I. Introduction

The Alien Tort Claims Act (ATCA)[1] provides that 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." After lying in desuetude for nearly two centuries, the ATCA was reinvigorated by *Filartiga v. Pena-Irala*,[2] in which the Second Circuit held that official torture was justiciable under the ATCA. *Filartiga* was followed by a line of cases using the ATCA as a nexus to bring suit against numerous violations of international law by both individuals and corporations. This activity spurred criticism of *Filartiga* and its progeny on legal and policy grounds. There has also been substantial division over whether the ATCA constitutes a jurisdictional grant or a wholesale incorporation of the law of nations into federal law, at least for this limited purpose.[3]

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[1] 28 U.S.C. § 1350 (9). There has been some conflict over nomenclature between those who prefer the moniker "Alien Tort Statute" (ATS) and those who prefer ATCA. See, e.g., Eugene Kontorovich, *Implementing Sosa v. Alvarez-Machain: What Piracy Teaches about the Limits of the Alien Tort Statute*, 80 Notre Dame L. Rev. 111, 113 (Nov. 2004); Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 Va. J. Int'l. L. 587, 592-93 (2002). Since I argue the statute in question has a substantive component – that is, provides causes of action for torts without other statutory corroboration – I use ATCA. This is not mutually exclusive from saying the statute is jurisdictional in nature; instead, the statute confers jurisdiction on federal courts to recognize causes of action for torts without other statutory corroboration. As a result, I do not disagree with the claim that the ATCA is a jurisdictional statute made in *Sosa* and in, e.g., Michael Garcia and Arthur Traldi, INTERNATIONAL LAW AND AGREEMENTS: THEIR EFFECT ON U.S. LAW, Congressional Research Service Report, Aug. 11, 2004. Rather, I use ATCA to distinguish my view from those who consider the fact the statute's jurisdictional nature to preclude it from being a source of new causes of action.

[2] 630 F.2d 876 (2nd Cir.1980).

[3] The ATCA was not the first statute in the former colonies to provide civil liability for international torts. See, e.g., An Act to Prevent Infractions of the Laws of Nations, in Acts and Laws Passed by the General Court or Assembly of His Majesties English Colony of Connecticut, January 1780-October 1783 at 602-03 (Timothy Green 1783) (authorizing civil actions against citizens violating the law of nations). Nor was the ATCA's deference to international law out of place in early American law. See, e.g., Beth Stevens, *The Law of Our Land: Customary International Law as Federal Law After Erie*, 66 Fordham L. Rev. 393, 402 (1997) (arguing that the Framers were concerned with

Sosa v. Alvarez-Machain[4] began to resolve this question, holding that only those torts substantially analogous to piracy, violations of safe passage, and offenses against ambassadors – the torts over which the first Congress intended to provide jurisdiction – are actionable under the ATCA.[5] Problematically, however, the court also explicitly upheld *Filartiga*. Consequently, *Sosa* failed to resolve the conflict between the two major paradigms of actionable offenses which have arisen in the academic literature as well as the caselaw. I term these the torture paradigm and the piracy paradigm. As a result of this ambiguity, scholars on both sides of the debate declared victory.[6]

This Note lays out the development of the ATCA and of the *jus gentium* (law of nations) into contemporary customary international law, as well as the two existent paradigms of ATCA interpretation, and establishes that *Sosa* is inconsistent with either extreme position. Since the Court's holding in *Sosa* is under-theorized, this Note crafts a reasonable middle ground between the two paradigms: holding all universal jurisdiction offenses (and those significantly analogous) civilly actionable under the ATCA.[7] It then

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following international law to avoid creating *causus belli* for a European power). Even before the Constitutional Convention, some U.S. courts had applied the principle suggested by the ATCA. *See* Respublica v. De Longchamps, 1 U.S. (1 Dall.) 111 (1784) ("[The law of nations], in its full extent, is a part of the law of this state, and is to be collected from the practice of different nations, and the authority of writers").

[4] 124 S.Ct. 2739 (2004).

[5] *See* 4. W. Blackstone, Commentaries on the Laws of England 67 (1769). See, e.g., Sosa at 2756 ("It was this narrow set of violations of the law of nations, admitting of a judicial remedy and at the same time threatening serious consequences in international affairs, that was probably on the minds of the men who drafted the ATS with its reference to tort").

[6] *Compare* Kontorovich, *supra* note 1, at 113 (claiming Sosa "mostly" accepted the piracy paradigm), *with* William S. Dodge, *Bridging Erie: Customary International Law in the U.S. Legal System After Sosa v. Alvarez-Machain, forthcoming* in TULSA J. OF COMP. & INT'L. L., at 2 (*Sosa* "endorsed the *Filartiga* line of cases").

[7] Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 781 (C.A.D.C., 1984).

uses *Yousef*[8] as well as the Princeton Principles[9] to synthesize a test for universal justiciability. The resultant formula constitutes a middle ground consistent with prior precedent on the ATCA and universal jurisdiction which serves the United States' policy goals better than either the piracy or torture paradigms. Finally, it answers several main objections to this conception of the ATCA and to modern universal jurisdiction generally. Throughout, I engage particularly with Professor Eugene Kontorovich's article *Implementing Sosa v. Alvarez-Machain: What Piracy Teaches About the Limits of the Alien Tort Statute*,[10] the most salient post-*Sosa* argument for a narrow interpretation of the ATCA.

II. Existing Law

A. The ATCA and the Law of Nations Since 1789

The ATCA was passed as part of the Judiciary Act of 1789. There is limited legislative history, but the available evidence indicates that the Framers had intended the ATCA to be self-executing.[11] It lay largely in disuse between 1789 and 1980, though it was successfully used as a jurisdictional nexus in two cases[12] and recodified by Congress twice with only cosmetic changes.[13] In 1980, however, the Second Circuit resurrected it

[8] United States v. Yousef, 327 F.3d 56 (2d Cir. 2003).
[9] Princeton Project on Universal Jurisdiction, *The Princeton Principles on Universal Jurisdiction* (Stephen Macedo ed., 2001), available at http://www.princeton.edu/~lapa/unive_jur.pdf.
[10] *See supra* note 1.
[11] *See, e.g.*, 1 OP. ATT'Y GEN. 57, 59 (1795).
[12] *See* Adra v. Clift, 195 F. Supp. 857 (D.Md. 1961), Bolchos v. Darrell, 3 F. Cas. 810 (D.S.C. 1795) (No. 1,607). *But see* Anh v. Levi, 586 F.2d 625 (6th Cir. 1978), Benjamins v. British European Airways, 572 F.2d 913 (2nd Cir. 1978), *inter alia* (rejecting attempts to use the ATCA as a jurisdictional nexus).
[13] *See* Bradley *supra* note 1, at n.2, *citing* Act of March 3, 1911, ch. 231, § 24, 36 Stat. 1087, 1093 (1911); Revised Statutes tit. 13, ch. 3, § 563, para. 16 (1873).

in *Filartiga*. Since then, it has been used to bring suit against political leaders[14] as well as corporations[15] for violations of international law.[16]

International law, however, grew and changed, increasingly incorporating recognition of the rights and duties of individuals as well as nation-states, and developing international institutions to better regulate those rights and duties.[17] These advances have

[14] *See, e.g.*, Tachiona v. Mugabe, 234 F.Supp. 2d 401 (S.D. N.Y.2002), Hilao v. Estate of Marcos, 103 F.3d 789 (9th Cir. 1996), Abebe-Jira v. Negewo, 72 F.3d 844 (11th Cir. 1996) (upholding recovery for plaintiff under ATCA), Abiola v. Abubakar, 267 F.Supp. 2d 907 (N.D. Ill. 2003) (denying Nigerian general's summary judgment motion), Xuncax v. Gramajo, 886 F. Supp 162 (D. Mass. 1995) (awarding damages against Guatemalan generals under the ATCA), Kadic v. Karadzic, 70 F.3d 232 (2d. Cir. 1995) (upholding recovery for plaintiffs under ATCA), Hwang Geum Joo v. Japan, 332 F.3d 679, 357 (D.C. Cir. 2003), *cert. granted* and judgment vacated and case remanded for reconsideration, 124 S. Ct. 2835 (June 14, 2004).

[15] *See, e.g.*, Wiwa v. Royal Dutch Petroleum Co. 226 F.3d 88 (2d Cir. 2000), Presbyterian Church of Sudan v. Talisman Energy, 244 F.Supp.2d 289 (S.D. N.Y. 2003), Sarei v. Rio Tinto PLC, 221 F. Supp. 2d 1116 (C.D. Cal. 2002), In re South African Apartheid Litigation, 288 F. Supp. 2d. 1379 (JPML 2002).

[16] *Filartiga* read the ATCA very broadly. *See infra* note 39. There was considerable support for this position in the ensuing litigation. *See, e.g.*, Wiwa, 226 F.3d at 103-105 (holding that the ATCA "reflects a United States policy interest in providing a forum for the adjudication of international human rights abuses," because "the law of nations is incorporated into the law of the United States" and "a violation of the international law of human rights is (at least with regard to torture) *ipso facto* a violation of U.S. domestic law"), Abebe-Jira, 72 F3d at 848 (holding that the ATCA gives domestic tribunals the power to "fashion domestic common law remedies to give effect to violations of customary international law"). However, some courts subscribed to a strictly jurisdictional reading of the ATCA. *See* Al Odah v United States, 321 F3d 1134, 1146-47 (DC Cir 2003) (Randolph concurring), Rasul v Bush, 124 S Ct 534 (2003), *cert granted* in part, 124 S Ct 534 (2003) (arguing that the ATCA does not, and should not, provide a cause of action); Tel-Oren v. Libyan Arab Republic, 726 F2d 774, 801, 808 (Bork concurring).

[17] *Compare* RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 101 (1987) ("International law, as used in this Restatement, consists of rules and principles of general application dealing with the conduct of states and of international organizations and with their relations inter se, as well as with some of their relations with persons, whether natural or juridical") with Jeremy Bentham (who coined the term "international law"), Introduction to the Principles of Morals and Legislation 6, 296 & n.x (J.H. Burns & H.L.A. Hart eds., 1970) (excluding transactions involving individuals from province of "international jurisprudence," which referred only to "transactions between sovereigns as such").

created what David Hirsh calls "cosmopolitan law."[18] Cosmopolitan law, though it has some roots in Greek and Roman thought,[19] is most commonly traced to Immanuel Kant.[20] In positive law, it is typically viewed as commencing with the Nuremberg trials[21] and developing through a variety of ensuing international agreements.[22] Richard J. Goldstone argues that its international use diminished during the Cold War, but has revitalized since 1991 due to the activity of tribunals like the International Criminal Tribunal for Rwanda (ICTR) and International Criminal Tribunal for the Former Yugoslavia (ICTY), as well as the International Criminal Court (ICC).[23] As Vaclav Havel perhaps overstates it, "The enlightened efforts of generations of democrats, the terrible experience of two world

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[18] *See, e.g.*, Hirsh, David, LAW AGAINST GENOCIDE, Glasshouse (2003). Professor Hirsh defines cosmopolitan law as "aim[ing] to protect human rights of individuals and of groups, primarily from serious threats that may be posed to them by their 'own' states, invading states, or other state-like structures." *Id*. at XV.

[19] *See, e.g.*, Geoffrey Robertson, CRIMES AGAINST HUMANITY, New Press (2000), at 1 (describing the Roman concept of *jus gentium* – literally 'law of nations' – as "rules which they discovered to be common to all civilized societies and which might therefore be catalogued specially as a kind of international law").

[20] *See, e.g.*, Kant, Immanuel, PERPETUAL PEACE (1795).

[21] *See* Brigadier General Telford Taylor, U.S.A., Chief of Counsel for War Offenses, Final Report to the Secretary of the Army on the Nuremberg War Offenses Trials Under Control Council Law No. 10, at 109 (William S. Hein & Co., Inc. 1997) (Aug. 15, 1949) ("[T]he major legal significance of the [Nuremberg] ... judgments, lies ... in those portions of the judgments dealing with the area of personal responsibility for international law offenses.") *But see* U.S. STATE DEPT. PUB. NO. 3080, REPORT OF ROBERT H. JACKSON, INTERNATIONAL CONFERENCE ON MILITARY TRIALS 437 (1949) (arguing that crimes against humanity were "implicitly" in violation of international law even before Nuremberg).

[22] *See, e.g.*, Universal Declaration on Human Rights, UN GAOR, Supp. No. 16, UN Doc. A/6316 (1948); Geneva Convention (Third) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention (Fourth) Relative to the Protection of Civilian Persons in Times of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; International Covenant on Civil and Political Rights, G.A. Res. 2200A, U.N. GAOR, 3 rd Comm., 21st Sess., 1496th plen. mtg., U.N. Doc. A/RES/2200A (XXI) (1966).

[23] *See* Goldstone, Richard J., FOR HUMANITY, New Haven 2000 at 75. Indeed, Kenneth Roth calls the time between 1948 and the end of the Cold War "the lipservice era for human rights." Robertson, *supra* note 9, at xxiii.

wars… and the evolution of civilization have finally brought humanity to the recognition that human beings are more important than the state."[24]

Professor Kontorovich views customary international law as simply the modern rendering of the law of nations.[25] If we accept this picture, then the scope of causes of action under the ATCA will have grown considerably since 1789 because of the revolution in cosmopolitan law. This is the *Filartiga* outlook – an expansive conception of the modern role of the ATCA – and though the specific test laid out in *Filartiga* may represent an overreaching, the revolution in cosmopolitan law affects every aspect of the ATCA's evolution between the Judiciary Act and *Sosa*.

B. The Piracy Paradigm

Advocates of the piracy paradigm have argued both that the ATCA should be restricted to the Blackstonian offenses and that it may include offenses which share their definitional characteristics. Professor Eugene Kontorovich bridges that gap by detailing six "salient characteristics" of the Blackstonian torts[26]:

1) Universal Condemnation[27]

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[24] Vaclav Havel. "Kosovo and the end of the Nation-State," *New York Review*, June 10 1999, as cited in Noam Chomsky, A NEW GENERATION DRAWS THE LINE, Verso, London: 2000, at 2. This claim was anticipated two centuries earlier by Judge James Wilson: "A state, useful and valuable as the contrivance is, is but the inferior contrivance of man; and from his native dignity derives all its acquired importance." Chisholm v. Georgia, 2 U.S. 419, 455 (1793). *But see* Michael Walzer, *The Rights of Political Communities*, *in* INTERNATIONAL ETHICS, ed. Beitz, Cohen, Scanlon, and Simmons, Princeton University Press, Princeton, New Jersey: 1985, at 168 (noting that a challenge to state sovereignty is also a challenge to the rights of an individual citizen "to live in [his] own historical communit[y], in which conflict and controversy about political and social arrangements are appropriately worked out by the members themselves according to their own traditions").

[25] Kontorovich, *supra* note 1, at 113.

[26] Kontorovich, *supra* note 1, at 116.

[27] Standards of proof for universal condemnation vary. *Compare* Mendonca v Tidewater, Inc, 159 F Supp 2d 299, 301-02 (ED La 2001), *aff'd* 33 Fed Appx 705 (5th Cir 2002)

2) Narrow and universally agreed-upon definition

3) Universal agreement on punishment

4) Specific rejection of the protection of their home states[28]

5) Occurrence on the high seas, rather than in any state's territory

6) Equal threat to all states from the offense's commission

Using those characteristics as definitional of the Blackstonian offenses, he argues that no offenses are sufficiently analogous to piracy to merit expanding the list of actionable torts under the ATCA.

Advocates of this paradigm also often argue that a more expansive interpretation of the text will endanger important United States economic or security interests. In *Doe*, the State Department notified the trial judge of the "potentially serious adverse impact [of that litigation] on significant interests of the United States, including interests related directly to the on-going struggle against international terrorism."[29] Litigation against transnational corporations involved in dealings with rights abusers can also pose significant economic risks.[30]

This paradigm is dubious for two primary reasons. First, the Sosa court explicitly upheld *Filartiga*, and a literal read of Kontorovich would suggest that torture should not

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with Tachiona v Mugabe, 234 F Supp 2d 401, 439-40 & n 153 (SDNY 2002) (reaching different conclusions about whether the same body of treaties constituted universal condemnation of racial discrimination).

[28] Pirates could become privateers legally by obtaining letters of marque. *See* Kontorovich, *supra* note 1, at 116.

[29] Letter of William H. Taft, IV, Legal Advisor, to Hon. Louis F. Oberdorfer (July 29, 2002).

[30] The Court in Sosa did not specifically address whether the ATCA provides a cause of action against corporations for aiding and abetting violations of the law of nations. For a discussion of the purported economic costs of ATCA litigation against MNC's, *see* Emeka Duruigbo, *The Economic Cost of Alien Tort Litigation: A Response to Awakening Monster: The Alien Tort Statute of 1789*, 14 MINN. J. GLOBAL TRADE 1 (2004).

be actionable under the ATCA[31] – as a result, this paradigm's explanatory power is limited. Second, Kontorovich rests his argument on one particular definition of the nature of piracy (and so one particular description of the offense to which other offenses must be sufficiently analogous). However, this articulation is not based in any authoritative American jurisprudence on the subject. There are other ways to describe piracy, for instance as the only universal jurisdiction offense of the time, which naturally lead to other implications for modern jurisprudence. Kontorovich's description of piracy is not the only description, nor is it a particularly compelling one as a matter of law, and so neither is his inference the only inference.[32]

The *Sosa* court upheld judicial recognition of new causes of action, noting that the First Congress had granted such discretion and no subsequent Congress had seen fit to remove it.[33] However, criticisms of the ATCA's impact on the national interest should not be tossed easily aside, since a belief that fulfilling international obligations was in the national interest played a major role in the Framers' sympathy to international law.[34] Perhaps for this reason, the *Sosa* court advised deference to the executive in determining whether particular ATCA litigation is conducive to the national interest.[35]

C. The Torture Paradigm

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[31] For instance, torturers cannot escape prosecution by obtaining letters of marque, so torture does not meet the piracy analogy as Kontorovich construes it. Nor does torture necessarily occur in a place where it would be difficult to enforce domestic or international laws against it, nor is there universal agreement upon its punishment.

[32] For a criticism of the piracy-universal jurisdiction analogy, see Eugene Kontorovich, *The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation*, 45 HARV. J. INT'L. L. 184, 202 n.111 (2004).

[33] Sosa, 124 S.Ct. at 2764-65 ("For two centuries we have affirmed that the domestic law of the United States recognizes the law of nations. It would take some explaining to say now that federal courts must avert their gaze entirely from any international norm intended to protect individuals." (citations omitted)).

[34] *See* Stephens, *supra* note 3.

[35] Sosa, 124 S.Ct. at 2765-66.

Torture is defined as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted" for purposes ranging from obtaining a confession to extracting information, coercing, or punishing with official sanction.[36] Yet torture is a peculiar crime. Of all commonly cited *jus cogens* offenses, it is the only one serious scholars argue can be morally permitted.[37] Yet it is the only offense to which ATCA jurisdiction has been specifically extended by the Supreme Court and Congress, and internationally enjoys a level of opprobrium comparable to offenses like genocide and crimes against humanity.[38] I do not attempt to explain in full torture jurisprudence and scholarship here. However, it is necessary to keep torture's peculiarity in mind to understand its implications for the applicability of the ATCA to other offenses.

Filartiga held that customary international law was incorporated "in toto" into federal common law.[39] In so doing, it laid out a two-pronged test for judiciability of particular offenses under the ATCA:

1) Near universal condemnation[40]

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[36] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 39 U.N. GAOR, Supp. No. 51, at 197, U.N. Doc. A/39/51, December 10, 1984, executed in U.S. law by 18 U.S.C. § 2340. Torture may also include sexual violence. *See* Kadic v. Karadzic, 70 F.3d 232 (1995), *cert. denied*, 518 U.S. 1005 (1996).

[37] *See, e.g.*, Memorandum from the Office of Legal Counsel, U.S. Dep't. of Justice, to Alberto R. Gonzales, Counsel to the President 3 (Aug. 1, 2002), Alan Dershowitz, *Is There a Torturous Road to Justice?*, Los Angeles Times, November 8, 2001. One important ramification of this controversy is that torture does *not* seem to enjoy universal moral condemnation in state practice. However, those who seek to justify torture generally do so only in a very narrow range of "ticking-bomb" cases, and the difference between torture and other *jus cogens* violations may only be that the other offenses do not tend to be useful in such cases. There is a clear consensus that torture is inappropriate absent such a justification.

[38] *See, e.g.*, Convention Against Torture, *supra* note 31. *See also* Regina v. Bow Street Metropolitan Stipendiary Magistrate and Others, ex parte Pinochest Ugarte, House of Lords, 2000 1 App. Cas. 147.

[39] Filartiga, 630 F.2d at 855.

[40] *Id.* at 880 ("In light of the universal condemnation of torture in numerous international agreements, and the renunciation of torture as an instrument of official policy by virtually

2) Defined specifically[41]

This test is very similar to the test for whether a particular action is in violation of customary international law.[42] Indeed, the Second Circuit held that torture is justiciable under the ATCA because official torture "violates established norms of the international law of human rights, and hence the law of nations.[43]"

While many have noted that the Court has held that "international law is our law,"[44] this is only true in the absence of a controlling executive or legislative act to the contrary.[45] As a result, many norms of customary international law are not incorporated into U.S. law, and so cannot constitute causes of action for ATCA litigation. Considerable scholarship both in support of and opposed to the *Filartiga* holding was generated in the next few years.[46]

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all of the nations of the world (in principle if not in practice), we find that an act of torture committed by a state official against one held in detention violates established norms of the international law of human rights, and hence the law of nations"). While this condemnation is not in fact universal, torture may provide some standard for what constitutes a sufficient international consensus. *See supra* note 16.

[41] *See, e.g.*, Sosa at 2769, 2776.

[42] *See* Buell v. Mitchell, 274 F.3d 337 (6th Cir. 2001), citing North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/The Netherlands) 1969 I.C.J. 51/52 (Feb. 20) & RESTATEMENT § 102 (2) cmt. k. & reporters' n. 6. ("Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation").

[43] Filartiga at 880. *See, e.g.*, Flores v. South Peru Copper Corp., 343 F.3d 140, 149-50 (2d Cir. 2003) ("The Filartiga Court not only held that § 1350 provides a jurisdictional basis for suit, but also recognized the existence of a private right of action for aliens… seeking to remedy violations of customary international law or of a treaty of the United States").

[44] The Paquete Habana, 175 U.S. 677, 700 (1900).

[45] *Id.* As a result, it is possible that "no enactment of Congress may be challenged on the grounds that it violates customary international law." Wade Estey, *The Five Bases of Extraterritorial Jurisdiction and the Failure of the Presumption Against Extraterritoriality*, 21 HASTINGS INT'L. & COMP. L. REV. 177, 180 (1997).

[46] *See* Jeffrey H. Blum and Ralph G. Steinhardt, *Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act after Filartiga v. Pena-Irala*, 22 HARV. INT'L L. J. 53 (1981); Lisa A. Rickard, *Filartiga v. Pena-Irala: A New Forum for*

In 1991, Congress expressly ratified *Filartiga* with its enactment of the Torture Victim Protection Act (TVPA).[47] The TVPA supplemented the ATCA and extended similar civil remedies to U.S. citizens tortured or killed abroad by a defendant acting under actual or apparent state authority.

The torture paradigm, however, was rejected in *Sosa*. Indeed, the *Sosa* court described the wholesale incorporation of customary international law into American law for ATCA purposes as "frivolous" and "implausible.[48]" Since this would be closely akin to the torture paradigm, the paradigm cannot be reconciled with *Sosa* and a middle ground between the two paradigms is necessary.

D. Sosa v. Alvarez-Machain

The case arose from the 1985 seizure of a Mexican national, Humberto Alvarez-Machain, on suspicion of assisting in the torture of a Drug Enforcement Agency (DEA) agent. When extradition attempts failed, the DEA contracted with Mexican nationals, including Jose Francisco Sosa, to abduct Alvarez-Machain from his home and bring him to the United States so he could be arrested by federal officers.[49] After a lengthy and unsuccessful procedural challenge,[50] Alvarez-Machain was acquitted at trial on a directed

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Violations of International Human Rights, 30 AM. U. L. REV. 807 (1980 – 1981), Richard A. Conn, Jr., *The Alien Tort Statute: International Law as the Rule of Decision*, 49 FORDHAM L. REV. 874 (1980 – 1981), Marc P. Jacobsen, *28 U.S.C. 1350: A Legal Remedy for Torture in Paraguay?*, 69 GEO. L. J. 833 (1980-1981), Michael Danaher, *Torture as a Tort in Violation of International Law: Filartiga v. Pena-Irala*, 33 STAN. L. REV. 357 (1980-1981), Thomas E. Grossmann, *Torture as a Tort in Violation of the Law of Nations, Giving Rise to Federal Jurisdiction Pursuant to 28 U.S.C. § 1350 Whenever an alleged Torturer, Regardless of Nationality, Is Served with Process by an Alien Within the Borders of the United States*, 49 U. CIN. L. REV. 880 (1980)

[47] 28 U.S.C. §1350.

[48] Sosa,124 S.Ct. at 2756.

[49] Alvarez-Machain v. United States, 331 F.3d 604, 609 (9th Cir. 2003) (en banc).

[50] *See* United States v. Alvarez-Machain, 504 U.S. 655 (1992).

verdict.[51] In 1993, he returned to Mexico and commenced a civil suit against the United States and Sosa for his allegedly arbitrary arrest and detention, using the ATCA as a jurisdictional hook.

The *Sosa* Court carved a compromise between the two paradigms, holding that while the first Congress did not intend to incorporate the law of nations *in toto* as in *Filartiga*, it did intend to create a cause of action for the specific violations noted above and envision that courts would eventually grant a similar cause of action for substantially analogous torts, describing those as the "principal" justiciable offenses, rather than the only justiciable offenses, under the ATCA.[52] The Court's opinion in *Sosa* notes, in fact, that some particularly prominent international conventions like the International Covenant on Civil and Political Rights (ICCPR) and the United Nations Declaration of Human Rights (UNDHR) are insufficient in themselves to provide a cause of action for individual plaintiffs.[53]

The Court held that a legitimate ATCA claim should "rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th century paradigms we have recognized [i.e., violations of safe conduct, infringement of the rights of ambassadors, and piracy]."[54] Further, the norm must extend liability to the type of defendants under suit, and not be

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[51] Trial judge Edward Rafeedie noted that the prosecution of Alvarez-Machain appeared based on "wild speculation" and "hunches." *See, e.g.*, Respondent's Brief for Humberto Alvarez-Machain in Sosa, at 2.

[52] Sosa, 124 S.Ct. at 2773-74. Indeed, the Court considers the interpretation that all violations of the law of nations are judiciable under the ATCA "frivolous" and "implausible." *Id.* at 18. For a discussion of the implications of the ATCA and its limited incorporation of international law on non-delegation doctrine, see Edward T. Swaine, *The Constitutionality of International Delegations*, 104 COLUM. L. REV. 1492 (2004).

[53] Sosa, 124 S.Ct. at 2757.

[54] *Id.* at 2751-52.

preempted by explicit or implicit Congressional action. The executive branch also may discourage courts from finding a particular tort actionable, and that determination will carry significant weight.[55] While rejecting the ICCPR and UNDHR as causes of action and counseling restraint in identifying new causes of action, the Court explicitly states that "some, but few" torts are justiciable under the ATCA.[56] Tortious arrest, however, is not one of those few, as it is not defined with sufficient specificity.[57] As a result, while the importance of *Sosa* was recognized immediately, its meaning is still subject to debate.[58]

III. A Middle Ground

Neither the piracy paradigm nor the torture paradigm can be reconciled with the holding in *Sosa.* The piracy paradigm is inconsistent with the *Sosa* court's endorsement of *Filartiga*,[59] and the torture paradigm is explicitly rejected.[60] The piracy paradigm cannot explain why torture is actionable, and the torture paradigm cannot explain why tortious arrest (or any violation of international law) is not, so some synthesis of the two positions is necessary to create a test for actionable torts which is reasonable and consistent with *Sosa.* Unfortunately, the Court's holding itself is under-theorized and provides only limited guidance if ATCA claims are brought for other international torts.

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[55] *Id.* at 2765-66. One justice suggests adding a consideration of the effect on international comity of incorporating a particular tort. *Id*. at 44 (Breyer, J., concurring in part and in the judgment). See also Peter J. Smith, *States as Nations: Dignity in Cross-Doctrinal Perspective*, 89 VA. L. REV. 1, 6 ("There is a particular imperative of judicial non-intervention in matters of international relations, which are more appropriately left to the political branches").

[56] Sosa, 124 S.Ct. at 2749.

[57] *Id.* at 2769.

[58] *See, e.g.*, Dodge, *supra* note 6 ("Indeed, Sosa may stand with Sabbatino as one of the Court's seminal decisions on the relationship between international and U.S. domestic law").

[59] It is possible, though unlikely, the court may have endorsed *Filartiga* simply due to the TVPA (see *infra* note 19). Had it, the rationale would likely have been explicit.

[60] *See supra* note 48.

American courts have held that "Universal jurisdiction is a doctrine of international law allowing states to define and punish certain offenses considered to be of 'universal concern.'"[61] However, neither universal jurisdiction[62] nor *jus cogens*[63] has been recognized as providing a useful limiting principle for ATCA actions.

I argue, *contra* Kontorovich, that universal jurisdiction[64] provides the proper analogy for ATCA causes of action.[65] When courts deem universal jurisdiction appropriate, prosecutions may occur even though there is no causal nexus between the forum state and the offense.[66] The ATCA's grant is similar in form; no language in the Judiciary Act requires any connection between the tort at issue and the United States.

"The principle of universal jurisdiction is based on the notion that certain offenses are so harmful to international interests that states are entitled - and even obliged - to bring proceedings against the perpetrator, regardless of the location of the offense or the nationality of the perpetrator or victim."[67] The ATCA is grounded in the similar desire to make victims of some types of wrongs whole regardless of where those wrongs are

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[61] *See* United States v. Rezaq, 134 F.3d 1121, 1133 (D.C. Cir. 1998).
[62] *See* Kontorovich at 127-36.
[63] *See* Respondent's Brief at 45-47 (arguing that *Paquete Habana* demonstrates by incorporating the international norm against interference with domestic fishing vessels in times of war without arguing it is a *jus cogens* norm that *jus cogens* is not required).
[64] Universal jurisdiction to prescribe particular actions may be either conditional or absolute. See A. Cassese, INTERNATIONAL CRIMINAL LAW (2003).
[65] Kontorovich recognizes that the ATCA and universal jurisdiction are analogous in form. "A unique and controversial component of [ATCA] litigation has been the exercise of universal jurisdiction by U.S. courts." Kontorovich at 128, citing Robert H. Bork, *Judicial Imperialism*, WALL STREET J. A16 (July 12, 2004). As I demonstrate, this exercise is not at all unique.
[66] *See* Beanal v. Freeport-McMoran, Inc., 969 F. Supp. 362, 371 (E.D. La. 1997) ("Where a state has universal jurisdiction, it may punish conduct although the state has no links… with the offender or victim." (quoting RESTATEMENT, *supra* note 17, § 404 cmt. A). *See, e.g.*, Kontorovich at 128, explaining what types of causal nexi may otherwise confer jurisdiction.
[67] Mary Robinson. Forward to the Princeton Principles on Universal Jurisdiction, at 16.

committed.[68]

A. Universal Jurisdiction Offenses[69]

The Princeton Principles provide an illustrative list of "serious offenses" under international law amenable to the exercise of universal jurisdiction: 1) piracy; 2) slavery; 3) war crimes; 4) crimes against humanity; 5) crimes against peace; 6) genocide; and 7) torture.[70] This list does not bar the application of universal jurisdiction to other offenses,[71] but merely establishes that these offenses do merit the application of universal jurisdiction. (For instance, it does not address the conflict between *United States v. Yousef*[72] and *United States v. Yunis*[73] as to whether aircraft hijacking constitutes a universal jurisdiction offense). These principles update the Restatement's catalogue of universal jurisdiction offenses: piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism.[74]

The Princeton Principles also make clear that universal jurisdiction is self-executing: "With respect to serious offenses under international law as specified in Principle 2(1), national judicial organs may rely on universal jurisdiction even if their national legislation does not specifically provide for it."[75] However, like the *Sosa* court,

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[68] *See, e.g.*, Brandon HMA Inc. v. Bradshaw, 809 So.2d 611, 625 (Miss. 2001) (Smith, J., dissenting) ("A plaintiff is entitled to compensation sufficient to make him whole… and a defendant is liable for all damages that proximately result from his wrong").
[69] For one critique of universal jurisdiction, *see* George P. Fletcher, *Against Universal Jurisdiction*, 1 J Int'l Crim. Just. 580 (2003).
[70] Princeton Principles, *supra* note 9, at Art. 2(1).
[71] *Id.* at Art. 2(2).
[72] 327 F.3d 56.
[73] 924 F.2d 1086, 1092 (D.C. Cir. 1991) ("hijacking may well be one of the few offenses so clearly condemned under the law of nations that states may assert universal jurisdiction to bring offenders to justice, even when the state has no territorial connection to the hijacking and its citizens are not involved.").
[74] RESTATEMENT, *supra* note 17, § 404.
[75] *Id.* at Art. 3.

the Princeton Principles provide no clear test for which offenses may be subject to universal jurisdiction beyond the above liturgy.

Universal jurisdiction, though limited in application[76] and inconsistent in practice,[77] has been established as legitimate in at least some cases under both American[78] and international law.[79] When discussing the concept, we must be careful to avoid the "tendency… to elide prescription and enforcement, as well as an inattention to the question of when the requisite prescriptive jurisdictional nexus must be present."[80] Instead, universal jurisdiction "is shorthand for universal jurisdiction to prescribe, and refers to the assertion of jurisdiction to prescribe in circumstances where no other lawful head of prescriptive jurisdiction is applicable to the impugned conduct at the time of its commission,[81]" that is, no other nexus (like nationality jurisdiction, territorial jurisdiction, passive personality jurisdiction, or protective principle jurisdiction) connects the forum

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[76] *See* LUC REYDAMS, UNIVERSAL JURISDICTION: INTERNATIONAL AND MUNICIPAL LEGAL PERSPECTIVES (2003) (surveying universal jurisdiction around the world and finding only 20 cases in the past ten years).

[77] *See, e.g.*, Kontorovich, *supra* note 1 at note 60 (pointing out that Spain and Belgium, two pioneers in the use of universal jurisdiction, had scaled back their jurisdictional claims in 2003 to require a direct link between offense and forum state).

[78] *See* Yousef, 327 F.3d at 105.

[79] *See* Geneva Convention, Additional Protocol 1, 1977 ('each High Contracting Party shall be under the obligation to search for persons alleged to have committed ... grave breaches, and shall bring such persons, regardless of their nationality, before its own courts'). *But see* Arrest Warrant Case, sep. op. Higgins, Kooijman and Buergenthal, at § 31 ('No territorial or nationality linkage is envisaged, suggesting a true universality principle .... But …the authoritative Pictet Commentary … contends that this obligation was understood as being an obligation upon States parties to search for offenders who may be on their territory. Is it a true example of universality, if the obligation to search is restricted to their own territory? Does the obligation to search imply a permission to prosecute in absentia, if the search had no result?') *See also* Princeton Principles; Luis Benavides, Introductory Note To The Supreme Court Of Spain: Judgment On The Guatemalan Genocide Case, 42 I.L.M. 683 (2003), et al.

[80] O'Keefe, Roger. *Universal Jurisdiction: Clarifying the Basic Concept*, 2 J. INT'L CRIM. JUST. 735, 736 (September, 2004).

[81] *Id*. at 754-55.

state to the offense.

Universal jurisdiction offenses must be defined specifically, as the *Sosa* court requires. For instance, in *Yousef*, the Second Circuit held that the lack of an international consensus on the definition of terrorism was a major reason that terrorism was not a universal jurisdiction offense.[82] The court held that the test for universal justiciability is that "The historical restriction of universal jurisdiction to piracy, war crimes, and crimes against humanity demonstrates that universal jurisdiction arises under customary international law only where offenses (1) are universally condemned by the community of nations, and (2) by their nature occur either outside of a State or where there is no State capable of punishing, or competent to punish, the offense (as in a time of war)."[83] The Ninth Circuit, by contrast, defined universal jurisdiction as "appropriate for offenses so heinous that any nation… may assert jurisdiction.[84]"

An objective test for universal jurisdiction would require (1) that the act in question be defined specifically, as in *Yousef*, and (2) that it be in violation of international law. It would then consider either or both (3) the lack of a competent forum state and (4) the heinousness of the act in question.[85] For purposes of this paper, I advocate considering both but requiring a specific minimum level for neither – that is, taking a holistic approach to the competence of other forum states and the heinousness of the act to balance the general goal of prosecuting offenses in their logical forum states

[82] *See, e.g.*, Yousef, 327 F.3d at 91.
[83] *Id.* at 105. See also Hersch Lauterpacht, *The Law of Nations and the Punishment of War Offenses*, 2 Brit. Y.B. Int'l L. 58, 65 (1944) (first proposing universal jurisdiction over individual war criminals).
[84] United States v. Vasquez-Velasco, 15 F.3d 833 (9th Cir. 1994), citing to RESTATEMENT § 402 cmt. A.
[85] I leave aside here questions of universal threat, since jurists' understanding of *hostis humani generis* has modulated in the past two centuries. See *infra* notes 100, 101.

and the principle that certain offenses are sufficiently heinous to cry out for justice, regardless of who provides it. Finally, the objective test would consider policy concerns, like the impact of exerting jurisdiction on international comity.

B. Specific Offenses and the Four-Pronged Test

The universal jurisdiction offenses enumerated by the Princeton Principles and American law mostly pass this test, so it has the virtue of being consistent with existing international law. It would not require replacing extant universal jurisdiction jurisprudence. Instead, the test merely supplements extant jurisprudence by providing a consistent descriptive formula.

(1) Piracy

Piracy, the original universal jurisdiction offense, is inarguably subject to universal jurisdiction.[86] If it were not explicitly subject to universal jurisdiction, it would still pass the four-pronged test: it is in violation of international law and defined specifically,[87] the *locus delecti* renders enforcement difficult, and it is normatively heinous. Moreover, piracy is still a serious policy concern – over the past few years, pirate attacks have increased in frequency around the world, and particularly in poorer areas of Africa and Southeast Asia.[88]

(2) Slavery

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[86] *See Yousef*, *supra* note 74. *See generally* Kontorovich, *supra* note 1.
[87] *See* UN Convention on the Law of the Sea, Art. 101 (defining piracy as an attack on a ship or aircraft outside any state's territorial jurisdiction).
[88] *See Piracy, Terrorism Threats Overlap*, Adam Young and Mark J. Valencia, Washington Times, July 6, 2003. See also Reports on Piracy, Fifty-Third Session Agenda, 1998: Report of the Secretary General, V(A)(4)(146). Piracy's increased prevalence is due in part to difficulty finding effective anti-piracy strategies; *see* Rodeman, Christopher A. *In Search of an Operational Doctrine for Maritime Counterterrorism*. Newport, RI: United States Naval War College. Joint Military Operations Dept., (November 28, 2003).

The slave trade has been illegal under international law at least since the signing of the Slavery Convention in 1926, and victims of slavery are also entitled to protection under United States law.[89] Slavery is defined as "the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised,"[90] while the slave trade "includes all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery... with a view to selling or exchanging him... sale or exchange of a slave ... and, in general, every act of trade or transport in slaves."[91] Currently, the slave trade goes on across the developing world,[92] and even in some corners of the developed world.[93] President Bush has called for aggressive action against the practice.[94] Because it often stems from failed states or states where enforcement is difficult,[95] the slave trade meets the *locus delecti* prong, and has long been thought normatively heinous.

(3) War Crimes

War crimes include "grave breaches" of the Geneva conventions, such as hostage-taking or murder, and other "serious violations" of the law of war, like targeting

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[89] *See* Public Law No. 106-386, Division A, 114 Stat. 1464 (2000) (the Trafficking Victims Protection Act).
[90] Slavery Convention, Art. I(1).
[91] *Id.* at Art. I(2).
[92] *See, e.g.*, United States Department of State, "Victims of Trafficking and Violence Protection Act 2000: trafficking in persons report," (2003), available at http://www.state.gov/g/tip/rls/tiprpt/2003.
[93] *Id.*
[94] *See, e.g.*, Matthew Continetti, *Of human bondage: Bush calls for action against the modern slave trade*, WEEKLY STANDARD, Oct. 6, 2003, p. 17-18.
[95] *See* Martin Brass, *The modern scourge of sex slavery*, SOLDIER OF FORTUNE, vol.27, no.7, July 2002, p.62-5, 75; no. 8, Aug. 2002, p. 70-3, 80-1; no.9, Sept. 2002, p.56-9, Jonathan Cohen, *Borderline slavery: child trafficking in Togo*, Human Rights Watch, Apr. 2003, v. 15, no. 8 (A), 79+[5]p; Patricia Rho-Ng, *Conscription: Asian sex slaves: the development of Thailand's modern-day sex tourism industry*, MONOLID MAGAZINE, vol.2, no.3, Winter/Spring, 2002, p.10-13.

civilians.[96] Under U.S. precedent, war crimes are explicitly subject to universal jurisdiction.[97] They are also subject to universal jurisdiction under international law,[98] and indeed several commentators have argued that ensuring justice in war crimes cases rises to the level of a *jus cogens* obligation.[99]

Were war crimes not explicitly subject to universal U.S. jurisdiction, they would still pass the four-pronged test: they are specifically defined violations of international law,[100] which occur by definition in war zones where enforcement is difficult, and are normatively heinous.[101]

(5) Crimes Against Humanity

Crimes against humanity encompass a variety of acts "committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack."[102] Under American law, crimes against humanity are explicitly subject to

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[96] Rome Statute, *supra* note 79, at Article VIII.
[97] *See Yousef*, *supra* note 74.
[98] Mark S. Zaid, *Universal Jurisdiction: Myths, Realities, And Prospects: Will Or Should The United States Ever Prosecute War Criminals? A Need For Greater Expansion In The Areas Of Both Criminal And Civil Liability*,35 N EW ENG.L. REV 447,450 (2001); Christopher Joyner, *Arresting Impunity: The Case for Universal Jurisdiction in Bringing War Criminals to Accountability*, 59 L. & CONTEMP. PROB. 153 (1996); Melissa K. Marler, Note, *The International Criminal Court: Assessing The Jurisdictional Loopholes In The Rome Statute*, 49 DUKE L.J. 825 (1999); Hans-Peter Kaul, *Preconditions to the Exercise of Jurisdiction*, in: The Statute of the International Criminal Court: A Commentary, Cassese, Gaeta & Jones (eds.), Vol. II, Oxford, (2002); Document Submitted by the German Delegation to the Preparatory Committee of the ICC Statute, A/AC.24971998/DP.2, 23 Mar. 1998.
[99] Sherif Bassiouni, *Accountability For International Offenses And Serious Violations Of Fundamental Human Rights: International Offenses, Jus Cogens and Obligations Erga Omnes*, 59 L. & CONTEMP. PROB. 66 (1996); Lee A. Steven, Note, *Genocide and the Duty to Extradite or Prosecute: Why the US is in Breach of Its International Obligations*, 39 VA. J. INT'L L. 425 (1999).
[100] *See supra* note 94, *inter alia*.
[101] *See Id*. (defining willful killing, willfully causing serious injury, inhuman treatment, wanton destruction of property, *inter alia*, as actionable war offenses under the Statute).
[102] Rome Statute, *supra* note 79, at Article VII.

universal jurisdiction.[103] These grave offenses differ from genocide insofar as they are committed not against individuals viewed as members of certain protected groups, but against individuals *per se*, with their own rights and dignity at stake.[104]

Were crimes against humanity not explicitly subject to universal jurisdiction, they would still pass the four-pronged test: crimes against humanity are in violation of international law, defined specifically, normatively heinous, and the *locus delecti* is the middle of a "widespread or systematic attack directed against [a] civilian population." In such a situation, it is difficult to imagine the local forum state competently and equitably providing enforcement.

(6) Crimes Against Peace

According to the International Law Commission, crimes against peace include aggression, genocide, crimes against humanity, war crimes, and offenses against United Nations personnel.[105] Previously, crimes against peace had been defined as "planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing."[106] The second definition is more salient for our purposes, as the first encompasses other offenses already shown to be appropriate subjects for universal jurisdiction.[107]

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[103] *See Yousef*, *supra* note 74.
[104] *See* Luban, *supra* note 82.
[105] International Law Commission: Draft Code of Offenses against the Peace and Security of Mankind, Commission Report A/48/10 (1996).
[106] Charter of the Nuremburg Tribunal, Article VI(a). The tribunal termed aggression "the supreme offense." United States v. Göring, Judgment (1946).
[107] Offenses against United Nations personnel may be appropriate subjects for universal jurisdiction, depending on the circumstances surrounding the act in question. Picking the pocket of a UN official, for instance, is not an appropriate subject for universal jurisdiction.

Aggressive war has long been illegal,[108] and is specifically forbidden by the United Nations Charter.[109] This ban constitutes a *jus cogens* norm of international law, from which no derogation is permitted.[110]

In cases of aggression, the *locus delecti* cannot help but be in the middle of a war zone, and if the declarer does not have broad enough popular support to make a fair proceeding impossible, he will likely be unable to initiate hostilities in the first place. Moreover, even aggression tends to be justified as defensive, and local courts will likely defer to executives in making such determinations.[111] These difficulties are endemic of a larger problem: "aggression" does not have a specific, universally accepted definition, despite a 1974 United Nations resolution which attempted to provide one.[112] Though the United Nations charter can be read narrowly to permit the use of force only in response to "armed attack,[113]" states have claimed broader rights: to use force to pre-empt an

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[108] *See* Treaty Providing for Renunciation of War as an Instrument of National Policy (Kellogg-Briand Pact), Aug. 28, 1928, 46 Stat. 2343.
[109] *See, e.g.,* Art. 2 (4).
[110] *See, e.g.*, Military and Paramilitary Activities In and Against Nicaragua, 1986 I.C.J. 14, 100.
[111] *See* Adolf Hitler, Speech to the Reichstag, October 6, 1939 (arguing that alleged Polish mistreatment of German and Czech nationals, *inter alia*, was sufficient to constitute *jus ad bellum*). In many cases, it is difficult for international law to conclusively establish which state is the aggressor and which the victim. Tom Franck, *Who Killed Article 2(4)?*, 64 AM. J. INT'L L. 809, 811.
[112] G.A. Res. 3314, U.N.G.A.O.R., 29th Sess., Supp. No. 31, at 143, UN Doc. A/9631 (1974) ("Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any manner inconsistent with the Charter of the United Nations..." and a rebuttable presumption exists that a first use of force in contravention of the United Nations Charter constitutes aggression). For one genealogy of aggression, *see* Jonathan A. Bush, *"The Supreme... Offense" and its Origins: The Lost Legislative History of the Offense of Aggressive War*, 102 COLUM. L. REV. 2324 (2002). One commentator suggests that aggression may be best understood as a military attack directed against the territory of another state without a justification in international law. Louis Rene Beres, *After the Gulf War: Israel, Pre-Emption, and Anticipatory Self-Defense*, 13 HOUS. J. INT'L L. 259, 263 n.5 (1991).
[113] Art. 51.

imminent threat,[114] prevent a more distant one, protect their citizens abroad,[115] retaliate against those who harm them,[116] or promote human rights.[117] As a result, crimes against peace are not defined specifically enough to be appropriate subjects for universal jurisdiction.

(6) Genocide

Under international law, genocide is defined as "any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group."[118] The United States adopted this definition in the Genocide Convention Implementation Act in 1988, adding only that "intent to destroy, in whole or

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[114] The right to pre-empt imminent armed attacks is protected by customary international law. John D. Becker, *The Continuing Relevance of Article 2(4): A Consideration of the Status of the U.N. Charter's Limitations on the Use of Force*, 32 DENV. J. INT'L L. AND POL'Y 583, 590 (2004); Franck, *supra* note 94 at 821.

[115] *See, e.g.*, the Entebbe incident (1976), in which the Israeli Defense Forces rescued Israeli hostages from Uganda. This use of force should not be considered aggression. *See* Malcolm Shaw, INTERNATIONAL LAW 1032-34 (2003); Antonio Cassese, INTERNATIONAL LAW 313-16 (2001); Yoram Dinstein, WAR, AGGRESSION AND SELF-DEFENCE 203-37 (2001).

[116] This right was recognized by international law before World War I. *See* Marjorie M. Whiteman, Digest of International Law § 4 at 148, 149 (GPO 1971).

[117] *See* Antonio Cassese, *Ex Iniuria Ius Oritur: Are We Moving Towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?* 10 EUR. J. INT'L L. 23, 24 (1999), Dino Kritsiotis, *Reappraising Policy Objections to Humanitarian Intervention*, 19 MICH. J. INT'L L. 1005 (1998). The right to use force to promote rights seems to have been validated in Kofi Annan, *In Larger Freedom: Towards Development, Security, and Human Rights For All*, U.N. Report (March 2005). *But see* Military and Paramilitary Activities, 1986 ICJ 14, at paragraph 268 ("use of force could not be the appropriate method to monitor or ensure" the provision of human rights).

[118] Convention on the Prevention and Punishment of the Offense of Genocide, G.A. Res. 260 A, Art. II (1951). *See also* Rome Statute of the International Criminal Court, Art. VI.

in part," must mean intent to destroy in *substantial* part.[119] Genocide is traditionally considered the most repugnant offense an individual can commit,[120] and while it may be committed by individual actors[121] generally it is difficult to prove without the backing of an organization or system.[122] International tribunals have found genocide in the Holocaust, Rwanda, and Bosnia, and Congress declared in July 2004 that the atrocities currently being perpetrated in Sudan constitute genocide.[123]

(7) Torture

Torture is expressly actionable due to the TVPA[124] and would likely be actionable under our four-pronged test as well. Torture is in violation of international law and defined specifically.[125] Since it must be committed by or with the consent or acquiescence of a state official,[126] the competence of the forum state will always be called into question to some degree. Further, while torture under some circumstances may be morally ambiguous, much torture – to punish, intimidate, or coerce, for instance – is unquestionably normatively heinous and a proper subject for universal jurisdiction.

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[119] PL 100-606 (1988).
[120] *See, e.g.,* William A. Schabas, GENOCIDE IN INTERNATIONAL LAW: THE CRIME OF CRIMES, 207-09 (2000).
[121] Genocide Convention, *supra* note 112, Art. III.
[122] Prosecutor v. Jelisec, Case No. IT-95-10-A, para. 101 (App. Chamber, Int'l Crim. Trib. For the Former Yugoslavia, July 5, 2001), Prosecutor v. Kavishema, Case No. IT-95-I-T, para. 94 (Trial Chamber II, Int'l Crim. Trib. For Rwanda, May 21, 1999). *But see* David Luban, *A Theory of Crimes Against Humanity*, 29 YJIL 85, 98 (2004) (arguing that this constitutes a "failure of imagination" on the part of the tribunals and in fact it is easy to imagine individual *genocidaires* attempting to destroy a city in an age of terror).
[123] S.Con.Res. 137 (July 22, 2004).
[124] 28 U.S.C. §1350.
[125] Convention against Torture, *supra* note 31.
[126] *Id.*

III. Law, Policy, and the ATCA

Justice Breyer wisely notes the import of restraining the ATCA to avoid negatively impacting international comity, "a matter of increasing importance in an ever more interdependent world."[127] Indeed, the Court notes the likelihood that the ATCA was specifically targeted at a "narrow set of violations of the law of nations, admitting of a judicial remedy and at the same time threatening serious consequences in international affairs."[128] As Justice Breyer suggests, this indicates that the ATCA was intended to promote international harmony, and a reading not conducive to that goal should be rejected.[129] However, the advancement of human rights, too, is important to understanding the ATCA in context; the Framers conceptualized the United States as a "city upon a hill," to which the world might look for moral leadership.[130] The ATCA, then, should be interpreted to promote the twin goals of comity and respect for rights.

The piracy paradigm does not impugn comity, nor threaten the sovereignty of other judicial systems. However, it is nonetheless inadequate as a policy tool because it fails to advance desirable ends like respect for human rights and restitution for victims of particularly grave offenses.

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[127] *Sosa*, 124 S.Ct. at 2782 (Breyer, J., concurring) (noting that courts help the laws of different nations "work together in harmony," citing F. Hoffman-La Roche Ltd. v. Empagran S.A., 124 S. Ct. 2359, 2366 (2004)).
[128] *Sosa*, 124 S.Ct. at 2756-57.
[129] *Id.* at 2782 (Breyer, J., concurring).
[130] *See* John Winthrop, *City Upon a Hill* (1630). For one early articulation of this view, viewing the American Revolution through a prism of republican values, see Mercy Otis Warren, HISTORY OF THE RISE, PROGRESS, AND TERMINATION OF THE AMERICAN REVOLUTION (1805). See also Thomas Jefferson, *Letter to Roger C. Weightman*, 24 June 1826 ("May [the American revolution] be to the world... the signal of arousing men to burst the chains under which... ignorance and superstitution had persuaded them to bind themselves... All eyes are opened or opening to the rights of man... the mass of mankind has not been born with saddles on their backs, nor a favored few, booted and spurred, ready to ride them legitimately, by the grace of God").

The torture paradigm, on the other hand, allows for restitution in American courts for every person victimized by a violation of international law. However, its impingement on comity may be excessive, since it would place no restraints on American courts' rights to hear cases without a traditional jurisdictional nexus. There are clearly some torts (vandalism of property, for instance) which are inappropriate subjects for litigation in American courts absent such a nexus. This litigation would not be inappropriate in and of itself, but instead would be inappropriate because it would not sufficiently relate to American interests to justify allowing access to American courts; the risk to American interests in comity and international harmony would outweigh the benefit in providing justice for the victims.

The universal jurisdiction paradigm provides a reasonable balance between these competing interests. Comity is not impugned, because any offenses made civilly actionable under the ATCA would already be criminally actionable, and there is no particular reason to think that civil liability is more of a risk to comity than criminal liability. Moreover, the universal jurisdiction paradigm allows for promotion of human rights, since victims of heinous offenses in places where enforcement is difficult will now have a clear route to restitution.

IV. Objections

A. Does the Federal Courts' Power to Recognize New Causes of Action Violate *Erie*?

As noted earlier, the *Sosa* court held that the judicial branch could recognize new causes of actions for ATCA suits consistent with the First Congress' intent.[131]

[131] See *infra* note 21.

Nonetheless, previous commentators[132] and one dissenter[133] argued that the elimination of the federal common law in *Erie R.R. v. Tompkins*[134] precluded judicial recognition of new causes of action. Justice Scalia writes, "The question is not what case or Congressional action *prevents* federal courts from applying the law of nations as part of the general common law; it is what *authorizes* that particular exemption from *Erie*'s fundamental holding that the federal common law *does not exist*."[135]

However, Justice Scalia's interpretation implies that the *Erie* Court was empowered to abrogate the Congressionally granted power to recognize new ATCA causes of action.[136] As he writes, a federal common law has developed "for a 'few and restricted' areas in which 'a federal rule of decision is necessary to protect uniquely federal interests, and those in which Congress has given the federal courts the power to develop substantive law.'"[137] Justice Scalia further concedes that the First Congress had intended to bestow the power of recognizing new ATCA causes of action upon the judiciary.[138] He suggests, however, that *Erie* reshaped the federal common law in a way

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[132] *See, e.g.*, Curtis A. Bradley and Jack Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997).
[133] *See, e.g.*, Sosa, 124 S.Ct. at 2769 (Scalia, J., concurring in part and in the judgment) ("There is not much I would add to the court's detailed opinion, and only one thing I would subtract: its reservation of a discretionary power in the Federal Judiciary to create causes of action for the enforcement of international-law-based norms").
[134] 304 U.S. 64 (1938). Erie overturned Swift v. Tyson, 16 Pet. 1 (1842) which held federal courts could "express their own opinions" about the common law.
[135] Sosa, 124 S.Ct. at 2772, 2773 (Scalia, J., concurring in part and in the judgment).
[136] III. Federal Statutes and Regulations, 118 Harv. L. Rev. 446, at note 54 ("such a view, however, implies that the Erie Court had the unilateral power to abrogate the authority it was given").
[137] Sosa, 124 S.Ct. at 2771 (Scalia, J., concurring in part and in the judgment), *citing* Texas Industries v. Radcliff Materials, Inc., 451 U.S. 630, 640 (1981).
[138] *Id.* at 2773.

that rendered the original grant of authority illegitimate.[139] But since causes of action may still be discovered in certain pressing federal cases,[140] including some about foreign relations,[141] the only relevant question is whether this is one such case. Since the initial grant of authority was Congressional rather than a judicial assertion, it would be reasonable to assume that this power grant is still within the legitimate scope of judicial authority. Indeed, in *Sabbatino*, the act of state doctrine was entirely judicially created – no Congressional statute legitimated the assertion of authority - so the mandate to recognize new ATCA causes of action has a stronger underlying foundation. The *Sabbatino* court justified the act of state doctrine by arguing that it had an important bearing on the conduct of the country's foreign relations and so was appropriate for judicial scrutiny. Similarly, appropriate punishment for universal jurisdiction offenses is of concern to all states.[142] As a result, the nexus suggested by *Sabbatino* – important federal interest – is also present in the cases of universal jurisdiction offenses, and so it is consistent with prior *Erie* jurisprudence for the federal judiciary to recognize a cause of action here.

Even further, some scholars have argued that the incorporation of international law as federal common law was unaffected by *Erie*,[143] a position ratified by the Restatement.[144]

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[139] *Id*.
[140] *See, e.g.*, United States v. Kimbell Foods, Inc., 440 U.S. 715, 726-27 (1979).
[141] *See, e.g.*, Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 427, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964).
[142] *See* Rezaq, 124 F.3d 1121.
[143] *See* Dodge, *supra* note 6; Philip C. Jessup, *The Doctrine of Erie Railroad v. Tompkins Applied to International Law*, 33 AM. J. INT'L L. 740 (1939).
[144] RESTATEMENT, *supra* note 17, §111, cmt. d (1987).

B. Does ATCA litigation unconstitutionally conflict with executive power?

Under this administration, the Department of Justice has reversed prior precedent and adamantly opposed the use of the ATCA for human rights litigation.[145] One major argument has been that the ATCA oversteps the bounds of the judicial branch in crafting foreign policy, where the executive branch has broad power.[146] It has further been argued that holdings declaring private corporations potentially liable for violations like forced labor have a negative impact on American economic interests.[147] The Administration has, for instance, argued that the ATCA "implicate[s] matters that by their nature should be left to the political Branches…"[148] However, as argued above, this particular right of the judicial branch has been *conferred* by the political branches, under Congress' power to create and define the jurisdiction of federal district courts.[149] And as the *Sosa* court noted, succeeding Congresses' deference to this particular grant of judicial power provides a compelling argument in favor of the ATCA.

C. Does *Paquete* Mean All Violations of International Law Must Be Actionable?

Counsel for Alvarez-Machain argued that because the *Paquete Habana* Court did not restrict the incorporation of customary international law into United States law

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[145] *See, e.g.*, Beth Stephens, *Upsetting Checks and Balances: The Bush Administration's Efforts to Limit Human Rights Litigation*, 17 HARV. HUM. RTS. J. 169 (Spring, 2004) (describing support for the *Filartiga* line of cases under Presidents Carter, Bush Sr., and Clinton, and opposition under President Bush Jr.).

[146] *See, e.g.*, American Ins. Ass'n. v. Garimendi, 539 U.S. 396 (2003) (holding that a California law barring insurance companies which had not paid out all Holocaust-era claims from doing business in California was preempted by the executive's foreign affairs power).

[147] Doe v. Unocal Corp., 963 F. Supp. 880 (C.D. Cal. 1997), *aff'd* in part, *rev'd* in part by Doe v. Unocal, 2002 WL 31063976, (9th Cir. Dec. 3, 2001), *vacated* by Doe v. Unocal Corp., 2003 WL 359787 (9th Cir. Feb 14, 2003).

[148] Brief for the United States of America as Amicus Curiae, Doe v. Unocal Corp., at 20 (No. 00-56603).

[149] U.S. Const. Art. III, § 1.

generally, such incorporation must also be total for purposes of ATCA causes of action.[150] However, this is incorrect. As *Sosa* makes clear, the ATCA does not in itself provide a cause of action for any violations. Instead, it merely grants the federal courts jurisdiction to recognize causes of action.[151] As a result, the entirety of international law does not need to be read into the ATCA's jurisdictional grant – and, since it is not desirable as a matter of policy to do so, courts should exercise discretion and limit the ATCA's scope.[152]

D. Does the Piracy Analogy Preclude Recognition of Causes of Action for Some Universal Jurisdiction Offenses?

The *Sosa* court held that newly recognized torts must be "sufficiently analogous" to those intended by the First Congress.[153] Under Professor Kontorovich's description of piracy, very few newly recognized torts would be so analogous. However, as argued above, this constitutes only one rendering of the piracy analogy, and one that is less useful than the universal jurisdiction understanding as a matter of policy.[154]

Professor Kontorovich describes six salient characteristics, notes that no contemporary offenses possess the same component parts, and assumes *arguendo* that no other offense will have them. Looking particularly to the element of rejection of sovereign protection, he seems correct; no letters of marque exist for torturers, genocidaires, or slave traders. His rendering would leave all modern offenses insufficiently analogous.

Several commentators have argued *contra* Kontorovich that piracy was a universal jurisdiction offense based in large part on heinousness. Witness Christopher C.

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[150] *See supra* note 54.
[151] *See supra* note 1.
[152] *See infra* section 3.
[153] *See* Kontorovich at 113, citing *Sosa* at 2776.
[154] *See infra* note 20.

Joyner: "Piratical acts were made subject to universal jurisdiction . . . because they were considered particularly heinous and wicked acts of violence and depredation."[155] However, Kontorovich argues convincingly that heinousness was not the defining characteristic: acts equivalent to piracy were perfectly legal, and certainly not universally barred, when committed with sovereign authorization – the letter of marque issued to privateers.[156] Still, heinousness is not the only possible grounding for the universal justiciability of piracy other than Professor Kontorovich's sextet of "salient characteristics." Indeed, only two of the six are explicitly referenced by the *Sosa* court, specificity and uniform condemnation.[157] The others are either unproductive, anachronistic, or incorporated into our four-pronged test.

(1) Uniform Punishment

Professor Kontorovich argues this characteristic is important to prevent "forum shopping,"[158] an even more pressing concern because of the international *non bis in idem* norm.[159] As he writes, this exacerbates forum shopping because countries may be concerned about differential punishment. However, the problem of forum shopping is mitigated if one consideration in determining the appropriateness of universal jurisdiction over a particular act is whether the forum state is capable of effective judicial remedy,

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[155] Christopher C. Joyner, *supra* note 96 at 165-67. *But see* Anthony Sammons, *The "Under-Theorization" of Universal Jurisdiction: Implications for Legitimacy on Trials of War Criminals By National Courts*, 21 BERKELEY J. INT'L L. 111, 127 (2003) ("Many commentators and jurists incorrectly … assert that the basis of universal jurisdiction arises from the 'heinous' nature of the offense itself").

[156] *See* Kontorovich, *supra* note 20, at 210-214. *See, e.g.*, Gordon Baldwin, Book Review and NOTE, *The Prize Game: Lawful Looting on the High Seas in the Days of Fighting Sail*. By Donald A. Petrie, 94 A.J.I.L. 608. ("Distinguishing privateering from piracy proved difficult when the aggressive vessels carried letters of marque and reprisal").

[157] See, e.g., *Sosa* at 38.

[158] See Kontorovich at 39.

[159] Literally "not twice for the same," the principle bars two prosecutions even in different forum states for the same offense.

since if the forum state is incapable of exercising judicial oversight than the lack of alternative forums would leave victims without legal recourse. On balance, shopping between universal jurisdiction forums is less harmful to the cause of justice than the inability of victims of genocide, slavery, and torture to take legal action against their persecutors. Professor Kontorovich does not address this important interest, referring only to states' interests in seeing their laws enforced. In 1789, this might have been a proper perspective. However, in light of the revolution in cosmopolitan law which has taken place in the interim, it seems impossible to provide a complete picture without also accounting for the restitution interest of the victims of such heinous offenses.

(2) Rejection of Sovereign Protection

Pirates, by refusing to acquire letters of marque which would have legitimated their actions, specifically rejected licensure from nation-states. While even in international law prior to 1789 not all conduct could be justified by an assertion of power,[160] since then a much broader swath of conduct which cannot be legitimated under international law by any authority on earth has been identified. *Jus cogens* norms, for instance, are peremptory norms which override protections for sovereignty like the persistent objector exemption to general rules of international law.[161] Since sovereign protection is no longer as certain a guarantor of legality, it stands to reason that declining such protection would also be less important as a matter of law. Again, Professor Kontorovich does not consider the impact of cosmopolitan law, but treats the fundamental principles of international law as if they

[160] *See, e.g.*, Suarez, Francisco. VINDICIAE CONTRA TYRANNOS (1579) ("it is the right and duty of princes to interfere in behalf of neighboring peoples who are oppressed on account of adherence to the true religion, or by any obvious tyranny").
[161] *See* Colom v. Peru, 1950 I.C.J. 266 (Nov. 20); U.K. v. Norway, 1951 I.C.J. 116 (Dec.18) The persistent objector exemption can be found in Restatement (Third) of Foreign Relations (1986) § 102, reporters' n. 2. For one instance of the rule, *see* Curtis A. Bradley, *The Juvenile Death Penalty and International Law*, 52 DUKE L.J. 485 (2002).

had been frozen in time in 1789. Their development calls the import of this rejection for modern piracy analogues into question; a robust analogy must take into account piracy's place in the context of the international law of the time as well as contextualizing modern offenses in a very different international legal schema.

(3) The *locus delecti* makes enforcement difficult

It is important to note that Professor Kontorovich is not asserting that piracy's *locus delecti* – that is to say, the high seas – is specifically important. Indeed, this would not be accurate. As he writes, "The real problem was not the formal jurisdictional status of the high seas but the practical problem of enforcement."[162] Even had the high seas been a jurisdictional no-man's land, "pirates' offenses did not take place in the water on the high seas – they were committed onboard ships," a *locus* where the territorial jurisdiction of the nation-state who owned the ship has been traditionally respected.[163] So when we speak of "the practical problem of enforcement" of international law against piracy, it is necessary to avoid confusing problematic enforcement with an inability to enforce. To be analogous, a modern offense must only be one where enforcement is difficult, not one where "universal jurisdiction was needed to fill in a jurisdictional lacunae."[164]

Moreover, our test for universal jurisdiction focuses attention on exactly this factor, as does American law on universal jurisdiction. Unquestionably, enforcement is difficult in a forum state which is, for instance, embroiled in a civil conflict, particularly one with a significant ethnic or religious component, or culpable in the offenses. As a result, in the great majority of states where offenses actionable under the universal jurisdiction theory

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[162] Kontorovich, *supra* note 1 at 160.
[163] Kontorovich at 160 (*citing* S.S. Lotus, 1927 P.C.I.J. (ser. A) No. 10 for the principle that a nation has territorial jurisdiction over events on its ships).
[164] *Sosa* at 2775 (referring to pirates as "actors on the high seas hostile to all nations and beyond their territorial jurisdiction") (Scalia, J., concurring in part and in the judgment).

of the ATCA are committed, enforcement will be practically problematic in the same way it was for piracy.

(4) Direct threat to many nations

Pirates were defined as *hostis humani generis*, the enemies of all mankind, by Edward Coke.[165] As Kontorovich notes, for pirates were generally considered *hostis humani generis* not due to their normative heinousness but due to concrete threats posed to all nations.[166] Torturers and others who commit modern universal jurisdiction offenses tend to be considered *hostis humani generis* due to heinousness instead. The question, then, is the extent of the disconnect: Are torturers "not really" *hostis humani generis*, as the *Sosa* and *Filartiga* courts deemed them, or are they merely enemies of all mankind for a different reason than pirates? If it is the latter, what implications, if any, does that hold for modern universal jurisdiction?

Fortunately, the answer is simple: torturers are *hostis humani generis* due to heinousness, even though pirates were not. The term has grown, like international law itself, to encompass offenses which would not have been included before the revolution in international cosmopolitan law.[167] And just as it is appropriate to prosecute the enemies of all mankind anywhere good people have the willingness and resources to do so, it is appropriate to allow their victims to seek restitution in the United States, regardless of where they are victimized.

V. Conclusion

The ATCA has inspired vigorous argumentation from those taking extreme positions on both sides – some arguing that it may be used as a cause of action for all, or

[165] *See* Blackstone, IV Commentaries at 71.
[166] Kontorovich at 162, *citing* Blackstone, IV Commentaries at 71.
[167] *See infra* section II(A).

virtually all, torts in violation of the law of nations, and others arguing that it can be used for none, or virtually none. This split in the Circuits and the academy was not much clarified by the Supreme Court's holding in *Sosa* that "some, but few" torts are actionable under the ATCA. However, an accessible middle ground consistent with the *Sosa* court's opinion is available: as the ATCA provides for the universal extension of United States civil jurisdiction, it ought be applied to acts which would meet the test for universal criminal jurisdiction. A synthesis of available law and scholarship suggests that this test focuses on whether the offense is in violation of international law, defined specifically, committed in a *locus delecti* which impedes enforcement, and normatively heinous. The offenses categorized by the Princeton Principles as appropriate for the exercise of universal jurisdiction generally pass this test, and those that do mark the beginning of a list of torts which should be actionable in American courts under the ATCA.