted the French Counsel-General to the United States).

²¹ 175 U.S. 677 (1900).

²² *Id.* at 700.

B. *The Modern ATS: Filartiga v. Pena-Irala and Deference to International Definition of the Laws of Nations.*

The Second Circuit infused the ATS with meaning in *Filartiga*, where two Paraguayan citizens in the U.S. on a visitor's Visa brought an action against another Paraguayan citizen for allegedly torturing their son in Paraguay and, thereby, wrongfully causing his death.²³ In *Filartiga*, the court held that "deliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human rights, regardless of the nationality of the parties. Thus, whenever an alleged torturer is found and served with process by an alien within our borders, the [ATS] provides federal jurisdiction."²⁴

In *Filartiga*, the court treated the ATS as a grant of subject-matter jurisdiction to recognize and adjudicate claims that violate the law of nations.²⁵ As such, it had to determine whether *Filartiga* had asserted a claim based on a violation of a law of nations.²⁶ This question, however, immediately gave rise to the dispute about which governmental body is entitled to define the substance of an ATS claim, Congress or the judiciary. The defense argued that Article III of the federal Constitution did not permit federal courts to exercise jurisdiction over non-statutory claims.²⁷ The plaintiff asserted that, in the absence of implementing legislation, the judiciary is charged with determining whether the complaint alleges a violation of the law of nations.²⁸ The court weighed in squarely on the plaintiff's side, indicating that it was the judiciary's duty to define the substance of ATS claims. The court explained:

[c]ommon law courts of general jurisdiction regularly adjudicate transitory tort claims between individuals over whom they exercise personal jurisdiction, wherever the tort occurred. Moreover, as part of an articulated scheme of federal control over external affairs, Congress provided in the first Judiciary Act for federal jurisdiction over suits by aliens where principles of international law

²³ See *Filartiga*, 630 F.2d at 878–80.

²⁴ *Id.* at 878.

²⁵ See *id.* at 880.

²⁶ *Id.*

²⁷ Defendant Appellee's Brief in Support of Judgment of Dismissal at 8–11, *Filartiga v. Pena-Irala*, 630 F. 2d 876 (2d Cir. 1980) (No. 79-6090).

²⁸ Appellants' Reply Brief at 14–16, *Filartiga v. Pena-Irala*, 630 F. 2d 876 (2d Cir. 1980) (No. 79-6090).

are in issue. The Constitutional basis for the [ATS] is the law of nations, which has always been part of the federal common law.²⁹

Further, as evidence that international law exists in federal courts in the absence of congressional legislation, the court invoked Chief Justice Marshall's statement that "an act of [C]ongress ought never to be construed to violate the law of nations, if any other possible construction remains."³⁰ Thereby, the court explained that since the judiciary had traditionally sought to construe federal legislation so as to comport with the law of nations, the law of nations had been treated as part of the federal common law.³¹

With confidence that it had subject-matter jurisdiction over ATS claims, the court next explained the source of the law of nations.³² The law of nations, the court indicated, "may be ascertained by consulting the works of jurists . . . or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law."³³ The court also cited Article 38 of the Statute of the International Court of Justice, which provides the following list sources of international law: (a) international conventions, i.e. treaties; (b) "international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilized nations;" and (d) "judicial decisions and the teachings of the most highly qualified publicists of the various nations."³⁴ Next, because international custom was the basis of *Filartiga's* claim, the court had to decide when a custom has evolved (or ripened) into a law of nations.³⁵ To this end, the court adopted the standard articulated by the Supreme Court in *Paquete Habana*, which found that an "[international] standard that began as one of comity only had ripened . . . into 'a settled rule of international law [by] the general assent of civilized nations'" over many years.³⁶ Thus, the court stated "it is clear that courts must interpret international law not as it was in 1789, but as it has evolved

²⁹ *Filartiga*, 630 F.2d at 885. *Filartiga* does not recognize the problem of claiming that the law of nations is part of the federal common law that the Supreme Court focuses on in *Sosa*—namely, that since common law today is no longer considered to be derived from natural law, but rather the will of a judge, there is a strong inclination to only give force to written, i.e. statutory, law.

³⁰ *Id.* at 887 n.20 (quoting *The Charming Betsy*, 6 U.S. (2 Cranch) 64, 67 (1804)).

³¹ *Id.*

³² *Id.* at 880 (citing *U.S. v. Smith*, 18 U.S. (5 Wheat.) 153, 160–61 (1820)).

³³ *Id.*

³⁴ *Id.* at 881 n.8 (citing *The Statute of the International Court of Justice*, art. 38, 59 Stat. 1055, 1–60 (1945)).

³⁵ *Filartiga*, 630 F.2d at 881.

³⁶ *Id.* (quoting *Paquete Habana*, 175 U.S. 677, 694 (1900)).

and exists among the nations of the world today.”³⁷ The court, however, also acknowledged that the requirement of the “general assent” by of civilized nations” greatly limits the number of claims that can be based on a violation of an international law of nations.³⁸

As evidence of international customary practice, *Filartiga* recognized that torture has been renounced as “an instrument of official policy by virtually all of the nations of the world.”³⁹ The court referred to opinions of international jurists and universal condemnation of torture in international agreements to conclude that torture was a violation of the law of nations and, thus, an actionable tort under the ATS.⁴⁰ More specifically, the court first noted that “[d]istinguished international scholars” vouched that the law of nations prohibits use of torture.⁴¹ Then, it listed international agreements that contained provisions barring torture, among which were the Universal Declaration of Human Rights⁴² and the United Nation’s Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment (“the Declaration”).⁴³ The court identified the latter as providing reparations for torture victims, indicating that “[w]here it is proved that an act of torture or other cruel, inhuman or degrading treatment or punishment has been committed by or at the instigation of a public official, the victim shall be afforded redress and compensation, in accordance with national law.”⁴⁴ Further, the court explained that the Declaration provides a detailed breakdown of state obligations and responsibilities.⁴⁵ As especially relevant, the court pointed to Article Three of the Declaration, which provides that “[e]xceptional circumstances such as a state of war or a threat of war, internal political in-

³⁷ *Filartiga*, 630 F.2d at 881.

³⁸ *Id.* (citing *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428–30 (1964) (where citizens alleged that the Cuban government’s expropriation of the assets of a foreign corporation was a violation of customary international law, as an example of an action that civilized nations have not generally agreed to prohibit)).

³⁹ *Id.* at 880.

⁴⁰ *Id.* at 879 n.4, 881.

⁴¹ *Id.* at 879 n.4.

⁴² G.A. Res. 217A(III), art. 5, U.N. GAOR, 3d Sess., 1st plen. mtg. U.N. Doc. A/810 (Dec. 10, 1948) (“no one shall be subject to torture”).

⁴³ See *Filartiga*, 630 F.2d at 882; G.A. Res. 3452, U.N. GAOR, 30th Sess., Supp. No. 34, at 91, U.N. Doc. A/1034 (Dec. 9, 1975) (expressly prohibiting states from permitting acts of torture and was adopted by the general assembly without dissent).

⁴⁴ *Filartiga*, 630 F.2d at 883. In the United States, the ATS is the national law that could provide redress for such violations because it provides for redress for victims of violations of international law. 28 U.S.C. § 1350 (1992).

⁴⁵ See *Filartiga*, 630 F.2d at 883.

stability or any other public emergency may not be invoked as a justification of torture or other cruel, inhuman or degrading treatment or punishment.”⁴⁶ Although the court recognized that United Nations Declarations are not binding per se, it found that they may be a source of the law of nations because they “create[] an expectation of adherence, and ‘insofar as the expectation is gradually justified by state practice, a declaration may by custom become recognized as laying down rules binding upon the states.’”⁴⁷ Additionally, the court explained, “Paraguay’s renunciation of torture as a legitimate instrument of state policy . . . [did] not strip the tort of its character as an international law violation, if it in fact occurred under color of government authority.”⁴⁸

Filartiga remains a powerful example of how the federal courts can enforce international human rights. *Filartiga* is significant because its analytical approach called for deference to the international community’s judgment, as embodied in a host of conventions and practices, for evidence of international customary law. As such, it reflected trust in the judgment and commitment manifested by the international community to define and prohibit international law. Further, for many, *Filartiga* embodies the true spirit of ATS—the notion that the judiciary has a constitutional mandate to enforce international law. At the time, this notion was recognized by the Carter Administration, which, in support of judicial authority under the ATS, stated that “[l]ike many other areas affecting international relations, the protection of fundamental human rights is not committed exclusively to the political branches of government.”⁴⁹ Instead, the Carter Administration indicated:

It should be apparent that the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions re-

⁴⁶ G.A. Res. 3452, *supra* note 43. *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443 (D.C. Cir. 2005) and others have found that detainee torture suits against the state cannot proceed because of a military defense exception under the Administrative Procedures Act, which appears to contravene the principle above. See *infra* Part VII.

⁴⁷ *Filartiga*, 630 F.2d at 883 (quoting Memorandum of Office of Legal Affairs, U.N. Secretariat, 34 U.N. ESCOR, Supp. No. 8, at 15, U.N. Doc. E/CN.4/1/610 (1962)).

⁴⁸ *Id.* at 890; cf. *Ex parte Young*, 209 U.S. 123 (1908) (subjecting state official to suit for constitutional violations despite immunity of state).

⁴⁹ Brief of Amici Curiae United States 22, *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) (No. 79-6090), 1980 WL 340146 (citing *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423, 430 n.34 (1964)) [hereinafter U.S. *Filartiga* Memorandum].

garding it, since the courts can then focus on the application of an agreed principle to circumstances of fact rather than on the sensitive task of establishing a principle not inconsistent with the national interest or with international justice.⁵⁰

Accordingly, the Carter Administration agreed with the Second Circuit in *Filartiga* that there is no separation of powers, i.e. “[no] danger that judicial enforcement will impair our foreign policy efforts,” when the judiciary confines ATS litigation to violations as to which “there is consensus in the international community that the right is protected and that there is a widely shared understanding of the scope of that right.”⁵¹

C. *Narrowing of the ATS: Sosa v. Alvarez-Machain*

In *Sosa*, the facts indicate that a Mexican national, Alvarez-Machain, was abducted pursuant to the orders of the Drug Enforcement Administration (DEA) by Sosa and other Mexican nationals from Mexico and brought to the United States to be tried for the murder and torture of a DEA agent.⁵² Alvarez was detained by the DEA agents for less than a day before he was arraigned.⁵³ After his acquittal, Alvarez-Machain sued Sosa under the ATS for violating the international law prohibition against arbitrary detention.⁵⁴ Specifically, Alvarez-Machain alleged that his detention in U.S. custody was arbitrary under international law because his arrest and detention were not authorized under United States law.⁵⁵

The Supreme Court rejected Alvarez’s proposed definition of arbitrary detention as too broad to constitute a binding customary international law, interpreting it as “a general prohibition of ‘arbitrary’ detention defined as officially sanctioned action exceeding positive authorization to detain under the domestic law of some government, regardless of the circumstances.”⁵⁶ To “underscore[]” the unsuitability of Alvarez-Machain’s proposed definition of arbitrary detention, the Court pointed to “the Restatement (Third) of Foreign Relations Law of the United States (1987), which says in its discussion of customary international human rights law that a ‘state violates interna-

⁵⁰ *Id.* at 23.

⁵¹ *Id.* at 22.

⁵² *Sosa v. Alvarez-Machain*, 542 U.S. 692, 697–98 (2004).

⁵³ *Id.* at 738.

⁵⁴ *Id.* at 733.

⁵⁵ *Id.* at 735 (arguing that “the DEA lacked extraterritorial authority under 21 U.S.C. § 878, and because Federal Rule of Criminal Procedure 4(d)(2) limited the warrant for Alvarez’s arrest to ‘the jurisdiction of the United States’”).

⁵⁶ *Id.* at 736.

tional law if, as a matter of state policy, it practices, encourages, or condones . . . prolonged arbitrary detention.”⁵⁷ Alvarez-Machain’s proposed definition, the Court explained, lacked both the requirement for “state policy” and “prolonged” detention.⁵⁸

Invoking the facts of Alvarez’s detention, the Supreme Court held that “a single illegal detention of less than a day, followed by the transfer of custody to lawful authorities and a prompt arraignment, violates no norm of customary international law so well defined as to support the creation of a federal remedy.”⁵⁹ Thus, the Court found that Alvarez did not allege facts that gave rise to a violation of a law of nations and, therefore, he was not entitled to a remedy under the ATS.⁶⁰

The Court, however, seized the opportunity provided by *Sosa* to interpret the standard of review courts should employ in determining whether an alleged violation of customary international law is actionable under the ATS.⁶¹ The Court explained that the ATS is a jurisdictional statute creating no cause of action, except with respect to international law violations that conform to those fully formed in 1789, i.e. offenses against ambassadors, violations of safe conduct, and piracy.⁶² The Court established the following judicial standard of re-

⁵⁷ *Id.* at 737 (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (1987)). The Court here does not adopt the Restatement’s definition of arbitrary detention as sufficient to give rise to a cause of action under the ATS. Rather, the Court explained,

[e]ven the Restatement’s limits are only the beginning of the inquiry, because although it is easy to say that some policies of prolonged arbitrary detentions are so bad that those who enforce them become enemies of the human race, it may be harder to say which policies cross that line with the certainty afforded by Blackstone’s three common law offenses.

Sosa, 542 U.S. at 737. Blackstone’s three common law offenses were offenses against ambassadors, violations of safe conduct, and piracy. See *infra* note 62 and accompanying text.

⁵⁸ *Sosa*, 542 U.S. at 737–38.

⁵⁹ *Id.* at 738. “Any credible invocation of a principle against arbitrary detention that the civilized world accepts as binding customary international law requires a factual basis beyond relatively brief detention in excess of positive authority.” *Id.* at 737.

⁶⁰ *Id.* at 737–38.

⁶¹ *Id.* at 749.

⁶² *Id.* In the eighteenth century, when the ATS was passed, Blackstone defined the law of nations as:

[a] system of rules, deducible by natural reason, and established by universal consent among the civilized inhabitants of the world; in order to decide all disputes, to regulate all ceremonies and civilities, and to insure the observance of justice and good faith, in that intercourse which most frequently occur between two or more independent states, and the individuals belonging to each.

view: “federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when §1350 was enacted.”⁶³

By interpreting the statute, the Court resolved a long-standing debate over the proper implementation of the ATS: whether the ATS was purely a grant of jurisdiction, requiring implementing legislation, or whether it provided the judicial branch with subject-matter jurisdiction, the discretion to recognize claims based on international law.⁶⁴ As noted, the Court resolved the debate with a compromise, holding that a “narrow set” of international law violations—those that are as definite in content and acceptance among civilized nations as were the violations of the law of nations recognized in 1789—are directly actionable under the ATS; the Court concluded that the ATS is otherwise a purely jurisdictional statute, requiring the congressional passage of specific implementing statutes for claims beyond that “narrow set.”⁶⁵

The Court provided five distinct reasons grounded in the separation of powers doctrine for limiting the scope of private rights derived from the law of nations.⁶⁶ First, the Court explained that when the ATS was enacted, the accepted view was that judges discovered the common law, which always independently existed, but today it is commonly understood that the common law is really judge-made.⁶⁷ Consequently, a judge charged with making decisions in reliance on international norms will wield a great deal of discretionary law-making power.⁶⁸ Thus, the Court deemed that the current counter-majoritarian conception of common law, as providing the judiciary with unrestrained discretion, counsels against permitting the judiciary to use such discretion to determine which international laws can

WILLIAM BLACKSTONE, 4 COMMENTARIES ON THE LAWS OF ENGLAND *66 (1979) (A facsimile of the first edition of 1765–1769). According to Blackstone, the principal offenses against the law of nations were: (1) violation of safe-conducts, (2) infringement on rights of ambassadors, and (3) piracy. See *Sosa*, 542 U.S. at 715 (citing BLACKSTONE, 4 COMMENTARIES, at *68).

⁶³ *Sosa*, 542 U.S. at 732. Alvarez-Machain’s proposed definition of arbitrary detention not only fell short of the Court’s articulated standard, it also fell short of the Restatement’s definition of arbitrary detention, which arguably reflects customary international law. *Id.* at 737.

⁶⁴ Kontorovich, *supra* note 8, at 117–18.

⁶⁵ See *Sosa*, 542 U.S. at 715, 725.

⁶⁶ See *id.* at 749–51.

⁶⁷ See *id.* at 749.

⁶⁸ *Id.* at 726.

provide the basis for an ATS claim.⁶⁹ Second, the Court considered the radical effect *Erie R.R. Co. v. Tompkins*⁷⁰ had on federal judges' law-making role. In *Erie*, the Supreme Court denied the existence of "general" federal common law.⁷¹ In doing so, the Court indicated that federal judges should look to the legislature for guidance before carving out new substantive law at their discretion.⁷² Thus, again, the *Sosa* Court indicated that the judiciary does not have the authority to make law.⁷³ Third, complementing the *Erie* rationale, the Court emphasized that it is more suitable for the legislative judgment to be exercised in the creation of a new private right.⁷⁴ Fourth, the Court found that the judiciary should be reticent to impose upon the discretion of the legislative and executive branches in the realm of foreign affairs by recognizing private causes of action based upon violations of international law.⁷⁵ Lastly, the Court found that Congress has not mandated for the federal courts to find and apply new violations of international law, nor does Congress seem particularly inclined to grant such judicial activity in the future.⁷⁶

As noted above, after disparaging the role of the judiciary in defining substantive rights under the ATS, the Court did hold that there are instances when it is appropriate for the judiciary to find that a law of nations is a suitable basis for an ATS claim, absent congressional guidance.⁷⁷ The Court found that although its inclination is to defer to Congress for substantive rights under the ATS, it concluded that the text of the ATS indicates that it was not Congress's intent to have the ATS lie dormant until legislation is passed; rather, the statute was to have immediate effect through judicial recognition of rights.⁷⁸ Thus, the Court reaffirmed the authority of the judiciary to define

⁶⁹ *Id.*

⁷⁰ 304 U.S. 64 (1938).

⁷¹ *Id.* at 78.

⁷² *Sosa*, 542 U.S. at 726.

⁷³ *See id.*

⁷⁴ *Id.* at 727 (citing *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 68 (2001); *Alexander v. Sandoval*, 532 U.S. 275, 286–87 (2001)).

⁷⁵ *Id.* at 727–28.

⁷⁶ *Id.* at 728. *But see* H.R. REP. NO. 102-367(I), at 4 (1991), *as reprinted in* 1992 U.S.C.C.A.N. 84, 86 (referring to the Torture Victim Protection Act of 1991 as the first legislation providing a cause of action under the Alien Tort Claims Act, Congress stated that "[c]laims based on torture and summary execution do not exhaust the list of actions that may appropriately be covered by the [ATS]. That statute should remain intact to permit suits based on other norm that already exist or may ripen in the future into rules of customary international law").

⁷⁷ *See Sosa*, 542 U.S. at 724–25.

⁷⁸ *See id.*

and review claims arising under the ATS, that is, so long as the claims are as definite in “content and acceptance among civilized nations [as] the historical paradigms familiar when § 1350 was enacted.”⁷⁹

D. Filartiga and Sosa Establish Categorically Different Modes of Analyzing the ATS

In *Sosa*, the Supreme Court explicitly stated that the standard of analysis it sets out comports with that in *Filartiga*.⁸⁰ Referring to *Filartiga*, the Court stated that the limitations this decision imposes on judges in recognizing violations of the law of nations as bases for a claim under the ATS in the future are “generally consistent with the reasoning of many of the courts and judges who faced the issue before”⁸¹ A cursory glance at the two cases, however, indicates that in *Sosa* the Supreme Court deviated significantly from the method adopted in *Filartiga* for deciding whether an alleged law of nations violation is actionable under the ATS.

One fundamental difference is that in *Filartiga*, Judge Kaufman sought guidance from twentieth century U.N. Declarations and Conventions in determining what actions constituted a violation of a law of nations within the meaning of the ATS;⁸² by contrast, the Supreme Court looked only to the paradigm of law of nations as it was understood in 1789.⁸³ Similarly, whereas Judge Kaufman required only the “general assent of civilized nations” to find that an action is a violation of the law of nations,⁸⁴ the Court, by inference, required that the act complained of be as “definite [in] content and acceptance among civilized nations” as the acts that had been considered violations of the law of nations in 1789.⁸⁵

Although the *Sosa* Court was rather adamant that the judiciary should be reticent to recognize a cause of action arising under the ATS, absent a congressional mandate, it did not provide clear guidance for future judicial action. That is, the Court did not indicate the steps a judge should take to determine whether the cause of action urged by a plaintiff rises to the level of a violation of the law of nations that is as definite in “content and acceptance among civilized nations [as] the historical paradigms familiar when § 1350 was en-

⁷⁹ *Id.*

⁸⁰ *Id.* at 732.

⁸¹ *Id.*

⁸² See *supra* Part II.B.

⁸³ See *supra* Part II.C.

⁸⁴ *Filartiga v. Pena-Irala*, 630 F.2d 876, 880–81 (2d Cir. 1980).

⁸⁵ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004).

acted,” so as to constitute a legitimate basis for cause of action even in the absence of a U.S. statute.⁸⁶

A contextual reading of the opinion suggests some possibilities. First, a judge faced with an ATS claim should first deconstruct the elements of one of the offenses recognized at international law in 1789, i.e. piracy, and determine the nature and scope of its prohibition at the time. Then, the judge should do the same with the alleged violation of international law in the complaint before him. Finally, the judge should do a point-by-point comparison of the two to determine whether the law of nations violation complained of in his courtroom today is as sufficiently defined and as widely recognized as the law of nations violations of 1789. Presumably, if the prohibition against an act complained of today is as well-defined and widely recognized internationally as was an actionable law of nations violation in 1789, it too should be actionable under the ATS.

Rather than focusing solely on the scope and depth of universal condemnation of an act in the abstract, the Court in *Sosa* decided that the characteristics of the act complained of, as reflected in the nature and scope of its prohibition at international law in 1789, should serve to guide future decisions whether to recognize a particular act as a violation of the law of nations for ATS purposes.⁸⁷ Subtly, *Sosa* has freed the federal courts to reject a law of nations that may have achieved wide and deep recognition, as is evidenced by U.N. Declarations, for instance, on the ground that it does not conform to the 1789 paradigm of a violation of a law of nations (that is, it is not analogous enough to piracy). Fundamentally, the difference between *Filartiga* and *Sosa* is that, in the former, the court was willing to defer to the international community for a definition of a violation of a law of nations⁸⁸ whereas, in the latter, the Supreme Court was only willing to recognize violations of the law of nations assented to by the international community today, after it has measured it against its 1789 paradigm or statutorily enacted by Congress.⁸⁹ Thus, *Sosa* provides an extra hurdle for a law of nations, defined as such by the international community, to jump through before it may be deemed a violation of the law of nations for ATS purposes.⁹⁰ This hurdle was noticeably absent in *Filartiga*.

⁸⁶ *Id.*

⁸⁷ *See id.*

⁸⁸ *See supra* notes 39–48 and accompanying text.

⁸⁹ *See supra* notes 62–63 and accompanying text.

⁹⁰ *See Sosa*, 542 U.S. at 737.

III. PARSING *SOSA*

As explained in the previous section, the *Sosa* standard for law of nations recognition under the ATS requires a parsing of the characteristics of eighteenth century violations of the law of nations and the nature and scope of its prohibition.⁹¹ The most frequently invoked eighteenth century law of nations, and the most susceptible to a characterization as a violation of international law/human right, is the prohibition of piracy.⁹² As such, piracy will serve as the measure of an eighteenth century law of nations violation to which the prohibition of arbitrary detention will be compared here.

Since *Sosa*, the task of characterizing piracy as a violation of the law of nations has been undertaken, among many others, by Professor Eugene Kontorovich.⁹³ Kontorovich purported to identify “the salient characteristics of [piracy], which in turn become the characteristics that a [customary international law] norm must possess [sic] to be actionable under the ATS”⁹⁴ and further concluded that *Sosa* has in practice shut the door on future human rights litigation.⁹⁵ For the purposes of this section, this Comment will refer to Kontorovich’s characteristics of piracy because they raise the pertinent issues with respect to what are the characteristics of the crime of piracy that compelled the Court to designate it a model cause of action under the ATS. Unlike Kontorovich, however, this Comment concludes that *Sosa* does not foreclose future human rights litigation and that arbitrary detention can indeed emerge as a law of nations violation under *Sosa* analysis. In other words, this Comment argues that the prohibition against arbitrary detention at international law today is as

[A]lthough it is easy to say that some policies of prolonged arbitrary detentions are so bad that those who enforce them become enemies of the human race [and, thus, punishable under international law], it may be harder to say which policies cross that line with the certainty afforded by Blackstone’s three common law offenses.

Id.

⁹¹ *Id.* at 749.

⁹² See, e.g., *Sosa*, 542 U.S. at 732. But see ALFRED P. RUBIN, THE LAW OF PIRACY 91–105 (2d ed. 1998) (questioning international law as a direct source of law and jurisdiction in piracy).

⁹³ See Kontorovich, *supra* note 8, at 111.

⁹⁴ *Id.* at 113; but see RUBIN, *supra* note 92 at 117–20 (indicating that “[t]he phrase ‘law of nations’ in 1705 was itself ambiguous” and that, therefore, in the eighteenth century, it had not been reconciled whether the crime of piracy was merely a reflection of individual nations’ municipal law or whether it was a reflection of a sort of international prohibition that existed regardless of the nature of the prohibition in any individual nation).

⁹⁵ RUBIN, *supra* note 92, at 116.

“definite [in] content and acceptance among civilized nations” as was the prohibition against piracy in 1789.⁹⁶

First, Kontorovich argued that international law today is distinguishable from the prohibition of piracy in the eighteenth century because, unlike piracy, international laws today do not reflect in the municipal law of most nations.⁹⁷ This assertion is not accurate. Article 38 of the Statute of the International Court of Justice explicitly points to common municipal laws as a source of international law.⁹⁸ Although it is true that Article 38 indicates that international law may arise from ubiquitous customary practice among nations alone, this is no reason to assume that all human rights-oriented international laws are derived from customary practice alone, rather than the nations’ municipal laws.⁹⁹ On the contrary, if we were to place more stock in the laws of Western nations, as is invariably done by international institutions in codifying international law, there would be a clear indication that international human rights laws do reflect the municipal laws of the democratic nations of the world.¹⁰⁰

Second, Kontorovich asserts that, unlike international laws today, “piracy had a narrow and universally agreed on definition; the conduct it proscribed was well understood, thus preventing conflict between states about the propriety of [universal jurisdiction over the act].”¹⁰¹ This argument falls short as well because history has revealed

⁹⁶ *Sosa*, 542 U.S. at 732.

⁹⁷ Kontorovich, *supra* note 8, at 114. This Comment states “most nations,” whereas Kontorovich states “all nations,” because it is safe to assume that his source for the ubiquitous municipal law prohibition of piracy among nations was referring to “civilized” nations, i.e. European and North American nations. *Id.* It is justified in making this inference because the practices of the nations of Africa, Asia, the Middle East, and South America were not generally consulted before scholars of the time proclaimed a custom universal.

⁹⁸ Statute of the International Court of Justice art. 38, 59 Stat. 1055 (1945) (providing the following as sources of international law: (1) treaties—international conventions; (2) “international custom, as evidence of a general practice accepted as law” (International Customary Law); (3) “general principles of law recognized by civilized nations”; and (4) subject to Article 59, “judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law”).

⁹⁹ This is especially true since the U.S. Constitution and laws prohibit most, if not all, of the conduct that would give rise to a human rights violation at international law.

¹⁰⁰ Brief for the Lawyers Committee for Human Rights, Human Rights Watch, and Amnesty International USA as *Amici Curiae* in Support of Petitioner at 3, *Benitez v. Mata*, 542 U.S. 902 (2004) (No. 03-7434), 2004 WL 354194 [hereinafter Lawyers Committee for Human Rights].

¹⁰¹ Kontorovich, *supra* note 8, at 114.

that the prohibition of piracy was dubious at best.¹⁰² In the seventeenth and eighteenth centuries, European nations clandestinely employed pirates, thus giving rise to the enterprise of privateering, to plunder the coasts of competing nations.¹⁰³ As such, one nation's pirate was commonly another nation's legitimate instrument. Thus, even if the written definition of the offense of piracy had been similarly defined among most nations, the circumstances that surrounded the offense clearly gave rise to variance in the enforcement and punishment of piracy.¹⁰⁴ That is, the fear of forum shopping should not limit the individual's substantive rights to be free from certain types of conduct, the prohibition of which is well defined and widely accepted in international law today.

Third, Kontorovich argued "all nations made piracy punishable by death. Thus it would not lead to forum shopping or disputes among nations" as to what punishment should be inflicted."¹⁰⁵ Inversely, he implied that international law today does give rise to forum shopping and disputes about punishment. However, the fact that the punishment was the same in every nation does not itself eliminate the potential for forum shopping. That is, a plaintiff may decide to seek redress in one forum or another on the basis of a variety of factors, including whether one country's procedures are perceived as more plaintiff-friendly than another's, that may contribute in securing a favorable verdict.¹⁰⁶ Ultimately, these matters are not significant in the characterization of a violation of the law of nations for ATS purposes because they do not comport with the purpose of vindicating international rights, one of the motivations underlying in-

¹⁰² WILLIAM MCFEE, *THE LAW OF THE SEA* 105 (1950); see also RUBIN, *supra* note 92, at 74–86 (providing an account of one incident in England that illustrates how fine the line is between pirate and privateer).

¹⁰³ MCFEE, *supra* note 102, at 109–10.

All through the ages law has too often been what the citizen could get away with Perhaps the most spectacular illustration of the wavering character of the law on the sea was [Queen Elizabeth's] relations with her seamen in the long struggle with Spain. Theirs was the responsibility. If they were caught she disowned them. The Spanish ambassador in London might rage, but the Queen would shrug and deny any share in the affront to his master. If her seamen came home laden with booty, she took her dividends like the rest of the ladies and gentlemen who had financed the pirates' expeditions.

Id.

¹⁰⁴ *Id.*

¹⁰⁵ Kontorovich, *supra* note 8, at 114.

¹⁰⁶ See generally, Andreas F. Lowenfeld, *Forum Shopping, Antisuit Injunctions, Negative Declarations, and Related Tools of International Litigation*, 91 AM. J. INT'L L. 314 (1997).

ternational law.¹⁰⁷ Indeed, the protections that international law, especially human rights law, provides and the obligations it imposes have operated despite procedural challenges that arise from their existence.¹⁰⁸ Thus, any procedural difficulties that arise from a country's assertion of jurisdiction over an incident sounding in international law is not limited simply because there may be variance among domestic courts in adjudicating the issue. That is, the fear of forum shopping should not limit the individuals' substantive rights to be free from certain types of conduct, the prohibition of which is well defined and widely accepted in international law today.

Fourth, Kontorovich claimed that "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."¹⁰⁹ But, again, history indicates that pirates and privateers, those hired by one's government to make war on other governments, were virtually indistinguishable: "[t]he same qualities which made a good privateer, enterprise, ruthless discipline, leadership and independence of conventional rules of conduct, were ideal equipment for piracy."¹¹⁰ In the seventeenth and eighteenth centuries, all belligerents, whether private or state-sponsored, were considered pirates, as is evidenced by the fact that the enemy state treated them as criminal actors and because their sponsoring state usually denied the fact of sponsorship upon their capture.¹¹¹ Thus, the majority of the action that led up to the universal prohibition of piracy had been commissioned by states.¹¹² Given the fact that piracy was routinely state-sponsored, it is not surprising that the activity precipitously declined with the signing of the Declaration of Paris of 1856, which specifically abolished "privateering."¹¹³ Thus, universal condemnation of piracy was directed at curtailing the

¹⁰⁷ See Andrew Moravcsik, *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe*, 54 INT'L ORG. 217, 217 (2000) ("[G]overnments construct international regimes to adjudicate and enforce human rights.").

¹⁰⁸ See *id.* at 218. Today, forum shopping and varying punishment concerns with respect to adjudicating violations of human rights law have largely been overcome because such violations are often adjudicated in international courts, rather than state courts. See *id.* The European Court of Human Rights (ECHR), for instance, has "established 'effective supranational adjudication' in Europe." *Id.*

¹⁰⁹ Kontorovich, *supra* note 8, at 114.

¹¹⁰ MCFEE, *supra* note 102.

¹¹¹ See *id.*

¹¹² See *id.* at 106–08.

¹¹³ See Douglass R. Burgess Jr., *The Dread Pirate Bin Laden*, LEGAL AFFAIRS, (July/August 2005), available at http://www.legalaffairs.org/issues/July-August-2005/feature_burgess_julaug05.msp.

state act of clandestinely fostering piracy for its own benefit at the expense of another nation.¹¹⁴ Therefore, piracy by definition embodies an element of state action, as do most modern international human rights claims.

Kontorovich's fifth characteristic, the fact that piracy occurred on the high seas, suggests that piracy was distinguishable from other violations of international law because the act commonly occurred outside the sovereign territory of any state and, thus, was subject to universal jurisdiction.¹¹⁵ Kontorovich used the common loci of piracy, the high seas, to limit the offenses for which universal jurisdiction may be invoked.¹¹⁶ In doing so, however, he failed to recognize that it was not merely the fact that piracy occurred on the high seas, outside of the sovereign territory of any nation, which made it subject to universal jurisdiction, but also that no nation acting alone could keep its shores and ships on the high seas safe from pirate plunder otherwise.¹¹⁷ Thus, to eradicate the offense of piracy in the known world, universal measures had to be taken.

Finally, Kontorovich claimed that "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."¹¹⁸ Consistent with the retort to the fourth point above, pirates did not always attack ships indiscriminately because often they were employed by a state to attack specified parties.¹¹⁹ As such, a pirate ship would not attack the merchant ships of a nation that had been its benefactor.¹²⁰ As one scholar of eighteenth century piracy explains,

[t]he political, economic, and social elites in England attempted to distinguish pirates from imperialists during the early decades of the eighteenth-century. Only a few decades earlier, the state appreciated the terror that pirates spread throughout the Spanish-controlled [territories], but as the English began to colonize some of these territories for themselves, they used laws, propaganda, and popular literature to vilify piracy and glorify imperial trade and colonial occupation. However, the moral and social

¹¹⁴ *Id.*

¹¹⁵ See Kontorovich, *supra* note 8, at 114–15.

¹¹⁶ See *id.*

¹¹⁷ See Burgess, *supra* note 113.

¹¹⁸ See Kontorovich, *supra* note 8, at 115.

¹¹⁹ See MCFEE, *supra* note 102.

¹²⁰ See *id.*

differences between pirates and imperialists were much less clear.¹²¹

In light of the analysis of Kontorovich's characteristics of piracy, this Comment proposes here that the following characteristics are central to the offense of piracy at international law: (1) although piracy was officially a municipal offense in most nations, it was often state-sponsored in the eighteenth century;¹²² (2) although piracy did not have a narrow and universally agreed upon definition due to the underhanded practices of the states at the time, it was subject to universal jurisdiction because those who captured pirates (or privateers) were at liberty to prosecute them without objection from the state that had sponsored them;¹²³ (3) since states disassociated from the pirates they sponsored upon their capture by another state, disputes about where and how to prosecute the accused did not arise unless, of course, a state was so bold as to seek to protect the pirates and, thereby, expose their association;¹²⁴ (4) all pirates were not private actors by definition; they often sought the sponsorship and protection of their state, which the state was eager to oblige because their conduct reaped rewards for the state;¹²⁵ and (5) pirates did not indiscriminately attack ships of all nations because they were constrained by ties to national objectives.¹²⁶

As previously noted, *Sosa* mandated that "federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when [ATS] was enacted."¹²⁷ There, the Court indicated the offense of piracy in the eighteenth century was of such a definite content and acceptance among civilized nations as to give an actionable claim under the ATS.¹²⁸ With the characteristics of piracy that are identified above to serve as a guide, this Comment will next attempt to demonstrate that arbitrary detention is of no less definite content and accep-

¹²¹ Matthew Teorey, *Pirates and State-Sponsored Terrorism in Eighteenth-Century England*, in 1 PERSPECTIVES ON EVIL AND HUMAN WICKEDNESS 2, 53 (2003), available at http://www.wickedness.net/ejvn2/ejvIn2_teorey.pdf.

¹²² Lawyers Committee for Human Rights, *supra* note 100; MCFEE, *supra* note 102, at 109–10.

¹²³ See MCFEE, *supra* note 102, at 109–10.

¹²⁴ See *id.*

¹²⁵ See *id.*

¹²⁶ See *id.*

¹²⁷ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004).

¹²⁸ *Id.*

tance among civilized nations today than piracy was in the eighteenth century.

A. *Applying Sosa to Arbitrary Detention Claims*

Although *Sosa* warns against broad recognition of international customary norms under the ATS, the standard it espoused is easily satisfied by a multitude of international laws because the modern world has aggressively defined and recognized international customary law.¹²⁹ The prohibition of arbitrary detention is one such international law that has been well defined and widely recognized¹³⁰ and, as such, it unquestionably satisfies the *Sosa* “definiteness” and “acceptance” standard.

The content of the offense of piracy was anything but definite in the eighteenth century. As highlighted above, it was riddled with nuanced interpretations, which served to promote the state practices of selective enforcement.¹³¹ Although most states formally denounced piracy as an offense against nations, piracy flourished as a state-sponsored practice until 1856, when the Declaration of Paris formally abolished it.¹³² Consequently, piracy sets a low bar for definiteness of content and acceptance among civilized nations. As evidenced by a multitude of modern multilateral treaties (including the U.N. Charter), the nations of the world today are much more interconnected and closely aligned in their practices than nations were in the eighteenth century.¹³³ This close relationship has given rise to an amorphous supranational entity, the international community, which reflects their shared values.¹³⁴ The international community has taken these shared values and sought to protect and enforce them through codification.¹³⁵ The process of international law codification has pro-

¹²⁹ Establishment of an International Law Commission, G.A. Res. 174(II), preamble, U.N. Doc. A/3881 (1947) [hereinafter International Law Commission] (“[T]he General Assembly shall initiate studies and make recommendations for the purpose of encouraging the progressive development of international law and its codification.”).

¹³⁰ See *infra* notes 137–54 and accompanying text.

¹³¹ See MCFEE, *supra* note 102, at 109–10.

¹³² See Burgess, *supra* note 113.

¹³³ See MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 11 (4th ed. 2003) (“Treaties concluded between 1648 and 1919 fill 226 thick books, between 1929 and 1946 some 205 more volumes, and between 1946 and 1999, 2,049 more [volumes].”).

¹³⁴ Jost Delbruck, *Transnational Federalism: Problems and Prospects of Allocating Public Authority Beyond the State*, 11 IND. J. GLOBAL LEGAL STUD. 31, 31–32 (2004). In the twentieth century “[s]tate independence increasingly gave way to interdependence and institutionalized cooperation.” *Id.* at 31.

¹³⁵ See International Law Commission, *supra* note 129.

duced laws that are much more definite in content and more widely accepted by civilized nations than any internationally recognized norms were in the eighteenth century.¹³⁶

1. International Law Condemnation of Arbitrary Detention

The international community has defined arbitrary detention and declared it impermissible in the following conventions: Article 9 of the Universal Declaration of Human Rights¹³⁷ and Article 9 of the International Covenant on Civil and Political Rights.¹³⁸ Article 9 of the International Covenant on Civil and Political Rights provides a detailed account of the procedures that must be afforded a detained person in order for his detention to be permissible and not arbitrary.¹³⁹ Additionally, the U.N. Working Group on Arbitrary Detention, established by the U.N. Human Rights Commission, has provided standards for the detention of prisoners that arguably establish an international law norm that allows no derogation.¹⁴⁰

¹³⁶ *See id.*

¹³⁷ G.A. Res. 217A, *supra* note 42, art. 9 (“No one shall be subjected to arbitrary arrest, detention or exile.”).

¹³⁸ International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), art. 9, U.N. GAOR, 21st Sess., Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966) (“No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.”) [hereinafter G.A. Res. 2200A(XXI)].

¹³⁹ *Id.*

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law. 2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him. 3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment. 4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful. 5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

Id.

¹⁴⁰ *See* LEILA ZERROUGUI, CHAIRPERSON-RAPPOREUR, Working Group on Arbitrary Detention, Civil and Political Rights, Including the Question of Torture and Detention, at 5, U.N. Doc. E/CN.4/2005/6 (2004), *available at* <http://daccessdds.un.org/>

Arbitrary detention is indeed more definite in content and more widely accepted today than piracy was in the eighteenth century.¹⁴¹ Moreover, the characteristics of arbitrary detention are closely related to the characteristics of piracy that provided the basis for pronouncing piracy a violation of the law of nations. First, like piracy in the eighteenth century, prohibition against arbitrary detention today is widely recognized as fundamental.¹⁴² Second, the prohibition of arbitrary detention today has a narrower universally agreed upon definition than piracy did in the eighteenth century because its definition is contained in many international documents to which the international community has consented.¹⁴³ However, like piracy, the definiteness of the definition of arbitrary detention is often contravened by deviations in state practice.¹⁴⁴ But, unlike in the eighteenth century, today there are international committees in place to oversee the state compliance with the prohibition of arbitrary detention.¹⁴⁵ Thus, the sanctity of the definition of arbitrary detention is retained because any deviation from it is espoused and denounced. Third, arbitrary detention, like piracy, does not give rise to significant international disputes over adjudication of the case.¹⁴⁶ Fourth, like piracy, the offense of arbitrary detention is most commonly committed by state actors because the state provides them with false authority to detain because their conduct garners rewards for the states.¹⁴⁷ Finally, arbitrary detention, like piracy, is not an indiscriminate act. It arises

doc/UNDOC/GEN/G04/167/19/PDF/G0416719.pdf?OpenElement (indicating that the “Working Group on Arbitrary Detention was established by the Commission on Human Rights in its resolution 1991/42 and entrusted with the investigation of instances of alleged arbitrary deprivation of liberty, according to the standards set forth in the Universal Declaration of Human Rights and with the relevant international instruments accepted by the States concerned.”).

¹⁴¹ *See id.*

¹⁴² In the United States, freedom from arbitrary detention is a constitutional right. *See* U.S. CONST. amend. V (“No person shall . . . be deprived of . . . liberty . . . without due process of the law.”).

¹⁴³ *See, e.g., supra* text accompanying notes 138–41.

¹⁴⁴ For instance, the Bush Administrations maintains that the detentions in Guantánamo are not arbitrary because the President claims to have authority to detain individuals in such a manner, even though—as the comment argues—it is widely accepted that they do constitute arbitrary detention as defined by international law. Memorandum from President George W. Bush to the Vice President, the Sec’y of State and Def., the Attorney Gen., Chief of Staff to the President, Dir. Of Cent. Intel., Asst. to the President for Nat’l Sec. Affairs, and Chairman of the Joint Chiefs of Staff 1–2 (Feb. 7, 2002) [hereinafter President Bush Memorandum]. In this way, the Bush Administration invariably undermines the definition of arbitrary detention.

¹⁴⁵ *See* International Law Commission, *supra* note 129.

¹⁴⁶ *See supra* notes 105–08 and accompanying text.

¹⁴⁷ *See supra* notes 109–14 and accompanying text.

when state actors, who are pursuing legitimate ends (such as national security), do not have a legal cause for detaining a person, do not follow adequate procedure for taking the person into custody, or do not provide the detainee with the procedural safeguards he is entitled to.¹⁴⁸

In addition, United States courts have repeatedly held that arbitrary detention violates international law.¹⁴⁹ For instance, in *Martinez v. City of Los Angeles*,¹⁵⁰ the court found a “clear international prohibition against arbitrary arrest and detention.”¹⁵¹ which is actionable under the ATS.¹⁵² Detention is arbitrary, according to *Martinez*, if “it is not pursuant to law; it may be arbitrary also if it is incompatible with the principles of justice or with the dignity of the human person.”¹⁵³ Likewise, in *Sosa*, the Court did not explicitly determine that arbitrary detention is a violation of the law of nations sufficient to give rise to an ATS claim (because it found that the facts of *Sosa* did not give rise to arbitrary detention), it did recognize that “pursuant to “customary international human rights law that a . . . ‘a state violates international law if, as a matter of state policy, it practices, encourages, or condones . . . prolonged arbitrary detention.’”¹⁵⁴

B. The Guantánamo Bay Detentions are Arbitrary Within the Meaning of the Law of Nations

International laws provide detailed instructions on the permissible scope of detention and the procedural safeguards that must be

¹⁴⁸ See, e.g., *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1541 (N.D. Cal. 1987) (holding that individuals imprisoned for years without being charged were arbitrarily detained); see also *Fernandez-Roque v. Smith*, 622 F. Supp. 887, 903 (N.D. Ga. 1985) (finding that indefinite detention without periodic hearings violates international law).

¹⁴⁹ See, e.g., *Martinez v. City of Los Angeles*, 141 F.3d 1373, 1384 (9th Cir. 1998); *Siderman de Blake v. Argentina*, 965 F.2d 699, 717 (9th Cir. 1992); *Comm. of U.S. Citizens Living in Nicar. v. Reagan*, 859 F.2d 929, 940 (D.C. Cir. 1988); *De Sanchez v. Banco Central de Nicar.*, 770 F.2d 1385, 1397 (5th Cir. 1985); *Xuncax v. Gramajo*, 886 F. Supp. 162, 184–85 (D. Mass. 1995); *Paul v. Avril*, 901 F. Supp. 330, 335 (S.D. Fla. 1994); *Forti*, 672 F. Supp. at 1541.

¹⁵⁰ 141 F.3d 1373 (9th Cir. 1998).

¹⁵¹ *Id.* at 1384.

¹⁵² *Id.*

¹⁵³ *Id.* (quoting RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S., § 702 cmt. h (1987)).

¹⁵⁴ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 737 (2004) (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE U.S. § 702 (1987)).

afforded to those detained in both times of war and times of peace.¹⁵⁵ With respect to non-state actors, such as members of terrorist groups, international law dictates that detention and prosecution of members of these organizations should be governed by national law because “criminal organizations receive no legal recognition as international actors.”¹⁵⁶ As Mary Ellen O’Connell, a prominent scholar on the use of force, explains:

Before September 11, 2001, terrorist organizations remained largely the subject of national criminal law. A variety of treaties and resolutions of the United Nations Security Council and General Assembly have mandated that states take action to suppress terrorism, but these obligations had been directed at states. Even when terrorist groups have used significant and sustained armed violence, their acts were treated as criminal unless a state was found to be legally responsible for the actions of the group. In those cases where a state was responsible, a significant act of violence could be treated as an armed attack, giving rise to the right to self-defense by the victim under Article 51 of the United Nations Charter. For criminal groups’ acts of violence to rise to the level of direct concern for international law, the view has been that non-state actor must be connected with a state or be in a position to challenge a state authority by controlling significant territory. The acts of groups lacking these links . . . are usually viewed as acts of criminal violence, not acts of war.¹⁵⁷

Thus, international law draws a sharp distinction between non-state actors who engage in international violence and state actors who engage in international violence.¹⁵⁸ In international law, the actions of the latter are capable of justifiably provoking a nation’s use of force against another nation—thus triggering the application of the Geneva Convention on the Treatment of Prisoners (“Geneva Convention”), which governs detention of enemy combatants in time of war.¹⁵⁹ On the other hand, a nation’s use of force against a non-state

¹⁵⁵ See Third Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 1949, 75 U.N.T.S. 135, at arts. 3,4 [hereinafter Third Geneva Convention]; G.A. Res. 2200A (XXI), *supra* note 138, art. 52.

¹⁵⁶ Mary Ellen O’Connell, *Enhancing the Status of Non-State Actors Through a Global War on Terror?*, 43 COLUM. J. TRANSNAT’L L. 435, 440 (2005).

¹⁵⁷ *Id.* at 445.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* It should be noted that the MCA attempts to deprive the federal courts of authority to enforce the provisions of the Geneva Convention. Pub. L. No. 109-366, 120 Stat. 2600 (2006). This portion of the MCA is likely unenforceable because the federal courts are obliged to enforce treaty provisions because treaties are the “supreme law of the land.” U.S. CONST. art. VI, cl. 2; *see also* The Head Money Cases, 112

actor is not justifiable.¹⁶⁰ Consequently, under international law, international terrorist organizations are to be treated as criminals subject to national laws, who are afforded all the procedural protections a nation's law provides.¹⁶¹

Instead of continuing to treat al Qaeda as an international criminal organization, devoid of international status (or "personality"), the Bush Administration responded to the tragedies of 9/11 by elevating their status to combatants.¹⁶² As such, the Bush Administration triggered the application of the Geneva Convention—which had previously been reserved only for state actors—to terrorist suspects.¹⁶³ The Bush Administration, however, did not acknowledge that the Geneva Convention applied to the conflict termed the "War on Terror."¹⁶⁴ Accepting the legal conclusions of the Department of Justice,¹⁶⁵ President Bush "determine[d] that common Article 3 of [the] Geneva [Convention]¹⁶⁶ does not apply to either al Qaeda or Taliban detainees, because, among other reasons, the relevant conflicts are international in scope and common Article 3 applies only to 'armed conflict not of an international character.'"¹⁶⁷ Additionally, the President concluded that the Taliban and al Qaeda detainees are "unlawful combatants" and, therefore, do not qualify as prisoners of war under Article 4 of the Geneva Convention.¹⁶⁸ Thus, as one author aptly put it,

U.S. 580, 598 (1884) (A treaty is to be enforced "whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined.").

¹⁶⁰ O'Connell, *supra* note 156, at 445.

¹⁶¹ *See id.*

¹⁶² Memorandum from William J. Haynes, II, General Counsel of the Department of Defense, Enemy Combatants (Dec. 12, 2002), *available at* <http://www.cfr.org/publication.html?id=5312> [hereinafter Haynes Memorandum] ("The President has determined that al Qaeda members are unlawful combatants because (among other reasons) they are members of a non-state actor terrorist group that does not receive the protections of the Third Geneva Convention.").

¹⁶³ O'Connell, *supra* note 156, at 454.

¹⁶⁴ President Bush Memorandum, *supra* note 144, at 1–2.

¹⁶⁵ Memorandum from Assistant Attorney Gen. Jay S. Bybee to White House Counsel Alberto R. Gonzales and Dep't of Def. Gen. Counsel William J. Hayes II, at 9–10 (Jan. 22, 2002) (concluding that the Geneva Convention does not apply to al Qaeda overall because (1) its members did not satisfy the four basic criteria for prisoner of war status, i.e., they were not under the command of a responsible individual, they did not wear insignia, they did not carry arms openly, and they did not obey the laws of war and (2) "[a]l Qaeda is not a state"). *See also* Third Geneva Convention, *supra* note 155, art. 4(A)(2).

¹⁶⁶ Article 3 of the Third Geneva Convention provides protection for civilians in times of war.

¹⁶⁷ President Bush Memorandum, *supra* note 144.

¹⁶⁸ Haynes Memorandum, *supra* note 162.

[i]n classifying the detainees as unlawful combatants, the United States, it seems, asserts the right to treat the detainees in any way it deems appropriate—unencumbered by international legal obligation. For example, Secretary of Defense Donald Rumsfeld stated that the United States would, as a matter of policy, treat the detainees humanely, but made clear that the United States was under no legal obligation to do so.¹⁶⁹

The consequence of the Bush Administration's classification of those it alleges are members or affiliates of al Qaeda is that over five hundred foreign nationals have been indefinitely detained in Guantánamo Bay without charges or other basic procedural guarantees that legitimate a government's detention of a person.¹⁷⁰ The detainees held under these circumstances have a legitimate cause of action under the ATS for arbitrary detention because their detention is arbitrary within the narrowest definition of arbitrary detention at international law and is as definite in content and acceptance among civilized nations as piracy was in 1789.¹⁷¹

IV. SOVEREIGN IMMUNITY SHOULD NOT BAR DETAINEES' ATS CLAIMS

The Supreme Court in *Rasul* reversed the dismissal of the detainees' ATS claims, holding that the "[ATS] explicitly confers the privilege of suing for an actionable 'tort . . . committed in violation of the law of nations or a treaty of the United States' on aliens alone."¹⁷² Therefore, the Court held that the District Court of the District of Columbia has jurisdiction over detainees' ATS claims.¹⁷³ Instead of reviewing the detainees' ATS claims as the Supreme Court mandated, however, the district court has declined to review the detainees' claims by holding that the doctrine of sovereign immunity bars such claims.¹⁷⁴ Although the Court did not explicitly address the question

¹⁶⁹ Derek Jinks, *The Declining Significance of POW Status*, 45 HARV. INT'L L.J. 367, 370 (2004) (citing Fact Sheet, White House Press Office, Status of Detainees at Guantánamo (Feb. 7, 2002), <http://www.whitehouse.gov/news/releases/2002/02/20020207-13.html>).

¹⁷⁰ MARK DENBEAUX, REPORT ON GUANTÁNAMO DETAINEE: A PROFILE OF 517 THROUGH ANALYSIS OF DEPARTMENT OF DEFENSE DATA 4, <http://www.pbs.org/now/shows/230/guantanamo-report.pdf> (last visited March 1, 2007); Petitioners' Memorandum in Opposition to Respondents' Motion to Dismiss at 56, *In re Guantánamo Detainee Cases*, 355 F. Supp. 2d 443 (D.D.C. 2005) [hereinafter Petitioners' Memorandum].

¹⁷¹ See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 737 (2004) (citing RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S. § 702 (1987)).

¹⁷² *Rasul v. Bush*, 542 U.S. 466, 485 (2004).

¹⁷³ See *id.*

¹⁷⁴ See, e.g., *In re Guantánamo Detainee Cases*, 355 F. Supp. 2d 443, 480–81 (D.D.C. 2005); *Khalid v. Bush*, 355 F. Supp. 2d 311, 326 n.19 (D.D.C. 2005); *Al Odah*

of sovereign immunity, its holding cannot be reconciled with the district court's opinion that these claims are barred by the doctrine of sovereign immunity.¹⁷⁵ Thus, the district court's dismissal of the ATS claims on the basis of sovereign immunity is impermissible because it departs from the Supreme Court's ruling in *Rasul*.

Whether the United States is amenable to suit under the ATS has been at the heart of recent ATS litigation, notwithstanding the Supreme Court's holding in *Rasul*.¹⁷⁶ The doctrine of sovereign immunity bars suits against the government absent explicit congressional waiver of the immunity.¹⁷⁷ Accordingly, most case law indicates that sovereign immunity cannot be waived by the ATS without explicit congressional authority.¹⁷⁸ On the other hand, however, it is arguable that the ATS implicitly waives sovereign immunity because it has primarily been used to challenge state action that has allegedly violated international human rights.¹⁷⁹ Thus, if the courts continue to recognize United States sovereign immunity, they will effectively render the ATS useless.¹⁸⁰

v. United States, 321 F.3d 1134, 1150 (D.C. Cir. 2003) (Randolph, J., concurring), *aff'd*, 321 F.3d 1134 (D.C. Cir. 2003); *Rasul v. Bush*, 215 F. Supp. 2d 55, 64 n.11 (D.D.C. 2002), *rev'd on other grounds*, 542 U.S. 466 (2004).

¹⁷⁵ See *Rasul*, 542 U.S. at 485.

¹⁷⁶ See, e.g., *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d at 480–81; *Khalid*, 355 F. Supp. 2d at 326 n.19; *Al Odah*, 321 F.3d at 1150 (Randolph, J., concurring), *aff'd*, 321 F.3d 1134 (D.C. Cir. 2003); *Rasul*, 215 F. Supp. 2d at 64 n.11, *rev'd on other grounds*, 542 U.S. 466 (2004).

¹⁷⁷ *Ickes v. Fox*, 300 U.S. 82, 96 (1937); *United States v. N. Y. Rayon Importing Co.*, 329 U.S. 654, 660–61 (1947).

¹⁷⁸ See *Bieregu v. Ashcroft*, 259 F. Supp. 2d 342, 354 (D.N.J. 2003) (finding that the ATS does not itself waive the sovereign immunity of the United States); see also *Rosner v. United States*, 231 F. Supp. 2d 1202, 1206 (S.D. Fla. 2002), *reconsideration denied*, 2002 WL 31954452 (S.D. Fla. 2002), *reconsideration denied*, 2002 WL 31954453 (S.D. Fla. 2002). Generally, sovereign immunity bars the assertion of jurisdiction over the United States in suits that seek “money or property damages or some form of coercive injunctive relief.” 14 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3654 (3d ed. 2005). However, sovereign immunity does not operate in every proceeding that might affect a governmental interest. *Id.* (citing *United States v. Rural Elec. Convenience Co-op Co.*, 922 F.2d 429, 434 (7th Cir. 1991)).

¹⁷⁹ See Torture Victims Protection Act, Pub. L. No. 102-256, 106 Stat 73 (codified at 28 U.S.C. § 1350 (2000)) (“provides a cause of action for official torture and extrajudicial killing”); *but see* *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434–35 (1989), where the Supreme Court held that the ATS does not itself waive foreign sovereign immunity. As such, in order to carry out an ATS claim against a foreign state in U.S. courts, the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. §§ 1602–1605, must waive the foreign sovereign's immunity with respect to the act complained of. See *Amerada Hess*, 488 U.S. at 434–35.

¹⁸⁰ That is, at least as far as U.S. actors are amenable to suit. On the other hand, foreign sovereigns are amenable to suit under the ATS, so long as the claim satisfies

The Bush Administration has consistently argued that sovereign immunity, which includes military authority, bars judicial review of claims brought by detainees under the ATS against U.S. officials.¹⁸¹ Conceding that “the [ATS] does not itself waive . . . sovereign immunity,”¹⁸² detainees have asserted, in response, that the Administrative Procedure Act (APA)¹⁸³ waives sovereign immunity by providing for judicial review for “any person suffering legal wrong because of agency action . . . [and] seeking relief other than money damages.”¹⁸⁴ The detainees have argued that violations of the ATS constitute such “legal wrongs” and seek injunctive relief and declaratory judgment that “the conditions of their confinement violate customary international law and international treaties prohibiting prolonged detention.”¹⁸⁵

The APA provides a presumption that agency action is reviewable absent express statutory preclusion or explicit and exclusive delegation to the discretion of the agency by law.¹⁸⁶ Additionally, it mandates review of agency action when there is “no other adequate remedy in a court.”¹⁸⁷ Once the detainees established that “the United States Army is an agency within the meaning [of section 701] of the APA,”¹⁸⁸ they argued that the Army’s actions with respect to the detainees’ confinement are subject to judicial review because there is

one of the offenses listed in the Foreign Sovereign Immunities Act, 28 U.S.C. § 1603, it can be brought against a foreign sovereign.

¹⁸¹ See, e.g., *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 480–81 (D.D.C. 2005); *Khalid v. Bush*, 255 F. Supp. 2d 311, 326 n.19 (D.D.C. 2005); *Al Odah v. United States*, 321 F.3d 1134, 1150 (D.C. Cir. 2003) (Randolph, J., concurring); *Rasul v. Bush*, 215 F. Supp. 2d 55, 64 n.11 (D.D.C. 2002), *rev’d on other grounds*, 542 U.S. 466 (2004).

¹⁸² See *Bieregu v. Ashcroft*, 259 F. Supp. 2d 342, 354 (D.N.J. 2003).

¹⁸³ Administrative Procedure Act, 5 U.S.C. §§ 701–06 (2000).

¹⁸⁴ Petitioners’ Memorandum, *supra* note 170, at 44. The APA also provides for a waiver of sovereign immunity for “action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority.” 5 U.S.C. § 702; see also *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 208–09 (D.C. Cir. 1985) (acknowledging that the APA may waive sovereign immunity under the ATS).

¹⁸⁵ Petitioners’ Memorandum, *supra* note 170, at 44.

¹⁸⁶ See, e.g., *Von Clemm v. Banuelos*, 365 F. Supp. 477, 481 (D. Mass. 1973), *aff’d* 498 F.2d 163 (1st Cir. 1974), *cert. denied*, 419 U.S. 1079 (1974).

¹⁸⁷ 5 U.S.C. § 704 (“Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review.”).

¹⁸⁸ Petitioners’ Memorandum, *supra* note 170, at 45 (citing *Jaffee v. United States*, 592 F.2d 712, 719 (3d Cir. 1979)).

no “other adequate remedy in a court.”¹⁸⁹ Specifically, they argued that there is no “statutory review proceeding” applicable to actions of the Army with respect to the conditions of the detainees’ confinement, which is at issue under the ATS claim.¹⁹⁰ Further, they indicated that an arbitrary detention claim under the ATS “do[es] not fall within the category of claims for which habeas is the exclusive remedy,” and, as such, a habeas proceeding does not provide an “adequate remedy” foreclosing judicial review.¹⁹¹ Finally, they addressed the government’s contention that military related exceptions to the APA prevent the waiver of sovereign immunity.¹⁹²

The exemptions invoked by the government against APA waiver of sovereign immunity are either for “court martials and military commissions”¹⁹³ or “military authority exercised in the field in time of war or in occupied territory.”¹⁹⁴ However, the detainees indicated that the “military authority” exemption is not applicable to arbitrary detention because it is “intended to prohibit ‘judicial interference with the relationship between soldiers and their military superiors’ and ‘military commands made in combat zones or in preparation for, or in the aftermath of, battle.’”¹⁹⁵ Additionally, the detainees argued, the military exemption is not applicable because the detainees are not being held in “occupied territory” or “in the field” and, thus, cannot interfere with military functions as required for it to apply.¹⁹⁶ Lastly, even if the executive’s discretion to wage war and capture enemies is not reviewable, the APA still may waive sovereign immunity with respect to ATS claims, the detainees explained, because the APA does not provide the military with absolute discretion to detain individuals, especially if the conditions of their detention are in violation of international human rights standards, constitutional law, and the laws of war.¹⁹⁷

Since governmental actions during war have traditionally been subject to judicial review when violations of liberty are alleged,¹⁹⁸ it

¹⁸⁹ *Id.* (citing 5 U.S.C. § 704).

¹⁹⁰ *Id.* at 46.

¹⁹¹ *Id.* at 47 (citing *Rasul v. Bush*, 542 U.S. 466, 563 (2004)).

¹⁹² *Id.* at 51.

¹⁹³ Administrative Procedure Act, 5 U.S.C. § 701(b)(1)(F) (2000).

¹⁹⁴ *Id.* § 701(b)(1)(G).

¹⁹⁵ Petitioners’ Memorandum, *supra* note 170, at 49 (quoting *Doe v. Sullivan*, 938 F.2d 1370, 1380 (D.C. Cir. 1991)).

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at 51.

¹⁹⁸ *Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 426 (1934) (“[E]ven the war power does not remove constitutional limitations safeguarding essential liberties.”).

follows that there is no reason to believe that the Authorization for the Use of Military Force (AUMF)¹⁹⁹ forecloses judicial review of such claims in the “War on Terrorism.”²⁰⁰ On the contrary, the detainees contended that nothing in the “AUMF authorizes indefinite detention without charges.”²⁰¹ Accordingly, the brief concluded by noting that the judiciary is obliged to review allegations of arbitrary detention under the ATS.²⁰²

The government’s assertion of sovereign immunity has prevailed in each of the recent detainee ATS cases.²⁰³ In *Al Odah v. United States*,²⁰⁴ Judge Randolph, in concurrence, explained that the ATS does not waive sovereign immunity because Congress has not provided for its explicit waiver in this context.²⁰⁵ Further, assuming that the APA provides a general waiver of sovereign immunity, the judge indicated, that the “military authority” exemption bars any such waiver.²⁰⁶ Judge Randolph reasoned that the exemptions discussed earlier are applicable because in each case the detained was taken “in the field in time of war,” asserting that the language implies much broader meaning which reaches the captivity of those in Guantanamo Bay.²⁰⁷ Additionally, the judge explained that the military detentions

¹⁹⁹ S.J. Res. 23, 107th Cong. (2001) (enacted):

[T]he President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

²⁰⁰ Petitioners’ Memorandum, *supra* note 170, at 52.

²⁰¹ *Id.*

²⁰² *Id.* at 53.

²⁰³ See, e.g., *In re Guantanamo Detainees*, 355 F. Supp. 2d 443, 480–81 (D.D.C. 2005); *Khalid v. Bush*, 355 F. Supp. 2d 311, 326 n.19 (D.D.C. 2005); *Al Odah v. United States*, 321 F.3d 1134, 1150 (D.C. Cir. 2003) (Randolph, J., concurring), *aff’d*, 321 F.3d 1134 (D.C. Cir. 2003); *Rasul v. Bush*, 215 F. Supp. 2d 55, 64 n.11 (D.D.C. 2002), *rev’d on other grounds*, 542 U.S. 466 (2004).

²⁰⁴ 321 F.3d 1134 (D.C. Cir. 2003).

²⁰⁵ See *id.* at 1149–50 (Randolph, J., concurring). Judge Randolph’s opinion reflects Judge Kollar-Kotelly’s reasoning in *Rasul*. Although *Rasul* was overturned by the Supreme Court with respect to its denial of federal court jurisdiction to hear claims brought by aliens under the ATS, the Supreme Court did not rule on the sovereign immunity issue. Consequently, lower courts, such as the District Court for the District of Columbia in *Al Odah*, have continued to dismiss ATS claims on the ground of sovereign immunity by invoking *Rasul*’s reasoning with respect to the APA.

²⁰⁶ See *id.*

²⁰⁷ See *id.* at 1150.

are precluded from judicial review because they are “committed to agency discretion by law.”²⁰⁸

The use of sovereign immunity to preempt judicial review of detainee ATS claims has become so accepted that in one of the latest cases, *In re Guantanamo Detainee Cases*, the court did not proffer an independent justification for its holding.²⁰⁹ Instead, the court simply directed the reader’s attention to the treatment of this issue in *Rasul* and Judge Randolph’s concurrence in *Al Odah*.²¹⁰

A. *Sovereign Immunity and the International Law Approach*

Under principles of international law, the courts should not recognize the Government’s assertion of sovereign immunity because such an assertion by a state is inappropriate when international human rights violations, including arbitrary detention, are alleged.²¹¹ Sovereign immunity is limited in international law by obligations called *erga omnes*, which are owed to the international community rather than to any particular state.²¹² Some of these obligations con-

²⁰⁸ *Id.* (quoting 5 U.S.C. § 701(a)(2) (1966)). “This exclusion applies when ‘a court would have no meaningful standard against which to judge the agency’s exercise of discretion.’” *Id.* (quoting *Heckler v. Chaney*, 470 U.S. 821, 830 (1985)). “The military’s judgment about how to confine the detainees necessarily depends upon ‘a complicated balancing of a number of factors which are peculiarly within its expertise.’” *Lincoln v. Vigil*, 508 U.S. 182, 193 (1993) (quoting *Heckler v. Chaney*, 470 U.S. 821, 831 (1985)).

The level of threat a detainee poses to United States interests, the amount of intelligence a detainee might be able to provide, the conditions under which the detainee may be willing to cooperate, the disruption visits from family members and lawyers might cause - these types of judgments have traditionally been left to the exclusive discretion of the Executive Branch, and there they should remain.

Al Odah, 321 F.3d at 1150 (Randolph, J., concurring); see also *United States ex rel. Schonbrun v. Commanding Officer, Armed Forces*, 403 F.2d 371, 375 n.2. (D.C. Cir. 2003), *Nat’l Fed’n of Fed. Employees v. United States*, 905 F.2d 400, 406 (D.C. Cir.1990).

²⁰⁹ See *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 481–90 (D.D.C. 2005).

²¹⁰ *Id.*

²¹¹ See JANIS, *supra* note 133, at 36 (“[*Jus cogens*] is the notion that there exist some rules of international law so fundamental that they prohibit acts by states even if such conduct is expressly sanctioned by state consent.”); RESTATEMENT (THIRD) ON THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 cmt. N (1986) (identifying the prohibition against prolonged arbitrary detention as a *jus cogens* norm); see also Steven Folgelson, Note, *The Nuremberg Legacy: An Unfulfilled Promise*, 63 S. CAL. L. REV. 833, 868 (1990) (noting that Nazis on trial at Nuremberg could not use sovereign immunity as a defense to crimes that are considered *jus cogens*).

²¹² Andrea Bianchi, *Immunity Versus Human Rights: The Pinochet Case*, 10(2) EUR. J. OF INT’L L. 237, 271 (1999), available at <http://www.ejil.org/journal/Vol10/No2/art1-07.html> (citing *Barcelona Traction Light & Power Co., Ltd.*, 1970 I.C.J.

cern the protection of fundamental human rights (also referred to as *jus cogens*) and operate under the premise that “every state has a legal interest in their fulfillment.”²¹³ Accordingly, “any unilateral action or international agreement which violates them is absolutely prohibited.”²¹⁴ Additionally, some have claimed that *jus cogens* protects certain individual human rights directly²¹⁵ and, in *Siderman de Blake v. Republic of Argentina*,²¹⁶ the United States Court of Appeals for the Ninth Circuit concluded that “the right to be free from official torture is fundamental and universal, a right deserving of the highest status under international law, a norm of *jus cogens*.”²¹⁷ The paramount nature of *jus cogens*, as embodied in individual human rights, indicates that state actors are not at liberty to assert sovereign immunity in the face of violation of such rights.

Like genocide and torture, arbitrary detention is widely considered a *jus cogens*, a fundamental human right or “a set of norms from which no derogation is ever admitted under international law.”²¹⁸ As such, the prohibition against arbitrary detention is subject to universal jurisdiction, that is, any state may (and indeed has the obligation to) assert jurisdiction over individual allegations of arbitrary detention.²¹⁹ The notion that sovereign immunity is inoperable in the face of an allegation of a *jus cogens* violation is fundamental to the principal of universal jurisdiction.²²⁰

Although the Court in *Sosa* did not decide that only violations of international norms that are *jus cogens* are recognizable under the

32). *Erga omnes* obligations can be distinguished from those that arise when two or more nations enter into a treaty in which they explicitly define the obligations that operate under the treaty with respect to each other. *Id.*

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ See JANIS, *supra* 133, at 65 (citing Robledo, *Le jus cogens international: sa genese, sa nature, ses fonctions*, 172 HAGUE RECUEIL 9, 167–87 (1981)).

²¹⁶ 965 F.2d 699 (9th Cir. 1992).

²¹⁷ *Id.* at 717. There, the court explained that “[w]hereas customary international law derives solely from the consent of states, the fundamental and universal norms constituting *jus cogens* transcend such consent, as exemplified by the theories underlying the judgments of the Nuremberg Tribunals following World War II.” *Id.* at 715. Also, in 1987, the Inter-American Commission on Human Rights found the United States had violated *jus cogens* by executing two minors. See Donald T. Fox, *Inter-American Commission on Human Rights Finds United States in Violation*, 82 AM. J. INT’L L. 601, 601 (1988).

²¹⁸ Bianchi, *supra* note 212, at 271; see also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (1986) (providing that “a state violates international law if, as a matter of state policy, it practices, encourages, or condones prolonged arbitrary detention.”).

²¹⁹ See Bianchi, *supra* note 212.

²²⁰ *Id.*

ATS, its cautionary language with respect to recognizing claims suggests that the judiciary would be more justified in upholding a *jus cogens* claim than a non-*jus cogens* claim. Additionally, violations of *jus cogens* claims, unlike those based on customary international law pertaining to business, for instance, are readily able to satisfy the *Sosa* requirement of definiteness and universal acceptance. Thus, since the prohibition against arbitrary detention, as a *jus cogens*, would satisfy the *Sosa* standard by virtue of its definite definition and ubiquitous acceptance, it follows that United States courts should not recognize sovereign immunity as a bar to judicial review. Recognition of sovereign immunity in the face of such claims does violence to centuries of international human rights law development and to the status of United States courts as guardians and facilitators of human rights law.

V. CONCLUSION

The ATS is the only legislative provision that affirmatively requires the federal courts to recognize and review violations of international law. As such, the ATS bestows on the courts the constitutional duty to review tort claims brought by aliens alleging violations of international law.²²¹ In carving out an exception for United States state actors, the courts are failing to use the ATS as a tool for justice and, instead, using it as a shield for injustice.²²²

The courts should find that sovereign immunity is waived under the ATS because arbitrary detention is a violation of the laws of nations for the purposes of the ATS.²²³ The courts' reliance on sovereign immunity as a shield to accusations of official arbitrary detention in violation of the ATS is weak because it is a firmly established international law principle that sovereign immunity does not bar claims of arbitrary detention.²²⁴ In light of this, in order to deny the detainees' claims, the federal courts have only two equally undesirable options: they can either completely disregard the extent of international agreements stipulating that freedom from arbitrary detention is a fundamental human right by deciding that the international law principle prohibiting arbitrary detention does not meet the requirements of *Sosa's* eighteenth century paradigm or they can continue to stand in outright opposition to international law and maintain that U.S. officials are immune from accusations of arbitrary detention. Since deciding in either direction will negatively impact the United

²²¹ See Part II.A.

²²² See Part IV.

²²³ See Part III.A.1.

²²⁴ See *supra* notes 211–20 and accompanying text.

States judiciary's role as interpreters and sources of international law, the courts should substantively review the detainees ATS claims of arbitrary detention.