CUSTOMARY INTERNATIONAL LAW AND INTERNATIONAL HUMAN RIGHTS LAW: A PROPOSAL FOR THE EXPANSION OF THE ALIEN TORT STATUTE

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I. INTRODUCTION

Human rights, by definition, belong to all people equally, inalienably, and universally.[1] A being is either human or not human, and if it is human, it possesses the same rights as all other humans.[2] Furthermore, once a being is human, it cannot cease being human.[3] Therefore, human rights cannot be taken away from any person.[4]

Even so, these rights, despite their universality and inalienability, are sometimes violated by the conduct of governments, corporations, and private individuals. Various international laws and conventions have been developed to address and prevent human rights violations.[5] Members of the international community—States themselves—must, and do, play an important role in both developing and enforcing international human rights laws.[6]

In the United States, an important vehicle used to adjudicate international human rights claims is the Alien Tort Statute (ATS), also known as the Alien Tort Claims Act.[7] The ATS is a statute that allows US federal courts to hear cases brought by foreign plaintiffs alleging various torts committed outside of the United States.[8] Today, most of the cases brought under the statute involve alleged human rights violations.[9]

This Note begins with a brief history of the Alien Tort Statute and an examination of its purpose, jurisdictional requirements, and scope. The Note then examines the subject of customary international law (CIL). The Note explores the ways courts determine whether a practice violates customary international law in the context of ATS cases and the relationship between human rights norms and customary international law.

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1. *See* MARK GOODALE, THE PRACTICE OF HUMAN RIGHTS: TRACKING LAW BETWEEN THE GLOBAL AND THE LOCAL 7 (Mark Goodale & Sally Engle Merry eds., 2007).

2. *See id.*

3. *See id.*

4. *See id.*

5. *See* MARGOT E. SALOMON, GLOBAL RESPONSIBILITY FOR HUMAN RIGHTS 16 (Oxford University Press, 2007).

6. *See id.* at 17.

7. 28 U.S.C. § 1350 (2011).

8. *See id.*

9. *See* THE ALIEN TORT STATUTE, available at http://www.cja.org/article.php?id=435 (last visited Aug. 13, 2013).

Next, the Note briefly considers the subject of international human rights, the nature of human rights, States' obligations to protect and enforce international human rights, and the challenges encountered in enforcing such rights.

Finally, this Note proposes a broader approach to the application of customary international law as a basis for ATS liability. This Note will argue that the proposed solution will allow the United States to more readily fulfill its obligation to protect and enforce human rights.

II. AN OVERVIEW OF THE ALIEN TORT STATUTE

The Alien Tort Statute was enacted under the Judiciary Act of 1789.[10] The actual text of the law is very simple: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[11]

While the legislative history of the Judiciary Act fails to provide concrete evidence regarding Congress's purpose in enacting the ATS,[12] other historical evidence indicates that the statute was intended to protect the young country in a volatile international community.[13] The Framers likely sought to "avoid embroiling the nation in conflicts with foreign states arising from U.S. mistreatment of foreign citizens."[14] To avoid offending another nation by denying justice to one of its citizens, Congress enacted the ATS, providing a federal forum for aliens to bring tort claims.[15] Congress was likely interested in ensuring that claims involving foreign citizens or foreign states were tried in federal courts rather than state courts, because "state judges were less likely to be sensitive to national concerns than their federal counterparts."[16]

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10. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 712-13 (2004):
> The first Congress passed [the ATS] as part of the Judiciary Act of 1789, in providing that the new federal 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.

(quoting Act of Sept. 24, 1789, ch. 20, § 9, 1 Stat. 77).

11. 28 U.S.C. § 1350 (2011).

12. *See* CHARLES ALLAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3661.1 (3d ed. 2011).

13. *See* Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AM. J. INT'L L. 461, 464 (1989).

14. *Id.* at 465.

15. *Id.*

16. *Id.*

A. History of the ATS

Judge Friendly, of the Second Circuit, once called the ATS a "legal Lohengrin" because "no one seems to know whence it came."[17] The statute provided jurisdiction for only one case in the 170 years following its enactment.[18]

Then, in 1980, the Second Circuit "launched the modern ATS litigation revolution"[19] when it decided *Filartia v. Pena-Irala*.[20] In *Filartiga*, plaintiffs who were citizens of the Republic of Paraguay brought an action against another citizen of Paraguay, alleging that the defendant had violated the law of nations by torturing the plaintiffs' son to death.[21] The Second Circuit found that the ATS provided jurisdiction for the suit because deliberate torture, under color of authority, does in fact violate the law of nations.[22]

The Second Circuit also concluded that the "law of nations" referenced in the text of the ATS is equivalent to modern customary international law.[23] Furthermore, the Second Circuit found that there is "an international consensus that recognizes basic human rights and obligations owed by all governments to their citizens."[24] This case marks the first time that foreigners had the ability to sue for alleged human rights violations in US courts.[25] The Second Circuit's findings provided the groundwork for the ATS to serve as a modern tool for courts to use to address human rights violations abroad.

Using the guidelines provided by the Second Circuit in *Filartiga*, US federal courts began to hear ATS cases alleging violations of customary international law more regularly.[26] Slowly but surely, court decisions have continued to delineate the permissible reach and scope of the ATS.[27] For

17. IIT v. Vencap, Ltd., 519 F.2d 1001, 1015 (2d Cir. 1975).

18. *See id.*:

> [A]lthough it has been with us since the first Judiciary Act, no one seems to know whence it came. We dealt with it some years ago in Khedivial Line, S. A. E. v. Seafarers' Union. At that time we could find only one case where jurisdiction under it had been sustained, in that instance violation of a treaty, Bolchos v. Darrell, [a 1795 case].

(internal citations omitted).

19. Robert Knowles, *A Realist Defense of the Alien Tort Statute*, 88 WASH. U.L. REV. 1117, 1127 (2011).

20. 630 F.2d 876 (2d Cir. 1980).

21. *See* Filartiga v. Pena-Irala, 630 F.2d 876, 878 (2d Cir. 1980).

22. *See id.* at 880.

23. *Id.* at 880-81.

24. *Id.* at 884.

25. *See* Knowles, *supra* note 20, at 1127.

26. *See id.* at 1127.

27. *See id.* at 1127-28.

example, in *Hilao v. Estate of Marcos*,[28] Philippine citizens brought a human rights violations class action against the former president of the Philippines, alleging that he committed human rights abuses against the plaintiffs themselves, as well as the plaintiffs' descendants.[29] The Ninth Circuit found that the defendant could be held liable under the ATS for the human rights violations his military committed, since he had knowledge of the violations and did not prevent them.[30] The court also held that ATS jurisdiction applies even where the alleged tort is committed abroad rather than on US soil.[31]

In *Kadic v. Karadzic*,[32] Bosnian nationals sued the chief of Serbian forces for alleged human rights violations, including torture, rape, and execution.[33] The Second Circuit found that the ATS did provide jurisdiction for the plaintiffs' suit and that *private* liability did exist for the violations.[34] The defendants' conduct, the court declared, breached the law of nations "whether undertaken by those acting under the auspices of a state or only as private individuals."[35] The court specified, however, that the only conduct that should lead to individual liability under the ATS is that "committed in pursuit of genocide or war crimes."[36]

In *Flores v. Southern Peru Copper Corp.*,[37] Peruvian citizens sued a corporate defendant, alleging that the corporation had violated the law of nations by causing environmental damage that led to the plaintiffs' illnesses.[38] The Second Circuit held that no jurisdiction existed under the ATS because the plaintiffs did not show that the defendant's conduct constituted a violation of customary international law.[39] However, by failing to hold that the plaintiff's allegations should be dismissed on the grounds that the defendant was a corporation rather than a government official or private individual, the court implied that a corporation may indeed be held liable under the ATS for sufficiently universal and specific human rights violations.[40]

28. 103 F.3d 767 (9th Cir. 1996).
29. *See id.* at 771.
30. *See id.* at 776.
31. *See id.* at 772.
32. 70 F.3d 232 (2d Cir. 1995).
33. *See id.* at 236-37.
34. *See id.* at 239.
35. *Id.* at 239.
36. *Id.* at 244.
37. 414 F.3d 233 (2d Cir. 2003).
38. See *id.* at 236-37.
39. See *id.* at 255.
40. *See generally id.*

B. Jurisdictional Requirements

Federal subject matter jurisdiction over an ATS claim depends on the satisfaction of three independent criteria. First, a foreigner must sue.[41] Second, the suit must allege that a tort has been committed.[42] Third, the tort must have been committed either in violation of the "law of nations,"[43] of a treaty that has been ratified by the United States, or of a binding legislative, judicial, or executive rule.[44]

If a plaintiff brings a claim that fails to allege conduct that violates either a treaty ratified by the United States or a binding decision or act,[45] the court must undertake the sometimes difficult task of determining whether the conduct violates the law of nations. When conducting this analysis, the court must determine whether the claim implicates an international legal norm that is "specific, universal, and obligatory,"[46] and whether the United States accepts that norm. When a claim meets these criteria, the court then decides whether the plaintiff states a claim that sufficiently alleges a violation of the norm.[47]

C. The Permissible Scope of the ATS

Prior to 2004, American courts were split on the issue of the ATS's jurisdictional scope. The majority of courts ruled that the ATS provides plaintiffs with a substantive right of action for law of nations violations.[48] Under this approach, once the court identified an international legal norm, the plaintiff had a right of action under the ATS and traditional standing principles against alleged violations of that norm.[49] A minority of courts, on the other hand, viewed the ATS as a statute that provides only jurisdiction for claims brought by plaintiffs, but no substantive cause of action.[50] Under this approach, the statute provides nothing but a forum for the action.[51] The

41. *See* Filartiga v. Pena-Irala, 630 F.2d 876, 887 (2d Cir.1980) ("[T]his action is properly brought in federal court. This is undeniably an action by an alien, for a tort only, committed in violation of the law of nations.").

42. *See id.*

43. *Id.* For further discussion of customary international legal norms, see *infra* Part II.E.

44. *See id.* at 880.

45. *See* The Paquete Habana, 175 U.S. 677, 700 (1900) ("[W]here 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 . . .").

46. In re Estate of Marcos Human Rights Litigation, 25 F.3d 1467, 1475 (C.A.9 1994).

47. *See* Joel Slawotsky, *Doing Business Around the World: Corporate Liability Under the Alien Tort Claims Act*, 2005 MICH. ST. L. REV. 1065, 1087 (2005).

48. *See* Patrick D. Curran, *Universalism, Relativism, and Private Enforcement of Customary International Law*, 5 CHI. J. INT'L L. 311, 313 (2004).

49. *See id.*

50. *See id.* at 313-14.

51. *See id.* at 314.

substantive right of action was to be provided by self-executing treaties, statutes, and customary international law, not by the ATS itself.[52]

Then, in 2004, the United States Supreme Court decided *Sosa v. Alvarez-Machain*[53] and resolved the debate. In *Sosa,* the Court held that the ATS is a jurisdictional statute only and creates no cause of action.[54] This decision greatly limited the scope of tort claims permitted under the ATS. The Court found that the more narrow approach corresponded better with the intent of the ATS drafters.[55] According to the Court, the ATS's drafters intended that common law, rather than the ATS standing alone, would supply a cause of action for only a "modest number of international law violations."[56] Justice Souter pointed out that, at the time of its adoption, the ATS allowed federal courts to hear claims only "in a very limited category defined by the law of nations and recognized at common law."[57] In other words, at the time of its ratification, ATS jurisdiction depended on the existence of an established cause of action under either common law or the law of nations. [58]

The *Sosa* Court specified three "law of nations" offenses addressed by the ATS at the time of its ratification: "violation of safe conducts, infringement of the rights of ambassadors, and piracy."[59] The Supreme Court did not restrict modern ATS jurisdiction to these three offenses, but instead held that federal courts have ATS jurisdiction according to "present-day law of nations."[60] ATS claims, the Court declared, must derive from

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52. *See id.*
53. 542 U.S. 692 (2004).
54. *See id.* at 724.
55. *Id.*
56. *Id.*
57. *Id.* at 712.
58. *See id.*
59. *Id.* at 715.
60. *Id.* at 724-25. The Court explained:

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

(internal citations omitted).

"norm[s] of international character accepted by the civilized world and defined with a specificity" similar to "the features of the 18th-century paradigms" recognized by the Court.[61] In other words, the Supreme Court held that, in order to be recognized, ATS claims must be similar in specificity and universality to the historical ATS claims Congress anticipated when it enacted the ATS.[62]

D. Corporate/Individual Liability

Plaintiffs often bring ATS claims for corporations' human rights violations.[63] Corporations can be appealing defendants because their business practices abroad sometimes lead to serious human rights violations, and they possess ample assets from which to pay settlements or judgments to plaintiffs.[64]

The international community recognizes that corporations' practices should be monitored for human rights violations.[65] However, neither members of the international community nor US courts have been able to agree regarding whether law of nations liability reaches corporations.[66] The Supreme Court has not yet resolved the issue.[67]

E. Customary International Law as Federal Common Law

The boundaries of the law of nations have shifted a great deal during

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61. *Id.*

62. *See* Curtis A. Bradley et. al., *Sosa, Customary International Law, and the Continuing Relevance of Erie*, 120 HARV. L. REV. 869, 904 (2007).

63. *See* Mara Theophila, *"Moral Monsters" Under the Bed: Holding Corporations Accountable for Violations of the Alien Tort Statute After Kiobel v. Royal Dutch Petroleum Co.*, 79 FORDHAM L. REV. 2859, 2876 (2011).

64. *See id.*

65. *See id.* at 2880.

66. *See id. See also* Kiobel v. Royal Dutch Petroleum, 621 F.3d 111 (2d Cir. 2010) (holding that corporations are not subject to ATS jurisdiction for violations of customary international law); Doe I. v. Unocal, 395 F.3d 932 (9th Cir. 2002) (holding that private parties, including corporations, may be sued under the ATS for aiding and abetting in customary international law violations without a showing of state action); Romero v. Drummond Co., Inc., 552 F.3d 1303, 1316 (11th Cir. 2008) ("[S]tate actors are the main objects of the law of nations, but individuals may be liable, under the law of nations, for some conduct, such as war crimes, regardless of whether they acted under color of law of a foreign nation.").

67. *See* Theophila, *supra* note 64, at 2873:

> The Supreme Court has never ruled on what categories of defendants can be held liable for a violation of the law of nations, nor has the Court indicated which body of law--domestic or international--should control this inquiry. Particularly with the infusion of corporate defendants into ATS litigation, courts have only recently begun to analyze the question.

the two centuries following the ATS's enactment.[68] In the eighteenth century, the law of nations included only maritime law, the conflict of laws, the law of merchant, and laws that applied in disputes between states.[69] Over time, other private-law principles of the law of nations became integrated into common law, and the law of nations began to include human rights principles and norms.[70] Eventually, the law of nations "came to rest on the positive authority of custom."[71] Today, to determine the scope of customary international law, courts look at "the customs and usages of civilized nations,"[72] which help denote "the general assent of civilized nations."[73]

Early courts hearing ATS law of nations claims interpreted Article III, Section II of the US Constitution to allow jurisdiction for these claims under the theory that the law of nations was incorporated into US federal common law.[74] However, the Supreme Court in its 1938 decision, *Erie Railroad v. Tompkins,*[75] held that federal courts must apply state law in diversity cases.[76] It followed from the decision that no federal common law exists.[77] This presented a problem for courts hearing ATS cases because ATS jurisdiction depends on the claim falling under federal common law.

The Supreme Court addressed this problem when it heard *Sosa v. Alvarez-Machain.*[78] In *Sosa*, the Court held that courts could hear a very limited range of claims—only those for violations of international legal norms—under federal common law.[79] The effect of the Court's decision in *Sosa*, then, was to create "a new class of federal common law claims based

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68. *See* William S. Dodge, *Customary International Law and the Question of Legitimacy*, 120 HARV. L. REV. F. 19, 21 (2007).

69. *See id.* at 21-22.

70. *See id.* at 22.

71. *Id.* at 23.

72. *Id.* (quoting The Paquete Habana, 175 U.S. 677, 700 (1900)).

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

74. *See* Filartiga v. Pena-Irala, 630 F.2d 876, 885 (2d Cir. 1980). The court said,

> [A]s part of an articulated scheme of federal control over external affairs, Congress provided, in the first Judiciary Act, for federal jurisdiction over suits by aliens where principles of international law are in issue. The constitutional basis for the Alien Tort Statute is the law of nations, which has always been part of the federal common law.

Id. (internal citation omitted).

75. 304 U.S. 64 (1938).

76. *See id.* at 78 ("Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state.").

77. *See id.* ("There is no federal general common law.").

78. 542 U.S. 692 (2004).

79. *See id.* at 731-32 ("[F]ederal 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.").

on a narrow subset of international law norms."[80]

The Court gave three reasons for its decision. First, it reasoned that Congress, when enacting the ATS in 1789, had concluded that "torts in violation of the law of nations would have been recognized within the common law of the time."[81] The Court recognized that, since the enactment of the ATS, the evolution of the *Erie* doctrine had significantly altered the function of federal common law, but determined that it should safeguard the drafters' intention that common law would provide causes of actions for a limited scope of law of nations violations.[82] The reason: in 1789, Congress could not have anticipated that federal courts would "lose all capacity to recognize enforceable international norms simply because the common law might lose some metaphysical cachet on the road to modern realism."[83] The Court also noted that, since the ATS's enactment, no legislative or judicial action, including *Erie*, expressly proscribed courts from recognizing claims alleging violations of customary international law.[84]

F. Permissible Sources of International Law

Since, under *Sosa*, the ATS provides no substantive cause of action, but simply provides a forum for plaintiffs to litigate alleged violations of existing international law, the question of where a federal court may find its sources of international law is an important one. In *Paquete Habana*,[85] the United States Supreme Court held that

> 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

80. Note, *An Objection to Sosa - and to the New Federal Common Law*, 119 HARV. L. REV. 2077, 2088 (2006).

81. *Sosa*, 542 U.S. at 714.

82. *See id.* at 740 ("[Erie v. Tompkins] signaled the end of federal-court elaboration and application of the general common law.").

83. *Id.* at 730.

84. *See id.* at 694 ("[T]he reasonable inference from history and practice is that the ATS was intended to have practical effect the moment it became law, on the understanding that the common law would provide a cause of action for the modest number of international law violations thought to carry personal liability at the time.").

85. The Paquete Habana, 175 U.S. 677 (1900).

evidence of what the law really is.[86]

In *Paquete Habana*, the Supreme Court held that the traditional proscription against wartime seizure of an enemy's fishing ships had become a rule of international law by general agreement among civilized nations.[87] This holding is particularly significant for ATS cases, because it clearly directs courts to construe international law "as it has evolved and exists among the nations of the world today," rather than as it existed in 1789.[88]

The sources of international law outlined in *Paquete Habana* are perpetuated in modern interpretations of customary international law. For example, the Statute of the International Court of Justice (ICJ Statute), in Article 38(1),[89] describes four types of sources on which a court should rely when interpreting international law.[90] First, courts must apply international laws contained in binding international conventions.[91] If no such laws exist, a court may look to customary international law as a source of international legal norms.[92] To determine whether a practice is customary international law, courts must determine whether the practice exists across civilized nations and whether that practice is rendered obligatory by rule of law, or *opinio juris*.[93] Third, courts may also consider general legal principles recognized by civilized nations.[94] Finally, courts may consider judicial decisions and the works of highly-regarded scholars and experts.[95] All of these provide acceptable sources of international law under which US courts may hear ATS cases.[96]

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86. *Id.* at 700.

87. *See generally id.*

88. Filartiga v. Pena-Irala, 630 F.2d 876, 881 (2d Cir. 1980).

89. *See* Statute of the International Court of Justice art. 38(1), June 26, 1945, 59 Stat. 1055, 1060 [hereinafter ICJ Statute].

90. *See id.* at art. 38(1)(a)-(d).

91. *See id.* at art. 38(1)(a).

92. *See id.* at art. 38(1)(b).

93. *See* Doe v. Nestle, S.A., 748 F. Supp. 2d 1057, 1068 (C.D. Cal. 2010) (citing The Paquete Habana, 175 U.S. 677, 708 (1900). *See also* Jo Lynn Slama, *Opinio Juris in Customary International Law*, 15 OKLA. CITY U. L. REV. 603, 648 (1990) ("Under traditional theory, opinio juris 'comprehends a conviction on the part of states that their acts are required by, or consistent with, existing international law.' The opinio juris principle has also been described as a state's perception or belief that a particular practice is binding or obligatory. Still others have characterized opinio juris as 'shared community expectations,' 'common popular sentiment,' and the 'spirit of the people.' Despite these varying definitional formulations and theories, two distinct notions emerge as the 'essence' of opinio juris: (1) that the consequence of opinio juris is a binding international obligation, and (2) that the nature of opinio juris is subjective.").

94. *See* Doe v. Nestle, 748 F. Supp. 2d at 1068.

95. *See* ICJ Statute, *supra* note 90, art. 38(1)(d).

96. *See* Doe v. Nestle, 748 F. Supp. 2d at 1068.

III. CUSTOMARY INTERNATIONAL LAW

A. Customary International Law Generally

Much of the uncertainty surrounding jurisdiction in ATS cases involves the question of whether a particular type of conduct constitutes a violation of customary international law. Customary international law is "created by the general customs and practices of nations"[97] and is defined and framed using "myriad decisions made in numerous and varied international and domestic arenas."[98] Since there exists no "single, definitive, readily-identifiable source" of customary international law, determining whether a certain type of conduct violates customary international law can be a complex task, one with which lawyers and judges tend to be inexperienced.[99]

Customary international law is derived from "those rules that States universally abide by, or accede to, out of a sense of legal obligation and mutual concern."[100] In other words, in order for a standard to become customary international law, it must be one adopted in writing or in practice by most or all civilized nations. States need not, however, be universally effective in implementation of the principle.[101] Also, states must adhere to the practice because they feel there is a legal obligation.[102] Principles that states follow for political or moral reasons, rather than legal reasons, are generally not considered customary international law.[103]

In order to be considered customary international law, the legal standard must be of "mutual," and not merely "several," concern to states.[104] The distinction: areas of "mutual" concern between states involve state conduct that involves or is related to other states. Areas of "several" concern are "matters in which States are separately and independently interested."[105]

B. Customary International Law and the ATS

International legal norms that are "so fundamental and universally recognized that they are binding on nations even if they do not agree to them" are called *jus cogens*.[106] A *jus cogens* violation always satisfies the

97. Flores v. S. Peru Copper Corp., 414 F.3d 233, 248 (2d Cir. 2003).
98. *Id.* at 247.
99. *Id.* at 248.
100. *Id.*
101. *See id.*
102. *See id.*
103. *See id.*
104. *Id.* at 249.
105. *Id.*
106. Doe v. Qi, 349 F. Supp. 2d 1258, 1277 (N.D. Cal. 2004).

ATS's "law of nations" requirement,[107] but a norm need not be considered *jus cogens* before it can be considered customary international law and, thus, actionable under the ATS.[108]

To satisfy ATS jurisdictional requirements, a principle of customary international law must be universal, specific, and obligatory.[109] These requirements serve as a filter to allow in only claims arising from the violation of international norms that are truly fundamental. They also ensure that US courts do not "sit in judgment of the valid acts of another state in the absence of agreement on the controlling principles of law."[110] Finally, the requirement of specificity guarantees that those claims brought under the ATS are governed by standards that are judicially manageable.[111]

After *Sosa*, federal courts must perform a two-part analysis to determine whether a practice may be considered a violation of the law of nations. [112] The court must find that the claim is based on a "present-day law of nations" that (1) derives from an international norm that is accepted by civilized nations and (2) is defined with a degree of specificity similar to the actionable eighteenth-century norms of the era during which the ATS was enacted: piracy, infringement of ambassador's rights, and violation of safe conducts.[113]

C. Treaties Versus Other Sources of Law

While binding treaties certainly constitute law of nations, sources other than treaties may be used to determine customary international law. For example, international agreements create law for the states who are parties to the agreements, and can still be considered customary

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107. *See id.*

108. Doe I v. Unocal Corp., 395 F.3d 932, 978 n.15 (9th Cir. 2002). *See also* Curtis A. Bradley et al., *Sosa, Customary International Law, and the Continuing Relevance of Erie*, 120 HARV. L. REV. 869, 890 (2007):

> Some litigants and commentators suggested that ATS litigation should be limited to violations of jus cogens norms. A jus cogens norm is a norm "accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." In the Ninth Circuit opinion that the Supreme Court reviewed in Sosa, the court rejected such a jus cogens limitation . . .

(quoting Vienna Convention on the Law of Treaties art. 53, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331).

109. *See* Ryan Goodman & Derek P. Jinks, *Filartiga's Firm Footing: International Human Rights and Federal Common Law*, 66 FORDHAM L. REV. 463, 495 (1997).

110. *Id.* at 496.

111. *See id.*

112. Doe v. Nestle, S.A., 748 F. Supp. 2d 1057, 1067 (C.D. Cal. 2010).

113. *Id.*

international law even for those states who are not party to the agreement,[114] when those agreements are intended for general observance and are, in fact, broadly accepted.[115] The agreements, while technically unbinding, serve as sufficient evidence that "a norm has developed the specificity, universality, and obligatory nature required for ATS jurisdiction."[116] For example, in *Abdullahi v. Pfizer*, the Second Circuit noted that the International Covenant on Civil and Political Rights provided sufficient evidence of customary international law, even though it was not self-executing and did not create binding international obligations.[117]

General legal principles that are common amongst civilized nations, even if those principles are not incorporated into express law or agreement, may also be invoked as principles of customary international law.[118]

IV. INTERNATIONAL HUMAN RIGHTS GENERALLY

A. The Nature of Human Rights

The phrase "human rights" applies to "a broad range of rights and freedoms to which every person is entitled."[119] These rights are considered to be inalienable and inherent in all human beings.[120] The very fact that principles of human rights exist necessarily demonstrates that those who hold these rights—all human beings—may also exercise them.[121] Human

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114. *See* Flomo v. Firestone Nat. Rubber Co., 643 F.3d 1013, 1021 (7th Cir. 2011) ("[C]onventions that not all nations ratify can still be evidence of customary international law. Otherwise every nation (or at least every 'civilized' nation) would have veto power over customary international law.") (citation omitted).

115. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102 cmt. b (1987). *See also* Abdullahi v. Pfizer, Inc., 562 F.3d 163, 176 (2d Cir. 2009):

> While adoption of a self-executing treaty or the execution of a treaty that is not self-executing may provide the best evidence of a particular country's custom or practice of recognizing a norm the existence of a norm of customary international law is one determined, in part, by reference to the custom or practices of many States, and the broad acceptance of that norm by the international community. Agreements that are not self-executing or that have not been executed by federal legislation, including the ICCPR, are appropriately considered evidence of the current state of customary international law.

(internal citation omitted)).

116. Abdullahi, 562 F.3d at 177.

117. *See id.* at 180.

118. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102 cmt. c (1987).

119. Helen C. Lucas, *The Adjudication of Violations of International Law Under the Alien Tort Claims Act: Allowing Alien Plaintiffs Their Day in Federal Court*, 36 DEPAUL L. REV. 231, 232 (1987).

120. *See id.* at 233.

121. *See* Robert D. Sloane, *Outrelativizing Relativism: A Liberal Defense of the Universality of International Human Rights*, 34 VAND. J. TRANSNAT'L L. 527, 543 (2001).

rights standards are generally accepted by members of the international community, and abuse of these standards is a matter of international concern.[122] Today, states have significant contact with each other and the decisions made by one state often affect other states in the global community.[123] States all "rely on the same global environment for satisfaction" of their economic needs, and this close connection requires their collaboration in enforcing human rights globally.[124] This system also influences the ways human rights are defined and enforced globally. Although states are sovereign entities, there exists a globally-shared responsibility, one which derives from the interdependence between states, to cooperate in protecting and enforcing human rights principles, both domestically and abroad.[125]

B. The Development of International Human Rights Standards

Modern international human rights law looks very different than it did prior to World War II. Traditional international law governed only relations between sovereign states, rather than between private individuals or between states and individuals. Furthermore, international law applied only to states within that specific law's express jurisdiction.[126] The traditional framework treated states as sovereign and largely unaccountable. Individuals who were citizens of these states were only entitled to those human rights which their governments granted to them.[127] However, the international community's perspective on human rights shifted dramatically after World War II due to outrage over the brutalities that occurred during the war.[128]

The formation of international law occurs mostly at the international level through treaties, agreements, and conventions of the United Nations and of other international entities.[129] The United Nations has been largely responsible for the proclamation and definition of human rights through its international human rights conventions and declarations.[130]

One of the most prominent examples of an international human rights convention is the United Nations' Universal Declaration of Human Rights (UDHR). The UDHR declares, "All human beings are born free and equal

122. *See* Lucas, *supra* note 120, at 233.
123. SALOMON, *supra* note 5, at 15.
124. *Id.* at 24.
125. *Id.* at 25.
126. *See* Lucas, *supra* note 120, at 233.
127. *See id.* at 234.
128. *See id.*
129. *See* Elizabeth M. Bruch, *Whose Law Is It Anyway? The Cultural Legitimacy of International Human Rights in the United States*, 73 TENN. L. REV. 669, 674 (2006).
130. *See* Lucas, *supra* note 120, at 234.

in dignity and rights. They are endowed with reason and conscience . . . ."[131] The UDHR is a non-binding convention, so it was later supplemented by the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), which are binding treaties.[132] However, even though the UDHR is not a binding treaty, it is considered to be a source of customary international law, and, therefore, imposes binding international legal obligations.[133]

While international law is generally framed and codified via international bodies, implementation and enforcement of these international human rights laws occurs mostly at the domestic level.[134] State governments are the primary actors in "implementing international human rights law at both the international and national levels."[135]

Human rights principles become universally-accepted norms by way of three different forms of internalization: social, political, and legal.[136] A norm is internalized socially when it "acquires so much public legitimacy that there is widespread general adherence to it."[137] When political figures recognize an international norm and recommend that a government adopt the principle as a matter of policy, the norm is internalized politically.[138] Legal internalization occurs when a principle is incorporated into a State's legal system through judicial interpretation, legislative action, and/or executive action.[139] Thus, one method governments can use to help shape international human rights norms is to provide for their courts both jurisdiction and a framework under which to adjudicate violations of those norms.

Consideration of all three forms of norm internalization proves useful when determining whether a claim of human rights violations is actionable under the ATS. When a norm is socially and politically internalized in the international community, to the degree that it is considered universal, the norm constitutes customary international law and its violation is presumably actionable under the ATS.[140] Then, when a US federal court

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131. Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3rd Sess., U.N. Doc. A/810 (1948).

132. *See* Melissa Robbins, *Powerful States, Customary Law and the Erosion of Human Rights Through Regional Enforcement*, 35 CAL. W. INT'L L.J. 275, 280 (2005).

133. *See id.* at 280-281.

134. *See* Bruch, *supra* note 130, at 674.

135. *Id.*

136. *Id.* at 472, citing Harold Hongju Koh, *The 1998 Frankel Lecture: Bringing International Law Home*, 35 Hous. L. Rev. 623, 642 (1998).

137. *Id.*, citing Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2657 (1997).

138. *Id.*

139. *Id.*

140. *See generally* The Paquete Habana, 175 U.S. 677 (1900). *See also* ICJ Statute, *supra* note 90, art. 38(1)(a)-(d).

delivers a decision regarding the norm, the judicial decision serves as legal integration of the norm, certainly in the US court system and likely in the international legal community as well.[141]

C. States' Obligations

Modern international human rights law places less emphasis on state sovereignty than did traditional human rights law. The international community has "manifested [its] concern with states' treatment of their own nationals in the numerous international conventions prohibiting conduct that violates human rights."[142] International human rights laws leave enforcement and protection of these rights to individual countries, so each nation shoulders an obligation not only to avoid violating the human rights of its citizens and those of citizens of other states, but also to implement human rights law and to ensure that human rights are protected and enforced globally.[143] This duty becomes even more important given the increasing globalization and interdependence between nations.[144] Many nations, willingly accepting the obligation imposed by international human rights law,[145] assert the right to protest other nations' human rights violations against their own citizens.[146] These protesting nations believe that a "lack of means of enforcement" within the violating state's legal system does not counteract the existence of a human right and a state's obligation to protect it.[147]

D. Global Challenges in Enforcing Human Rights

While members of the international community generally agree that human rights are universally enjoyed by all individuals, regardless of culture, religion, or politics, there still exist unresolved questions related to the most effective way to define, protect, and enforce these rights.[148]

Despite widespread globalization among nations, "local variables have a major impact on success or failure of adaptation" of human rights

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141. *See generally* The Paquete Habana, 175 U.S. 677 (1900). *See also* ICJ Statute, *supra* note 90, art. 38(1)(a)-(d).

142. Lucas, *supra* note 120, at 247.

143. Michael C. Small, *Enforcing International Human Rights Law in Federal Courts: The Alien Tort Statute and the Separation of Powers*, 74 GEO. L.J. 163, 178 (1985).

144. *Id.*

145. Filartiga v. Pena-Irala, 630 F.2d 876, 881 (2d Cir. 1980) ("The United Nations Charter makes it clear that in this modern age a state's treatment of its own citizens is a matter of international concern." (internal citation omitted)).

146. Lucas, *supra* note 120, at 247.

147. *See id.* at 248.

148. *See* Mahmood Monshipouri, *Promoting Universal Human Rights: Dilemmas of Integrating Developing Countries*, 4 YALE HUM. RTS. & DEV. L.J. 25, 43-44, 60 (2001).

norms.[149] A practice that seemingly constitutes a human rights violation in one nation or culture may be considered acceptable conduct in another nation or culture. United Nations' conventions, though they offer a legal basis for universal human rights, do not always provide "universal agreement as to the precise extent of the 'human rights and fundamental freedoms' guaranteed to all by the Charter . . . ."[150] In other words, even when a convention identifies a universal human right, it may fail to define the scope or the breadth of the right.

V. ANALYSIS

A. A Survey of ATS Decisions

Before discussing a proposal for a new approach in determining jurisdiction under the ATS, it may be helpful to take a broad look at those human rights violations which have been found to satisfy the ATS's jurisdictional requirements and those violations which have not.

Human rights violations that have thus far been determined actionable under the ATS include official torture;[151] war crimes (either by a State or by private individuals);[152] torture and summary execution committed within the context of war crimes or genocide;[153] torture and cruel treatment by private individuals;[154] systematic racial discrimination;[155] crimes against humanity;[156] environmental injury;[157] arbitrary, prolonged detention, kidnapping, forced disappearance; [158] genocide;[159] slavery or forced labor;[160] cruel treatment;[161] and denial of political rights.[162]

Human rights violations determined not actionable thus far under the ATS include cultural genocide;[163] environmental injury;[164] sustainable

149. *Id.*

150. Filartiga v. Pena-Irala, 630 F.2d 876, 882 (2d Cir. 1980) (quoting United Nations Charter, 59 Stat. 1033 (1945)).

151. *Id.*

152. Kadic v. Karadzic, 70 F.3d 232, 236 (2d Cir. 1995).

153. *Id.* at 243.

154. Doe v. Islamic Salvation Front, 993 F. Supp. 3, 8 (D.D.C. 1998).

155. Sarei v. Rio Tinto, PLC, 487 F.3d 1193, 1210 (9th Cir. 2007).

156. *Id.* at 1199.

157. *Id.*

158. *See generally* Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995). *See also* Eastman Kodak Co. v. Kavlin, 978 F. Supp. 1078, 1092-93 (S.D. Fla. 1997).

159. *See generally* Sarei v. Rio Tinto, PLC, 487 F.3d 1193 (9th Cir. 2007). *See also* Kadic v. Karadzic, 70 F.3d 232, 241-42 (2d Cir. 1995).

160. Doe I v. Unocal Corp., 395 F.3d 932, 945-46 (9th Cir. 2002).

161. *See generally* Tachiona v. Mugabe, 169 F. Supp. 2d 259 (S.D.N.Y. 2001).

162. *See generally id.*

163. Beanal v. Freeport-McMoran, Inc., 197 F.3d 161, 168 (5th Cir. 1999).

164. Flores v. S. Peru Copper Corp., 414 F.3d 233, 241 (2d Cir. 2003). *See also* Beanal v.

development;[165] child custody disputes;[166] child labor;[167] terrorism;[168] libel and free speech;[169] negligence;[170] and fraud.[171]

The courts deciding these cases have provided a variety of reasons for declaring a human rights claim not actionable under the ATS. Very often, potential ATS suits are struck down because they do not satisfactorily allege all of the ATS jurisdictional requirements.[172]

In *Flomo v. Firestone Nat. Rubber Co., LLC*, a group of Liberian children filed an action under the ATS, claiming that a corporation and its officers violated customary international law against using hazardous child labor on a rubber plantation.[173] The Seventh Circuit dismissed the suit.[174] For sources of customary international law, the court looked to the United Nations Convention on the Rights of the Child,[175] but ultimately decided that the language in the Convention was too indistinct and broad to constitute an international legal norm.[176] Next, the court looked at the International Labour Organization's (ILO) Convention 138: Minimum Age Convention.[177] The court declared the language in this Convention too vague and concluded that the type of labor appropriate for children varies greatly across cultures.[178] Lastly, the court looked at the ILO's Convention 182: The Worst Forms of Child Labour, which was ratified by the United States.[179] This Convention provides that the worst forms of child labor include "work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children."[180] The

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Freeport-McMoran, Inc., 197 F.3d 161, 167 (5th Cir. 1999).

165. *See* Sarei v. Rio Tinto, PLC, 487 F.3d 1193, 1200 (9th Cir. 2007).

166. Huynh Thi Anh v. Levi, 586 F.2d 625, 630 (6th Cir. 1978).

167. Flomo v. Firestone Natural Rubber Co., 643 F.3d 1013, 1022-23 (7th Cir. 2011).

168. Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 795 (D.C. Cir. 1984).

169. De Wit v. KLM Royal Dutch Airlines, 570 F. Supp. 613, 618 (S.D.N.Y. 1983).

170. Benjamins v. British European Airways, 572 F.2d 913, 916 (2d Cir. 1978).

171. Int'l Inv. Trust v. Vencap, Ltd., 519 F.2d 1001, 1016-18 (2d Cir. 1975), *abrogated by* Morrison v. Nat'l Australia Bank Ltd., 130 S. Ct. 2869, 2885 (U.S. 2010).

172. *See* Doe v. Nestle, S.A., 748 F. Supp. 2d 1057, 1067 (C.D. Cal. 2010).

173. *Flomo*, 643 F.3d at 1015.

174. *Id.* at 1024.

175. *Id.* at 1021-22. ("Article 32(1) of the United Nations' Convention on the Rights of the Child provides that a child has a right not to perform 'any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development.'") (citing Convention on the Rights of the Child, G.A. Res 44/25, U.N. Doc. A/RES/44/25 (Nov. 20, 1989)).

176. *Id.* at 1022.

177. *Id.* ("ILO Convention 138 provides that children should not be allowed to do other than 'light work' unless they are at least 14 years old.")

178. *Id.*

179. *Id.*

180. *Id.* (quoting *International Labor Organization Convention 182, Convention Concerning the Prohibition and Immediate Action for the Elimination of The Worst Forms of Child Labour*, Article 3(d), (June 17, 1999), http://www.ilo.org/public/english/standards/relm/ilc/ilc87/com-chic.htm).

court proclaimed that the Convention was still "pretty vague" because "no threshold of actionable harm is specified" and because of "the inherent vagueness of the words 'safety' and 'morals.'"[181]

The court noted that the ILO's Recommendation 190 "adds some stiffening detail" by specifically decrying "work in an unhealthy environment which may, for example, expose children to hazardous substances, agents or processes, or to temperatures, noise levels, or vibrations damaging to their health," and "work under particularly difficult conditions such as work for long hours."[182] The court remarked, however, that a "Recommendation" is not the same as an enforceable obligation.[183]

The Seventh Circuit ultimately concluded that the three conventions fail to provide a specific and enforceable rule.[184] The court indicated that, because economic conditions vary from state to state, "working conditions of children below the age of 13 that significantly reduce longevity or create a high risk (or actuality) of significant permanent physical or psychological impairment" may not violate customary international law.[185] It also declared that the working conditions on the rubber plantation were "bad" but "not that bad."[186] The court speculated that the children, in helping their fathers fill their daily quotas, enabled their fathers to keep their jobs, and were therefore better off than Liberian children whose parents did not have the benefit of the labor of their children.[187]

In *Guinto v. Marcos*, a group of Philippine citizens brought an action against the former president of the Philippines.[188] The plaintiffs argued that the Philippine government, under the direction of its president, violated

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181. *Id.*

182. *Id.* (quoting *International Labor Organization Convention 182, Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour,* Recommendation 190, (June 17, 1999) http://www.ilo.org/public/english/standards/relm/ilc/ilc87/com-chic.htm).

183. *See id.* at 1022-23:

> [A]part from bringing the Recommendation before the ... competent authority or authorities, no further obligation shall rest upon the Members, except that they shall report to the Director–General of the International Labour Office, at appropriate intervals as requested by the Governing Body, the position of the law and practice in their country in regard to the matters dealt with in the Recommendation, showing the extent to which effect has been given, or is proposed to be given, to the provisions of the Recommendation and such modifications of these provisions as it has been found or may be found necessary to make in adopting or applying them.

(citing ILO Constitution, Article 19(6)(d), (April 1919) *available at* http://www.ilo.org/ilolex/english/constq.htm).

184. *Id.* at 1023.

185. *Id.*

186. *Id.*

187. *Id.* at 1024.

188. Guinto v. Marcos, 645 F. Supp. 276 (S.D. Cal. 1986).

their right to free speech by seizing a film produced and directed by the plaintiffs.[189] The district court dismissed the action.[190] The judge stated, "[H]owever dearly our country holds First Amendment rights, I must conclude that a violation of the First Amendment right of free speech does not rise to the level of such universally recognized rights and so does not constitute a 'law of nations.'"[191]

In *Beanal v. Freeport-McMoran, Inc.*, Indonesian citizens filed suit against corporations mining in Indonesia.[192] The plaintiffs alleged environmental abuses, individual human rights violations, and cultural genocide, which are all offenses under the ATS and the Torture Victim Protection Act.[193] The Fifth Circuit dismissed the environmental torts claims and the cultural genocide claims.[194] The court found that the environmental claims were not actionable because the sources of international law the plaintiffs cited "merely refer to a general sense of environmental responsibility and state abstract rights and liberties devoid of articulable or discernible standards and regulations to identify practices that constitute international environmental abuses or torts."[195]

Similarly, the Fifth Circuit held that cultural genocide is not recognized globally as a violation of universal international law.[196] The court found that the international declarations, conventions, and agreements to which the plaintiffs referred merely made "pronouncements and proclamations of an amorphous right to 'enjoy culture,' or a right to 'freely pursue' culture, or a right to cultural development" without specifying which conduct actually would amount to an act of cultural genocide under customary international law.[197]

B. A Review of the Current Approach

Under *Sosa*, courts must treat the Alien Tort Statute as a jurisdictional statute only.[198] Thus, the ATS, standing alone, neither provides nor defines a cause of action for foreign plaintiffs. Instead, the statute simply allows US federal courts to serve as a forum in which these plaintiffs may bring a very limited scope of claims.[199]

Plaintiffs' causes of action under the ATS, then, must derive from

189. *Id.* at 277.
190. *Id.* at 280.
191. *Id.*
192. Beanal v. Freeport-McMoran, Inc., 197 F.3d 161 (5th Cir. 1999).
193. *Id.* at 163.
194. *Id.* at 167-68.
195. *Id.* at 167.
196. *Id.* at 168.
197. *Id.*
198. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 724 (2004).
199. *See id.*

substantive treaties, statutes, or universal legal norms known as customary international law.[200] Customary international law, for ATS purposes, is comprised of legal principles featuring the same degree of specificity and universality as the law of nations principles in place at the time the ATS was ratified.[201] Those ancient principles include violations of safe conduct, infringement on ambassadors' rights, and piracy.[202] Today, in order for a customary international law violation to be actionable under the ATS, the principle of customary international law must be both universally adopted by civilized nations and defined with a great deal of specificity.[203]

The *Sosa* approach permits US courts to protect only a relatively limited range of human rights. It also allows courts little freedom to define and enforce many of the human rights that are indeed recognized universally in UN conventions and other international agreements.[204] As a result, courts have found ATS claims to be non-justiciable if the underlying customary international law principles are not sufficiently specifically defined, even if the principles are arguably universally held by civilized nations.[205]

For example, as previously noted, the Seventh Circuit dismissed the *Flomo* plaintiffs' claim that the defendant violated customary international law by using hazardous child labor, holding that the child labor-related language found in the conventions cited by the plaintiffs was too vague, expansive, and culturally-relative to be considered customary international law.[206] The court also noted that the conventions failed to specify the scope of actionable injury.[207]

In *Beanal*, the Fifth Circuit dismissed the plaintiffs' environmental claims, because the relied-upon sources of customary international law failed to denote actual practices that amounted to violations of these norms.[208] In the same case, the Fifth Circuit also held that cultural genocide did not violate customary international law because international conventions that refer to a right to enjoy or pursue culture or cultural development fail to explicitly denote actual practices that amount to cultural genocide.[209]

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200. Curran, *supra* note 49, at 314.

201. *See* Doe v. Nestle, 748 F. Supp. 2d 1057, 1067 (C.D. Cal. 2010).

202. *Id.*

203. *Id.*

204. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 724 (2004) ("The jurisdictional grant is best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time.").

205. Doe v. Nestle, 748 F. Supp. 2d 1057, 1071 (C.D. Cal. 2010).

206. Flomo v. Firestone Natural Rubber Co., 643 F.3d 1013, 1022 (7th Cir. 2011).

207. *Id.*

208. Beanal v. Freeport-McMoran, Inc., 197 F.3d 161, 167 (5th Cir. 1999).

209. *Id.* at 168.

In *Flores v. S. Peru Copper Corp.*, the Second Circuit held that claims alleging violations of a right to life and health, based on principles asserted in the United Nations Universal Declaration of Human Rights as well as other UN conventions, were not actionable because those rights were too ambiguous and abstract to constitute customary international law principles.[210] Rather, the principles lacked specific standards for enforcement.[211]

In *Wiwa v. Royal Dutch Petroleum Co.*, a New York district court held that an alleged violation of the right to peaceful assembly is not actionable under the ATS.[212] To establish the existence of the customary international law norm of right to peaceful assembly, the plaintiffs relied on two UN resolutions[213] and four European Court of Human Rights decisions.[214] The court noted that these sources do help establish a customary international law norm, but ultimately held that the sources do not adequately define the norm, so they do not meet *Sosa's* specificity requirement.[215]

These and other ATS decisions demonstrate the limitations of the current ATS framework under *Sosa*. Even when a human rights principle is supported by an acceptable source of customary international law, and even when that principle is found to be sufficiently universal, if the customary international law sources fail to define the scope of the principle, then the ATS does not grant jurisdiction.[216] This means that US courts must refuse to

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210. Flores v. S. Peru Copper Corp., 414 F.3d 233, 254-55 (2nd Circ. 2003) (quoting Universal Declaration of Human Rights, Art. 25, G.A. Res. 217A(III), U.N. GAOR, 3d Sess., U.N. Doc. A/810, at 71 (1948) ("Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family.") (also quoting International Covenant on Economic, Social, and Cultural Rights, Art. 12, *opened for signature* Dec. 19, 1966, 993 U.N.T.S. 3, 6 I.L.M. 360 ("The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.") (also quoting Rio Declaration on Environment and Development (Rio Declaration), United Nations Conference on Environment and Development, Rio de Janeiro, Brazil, June 13, 1992, Principle 1, 31 I.L.M. 874 ("Human beings are . . . entitled to a healthy and productive life in harmony with nature.")).

211. *See Flores*, 414 F.3d at 254-55.

212. Wiwa v. Royal Dutch Petroleum Co., 626 F. Supp.2d 377,385-86 (S.D.N.Y 2009).

213. *Id.* at 385 (citing United Nation's *Code of Conduct for Law Enforcement Officials,* annex, 34 U.N. GAOR Supp., No. 46, at 186, U.N. Doc. A/34/46 (1979) and United Nation's *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders,* principle 9, U.N. Doc. A/CONF. 144/28/Rev. 1, at 112 (1990).)

214. *Id.*

215. *Id.* at 385-86.

216. *See* Flores v. S. Peru Copper Corp., 414 F.3d 233, 258 (2d Cir. 2003) ("[T]he American Convention on Human Rights does not assist plaintiffs because, while it notes the broad and indefinite '[r]ight to [l]ife,' it does not refer to the more specific question of environmental pollution, let alone set parameters of acceptable or unacceptable limits." (internal citations omitted)).

enforce many human rights, which members of the international community have agreed are universal, simply because no agreement has already provided specific guidelines for enforcement.

C. Why the Current Approach Should be Broadened

The world is changing rapidly. The international community is no longer comprised of separate nations existing independently from one another. Today, international actors have a great deal of contact with and interdependence on each other.[217] States are "linked by communication, disease, the environment, crime, drugs, terror, and also by the search for prosperity. . . ."[218] The authority and effectiveness of international laws and agreements depend on these connections.[219] The decisions and conduct of one state have a remarkable impact on other states.[220] This is especially true with regard to international legal principles of human rights.[221]

Legal human rights norms should apply universally to all people, regardless of culture, religion, or citizenship,[222] and regardless of whether the precise framework of those rights has been unambiguously defined. Human rights belong to each individual because each individual is human. Since human rights belong to people by virtue of their humanity, these rights "cannot vary from state to state or individual to individual," but instead, all people enjoy these rights equally.[223] It follows, then, that each individual is equally entitled to protection of those rights.[224] As the international community becomes smaller, it is important that members of this community recognize that all individuals enjoy the same human rights. It is also important that the international community understand that those human rights that have been acknowledged in international conventions are worthy of being protected, [225] whether or not an international convention, agreement, or treaty has specifically defined the precise behavior which constitutes a violation of those rights.

The issue of human rights is ultimately an international one, since the values informing notions of human rights are presumably universally held across nations and since all individuals, regardless of citizenship or nationality, hold these rights.[226] Therefore, all members of the international

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217. SALOMON, *supra* note 5, at 15.
218. *Id.* at 24.
219. *See id.*
220. *See id.* at 15.
221. *See* Lucas, *supra* note 120, at 232-34.
222. Robbins, *supra* note 133, at 277-78. *See also* Curran, *supra* note 49, at 316.
223. Robbins, *supra* note 133, at 277.
224. *Id.*
225. *See id.* at 301.
226. *See* Lucas, *supra* note 120, at 232-33. *See also* SALOMON, *supra* note 5, at 24.

community have an obligation to cooperate to ensure that human rights are both recognized and protected.[227]

While formation of international human rights treaties and conventions occurs mostly at the international level, through entities such as the United Nations, execution and enforcement of these rights takes place primarily at the domestic level, through State governments.[228] Therefore, all states have an individual and collective obligation to ensure that human rights are protected and that the means exist to redress human rights violations.

Since states themselves enjoy the economic benefits of an increasingly-globalized international community, they must also accept the responsibility of "determining and enforcing" the boundaries of universal human rights.[229] States must be proactive in ensuring that principles of human rights "catch up with the realities of a world in which the actions and decisions of states have unprecedented impact on the human rights of people in other states."[230] One way states may achieve this objective is to not only enforce human rights, but to help clearly define the rights held by all people and also to define the scope of states' obligations to protect those rights.

D. Proposal for Expanded Application of the Alien Tort Statute

1. An Introduction to the Proposed Approach

The Alien Tort Statute provides a vehicle for the United States, as a nation, to protect the human rights of foreign individuals, but with a broader interpretation of permissible customary international law, ATS claims would allow US courts to more affirmatively implement and enforce human rights principles.

The proposed approach does not suggest that the universality prong of the Alien Tort Statute analysis be abandoned or even altered. Under the proposed approach, as under the current *Sosa* approach, the customary international law underlying the human rights claim must be universally accepted (although not necessarily universally enforced) by civilized nations.[231] Otherwise, US courts would be free to impose human rights principles unique to the United States on foreign defendants, possibly in situations where upholding those principles is neither practical nor appropriate. Furthermore, it is not enough that a US court could find that a

227. *See* SALOMON, *supra* note 5, at 24-25.
228. Bruch, *supra* note 130, at 674-75.
229. *See* SALOMON, *supra* note 5, at 24-25.
230. *Id.* at 24.
231. *See* Doe v. Nestle, 748 F. Supp. 2d 1057, 1067 (C.D. Cal. 2010).

certain *type* of behavior violates customary international law.[232] To justify liability under the proposed ATS approach, the court must find that the international community would reach agreement that the *specific conduct* alleged by the plaintiff embodies a violation of universal customary international law.[233]

The proposed approach does not suggest that sources of customary international law—other than those already accepted—be permitted to establish a cause of action for an ATS claim. Under both the current approach and the proposed approach, acceptable sources of international law include binding international conventions, treaties, legislative and executive acts, judicial decisions, customary international law, and the works of certain scholars and experts.[234]

Instead, the proposed approach simply suggests that US courts be permitted to relax the specificity requirement of the current approach in determining whether conduct violates a principle of customary international law. In other words, courts should be permitted to hear claims of violations of norms that are universal but for which specific guidelines for enforcement do not yet exist.

2. Practical Justifications of the Proposed Approach

Often, a court concludes that a claim is not actionable under the ATS because, while the alleged violation of human rights is arguably a universal customary international law principle, the language in the source of the customary international law is too vague, abstract, or non-specific to render the claim actionable under the ATS.[235] This limits US courts' ability to protect legitimate and universal human rights that are enumerated in sources of customary international law but that have not yet been specifically defined. This limitation is a maltreatment of the opportunity the ATS gives US courts to fulfill its obligation in protecting and enforcing international human rights.

3. How US Courts Should Treat ATS Claims Under the Proposed Approach

If a principle of human rights can be found in an acceptable form of

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232. *See* Eastman Kodak Co. v. Kavlin, 978 F. Supp. 1078, 1093 (S.D. Fla. 1997).

233. *See id.*

234. *See generally* The Paquete Habana, 175 U.S. 677, 700-01, 707 (1900). *See also* ICJ Statute, *supra* note 90, art. 38(1)(a)-(d).

235. Flomo v. Firestone Natural Rubber Co., 643 F.3d 1013, 1016 (7th Cir. 2011) ("[S]ome of the most widely accepted international norms are vague, such as 'genocide' and 'torture.'").

customary international law and the principle is found to be adequately universal, then US courts should hear allegations of its violation under the ATS, regardless of whether there are already specific guidelines for the enforcement of the human rights norm. The court itself can establish specific guidelines or boundaries for defining the customary international law principle. These guidelines can then serve as a framework for other US courts hearing ATS claims and also for members of the international community enforcing or determining human rights.

This approach, while a departure from the approach the Supreme Court directed in *Sosa*, has already been used in the ATS context. For example, in *Eastman Kodak Co. v. Kavlin*, a federal district court heard an ATS claim alleging conspiracy to arbitrarily and inhumanely detain.[236] For evidence of customary international law, the plaintiffs relied on two United Nations conventions prohibiting arbitrary detention of individuals.[237] The court reviewed the conventions and concluded that "international law clearly forbids arbitrary detentions" and that "no reasonable person" would argue that arbitrary detention is permissible.[238] The court also found, however, that the conventions the plaintiff cited failed to show that members of the international community had been able to agree on "what constitutes probable cause to arrest."[239] In other words, the international community had not yet distinguished between arrests constituting arbitrary detention and arrests that are justified by probable cause.[240] The court further noted that the arbitrary detention standards set forth in the conventions cited by the plaintiffs constitute a "general and hortatory norm," rather than one that is specific.[241] Therefore, the customary international law sources proscribing arbitrary detention were, at this point, not sufficiently specific to be actionable under the ATS.[242]

The court spent some time contemplating the appropriate meaning of "arbitrary detention."[243] It considered, for example, whether such detention

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236. Eastman Kodak Co. v. Kavlin, 978 F. Supp. 1078, 1090 (S.D. Fla. 1997).

237. *Id.* at 1092. ("Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.") (citing Article 9.1 of the International Convention on Civil and Political Rights, Dec. 16, 1966, G.A. Res. 2200(A)(XXI), 6 I.L.M. 383, 999 U.N.T.S. 171 (1967)). ("No one shall be subject to arbitrary arrest or imprisonment." Article 5.2 of the same Convention directs that "All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.") (citing Article 7 of the American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123, 9 I.L.M. 673 (1970)).

238. *Id.*

239. *Id.* at 1092-93.

240. *Id.* at 1092.

241. *Id.* at 1093.

242. *Id.*

243. *Id.* at 1093-95 (discussing whether specific conduct can be included in arbitrary

must also be accompanied by torture, the length of time the person must be detained, and the implications of the word "arbitrary."[244]

Ultimately, the court, using the conventions cited by the plaintiffs, provided its own definition of conduct that constitutes arbitrary detention.[245] It found that "the law of nations does prohibit the state to use its coercive power to detain an individual in inhumane conditions for a substantial period of time solely for the purpose of extorting from him a favorable economic settlement."[246] Having adequately defined the notion of "arbitrary detention," the court then ruled on the plaintiff's claim.[247]

Courts hearing ATS claims alleging violations of human rights, that have not yet been specifically defined, can use the same approach used by the *Eastman Kodak* court. If a plaintiff is able to provide acceptable customary international law sources affirming the existence of the allegedly-violated human right and if the court finds that the human right principle is sufficiently universal, but the customary international law sources fail to provide specific guidelines for enforcing the human right, the court can provide the guidelines, or at least determine whether the conduct at issue violates the human right in question.[248]

For guidance, courts may look to decisions by other courts and international tribunals regarding the same or similar conduct.[249] Courts can also look closely at the language of the convention itself, the precise context of the language in question, and the general context of the agreement as a whole.[250] Courts need not attempt to provide broad, sweeping definitions for a customary international law norm but may simply determine whether the conduct at issue in the case at hand violates the norm. In fact, the United States District Court for the Northern District of California has held that the limits of a norm of international law need only be so defined that the acts on which the plaintiff's claim is based certainly fall within the limits of that norm.[251] Put differently, if a principle of international law is defined sufficiently to assure the fact-finder that the defendant's behavior surely violates that norm, the ATS should provide jurisdiction for the plaintiff's claim.

Judicial decisions related to international human rights become customary international law.[252] Accordingly, US courts' ATS decisions have a significant impact on implementation and enforcement of human

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detention and whether "prolonged" detention is a required element).

244. *Id.* at 1093-94.

245. *See id.* at 1094.

246. *Id.*

247. *Id.*

248. *See generally id.*

249. *See id.* at 1093.

250. Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997).

251. *See* Doe v. Qi, 349 F. Supp. 2d 1258, 1322 (N.D. Cal. 2004).

252. *See generally* The Paquete Habana, 175 U.S. 677 (1900).

rights on an international level. The guidance US courts provide in defining and framing human rights principles will in turn enable other States to protect individuals against human rights violations more effectively.

4. Possible Criticisms of the Proposed Approach

Since the proposed approach embodies a departure from the ATS jurisdictional requirements set forth in *Sosa*, it is subject to numerous potential criticisms. Critics may argue that the proposed approach gives US courts too much discretion in determining international law and imposing liability on citizens of other States.[253] However, this Note argues that US courts in fact have *an obligation* imposed by international human rights law to hear and help enforce human rights claims like those brought under the ATS.[254] This obligation includes the duty to enforce the sometimes-vague principles of human rights set forth in international conventions and agreements, especially since these conventions often call for "*institutionalized reaction*" to violations of those principles.[255] Indeed, the drafters of various international laws setting forth enforceable human rights often assume that the laws will be interpreted and enforced at the domestic level.[256]

Critics may also argue that courts should only be permitted to hear claims for which there exists a judicially manageable standard to adjudicate the claim, and that sources of customary international law that provide no judicially manageable standard cannot provide ATS jurisdiction. However, it is important to note that the very purpose of the Alien Tort Statute is to allow plaintiffs to bring claims alleging violations of *customary international law*, not just violations of existing treaties and conventions.[257] A principle of customary international law—a prohibition against arbitrary detention, for example, as in *Eastman Kodak*[258]—may be a well-accepted human right norm, but there may be no universally-agreed-upon specific definition framing that norm. This approach allows US courts to provide judicially manageable standards for future cases alleging violations of the customary international law norm.

By hearing cases under the ATS, US courts have taken upon themselves the obligation to protect international human rights. A "lack of means of enforcement at the international level" does not cancel out that

253. *See* Eastman Kodak Co. v. Kavlin, 978 F. Supp. 1078, 1095 (S.D. Fla. 1997).

254. *See* SALOMON, *supra* note 5, at 25.

255. *See id.* at 20.

256. *See id.*

257. Flomo v. Firestone Nat Rubber Co., 643 F.3d 1013, 1022 (7th Cir. 2011) (stating that even a treaty or convention not ratified by the United States could establish principles that could be enforceable in US courts).

258. *Eastman Kodak*, 978 F. Supp, at 1092-93.

obligation.[259] If a norm has been recognized as one that is universal, but no specific enforcement guidelines have been established, US courts should be willing to hear the case and set usable guidelines. In doing so, courts could "greatly increase the quality and quantity of available evidence on substantive law in [ATS] disputes, improving the accuracy and uniformity of judicial outcomes. . . ."[260] After all, as Judge Posner points out, "There is always a first time for litigation to enforce a norm; there has to be."[261] Every time a court decides an ATS case, it clears away some of the ambiguity surrounding international human rights law by providing a framework for other courts to use in similar cases that may arise.

Critics might argue that the proposed approach would, in large part, adopt as law vague notions about human rights found in UN conventions, and UN conventions are not binding international law. However, the fact that a UN convention, or any other non-self-executing agreement or convention, champions a principle of human rights constitutes decisive evidence that the principle is indeed a customary international norm accepted by civilized nations.[262] The process of integrating a principle of human rights into such an agreement shows that the universal status of the principle has been carefully considered and, presumably, agreed upon by a group of civilized nations.[263] Therefore, one could safely suppose that those rights enumerated in UN conventions and other widely-accepted international agreements *are* sufficiently universal to support an ATS cause of action.

A common argument against expanding the jurisdictional scope of the ATS revolves around the notion that US courts should not feel entitled to determine, without the benefit of an existing legal enforcement framework, which human rights truly are sufficiently specific and universal within the international community.[264] However, given increasing globalization of the international community,[265] and the evolving and expanding human rights movement, courts can, without inappropriately overstepping their ATS-granted boundaries, use the ATS as a vehicle to protect human rights that are universal but so far have remained unprotected in the legal sense.

Moreover, given the makeup of the international community, with its diversity of cultural and legal norms and practices, it is no surprise that international human rights law requires further definition and interpretation by those implementing and enforcing it. After all, very few human rights principles are entirely universal and some human rights principles that have

259. Lucas, *supra* note 120, at 248.
260. Curran, *supra* note 49, at 319.
261. Flomo v. Firestone Nat. Rubber Co., 643 F.3d 1013, 1017 (7th Cir. 2011).
262. Curran, *supra* note 49, at 318.
263. *Id.* at 317-18.
264. *See* Dodge, *supra* note 69, at 26.
265. *See Monshipouri*, *supra* note 149, at 30.

already been found to be actionable under the ATS (like "genocide" and "torture") are indeed very vague.[266]

In order for a principle of human rights to be integrated into international law, someone must first take action to prompt international interactions which produce legal interpretations.[267] These legal interpretations, then, can be adopted as international legal standards in the global community.[268] As such, US courts have an interest in hearing human rights claims brought under the ATS, even if the boundaries of the human rights norms in question have not been specifically determined. In hearing the claims and delivering opinions, US courts have an opportunity to legally integrate human rights principles which have been socially or politically integrated but not yet legally integrated. While a US court decision regarding a human rights norm may not serve as binding international law, it still provides guidance for international groups and communities and for the governments of other States in protecting human rights and, at the very least, furnishes a "normative dialogue with human rights bodies and constitutional courts around the world."[269]

VI. CONCLUSION

It would be illogical to "conceptually divide the idea . . . of human rights from the practice of human rights . . . ."[270] Furthermore, it makes no sense for a member of the international community to concern itself only with the "expression of the idea of human rights" without taking affirmative action to protect the human rights that have already been expressed.[271] In other words, members of the international community have an obligation not only to pay heed to international statements about human rights but to protect those rights in practice.

The ATS can and should be used as "an American response to a decentralized international legal system that calls on the members of the

266. *See Flomo* 643 F.3d at 1016.

267. Cynthia Soohoo & Suzanne Stolz, *Bringing Theories of Human Rights Change Home*, 77 FORDHAM L. REV. 459, 471 (2008) (citing Harold Hongju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479, 1502 (2003)).

268. *Id.* (citing Harold Hongju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479, 1502 (2003)).

269. Soohoo & Stolz, *supra* note 268, 473-74 (2008):

> Scholars also have suggested that there are institutional and suprapositive concerns that may make it beneficial for courts to consider human rights law and the decisions of other high courts in constitutional adjudication. For example, some scholars suggest there is an empirical benefit to considering international and foreign law because it provides an opportunity for a judge to observe how a proposed rule operates in other systems.

270. GOODALE, *supra* note 1, at 10.

271. *Id.*

world community to supply human rights remedies."[272] The proposed approach would allow US courts to expand and define notions of international human rights within the global community, and it would provide a framework for both the US judiciary and other members of the international community to recognize and enforce universal human rights standards through imposition of civil penalties on those who violate the standards.[273] Therefore, the approach would have the effect of benefitting not only the individual holders of human rights, but also the States themselves.[274]

Article I of the United Nations Universal Declaration of Human Rights proclaims, "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood."[275] In an ever-shrinking global community, States' obligation to defend human rights requires that each State do more than merely wait passively for an acceptable enforcement framework to come along. Rather, states must be active in protecting those human rights already characterized as universal. The ATS, as it stands today, fails to adequately protect even universal human rights. The proposed approach, on the other hand, offers the flexibility and movement required under our duty to recognize and shield the human rights we often take for granted.

272. Small, *supra* note 144, at 177.

273. *See* Curran, *supra* note 48, at 320.

274. *Id.*

275. Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3rd Sess., U.N. Doc. A/810 (1948).