ARTICLES

THE MEANING AND SCOPE OF THE LAW OF NATIONS IN THE CONTEXT OF THE ALIEN TORT CLAIMS ACT AND INTERNATIONAL LAW

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1. INTRODUCTION

The Alien Tort Claims Act ("ATCA") grants the U.S. Federal courts "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."\(^1\) Initially enacted as section 9 of the Judiciary Act of 1789,\(^2\) the ATCA has survived unchanged since its adoption until the present time. The phrase "law of nations" used in § 1350 deserves particular attention, for it has been subject to different interpretations throughout the history of its implementation.\(^3\) The term law of nations has recently become even more intriguing, since it has been invoked very intensively to attract jurisdiction to U.S. courts for lawsuits among natural and legal persons from countries other than the United States, although an alien can use this clause against U.S. citizens and companies as well. Because of its vagueness, as well as other challenges to plaintiffs suing under the ATCA (such as the state action requirement and protection of world leaders by sovereign immunity), the actual impact of the ATCA suits has been the generation of publicity and controversy more than anything else.\(^4\)

The concept of the law of nations, as provided for in the ATCA, is nonexistent in countries other than the United States. Other countries use different rules, allowing certain human rights claims to be brought on a basis of universal jurisdiction, but only as ad-

and a few dozen articles on international commercial law, the law of the World Trade Organization, contract law, international law, and the law of intellectual property rights.

I am indebted to Professor Harold Berman and Professor David Bederman for valuable comments and insightful discussions on earlier drafts of this Article. I dedicate this Article to my fiancée Albijana for the immense patience and devotion she showed during my absence from home.


\(^3\) "What makes the case particularly difficult for the justices to resolve is the fact that virtually no information exists explaining why Congress passed the so-called Alien Tort Statute of 1789. There are no legislative findings explaining the problems lawmakers were seeking to address." Warren Richey, When Can Foreigners Sue in US Courts?, CHRISTIAN SCI. MONITOR, Mar. 30, 2004, at 2.

\(^4\) In IIT v. Vencap Ltd., 519 F.2d 1001, 1015 (2d Cir. 1975), Judge Friendly of the Second Circuit compared the Alien Tort Claims Act ("ATCA") to "a kind of legal Lohengrin; . . . no one seems to know whence it came."
juncts to criminal procedures, and not as independent actions.\textsuperscript{5}

Legal scholars and human rights activists are paying close attention to the ruling of the U.S. Supreme Court in the case \textit{Sosa v. Alvarez-Machain},\textsuperscript{6} which was reached under the ATCA. The outcome of the case is expected to exert a strong influence on the role that American courts have in enforcing peremptory norms (\textit{ius cogens}) and international human rights. Rulings in this and in previous landmark cases define the way U.S. courts should assume universal jurisdiction and implement international law. The U.S. Supreme Court and other federal courts have become "for[a] for a wide-ranging debate on whether a law passed by the first Congress in 1789 is meant to permit foreign citizens to use federal courts to sue for damages resulting from human rights violations committed abroad."\textsuperscript{7} As I will demonstrate in this Article, the \textit{Sosa} Court in its reasoning consistently confused and interchangeably used the terms international law and the law of nations, although these terms reflect deep doctrinal differences and tensions that were developed in the political philosophies of William Blackstone and Jeremy Bentham in the last two centuries. The theoretical concepts of these two great scholars about the rules regulating relations between nations directly affected the way the ATCA was adopted and later implemented by U.S. federal courts.

Subsequent to its adoption at the end of the eighteenth century, the ATCA lay almost completely dormant for more than two centuries and was almost forgotten until the late 1970s. The first two cases that involved implementation of maritime law—\textit{Moxon v. Fanny}\textsuperscript{8} (1793) and \textit{Bolchos v. Darrel}\textsuperscript{9} (1795) (the Prize Cases)\textsuperscript{10}—were

\begin{itemize}
  \item [6] \textit{Sosa v. Alvarez-Machain}, 124 S. Ct. 2739 (2004). The case involved a joint appeal by the United States and Mexican citizen Jose Francisco Sosa, who was recruited by federal drug enforcement agents to kidnap Mexican doctor Humberto Alvarez-Machain in his Guadalajara office and bring him across the border: Alvarez-Machain had been indicted on charges of participating in torture and murder of federal agent Enrique Camarena-Salazar in Guadalajara in 1990, but was acquitted of charges and returned to Mexico. He sued both the United States and Sosa. \textit{Id.} at 2747.
  \item [8] 17 F. Cas. 942 (D. Pa. 1793) (No. 9,895).
  \item [9] 3 F. Cas. 810 (D.S.C. 1795) (No. 1,607).
\end{itemize}
decided under the ATCA shortly after its enactment. Interestingly enough, after these two holdings (brought within a few years of enactment), the entire nineteenth century passed without a complaint of a tort committed in violation of the law of nations.\textsuperscript{11} Eventually in 1908 the Supreme Court decided the case \textit{O'Reilly de Camara v. Brooke}, which dealt with the disseizin of certain property rights in Cuba by the then American military governor of Cuba.\textsuperscript{12} Yet another half century passed before a federal court decided a case under the ATCA. Since the 1960s, ATCA cases have become more numerous. Among them, the most important case, \textit{Filartiga v. Pena-Irala}, involved a Paraguayan family that successfully used the ATCA in 1980 to sue the policeman who had tortured and killed their close relative in Paraguay.\textsuperscript{13} Others have since filed civil suits against individuals, including the Balkan war crime suspect Radovan Karadzic and Zimbabwe's Robert Mugabe, seeking compensation for damages resulting from breaches of international law.\textsuperscript{14} In reaction to \textit{Filartiga} and other cases brought under the ATCA for torture and extrajudicial killing, the U.S. Congress enacted the Torture Victim Protection Act ("TVPA") in 1992.\textsuperscript{15} This enactment provides a cause of action for official torture and extrajudicial killing proscribing:

\begin{quote} 
[a]n 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
\end{quote}

\textsuperscript{10} All these cases are described and analyzed in detail infra Section 6.


\textsuperscript{12} O'Reilly de Camara v. Brooke, 209 U.S. 45, 49–51 (1908).

\textsuperscript{13} 630 F.2d 876, 876–90 (2d Cir. 1980).

\textsuperscript{14} See also Yoav Gery, \textit{The Torture Victim Protection Act: Raising Issues of Legitimacy,} 26 Geo. Wash. J. Int'l L. & Econ. 597, 599 (1993) (arguing that the United States has exceeded its authority under international law by enacting legislation that creates a civil cause of action for citizens and aliens who are victims of torture); Cristopher Haffke, \textit{The Torture Victim Protection Act: More Symbol Than Substance,} 43 Emory L. J. 1467, 1490–93 (1994) (arguing that the Torture Victim Protection Act ("TVPA") fails short of its principal objective of deterring official torture and has succeeded only in expanding the class of plaintiffs who can bring suit).

representative, or to any person who may be a claimant in an action for wrongful death.\textsuperscript{16}

There has been a trend in recent years to bring human rights claims not only against foreign torturers, but also against huge companies over their business operations in repressive states. The growing use of the ATCA has alarmed the international business community, which has seen several lawsuits brought against multinationals for their labor practices or collaborations with repressive and murderous regimes.\textsuperscript{17} Since the beginning of the 1990s, there has been an interesting development: using the ATCA to sue transnational corporations for violations of international law in countries outside the United States for use of child labor and breach of international labor standards.\textsuperscript{18} Should these claims be upheld by U.S. federal courts, the ATCA could become a powerful legal instrument to increase accountability of multinational companies operating in foreign countries.\textsuperscript{19}

\textsuperscript{16} Id.

\textsuperscript{17} The decision of the U.S. Court of Appeals for the Ninth Circuit in \textit{Doe I v. Unocal Corp.}, 395 F.3d 932 (9th Cir. 2002), represents a significant precedent in the field of corporate liability for international human rights violations under the Alien Tort Claims Act ("ATCA"), 28 U.S.C. § 1350 (2000).

\textsuperscript{18} Because the use of the Alien Tort Claims Act has proved controversial, some groups have proposed creating a new international legal standard for such conflicts. Stuart Eizenstat, the deputy treasury secretary in the Clinton administration, proposes establishing a 'Code of Conduct' for multinational companies, based on the Organisation for Economic Co-operation and Development's (OECD) Guidelines for Multinationals, which would create a set of standards for business conduct in a variety of areas including employment and industrial relations, human rights and the environment. The code would clarify what counts as "aiding and abetting" a brutal regime in abuses. The effect would be to limit frivolous lawsuits and help multinationals, particularly the extractive industries, who could use the standards as part of their defense in ATCA cases. This type of agreement has already been established in the UK. However, such an international code may face an uphill battle in the United States, which has been extremely reluctant to place American citizens and businesses under the rule of international entities.

\textsuperscript{19} Los Angeles Superior Court Judge Victoria Chaney ruled in favor of [U.S. oil giant Unocal] in a lawsuit which accused [the company] if [sic] complicity in rights abuses by Myanmar's military junta during the building of [a gas] pipeline in the 1990's. . . . Terry Collingsworth, a law-
The practical value of judicial awards reached on the basis of the ATCA often is not significant for the victims, who rarely see any of the money they are awarded because the defendants have no assets in the United States.

There is a tendency of national (domestic) courts to become increasingly involved in resolving disputes and issues, the significance of which goes beyond borders of their nation states. At the same time, nation states are creating new global and regional international tribunals. The result is a complex transnational justice system, in which international, national and regional courts interact and overlap. This problem requires an effective solution by a collective action—an international agreement with an enforcement mechanism that would delineate jurisdiction among national, regional, and global tribunals in bringing to justice perpetrators of the most heinous crimes and providing remedies in tort to the victims of human rights abuses.

The meaning and scope of the law of nations can be traced back historically to the era of Roman law. This phrase was taken over

yer for the villagers, claimed in closing arguments . . . that Unocal set up "corporate shells" simply to avoid liability for the enslavement of villagers when the pipeline was built.

AGENCE FRANCE-PRESSE, Unocal Cannot Be Blamed for Myanmar Rights Abuses: U.S. Judge, Jan. 23, 2004, available at http://www.globalpolicy.org/intljustice/atca/2004/0123noblame.htm. "But the judge ruled that the firm could not be held responsible for the conduct of its wholly-owned subsidiaries which were directly involved in the Yadana project." Id.

Automaker Daimler Chrysler AG was sued on Wednesday over its alleged role in the disappearance and torture of workers and union leaders at the height of the "Dirty War" in Argentina, nearly three decades ago . . . The plaintiffs say the disappearances "were carried out by state security forces acting under the direction and collaboration" with Mercedes-Benz Argentina.


with somewhat altered perception later in the Middle Ages and in the Renaissance period, to be supplanted with the term international law in legal theory and practice of the nineteenth century. However, the use of this term has not withered away completely; in large part due to the ATCA, which has been in force since the end of the eighteenth century.

To understand properly the meaning and scope of the law of nations in present context, there is a need for thorough historical analysis of its meaning and practical use from the very beginning to the present time.

2. THE LAW OF NATIONS AND IUS GENTIUM IN ROMAN LAW

Romans did not impose their private law on conquered peoples (peregrines). On the contrary, peregrines were forbidden to use ius civile (civil law). On one hand, they were allowed to regulate their private legal relationships with their own customary law or the law of their former (conquered) state, while on the other, Romans did not allow peregrine law to govern private relationships between peregrines and Roman citizens. That approach caused great problems in the trade among Romans and peregrines. In addition, the relationships among peregrines from different parts of Roman Empire created a particular problem, since every province had had its own law.21

Eventually, the problem was solved by introducing the institution of the peregrine praetor (magistrate). Praetor was a magistrate with imperium. The peregrine praetor not only settled disputes as between Romans and peregrines and as between peregrines from different Roman provinces, but also created general rules in the form of edicts. This particular activity of the peregrine praetor resulted in a completely new system of private law that was dubbed ius gentium in the period of the principate.22 The meaning of the term ius gentium is the law "common to all mankind," as opposed to both ius civile, which only Romans were allowed to use, and to provincial laws, which were used only by people from the particular province.23 The peregrine praetor, as a Roman magistrate, created

21 1 PRAVNA ENCIKLOPEDIJA [THE LAW ENCYCLOPEDIA] 526 (Borislav T. Blagojevic ed., 1989) (Serb. & Mont.).
22 The history of the Roman Empire is traditionally divided into two periods: Republic (510–27 B.C.) and Principate (27 B.C. to 284 A.D.).
23 THE INSTITUTES OF JUSTINIAN bk. I, tit. II, para. 1 (Thomas Collett Sandars trans., 15th ed. 1922) [hereinafter INSTITUTES]; see also 1 PRAVNA ENCIKLOPEDIJA, su-
ius gentium relying on ius civile and instilling in the former the spirit of the Roman state. Liberated from the narrow confinements of ius civile and its sacred forms and obsolete traditions, and having at his disposal rules originating from various provinces, he was able to create very simple and flexible legal solutions to every particular problem. Over time ius gentium became more complete and perfect than ius civile. After a while Romans started using ius gentium in regulating legal relationships among themselves. Many rules of ius gentium penetrated into ius civile (e.g., rules on bona fides, consensual contracts, etc.). As the two systems gradually melted together by the beginning of the third century A.D., the differences between them completely vanished.

The ancient Roman jurists and scholars dealt with two types of law that transcended the law of the Roman Empire, the law of peoples (or nations—ius gentium) and natural law (ius naturale). However, the phrase ius gentium was used by some scholars, most notably the Roman jurist Gaius, with a wider meaning in the era of the principate in the second half of the second century A.D.

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24 Cf. 1 BOUVIER'S LAW DICTIONARY AND CONCISE ENCYCLOPEDIA 1790 (Francis Rawle ed., 8th ed. 3d rev. 1914) (outlining the origin and history of ius gentium).

25 The early law of the primitive Roman city-state was able to develop into a law adequate to the needs of a highly civilized world empire, because it showed a peculiar capacity of expansion and adaptation which broke through the archaic formalism which originally characterized it, as it characterizes all primitive law. In brief, the process of expansion and adaptation took the form of admitting side by side with the jus civile, or original law peculiar to Rome, a more liberal and progressive element, the jus gentium, so called because it was believed or feigned to be of universal application, its principles being regarded as so simple and reasonable that they must be recognized everywhere and by every one.


26 Justinian's codification included an introductory textbook for the study of law called the Institutes that was part of a wider collection of legal rules called the Corpus Iuris Civilis (Body of Civil Law). This codification was issued under the direction of Tribonian in 529 A.D. in three parts:

1. "[T]he Codex Justinianus compiled all of the extant (in Justinian's time) imperial constitutiones from the time of Hadrian. It used both the Codex Theodosianus and private collections such as the Codex Gregorianus and Codex Hermogenianus."

2. "[T]he Digest (Digesta), or Pandects (Pandectae), was issued in 533: it compiled the writings of the great Roman jurists such as Ulpian along with current edicts. . . . It constituted . . . the current law of the time."
Gaius distinguished *ius gentium* from *ius civile*, arguing that:

> Every community governed by laws and customs uses partly its own law, partly laws common to all mankind. The law which a people makes for its own government belongs exclusively to that state, and is called the civil law [*ius civile*], as being the law of the particular state. But the law which natural reason appoints for all mankind obtains equally among all nations, and is called the law of nations [*ius gentium*], because all nations make use of it. The people of Rome, then, are governed partly by their own laws, and partly by the laws which are common to all mankind.\(^27\)

Gaius even identified *ius gentium* with *ius naturale* (natural law) and *naturalis ratio* (natural reason, sense, or wisdom): “the law which natural reason appoints for all mankind . . . is called the law of nations.”\(^28\) Gaius was the first to define *ius gentium* as having been established by the natural reason of all humankind.\(^29\) Subsequently, the authors of the *Institutes* asserted that *ius gentium* was identical with natural law.\(^30\) The definition of natural law in the *Institutes* moved the source of natural law from the behavior of creatures to God: “The laws of nature, . . . being established by a divine providence, remain ever fixed and immutable.”\(^31\)

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3. “[T]he Institutes (*Institutiones*) was . . . [a] sort of legal textbook for law schools. . . . Justinian later issued a number of other laws, mostly in Greek, which were called Novels.”


\[^{28}\] *Id.*

\[^{29}\] *Id.*

\[^{30}\] *Id.* bk. II, tit. I, para. 11.

\[^{31}\] *Id.* bk. I, tit. II, para. 11.
Later jurists did not always distinguish carefully between natural law and *ius gentium*. This conceptual ambiguity would long remain a problem of jurisprudential and theological thought. In the first half of the third century A.D., the famous Roman jurist Ulpian defined natural law as that which "nature teaches to all animals," including human beings. He distinguished natural law from *ius gentium*, which was common only to human beings and established by their customs and usages. Ulpian's definition was later included in the Emperor Justinian's comprehensive codification of Roman law. In every European law school from the eleventh to the seventeenth century, professors and students studied and pondered Ulpian's and the Institute's definitions and their contradictions. Although some late antique Christian theologians mentioned natural law in their writings, they did so infrequently. Natural law and its difference with *ius gentium* never became an important concept in the theological thought of the early church fathers.

The Roman notion of *ius gentium* was not identical to the modern meaning of international law. As a matter of fact, *ius gentium* was not law regulating relationships among independent states, but rather, it was, like *ius civile*, internal (national) Roman law

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32 Jus naturale... as developed by the Stoics in Greece and borrowed from them by the Romans, meant, in effect, the sum of those principles which ought to control human conduct, because founded in the very nature of man as a rational and social being. In course of time *ius gentium*, the new progressive element which the practical genius of the Romans had imported into their actual law, and *jus naturale*, the ideal law conforming to reason came to be regarded as generally synonymous. In effect, they were the same set of rules looked at from different points of view; for rules which were everywhere observed, i.e. *jus gentium*, must surely be rules which the rational nature of man prescribes to him, i.e. *jus naturale*, and vice versa.

BRIERLY, supra note 25, at 17-18.

33 INSTITUTES, supra note 23, bk. I, tit. II.

34 Thomas Collett Sandards, Introduction to INSTITUTES, supra note 23, at ix, xxix.


36 For a discussion about the origins of international law in ancient state relations, see generally DAVID J. BEDERMAN, INTERNATIONAL LAW IN ANTIQUITY 1-15 (2001).

https://scholarship.law.upenn.edu/jil/vol26/iss2/1
regulating relationships among private persons.\textsuperscript{37} However, some ideas and conceptions of international law were initially created during the Roman era (Cicero’s definition on a just war derived from the meaning, beliefs, and notions of Roman customary law of war—\textit{ius belli}).\textsuperscript{38}

From the legislative history of the ATCA and circumstances that affected its adoption, there is a firm ground to conclude that the authors of the U.S. Constitution and the ATCA used the term \textit{the law of nations} with a meaning, a scope, and features that were similar to \textit{ius gentium} of Roman law era under the influence of Anglo-American political and legal theory of the time. As it will be demonstrated a little later, the definition of the law of nations that was developed in English theory from the 16th to 18th century, most notably the one created by William Blackstone, was very akin to the concept of \textit{ius gentium} from the Roman law era.\textsuperscript{39}

3. MEANING OF \textit{IUS GEN'TIUM} IN THE MIDDLE AGES

Legal affairs in the Middle Ages were regulated according to the principle of personality, rather than the principle of territoriality.\textsuperscript{40} After the restoration of the western empire under Charlemagne, who managed to unite the large parts of Europe under the same religion, ecclesiastical institutions, Latin language, and common laws, the Roman law (including \textit{ius gentium} as internal law) once again became the common law of all peoples living in this

\textsuperscript{37} When the Romans called their facial law the law of nations, \textit{jus gentium}, we are not to understand from hence that it was a positive law, established by the consent of all nations. It was in itself only a civil law of their own; they called it a law of nations, because the design of it was to direct them how they should conduct themselves towards other nations in the hostile intercourse of war, and not because all other nations were obliged to observe it.

\textsuperscript{38} 1 PraVna Enciklopedija, supra note 21, at 523–26.

\textsuperscript{39} 4 William Blackstone, Commentaries *66; see also Stewart Jay, The Status of the Law of Nations in Early American Law, 42 Vand. L. Rev. 819 (1989) (demonstrating the way in which the law of nations was treated in the constitutional politics of the late eighteenth century).

\textsuperscript{40} “In the middle age it was otherwise: in the same country, in the same city, the Frank, the Burgundian, the Goth, the Lombard, and the Roman, lived each according to his respective national law, administered by magistrates of his own nation.” Wheaton, supra note 37, at 31.
vast European kingdom.\textsuperscript{41} \textit{Ius gentium} was, in this context, invoked whenever disputes involved parties belonging to different peoples or tribes. In this era, the civil law almost completely merged with \textit{ius gentium} in the teachings of the legal scholars at the famous school of Bologna.\textsuperscript{42}

By the twelfth century, jurists and theologians had reached general agreement about the structure and content of natural law. However, the notion of \textit{ius gentium} and its delineation within \textit{ius naturale} still remained vague. To early medieval writers, \textit{ius gentium} was a term to describe those general rules that were common to diverse bodies of municipal law. \textit{Ius gentium} in this concept "mediat[ed] between the principles of natural law and the rules of municipal law."\textsuperscript{43}

Thomas Aquinas (1225–1274) distinguished \textit{ius naturale}, \textit{ius gentium}, and \textit{ius civile} according to the "two faculties of the intellect, the speculative (cognoscere) and the practical (dirigere)."\textsuperscript{44} Law in general is related to the practical intellect, since it determines the actions that direct men to the ends that are speculatively apprehended. \textit{ius naturale} consists of evident conclusions from the first truths of human nature and the end teleologically conceived. However, \textit{ius gentium} "consist[s] of

\textsuperscript{41} Charlemagne, King of the Franks and Emperor of the Holy Roman Empire, was by 800 A.D. the undisputed ruler of Western Europe. His vast realm encompassed what is now France, Switzerland, Belgium, and The Netherlands. It included half of present-day Italy and Germany, and parts of Austria and Spain. By establishing a central government over Western Europe, Charlemagne restored much of the unity of the old Roman Empire and paved the way for the development of modern Europe. Owing to his successes, Roman law even extended over the Danube and Rhine, which the Romans never managed to conquer. \textit{See} Wheaton, supra note 37, at 32 ("[T]he western empire under Charlemagne once more united the greater part of the nations of Europe by the ties of common laws, religion, and ecclesiastical institutions, by the general use of the Latin language in all public transactions, and the majesty of the imperial name."). \textit{See generally} Matthias Becher, Charlemagne 7–19 (David S. Bachrach trans., Yale University Press 2003) (1999) (discussing the rise and establishment of Charlemagne’s empire).

\textsuperscript{42} \textit{See} Wheaton, supra note 37, at 32 (noting that civilians employed in public positions comprised the majority of the professors at Bologna).


conclusions drawn from these first principles," while *ius civile* (positive or municipal law) consists of "determinations of means in a general way by reference to the generality of contingent circumstances." Aquinas maintained that both *ius gentium* and *ius civile* derived "from the natural law 'by way of conclusions from the premises' and 'by way of determinations of certain generalities.'" Aquinas divided natural law generally into an absolute natural law (*ius naturale secundum primum modum*) that is universal to all men and animals (instincts of procreation and self-preservation) and natural law deriving from self-evident principles and specific to man (*ius naturale secundum modum*). The nature of *ius gentium* within this classification is two-fold: on the one hand *ius gentium* draws from the latter, the secondary or more immediately concluded principles of natural law (i.e., right to life); on the other hand, it is the sum of legal principles that all nations have in common (i.e., prohibition of murder, theft, fraud). Aquinas separated *ius gentium* from Ulpian's definition of natural law as "what nature teaches all animals" by considering it as "'derived from natural law by way of conclusions that are not very remote from their premises.'" This concept, however, deprived *ius gentium* of the properties attributed to both modern international law and positive law and blurred its distinction from natural law.

The Iberian legal compilation, *Las Siete Partidas*, published during the reign of Alfonso X the Wise (1221–1284), devoted the second law of the first title of Book I to natural law and *ius gentium*. This summary of natural law and its derivative, *ius gentium*, also reflected the thought of the jurists of the time. According to this

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46 *Id.* (quoting *AQUINAS, supra* note 44): "Ad jus gentium pertinent ea quae derivantur ex lege naturae, sicut conclusions ex principiis: ut justae emptiones, venditiones, et alia hujjusmodi: sine quibus hominess ad invicem convivere non possunt; quod est de lege naturae."
47 *Id.*
48 *Id.; see also DROSTAN MACLAREN, PRIVATE PROPERTY AND THE NATURAL LAW 14 (Aquinas Papers No. 8, 1948).
50 *Id.* "Jus gentium potest vocari jus naturale secundum verum significatum. Nam cum verbum naturale refetur ad rationem, intelligitur de jure gentium. Nam non est commune animabilus carentibus ratione." *Id.* at 259 n.31 (quoting Aquinas, *supra* note 44).
compilation, and similarly to Aquinas's concept, natural law governs all men and animals, while *ius gentium* is law that is common for all men but not animals.\(^5^2\)

4. RENAISSANCE SCHOLARS AND *IUS GENTIUM*

After the demise of Rome, scholars from throughout Europe literally translated the term *ius gentium* into their native languages: in Italian, "diritto delle genti"; French, "droit des gens"; German, "Volkerrecht"; and English "Law of Nations."

In the period of the late Middle Ages marked by feudal parochialism, Roman law (*ius gentium*) was mutatis mutandis implemented in relationships among small Italian states and cities. The founder of international law, famous Dutch scholar Hugo Grotius, had understood *ius gentium* as law regulating affairs among independent states, but he did not introduce the term international law. English professor Richard Zouche (1550-1660) used the term *ius inter gentes* (law between peoples).\(^5^3\) English jurist and philosopher Jeremy Bentham (1748-1832), the contemporary of the French revolution, was the first scholar to introduce the term "international law."\(^5^4\)

The era of the Renaissance freed the enormous human potential previously suffocated by religious dogmas and ideological constraints established during the Middle Ages. The reformation in the sixteenth century brought to an end the idea of world government and church unity with the Roman Pope as the supreme moral authority. In lieu of states formed on feudal premises run with influential clergy, new national states evolved that were organized according to the principle of territoriality. The role of the Church had finally diminished to such a degree that it could not jeopardize the political power of absolutist rulers. This was the historical milieu in which international law could thrive, regulating relationships among sovereign states with equal rights, and based on the premise of mutual recognition and right of survival.

\(^{52}\) *Id.*

\(^{53}\) Professor Richard Zouche was an "English jurist, one of the founders of international law, who became regius professor of civil law at Oxford and later practiced successfully in London." Encyclopedia Britannica Online, *Richard Zouche*, at http://www.britannica.com/eb/article?tocId=9078463 (last visited Apr. 2, 2005).

The theoretical distinction between *ius gentium* (*ius intra gentes*) and *ius inter gentes* is attributed to a Spanish scholastic in the sixteenth century, Francisco de Vitoria (1486–1546).55 He was the first to divide the law of nations into the law between nations (peoples) and the law between individuals. This division was not a consequence of positive lawmaking. The rules of *ius gentium* emerged as a general principle of law originating in the intercourse of individuals that goes beyond the borders of particular states, while the rules of *ius inter gentes* in a narrower sense (today’s international law), by their very nature, can only be applied in relations among sovereigns. Those are the rules resulting from the sovereign equality of states.56 In the Renaissance period, the narrow concept of *ius gentium* was contemplated in practice as something similar to the common law of transnational private transactions. It included the rules of admiralty and prize that determined propriety rights in ships and cargo traveling over the territories of many sovereigns. These rules were considered as part of the universal law very similar to the Roman law’s concept of *ius gentium*, i.e., the law common to all nations.

Francisco Suarez (1548–1617) lived and worked in a period of great political upheaval and at the time when confessional differences promoted the secularization of Christendom.57 In his theoretical work, influenced by Vitoria’s teachings, he sought to reconcile the concept of modern State with the moral purposes ordained by God for the whole human race and fit his idea within the traditional framework of scholastic thought.58 He was the first to develop the idea of the society of nations (*societas gentium*) that was


56 Cf. id. ("[I]t is reckoned among all nations inhumane to treat visitors and foreigners badly without some special cause, while, on the other hand, it is humane and correct to treat visitors well; but the case would be different, if the foreigners were to misbehave when visiting other nations.").

57 He was a professor at Avila and Segovia (1571–1576); Rome (1580–1585); Alcalá (1585–1592); Salamanca (1592–1597); and Coimbra (1597–1616). O’Connell, *supra* note 43, at 253 n.2. See generally id. at 253–54 (providing background on Francisco Suarez and the historical times in which he lived).

regulated by *ius gentium* as a body of law.\(^{59}\) Suarez saw *ius gentium* as an intermediate stage of reasoning between natural law and positive law in general. He argued that *ius gentium* has a twofold form: (1) "it is a body of laws . . . which individual states observe within their own borders but which are similar and commonly accepted; [(2)] it is also the law which various nations ought to observe in their relations with each other."\(^{60}\) Therefore he distinguished between two forms of *ius gentium*: *ius intra gentes* and *ius inter gentes*.

The former is no more than the usages introduced throughout the world by successive acts of mutual imitation because they are expressive of or in harmony with the natural law and so befitting to all nations individually and collectively. The latter is similar to the former in its institutions, for the same reason, but is the produce of imitation by nations considered as entities and not aggregations.\(^{61}\)

The basic distinction between these two categories is in that *ius intra gentes* is easily changed by any state, without the consent of other states. Therefore, "a State may decree that unjust sales shall be rescinded or its citizens not use certain currency."\(^{62}\) It is much more difficult to change *ius inter gentes*, however:

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\(^{59}\) [T]he human race, into howsoever many different peoples and kingdoms it may be divided, always preserves a certain unity . . . .

\(^{60}\) Each one of these states is also, in a certain sense, and viewed in relation to the human race, a member of that universal society; for these states when standing alone are never so self-sufficient that they do not require some mutual assistance, association, and intercourse, at times of their own greater welfare and advantage, but at other times because also of some moral necessity or need. This fact is made manifest by actual usage.

**SUAREZ, supra** note 58, bk. II, ch. XIX, para. 9, *reprinted in 2 SELECTIONS FROM THREE WORKS* 348-49. The similar concept was later developed by Grotius. Cf. C. Wilfred Jenks, *The Significance To-day of Lorimer's "Ultimate Problem of International Jurisprudence,"* 26 TRANSACTIONS OF THE GROTIAN SOCIETY 35, 36-37 (1940) (discussing, before the Grotius Society, Lorimer's acknowledgement of the impossibility of complete independence).


\(^{61}\) *Id.* at 267.

\(^{62}\) *Id.* (citing **SUAREZ, supra** note 58, bk. II, ch. XX, para. 7, *reprinted in 2 SELECTIONS FROM THREE WORKS* 355).

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for this phrase involves law common to all nations and appears to have been introduced by the authority of all, so that it may not be annulled [even in part] without universal consent. Nevertheless, there would be no inherent obstacle to change, in so far as the subject-matter of such law is concerned, if all nations should agree to the alteration, or if a custom contrary to [some established rule of this law of nations] should gradually come into practice and prevail.63

In Suarez’s theoretical concept, *ius gentium* is superior to civil law, for its proximity to the natural law and intimate relatedness to the end of man. “Man as a citizen is governed by municipal law, but man as man emerges beyond the confines of municipal law and partakes of the wider community of the *societas gentium*.”64

Hugo Grotius (1583–1645), the renowned Dutch lawyer, theologian, philosopher and poet, wrote his masterpiece *De Iure Belli Ac Pacis [The Law of War and Peace]*,65 and published it for the first time in Paris in 1625, owing to which he has been credited as “the father of international law.”66 His whole conception of international law was premised on the basic distinction between natural law (*ius naturae*) and voluntary law (*ius voluntarium*).67 He considered the *ius gentium* to be the part of the former and considered it as a universal law binding upon all mankind.68

Although deeply religious, Grotius’s notion of natural law was rather different from the one of Thomas Aquinas and other church theologians. His teaching was also a break from Calvinist ideals, in that God was no longer the only source of ethical qualities. Grotius distanced natural law from the unlimited reach of God’s omnipotence. Natural law is a dictate of reason.69 However, the source of it is not God’s will. God does not create the rules of natural law di-

63 Suárez, supra note 58, bk. II, ch. XX, para. 8, reprinted in 2 Selections from Three Works 356 (alterations in original).
64 O’Connell, supra note 43, at 267.
67 See generally, Grotius, supra note 65, bk. I, ch. I (exploring the definitions of “war” and “law”).
68 Id. bk. I, ch. I, § XIV.
69 Id. bk. I, ch. I, § X, para. 1.
rectly, but only indirectly. Natural law is, according to Grotius, eternal and unchanging, so that even God is unable to change it.\textsuperscript{70} Humans can learn natural law by the method of deduction. Grotius' natural law is highly transcendental and speculative.\textsuperscript{71}

Voluntary law (\textit{ius voluntarium}) must be in conformity with natural law. However, Grotius divided this body of law into divine voluntary law (\textit{ius voluntarium divinum}) and human voluntary law (\textit{ius voluntarium humanum}). God prescribes divine voluntary law either to some peoples in particular (e.g., Jews) or humanity in general. Human voluntary law is created by humans and consists of civil law (\textit{ius civile}) that derives from civil (secular, layperson) power prescribed by state and a wider category of law—\textit{ius gentium} (law of nations). "The law of nations is a law of greater extent than the civil law, and is not derived from the civil power. By the law of nations we mean such rules, as nations or civil societies are obliged to observe in their intercourse with one another."\textsuperscript{72} In his seminal anthology on war and peace, Grotius proclaimed:

The fact must also be recognized that kings, and those who possess rights equal to those kings, have the right of demanding punishments not only on account of injuries committed against themselves or their subjects, but also on account of injuries which do not directly affect them but excessively violate the law of nature or of nations in regard to any person whatsoever.\textsuperscript{73}

\textit{Ius gentium}, or law of nations, has acquired its binding force on the basis of the will of all nations, or at least, a majority of nations. It is affirmed in the same token as unwritten (customary) civil law through prolonged practice and testimony of legal experts. This

\textsuperscript{70} \textit{Id.} bk. I, ch. I, § X, para. 5.

\textsuperscript{71} Grotius's disciple Christian Wolf (1676–1756) believed that the process of creation and formation of legal rules should be conducted by deduction. C. \textsc{Van Vollenhoven}, \textsc{The Three Stages in the Evolution of the Law of Nations} 25 (1919).

\textsuperscript{72} 1 \textsc{Thomas Rutherford}, \textsc{Institutes of Natural Law: Being the Substance of a Course of Lectures on Grotius's \textit{De Jure Belli et Pacis} 23} (Cambridge, Archdeacon, 2d ed. 1774) (1754).

\textsuperscript{73} \textsc{Grotius, supra} note 65, bk. II, ch. XX, § XL, para. 1. There is a striking similarity of this sentence to the U.S. Constitution assigning Congress the power to "define and punish ... Offences against the Law of Nations," \textsc{U.S. Const.} art. I, § 8, cl. 10, that served as a legal foundation for the adoption of the \textsc{ATCA}.  

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law is, therefore, the product of time and mere custom. The consent of all nations, or at least a majority of them, creates common laws among them. Those are the laws that mirror the interests if not of every nation individually, then of the great community of nations (magnae illius universitatis). Grotius further expounded on customs that must be followed by tacit agreement of peoples if they were to create the law of nations. In other words, the law of nations is customary law established by the tacit agreement of all or a majority of nations. In explaining the double nature of voluntary law as ius humanum vel divinum, Grotius was the first to define ius strictum (ius cogens) as a part of the latter by its very nature.

Grotius was also among the first to create and use the term society (community) of nations (magnae illius universitatis). A society of nations is a community joined together by the notion that states and rulers possess rules that apply to them all. All men and nations are subject to this law of nations and this community is held together by written agreement in states of instituted customs. Relations among nations and the political implications of the society of nations (possibly called "international," "world," or "global" community in more contemporary times) can presently be seen in governments like that of the United States and much of Europe. Grotius also expounded on the idea of common consent of mankind as the basis for the binding force of the law of nations.

According to Grotius's doctrine, should human voluntary law, including the law of nations, contravene the dictate of reason exemplified in natural law, the latter is to prevail, since it represents the supreme legal order.

The Swiss professor Emerich Vattel (1714–1767) and his doctrine of the law of nations (droit des gens) influenced the legal practice among nations at the time more intensively than Grotius. "His treatise, Les Droit des Gens [The Law of Nations], published in 1758, was widely read in European capitals and was admired both by the founders of the United States (in 1776 and 1787) and by the Jacobin leaders of France (in 1789)." Many American writers on the subject followed Vattel's doctrine in the age of revolutions, in-

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74 GROTIIUS, supra note 65, prolegomena, § 17.
75 Id. bk. I, ch. I, § XIII.
cluding Chancellor James Kent, Professor Henry Wheaton, and Justice Joseph Story.\textsuperscript{78}

Vattel was also more frequently cited in contemporary rulings of international arbitrations. He was the first to argue that all nations should be equal. A "small republic", according to Vattel, "is no less a sovereign state than the most powerful kingdom."\textsuperscript{79} The law of nations, however, by its origin is nothing else than "law of Nature applied to Nations."\textsuperscript{80} Vattel wrote of the law of nations as "the science which teaches the rights subsisting between nations or states, and the obligations correspondent to these rights."\textsuperscript{81} Vattell dubbed so-called necessary Law of Nations (droit de nécessaire) that results from applying natural law to nations. Nations have no power to change it by treaties, nor can they liberate themselves by individual or mutual behavior.\textsuperscript{82} In other words, the law of nations was exclusively composed of ius cogens in the modern meaning of this phrase. However, in some issues, there is some latitude in forging agreements among nation states that can be affirmed and implemented by treaties, conventions, customs, and usages.\textsuperscript{83} Vattel argues that this, droit de nécessaire, limits the scope of freedom that nations enjoy in their intercourse with each other.

If implemented properly, the law of nature creates a natural society existing among all men\textsuperscript{84} as well as among nations.\textsuperscript{85}

Vattel explicitly linked the criminal sanction for offenses against ambassadors with the requirement that the state, at the expense of the delinquent, "give full satisfaction to the sovereign

\textsuperscript{78} Id.


\textsuperscript{80} Id. preliminaries § 6.

\textsuperscript{81} Id. preliminaries § 3.

\textsuperscript{82} Id. preliminaries § 9.

\textsuperscript{83} Id.

\textsuperscript{84} "The general law of that society is, that each individual should do for the others every thing which their necessities require, and which he can perform without neglecting the duty that he owes to himself: . . . a law which all men must observe in order to live in a manner consonant to their nature, and conformable to the views of their common Creator . . . ." Id. preliminaries § 10.

\textsuperscript{85} "The universal society of the human race being an institution of nature herself, . . . a necessary consequence of the nature of man,—all men . . . are bound to cultivate it, and to discharge its duties." VATTEL supra note 79, preliminaries § 11. "[Hence] the object of the great society established by nature between all nations is also the interchange of mutual assistance for their own improvement and that of their condition." Id.
who has been offended in the person of his minister.”

Vattel's positive law of nations consists of: (a) voluntary law (droit volontaire) that ensues from implied consent; (b) contractual law that ensues from explicit consent; and (c) customary law that ensues from implicit consent. This pioneer trichotomy somewhat resembles the three main sources of international law listed in Article 38(1) of the Statute of the International Court of Justice: international conventions, international custom, and general principles of law.

Today, historians agree that the ideas, beliefs, and principles supported by the founding fathers of the United States and framers of the ATCA came straight from that universal jurisprudence that had been elaborated in the treatises of Grotius, Pufendorf, Burlamaqui, Vattel, and others.

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86 Id. bk. IV, § 80.
87 Id. preliminaries, §§ 27–28.
88 See C. Wilfred Jenks, The Common Law of Mankind, 106–09 (1958) (discussing general principles of law as a source of international law). General principles of international law that are particularly applicable by the international judiciary include highly developed rules that draw from: (1) principles taken from generally recognized National Law (that include liability; responsibility; repARATION; unjust enrichment; property; expropriation; indemnity; denial of justice; right of passage; prescription; error; implied agreement; preclusion by conduct; principles of presumption in certain circumstances; general principles of administrative law; and procedural principles); and (2) General Principles Originating in International Relations (that include principles resulting from specific features of international legal community; generally accepted principles; principles connected with treaties; elementary considerations of humanity; general principles applicable to all kinds of legal relations; good faith; pacta sunt servanda, unilateral declarations; equity; estoppel; principles of judicial procedure; and respect for human rights). See Karl Zemanek, Responsibilities of States: General Principles, in 10 Encyclopedia of Public International Law 362, 363–66 (R. Bernhardt ed., 1987) (discussing responsibilities arising between states regarding internationally wrongful acts).

5. MODERN PERCEPTIONS OF THE LAW OF NATIONS

5.1. The Law of Nations in Anglo-American Political and Legal Doctrine

The founding fathers of the United States contemplated indeed that the courts should interpret and apply the law of nations as part of the common law without further need of specific statutory authority.

Prominent scholars at the time argued that "the law of nations . . . is here adopted in its full extent by the common law, and is held to be a part of the law of the land" and that "there is no reason to suppose that only one branch of the federal government was re-

(discussing Ellsworth's effort to improve his legal knowledge). It was also Emmerich de Vattel, whose Le Droit de Gens appeared as the Seven Years War ended, that Hamilton counted among the "ablest writers on the laws of nations." For unlike many whose "theories were too abstract for practice," Vattel presented a body of thought that was eminently practicable, as evidenced by the numerous references to his work in Hamilton's writings and speeches. See Alexander Hamilton, Remarks on an Act Acknowledging the Independence of Vermont (Mar. 28, 1787), reprinted in 4 The Papers of Alexander Hamilton 126, 131-32 nn. 6-7 (Harold C. Syrett & Jacob E. Cooke eds., 1962) (discussing the practicality of Vattel's theories); Tara Helfman, The Law of Nations in the Federalist Papers, 23 Legal Hist. 107, 107-28 (2002) ("This article explores the influence of prevailing legal and political theories of interstate relations on the formation of early American constitutional thought").

Justice James Wilson, a signer of the Declaration of Independence and a leader among the delegates to the Constitutional Convention, argued in his lectures on the law of nations:

Some seem to have thought, that [the law of nations] respects and regulates the conduct of nations only in their intercourse with each other. A very important branch of this law—that containing the duties which a nations owes itself—seems to have escaped their attention. "The general principle," says Burlamaqui "of the law of nations, is nothing more than the general law of sociability, which obliges nations to the same duties as are prescribed to individuals. Thus the law of natural equality, which prohibits injury and commands the reparation of damage done; the law of beneficence, and of fidelity to our engagements, are laws respecting nations, and imposing both on the people and on their respective sovereigns, the same duties as are prescribed to individuals.

sponsible for interpreting the law of nations." 90 They also held that:

[O]ffences against the law of nations can rarely be the object of the criminal law of any particular state. For offences against this law are principally incident to whole states or nations: in which case recourse can only be had to war . . . . But where the individuals of any state violate this general law, it is then the interest as well as the duty of the government under which they live, to animadvert upon them with a becoming severity, that the peace of the world may be maintained. 91

Today there is a consensus among historians that, at the time, the law of nations was considered as "a part of the law of the land to be ascertained and administered, like any other, in the appropriate case." 92 "Alexander Hamilton in his Letters of Camillus, No. 20, stated that it is indubitable, that the customary law of European nations is a part of the common law, and, by adoption, that of the United States." 93

The Restatement (Third) of the Foreign Relations Law of the United States 94 has exerted a strong influence on the U.S. courts faced with requests to implement international law. The authors of the Restatement declared: "the modern view is that customary in-

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90 See Stewart Jay, The Status of the Law of Nations in Early American Law, 42 VAND. L. REV. 819, 824, 834 (1989) (exploring the way in which the law of nations was treated in the constitutional politics of the eighteenth century).
91 4 BLACKSTONE, supra note 39, at *68.
93 Philip C. Jessup, The Doctrine of Erie Railroad v. Tompkins Applied to International Law, 33 AM. J. INT'L L. 740, 742 (1939). In one case involving aliens injured in an attack on a British colony in violation of a treaty of neutrality, the Attorney General, William Bradford, argued that aliens clearly 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." 1 Op. ATT'Y GEN. 57, 59 (1795).
ternational law in the United States is federal law” and that “cases arising under international law . . . are within the Judicial Power of the United States.”

All doctrines on the law of nations in the Anglo-American legal tradition were conceived in the mid-seventeenth century by prominent English scholars and practitioners of the time.

Edward Coke (1552-1634), was an English jurist—one of the most eminent in the history of English law. “As chief justice of the King’s Bench (1613), Coke became the champion of common law against the encroachments of the royal prerogative and declared null and void royal proclamations that were contrary to [this] law.” In his famous book INSTITUTES, he championed the “naturalist notion of some acts being so evil in themselves (mala in se) that there could be no jurisdictional problems in any tribunal enforcing the natural laws” and ius gentium prohibiting those acts:

But if [even] a foreign Ambassador being Prorex comitteth here [in England] any crime, which is contra ius gentium, as Treason, Felony, Adultery, or any other crime which is against the law of Nations, he loseth the privilege and dignity of an Ambassador, as unworthy of so high a place, and may be punished here as any other private Alien, and not to be remanded to his Soveraign but of curtesie. And so of contracts that be good jure gentium, he must answer here. But if any thing be malum prohibitum by any Act of Parliament, private Law or Custom of this Realm, which is not malum in se jure gentium, nor contra jus gentium, an Ambassador residing here shall not be bound by any of them.

English jurisprudence, led by William Blackstone, exerted a strong influence on the framers of the ATCA. Blackstone considered the law of nations as universal law consisting of the law of merchants, the law maritime and the law of states. That concept

95 Id. § 111 n.3.
96 Id. § 111 n.3 cmt. e.
98 ALFRED P. RUBIN, ETHICS AND AUTHORITY IN INTERNATIONAL LAW 53 (1997).
99 Id. (quoting 4 EDWARD COKE, INSTITUTES *153) (alterations in original).
100 Dickinson, supra note 89, at 27 (citing 1 WILLIAM S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 300-37 (1903). Alexander Hamilton said about maritime causes:
of the law of nations was very similar to the Roman law concept of *ius gentium*, since it encompassed elements of private law such as "mercantile questions, . . . bills of exchange and the like; in all marine causes, . . . disputes relating to prizes, to shipwrecks, to hostages, and ransom bills," as well as rules relating to passports, rights of ambassadors, and piracy.\(^{101}\)

The reason for this similarity lies in fact that jurisprudence from the sixteenth through the eighteenth century had not developed the idea and rules of conflict of laws (private international law) that were eventually created in the nineteenth and twentieth centuries. In that era, the Blackstonian concept of the law of nations, similarly to the Roman *ius gentium*, served as an instrument for the eighteenth-century common law court to find "the appropriate rule for any dispute touching on more than one [national] legal system."\(^{102}\) Instead of deciding cases with foreign elements by applying English (or other municipal) law, the court simply implemented the rule drawn from principles common to the whole of humanity and all legal systems, i.e., the law of nations—a law theoretically applicable not only in English, but also in foreign courts.\(^{103}\)

William Blackstone gave his definition of the law of nations in volume four of his masterpiece, Commentaries, in the chapter entitled "Of Offences Against the Law of Nations":

The law of nations is a system of rules, deductible by natural reason, and established by universal consent among the civilized inhabitants of the world; in order to decide all disputes, to regulate all ceremonies and civilities, and to insure

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These most bigoted idolizers of State authority have not thus far shown a disposition to deny the national judiciary the cognizance of maritime causes. These so generally depend on the laws of nations, and so commonly affect the rights of foreigners, that they fall within the considerations which are relative to the public peace. The most important part of them are, by the present Confederation, submitted to federal jurisdiction.


\(^{101}\) 4 BLACKSTONE, supra note 39, at *67-68.


\(^{103}\) See D'Amato, supra note 102, at 94 (summarizing the court's reasoning).
the observance of justice and good faith, in that intercourse which must frequently occur between two or more independent states, and the individuals belonging to each.\textsuperscript{104}

In sum, Blackstone's concept of the law of nations included three layers of rules encompassing: (1) "general norms governing the behavior of national states with each other"\textsuperscript{105}; (2) "a body of judge-made law regulating the conduct of individuals situated outside domestic boundaries and consequently carrying international savor"\textsuperscript{106} (bills of exchange, maritime law related to freight, average, demurrage, insurances, bottomry, prizes, shipwrecks, hostages and ransom bills); and (3) rules that were exercised among individuals, but "overlapped with the norms of state relationship"\textsuperscript{107} (so-called offences against the law of nations addressed by criminal law of England: "violation of the safe conduct, infringement of the rights of ambassadors, and piracy"\textsuperscript{108}). However, Blackstone did not terminologically distinguish between \textit{ius gentium} (\textit{ius intra gentes}) and \textit{ius inter gentes}. This confusion was later noted by Jeremy Bentham; so "he suggested replacing the phrase 'the law of nations' in its \textit{ius inter gentes} sense with the phrase 'international law.'"\textsuperscript{109}

Jeremy Bentham was the first to carefully distinguish between public and private matters in his concept of international law.\textsuperscript{110} He delivered his theory of international law in \textit{Introduction to the Principles of Morals and Legislation} (1789) arguing "[f]irst . . . that international law was exclusively about the rights and obligations of states \textit{inter se} and not about rights and obligations of individuals. [And s]econd, . . . that foreign transactions before municipal courts were always decided by internal, not international, rules."\textsuperscript{111} Bentham explained the term "international" in the footnote as follows:

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\textsuperscript{104} 4 \textit{BLACKSTONE}, \textit{supra} note 39, at *66 (emphasis added).
\textsuperscript{106} \textit{Id.}
\textsuperscript{107} \textit{Id.} at 2756.
\textsuperscript{108} \textit{Id.} at 2757.
\textsuperscript{109} \textit{RUBIN}, \textit{supra} note 98, at 68.
\textsuperscript{111} Janis, \textit{supra} note 102, at 409.
\end{flushright}
The word *international*, it must be acknowledged, is a new one; though, it is hoped, sufficiently analogous and intelligible. It is calculated to express, in a more significant way, the branch of the law which goes commonly under the name of the *law of nations*: an appellation so uncharacteristic, that, were it not for the force of custom, it would seem rather to refer to internal jurisprudence. The chancellor D'Aguesseau has already made, I find, a similar remark: he says, that what is commonly called *droit des gens*, ought rather to be termed *droit entre les gens*.112

A little further, Bentham asserted:

Now as to any transactions which may take place between individuals who are subjects of different states, these are regulated by the internal laws, and decided upon by the internal tribunals, of the one or the other of these states . . . . There remain then the mutual transactions between sovereigns as such, for the subject of that branch of jurisprudence which may be properly and exclusively termed *international*.113

112 *Jeremy Bentham, An Introduction to the Principles of Morals and Legislation* 296 n.x (J.H. Burns & H.L.A. Hart eds., 1970) (1789). On a practical level, the clash between the positivist and naturalist approaches came in the early nineteenth century and "was waged over the most compelling social issue of the day: the institution of slavery and the slave trade." *Bederman, supra* note 77, at 6. For those who believed in natural law principles, slavery was easy to denounce, prohibit, and prosecute. As Justice Joseph Story wrote in *La Jeune Eugénie*:

[I]t may be unequivocally affirmed, that every doctrine, that may be fairly deduced by correct reasoning from the rights and duties of nations, and the nature of moral obligation, may theoretically be said to exist in the law of nations; and unless it be relaxed or waved by the consent of nations, which may be evidenced by their general practice and customs, it may be enforced by a court of justice, whenever it arises in judgment. And I may go farther and say, that no practice whatsoever can obliterate the fundamental distinction between right and wrong, and that every nation is at liberty to apply to another the correct principle, whenever both nations by their public acts recede from such practice, and admits the injustice or cruelty of it.

United States v. La Jeune Eugénie, 26 F. Cas. 832, 846 (C.C.D. Mass. 1822) (No. 15,551).  
113 *Bentham, supra* note 112, at 296.
According to Professor Berman:

In inventing the term "international law," Bentham contended that the "law of nations" was objectionable because it combined three mutually contradictory elements: (1) natural law, defined as a system of rules derived from natural reason and common to all civilized peoples, which Bentham said was not law at all; (2) rules of mercantile and maritime law concerning private transactions that cross national boundaries, which Bentham said are governed by the applicable municipal law of one or another sovereign state; and (3) "the mutual transactions between sovereigns as such," which alone, in Bentham's view, could be called both "inter-national" and "law."  

As time passed, and the Benthamite concept prevailed during the nineteenth century, Coke and Blackstone's offenses of ius gentium, such as treason and adultery, dropped from the ambit of international law. Piracy is one of the few other notions from that era that has survived until the present. Bentham's definition of international law gave rise to the emergence of conflict of laws as a separate branch of private law, distinct from public international law. Should Bentham's distinction between private (conflict-of-laws rules) and public international law have never taken place, modern private legal relationships and transactions with foreign elements would probably have been regulated according to the Blackstonian concept, by the law of nations as a unique body of law.  

A disciple of Bentham, John Austin, in his book Province of Jurisprudence in 1832, went even further in expounding on his positivist view by denying international law the attribute of even being law:

[T]he law obtaining between nations is not positive law: for every positive law is set by a given sovereign to a person or persons in a state of subjection to its author. . . . [T]he law

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115 Cf. Janis, supra note 102, at 417 ("Blackstone justified including such private law in the law of nations in part to solve what we might see as a problem in the conflict of laws . . . .").
obtaining between nations is law (improperly so called) set by general opinion. The duties which it imposes are enforced by moral sanctions: by fear on the part of nations, or by fear on the part of sovereigns, of provoking general hostility, and incurring its probable evils, in case they shall violate maxims generally received and respected.  

Bentham’s concept also prevailed in modern jurisprudence of international law of the twentieth century. Professor Oppenheim provides example for this, stating in his treatise:

Since the Law of Nations is based on the common consent of individual States, States are the principal subjects of International Law. This means that the Law of Nations is primarily a law for the international conduct of States, and not of their citizens. As a rule, the subjects of the rights and duties arising from the Law of Nations are States solely and exclusively.

Today, in our era of the unprecedented and ongoing globalization, the idea that international law should not be strictly divided into public and private realms is gaining more ground.

Especially after World War II, scholars began to look for new names to designate areas of law that transcend[ed] “mutual transactions between sovereigns as such.” One such name was “United Nations law” or more broadly, “the law of world organizations.” Another was “the law of human rights.” The most ambitious effort to find a name that would correspond to the realities of a new world order, however, was Jessup’s proposal to replace the term “international law” with the term “transnational law.” “The term ‘international’ is misleading,” Jessup wrote, “since it suggests that one is concerned only with the relations of one

nation (or state) to other nations (or states).”

According to professor Jessup,

A term is needed . . . to identify “the law applicable to the complex interrelated world community, which may be described as beginning with the individual and reaching up to the so-called ‘family of nations’ or ‘society of states.’” “[T]he word ‘international’ is inadequate to describe the problem . . . the term ‘international law’ will not do.” “[I] shall use, instead of ‘international law’ the term ‘transnational law,’ to include all law which regulates actions or events that transcend national frontiers. Both public and private international law are included, as are other rules which do not wholly fit into such standard categories.”

Indeed, the emerging world society deserves to be regulated by a new body of global law that can be dubbed “world law.” In the words of Professor Berman, this term will:

become more and more widely used as humanity moves into a new century and a new millenium. It will embrace, but not replace, both the term “international law,” introduced by Jeremy Bentham in 1789, and the term “transnational law,” introduced by Philip Jessup in 1956. Eventual acceptance of the term “world law” will reflect as deep a conceptual change as that which occurred when the term “international law” replaced the older term the “law of nations” (ius gentium).

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118 Berman, supra note 114, at 1618 (quoting PHILIP C. JESSUP, TRANSNATIONAL LAW 1 (1956)).
119 Id. at 1618–19 (quoting JESSUP, supra note 118, at 1) (alterations in original).
120 Id. at 1617. The term “world law” also embraces “soft law” created by nongovernmental organizations (“NGOs”).

https://scholarship.law.upenn.edu/jil/vol26/iss2/1
5.2. Historical Circumstances Surrounding the Adoption of the ATCA

The ATCA was adopted on the basis of the Congress's constitutional power to "define and punish . . . Offences against the Law of Nations."121 The Continental Congress had adopted a Resolution in 1781 urging the state legislatures to "provide expeditious, exemplary and adequate punishment" for a number of specific offences "against the law of nations."122 Included were: "violations of safe conduct" and "infractions of the immunities of ambassadors and other public ministers," as well as "infractions of treaties and conventions to which the United States are a party."123 However, the Resolution envisaged only offences, "which are the most obvious," and this enumeration was not all inclusive, since the Continental Congress exhorted states to include additional "offences . . . not contained in the forgoing enumeration."124 The Resolution finally recommended that the states "authorise suits to be instituted for damages by the party injured, and for compensation to the United States for damage sustained by them from an injury done to a foreign power by a citizen."125 Congress accordingly urged states to authorize suits by the United States to recover from the tortfeasor any such amounts expended.126 These recommendations appear to be the direct precursor of the alien tort provision in the First Judiciary Act that preceded the ATCA.127

From the available historical documentation, historians conclude that the principal draftsman of the ATCA was Oliver Ellsworth, previously a member of the Continental Congress that had passed the 1781 resolution and a member of the Connecticut Legis-

121 U.S. CONST. art. I, § 8, cl. 10.
123 21 J. CONT. CONG., supra note 122, at 1136-37.
124 Id., at 1137.
125 Id.; cf. Beth Stephens, Individuals Enforcing International Law: The Comparative and Historical Context, 52 DePaul L. Rev. 433, 444 (2002) (observing that a "mixed approach to international law violations, encompassing both criminal prosecution . . . and compensation to those injured through a civil suit, would have been familiar to the founding generation").
126 21 J. CONT. CONG., supra note 122, at 1137.
lature that made good on that congressional request. The ATCA itself appears in Ellsworth’s handwriting in the original version of the bill in the National Archives.

Disputes among aliens in the United States were originally regulated by section 9 of the Judiciary Act of 1789, which provided that 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.”

Some scholars speculate that the framers of the statute designed the legislation in order to avoid conflicts with other nations over mistreatment of non-U.S. citizens. Theorists exploring the historical origins of the ATCA provide explanations depicting it as being designed by the framers to provide national security at a time when the United States, a newly formed nation, was seeking a foothold in its diplomatic relations with other nations. Therefore, these scholars argue that the ATCA “was an important part of a national security interest in 1789,” and this is still considered to be a valid consideration for the broadest possible construction of the statute today.

One version of this explanation, the so-called denial of justice theory, argues that the main purpose of this enactment was “the Framers’ desire to avoid embroiling the nation in conflicts with foreign states arising from U.S. mistreatment of foreign citizens,” since one way to offend a foreign state was to deny justice to an alien suing in the United States. This threat was considered by

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128 Brown, supra note 89, at 53-106.
129 Casto, supra note 122, at 498 n.169.
130 1 Stat. 73, 77 (1789) (codified as amended at 28 U.S.C. § 1350 (2000)).
131 See Burley, supra note 127, at 465 (“Virtually every commentator on the statute has tied it to the Framers’ desire to avoid embroiling the nation in conflicts with foreign states arising from U.S. mistreatment of foreign citizens.”).
132 D’Amato, supra note 102, at 65.
133 Burley, supra note 127, at 465; see also Casto, supra note 122, at 489-98 (describing the enactment and events preceding the enactment of the ATCA); Dickinson, supra note 89, at 44-45 (arguing that Hamilton thought the United States needed jurisdiction to provide redress to injured foreigners and thereby avoid war); Kenneth G. Randell, Federal Jurisdiction over International Law Claims: Inquiries into the Alien Tort Statute, 18 N.Y.U. J. INT’L L. & POL. 1, 5 n.17 (1985) (citing opinions in which plaintiffs asserted jurisdiction under the ATCA); John M. Rogers, The Alien Tort Statute and How Individuals “Violate” International Law, 21 VAND. J. TRANSNAT’L L. 47, 48 (1988) (arguing that the ATCA is a federal jurisdiction statute).
Federalists to be even more serious for aliens suing in state courts, due to the parochial mindset of state judges, as opposed to the nationally oriented approach of federal judges.\textsuperscript{134} The adoption of the ATCA in this context was necessary, since the provisions of the First Judiciary Act did not provide adequate protection to aliens suing other aliens in the United States. According to section 11 of the Judiciary Act, aliens could have access to federal courts only when suing for more than $500. That sum was considered enormous at the time, and most disputes among aliens never reached that value.\textsuperscript{135}

Another historical explanation for the ATCA limits the purpose of its enactment to providing the legal foundation to protect the rights of foreign ambassadors.\textsuperscript{136} According to this explanation, the immediate reason for the adoption of the ATCA was the so-called Marbois incident of May 1784 that involved an attack by the French citizen and adventurer Longchamps on a fellow countryman, a French Legionnaire in Philadelphia. The Pennsylvania Supreme Court convicted the offender of a crime in violation of the law of nations that it held to be part of state law.\textsuperscript{137} After this incident, Congress called again for state legislation to address such matters, and, through the time of the Constitutional Convention, expressed concern over the inadequate vindication of the law of nations.\textsuperscript{138} During the Convention itself, in fact, a New York City constable produced a reprise of the Marbois affair and Secretary Jay reported to Congress on the Dutch Ambassador’s protest, with

\textsuperscript{134} Burley, \textit{supra} note 127, at 465. Alexander Hamilton’s statement in \textit{The Federalist} is commonly relied upon to support this view:

The Union will undoubtedly be answerable to foreign powers for the conduct of its members. And the responsibility for an injury ought ever to be accompanied with the faculty of preventing it. As the denial or perversion of justice by the sentences of courts, as well as in any other manner, is with reason classed among the just causes of war, it will follow that the federal judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned. This is not less essential to the preservation of the public faith, than to the security of public tranquility.

\textit{The Federalist, supra} note 100, at 500–01.

\textsuperscript{135} Casto, \textit{supra} note 122, at 497 & n.168.

\textsuperscript{136} \textit{Id.} at 499.

\textsuperscript{137} \textit{See Respublica v. De Longchamps, 1 U.S. (1 Dall.) 111, 114 (1784)} (holding that the law of nations is part of the law of Pennsylvania).

\textsuperscript{138} \textit{See The Records of the Federal Convention of 1787, at 25 (Max Farrand ed., 1911)} (“If the rights of an ambassador be invaded by any citizen it is only in a few states that any laws exist to punish the offender.”).
the explanation that "the federal government does not appear . . . to be vested with any judicial Powers competent to the Cognizance and Judgment of such Cases."\(^{139}\) The French minister plenipotentiary lodged a formal protest with the Continental Congress\(^{140}\) and threatened to leave Pennsylvania unless the decision of the Longchamps Case gave him "full satisfaction."\(^{141}\) The Congress at the time had the authority only to pass resolutions. Therefore, it adopted one approving the state court proceedings\(^{142}\) and another directing the Secretary of Foreign Affairs to apologize and to "explain to Mr. De Marbois the difficulties that may arise . . . from the nature of a federal union,"\(^{143}\) and to explain to the representative of Louis XVI that "many allowances are to be made for" the young nation.\(^{144}\) The response of the Framers was to vest the Supreme Court with original jurisdiction over "all Cases affecting Ambassadors, other public Ministers and Consuls."\(^{145}\) The First Congress followed suit by adopting the Judiciary Act, which reinforced the Court's original jurisdiction over suits brought by diplomats,\(^{146}\) created alienage jurisdiction in section 11 and, of course, included the ATCA in section 9.\(^{147}\)

The fact of the matter is that there is no record of congressional discussion about private actions that might be subject to the jurisdictional provision, or about any need for further legislation to cre-

\(^{139}\) Casto, supra note 122, at 494 & n.152 (quoting Report of Secretary for Foreign Affairs on Complaint of Minister of United Netherlands (Mar. 25, 1788)).

\(^{140}\) See 27 J. CONT. CONG., supra note 122, at 478 (noting the allegation that Longchamps had violated the law of nations and calling on the states to arrest him).

\(^{141}\) See Letter from Samuel Hardy to Governor Benjamin Harrison of Virginia (June 24, 1784), in 7 LETTERS OF MEMBERS OF THE CONTINENTAL CONGRESS 558, 559 (Edmund C. Burnett ed., 1934) (discussing the Longchamps affair).

\(^{142}\) See 27 J. CONT. CONG., supra note 122, at 503 (applauding Pennsylvania for arresting Longchamps).

\(^{143}\) 28 J. CONT. CONG., supra note 122, at 314.

\(^{144}\) Id.

\(^{145}\) U.S. CONST. art. III, § 2, cl. 2.

\(^{146}\) See Federal Judiciary Act, ch. 20, § 13, 1 Stat. 67, 80–81 (1789) (codified as amended at 28 U.S.C. § 1251 (2000)) (stating that the Supreme Court has exclusive jurisdiction over civil suits involving "ambassadors or other public ministers" against diplomats, and original jurisdiction over civil suits brought by "ambassadors, or other public ministers, or in which a consul, or vice-consul, shall be a party").

ate private remedies. There is no record even of debate on the section.

Explanations that "originalists" provide fall short of making clear the precise reasons for the broad wording the authors of the ATCA used in defining the scope of the Statute. The Sosa court observed that "Congress did not intend the [ATCA] to sit on the shelf until some future time when it might enact further legislation." The ATCA owes its larger significance to the vision and will of the founding fathers, who emphasized "honor," "virtue," and respect for the law of nations in order to gain respect for the newly formed and vulnerable United States in its relations with other nations. A denial or perversion of justice by the courts, or in any other manner, was at the time considered to be a just cause of war. Before the ATCA, aliens could file their claims only in state courts that in previous cases had proven not to be aware enough of the importance and binding nature of the law of nations. The parochial approach of the state courts had a particularly harmful effect on trading and economic relations that the United States tried to develop with other nations. The difficulty that British creditors encountered in collecting their debts following the peace in 1783 showed the hostility of state courts towards alien claims and sparked fear that they would show similar hostility towards tort actions based on the law of nations. This led James Madison to defend the Constitution's grant of alienage jurisdiction with the following words: "We well know, sir, that foreigners cannot get justice done them in these [state] courts, and this has prevented many wealthy gentlemen from trading or residing among us."

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149 But see Burley, supra note 127, at 464 (discussing the importance of "national honor and virtue" in shaping foreign and domestic policy).
150 See William R. Casto, The First Congress's Understanding of its Authority over the Federal Courts' Jurisdiction, 26 B.C. L. REV. 1101, 1114 (1985) ("One would assume that those 'local prejudices' that alienage and diversity jurisdiction were designed to remedy would be particularly virulent in tort actions."); see also Wythe Holt, "To Establish Justice": Politics, the Judiciary Act of 1789, and the Invention of the Federal Courts, 1989 DUKE L.J. 1421, 1458 (noting that the federal courts are a response to state bias); K.R. Johnson, Why Alienage Jurisdiction? Historical Foundations and Modern Justifications for Federal Jurisdiction over Disputes Involving Noncitizens, 21 YALE J. INT'L L. 1, 6–8 (1996) (discussing the history that prompted the creation of alienage jurisdiction).
151 3 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 583 (Jonathan Elliot ed., 2d ed. 1881); cf. Dodge, supra note 92, at 226–29 (recounting the history of the resolution passed in 1781).
6. THE LAW OF NATIONS AND THE U.S. CASE LAW

Since the United States came into being, the prevailing view among U.S. courts has been that the law of nations is in fact customary international law that has become part of the domestic common law. From the very beginning of the Republic, federal courts have been vested with authority to interpret and apply customary international law in the context of the ATCA, first as part of general common law, and, in the post-Erie\textsuperscript{152} era, as part of federal common law, but only as a specialty.\textsuperscript{153}

There are some scholars that challenge this view, arguing that customary international law should not have the status of federal common law.\textsuperscript{154} They argue that the modernist view does not comport with the basic understandings about American representative democracy, federal common law, separation of powers, and federalism.\textsuperscript{155} Their whole concept hinges upon the \textit{Erie} case and the effect they maintain it had on constitutional order of the United States. Critics of the modern approach assume that \textit{Erie} eliminated federal common law that is created rather than discovered. Under this positivist view, customary international law is not part of federal common law. As we will see a little later, the the concept of federal common law survived \textit{Erie} as a specialty.\textsuperscript{156}

Other scholars consider customary international law to be neither state nor federal law.\textsuperscript{157} Advocates of this approach attempt to reconcile it with the \textit{Erie} positivist concept of common law, arguing that customary international law emanates from the lawmaking ac-

\textsuperscript{152} Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).


\textsuperscript{154} See id. ("We conclude that, contrary to conventional wisdom, [customary international law] should not have the status of federal common law.").

\textsuperscript{155} Id. at 817.

\textsuperscript{156} These authors failed to distinguish carefully between common law and customary international law, between customary international law and general principles of law of civilized nations as well as between the \textit{ius cogens} and customary international law. See id. at 820–22 (summarizing their critique of the "modern position").

tivity of many sovereigns.158

From the end of the eighteenth until the middle of the twentieth century, both federal and state courts, although sometimes using the term "international law," considered the law of nations as customary international law that had become part of the general common law.159 However, since then until present, federal courts have divided over the precise scope of the ATCA and the meaning of its syntagma "law of nations." It is a hotly debated issue whether it should be interpreted historically (statically) or evolutionary (dynamically).

The first cases decided under the ATCA involved interpretation of maritime law. This fact led Professor Sweeney to conclude that the purpose of the ATCA was to provide jurisdiction only in maritime cases dealing with prizes, thereby substantially limiting

158 Id. at 48–56.

159 Interpretation of the phrase "law of nations" includes cases that were not decided under the ATCA. For example:

1) In the landmark case Swift v. Tyson, 41 U.S. 1 (1842), which did not involve interpretation of the ATCA, the Court declared the law merchant, or general principles of commercial law, to be part of general common law.

2) In the case Huntington v. Attrill, 146 U.S. 657 (1892), also not related directly to the ATCA, the court held "the question of international law . . . is one of those questions of general jurisprudence which a court must decide for itself." Id. at 683.

3) In The Paquete Habana, 175 U.S. 677 (1900), the Court reaffirmed once again that "[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination." Id. at 700. Speaking about merchant law and the law of nations, the Court explained the status of coastal fishing vessels in wartime as growing from "ancient usage among civilized nations, beginning centuries ago, and gradually ripening into a rule of international law." Id. at 686. Expounding on the sources of international law, The Paquete Habana court stated that: "[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; 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." Id. at 700.
its scope of application.\textsuperscript{160}

In the case \textit{Moxon v. The Fanny} (1793), the district court for the District of Pennsylvania considered whether an action for the return of a ship allegedly seized in violation of the law of nations could be brought under the ATCA.\textsuperscript{161} The court stated, "[n]either does this suit for a specific return of the property, appear to be included in the words of the [ATCA] . . . . It cannot be called a suit for a tort only, when the property, as well as damages for the supposed trespass, are sought for."\textsuperscript{162} There is no suggestion that a specific cause of action beyond the tort in question was required. To the contrary, this suit failed not for lack of a cause of action, but for the failure to plead it correctly. This case was very thorough in examining the sources of the law of nations. The concept of the law of nations relied strongly upon judicial authority and the writings of jurists and of scholars.\textsuperscript{163} The ruling of the court included citations of Grotius and Burlemaqui.\textsuperscript{164}

\textit{Bolchos v. Darrell} (1795) was brought about following the piratical seizure and sale of slaves by the defendants, who were Spanish and French nationals.\textsuperscript{165} The suit in \textit{Bolchos} was filed for restitution of three slaves who were on board a Spanish ship seized as a prize of war. This time the seizure of a neutral alien's property upon the ship of a belligerent was considered by a South Carolina District Court to be in violation of the of the law of nations. In this case, the ATCA provided an alternative basis for jurisdiction over a suit to determine title to slaves on board an enemy vessel taken on the high seas. It is worth noting that, although \textit{Bolchos} involved a treaty obligation, at the time of the \textit{Bolchos} case, individual defendants were in fact found to violate the law of nations (customary international law), although not necessarily in actions based on § 1350. The court found that the treaty with France superseded the law of nations. In contrast to the previous case, the \textit{Bolchos} opinion is an arid description of the fact-finding, and contains an unconvincing statement: "It is certain that the law of nations would adjudicate neutral property, thus circumstanced, to be restored to its


\textsuperscript{161} \textit{Moxon v. The Fanny}, 17. F. Cas. 942 (D. Pa. 1793) (No. 9,895).

\textsuperscript{162} \textit{Id.} at 947–48.

\textsuperscript{163} \textit{Id.}

\textsuperscript{164} \textit{Id.} at 945–47.

\textsuperscript{165} \textit{Bolchos v. Darrell}, 3 F. Cas. 810 (D.S.C. 1795) (No. 1,607).
neutral owner."166

In 1908, after more than a century, the Supreme Court was once again called upon to consider the ATCA in O'Reilly de Camara v. Brooke, a suit that was brought by a Spanish subject alleging the illegal disseizin of certain property rights in Cuba by the American military governor of Cuba.167 The court held that such property rights in this particular case had not survived the extinction of Spanish sovereignty for the American military governor to abolish. However, the court suggested that an otherwise unjustified seizure of an alien's property in a foreign country by a United States officer might fall within the meaning of § 1350. The court held that an act cannot be held to be a "tort, only in violation of the law of nations or of a treaty of the United States" when the Executive, Congress, and the treaty-making power all have adopted the act.168 Unfortunately, this holding lacks a thorough legal analysis as to the nature and sources of the law of nations. It does not include an examination of international custom, writings of scholars and judicial authority.169

The holding of the court in Erie Railroad v. Tompkins (1938) finally provided a foothold to the concept of federal common law as opposed to the general common law implemented by state and federal courts alike, but with very restrictive limitations.170 The Court established that primary responsibility for enforcing international law rests with the federal government.171 Before Erie, the accepted conception was that the common law, including international law, was found or discovered.172 Now, in contrast to the pre-Erie era, it is understood that in most cases where a court is asked to state or formulate a common law principle in a new context, the law is made or created. The Erie Court denied the existence of any federal "general" common law (that largely withdrew to havens of specialty), with the general practice being to look for legislative guidance before exercising innovative authority over substantive

166 Id. at 811.
168 Id. at 52.
169 Barenblat, supra note 11 at 125.
170 Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).
171 Id.
172 At the time § 1350 was enacted, the common law was considered "a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute." Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 533 (1928).
law.\textsuperscript{173} \textit{Erie} infused legal positivism into the constitutional jurisprudence of the United States. The \textit{Sosa} Court later relied on \textit{Erie} findings, and held that, as an exception to the general principle, the law of nations under the ATCA belongs to that special category of federal common law that can be enforced through claims of private actors, but with a great caveat.\textsuperscript{174}

In modern times, the Second Circuit has been the federal court that most often encountered cases involving implementation of the ATCA, and thus it has been in a position to substantially influence the standards as to what sort of conduct violates the law of nations.\textsuperscript{175} The series of cases began with \textit{Khedivial Line, S.A.E. v. Seafarers' International Union} (1960), which involved an American union's picketing of a vessel owned by a United Arab corporation.\textsuperscript{176} The plaintiff sought injunctive relief from the picketing under § 1350. After briefly examining doctrines of the law of nations, the court held that an unrestricted right of access to harbors by vessels of all nations was not a right enforceable under the ATCA. The court further maintained that "the law of nations would not require more than comity to the ships of a foreign nation" and that considering the ongoing Arab oil embargo, the absence of comity in this case was understandable.\textsuperscript{177}

In \textit{Abdul-Rahman Omar Adra v. Clift} (1961) another federal court considered the ATCA.\textsuperscript{178} Unfortunately, the reasoning of the holding in this case is rather scarce.\textsuperscript{179} The suit was brought for custody of a child by her Lebanese mother, who was traveling with her child under an Iraqi passport, concealing the child's Lebanese nationality.\textsuperscript{180} The District Court, without traditional reference to the sources of the law of nations, concluded that the alleged concealment of a child's true nationality coupled with the wrongful inclusion of its name on another's passports did violate the law of na-

\textsuperscript{173} Even Bradley and Goldsmith acknowledge that federal judicial lawmaking is consistent with \textit{Erie} in a variety of circumstances. Bradley & Goldsmith, supra note 152.


\textsuperscript{175} Barenblat, supra note 11, at 127.


\textsuperscript{177} \textit{Id.} at 52.


\textsuperscript{179} Barenblat, supra note 10, at 125.

In Lopes v. Schroder (1963), the Eastern District Court of Pennsylvania held that the unseaworthiness of a vessel was not a tort within the meaning of the ATCA. The court found the doctrine of unseaworthiness was a principle unique to the U.S. and not part of the law of nations. In examining what exactly constitutes the law of nations under § 1350, the Lopes court proposed standards that strongly influenced later decisions involving implementation of the ATCA. According to this court's opinion, the ATCA includes only violations "of those standards, rules or customs (a) affecting the relationship between states or between an individual and a foreign state, and (b) used by those states for their common good and/or in dealing inter se." This approach was explicitly followed in Damaskinos v. Societa Navigacion Interamericana (1966), and many other cases.

In Banco National de Cuba v. Sabbatino (1964) the plaintiff, a Cuban national bank, sought to recover proceeds from the sale of a shipment of sugar that had been expropriated by the Cuban government from a U.S.-owned company. The defendant maintained that the bank was not entitled to recover the proceeds because the expropriation violated customary international law rules governing state responsibility towards aliens. Under normal circumstances, the Cuban expropriation would have been considered a foreign "act of state," the validity of which U.S. courts would not question. The Supreme Court in this case concluded that there was no exception to the act of state doctrine for acts of state that violated the customary international law and that an adjudication of the validity of a foreign expropriation under this contested standard of customary international law would impinge on the President's constitutional prerogative to conduct foreign relations. To avoid the "possibility of conflict between the Judicial and Executive Branches," this Court concluded that, "in the absence of a treaty or other unambiguous agreement regarding controlling legal principles," the act of state doctrine precluded the judiciary from inquiring into the validity of the Cuban expropriation under cus-

181 Id. at 864–65.
183 Id. at 297.
186 Bradley & Goldsmith, supra note 152, at 829 (discussing the legal status of customary international law).
tomary international law.\textsuperscript{187} The \textit{Sabbatino} Court held that the act of state doctrine was a rule of federal common law binding on the states.\textsuperscript{188} The Court made a reference to \textit{Erie} as not having rules like the act of state doctrine in mind.\textsuperscript{189} The act of state doctrine was later \textit{mutatis mutandis} introduced by federal courts in ATCA cases to establish a relationship between the conduct of a private party, and a state, in order to adjudicate the case under the ATCA. The Supreme Court's rationale in this case was that a judicial pronouncement on the validity of foreign acts may "hinder rather than further this country's pursuit of goals."\textsuperscript{190} Therefore it declined to decide the case against the Cuban government. This court undoubtedly concluded that customary international law is part of federal common law.

The \textit{Sabbatino} Court also established a so-called sliding scale test used by federal courts to determine whether to decide on cases of international law. The Court held that, "the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it."\textsuperscript{191}

In \textit{Valanga v. Metropolitan Life Insurance Co.} (1964), the Court found that an American insurance company's refusal to pay the proceeds of a life insurance policy to a Russian beneficiary had not violated the law of nations under the ATCA.\textsuperscript{192} The federal court in this case reiterated the standard that was first established in \textit{Lopes}, holding that, "[a] violation of the law of nations means a violation of those standards by which nations regulate their dealings with one another inter se."\textsuperscript{193}

In \textit{Abiodun v. Martin Oil Service, Inc.} (1973), the Seventh Circuit found that the alleged fraud and deceit on the part of the oil company—that instead of training Nigerian plaintiffs under a contract as executives in the U.S., trained them as service station operators—was not a tort in violation of the law of nations.\textsuperscript{194}

\begin{thebibliography}{9}
\bibitem{189} \textit{Id.}
\bibitem{190} \textit{Id.} at 423.
\bibitem{191} \textit{Id.} at 428.
\bibitem{193} \textit{Id.}
\bibitem{194} \textit{Abiodun v. Martin Oil Serv., Inc.}, 475 F.2d 142 (7th Cir., 1973).
\end{thebibliography}

https://scholarship.law.upenn.edu/jil/vol26/iss2/1
In two cases that arose from the Vietnamese orphan evacuation (the “baby-lift”) in the late 1970's, the Sixth and Ninth Circuits' courts reached different decisions. In *Nguyen Da Yen v. Kissinger* (1975) (which was not decided explicitly under the ATCA), plaintiffs filed a class action suit on behalf of those lifted children who did not turn out not to be orphans, and sought reunion of the children and their families. The court held that: “the illegal seizure, removal and detention of an alien against his will in a foreign country would appear to be a tort . . . and it may well be a tort in violation of the law of nations.”

However, the Sixth Circuit took the opposite view in *Huynh Thi Anh v. Levi* (1978), after hearing the claim by a grandmother and an uncle in which they sought a reunion with several children who were mistakenly airlifted. The court held that the phrase “law of nations” in the 1789 Judiciary Act “should [not] be construed to vest jurisdiction in the federal court over an alien’s claim when the only effect of the ‘law of nations’ is to suggest that the applicable standard is to be found in the domestic law of a state within the federal union.” The court further stated that the examination was not able to “disclose in the traditional sources of the ‘law of nations,’ or private international law, a universal or generally accepted substantive rule or principle which grants custody of children to grandparents over foster parents, as a matter of right, in the absence of weighing the desires of the children and the other available alternatives.”

In *IIT v. Vencap, Ltd.* (1975), a Luxemburg investment fund brought suit against a Bahamian corporation for fraud, conversion and corporate waste. Judge Friendly of the Second Circuit concluded that theft was not a violation of the law of nations under the *Lopes* standard and, thus, under § 1350. He also recognized the universality of the prohibition against theft, dating back at least to the Eighth Commandment: “We cannot subscribe to plaintiff’s view that the Eighth Commandment ‘Thou shalt not steal’ is part of the law of nations. While every civilized nation doubtless has this as part of its legal system . . .”

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195 *Nguyen Da Yen v. Kissinger*, 528 F.2d 1194, 1201 n.13 (9th Cir. 1975). However, the Court further asserted “we are reluctant to address [the applicability of § 1350] here without [adequate] briefing.” *Id.* at 1201 n.12.


197 *Id.* at 629.

198 *IIT v. Vencap, Ltd.*, 519 F.2d 1001 (2d Cir. 1975).

199 *Id.* at 1015.
In *Dreyfus v. Von Fink* (1976), the plaintiff alleged that the defendants tortiously and unlawfully took advantage of his dire situation by buying his property under duress and below the market price while the plaintiff had been forced to emigrate from Nazi Germany in 1938, and that the defendants afterwards wrongfully repudiated a 1948 settlement agreement in lieu of the sale. The court chose the Benthamite approach, holding that this behavior had not violated the law of nations reasoning that: “there is a general consensus, however, that [the law of nations] deals primarily with the relationship among nations rather than among individuals. It is termed the Law of Nations—or International Law—because it is relative to States or Political Societies and not necessarily to individuals, although citizens or subjects of the earth are greatly affected by it.” The court further reasoned that “violations of international law do not occur when the aggrieved parties are nationals of the acting state.” Only four years later, however, the same court departed from this opinion in *Filartiga v. Pena-Irala*, when it held that the *Dreyfus* court’s statement that “violations of international law do not occur when the aggrieved parties are nationals of the acting state is clearly out of tune with the current usage and practice of international law.”

In *Benjamins v. British European Airways* (1978) a Dutch survivor of an airplane crash sued in tort against an international air carrier for the wrongful death of his wife and the loss of his baggage. The Second Circuit denied his claim, holding that air crashes as torts do not fall within the ambit of the ATCA while relying on the standard first set forth in *Lopes v. Schroder*. The same standard was later reaffirmed in *Filartiga*.

The narrow scope of federal common law that did not involve implementation of § 1350 was argued in *Texas Industries, Inc. v. Radcliff Materials* (1981): “federal common law exists only in such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases.”

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200 Dreyfus v. Van Fink, 534 F.2d 24 (2d Cir. 1976).
201 Id. at 30–31.
202 Filartiga v. Pena-Irala, 630 F.2d 876, 884 (2d Cir. 1980).
In First National City Bank v. Banco Para El Commercio Exterior de Cuba (1983), although the case was not directly related to the ATCA, the Court cited the Paquete Habana and Erie rules, confirming that “international law . . . is part of our law” and that “the principles governing this case are common to both international law and federal common law, which in these circumstances is necessarily informed by . . . international law principles . . .”\(^206\)

In recent times, lower courts have been unanimous in holding that federal common law incorporates customary international law.\(^207\) In the most important case to date involving the interpretation of the ATCA, Filartiga v. Pena Irala (1980), the Court concluded that, “[f]or the purposes of civil liability, the torturer has become like the pirate and slave trader before him hostis humani generis, an enemy of mankind.”\(^208\) The Court in Filartiga analyzed the abovementioned Supreme Court decisions in Paqueta Habana and Erie and established four distinctive features of the law of nations under § 1350:

1. the law of nations is part of the federal common law, and thus cases arising under the law of nations also arise under the laws of the United States as required by Article III of the Constitution;

2. the law of nations “may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law;”

3. a norm must “command the general assent of civilized nations” to be part of the law of nations and “it is only where the nations of the world have demonstrated that a wrong is of mutual, and not merely several, concern, by means of express international accords, that a wrong generally recognized becomes


\(^{208}\) Filartiga v. Pena-Irala, 630 F.2d 876, 881 (2d Cir. 1980).
an international law violation within the meaning of the statute.”

4. the law of nations must be interpreted “not as it was in 1789, but as it has evolved and exists among the nations of the world today.”

In Tel-Oren v. Libyan Arab Republic (1984), the Court of Appeals for the District of Columbia Circuit dealt with a suit brought by plaintiffs representing wounded, tortured, and families of killed passengers of two buses, a taxi, and a civilian car that had been hijacked by the Palestine Liberation Organization under instructions to seize and hold Israeli civilians in ransom for the release of PLO members incarcerated in Israel. The suit was filed against the Palestine Liberation Organization, the Libyan Arab Republic, the Palestine Information Office, the National Association of Arab Americans, and the Palestine Congress of North America. The District Court dismissed the action for lack of subject matter jurisdiction and as barred by the applicable statute of limitations. The Court of Appeals affirmed the dismissal in a brief per curiam opinion, but appended three separate concurring opinions by Judges Edwards, Bork, and Robb.

Judge Bork’s opinion deserves close attention, since it has raised great controversy for the “originalist” concept of the law of nations. His opinion relied on three arguments: first, treaties do not provide a cause of action for the plaintiffs; second, the reasoning applied to treaties carries over to customary international law, which is then seen as similarly not providing a cause of action; finally, the law of nations, with very few exceptions, does not provide a cause of action apart from treaties and custom. Following Bentham’s concept of a strict division between public and private in international law, Judge Bork argued that nearly all rules of int-


210 Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 776 (D.C. Cir. 1984).

211 However, the Court in this case acknowledged that § 1350 should be limited and defined by “a handful of heinous actions—each of which violates definable, universal and obligatory norms.” Id. at 781 (Edwards, J., concurring).


213 Id. at 96.
ternational law address states and not individuals. Later federal court decisions involving implementation of the ATCA reject this approach. The most prominent of which is the recent decision of the Supreme Court in Sosa v. Alvarez-Machain. In contrast to Judge Bork’s opinion, Judge Edwards found the principles established in Filartiga to be sound, but concluded that international law does not impose liability on non-state actors for torture. Because the PLO was not a state, its members cannot act under color of state law. Judge Robb’s opinion did not discuss the ATCA in much detail, but relied solely on the “political question” doctrine and dismissed the action in Tel-Oren for lack of subject-matter jurisdiction. This doctrine proposes that human rights violations perpetrated abroad would be better dealt with by political branches of government. The court in Kadic v. Karadzic took a completely different tack in regard to the act of state requirement and “political question” doctrine in cases of torture. The “political question” doctrine was later revived in Sosa.

In Sanchez-Espinoza v. Reagan, Nicaraguan citizens filed a law suit under several causes of action, including the ATCA, for damages arising out of U.S. support of the Nicaraguan Contras who had committed human rights violations against plaintiffs and the people whom they represented. The District Court dismissed the action, mainly relying on the political question doctrine that had been established by the U.S. Supreme Court in Baker v. Carr.

\[\text{\textsuperscript{216}}\] Tel-Oren v. Libyan Arab Republic 726 F.2d 774, 779 (D.C. Cir. 1984) (Edwards, J., concurring).
\[\text{\textsuperscript{217}}\] Id.
\[\text{\textsuperscript{218}}\] Id. at 774, 823 (Robb, J., concurring).
\[\text{\textsuperscript{219}}\] Kadic v. Karadzic 70 F.3d 232 (2d Cir. 1995).
\[\text{\textsuperscript{221}}\] The Supreme Court of the United States set out a number of factors in Baker v. Carr, 369 U.S. 186, 217 (1962) to be applied when encountered with a political question: (1) a textually demonstrable constitutional commitment of the issue to a coordinate political department; (2) a lack of judicially discoverable and manageable standards for resolving it; (3) the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion; (4) the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due for coordinate branches of government; (5) an unusual need for unquestioning adherence to a political decision already made; (6) the po-
The Court of Appeals for the District of Columbia affirmed the dismissal and dismissed the claim brought under the ATCA. However, it chose not to follow the lower court’s use of the political question doctrine. Writing for the court, then Circuit Court Judge Scalia stated: “We are aware of no treaty that purports to make the activities at issue here unlawful when conducted by private individuals. As for the law of nations—so-called ‘customary international law,’ arising from ‘the customs and usages of civilized nations,’—we conclude that this also does not reach private non-state conduct of this sort for the reasons stated by Judge Edwards in Tel-Oren v. Libyan Arab Republic.”

In Paul v. Avril (1993), the court affirmed the fact that the ATCA provides the district courts with original jurisdiction of any civil action by an alien for a tort committed in violation of the law of nations or treaty of United States.

In Hilao v. Marcos (1994), the court held: “[a]ctionable violations of international law must be of a norm that is specific, universal, and obligatory.”

In Xuncax v. Gramajo (1995), the District Court of Massachusetts followed the standard set out first in Lopes and later in Filartiga holding that: “[i]t is only where nations of the world have demonstrated that the wrong is of mutual, not merely several, concern, by means of express international accords, that a wrong becomes an international violation within the meaning of the [ATCA].”

In Kadid v. Karadzic (1995), Bosnian and Croatian citizens of Bosnia and Herzegovina filed an action against the defendant, Radovan Karadzic, a leader of the self-proclaimed republic of Srpska, alleging that they were victims and representatives of victims of a genocidal campaign perpetrated by the military and paramilitary forces under his command. The causes of action alleged in this suit...
were "genocide, rape, forced prostitution and impregnation, torture and other cruel, inhuman, and degrading treatment, assault and battery, sex and ethnic inequality, summary execution, and wrongful death." These acts were, according to plaintiffs, violations of international law that were within the jurisdiction of the U.S. federal courts granted under the ATCA. The district court dismissed the suit for lack of jurisdiction. Relying on Filartiga, this court held: "acts committed by non-state actors do not violate the law of nations." According to its opinion, Karadzic was not a state actor, and Srpska was not a recognized state, much like the PLO in Tel-Oren. Therefore, the court held that Karadzic could not have acted under color of state law and was thus beyond the reach of international law.

The Second Circuit dismissed this decision, holding that the ATCA permits claims against non-state actors because international law prohibits private individuals from engaging in genocide and war crimes. The court held that, "certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals." This court also dismissed the claim that the "political question" doctrine should be applied in cases involving human rights abuses, and that those nonjusticiable issues ought to be left to the political branches of government. Invoking the interpretation of the political question doctrine established in Baker v. Carr, the Kadic court cautioned that "not every case 'touching foreign relations' is nonjusticiable." As a matter of fact, the Second Circuit felt comfortable exercising jurisdiction in this case, although it involved a high profile "political question" along with issues relating to foreign policy matters, since the then incumbent U.S. administration, namely the Solicitor General and the State Department’s Legal Adviser, explic-

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228 Kadic v. Karadzic, 70 F.2d 232, 237 (2d Cir. 1995).


230 Id. at 739, 741; Poullaos, supra note 227, at 341.


232 Id. at 239.


itly stated that the suit did not present any nonjusticiable political question.\textsuperscript{235} As we will see later, the U.S. administration took a completely different stance in \textit{Sosa}, requiring the Supreme Court to interpret the ATCA as narrowly as possible and to emphasize the importance of the “political question” doctrine.

The Eleventh Circuit also dismissed implementation of the political question doctrine in \textit{Abebe-Jira v. Negewo} (1996).\textsuperscript{236} This court held that the official torture of former prisoners did not amount to a nonjusticiable political question. Quoting \textit{Baker}, the court concluded that “it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.”\textsuperscript{237}

In \textit{Beanal v. Freeport-McMoran, Inc.} (1999), the court maintained that international treaties and agreements “referred to a general sense of environmental responsibility, and state abstract rights and liberties, devoid of articulable environmental standards” which are insufficient sources of international law to form the basis of an international environmental law claim under ATCA.\textsuperscript{238}

In \textit{Mendonca v. Tidewater, Inc.} (2001), the District Court held that the ATCA “applies only to shockingly egregious violations of universally recognized principles of international law.”\textsuperscript{239}

In \textit{Tachiona v. Mugabe} (2002), Zimbabwean citizens alleged that the ruling political party of Zimbabwe tortured and killed members of an opposition party in violation of the norms of international law. They requested that the district court exercise subject matter jurisdiction on those citizens’ claim under the ATCA. The court concluded that: “[c]ertain wrongful conduct violates the law of nations, and gives rise to a right to sue cognizable by exercise of federal jurisdiction under the ATCA, when it offends norms that have become well-established and universally recognized.”\textsuperscript{240}

In \textit{Doe I v. Unocal} (2002), an action was brought on behalf of farmers from the Tenasserim region of Burma by Earth Rights International and the Center for Constitutional Rights (both are non-

\begin{itemize}
\item \textsuperscript{235} \textit{Kadic v. Karadzic}, 70 F.3d 232, 250 (2d Cir. 1995). The letter contained the following statement: “although there might be instances in which federal courts are asked to issue rulings under the Alien Tort Statute . . . that might raise a political question, this is not one of them.” \textit{Id.} at 250.
\item \textsuperscript{236} \textit{Abebe-Jira v. Negewo}, 72 F.3d 844 (11th Cir. 1996).
\item \textsuperscript{237} \textit{Id.} at 848 (quoting \textit{Baker v. Carr}, 369 U.S. 186, 211).
\item \textsuperscript{238} \textit{Beanal v. Freeport-McMoran, Inc.}, 197 F.3d 161, 167 (5th Cir. 1999).
\item \textsuperscript{239} \textit{Mendonca v. Tidewater, Inc.}, 159 F. Supp. 2d 299, 302 (E.D. La. 2001) (quoting \textit{Zapata v. Quinn}, 707 F.2d 691, 692 (2d Cir. 1983)).
\item \textsuperscript{240} \textit{Tachiona v. Mugabe}, 234 F. Supp. 2d 401, 410 (S.D.N.Y. 2002).
\end{itemize}
governmental organizations). The energy giant Unocal is one of the last American companies doing business in Burma, a country noted by the U.S. government for having a poor human rights record. The suit alleges that Unocal was responsible for human rights abuses committed by Burmese soldiers during a pipeline project in which Unocal was a partner.

In a decision reached on September 18, 2002, the Ninth Circuit Court of Appeals overturned a 2000 district court decision finding that victims of the military's abuses could not sue the California-based company, and remanded the case for trial. The court in this case concluded that "Unocal may be liable under the ATCA for aiding and abetting the Myanmar Military in subjecting Plaintiffs to forced labor" and that "the Myanmar Military and Myanmar Oil are entitled to immunity under the Foreign Sovereign Immunities Act" and "plaintiffs' claims against it are not barred by the 'act of state' doctrine."

In Flores v. Southern Peru Copper Corp. (2003), also involving the abusive practices of an multinational company, the court held that the "ATCA permits an alien to assert a cause of action in tort for violations of a treaty of the United States and for violation of the 'law of nations,' which as used in... [the ATCA] refers to the body of law known as customary international law."

The most recent case, Sosa v. Alvares-Machain, was brought to the Supreme Court of the United States by Sosa, a Mexican national, who was used by the Drug Enforcement Administration ("DEA") to abduct respondent Alvarezmachain ("Alvarez"), also a Mexican national, from Mexico and bring him to the United States to stand trial for the torture and murder of a DEA agent. After his acquittal, Alvarez sued the United States for false arrest under the Federal Tort Claims Act ("FTCA") and sued Sosa for violating the law of nations under the ATCA. The Supreme Court dismissed Alvarez's assertion that the prohibition of arbitrary arrest has attained the status of binding customary international law. According to the opinion of the Court, should the Alvarezmachain's claim be approved, its implications would be breathtaking. It would create a cause of action for any seizure of an alien in violation of the

241 Doe I v. Unocal Corp., 395 F.3d 932 (9th Cir. 2002).
242 NOW with Bill Moyers, supra note 18.
243 Id.
244 Doe I v. Unocal Corp., 395 F.3d 932, 947 (9th Cir. 2002).
245 Flores v. S. Peru Copper Corp., 343 F.3d 140, 152-54 (2d Cir. 2003).
Fourth Amendment and it would create a federal action for arrests by state officers who simply exceed their authority under state law.\(^\text{246}\)

This ruling did not override \textit{Filartiga}, which considers human rights violations as a predicate for tort claims under § 1350. But in contrast to \textit{Filartiga}, the Supreme Court’s decision in \textit{Sosa} provides a very cautious and limited interpretation of the law of nations in the context of the ATCA. The court found no basis to suspect Congress had any examples in mind beyond those torts corresponding to Blackstone’s three primary offenses: violation of safe conduct, infringement of the rights of ambassadors, and piracy. The court assumed, too, that no development in the two centuries from the enactment of § 1350 to the birth of the modern line of cases beginning with \textit{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 specificity comparable to the features of the 18\textsuperscript{th} century paradigms we have recognized. This requirement is fatal to Alvarez’s claim.\(^\text{247}\)

The Court considered the ATCA a jurisdictional statute creating no cause of action. However, according to the Court’s opinion, that did not render the ATCA stillborn, since “the reasonable inference from history and practice is that the [ATCA] 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: offenses against ambassadors, viola-


\(^\text{247}\) \textit{Id.} at 2761–62 (citations omitted).

https://scholarship.law.upenn.edu/jil/vol26/iss2/1
tion of safe conducts, and piracy."\textsuperscript{248}

While recognizing a claim under the law of nations as an element of federal common law as an exception to the \textit{Erie} rule, the Supreme Court in \textit{Sosa} was very vigilant in emphasizing good reasons for a restrained conception of a federal court's discretion in considering such a new cause of action. According to the Court's opinion: "federal courts should not recognize claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the 18th-century paradigms familiar when § 1350 was enacted."\textsuperscript{249} Further acknowledging that the law of nations under § 1350 belongs as a specialty to the federal common law, the Court warned that a decision to create a private right of action is better left to legislative judgment in most cases.

As a consequence of the pleadings submitted by the Executive Branch as well as the public outcry from multinational companies affected by the judicial activities of federal courts under the ATCA,\textsuperscript{250} the Supreme Court in \textit{Sosa} also stressed the potential implications for U.S. foreign relations in recognizing private causes of action for violating international laws. Therefore, the Court revived the "political question" doctrine, urging courts to become "particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs."\textsuperscript{251} Finally, this Court did not find a "congressional mandate to seek out and define new and debatable violations of the law of nations, and modern indications of congressional understandings of the judicial role in the field have not affirmatively encouraged greater judicial

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{248} \textit{Id.} at 2743–44.
\item \textsuperscript{249} \textit{Id.} at 2744.
\item \textsuperscript{250} Attorney general John Ashcroft's justice department is attacking a statute dating back more than 200 years . . . An action is being fought in California against the oil company Unocal, which is alleged to have conspired with the Burmese junta to use slave labour when building a pipeline. A case is pending in the New York courts against Shell for alleged complicity in the murders of Ken Saro-Wiwa and others in Nigeria. And DaimlerChrysler is being sued in California, accused of playing a part in the disappearance and torture of workers and union leaders at the height of the 'Dirty War' in Argentina nearly 30 years ago.


\item \textsuperscript{251} \textit{Sosa} v. Alvarez-Machain, 124 S. Ct. 2739, 2744 (2004).
\end{enumerate}
\end{footnotesize}
activity.”

In sum, in the ATCA cases that have been decided to the present time, U.S. courts have held that the following acts violate the law of nations: (1) the unlawful seizure of a vessel and its disposition as a prize; (2) unseaworthiness of a vessel and failure to provide a seaman with a safe place to work; (3) the seizure of neutral property upon the ship of a belligerent; (4) the concealment of a child’s true nationality coupled with the wrongful inclusion of that child on another’s passport; and (5) gross violations of human rights such as summary execution, disappearance, torture, cruel, inhuman, or degrading treatment, prolonged arbitrary detention, genocide, war crimes, and forced labor.

Courts, however, have declined to recognize the following types of conduct as torts that violate the law of nations: (1) the refusal to pay an alien the proceeds from a life insurance policy; (2) airplane crashes; (3) fraud and deceit; (4) the unlawful purchase of property at a low price from a seller under duress and repudiation of a subsequent settlement relating thereto; (5) theft in the form of fraud, conversion and corporate waste; (6) the refusal of access to harbors by vessels of all nations; (7) the refusal to grant custody of a child to a blood relative rather than a foster parent; (8) cultural genocide; (9) environmental abuses; (10) restrictions on freedom of speech; (11) price fixing; (12) ordinary torts such as libel, fraud, breach of fiduciary duty, misappropriation of funds; and (13) prohibition of arbitrary arrest that is not prolonged.

“No court has

252 Id. In his dissenting opinion, Justice Scalia stated: “[i]n Benthamite terms, creating a federal command (federal common law) out of ‘international norms,’ and then constructing a cause of action to enforce that command through the purely jurisdictional grant of the ATS, is nonsense upon stilts.” Id. at 2772. He then made reference to the Erie rule: “[b]y framing the issue as one of ‘discretion,’ the Court skips over the antecedent question of authority. This neglects the ‘lesson of Erie,’ that ‘rants of jurisdiction alone’ (which the Court has acknowledged the [ATCA] to be) ‘are not themselves grants of law-making authority,’” and that “this lapse is crucial, because the creation of post-Erie federal common law is rooted in a positivist mindset utterly foreign to the American common-law tradition of the late 18th century.” Id. at 2772-73. According to Justice Scalia, the main problem with the federal courts implementing international law under the ATCA is that “unelected federal judges have been usurping this lawmaking power by converting what they regard as norms of international law into American law. Today’s opinion approves that process in principle, though urging the lower courts to be more restrained.” Id. at 2776.

253 Cf. Harvard Law Review Association, supra note 209, at 2030 (discussing the right to be free from arbitrary arrest and detention).
yet ruled that economic, social, or cultural rights are actionable under the ATCA.”

7. EVOLUTIONARY (DYNAMIC) VS. HISTORICAL (STATIC)
INTERPRETATION OF THE LAW OF NATIONS

The proponents of the so-called originalist approach argue that the scope of the ATCA should be limited to those torts in violation of the law of nations that were recognized in 1789. Legal experts acting on behalf of Sosa even argued that the initial purpose of the ATCA was rather narrow, in that it was primarily enacted at the time to provide legal basis for claims of liberated slaves against their slave masters. In the aforementioned case Tel-Oren v. Libyan Arab Republic, Judge Bork claimed that, to bring their claims, aliens are required to demonstrate an express cause of action, i.e., another enactment specifically classifying torts against the law of nations and, until those statutes are passed by the U.S. Congress, the scope of the ATCA should be limited to those torts that violated the law of nations in 1789, such as piracy and torts against ambassadors. In other words, the meaning and scope of the law of nations in the context of the ATCA should be frozen in 1789. In effect, this would exclude modern human rights claims from the ambit of the ATCA, since the concept of human rights supported by international law did not exist in 1789. Relying on the innovative use of the wording “a tort only” in § 1350, Professor Sweeney offers another argument contending that the ATCA was designed exclusively to provide jurisdiction over a subcategory of prize cases—suits for torts committed during a capture in which the vessel’s status as a “prize” is disputed.

Even the Supreme Court in Sosa stated that the term “cognizance” as used in section 9 of the Judiciary Act of 1789 bespoke a grant of jurisdiction, not power to mold substantive action. The

254 Id. at 2037.
258 Dodge, supra note 255, at 689.
259 Sweeney, supra note 255.
Sosa court justifies this restrictive approach by reasoning that the fact that the Federalist used “jurisdiction” interchangeably with “cognizance”\textsuperscript{260} as well and the fact that section 9 of the Judiciary Act is a statute exclusively concerned with federal-court jurisdiction.\textsuperscript{261} The Court cited Professor Casto, an authority on the historical origins of the ATCA arguing that § 1350 “clearly does not create a statutory cause of action,” and that the contrary suggestion is “simply frivolous.”\textsuperscript{262} However, in an attempt to dilute this “originalist” approach, and out of fear that it might override Filartiga and the whole body of case law developed by U.S. federal courts in the second half of the twentieth century that provided a remedy in torts for the most egregious violations of international law, the Sosa court admitted that § 1350 gave district courts “cognizance” of “certain causes of action.”\textsuperscript{263}

Due to the scant historical data, the validity of these claims is rather hard to confirm. Beyond what has been described above, there is little legislative history to indicate the framers' actual intent and confirm the hypotheses as to the possible purpose of this statute.\textsuperscript{264}

The majority of legal scholars and historians agree that interpretation of legal norms should mirror the process of evolving both international law and domestic law. In other words, the evolutionary approach in interpreting the law of nations should prevail over the historical one.

As a matter of fact, some historical facts and documents lead to the conclusion that the First Congress and statesmen of that era expected the law of nations to evolve. The argument is that if the First Congress had wanted to limit the District Court's jurisdiction to accord aliens' tort claims, it would have used the method of enumerating the particular cases of violations of the law of nations under the ATCA, instead of using the rather broad wording in § 1350.\textsuperscript{265} In discussing the rights of neutral traders, Secretary of

\textsuperscript{260} The Federalist No. 80 (Alexander Hamilton).


\textsuperscript{262} Casto, supra note 122; Dodge, supra note 255, at 689-90.

\textsuperscript{263} Id.

\textsuperscript{264} Lucinda Saunders, Rich and Rare are the Gems They War: Holding De Beers Accountable for Trading Conflict Diamonds, 24 Fordham Int'l L. J. 1402, 1439 (2001).

\textsuperscript{265} "When the Continental Congress made its recommendation to the States in 1781, it did list several violations of the law of nations, but took care not to make the list exclusive." The First Congress explicitly provided that the district courts were to have jurisdiction over "all causes where an alien sues for tort only

https://scholarship.law.upenn.edu/jil/vol26/iss2/1
State Thomas Jefferson referred to "the principles of that law [of nations] as they have been liberalized in latter times by the refinement of manners & morals, and evidenced by Declarations, Stipulations, and Practice of every Civilized Nation." Justice Wilson held three years later in Ware v. Hylton: "when the United States declared their independence, they were bound to receive the law of nations, in its modern state of purity and refinement."

The First Congress contemplated that torts in violation of the law of nations should be actionable at common law in the same way as any other tort. Congress indeed required no cause of the action in 1789, since that doctrine did not exist at the time. This legal term was introduced for the first time only in 1848 when the New York Code of Procedure abolished the distinction between law and equity "and simply required a plaintiff to include in his complaint 'a statement of the facts constituting the cause of action'". Otherwise, the whole ATCA would lose its meaning and it would become largely redundant. The same can be said about the argument limiting the scope of the ATCA only to prize cases. As a matter of fact, the district courts at the time the ATCA was passed already had had jurisdiction in admiralty over maritime torts. The clause itself would serve no purpose if it were to provide the jurisdiction for the same cases for the second time.

As mentioned earlier, the U.S. Court of Appeals for the Second Circuit decided in Filartiga v. Pena-Irala that the law of nations must be interpreted "not as it was in 1789, but as it has evolved and exists among the nations of the world today." In Sosa, the Court concluded that there is every reason to suppose that the First Congress "did not pass the ATS as a jurisdictional convenience to be placed on the shelf for use by a future Congress or state legislature that might, some day, authorize the creation of causes of action or itself decide to make some element of the law of nations actionable in violation of the law of nations."
for the benefit of foreigners." However, this statement by the Sosa court seems to contradict the previous assertion that the ATCA was by its nature purely jurisdictional.

The originalist's argument that the federal courts cannot exercise innovative authority over substantive law and create federal common law that overrides the legislative power can be applied equally to limit the effect of the Erie ruling on the scope and meaning of the ATCA. Even the Erie precedent cannot trudge upon the legislator's will to enact the ATCA on the understanding that the common law would provide a cause of action and remedy in torts for a certain number of violations of the law of nations, until the legislature itself decides to change the meaning and purpose of the enactment, limit its scope, or even completely repel it.

Additionally, there is an explicit contemporary affirmation of the evolutionist interpretation of the ATCA by the U.S. Congress in enacting the TVPA of 1991 stipulating that the ATCA "should remain intact to permit suits based on . . . norms that already exist or may ripen in the future into rules of customary international law." 274

8. THE LAW OF NATIONS (IUS GENTIUM) AND IUS COGENS (IUS STRICTUM)

Some scholars argue that the notion of the law of nations should be reduced to the ius cogens (ius strictum) that is composed of peremptory norms (mandatory law). This body of law encompasses principles of international law which cannot be set aside by agreement or acquiescence. In modern use, as laid down by Article 53 of the Vienna Convention on the Law of Treaties, ius cogens is "a peremptory norm of general international law." Sections 53 and 54 of the Vienna Convention on Treaties spells out the strength of this set of rules as exceeding the binding nature of the rules of treaty laws:

275 See Brief of Amicus Curiae of the European Commission in Support of Neither Party at *6 (Jan. 23, 2004), Sosa v. Alvarez-Machain, 124 S. Ct. 2739 (2004) (Nos. 03-339, 03-485) (stating that "customary international law is established by general and consistent practices of States" and includes "peremptory norms that . . . prevail over any inconsistent international law.").
53. A treaty is void, if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present convention, a peremptory norm of general international law is a norm accepted by and recognized by the international community of States as a whole and from which no derogation is permitted.

64. If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with the norm becomes void and terminates.277

The Vienna Convention defines a peremptory norm, but gives no examples. In legal theory, it is widely considered that examples of *ius cogens* include slavery, piracy, and prohibition of the use of military force.278 The term *ius cogens* is used interchangeably with the terms “universal norm,” “universal international law,” and “universally recognized principle of international law.” By definition, *ius cogens* is said to be peremptory norms from which no derogation or objection is allowed.279

Yet, the list of international legal norms that enjoy the status of *ius cogens* is hotly debated and far from being settled.280 The area of human rights is one of the battlegrounds on which proponents

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278 The commentary of the International Law Commission mentions examples of *ius cogens*: a treaty contemplating use of force contrary to the principles of the U.N. Charter, a treaty contemplating the performance of any other act criminal under international law, and a treaty contemplating or conniving at the commission of acts such as trade in slaves, piracy or genocide, in the suppression of which ever State is called upon to cooperate. Treaties violating human rights, the equality of States or the principle of self-determination are also mentioned. *Treaties Conflicting with a Peremptory Norm of General International Law (Jus Cogens)*, 2 Y.B. Int'l L. Comm'n 247-48, U.N. Doc. A/6309/Rev.1 (1966).


280 The cause of action in the landmark case *Filartiga v. Pena-Irala*, 630 F.2d 876, 879 (2d Cir. 1980) is stated as arising under “wrongful death statutes; the U.N. Charter; the Universal Declaration of Human Rights; the U.N. Declaration Against Torture; the American Declaration of the Rights and Duties of Man, and other pertinent declarations, documents and practices constituting the customary international law of human rights and the law of nations.”
of a broad scope of *ius cogens* and their opponents clash.\(^{281}\) However, there exist today more than one hundred multilateral and bilateral international treaties on the protection of human rights. For the time being, there is a list of twenty-seven crime categories in international criminal law that are evidenced between 1815 and 1999.\(^{282}\) In the U.N. Charter, the Universal Declaration of Human Rights (UDHR), the 1993 Vienna Declaration on Human Rights, as well as in numerous other U.N. instruments, all 189 U.N. member states have also committed themselves to inalienable human rights as part of *general international law*.\(^{283}\) In addition, most states recognize human rights in their respective national constitutional laws as constitutional restraints on government powers, sometimes with explicit references to human rights as legal restraints on the collective exercise of government powers in international organizations.\(^{284}\) Human rights have thus become part of the general prin-

\(^{281}\) The International Law Commission, in the course of codifying the law of treaties, expressed the view that "the law of the Charter concerning the prohibition of the use of force in itself constitutes a conspicuous example of a rule in international law having the character of *jus cogens*." *Treaties Conflicting with a Peremptory Norm of General International Law*, supra note 278, at 247.


\(^{284}\) Id. The draft for the treaty establishing a Constitution of Europe states:

1. The Union shall recognize the rights, freedoms and principles set out in the Charter of Fundamental Rights which constitutes Part II of the Constitution.
2. The Union shall seek accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Constitution.
3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.

Draft Treaty establishing a Constitution for Europe, European Convention, art. 7, CONV 850/03 (July 18, 2003); see also BOSN. & HERG. CONST. art. 2 ("The rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols shall apply directly in Bosnia and Herzegovina. These shall have priority over all other law."); EUROPEAN UNION CONST. art. 11 ("Human dignity is inviolable. It must be respected and protected"); Grundgesetz [Constitution] art. 1 ("The German people therefore acknowledge inviolable and inalienable human rights as the basis of every commu-
principles of law recognized by civilized nations.\textsuperscript{285} International jurisprudence witnesses an enhancing \textit{opinio iuris} that membership in the U.N. and in the International Labor Organization (ILO) entails legal obligations to respect core human rights.\textsuperscript{286} Legal practice suggests that not only the prohibitions of genocide, slavery, and apartheid, but also other core human rights must be respected even "in time of public emergency."\textsuperscript{287} Since the end of the cold war these rules have become \textit{erga omnes} obligations of \textit{ius cogens} nature.\textsuperscript{288}


[S]ome government representatives in specialized international organizations sometimes appear to believe that governments remain 'sovereign' to exclude human rights from the law of specialized agencies and from the 'covered agreements' of WTO law. Yet, the \textit{lex posterior} and \textit{lex specialis} rules for the relationships between successive international treaties . . . cannot derogate from the \textit{inalienable ius cogens} nature of the obligation of all national and international governments to respect the essential core of human rights. U.N. human rights law explicitly recognizes that human rights entail obligations also for intergovernmental organizations. From a human rights perspective, all national and international rules, including economic liberalization agreements like the IMF and WTO agreements, derive their democratic legitimacy from protecting human dignity and inalienable human rights which today constitutionally restrain all national and international rule-making powers.

Petersmann, \textit{supra} note 283, at 14-15 (citations omitted).

\textsuperscript{285} \textit{See} Statute of the International Court of Justice, art. 38 (setting out the legal precedents to be followed by the court), \textit{available at} http://www.icj-cij.org/icjwww/ibasicdocuments/ibasicstatute.htm (last visited Apr. 3, 2005).

\textsuperscript{286} [A]ll Members, even if they have not ratified the Conventions in question, have an obligation, arising from the very fact of membership in the Organization, to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are subject of those Conventions, namely: (a) freedom of association and the effective recognition of the right to collective bargaining; (b) the elimination of all forms of forced or compulsory labor; (c) the effective abolition of child labor; and (d) the elimination of discrimination in respect of employment and occupation.


\textsuperscript{288} For an in depth view, see generally \textsc{Ian D. Seideman}, \textit{Hierarchy in International Law: The Human Rights Dimension} (2001).
Ius cogens in the field of the law of treaties, to a certain extent, restricts the rights of the parties to set the legal norms regulating their own contractual relations. Dictatorial governments can no longer freely “contract out” of their human rights obligations by withdrawing from U.N. human rights covenants or ILO conventions.289 Similarly, some principles of customary international law appear to transcend state consent.290 These particular rules have achieved the exceptionally high level of international consensus, so they are dubbed “supercustom.”291 As we will demonstrate in the next Section, some treaty rules as well as customary international law are so portentous that the international community will permit any state to claim their violation, not just the countries immediately affected.292

When the rules change, there is a problem of intertemporality that incurs a question: which rules will be implemented? Should we choose those that existed at the time the parties concluded the treaty, or those that have evolved over time? The International Court of Justice, in its 1971 Namibia opinion, stated that “the primary necessity of interpreting the instrument in accordance with the intention of the parties at the time of its conclusion” must be balanced with the realization that the concepts embodied in a treaty are “by definition, evolutionary” and “cannot remain unaffected by the subsequent development of law.”293 Therefore, emerging rules of ius cogens in both aspects of treaties and supercustoms will prevail over earlier treaty and custom.294

However, there is a trend that redactors and contracting parties of some international treaties insert clauses that declare some of their rules to have the effect of ius cogens. For example, if the U.N. Convention on the Law of the Sea declares the rules concerning the seabed to produce the legal effect of erga omnes and considers them to have a peremptory nature,295 a question arises in theory and

289 Petersmann, supra note 283. See also Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, Office of the U.N. High Commissioner for Human Rights, General Comment No. 5, at 1, 2, HRI/GEN/1/Rev.7 (considering derogation in times of public emergency).
290 For greater detail, see BEDERMAN supra note 77, at 39.
291 Id.
292 Id.
293 Id. at 103–04.
294 Id.
295 “State Parties agree that there shall be no amendments to the basic principle relating to the common heritage of mankind set forth in article 136 and that
practice of international law whether such a mere pronouncement is adequate to bind all members of the international community—including those who did not sign the Convention—and whether this pronouncement must be followed by prevailing opinio iuris sive necessitatis. In terms of the ATCA, it is clear that breaches of self-pronounced rules of ius cogens, such as those regulating the regime of the sea bed, and those that are upheld by unquestionable opinio iuris, such as universal condemnation and prohibition of genocide and torture, do not produce the same legal consequences. The practice of U.S. federal courts has proved that only the latter category of peremptory norms give the victims of such violations a cause of action under the ATCA.

Most legal systems distinguish between rules that are part of the cogens (ius strictum) and the ius dispositivum. While the parties may disregard rules of ius dispositivum in their contractual relationships, their legal acts must be in conformity with the ius strictum, or else they are void.\footnote{296} Therefore, the parties to the international agreement may agree upon exclusion of some provisions of general international law that are generally applicable to the legal relations among nations but do not have peremptory nature. These ius dispositivum rules, are thus applicable when parties to the agreement, relying on the principle of freedom of contract, have not explicitly regulated some issues relating to their legal relationship.

Finally, the underlying idea of ius cogens is that the freedom of contract and individual action of states cannot trump the paramount goal of humanity to preserve peace and prevent human rights abuse.


There are some preconditions that must be fulfilled in order for U.S. courts to initiate civil proceedings in these cases, the most important of which is universal jurisdiction. The ATCA should be applied to cases with no nexus to the United States only in accordance with the principles of universal jurisdiction defined by international law.

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296 Cf. 10 Encyclopedia of Public International Law 65–68 (Rudolf Bernhart ed., 1987) (discussing the rules of continuity with respect to changes in the state territory or form of government).
Universal jurisdiction provides the right and obligation of the courts of any nation to conduct criminal or civil proceedings in cases involving persons suspected of committing certain crimes or civil offenses outside its territory, when neither the alleged perpetrator nor the victims are nationals of that state and the crime or civil offense did not directly harm the forum state's own national interests.

Under the principle of universal jurisdiction, for certain offenses a nation state can exercise jurisdiction over an offender even if that state has neither a territorial link to the offense nor any connection to the nationality of the victim or offender. The principle of universality empowers the courts of any nation with jurisdiction (right and obligation) to try persons who have committed the most serious crimes prohibited by international law, regardless of where the crimes were committed or the nationality of the perpetrators or victims. That is, the crime itself, rather than the location where it occurred (principle of territoriality), the people involved (principle of personality), or damaged property (principle of realty), enables a court to claim jurisdiction. The principle of universality stems from the notion that certain crimes and the damage caused by them are so heinous that every country has an interest in ensuring that perpetrators are brought to justice and in recovering damages.

Among the first crimes over which international law empowered states to exercise universal jurisdiction were brigandage, war crimes, piracy, and the slave trade. Later additions were: genocide, war crimes, hijacking of aircraft, and acts of terrorism. After World War II, universal jurisdiction was exercised over Nazi officials at the Nuremberg trials. It is important to emphasize that universal jurisdiction can be assumed both by national courts and international tribunals. Some jurists argue that such suits violate


298 Several states, including Greece, New Zealand, Nicaragua, and Vanuatu, have enacted legislation providing for universal jurisdiction over the slave trade, without protest from other states. Several states, including Canada and New Zealand, have recently enacted legislation providing universal jurisdiction over the crime against humanity of enslavement, as defined by the Rome Statute of the International Criminal Court.

299 The most recent example of a grant of jurisdiction by the international community over ius cogens violations carried out within the confines of a state's
the constitutionally mandated separation of powers.\textsuperscript{300} However, the underlying value of universal jurisdiction in general and that of the ATCA in particular is that of preserving the role of United States courts to act against impunity.

Universal jurisdiction provides the actio popularis (popular law suit) against hostis humani generis (enemies of humanity). Actio popularis provides standing to sue to all victims of violations of ius cogens customs, erga omnes obligations, and regimes for which any member of the international community can provide legal remedies and redress.\textsuperscript{301} The aim of this action is to protect overarching and universal values that are shared and accepted by the international community, the significance of which goes beyond the limits of national interests and traditional jurisdiction. There are many philosophical foundations that justify the existence of universal jurisdiction, stretching from metaphysical (idealistic, philosophical, religious) explanations to pragmatic ones (that insist on the supremacy of the commonly shared interests of the international community over singular sovereignty).\textsuperscript{302}

\textsuperscript{300} "[T]hey have opened U.S. courts to suits that interfere with political branch management of foreign affairs, that undermine Executive Branch efforts to protect the Nation's security, and that force courts to usurp the constitutional power of the political branches to decide which norms of international law should be binding and enforceable" Brief of Petitioner Jose Francisco Sosa at 2, Sosa v. Alvarez-Machain, 124 S. Ct. 2739 (2004) (Nos. 03-339, 03-485).

\textsuperscript{301} The latest set of Draft Articles on State Responsibility, prepared by the U.N. International Law Commission, indicates that the "obligations of the responsible State . . . may be owed to another State, to several States, or to the international community as a whole, depending on the character and content of the international obligation and on the circumstances of the breach, and irrespective of whether a State is the ultimate beneficiary of the obligation." State Responsibility: Draft Articles Provisionally Adopted by the Drafting Committee on Second Reading, Art. 34, para. 1, U.N. Doc. A/CN.4/L.600 (2000); Bederman, supra note 77, at 201.

\textsuperscript{302} Bassiouni, supra note 282, at 104. Immanuel Kant wrote as far back as 1785 that the ideal of a peaceful community of nations serves not only ethical but also legal principles (because of the limited space available on the globe). \textit{Immanuel Kant, Grundlegung zur Methaphysik der Sitten,} pt. 2, § 62 (1785).
However, the use of universal jurisdiction under the ATCA is not without any restraints. Universal jurisdiction should be implemented only as an exception to traditional forms of jurisdiction. Its basic aim is to prevent impunity when national courts that are territorially or personally linked to the offense and damages are not able or willing to bring the perpetrators to justice and to redeem the victims of the offense. According to international law, the universal jurisdiction should be exercised if: (1) no other state can assume jurisdiction on the basis of traditional doctrines; (2) no other state has a direct interest in the case; (3) the claimant would otherwise be subject to a denial of justice and (4) there is a universal interest, i.e., of the whole of humankind (or of the whole international community), to assume jurisdiction.

In practical terms, plaintiffs suing under the ATCA face several obstacles that include: (1) the requirement of a high factual threshold; (2) overcoming a forum non conveniens motion; (3) obtaining personal jurisdiction over the defendant; (4) the requirement that defendants must not be protected by sovereign immunity; (5) showing state action for most human rights allegations and (6) the case must not present a nonjusticiable political question. Therefore:

1. Generally U.S. courts demand a highly developed factual basis for the continuation of a claim under

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303 In Filartiga v. Pena-Irala, 630 F.2d 876, 879 (2d Cir. 1980), jurisdiction was established on the basis of, "28 U.S.C. § 1350, Article II, Sec. 2 and the Supremacy Clause of the U.S. Constitution. Jurisdiction is claimed . . . principally on this appeal, under the Alien Tort Statute, 28 U.S.C. § 1350."

304 In international law, denial of justice is an international delict. The principle of denial of justice is closely connected to the national treatment principle in that a denial of justice occurs if one falls below the general minimum standard of developed legal systems. There is a principle of general international law that entitles foreign states only to protect their own nationals. In the Barcelona Traction Case the International Court of Justice stressed: "With regard more particularly to human rights . . . it should be noted that these also include protection against denial of justice. However, on the universal level, the instruments which embody human rights do not confer on States the capacity to protect the victims of infringements of such rights irrespective of their nationality." Case Concerning the Barcelona Traction, Light and Power Co., Ltd. (Belgium v. Spain), 1970 I.C.J. 3, 47 (Feb. 5).

305 Bassiouni, supra note 282, at 88-89.

306 Cf. Saunders, supra note 264, at 1408 (analyzing "whether De Beers may be held liable for knowingly funding war criminals under [the ATCA]" and the elements for such a claim).

https://scholarship.law.upenn.edu/jil/vol26/iss2/1
the ATCA, especially in cases seeking damages from multinational companies.\footnote{Id.}

2. U.S. courts will act upon claims based on the ATCA only if a case cannot be pursued more effectively and fairly in another country that is more closely related to it. Otherwise, they will grant the objecting defendant’s motion for dismissal for \textit{forum non conveniens}.\footnote{In Wiwa v. Royal Dutch Petroleum, 226 F.3d 88 (2d Cir. 2000), the Second Circuit Court of Appeals held that the defendants failed to establish that the claims would be more appropriately addressed in a foreign court. They also reasoned that there should be increased deference to the plaintiff’s choice of forum when the plaintiff has substantial ties to that forum, and that since the plaintiffs resided in the United States, changing the forum of the suit would impose a significant hardship on them. Saunders, \textit{supra} note 264, at 1455. In \textit{Sosa}, the European Commission argued as \textit{amicus curiae} that basic principles of international law require that before asserting a claim in a foreign forum, the claimant must have exhausted any remedies available in the domestic legal system, and perhaps in other fora, such as international claims tribunals. Brief of Amicus Curiae of the European Commission in Support of Neither Party at 24, 124 S. Ct. 2739 (2004) (Nos. 03-339, 03-485); \textit{cf.} Torture Victim Protection Act of 1991 \S\ 2(b), 28 U.S.C. \S\ 1350 (2000) (“A court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred.”).}

3. The personal jurisdiction requirement applies especially in cases where the defendant MNC is not based in the United States. Courts apply the minimum contacts test to determine whether exercising jurisdiction over the defendant would be in accordance with principles of “fair play and substantial justice.”\footnote{Id.} The minimum contacts test requires that the court assess the degree of contact of the party with the forum state as well as the relatedness of the contacts to the claim at issue.\footnote{See Asahi Metal Industry Co. v. Superior Ct., 480 U.S. 102 (1987) (holding that where a non-U.S. company simply places a product in the stream of commerce in the United States, minimum contacts have not been met and jurisdiction is improper, although jurisdiction over a corporation is available where the level of activity in the forum state is “continuous and systematic”); Saunders, \textit{supra} note 264, at 1408 (discussing potential ATCA liability for DeBeers Corp.).}
tion and minimum contacts are not required for ATCA claims involving slave trading, hijacking planes, genocide, or war crimes, since these crimes justify the exercise of universal jurisdiction by any state, regardless of its personal or territorial connection to the crime and the damages caused.

4. Under the Foreign Sovereign Immunities Act of 1976, the district courts do not have subject matter jurisdiction if the defendant is protected by the sovereign immunity under international law; there is no exception to the general grant of sovereign immunity. However, according to the Restatement (Third) of the Foreign Relations Law of the United States, immunity is confined to the sovereign or public acts of a foreign state and does not extend to its commercial or private acts.

5. In its decision in the case Doe I v. Unocal Corp., the Ninth Circuit Court of Appeals held that for law of nations violations requiring state action—in this case, torture and forced relocation—the plaintiff must show that the private defendant proximately caused the violation by “exercising control” over the government actor. According to the Benthamite concept that prevailed in the nineteenth century, international law was applied to states, not private parties. As a result, although courts have permitted claims based on international law to be brought under the ATCA against private parties (including corporations), they have required that plaintiffs establish “state action,” i.e., an interrelationship (nexus) between the conduct of the private party,

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312 See 28 U.S.C. § 1605 (1976) (stating that the general rule is that of sovereign immunity, subject to various statutory exceptions. Under the FSIA a foreign sovereign is immune from the jurisdiction of the “courts of the United States and of the States,” except insofar as a particular case comes within one of the several statutory exceptions to the rule of immunity).

313 RESTATEMENT, supra note 94, at § 451.
the damage caused, and a state. The state action requirement has indeed functioned in some cases as a procedural hurdle to ATCA suits. The exceptions to this general requirement, as set forth in Kadic v. Karadzic, permit civil suits in tort against non-state actors for piracy, slave trading, genocide, and war crimes. Therefore, two legal scenarios are possible in cases when U.S. courts rule in favor of plaintiffs under the ATCA: (a) if a defendant commits piracy, slave trading, genocide, or war crimes, then he may be held liable under the ATCA even absent state action; and (b), if a defendant commits other violations of the law of nations, it may be held liable only if the plaintiff establishes state action.

6. Finally, claims brought under the ATCA must not amount to nonjusticiable political questions, due to their international and political nature. This doctrine was strongly supported in Tel-Oren by Judge Robb, dismissed in Kadic, and finally reestablished in Sosa.

The courts' restrictive definition of the law of nations, together with the state action requirement, limits the actionable violations

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316 See Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995) (holding that the ATCA does not extend liability to private individuals and finding that Karadzic was a private actor. The Court of Appeals held that certain violations of the "law of nations" do not require state action and, thus, private individuals may be held liable under the ATCA for these crimes. The Court found that violations involving genocide or war crimes do not require State action and, since these violations were among the allegations, the defendant faced liability as a private actor under the ATCA.).
317 Id.
318 See Anne-Marie Slaughter and David Bosco, Plaintiff's Diplomacy, FOR. AFF., Sept./Oct. 2000, at 102 (detailing the policy-based criticism and fear of the politicization of American Courts); see also O'Reilly de Camara v. Brooke, 209 U.S. 45, 52 (1908) (deferring to the judgment of the Secretary of War).
under the statute primarily to gross violations of civil and political rights and to violations of rights protected under international humanitarian law, i.e., the most egregious violations of the *ius co-gens*. In addition, with the exceptions noted above, a court must deem any defendant to be a state actor in order to impose liability.319

In practice, however, the exercise of universal jurisdiction since World War II has been rather controversial.320 The balance between power and equal treatment awaits resolution in this field of international law.321

10. CONCLUSION

The notion from Roman law on *ius gentium* is not identical to the modern meaning of international law. *Ius gentium* was not at all law regulating relationships among independent states, but it was rather internal, national, Roman law regulating relationships among private persons. Yet the principles of the Roman *ius gentium* later inspired Renaissance scholars in contemplating the concept of the law of nations.

Later, in the Middle Ages, the distinction between natural law and *ius gentium* blurred. Scholars from the Middle Ages did not always carefully distinguish between the two. This conceptual confusion would long remain a problem of jurisprudential and theological thought.

In the Renaissance period, scholars throughout Europe literally translated the term *ius gentium* into their native languages to designate international law. In the adoption of the U.S. Constitution and the ATCA, there is firm ground to conclude that the founding fathers and framers of these enactments were deeply inspired by the treatises and ideas on the law of nations and international society of the great scholars of the time, such as Hugo Grotius and

319 Corporate Liability for Violations of International Human Rights Law, supra note 209, at 2030.
320 "Although law ideally treats all parties equally, it is well known that the legal enforcement system is less effective against those who are powerful than with respect to those who are poor and weak." Louis B. Sohn, The New International Law: Protection of the Rights of Individuals Rather Than States, 32 AM. U. L. REV. 1, 12 (1982).
Emmerich Vattell. In the theoretical conceptions of Coke and Blackstone, the law of nations was very similar to the one of *ius gentium* from the Roman law era. It encompassed not only rules regulating relations among sovereigns, but also relations between individuals of different nations and relations among individuals and sovereigns. Jeremy Bentham was the first to introduce the phrase "international law," which gradually supplanted the phrase "the law of nations." According to his positivist concept that prevailed in the nineteenth century, rules of international law should be carefully extrapolated and implemented differently between public and private matters. This concept eliminated from the traditional sources of the law of nations the common features of the various legal systems of the civilized world, previously characterized as natural law, including mercantile and maritime law—examples of the customary law of transnational communities whose members were typically citizens of more than one state. The only remnant of the concept of the law of nations from the Blackstonian era that survived the scourge of the Benthamite logic and theory of international law in contemporary times is the ATCA itself.

However, in modern times of emerging global society, there is a need for a new concept and a new name for the emerging global body of law. A new name will once again combine inter-state law with the common law of humanity, on the one hand, and the customary law of various world communities, on the other. Some would call it "transnational law," but as we speak of a world economy (not only of an international economy or even a transnational economy), and because its constituents are not only nations, but also, and primarily, voluntary associations (such as economic enterprises), we will finally come to speak of world law.

All historical facts and documents lead to the conclusion that the framers of the ATCA contemplated indeed that the courts should interpret and apply the law of nations as part of the common law without further need of specific statutory authority. Similarly, throughout the history of implementation of the ATCA, there is the prevailing view among U.S. courts that the law of nations is in fact customary international law that has become part of the domestic common law, first as part of general common law, and now as part of federal common law, as a specialty. In all ATCA cases decided to date, U.S. courts have held that only the gravest violations of human rights, such as summary execution; disappearance; torture; cruel, inhuman, or degrading treatment; pro-
longed arbitrary detention; genocide; war crimes; and forced labor, violate the law of nations.

It is obvious that the notion on the syntagma law of nations, as it is set out in the Alien Tort Claims Act of 1789, does not encompass the whole body of international law. Excessively wide interpretation of this term would grant U.S. courts the unwarranted jurisdiction over matters and issues that are not of the utmost concern for U.S. national interests as well as global prosperity, security, and development. For example, by no means should the U.S. judiciary be interested in providing a remedy in cases where parties from countries other than the United States cause one another material injury that resulted from the breach of a bilateral agreement on barter payments between countries X and Y. The same can be said when one party causes damages to another contrary to the international ius dispositivum. Also the law of nations under the ATCA should not encompass self-proclaimed rules of ius cogens that are not followed by the same level of opino iuris. In the landmark case Forti v. Suarez-Mason, a federal district court in California interpreted Filartiga to require that an international tort be definable, obligatory (rather than hortatory), and universally condemned. 322

If allowed, the broader interpretation of the law of nations would burden U.S. courts with an undesired workload. The interventionist interpretation of the law of nations would give rise to the retaliatory approach of other countries' judiciaries to assume jurisdiction and intervene where U.S. companies and other entities breach their duties stemming from regional or bilateral treaties, the ius dispositivum, or the self-proclaimed ius cogens. 323 This could indeed put in harms way the business interests of U.S. companies abroad. Moreover, too extended a use of the ATCA would hamper diplomatic efforts in cases where the negotiation approach in resolving disputes is more appropriate over the adjudicative one. 324

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324 For further discussion about the adjudicative approach versus the negotiation approach in resolving international trade disputes see JOHN H. JACKSON, WILLIAM J. DAVEY & ALAN O. SYKES, JR., LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS 125, 327-38 (3d ed. 1995).
The unrestrained resort to the ATCA by aliens before U.S. courts could be considered an unjustified intrusion into internal affairs by other nations. That could eventually poison the diplomatic atmosphere and finally aggravate the political and economic relations among nations involved.

Therefore, the interpretation of the ATCA that reduces the reliance on the current perception of the law of nations and instead identifies it with the customary law of *ius cogens* followed by the highest level of *opinio iuris* would be the best way to provide a remedy in tort to the victims of the gravest human rights abuses. It would also serve as a deterrent for the perpetrators of the most heinous crimes and transgressions of international law in cases where the remedy is not available in the home countries of the involved parties.

A majority of legal experts and historians agree that interpretation of legal norms should mirror the evolving process of both international law and national (domestic) law. In other words, the evolutionary approach in interpreting the law of nations should prevail over the historical one. Indeed, the first Congress and statesmen of that era expected the law of nations to evolve. The law of nations under the ATCA has proven to be an ever-changing category. Some offenses that were considered to contravene the law of nations during Coke's and Blackstone's time, such as adultery of an ambassador or treason, have obviously dropped from the scope of the ATCA, while other offenses, such as the most heinous abuses of human rights, were added in the modern era. The prohibition against piracy is the only norm of the law of nations that has survived since the time the ATCA was enacted until the present, and it is unequivocally considered to be part of the international *ius cogens* that is followed with the highest level of *opinio iuris*.

From the very beginning, the law of nations contained the rule that disputes of local concern should be decided locally. Vice versa, the ATCA should be applied to cases with no nexus to the United States only in accordance with the principles of universal jurisdiction that provides the right and obligation of the courts of any nation to bring criminal or civil proceedings for certain offenses and torts even if that state has neither a territorial link to the offense nor any connection to the nationality of the victim or offender. The aim of universal jurisdiction is to protect some overarching and universal values that are shared and accepted by the international community, the significance of which goes beyond
the limits of national interests and traditional jurisdiction and empower the United States courts to act against impunity. However, the universal jurisdiction exercised under the ATCA should be implemented as an exception to the traditional forms of jurisdiction and is subject to certain restraints, such as: (1) the requirement of a high factual threshold; (2) overcoming a forum non conveniens motion; (3) requiring personal jurisdiction over the defendant; (4) the requirement that defendants must not be protected by sovereign immunity; (5) the requirement to show state action for most human rights allegations; (6) for most violations of the law of nations, the requirement that the case not present a nonjusticiable political question.

All of this, therefore, restricts the definition of the law of nations, and limits the violations actionable under the statute primarily to gross violations of rights protected under international humanitarian law.

The practical value of universal jurisdiction since World War II has been rather controversial, since it proved to be rather ineffective when exercised against politically powerful defendants. Plaintiffs suing under the ATCA rarely get completely compensated, since the defendants have no assets in the United States, but there is a great moral satisfaction of hearing their cases properly determined by a court of law and seeing their abusers forced to flee the United States.

The problem with the incoherent transnational justice system requires an effective solution by collective action. There is a need for an international agreement with enforcement mechanisms that would delineate jurisdiction among national, regional, and global tribunals. Jurisdictions of these tribunals nowadays overlap in an attempt to bring to justice perpetrators of the most heinous crimes and to provide remedies in tort to the victims of human rights abuses.