

**THE SOSA DECISION:  
UNCLEAR BOUNDARIES OF INTERNATIONAL LAW IN UNITED STATES  
COURTS AND THE NEED FOR CHANGE**

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## I. Introduction

The manner in which international law is applied by the domestic courts of the United States has been an issue without any definitive boundaries since 1789. It is unclear as to the type and extent of international law that could be brought as a cause of action inside the United States for events that occurred outside its borders. The landmark case of *Sosa v. Alvarez-Machain*,<sup>1</sup> decided by the Supreme Court in 2004, has changed the landscape in this area. This decision will alter the field of domestic enforcement of international law by making it exceedingly difficult for a non-citizen to sue under the Alien's Tort Claims Act<sup>2</sup> ("ATCA") for recovery against a tortious act committed outside the U.S. by a party that comes under the personal jurisdiction of U.S. courts.<sup>3</sup> *Sosa* also eliminates any liability of the U.S. government in U.S. courts under the Federal Tort Claims Act<sup>4</sup> ("FTCA") for any alleged tortious acts that occur in a foreign country.<sup>5</sup>

These new limitations may lead to an accession of abuses by the U.S. government, U.S. entities, and other foreign powers due to the lack culpability for torts they may commit. On the other hand, *Sosa* helps the judiciary in maintaining its independence from foreign policy in order to allow the Executive and Legislative branches of the federal government to exercise their constitutionally granted powers to dictate U.S. foreign policy abroad. While it attempted to balance conflicting interests, the decision of the Supreme Court in *Sosa* is vague, and has thus been subject to divergent application by different federal judges since 2004, resulting in similar cases being decided quite differently. In order to stem the problems of conflicting case results and an

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<sup>1</sup> *Sosa v. Alvarez-Machain*, 124 U.S. 2739 (2004).

<sup>2</sup> 28 U.S.C. § 1350 (2005).

<sup>3</sup> 28 U.S.C. § 1350 (2005).

<sup>4</sup> 28 U.S.C. § 2671-2680.

<sup>5</sup> *Sosa*, 124 S. Ct. 2739.

accession of unchecked abuses, Congress should use its legislative powers to create a more definitive policy that clarifies the application of international law in U.S. courts and liability of the U.S. government for extraterritorial acts in order to create uniformity in these areas, hold parties liable for extreme violations of human rights, and avoid divergent and conflicting judicial decisions.

Part II of this note discusses the ATCA and FTCA past and present. A history of both statutes and the specific provisions that relate to changes made by the Supreme Court in *Sosa* are discussed. The former broad standard for judicial creation of new causes of action under the ATCA, and how that has been limited under the *Sosa* decision is examined. The article will then look at the discretion that the Supreme Court left up to lower courts in allowing causes of action under the ATCA, and how they intended for that discretion to be applied.

Next, the note will give a history to the FTCA, its foreign country exception, and the creation of the headquarters doctrine as a part of the common law. The discussion will then turn to the elimination of the headquarters doctrine by the Supreme Court in *Sosa*, and the effect that had on eliminating suits against the U.S. for torts committed on foreign soil.

Part III will focus on problems that have arisen under the new standards subsequent to the *Sosa* decision. The dangers of the U.S. invoking sovereign immunity and eliminating all suits against the U.S. for acts that occur on foreign soil are examined. The discussion then moves to some of the problems that have arisen under the ATCA, which includes conflicting judicial decisions and the ability to aid crimes against humanity in the pursuit of profit while remaining immune from liability.

Finally, the note concludes that the Supreme Court attempted, but failed to sufficiently clarify ambiguities and nuances of the ATCA and FTCA and create clear standards for judges to follow. These failures have led to conflicting court decisions and allowed for other harms to occur. As a result of these problems, there is a need for Congress to step in and create clear, exact, and fair standards under these statutes.

## **II. The *Sosa* Case and the New Standards**

When the Supreme Court decided *Sosa v. Alvarez-Machain*<sup>6</sup> in 2004, they modified significantly the scope of the ATCA and FTCA, and severely limited the power of U.S. courts to hear cases based on events that occurred on foreign soil. The ATCA, an ambiguous statute that has drawn constant debate and speculation over the last two hundred plus years as to Congress's true intent when passing the bill, had been interpreted broadly since the 1980 decision in *Filartiga v. Pena-Irala*.<sup>7</sup> Due to the creation of the headquarters doctrine, the FTCA also had a broad scope in allowing cases resulting from acts occurring on foreign soil to be heard against the U.S. in U.S. courts. However the decision of the Supreme Court in *Sosa* narrowed the spectrum of cases allowed into federal court under both statutes.

### **A. The Alien's Tort Claims Act**

#### **1. Background and History**

The Alien's Tort Claims Act, also known as the Alien's Tort Statute, which was originally passed as a part of the Judiciary Act of 1789,<sup>8</sup> reads, "[t]he district courts shall

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<sup>6</sup> *Sosa v. Alvarez-Machain*, 124 U.S. 2739 (2004).

<sup>7</sup> *Filartiga v. Pena-Irala*, 630 F.2d 876 (1980).

<sup>8</sup> The original statute, as passed in 1789, read, "The district courts shall also have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States," but has been amended several times until it has reached its current form. Act of Sept. 24, 1789, ch. 20, § 9(b), 1 Stat. 79. *Id.* at 2755.

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.”<sup>9</sup> This short and vague statute gives no indication as to what Congress intended when they passed this law over two hundred years ago. It does not specify whether the grant of jurisdiction to federal courts is personal or subject matter jurisdiction, or the extent of that grant for courts to hear cases. As a result of the vagueness of the statute, there has been an ongoing legal debate ever since its passage by the first Congress.

Some judges, such as the Second Circuit Court of Appeals Chief Judge Kaufman, have decided that the ATCA grants not only jurisdiction to federal courts to hear cases based on the law of nations, but also gives the courts the power to create new causes of action based on customary norms of international law.<sup>10</sup> This conception of the ATCA allows courts to use their discretion as to whether an international norm is worthy of being adopted by U.S. courts so that individuals could create an action based on events that occurred outside U.S. borders.<sup>11</sup> This interpretation of the ATCA comes from the idea that Congress intended the statute to evolve through the years and adopt new norms in new times when they passed it in 1789.<sup>12</sup>

However, other jurists, such as U.S. Supreme Court Justice Scalia, concurring in the *Sosa* opinion, believe that the ATCA is solely a jurisdictional statute, granting the courts the ability to hear such cases, but giving no authority to create new causes of action under common law.<sup>13</sup> Under this conception, in order for an individual to sue

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<sup>9</sup> 28 U.S.C. § 1350.

<sup>10</sup> Courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today. *Filartiga v. Pena-Irala*, 630 F.2d 876, 881, 887 (1980).

<sup>11</sup> *Id.* at 880.

<sup>12</sup> *Id.* at 886.

<sup>13</sup> Justice Scalia believes that to allow the ATCA to create new causes of action, “neglects the ‘lesson of Erie,’ that ‘grants of jurisdiction alone’ (which the Court has acknowledged the ATCA to be) ‘are not

under international law through the ATCA, Congress must have either intended a cause of action to be created with the law at its passage in 1789, or Congress must have later passed a statute expressly creating a cause of action for such a matter.<sup>14</sup> Without such an express authorization from Congress, the district courts have jurisdiction to hear a case based on international law, but no authority to create a new cause of action.<sup>15</sup>

The Torture Victim Protection Act of 1991 is an example of one such statute that has been passed by Congress which explicitly creates a cause of action under the ATCA based on the law of nations.<sup>16</sup> The statute's stated purpose is "[t]o carry out obligations of the United States under the United Nations Charter and other international agreements pertaining to the protection of human rights by establishing a civil action for recovery of damages from an individual who engages in torture or extrajudicial killing."<sup>17</sup> However, while this creates a cause of action against the actual perpetrators of torture or extrajudicial killing in federal court, it does nothing to create a means of remedy to any accessories to such acts, by means of financing or other types of support.<sup>18</sup> If, for example, a U.S. company were to financially back a regime that participated in torture and murder, the victim would have no means for recovery in the country of the violation, and would also have no statutory means for bringing such a party into a U.S. court.<sup>19</sup>

And if there is no manner in which a company can be held liable for its wrongful aid to

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themselves grants of law-making authority.' " *Sosa*, 124 S. Ct. at 2772 (concurring) (quoting 42 Va. J. Int'l L. 513 at 541).

<sup>14</sup> *Sosa*, 124 S. Ct. at 2776.

<sup>15</sup> *Id.*

<sup>16</sup> 102 P.L. 256 (1992).

<sup>17</sup> An individual who, under actual or apparent authority, or color of law, of any foreign nation --  
(1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or  
(2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.  
*Id.*

<sup>18</sup> Owen C. Pell, *Tort Claims Under International Law*, 231 New York Law Journal 4 (col. 4), August 8, 2004, at 4.

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

atrocities, it is likely that many companies will increasingly aid atrocities abroad in the pursuit of greater profits.

## **2. The *Filartiga* Decision**

The landmark case that initially established a standard for the creation of new causes of action under the ATCA was *Filartiga v. Pena-Irala*.<sup>20</sup> Dr. Joel Filartiga was a citizen of the Republic of Paraguay and a longstanding opponent of the government in power there.<sup>21</sup> He brought an action against the Inspector General of Police, Americo Norberto Pena-Irala for the kidnapping, torture,<sup>22</sup> and wrongful death of his son in Paraguay in 1976.<sup>23</sup> In 1978, Pena entered the United States on a visitor's visa,<sup>24</sup> which gave Dolly Filartiga, daughter of Joel, the opportunity to serve him with a civil complaint for, among other charges, violations of the United Nations ("U.N.") Charter, the Universal Declaration on Human Rights, the U.N. Declaration Against Torture, the American Declaration of the Rights and Duties of Man, and various other norms of customary international law, none of which were statutory causes of action under U.S. domestic law.<sup>25</sup>

Filartiga claimed that the alleged conduct violated the "law of nations"<sup>26</sup> and thereby used 28 U.S.C. § 1350 as the basis for federal jurisdiction of these actions."<sup>27</sup>

The district court dismissed the case for lack of jurisdiction. However the Second Circuit reversed and stated:

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<sup>20</sup> *Filartiga v. Pena-Irala*, 630 F.2d 876 (1980).

<sup>21</sup> *Id.* at 877.

<sup>22</sup> Today this would be actionable under the aforementioned Torture Victim Protection Act. However the events in this case occurred in 1976, fifteen years before the creation of the statute.

<sup>23</sup> *Filartiga* at 877.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 879.

<sup>26</sup> 28 U.S.C. § 1350.

<sup>27</sup> *Filartiga*, 630 F.2d 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 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.<sup>28</sup>

Since torture under color of official authority violates the law of nations, “whenever an alleged torturer is found and served with process by an alien within our borders, § 1350 provides federal jurisdiction,” and can therefore be sued in U.S. courts regardless of where the act took place.<sup>29</sup> In so holding, the court established the precedent that if an act violates the accepted and established norms of customary international law, then it will be actionable in U.S. courts under the ATCA.

The Second Circuit reasoned that the law of nations has been a part of federal common law ever since the Constitution was signed, and that same constitutional basis is also the foundation for the ATCA.<sup>30</sup> “Upon ratification of the Constitution, the thirteen former colonies were fused into a single nation, one which, in its relations with foreign states, is bound both to observe and construe the accepted norms of international law, formerly known as the law of nations.”<sup>31</sup> In fact, Article I of the United States Constitution states that one of Congress’s powers is, “[t]o define and punish piracies and felonies committed on the high Seas, and offences against the law of nations.”<sup>32</sup>

The Second Circuit determined that the appropriate sources for determining international law, which had previously been enumerated by the Supreme Court,<sup>33</sup> can include works of jurists, the general practices of nations, or judicial decisions recognizing

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<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 878, 880.

<sup>30</sup> *Id.* at 885.

<sup>31</sup> *Id.* at 877.

<sup>32</sup> U.S. Const. Art. I § 8

<sup>33</sup> *See* United States v. Smith, 18 U.S. 153, 160-61 (1820); *Lopes v. Reederei Richard Schroder*, 225 F. Supp. 292, 295 (E.D. Pa. 1963).

such law, none of which are any type of binding law, but nonetheless give insight into what scholars believe the state of international law is in the present.<sup>34</sup> “During the eighteenth century, it was taken for granted on both sides of the Atlantic that the law of nations forms a part of the common law.”<sup>35</sup> This, the court believed, was evidence that the ATCA should evolve to include whatever the current law of nations may become, not to be stuck in the common law of 1789.

The Second Circuit held that allowing these causes of action under the ATCA does not create new law, but instead follows the existing common law. The Constitution itself states that one of Congress’s jobs was to punish offences against the law of nations.<sup>36</sup> The Second Circuit found this provision to create a common law that evolves to adopt whatever the current law of nations may be. Chief Justice John Marshall once said, “in the absence of a congressional enactment, United States courts are ‘bound by the law of nations, which is a part of the law of the land.’”<sup>37</sup> For this reason, the Second Circuit found that the ATCA could hold causes of action under the law of nations that were not a part of the common law in 1789 because they “believe it is sufficient here to construe the Alien Tort Statute, not as granting new rights to aliens, but simply as opening the federal courts for adjudication of the rights already recognized by international law.”<sup>38</sup>

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<sup>34</sup> *Filartiga*, 630 F.2d at 881.

<sup>35</sup> *Id.*

<sup>36</sup> U.S. Const. Art. I § 8

<sup>37</sup> *Id.* at 887 (quoting *The Nereide*, 13 U.S. 388 (1815)).

<sup>38</sup> *Id.*

### 3. The *Sosa* Decision and its Limitation on the ATCA

The Second Circuit's decision in *Filartiga* remained unchallenged until the *Sosa*<sup>39</sup> case reached the Supreme Court in 2004. In *Sosa*, the Supreme Court greatly restricted the types of cases that could be brought into federal court under the ATCA by labeling it as primarily a jurisdictional statute that was not often meant to create new causes of action under common law based upon evolving international norms.<sup>40</sup>

The respondent in *Sosa*, Humberto Alvarez-Machain, a Mexican national, was believed to have participated in the torture and murder of a captured agent from the U.S. Drug Enforcement Agency ("DEA") while in Mexico.<sup>41</sup> A federal grand jury indicted Alvarez, still in Mexico, for the torture and murder of the agent, and a federal court issued a warrant for his arrest.<sup>42</sup> When the conclusion was reached that extradition negotiations with the Mexican government would be unsuccessful, the DEA approved and executed a plan for a group of Mexicans, which included the petitioner Jose Francisco Sosa, to abduct Alvarez, hold him overnight, and bring him to the U.S. for arrest by federal officials.<sup>43</sup> After his subsequent acquittal in federal court, Alvarez returned to Mexico where he filed an action under the ATCA against several Mexican and American citizens, Sosa among them.<sup>44</sup>

As opposed to the wide latitude granted by the Second Circuit to the ATCA in *Filartiga*, in *Sosa* the Supreme Court decided that the ATCA was passed mostly as a jurisdictional statute that was meant to create a sector for common law causes of action

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<sup>39</sup> *Sosa v. Alvarez-Machain*, 124 U.S. 2739 (2004).

<sup>40</sup> *Sosa v. Alvarez-Machain*, 124 U.S. 2739 (2004).

<sup>41</sup> *Id.* at 2746.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

for aliens based upon customary international law. The Court contends that when the ATCA was passed as part of the Judiciary Act of 1789, Congress “gave the district courts cognizance of certain causes of action, and the term bespoke a grant of jurisdiction, not power to mold substantive law.”<sup>45</sup> That the ATCA was intended to be a statute granting jurisdiction, not a grant to the judiciary to create new law, the Court asserts is evidenced by its placement in § 9 of the Judiciary Act.<sup>46</sup> The Judiciary Act is a statute which is strictly concerned with jurisdiction, not substantive law.<sup>47</sup> Had Congress intended to give authority to judges to create additional causes of action under the ATCA, they would have stated so expressly or at least attached this statute to a law that dealt with creation of substantive law.<sup>48</sup>

However, while the Court was trying to impose strict limitations on the reach of the ATCA, the Court also realized that if this theory, that the statute was of a purely jurisdictional grant, was to be taken to its logical conclusion, then the ATCA would be rendered a toothless statute.<sup>49</sup> Congress did not expressly authorize any cause of action when the law was passed, and thus would be granting jurisdiction for the courts to hear absolutely nothing.<sup>50</sup> Taking these and other historical records into consideration the court reasoned that:

Although the ATCA is a jurisdictional statute creating no new causes of action, the reasonable inference from the historical materials is that the statute was intended to have practical effect the moment it became law. The jurisdictional grant is best read as having been enacted on the understanding that the common law would provide a cause of action for

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<sup>45</sup> *Id.* at 2755. *See, e.g.*, The Federalist No. 81, pp. 447, 451 (J. Cooke ed. 1961). (A. Hamilton) (using “jurisdiction” interchangeably with “cognizance”).

<sup>46</sup> *Id.*

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

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

<sup>49</sup> *Sosa*, 124 S. Ct. at 2761.

<sup>50</sup> *Id.*

the modest number of international law violations with a potential for personal liability at the time.<sup>51</sup>

As a result, the Court held that any torts that were in violation of the law of nations at the time of the passage of the bill in 1789 are claims that could be entertained under the ATCA because they were recognized within the common law of the time.<sup>52</sup> Therefore, it could be presumed that Congress intended them to be actionable when passing this statute.<sup>53</sup>

The Court in *Sosa* found that it was likely that three main offenses against “the law of nations” that were on the minds of the men who drafted the ATCA, and hence actionable under the common law: (i) violations of safe conducts<sup>54</sup>, (ii) infringement of the rights of an ambassador, and (iii) piracy.<sup>55</sup> These were the three main norms of international law, adopted from England, that were a part of common law in 1789, and hence were implicitly intended to be actionable under § 1350.<sup>56</sup>

In order to create substantive law in addition to the three enumerated offenses, the Court thinks it imperative to look for legislative guidance.<sup>57</sup> The Supreme Court stated that “a decision to create a private right of action is one better left to legislative judgment in the great majority of cases”.<sup>58</sup> And since there has been practically no Congressional guidance on this subject matter since the original passage back in 1789, the Court believes it to be imprudent for the judiciary to legislate new actions without any express

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<sup>51</sup> *Id.*

<sup>52</sup> *Sosa*, 124 S. Ct. at 2761-62.

<sup>53</sup> *Id.*

<sup>54</sup> Violation of safe conducts relates to hostile acts that could result in path that would take nations to war. *Id.* at 2756-57

<sup>55</sup> *Id.* at 2756.

<sup>56</sup> The ATCA and the three enumerated norms primarily worked to protect the sovereignty of nations in a time when wars of conquest were rampant, not to work as private actions for aliens. For example, an assault on an ambassador could cause a chain of events that lead to war. *Id.*

<sup>57</sup> *Id.* at 2762-2763.

<sup>58</sup> *Id.*

or implicit authority from Congress.<sup>59</sup> “We are reluctant to infer intent to provide a private cause of action where the statute does not supply one expressly.”<sup>60</sup> Therefore, the court urges extreme judicial caution when allowing an action to be heard under the ATCA.

#### **4. The Possibility for Actions Based on Customary Norms of International Law**

While the *Sosa* Court held that the ATCA was not intended to give the judiciary wide discretion to create new law, there is some evidence to show that it was intended to allow for some creation of new law based on international norms. There were several cases in the 1790s in which the decisions mentioned in dictum that there would be no need for further legislation to be passed to give the district courts jurisdiction to hear a particular statute.<sup>61</sup> This is an indication the ATCA was not meant to be merely a jurisdictional statute, and be put on the shelf until Congress passed more legislation expressly certifying certain cases actionable under the ATCA, but rather was intended to be a statute granting courts the power to hear some actions under common law.

The Court in *Sosa* did take this idea into account, and has left the door open for lawsuits based on modern customary international law. While the Court will continue to allow common law actions to be heard under the ATCA, the types of cases that can be heard are severely limited. Under the *Filartiga* decision, the federal common law includes the law of nations as they appear today according to jurists and scholars, and

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<sup>59</sup> *Id.* at 2763.

<sup>60</sup> *Id.*

<sup>61</sup> *See, Moxon v. The Fanny*, 17 F. Cas. 942 (No. 9,895) (D.Pa. 1793); 1 Op. Atty. Gen. 57. In his opinion on one 1795 case regarding the liability of Americans in U.S. courts who had taken part in the French plunder of a British slave colony in Sierra Leone, Attorney General William Bradford stated, "But there can be no doubt that the company or individuals who have been injured by these acts of hostility have a remedy by a civil suit in the courts of the United States; jurisdiction being expressly given to these courts in all cases where an alien sues for a tort only, in violation of the laws of nations, or a treaty of the United States . . . ." 124 S. Ct. at 2759 Quoting 1 Op. Atty. Gen. 57, 59

those norms can create new causes of action under the ATCA. The Supreme Court has now rigorously limited that doctrine:

There are good reasons for a restrained conception of the discretion a federal court should exercise in considering a new cause of action of this kind. Accordingly, we think courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized.<sup>62</sup>

Common law causes of actions may still be created. However the *Sosa* Court defines these causes of actions to arise solely out of violations of norms that are accepted by the entire civilized world as the law of nations; in addition, they must be of a specific variety, such as the three original norms from 1789.<sup>63</sup> The U.S. has recognized and respected the law of nations since its creation. Failure to continue to do so would reverse over two hundred years of history and precedent. While Congress could take action to extend or limit judicial authority, their failure to do so since 1789 does not prevent the courts from allowing some common law to be created regarding the law of nations.<sup>64</sup>

## **5. The Emerging Standard from *Sosa***

Once the Court decided that the judiciary has the discretionary power to create causes of action under § 1350<sup>65</sup> under very limited circumstances, the Court set out to create a rigid standard to accompany its contention that there is still room for a “narrow

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<sup>62</sup> *Sosa*, 124 S. Ct. at 2761-2762.

<sup>63</sup> *Id.* at 2761-62. These three norms are (i) violations of safe conducts, (ii) infringements of the rights of an ambassador, and (iii) piracy. *Id.* at 2756.

<sup>64</sup> “It is, of course, true that United States courts apply international law as a part of our own in appropriate circumstances.” *Sabbatino*, 376 U.S. at 423. “[T]he court is bound by the law of nations which is a part of the law of the land” *The Nereide*, 9 Cranch 388, 423 (1815).

<sup>65</sup> While Chief Justice Rehnquist and Justices Scalia and Thomas concurred in part and in the judgment, they disagreed with the rest of the court concerning the idea that the ATCA gave any amount of discretionary power to the judiciary to create causes of action based on international law. In his concurring opinion Justice Scalia stated, “In Benthamite terms, creating a federal command (federal common law) out of ‘international norms,’ and then constructing a cause of action to enforce that command through the purely jurisdictional grant of the ATCA, is nonsense upon stilts.” *Sosa*, 124 S. Ct. at 2772. Despite this divergence of opinion, the judgment in *Sosa* remained a unanimous decision.

class of international norms today.”<sup>66</sup> One of the Court’s primary concerns when creating a standard regarding the merits of a claim was its desire for judicial caution in this matter. The Court listed two main considerations for a judge to take into account when deciding whether to allow an action under § 1350, (1) definitively accepted norms of international law and (2) political considerations and the separation of powers.<sup>67</sup>

**a. Definitively Accepted Norms of International Law**

The first consideration that a court must take into account is that, in order for the action to be allowed, it must be based on a definitive norm that is accepted throughout the civilized world,<sup>68</sup> not one that is only accepted in some nations.<sup>69</sup> “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.”<sup>70</sup> To do so would potentially allow cases into federal court that use customary international law that is not accepted in some civilized nations as the basis for the cause of action.<sup>71</sup> This could lead to U.S. courts virtually applying norms to civilized nations that do not accept such norms, and mandating that they do. Therefore only norms that are accepted by all civilized nations, such as torture, rape, and murder can be allowed as a cause of action under the ATCA.<sup>72</sup>

This limitation is necessary because hearing cases based on international laws that are not universally accepted in the civilized world could hold sovereign foreign

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<sup>66</sup> *Sosa*, 124 S. Ct. at 2772.

<sup>67</sup> *Id.* at 2765-66

<sup>68</sup> However, at no point in the *Sosa* opinion did the Supreme Court define the term “civilized world,” which leaves the opening for a great ambiguity in what nations are civilized and what laws are accepted throughout. Perhaps Congress could create legislation exactly giving definitive guidelines as to what laws or types of laws should be followed.

<sup>69</sup> *Id.* at 2765.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 2765-66.

<sup>72</sup> *Id.*

governments liable to their own citizens under the American justice system. This could not only create enormous friction between the United States and other nations, but will also have the effect of forcing our accepted norms and laws onto other nations that may possess different views and cultures. If norms are accepted in some civilized nations, but not others, then the United States has no right, and the courts no mandate, to enforce international customs that are not universally accepted.

To implement U.S. norms that are not accepted around the world would boast an arrogance that would communicate to the world that the United States courts believe themselves superior to the courts of other nations and have controlling effect in all nations around the world. This would be a dangerous path to take, especially in the political climate of the world today. The War in Iraq (2003) has caused much friction between the U.S. government and disagreeing governments and private citizens around the world. Many view the U.S.'s invasion of a sovereign nation with no legitimate mandate from the United Nations or the international community generally as violation of international law.<sup>73</sup> Other scandals, such as the Abu Ghraib prison torture scandal, have darkened the image of the United States around the world.<sup>74</sup> At such a time, it would be unadvisable and improper for a U.S. court to potentially litigate domestic affairs of a sovereign nation in a U.S. court under the rationale that the government may have

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<sup>73</sup> In fact the U.N. Secretary General Kofi Annan himself called the War in Iraq "illegal" under international law and claimed that it was not in "conformity" with the U.N. Charter. Patrick E. Tyler, *U.N. Chief Ignites Firestorm by Calling Iraq War Illegal*, N.Y. Times, September 17, 2004, at A1.

<sup>74</sup> "The United States already had very little credibility in the Middle East, and it is now approaching zero," said Abdelmonem, the director of Al Ahram Center for Political and Strategic Studies in Cairo . . . 'There was talk about fighting terrorism, and they brought terrorism with them. Finally, the issue of democracy and respect for human rights: Saddam was a butcher who tortured people; now the United States is torturing people.' " Neil MacFarquhar, *The Struggle for Iraq: World Reaction; Revulsion at Prison Abuse Provokes Scorn for the U.S.*, N.Y. Times, May 5, 2004, at A1.

violated an international norm, if that norm is not definitively accepted in all civilized nations around the world.

#### **b. Political Considerations and the Separation of Powers**

The second consideration is that when making a determination, a court must take into account the practical consequences of action permitting that cause of action to be heard in a U.S. court.<sup>75</sup> This relates directly back to the concern of the *Sosa* Court of allowing the judicial branch to intervene in foreign affairs. Once a case is heard in court, the case must be decided on the merits according to established law. However, the Legislative Branch and Executive Branch consider other factors of national concern, such as foreign policy repercussions and U.S. interests abroad, that a judge is not allowed to concern himself with when deciding a case. This could pave the way for dangerous precedent to be set by allowing U.S. norms to be held to standards that may conflict with national policy interests or restricting the powers of sovereign foreign regimes against their citizens, both problems which could create even greater conflict than previously existed.

Quite often, the courts must refrain from adjudicating a case on the merits due to the political ramifications or harmful effects on foreign policy that may result.<sup>76</sup> This is known as the political question doctrine.<sup>77</sup>

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<sup>75</sup> *Sosa*, 124 S. Ct. at 2766.

<sup>76</sup> *Id.*

<sup>77</sup> The political question doctrine originated in *Marbury v. Madison* when the Supreme Court declared, “By the Constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. . . . The subjects are political. . . . Being entrusted to the executive, the decision of the executive is conclusive. . . . Questions, in their nature political, or which are by the constitution and laws, submitted to the executive, can never be made in this court.” *Vietnam Ass'n for Victims of Agent Orange/Dioxin v. Dow Chemical Company*, 373 F. Supp. 2d 7, 65 (quoting 5 U.S. (1 Cranch) 137, 165-66, 170, 2 L. Ed. 60 (1803)).

A well-recognized, if not altogether clear, justiciability doctrine instructs federal courts to avoid deciding ‘political questions.’ It reflects an assumption based on our separation of powers doctrine that there is a narrow class of claims best resolved by the branches of government directly responsible to the people through the vote. Federal courts, when faced with certain allegations of unconstitutional government conduct, are to dismiss such claims without ruling on the merits.<sup>78</sup>

While it is normally left to a party to assert, a court can decide not to hear a case because the judgment would encroach into the realm of politics. If the courts were to get involved in such cases, they could be in great danger of destroying some of the separation of powers worked into the Constitution, as well as putting many sensitive foreign policy issues in jeopardy.

Court decisions could claim a limit of foreign governments over their own citizens, which would be beyond the mandate of our courts and create external problems for the U.S. government.<sup>79</sup> “Since many attempts by federal courts to craft remedies for the violation of new norms of international law would raise risks of adverse foreign policy consequences, they should be undertaken, if at all, with great caution.”<sup>80</sup> The federal courts have received no positive mandate from Congress to define what new accepted norms of international law exist. Without such authority, the courts lack the legal power to adopt new norms of international law.

One example, noted in the *Sosa* opinion, is in regard to a number of class action lawsuits that are now pending in district court which seek damages from various corporations that allegedly participated and/or aided the former Apartheid regime of

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<sup>78</sup> *Vietnam Ass'n for Victims of Agent Orange/Dioxin v. Dow Chemical Company*, 373 F. Supp. 2d 7, 64-65 (E.D.N.Y. 2005).

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

<sup>80</sup> *Id.*

South Africa.<sup>81</sup> The South African Government objects to these cases being heard because they may potentially interfere with the policy adopted by its Truth and Reconciliation Commission, which “deliberately avoided a ‘victors’ justice’ approach to the crimes of apartheid and chose instead one based on confession and absolution, informed by the principles of reconciliation, reconstruction, reparation and goodwill.”<sup>82</sup> If these cases are allowed to enter federal court and the plaintiffs are awarded damages, it could destroy the policy decided on by South Africa, and which is supported by the U.S. State Department.<sup>83</sup> If this were to happen, the credibility of the United States to negotiate and enforce peace treaties around the world would be weakened because the terms agreed upon could be undermined by a U.S. court.

## **6. Acceptable Sources to Determine if Standard is Met**

In determining if a particular case reaches the *Sosa* standards sufficiently so that it can enter court under the ATCA, the Court set guidelines as to what sources a court may use in the absence of treaty or legislation:

Where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.<sup>84</sup>

This standard is remarkably different than the *Filartiga* standard for sources of law, which allowed the court to take into account what scholars and jurists believed accepted

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<sup>81</sup> *Sosa*, 124 S. Ct. at 2765.

<sup>82</sup> *Id.* (quoting Declaration of Penuell Mpapa Maduna, Minister of Justice and Constitutional Development, Republic of South Africa).

<sup>83</sup> See Letter of William H. Taft IV, Legal Adviser, Dept. of State, to Shannen W. Coffin, Deputy Asst. Atty. Gen., Oct. 27, 2003.

<sup>84</sup> *Sosa*, 124 S. Ct. at 2766-67 (quoting, *The Paquete Habana*, 175 U.S., at 700).

law ought to be (possibly based on acceptance by a single or few nations).<sup>85</sup> The *Sosa* standard allows no room for expert input into what the law should be when a district court is making its determination, but simply for an expert to state what actually is accepted around the world. If a certain idea does not fit this criterion regarding universal acceptance, then it cannot be considered by the court when deciding whether to allow an action into court.<sup>86</sup> The Supreme Court does not want judges relying on scholarly opinions of what the law should be because that could lead to using norms that are not established in many nations, which is exactly the type of result that they want to avoid.<sup>87</sup> Instead scholarly works can be referenced, not for their personal opinions as to what should be, but for a guide as to what the established law around the world actually is.<sup>88</sup>

## **B. Federal Tort Claims Act**

### **1. Background and History**

Just as it narrowed the opening for suits under the ATCA, the Supreme Court's decision in *Sosa* also restricted actions against the U.S. under the Federal Tort Claims Act<sup>89</sup> ("FTCA") that occur outside its borders. "As a sovereign power, the United States may be sued only to the extent that it has expressly consented by statute to suit."<sup>90</sup> Therefore, in order to give private individuals some sort of recourse against the government in the event they have been harmed, the Federal Tort Claims Act was passed.<sup>91</sup> The FTCA "was designed primarily to remove the sovereign immunity of the United States from suits in tort and, with certain specific exceptions, to render the

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<sup>85</sup> *Filartiga*, 630 F.2d at 881.

<sup>86</sup> *Sosa*, 124 S. Ct. at 2766-67.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> 28 U.S.C. § 2671-2680.

<sup>90</sup> 35A Am Jur 2d, Federal Tort Claims Act §§ 1-3 (*quoting Maruska v. U.S.*, 77 F. Supp. 2d 1035 (D. Minn. 1999)).

<sup>91</sup> *See* 28 U.S.C. § 2671-80 (2005).

[Federal] Government liable in tort as a private individual would be under like circumstances.”<sup>92</sup> Under the FTCA, the U.S. can be held liable for torts inflicted upon private persons if the plaintiff can show that if the defendant were a private person he would liable to the plaintiff under the circumstances.<sup>93</sup>

However, with the passage of the FTCA, the U.S. still intended to maintain some of its sovereign immunity against certain types of suits. “In granting its consent to be sued, the United States may attach such conditions, and limitations, as it deems proper, and strict compliance with those conditions is an absolute requirement.”<sup>94</sup> One of these conditions attached to the FTCA is the foreign country exception, which stipulates that the FTCA shall not apply to “any claim arising in a foreign country.”<sup>95</sup>

The reason for the foreign country exception to the FTCA is to avoid the possibility of the U.S. government being sued under foreign substantive law in U.S. courts.<sup>96</sup> The ordinary rule in American courts for suits involving tortious acts would be to apply the law from wherever the tort occurred.<sup>97</sup> This means that if a tort occurs in a foreign country, the American court would have to apply foreign law. By passing the FTCA and allowing the waiver of sovereign immunity, Congress did not want to also permit the U.S. government to be subject to foreign law in its own courts, and thus passed the foreign country exception in order to avoid that possibility from coming to fruition.<sup>98</sup>

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<sup>92</sup> *Sosa*, 124 S. Ct. at 2747 (quoting *Richards v. U.S.*, 369 U.S. 1, 6 (1962)).

<sup>93</sup> See 28 U.S.C. § 2674 (2005). See also, 35A Am Jur 2d, Federal Tort Claims Act §§ 1-3 (quoting *Appley Bros. v. U.S.*, 924 F. Supp. 944 (D.S.D. 1996)).

<sup>94</sup> 35A Am Jur 2d, Federal Tort Claims Act §§ 1-3 (quoting *Stubbs v. U. S.*, 620 F.2d 775 (10d Cir. 1980)).

<sup>95</sup> 28 U.S.C. § 2680 (2005).

<sup>96</sup> See *U.S. v. Spelar*, 338 U.S. 217, 221 (1949). The reason for the exception is Congressional “unwillingness to subject the United States to liabilities depending upon the laws of a foreign power.”

<sup>97</sup> *Id.*

<sup>98</sup> *Sosa*, 124 S. Ct. at 2751.

Congress was so adamant about the rejection of foreign substantive law being used against the government in U.S. courts,<sup>99</sup> that it amended the original foreign country exception from “arising in a foreign country in behalf of an alien,” to its current form so that not even a U.S. citizen would have the opportunity to sue the U.S. under foreign substantive law on U.S. soil.<sup>100</sup> The final version codifies Congress’s “unwilling[ness] to subject the United States to liabilities depending upon the laws of a foreign power.”<sup>101</sup>

## **2. The Ninth Circuit’s Decision in *Sosa***<sup>102</sup>

As one of the alleged claims in the *Sosa* suit, Alvarez sued the U.S. government directly under the FTCA. The foreign country exception would seemingly have banned this suit because the abduction occurred in Mexico and therefore the claim arose in a foreign country. However, the “headquarters doctrine,” a common law creation that is something of an exception to the foreign country exception, seemed to give Alvarez an opening. It allowed claims to be filed under the FTCA if an act had an operative effect in a foreign country, so long as the act was committed in the U.S.<sup>103</sup> Alvarez claimed, and the Ninth Circuit agreed, that the headquarters doctrine applied because the act of

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<sup>99</sup> In an explanation regarding the amendment of the FTCA to the House Committee on the Judiciary, Assistant Attorney General Shea said that, “[c]laims arising in a foreign country have been exempted from this bill, H. R. 6463, whether or not the claimant is an alien. Since liability is to be determined by the law of the situs of the wrongful act or omission it is wise to restrict the bill to claims arising in this country. This seems desirable because the law of the particular State is being applied. Otherwise, it will lead I think to a good deal of difficulty.” *Sosa*, 124 S. Ct. at 2751-2 (quoting Hearings on H. R. 5373 et al. before the House Committee on the Judiciary, 77th Cong., 2d Sess., 35 (1942)).

<sup>100</sup> *Sosa*, 124 S. Ct. at 2751 (quoting H.R. 5373, 77<sup>th</sup> Cong., 2d Sess., § 303(12)).

<sup>101</sup> *Sosa*, 124 S. Ct. at 2752 (quoting *U.S. v. Spelar*, 338 U.S. 217, 221).

<sup>102</sup> *Alvarez-Machain v. U.S.*, 331 F.3d 604 (9d Cir. 2003).

<sup>103</sup> See *Sosa*, 124 S. Ct. at 2748 (quoting *Sami v. U.S.*, 617 F.2d 755, 761-2 (1979) The rationale for the headquarters doctrine was that “ ‘[t]he entire scheme of the FTCA focuses on the place where the negligent or wrongful act or omission of the government employee occurred,’ [some courts] have concluded that the foreign country exception does not exempt the United States from suit ‘for acts or omissions occurring here which have their operative effect in another country.’ ”

planning the kidnapping by the U.S. government occurred inside the U.S., and then had an operative effect in Mexico.<sup>104</sup>

In its ruling for *Alvarez-Machain v. U.S.*,<sup>105</sup> the Ninth Circuit accepted Alvarez's theory of the case under the headquarters doctrine.<sup>106</sup> The Court reasoned that Alvarez's arrest and detention, within the borders of the United States, was perfectly legal.<sup>107</sup>

However, the Court found that the DEA had no authority by which to execute an extraterritorial arrest.<sup>108</sup> Therefore, all actions committed by the U.S. upon Alvarez while still in Mexico were illegal.<sup>109</sup> Since the illegal arrest of Alvarez in Mexico resulted from planning by DEA agents while inside the United States, the Ninth Circuit believed that, "Alvarez's abduction fits the headquarters doctrine like a glove."<sup>110</sup> As a result, the Court refused to exempt the U.S. from liability under the foreign country exception because of the headquarters doctrine.<sup>111</sup>

### **3. Elimination of the Headquarters Doctrine by *Sosa***

On appeal from the Ninth Circuit in *Alvarez-Machain*, the Supreme Court came up with a different outcome. The Supreme Court did not like the application of the headquarters doctrine in this case, and others like it, because of its potential limitless

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<sup>104</sup> *Sosa*, 124 S. Ct. at 2748-49.

<sup>105</sup> *Alvarez-Machain v. U.S.*, 331 F.3d 604 (9d Cir. 2003).

<sup>106</sup> *Id.* at 640-41.

<sup>107</sup> *Id.*

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

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 638.

<sup>111</sup> "Working out of DEA offices in Los Angeles, [DEA agents] made the decision to kidnap Alvarez and . . . gave [their Mexican intermediary] precise instructions on whom to recruit, how to seize Alvarez, and how he should be treated during the trip to the United States. DEA officials in Washington, D. C., approved the details of the operation. After Alvarez was abducted according to plan, DEA agents supervised his transportation into the United States, telling the arrest team where to land the plane and obtaining clearance in El Paso for landing. The United States, and California in particular, served as command central for the operation carried out in Mexico." *Alvarez-Machain*, 331 F.3d at 638-639.

effect.<sup>112</sup> The Court believed that the headquarters doctrine “threatens to swallow the foreign country exception whole.”<sup>113</sup> “[I]t will virtually always be possible to assert that the negligent activity that injured the plaintiff [abroad] was the consequence of faulty training, selection or supervision--or even less than that, lack of careful training, selection or supervision--in the United States.”<sup>114</sup> Any case that involved actions that occurred abroad, but had relations in some manner to any acts from within the United States could be heard under the FTCA, thus, for all practical effect, eliminating the foreign country exception that Congress expressly codified in § 2680.<sup>115</sup>

In order to avoid any conflicts with Congressional intent when passing the foreign country exception to the FTCA, the Supreme Court held “that the FTCA’s foreign country exception bars all claims based on any injury suffered in a foreign country, regardless of where the tortious act or omission occurred,” thereby eliminating the headquarters doctrine and reinforcing the foreign country exception codified under 28 U.S.C. § 2680.<sup>116</sup> The Court decided that the express legislative intent of Congress, as codified in the FTCA, cannot be destroyed by judicial interpretation, and therefore the headquarters doctrine cannot supersede the foreign country exception.<sup>117</sup>

Allowing the headquarters doctrine to be used to overrule the foreign country exception could allow for the application of foreign substantive laws in U.S. courts against its own government, which was specifically what Congress wanted to avoid by

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<sup>112</sup> *Sosa*, 124 S. Ct. at 2749.

<sup>113</sup> *Id.*

<sup>114</sup> *Beattie v. U.S.*, 756 F.2d 91,119 (CA DC 1984) (Scalia, J., dissenting).

<sup>115</sup> *Sosa*, 124 S. Ct. at 2749.

<sup>116</sup> *Id.*, at 2754.

<sup>117</sup> *Id.*

passing the foreign country exception to the FTCA.<sup>118</sup> Therefore, with this decision, the Supreme Court has protected the Congressional intent of Congress when passing the FTCA and eliminated any possibility for a suit against the federal government for actions that occur outside the United States.

### **III. Problems Emerging Subsequent to *Sosa***

#### **A. The Dangers of Banning All Government Liability for Acts on Foreign Soil Under the FTCA**

While the protection of Congressional intent, by means of the elimination of the headquarters doctrine, is always important for a court, it also creates other problems. *Sosa* does allow for limited actions against private individuals, but gives no possibility for suits against the U.S. for violations committed outside the country. If the courts can hear cases regarding violations of international law in its own courts under the ATCA, allowances should be made for actions against the sovereign as well.

Although situations where U.S. courts can offer civil relief must be limited in order to promote foreign policy and avoid the use of foreign substantive law against the U.S. government in its own courts, some possibility of relief should be left open. While torture is a tactic that is commonly thought to be one of the most troublesome violations of international law and implemented only by foreign regimes as, as evidenced by the atrocities at the Abu Ghraib prison in Baghdad, the representatives of the U.S. government may also be responsible for clear violations of U.S. and international law.<sup>119</sup>

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<sup>118</sup> The court reasoned that by the words “arising in” from the “arising in a foreign country” exception, Congress was referring to the place of harm, and not some related actions that proximately caused the harm. Thus, any harm that occurred outside the United States is not actionable under the FTCA due to the foreign country exception. *Sosa*, 124 S. Ct. at 2750

<sup>119</sup> Neil MacFarquhar, *The Struggle for Iraq: World Reaction; Revulsion at Prison Abuse Provokes Scorn for the U.S.*, N.Y. Times, May 5, 2004, at A1.

If the U.S. is to win the hearts and minds of the Iraqi people in order to win the war,<sup>120</sup> people who have been wronged must have a way of obtaining redemption for violations of international and U.S. law.

The availability of civil remedy for atrocities connected to war must be very limited, but must exist nonetheless. The U.S. is conducting military operations in many locations around the world, most notably Iraq and Afghanistan, and cannot be held liable for all actions that could be brought to court. Whether or not you accept collateral damage as an unfortunate certainty in modern warfare, it should not be actionable in every situation. To allow people to sue the government or military personnel for all wrongful acts would not only completely overburden the courts, but would impair the war effort, precisely what the Supreme Court wants to avoid by staying out of foreign policy. However, if George W. Bush (“President Bush”) would like to hold the U.S. up to a higher standard in order to win the hearts and minds of the Islamic world, then the government’s actions must mimic their words. If the U.S. is responsible for a clear violation of a commonly accepted norm of international law, then the government and the individuals responsible should be held liable to the victims of their actions.

The headquarters doctrine was created by the courts, and has been used as a backdoor to the FTCA in order to avoid the foreign country exception. The U.S. Government should not hold itself liable for tortious acts committed domestically, but

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<sup>120</sup> 2005 B.Y.U.L. Rev. 371, 372. See Brian Knowlton, Anger Grows over Iraqi Prisoners, *Int'l Herald Trib.*, May 4, 2004, <http://www.ihf.com/articles/518107.html> (quoting Iranian Foreign Minister Kamal Kharrazi, “If Americans are in Iraq to promote democracy, is this the way to do it?”); Press Release, Office of the Press Secretary, President Bush Welcomes Canadian Prime Minister Martin to White House (Apr. 30, 2004), at <http://www.whitehouse.gov/news/releases/2004/04/20040430-2.html> (Responding to the question “How are you going to win [the Iraqi people's] hearts and minds with these sort of tactics?,” President Bush stated, “I shared a deep disgust that those prisoners were treated the way they were treated. Their treatment does not reflect the nature of the American people.”).

then simply look the other way if it commits a wrong on foreign soil, even if planning and preparation for the act occurred on U.S. soil.

Alternate solutions and compromises should be looked at instead of an outright ban under the foreign country exception. One possible answer is that a case could be allowed into federal court under the FTCA if the plaintiff agrees to accept U.S. substantive law, instead of any foreign laws, in order for the case to be adjudicated. A compromise should be made so that victims of tortious acts by the U.S. government do not go uncompensated for the wrongful acts committed upon them. Seeing how the courts have already shut the back door exception to the foreign country exception, Congress must play the leading role in changing the law.

## **B. Problems Under the ATCA**

While the Supreme Court attempted to clarify the standard for a case entering federal court under the ATCA, recent conflicting decisions have shown that the line is still quite blurred. Cases with very similar facts, such as *Joo v. Japan*<sup>121</sup> and *Dow Chemical*<sup>122</sup> have been decided different ways by different courts. Just as the ATCA statute itself is extremely vague, the standard created by the Supreme Court in *Sosa* is abstract and leaves open the possibility for diverging interpretations. Many judges have differed as to what are and are not accepted norms of customary international law and as to what cases should be adjudicated on the merits due to potential political ramifications and other concerns.<sup>123</sup> Ever since the *Sosa* decision in 2004, there has been a wide

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<sup>121</sup> *Joo v. Japan*, 413 F.3d 45 (DC Cir 2005).

<sup>122</sup> *Vietnam Ass'n for Victims of Agent Orange/Dioxin v. Dow Chemical Company*, 373 F. Supp. 2d 7 (E.D.N.Y. 2005).

<sup>123</sup> See *Joo*, 413 F.3d 45 and *Vietnam Ass'n for Victims of Agent Orange/Dioxin*, 373 F. Supp. 2d 7.

variety of conflicting case law regarding which ATCA cases can be heard under the *Sosa* guidelines.

## 1. Cases with Potential Political and Foreign Policy Consequences

In *Joo v. Japan*,<sup>124</sup> the court followed the guidance from *Sosa* and decided that it is important for the courts not to disturb the functions of the other branches of the government.<sup>125</sup> Just as the courts must respect and positively enforce treaties created by the executive and ratified by Congress, they must also negatively enforce any policy decisions by the other branches of the government to not allow lawsuits based on certain conflicts.<sup>126</sup> The courts must not impinge on the policies of the other branches of the federal government or they could substantially impair U.S. foreign policy around the world.<sup>127</sup> All ends of the spectrum could be hurt from the military strategists, to intelligence agents, to peace negotiators.<sup>128</sup> If peace negotiators prefer to create a peace without reparations, then that must be enforced on the private level as well in the courts of the U.S.<sup>129</sup> If not the treaty would be useless to a surrendering nation, and the U.S.

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<sup>124</sup> *Joo v. Japan*, 413 F.3d 45 (DC Cir 2005).

<sup>125</sup> *Id.* at 49.

<sup>126</sup> *Id.* at 52-53.

<sup>127</sup> *Id.* at 51-52.

<sup>128</sup> *Id.* at 52-53.

<sup>129</sup> “The Supreme Court first expressed the same understanding with respect to the Treaty of Paris ending the War of Independence, which expressly provided for the preservation of private claims. In *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 230, 1 L. Ed. 568, 3 Dall. 199 (1796), a case brought by a British subject to recover a debt confiscated by the Commonwealth of Virginia during the war, Justice Chase wrote: ‘I apprehend that the treaty of peace abolishes the subject of the war, and that after peace is concluded, neither the matter in dispute, nor the conduct of either party, during the war, can ever be revived, or brought into contest again. All [violence], injuries, or damages sustained by the government, or people of either, during the war, are buried in oblivion; and all those things are implied by the very treaty of peace; and therefore not necessary to be expressed. Hence it follows, that the restitution of, or compensation for, British property confiscated, or extinguished, during the war, by any of the United States, could only be provided for by the treaty of peace; and if there had been no provision, respecting these subjects, in the treaty, they could not be agitated after the treaty, by the British government, much less by her subjects in courts of justice.’ ” *Joo*, 413 F.3d at 51.

will lose its credibility to negotiate peace treaties because its own courts violate the terms.

That is why in *Joo*, the D.C. Circuit would not hear a case brought by women from China, Taiwan, South Korea, and the Philippines against Japan for the routine rape, torture, and murder that occurred prior to World War II.<sup>130</sup> Article 14 of the 1951 peace treaty between Japan and the Allied Powers expressly waived all claims of the Allied Powers and their nationals to sue Japan for actions that occurred during the execution of the war.<sup>131</sup> The Plaintiffs claim that they should still be allowed to sue because they are nationals of countries that were not a part of the 1951 treaty. However, the Court believed that “it [was] pellucidly clear the Allied Powers intended that all war-related claims against Japan be resolved through government-to-government negotiations rather than through private tort suits . . . the 1951 Treaty at a minimum obliges the courts of the United States not to disregard those bilateral resolutions.”<sup>132</sup> Despite the fact that the Plaintiffs may have a valid point, the Court still opted to dismiss the action because it would interfere with State Department foreign policy decisions,<sup>133</sup> which has been to dismiss private claims that could interfere with the peace since the end of World War II.<sup>134</sup>

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<sup>130</sup> *Id.* at 46.

<sup>131</sup> 3 U.S.T. 3169.

<sup>132</sup> *Joo*, 413 F.3d at 50.

<sup>133</sup> “[T]he Executive has persuasively demonstrated that adjudication by a domestic court not only ‘would undo’ a settled foreign policy of state-to-state negotiation with Japan, but also could disrupt Japan’s ‘delicate’ relations with China and Korea, thereby creating ‘serious implications for stability in the region.’ *Joo*, 413 F.3d at 52 (*quoting* Statement of Interest at 34-35).

<sup>134</sup> “[G]overnments have dealt with . . . private claims as their own, treating them as national assets, and as counters, ‘chips’, in international bargaining. Settlement agreements have lumped, or linked, claims deriving from private debts with others that were intergovernmental in origin, and concessions in regard to one category of claims might be set off against concessions in the other, or against larger political considerations unrelated to debts.” Louis Henkin, *Foreign Affairs and the Constitution* 300 (2d edition 1996). See *Dames and Moore v. Regan*, 453 U.S. 654, 688, 69 L. Ed. 2d 918, 101 S. Ct. 2972 (1981) (upholding President’s authority to settle claims of citizens as “a necessary incident to the resolution of a

However, while some courts reasoned that *Sosa* requires that they stay completely out of the foreign policy arena, others found (in remarkably similar cases) that *Sosa* still allows them to hear some cases even though they may have political tie-ins. In *Dow Chemical*,<sup>135</sup> the Plaintiffs sued a corporation for harm done to them by Agent Orange, a herbicide used by the U.S. and South Vietnamese Military in Vietnam. While this would seem to be a matter of foreign policy and reparations and thus result in a dismissal like *Joo*, the *Dow Chemical* court instead decided to hear this case on the merits because it would not violate the *Sosa* standard.<sup>136</sup> The Court rationalized allowing this case by analogizing it to a 1962 Supreme Court case in which the Court said:

There are sweeping statements to the effect that all questions touching foreign relations are political questions. . . . Yet it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance. Our cases in this field seem invariably to show a discriminating analysis of the particular question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in the light of its nature and posture in the specific case, and of the possible consequences of judicial action.<sup>137</sup>

Even with the new precedent from *Sosa* regarding cases under the ATCA, the *Dow Chemical* court refused to rule this case as nonjusticiable due to foreign relation issues. While it seems as though both the *Dow Chemical* and *Joo* cases hold similar fact patterns and potential political consequences of disturbing a peace, the two courts managed to interpret *Sosa* in such different manners as to give conflicting decisions in extremely similar circumstances. Applying the abstract standards from *Sosa*, it is

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major foreign policy dispute between our country and another [at least] where ... Congress acquiesced in the President's action"). *Joo*, 413 F.3d at 51-52.

<sup>135</sup> *Vietnam Ass'n for Victims of Agent Orange/Dioxin v. Dow Chemical Company*, 373 F. Supp. 2d 7 (E.D.N.Y. 2005).

<sup>136</sup> *Vietnam Ass'n for Victims of Agent Orange/Dioxin*, 373 F. Supp. 2d at 67.

<sup>137</sup> *Id.* (quoting *Baker v. Carr*, 369 U.S. 186, 211-12 (1962)).

difficult to claim that either court was seriously in error because the standards adopted by the Supreme Court allow for either a broad or narrow interpretation by lower courts.

## 2. Cases Involving Corporations Assistance to Atrocities

In addition to identifying the separation of powers concerns for the courts that have resulted in varied holdings by different judges, the *Sosa* decision can be used as a window for U.S. corporations to willfully aid and abet egregious human rights violations around the world to increase their bottom line. A judge applied a strict interpretation of the *Sosa* decision and found that accomplice liability is not a customary norm of international law that is fully accepted around the world. “In a recent submission to the Ninth Circuit, the executive branch argued that aiding and abetting liability is not so clearly established as to support ATCA jurisdiction after *Sosa*.”<sup>138</sup> Therefore, a corporation that today aided a perpetrator of human rights atrocities abroad, such as the torture, rape, or genocide of innocent civilians, may not be liable to any of the victims for the wrongs committed upon them because the corporation was merely “assisting” the atrocities without physically committing them.<sup>139</sup>

One problem with the stance of the Administration of George W. Bush (“Bush Administration”) is that,

[a]t the time the ATCA was enacted, the federal courts clearly recognized accomplice liability for violations of international law<sup>140</sup> . . . Several of the classic eighteenth-century cases applying international law in criminal prosecutions invoked accessory liability. In *Talbot v. Janson*<sup>141</sup> for

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<sup>138</sup> 70 Brooklyn L. Rev. 533, 558. See Supplemental Brief for the United States of America as Amicus Curiae at 7-8, *Doe I v. Unocal Corp.*, 395 F.3d 932 (9<sup>th</sup> Cir. 2002) (Nos. 00-56603, 00-56628), available at <http://www.earthrights.org/unocal/dojunocalbrief.pdf>.

<sup>139</sup> Owen C. Pell, *Tort Claims Under International Law*, 231 New York Law Journal 4 (col. 4), August 8, 2004, at 4.

<sup>140</sup> So did William Blackstone, the main source relied upon by the Supreme Court in its analysis of the original intent of the ATCA. In his discussion of piracy, Blackstone recognized broad liability for those aiding pirates in any manner.

<sup>141</sup> 3 U.S. (3 Dall.) 133 (1795).

example, the Court found the defendant liable for aiding in the unlawful capture of a neutral ship.<sup>142</sup> Similarly, *Henfield's Case*<sup>143</sup> recognized liability for “committing, aiding or abetting hostilities” in violation of the law of nations.<sup>144</sup>

Therefore, because these were issues that were “defined with a specificity comparable to the features of the 18th-century paradigms we have recognized,<sup>145</sup> they fit under the scheme of acceptable actions created in *Sosa*.

However, in their submission to the Ninth Circuit for the *Doe I* case<sup>146</sup>, the Bush Administration argued that it is interference with foreign policy and business investment, rather than legal impediments, which should prohibit corporations from being sued for aiding and abetting in human rights violations abroad.<sup>147</sup> Even if some deference must be given to defense contractors and other corporations to forward U.S. interests abroad, this policy cannot be taken too far. If the administration’s argument were to be taken at its word, this would be a virtual free pass for corporations to increase their profit margins by way of supporting atrocities, so long as they were only aiding the direct violators themselves, and not actually committing any atrocities. By this rationale, German corporations who built the ovens and gas chambers during the Holocaust would be free to continue such projects for profit even today, without the possibility of incurring liability. They would be committing no wrong that could be actionable in the eyes of American courts because they were simply aiding and abetting an atrocity, and had no direct connection to genocide.

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<sup>142</sup> Id. at 156-57.

<sup>143</sup> 11 F. Cas. 1099 (C.C.D. Pa. 1793).

<sup>144</sup> 70 Brooklyn L. Rev. 533, 558-9.

<sup>145</sup> *Sosa*, 124 S. Ct. at 2762.

<sup>146</sup> *Doe I v. Unocal Corp.*, 395 F.3d 932 (9<sup>th</sup> Cir. 2002).

<sup>147</sup> 70 Brooklyn L. Rev. 533, 562.

One extreme example of outrageous abuses committed indirectly by a U.S. corporation which the court refused to hear due to the *Sosa* doctrine came in *Doe v. Exxon Mobil Corp.*<sup>148</sup> The Plaintiffs alleged that the Exxon Mobil Corporation contracted with the Indonesian National Army to provide security for the construction of a pipeline through Indonesia.<sup>149</sup> The defendants allegedly provided financial, logistical, and strategical support for the security effort.<sup>150</sup> The Plaintiffs alleged that the soldiers hired to provide security engaged in human rights violations that include torture, rape, and genocide.<sup>151</sup> They brought suit against Exxon Mobil as accomplices to the atrocities.

Despite these alleged atrocities occurring in Indonesia, the U.S. District Court for the District of Columbia refrained from hearing the case.<sup>152</sup> The State Department filed a statement of interest in which it stated that it “believes that adjudication of this lawsuit at this time would in fact risk a potentially serious adverse impact on significant interests of the United States, including interests related directly to the on-going struggle against international terrorism.”<sup>153</sup> This stance was taken partly due to the Indonesian government’s statement that it “cannot accept the extra territorial jurisdiction of a United States court over an allegation against an Indonesian government institution.”<sup>154</sup> In response the Court reasoned that “[l]iability for ‘aiding and abetting’ violations of international law is not itself actionable under the Alien Tort Statute, 28 U.S.C.S. § 1350,”<sup>155</sup> and that “[p]laintiffs cannot maintain a claim for ‘sexual violence’ under the Alien Tort Statute, 28 U.S.C.S. § 1350, because it is not sufficiently recognized under

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<sup>148</sup> *Doe v. Exxon Mobil Corp.*, 393 F. Supp. 2d 20, 28 (D.C. 2005).

<sup>149</sup> *Id.* at 22.

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

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at 28.

<sup>153</sup> *Id.* at 22.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* at 24.

international law.”<sup>156</sup> As a result the court decided that it had no subject matter jurisdiction to hear the case under the ATCA.<sup>157</sup>

This case does bring about a conflict of interest for the court. Indonesia is a major partner in the global effort to prevent terrorism after 9/11, and to adjudicate this case could cause serious relation setbacks with their government.<sup>158</sup> However, a major American corporation such as Exxon Mobil should not be free to roam the world, aiding in atrocities at will in pursuit of profit, and remain free from consequence so long as they do not directly commit any acts, simply because it may interfere with a foreign policy interest.

The Court’s decision reflects the most troublesome aspect of the *Sosa* decision because it opens the door to abuses by U.S. corporations that the courts refuse to address. If the aiding of a perpetrator of sexual violence and genocide cannot be maintained as a violation of customary international law around the world, then there is very little that can. Freedom from rape, torture, and murder are quite possibly the three most important freedoms any individual can possess, yet at least one American court does not consider support of these horrific acts as actionable under the ATCA. This is a clear indicator of the potentially wide scope of interpretation left open by *Sosa* to the judiciary, as well as a need by Congress to step in and create some boundaries to prevent abuses. Otherwise companies such as Exxon Mobil, that fly the American flag over its headquarters, can continue to make large profits by aiding some of the most horrid and atrocious human rights violations around the world without the possibility of incurring any liability.

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<sup>156</sup> *Id.*

<sup>157</sup> *Id.* at 28.

<sup>158</sup> See Jeffrey C. Goldfarb, *Losing Our Best Allies in the War on Terror*, N.Y. Times, August 20, 2002, at A2. See also, Seth Mydans, *A Nation at War: Southeast Asia; In Far East of Many Muslims, Press is Anti-U.S. but Hardly Pro Jihad*, N.Y. Times, April 11, 2003, at B1.

Another predicament is that the *Sosa* doctrine is open to such wide interpretation that the courts have contrary opinions on what should be allowed into court and what should not. While some courts refuse to allow any cases involving corporate accessory liability under the ATCA (as in *Doe*), others are showing reluctance to give corporations the leeway to assist in the commission of human rights violations without liability, and are still allowing such actions into court. In *Dow Chemical*, the aforementioned case of Vietnamese victims of the use of Agent Orange War in Vietnam,<sup>159</sup> the Defendant Corporation attempted to claim that they committed no direct act against the Plaintiffs and therefore did not violate any customary international norm pursuant to the *Sosa* standard. However, the Court disagreed with Dow Chemical and held that:

[C]ustomary international law, which prohibits inhumane acts of a very serious nature such as willful killing and torture and other inhumane acts committed as part of a widespread or systematic attack against any civilian population or persecutions on political, racial or religious grounds. Leaders, organizers, facilitators, conspirators and accomplices participating in the formulation and execution of these acts are responsible for all acts performed by any person in execution of this plan.<sup>160</sup>

This explains that a corporation which is merely an accessory to an atrocity may still be held liable for acts of which they aid the commission.

The finding by the U.S. District Court for the Eastern District of New York in *Dow Chemical* is in direct opposition to the District Court's finding in *Doe*. Even with their contrary interpretations, the reasoning of both courts can be justified under *Sosa*. That is why Congress needs to step in and create definitive boundaries in this area, specifying what can and cannot be adjudicated under the ATCA. Otherwise differing

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<sup>159</sup> *Vietnam Ass'n for Victims of Agent Orange/Dioxin v. Dow Chemical Company*, 373 F. Supp. 2d 7, 15 (E.D.N.Y. 2005).

<sup>160</sup> *Id.* at 37.

stances in different jurisdictions may lead to potential plaintiffs' cherry picking their venue, as well as further inconsistent decisions in similar matters.

#### **IV. Conclusion**

The *Sosa* decision of the Supreme Court of the United States has taken the enforcement of the ATCA and FTCA in a new direction. While the intent of the Court was to clarify when and how the ATCA and FTCA can be implemented in order to avoid abuses of the separation of powers and to uphold Congressional intent, it has failed to solve the problem. The particular customary norms of international law that can be enforced under the ATCA are still unclear. This is currently resulting in divergent judicial decisions in similar cases. Also, Congress's intent when passing the FTCA was to hold the Federal government liable for tortious wrongs it commits, but with the elimination of the headquarters doctrine, the FTCA will fail to reimburse private people and companies for wrongs the government has committed outside of the country.

The Supreme Court tried its best to set standards in the *Sosa* decision, but they can only go so far. It is the job of the legislature to create new and better laws to correct the injustices that are continuing to occur. Congress must take the next step to fix the problems and create clarity with these laws. Only when specific and fair standards are set by Congress that can allow judges to fairly and correctly decide future cases will past injustices be avoided from reoccurring and future human rights violations be halted instead of turning a blind eye.