Balancing Judicial Cognizance and Caution: Whether Transnational Corporations are Liable for Foreign Bribery Under the Alien Tort Statute

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BALANCING JUDICIAL COGNIZANCE AND CAUTION: WHETHER TRANSNATIONAL CORPORATIONS ARE LIABLE FOR FOREIGN BRIBERY UNDER THE ALIEN TORT STATUTE

Matt A. Vega*

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INTRODUCTION

The problem of holding transnational corporations (TNCs) liable for corrupting behavior has grown increasingly urgent. With the largest TNCs headquartered in the United States, Europe, and Japan, a single multinational firm today can wield as much economic power and influence as an entire nation. The World Bank Institute estimates that TNCs pay out over one trillion dollars in bribes to foreign officials each year. In some countries, illegal payments have become highly institutionalized. For example, in India’s trillion dollar economy, three-quarters of all freight is transported on the nation’s highway system. Transportation companies find they must pay bribes at every phase of their business, from registering their vehicles, to obtaining and renewing interstate and national permits, to paying inspectors who demand informal payments when collecting taxes on goods brought into an area. It is estimated companies pay local traffic police and road transport officials in India more than $4.5 billion dollars in bribes annually.

Prior to the late 1970s, bribery by a TNC of a foreign official was regarded by many as a necessary evil to protect or obtain foreign business. Although bribery has always been universally condemned as unethical, it was simply the way business was done overseas. However, over the last few decades, clear international legal standards

4. See John T. Noonan, Jr., Bribe 652–53, 679, 694 (Univ. Cal. Press 1984). Traditionally, one exception to the ethical prohibition against bribery of officials was when it was deemed necessary during war or for gathering intelligence. Id.; see also Emmerich de Vattel, The Law of Nations or the Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and of Sovereigns 376 (London, G.G. & J. Robinson 1797) (1758) ("Seducing a subject to betray his country . . . [i]f such practices are at all excusable . . . [t]hey can be only [excused] in a very just war . . . .")
prohibiting bribery of foreign officials have emerged, which all persons and nations are now obligated to follow. The threat of private suits, particularly in U.S. courts, is essential to ensuring that TNCs comply with these standards globally. Victims in the “highest risk” countries, including both foreign employees and competitors, often lack effective remedies elsewhere. Many “[i]mpoverished countries, often desperate for foreign investment, are unable or unwilling to introduce legal measures” or enforce existing domestic measures, especially civil remedies against private individuals and corporations. Additionally, the vast majority of public prosecutions under the Foreign Corrupt Practices Act (FCPA) are settled before trial. Between 2002 and 2008, litigation by the Securities and Exchange Commission (SEC) and Department of Justice (DOJ) resulted in over “$1.2 billion in settlements and penalties involving more than 30 countries.” Settlement not only results in lower penalties than companies would face at trial, it also prevents victims from having their day in court and the courts from establishing important precedent. Even when public prosecutions result in large settlements, political compromises can still occur. For example, in 2009 the German engineering giant Siemens A.G. paid a record $1.6 billion in criminal and civil fines to the DOJ and SEC. Investigators found that company managers and sales staff used a multi-million dollar slush fund to influence well-placed government officials in several countries around the globe. Despite the overwhelming evidence

6. See Kendra Magraw, Note, Universally Liable? Corporate-Complicity Liability Under the Principle of Universal Jurisdiction, 18 MINN. J. INT’L L. 458, 464 (2009) (“Civil-law countries do not have mechanisms under their national systems to prosecute legal entities, effectively conferring automatic jurisdiction on the ICC in such proceedings.”).


8. Raymund Wong & Patrick Conroy, FCPA Settlements: It’s a Small World After All 1 (NERA Econ. Consulting, Jan. 28, 2009), available at http://www.nera.com/image/Pub_FCPA_Settle... (last visited Jan. 31, 2010). This study did not include the most recent Siemens or Halliburton settlements. See generally id.

9. Matt A. Vega, The Sarbanes-Oxley Act and the Culture of Bribery: Expanding the Scope of Private Whistleblower Suits to Overseas Employees, 46 HARV. J. LEGIS. 425, 435–36 (2009). This was in addition to the $569 million Siemens AG paid in fines and disgorgement of profits to the German authorities. Id. at 436. Now more than a dozen other countries have either forced Siemens to agree to similar settlement terms or are still conducting their own investigations or prosecutions of the company. Id. at 454–55.

supporting the allegations of systematic and widespread bribery, the DOJ allowed Siemens to plead to accounting violations not only because it cooperated with the investigation, but also because pleading guilty to bribery violations would have barred Siemens from bidding on U.S. government contracts.11

A one-sentence provision in the first Judiciary Act of 1789 may open up U.S. courts as an alternative avenue for alien plaintiffs to enforce global anti-bribery norms against TNCs.12 Originally passed by Congress as part of Section 9 of the first Judiciary Act, the Alien Tort Statute (ATS)13 granted federal courts concurrent jurisdiction over “all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States.”14 At the outset, the ATS was used to resolve international disputes involving primarily economic torts between private parties in a way that best preserved the sovereign equality between nations. Over the last three decades, however, the original concept of the “law of nations” has been turned on its head.15 There has been an explosion of ATS litigation centered almost exclusively on human rights violations.16 This has unwittingly caused opinions regarding what constitutes a “violation of the law of nations” to focus on the continuum of crimes against humanity and to conclude that only the most “egregious” or “shocking” crimes committed by state actors are covered by the ATS.17 Unfortunately, this has created a “blind spot” to other violations of customary international law (CIL) such as foreign bribery.

As a result of this distorted view of the statute, few attempts to date have been made to apply the ATS to foreign bribery. None have been successful. In the early years of the United States, and as late as 1908, bribery of a foreign official was commonly understood to violate the

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11. See id. at 1.
13. 28 U.S.C. § 1350 (2000). The ATS is sometimes referred to as the “Alien Tort Claims Act” or “ATCA,” although there does not appear to be any historical basis for this appellation and the Supreme Court has consistently referred to the provision as the Alien Tort Statute. Even the Second Circuit, which started the whole line of modern cases using the latter designation, has discontinued its use. See Vietnam Ass’n for Victims of Agent Orange v. Dow Chem. Co., 517 F.3d 104, 113 n.2 (2d Cir. 2008).
15. For a historical discussion of the law of nations, see infra Part III.
16. For a discussion of modern ATS case law, see infra Part I.
17. See, e.g., Beanal v. Freeport-McMoran, Inc., 197 F.3d 161, 167 (5th Cir. 1999) (citing Zapata v. Quinn, 707 F.2d 691, 692 (2d Cir. 1983)).
law of nations. Today, bribery is frequently mentioned in passing as a precursor to human right violations but the bribe itself is seldom analyzed as a potential violation of the law of nations. \(^{19}\)

District courts in Colorado and the Eastern District of New York rejected ordinary fraud and other illicit banking activity as a violation of the law of nations outright. \(^{20}\) However, the Second Circuit Court of Appeals recently allowed "aiding and abetting" to proceed as a CIL violation under the ATS, in large part because of language in the Organisation for Economic Co-operation and Development's Anti-Bribery Convention. \(^{21}\)

Finally, in early 2009 the Southern District of New York could have been convinced that bribery violates international law but lacked the necessary data to so hold. \(^{22}\) These decisions suggest that federal courts are primed to conclude foreign bribery is actionable under the ATS in the near future, a development as yet unaddressed in the legal literature. \(^{23}\)

In the process of applying the ATS to foreign bribery, this Article will examine several unresolved issues surrounding this statutory grant. It will seek to (1) determine what constitutes a "violation of the law of nations," (2) refute the proposition that private defendants may be prosecuted under the ATS for only the most shocking and egregious \textit{jus cogens} violations, (3) determine when and to what extent state action is required in ATS litigation, and (4) examine the limitations of the fundamental principles of international law on ATS litigation.

Part I of this Article provides an overview of the modern ATS case law including the most recent ATS trials. The U.S. Supreme Court has


\(^{19}\) See, \textit{e.g.}, Abdullahi v. Pfizer, Inc., 562 F.3d 163 (2d Cir. 2009) (noting the district court's refusal to accept evidence that Pfizer had bribed Nigerian officials, based on a lack of personal knowledge). See generally Flomo v. Bridgestone Americas Holdings, Inc., No. 1:06-CV-00627-DFH-JMS, 2009 WL 1456736 (S.D. Ind. May 20, 2009) (denying discovery of evidence supporting allegations of official demands for a bribe not to report child labor violations as irrelevant unless tied to the "worst forms of child labor"). Thirty-eight published federal court decisions mention both the ATS and bribery as of March 1, 2010. A list of these cases is on file with the author.


\(^{23}\) But see Joel Slawotsky, \textit{The New Global Financial Landscape: Why Egregious International Corporate Fraud Should Be Cognizable Under the Alien Tort Claims Act}, 17 \textit{Duke J. Comp. & Int'l L.} 131, 134 n.17 (2006) (arguing that large-scale corporate fraud involving "egregious deception" and resulting in "serious damage to the world economy" should be cognizable under the ATS).
made clear that the scope of tort claims brought under the ATS can theoretically expand as the present-day law of nations evolves. However, the Supreme Court has also emphasized a series of factors that effectively limit the statute’s application and ensure that it does not jeopardize foreign relations or unduly burden U.S. courts or businesses. Today these modern international law principles are embodied in doctrines such as the act of state doctrine, political question doctrine, *forum non conveniens*, exhaustion, and comity. Ultimately, however, more mundane factors such as the plausibility standard for pleadings will likely pose the greatest obstacle for future ATS litigation.

To set the stage for a discussion of whether the ATS may be applied to cases predicated on foreign bribery, Part II recounts the dramatic impact foreign bribery has had historically here in the United States and globally. Part III then reconstructs the Founding Fathers’ original understanding of the law of nations. It argues that the writings of Emmerich de Vattel had the greatest influence on the early United States. From this historical vantage point, it is clear that federal courts ought to give judicial cognizance to what Vattel calls “perfect” rights as part of the law of nations. While perfect rights generally arise out of state-to-state relations, they often also involve private actors and affect individuals. To that extent, the drafters of the ATS likely intended that those private actors be subject to civil suits brought by the affected aliens. Vattel also suggested that all nations may be presumed to have universal jurisdiction over the violation of certain other rights and obligations. Accordingly, the first Congress likely intended that the ATS provide a private right of action to litigate these offenses as well.

Beyond these two narrow sets of actionable rights, this Article also explores Vattel’s suggestion that imperfect rights or incommensurable moral values (that is, those concerns not yet universally recognized in positive law) are better addressed outside U.S. courts. A wide range of alternative international fora has recently emerged to help evolve international law. These range from international arbitrators to public-private sector working groups. Once these multilateral efforts successfully establish a new international norm, then and only then may the norm be added to the list of perfect or universal rights that federal courts can recognize as actionable under the ATS.

Part IV uses the above analytical framework to show that foreign bribery is a violation of the law of nations that should be actionable under the ATS. Bribery has long been considered a crime against the
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state. Its status as CIL is evidenced by the fact that every country today has anti-bribery laws on the books. Moreover, foreign bribery has been universally criminalized in at least seven international anti-bribery conventions, the most recent agreement including a mandate for each nation to provide a private civil remedy. Therefore, this Article argues that an alien should be able to bring an ATS action predicated solely on foreign bribery for personal or economic injuries, regardless of whether the bribery gives rise to more serious *jus cogens* offenses. Such ATS actions may be brought against either U.S. or foreign persons or TNCs. Since foreign bribery inherently involves complicity with a foreign government official, no further state action is required. Alternatively, foreign bribery implicates fundamental norms of such mutual concern that it merits treatment as a *jus cogens* offense. This Article concludes by reemphasizing how federal courts are uniquely situated to help deal with this worldwide problem.

I. An Overview of the Modern ATS

The Alien Tort Statute currently provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." This language in Section 1350 confers federal subject matter jurisdiction when three conditions are met: (1) an alien sues, (2) for a tort (3) committed "in violation of the law of nations or a treaty of the United States." The ATS was actually one of three specialized measures taken by the first Congress in the Judiciary Act of 1789 to extend federal court subject matter jurisdiction over international disputes. Federal courts had previously asserted common law jurisdiction over suits alleging breaches of the law of nations. The ATS codified and extended their reach, granting federal court jurisdiction over suits by alien plaintiffs.

27. The ATS is now codified, with only minor grammatical changes, at 28 U.S.C. § 1350 (2000). The original read:

[T]he district courts shall 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.


28. *Id.*

29. *See, e.g.*, Respublica v. De Longchamps, 1 U.S. (1 Dall.) 111, 116 (1784); *see also* Sosa v. Alvarez-Machain, 542 U.S. 692, 729–30 (2004) ("For two centuries we have affirmed that the domestic law of the United States recognizes the law of nations. . . . It would take some explaining to say now that federal courts must avert their gaze entirely from any international norm intended to protect individuals.").
At the same time the Judiciary Act reinforced the Supreme Court’s original jurisdiction over suits brought by diplomats, and created alienage jurisdiction over actions between U.S. and foreign parties.

The possibility of a tort remedy being brought by an alien under the ATS for injury or harm, here or abroad, by U.S. or foreign violators, was recognized in two early opinions of the Attorney General and in several early judicial opinions. Surprisingly though, the ATS was successfully used to obtain jurisdiction in only two published cases prior to 1980. In a third case, O’Reilly de Camara v. Brooke, the Supreme Court suggested in passing that the ATS may be applicable to a claim that a U.S. officer illegally seized alien property in a foreign state.

Prior to 1980, fewer than twenty other published federal cases mentioned even unsuccessful attempts by plaintiffs to invoke the ATS.

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31. Judiciary Act of 1789, ch. 20, § 11, 1 Stat. at 78. Despite the broad terms in Section 11 empowering federal courts to hear any cases in which “an alien is a party,” the Supreme Court held in Hodgson v. Bowerbank, 9 U.S. (5 Cranch) 304 (1809), that alienage jurisdiction, absent constitutional authority, was limited to suits involving an alien and a U.S. citizen. Id.; see also Dennis J. Mahoney, A Historical Note on Hodgson v. Bowerbank, 49 U. CHI. L. REV. 725, 731–32 (1982).
32. See, e.g., Wilson v. Pierce, 30 F. Cas. 150, 154 (N.D. Cal. 1852) (No. 17,826) (“If the admiralty jurisdiction of the district court be excluded from its operation, the only cases cognisable by the district courts to which it can apply, are suits against foreign consuls, and where an alien sues for a tort only in violation of the law of nations or of a treaty of the United States”); United States v. Greene, 26 F. Cas. 33, 33 (C.C.D. Maine 1827) (No. 15,258) (Story, J.) (“[Section 9 of the Judiciary Act] gives no right to any individual to sue in those courts, with the single exception of causes ‘where an alien sues for a tort only.’”); M’Grath v. Candaler, 16 F. Cas. 128 (D.S.C. 1794) (No. 8810) (“If an alien sue here for a tort under the law of nations or a treaty . . . the suit will be sustained.”); Jansen v. The Vrow Christina Magdalena, 13 F. Cas. 356, 358 (D.S.C. 1794) (No. 7216) (“[The powers of the district courts are expressed . . . as to civil causes . . . where an alien sues for a tort only.”); 26 Op. Att’y Gen. 250, 252–53 (1907); 1 Op. Att’y Gen. 57, 59 (1795). See generally Jordan J. Paust, The History, Nature, and Reach of the Alien Tort Claims Act, 16 FLA. J. INT’L L. 249, 250 n.3 (2004).
33. Adra v. Clift, 195 F. Supp. 857 (D. Md. 1961) (upholding ATS jurisdiction over a child-custody suit between Lebanese nationals because the unlawful taking of a minor child from the custody of her father was a tort, and the use of a falsified passport, concealing the child’s identity and nationality, and wrongfully transporting the child across a border violated the law of nations); Bolchoso Darrell, 3 F. Cas. 810 (D.S.C. 1795) (No. 1607) (upholding ATS jurisdiction over an action for the return or restitution of slave property which was on a Spanish vessel seized as a prize of war). But see Abdullah v. Pfizer, 562 F.3d 163, 172 (2d Cir. 2009) (stating that “the statute provided jurisdiction in just two cases during the first 191 years after its enactment” but citing only Taveras v. Taveras, 477 F.3d 767 (6th Cir. 2007)); Taveras, 477 F.3d at 771 (mentioning that there are two cases but discussing only the Bolchoso case); Sosa, 542 U.S. at 712 (stating that there has been only one case).
35. See Natalie L. Bridgeman, Human Rights Litigation Under the ATCA as a Proxy for Environmental Claims, 6 YALE HUM. RTS. & DEV. L.J. 1, 4–5 (2003) (citing twenty-one invocations of the ATS from 1789 until the decision in Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980)); Kenneth C. Randall, Federal Jurisdiction over International Law Claims, 18
Interestingly, all but three of these cases were brought after World War II. The only favorable post-WWII evidence is dicta in *Nguyen Da Yen v. Kissinger*, a case involving the alleged illegal evacuation of children from Vietnam by the U.S. Immigration and Naturalization Service (INS). In that case, the Ninth Circuit noted that injuries accruing as a result of the evacuation might be addressed pursuant to the ATS but the plaintiffs had not asserted a claim under the statute.

On June 30, 1980, the Second Circuit decided the seminal case of *Filartiga v. Pena-Irala*. The case involved the torture of a Paraguayan citizen by his own government's Inspector General of Police. The court maintained it had jurisdiction over the case because "[t]he law of nations forms an integral part of the common law." The Court went on to hold torture was a "well-established, universally recognized norm[] of international law" and, to the extent it was done under color of state law, was actionable under the ATS.

After *Filartiga*, well over one hundred ATS suits were filed in U.S. courts. Most significantly, liability under the ATS was extended to corporations. This led to more robust attempts to use the ATS to
confer jurisdiction. However, *Filartiga* did more than simply increase the number of ATS claims by expanding the scope of potential targets. It caused future litigants and other courts to view the ATS differently: through the sensationalized lens of *Filartiga*, the ATS became known first and foremost as a remedy for human rights violations. Consequently, modern courts declined to apply the ATS in the ever-growing context of private international law. For example, courts declined to apply the ATS in purely commercial contexts. They also held that plaintiffs could not state ordinary corporate fraud and conversion claims under the ATS. Even among those courts willing to find corporate liability under the statute, several limited corporate liability to particularly shocking *jus cogens* offenses or boot-strapped a "state ac-

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45. See *Aguinda v. Texaco, Inc.*, 303 F.3d 470, 476 (2d Cir. 2002) (plaintiffs alleging in the lower court that defendants had violated the law of nations by generating pollution in Peru and Ecuador, but court dismissing on *forum non conveniens* grounds); *Bigio v. Coca-Cola Co.*, 239 F.3d 440, 448 (2d Cir. 2001), remanded to No. 97 Civ. 2858, 2005 WL 287397 (S.D.N.Y. Feb 3, 2005), *rev’d and remanded*, 448 F.3d 176 (2d Cir. 2006), *cert. denied*, 549 U.S. 1282 (2007) (plaintiffs alleging that the defendants violated the law of nations by knowingly purchasing property illegally seized by the Egyptian government on the basis of religious discrimination, but the court holding that religious discrimination does not constitute a violation, unless the actor is acting under color of law or is a state official); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 305 (S.D.N.Y. 2003) (plaintiffs alleging that the defendant collaborated in torture, enslavement, war crimes, and genocide effectuated by the Sudanese government); *Sarei v. Rio Tinto PLC*, 221 F. Supp. 2d 1116, 1120 (C.D. Cal. 2002) (plaintiffs alleging that a private mining enterprise had cooperated with the government of Papua New Guinea to displace villages, cause environmental damage, and commit other abuses and war crimes); *Doe v. Unocal Corp.*, 963 F. Supp. 880, 892 (C.D. Cal. 1997), *aff’d in part, rev’d in part*, 395 F.3d 932 (9th Cir. 2003), *vacated and reh’g granted*, 395 F.3d 978 (9th Cir. 2003), *dismissed*, 403 F.3d 708 (9th Cir. 2005) (en banc) (holding Unocal liable under the ATS because its managers directed the Myanmar military to guard and perform other services associated with its pipeline project despite knowing that forced labor was occurring).


47. See *Hamid v. Price Waterhouse*, 51 F.3d 1411, 1418 (9th Cir. 1995), *cert. denied*, 516 U.S. 1047 (1996) (holding corporate fraud, and misappropriation of funds is not a violation of international law sufficient to state a claim under the ATS, even when the converted monies were used to commit various crimes including foreign bribery); *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1015–16 (2d Cir. 1975), *remanded to 411 F. Supp. 1094* (S.D.N.Y. 1995) (holding that corporate fraud was not a violation of any international norm, and was therefore not a cognizable tort under the ATCA); *Arndt v. UBS AG*, 342 F. Supp. 2d 132, 139 (E.D.N.Y. 2004) (holding that corporate fraud was not a violation of an international norm, and was therefore not a cognizable tort under the ATCA).
tor” requirement onto their analysis. The result was an incoherent, seemingly arbitrary, line of decisions regarding the ATS.

To make matters worse, the lower courts were divided over the fundamental question of whether the term “law of nations” referred only to those norms widely recognized in 1789 or whether it might have included new causes of action. The Second Circuit in Filartiga gave an elastic interpretation to the ATS, concluding that it encompassed contemporary causes of action. Although other circuits generally followed suit with Filartiga, the D.C. Circuit emerged sharply divided in its interpretation of the ATS. In a split panel decision, Judge Bork constrained the scope of the ATS to include only three causes of action that were well recognized at the time it was passed in 1789, effectively excluding any cause of action allowing a private party to recover for a human rights violation.

Legal scholars were also divided over the issue. Some scholars emphasized the “conventional” aspect of the law of nations, and posited that post-Erie federal courts may only recognize causes of action expressly authorized in legislation or self-executing treaties. This position did not

48. See Beanal v. Freeport-McMoran, Inc., 197 F.3d 161, 167 (5th Cir. 1999) (declining to address whether state action is required to sustain an action for an individual human rights violation under the ATS because the plaintiff’s conclusory allegations failed to satisfy the pleading standard); Kadic, 70 F.3d at 240 (holding in a torture case that unless there is some state involvement, private parties can only be held liable for activities that violate norms of “universal concern” such as slavery, genocide, and war crimes); Zapata v. Quinn, 707 F.2d 691, 692 (2d Cir. 1983) (stating that the ATS applies “only to shockingly egregious violations of universally recognized principles of international law”).

49. Flores v. S. Peru Copper Corp., 414 F.3d 233, 247 (2d Cir. 2003) (noting that “neither Congress nor the Supreme Court ha[d] definitively resolved the complex and controversial questions regarding the meaning and scope of the ATCA”).

50. Compare Hilao v. Estate of Marcos, 103 F.3d 789, 794 (9th Cir. 1996) (stating that the ATS includes new causes of action under the present-day law of nations), and Abebe-Jira v. Negewo, 72 F.3d 844, 847 (11th Cir. 1996), cert. denied, 519 U.S. 830 (1996) (stating that the ATS includes new causes of action under the present-day law of nations), and Filartiga v. Pena-Irala, 630 F.2d 876, 886 (2d Cir. 1980) (stating that the ATS includes new causes of action under the present-day law of nations), with Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984) (per curiam) (Bork, J., concurring) (finding that the law of nations is limited to causes of action that would have been contemplated in 1789).

51. Filartiga, 630 F.2d at 881 (“[I]t is clear that courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today.”).


53. See Tel-Oren, 726 F.2d at 774; Stephens, supra note 35, at 537.

54. Tel-Oren, 726 F.2d at 799.

55. Id. at 813.

turn on the original intent of the ATS; rather its proponents insisted it was mandated by the *Erie* doctrine that emerged in the mid-twentieth century.\(^7\) This Revisionist position maintained that, “in the absence of federal political branch authorization, CIL is not a source of federal law.”\(^8\)

Other scholars asserted that the Supreme Court’s post-*Erie* decision in *Banco Nacional de Cuba v. Sabbatino* upheld federal court authority to recognize certain universal rights under the federal common law enclave of “foreign affairs.”\(^9\) Thus, according to this Modernist view, new federal common law causes of action could be derived from CIL.\(^5\) Because most modern ATS litigation involved human rights violations, some modernists misconstrued the case law to mean that universal rights under CIL could involve only a few shocking or horrid offenses.\(^6\)

In 2004, the Supreme Court attempted to provide some much needed guidance on the ATS in *Sosa v. Alvarez-Machain*.\(^62\) There, the plaintiff, Alvarez-Machain, claimed that he had been wrongfully abducted in Mexico and brought to the United States to stand trial for having played an active role in the torture of a DEA agent in Guadalajara. The plaintiff claimed that short-term, “arbitrary” detention violated an international norm.\(^63\) The Court held the plaintiff had no cause of action under the ATS since the norm he advanced “express[ed] an aspiration that exceeds any binding customary law rule having the specificity that [the court] require[d].”\(^64\)

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61. See Stephens, *supra* note 59, at 455. The modern conception of *jus cogens* offenses has been plagued by the same circular reasoning.
62. *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). *Sosa* is one of only three Supreme Court opinions that mentions the ATS. *Id.*; see also Rasul v. Bush, 542 U.S. 466 (2004) (upholding habeas corpus jurisdiction over claims by various detainees at Guantanamo Bay, who challenged the legality of their detention by the United States government); Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428 (1989) (involving a claim seeking damages from Argentina for having bombed a British tanker in violation of international norms during the Falklands War, but the court dismissing on sovereign immunity grounds).
63. *Sosa*, 542 U.S. at 692.
64. Although potentially circular in its reasoning, this determination was consistent with the Court’s earlier decision in *United States v. Alvarez-Machain* in which it upheld the legality of foreign bounty hunters to abduct criminal defendants abroad and bring them to the United States for prosecution. 504 U.S. 655 (1992). In that case, however, the Court did not discuss the implications of customary international law (CIL). *Id.*
The Court further held in Sosa that the ATS is “strictly jurisdictional” and would have been understood by the first Congress to cover only “those torts corresponding to Blackstone’s three primary offenses: violation of safe conduct, infringement of the rights of ambassadors, and piracy.” Nevertheless, the Court did not circumscribe ATS claims to include only these offenses, but instead concluded that nothing had categorically precluded federal courts from recognizing a claim for torts committed anywhere in the world against aliens in violation of the “present-day law of nations.”

The Supreme Court declined to formulate a comprehensive list of the applicable causes of action. Instead, it argued that any newly recognized violation of the law of nations should (1) “rest on a norm of international character accepted by the civilized world,” and (2) be “defined with a specificity comparable to the features of the 18th-century paradigms” that the Court had recognized. It further required that the norm must extend liability to the type of perpetrator (for example, a private actor) the plaintiff seeks to sue. According to the majority, these norms are enforceable through a federal court’s exercise of “residual [federal] common law discretion” to create causes of action.

The Court in Sosa carefully tempered its unprecedented support for the judicial cognizance of new ATS claims by listing five “good reasons” why courts should exercise “great caution” when recognizing new claims. The Court counseled that “the determination [of] whether a norm is sufficiently definite to support a cause of action should (and, indeed, inevitably must) involve an element of judgment about the practical consequences of making that cause available to litigants in the federal courts.”

In the end, the Court in Sosa envisioned a “relatively modest set of actions alleging violations of the law of nations” and left it to the lower courts to exercise considerable judicial restraint and develop the federal common law to reflect the precise contours of these international law-

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65. Sosa, 542 U.S. at 713.
66. Id. at 723.
67. See id. at 723–25.
68. Id. at 725; see also id. at 733 (stating that plaintiff’s claim “must be gauged against the current state of international law”).
69. Id. at 725.
71. Id. at 738.
72. Id. at 725–28. These included: (1) the prevailing positivist approach to the common law, (2) Erie limits on federal common law; (3) the general presumption against implied private rights of action; (4) the potential for adverse foreign policy consequences; and (5) the lack of a congressional mandate to engage in judicial lawmaking in this area. Id.
73. Id. at 732–33. For further discussion of these five factors, see infra Part III(C)(4).
74. Sosa, 542 U.S. at 720.
based claims.\textsuperscript{75} The Court expressly rejected the Revisionist notion that “the ATS was stillborn because there could be no claim for relief without a further statute expressly authorizing adoption of causes of action,”\textsuperscript{76} and left the door to new ATS claims “ajar subject to vigilant doorkeeping.”\textsuperscript{77} In his concurrence, Justice Scalia warned that \textit{Sosa} opened the door to extending federal common law to the full extent of conventional and customary international law.\textsuperscript{78}

The response of the lower courts to the \textit{Sosa} decision over the last five years has been mixed. The Second Circuit has continued to take the lead by recognizing that claims against private actors such as TNCs (including aiding and abetting claims) are actionable under the ATS.\textsuperscript{79} Most circuits, with the notable exception of the D.C. Circuit, have followed suit.\textsuperscript{80} In 2008, the Supreme Court missed an opportunity to clarify the scope of “aiding and abetting” liability under the ATS in \textit{American Isuzu Motors v. Ntsebeza}, denying certiorari because it lacked the necessary quorum to hear the appeal from the Second Circuit.\textsuperscript{81}

\textsuperscript{75} Id. at 728–31.
\textsuperscript{76} Id. at 714.
\textsuperscript{77} Id. at 729. As the \textit{Sosa} court pointed out, no subsequent legal development precludes recognizing violations of the law of nations under federal common law. \textit{Id.} at 714.
\textsuperscript{78} \textit{See id.} at 739 et seq. (Scalia, J., concurring in part and concurring in judgment).
\textsuperscript{79} \textit{See, e.g.}, Khulumani v. Barclay Nat’l Bank, Ltd., 504 F.3d 254 (2d Cir. 2007), \textit{cert. denied}, Am. Isuzu Motors v. Ntsebeza, 128 S. Ct. 2424 (2008) (finding that the plaintiffs could plead a theory of aiding and abetting liability under the ATS to obtain jurisdiction over TNCs that purportedly collaborated with the government of South Africa in maintaining apartheid).
\textsuperscript{80} \textit{See, e.g.}, Aldana v. Del Monte Fresh Produce, N.A., Inc., 416 F.3d 1242, 1247–48 (11th Cir. 2005), \textit{remanded} to No. 001-3399-Civ-MORENO, 2007 WL 3054986 (S.D. Fla. Oct. 16, 2007), aff’d, 578 F.3d 1283 (11th Cir. 2009) (construing a state action requirement for a claim of torture by looking to Section 1983 claims against the United States for civil rights violations); Bowoto v. Chevron Corp., No. C 99-02506 SI, 2007 WL 4224593 (N.D. Cal. Nov. 28, 2007) (discussing how Order 1636, issued on August 13, 2007, reversed an earlier order, issued on August 22, 2006, and holding aiders and abettors may be vicariously liable for acts they could not have committed as a principals); Chavez v. Carranza, 413 F. Supp. 2d 891, 899 (W.D. Tenn. 2005) (noting that private persons can be considered state actors for the purpose of pursuing a claim of torture). \textit{But see} Saleh v. Titan Corp., 436 F. Supp. 2d 55, 57 (D.D.C. 2005) (citing Sanchez-Espinoza v. Reagan, 770 F.2d 202 (D.C. Cir. 1985)) (concluding that even if torture by private parties acting under “color of law” were actionable under the ATS, the defendants who had acted as agents of the state would be subject to sovereign immunity); Doe v. Exxon Mobil Corp., 393 F. Supp. 2d 20, 26 (D.D.C. 2005) (stating that traditionally only states, not persons, could hold liable under the ATS, and rejecting the use of Section 1983 jurisprudence to exercise jurisdiction over a claim involving sexual violence, but concluding that the “plaintiffs [had] failed] to allege adequately either of the two bases upon which color of law arguably [could] be based—joint action, and proximate cause”); Ibrahim v. Titan Corp., 391 F. Supp. 2d 10, 14 (D.D.C. 2005) (holding “the law of nations ‘does not reach private non-state conduct’” (quoting Sanchez-Espinoza, 770 F.2d at 206–07)).
\textsuperscript{81} Khulumani, 504 F.3d 254.
At the same time courts have felt duly restrained by the Sosa opinion not to recognize every wrong as a violation of the law of nations.\(^8\) Beyond the Sosa court’s two primary requirements of universality and specificity, the circuit courts have continued to emphasize that the norm must arise out of a sense of legal obligation and mutual concern.\(^3\)

Issues concerning how the ATS interacts with newer statutes have also arisen. For example, several circuits have grappled with how the ATS interacts with the more recent Terrorism and Violence Prevention Act of 1991 (TVPA).\(^4\) The Fourth, Sixth, and Eleventh Circuits have concluded that the TVPA is supplementary to the ATS,\(^5\) while the Seventh Circuit has held that the TVPA “occup[ies] the field” and cannot be pled concurrently with the ATS.\(^6\)

Another concern is whether U.S. government officials enjoy absolute immunity for acts taken abroad under the Federal Employees Liability Reform and Tort Compensation Act of 1988, commonly known as the Westfall Act.\(^7\) Lesser foreign ministers acting in their official capacity in the United States are protected under the FSIA as “agency[i'es]” or “instrumentalit[i'es]” of the state, at least in a majority of the federal

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8. See Mora v. New York, 524 F.3d 183 (2d Cir. 2008) (holding that the norm prohibiting the detention of a foreign national without informing him of the requirement of consular notification and access under Article 36(1)(b)(3) of the Vienna Convention on Consular Relations was insufficiently universal to support a claim under the ATS); see also Vietnam Ass'n for Victims of Agent Orange v. Dow Chem. Co., 517 F.3d 104, 122–23 (2d Cir. 2008) (concluding that the ATS did not support a claim against the manufacturers and suppliers of a herbicide used by U.S. troops because the plaintiffs could not establish the intentionality required by a customary international norm proscribing the purposeful use of poison as a weapon against human beings).

83. See Abdullahi v. Pfizer, Inc., 562 F.3d 163, 174 (2d Cir. 2009) (holding that the prohibition on nonconsensual medical experimentation on human beings constitutes a universally accepted norm of CIL “of mutual concern to states,” and is consequently within the jurisdiction of the ATS); In re Estate of Marcos Human Rights Litig., 25 F.3d 1467, 1475 (9th Cir. 1994) (“Actionable violations of international law must be of a norm that is specific, universal, and obligatory.”) (emphasis added) (quoted favorably in Sosa v. Alvarez-Machain, 542 U.S. 692, 732 (2004)).

84. See generally Philip Mariani, Assessing the Proper Relationship Between the Alien Tort Statute and the Torture Victim Protection Act, 156 U. Pa. L. Rev. 1383, 1398–1401 (2008).

85. See Chavez v. Carranza, 559 F.3d 486, 492 (6th Cir. 2009) (finding that the TVPA and ATS serve a common purpose and may be plead together); Yousuf v. Samantar, 552 F.3d 371 (4th Cir. 2009), cert. granted, 130 S. Ct. 49 (2009) (tacitly accepting that ATS and TVPA claims may be brought together); Aldana v. Del Monte Fresh Produce, N.A., Inc., 416 F.3d 1242, 1250 (11th Cir. 2005) (ATS and TVPA claims can be brought concurrently based on separate meaning of “torture” in each act).

86. Enahoro v. Abubakar, 408 F.3d 877, 884–85 (7th Cir. 2005).

87. 28 U.S.C. § 2679(b)(1)–(2) (2000) (amending the FTCA by broadening the scope of immunity to include absolute immunity for all acts of government employees taken within the scope of their office or employment, other than those in violation of the Constitution or those for which recovery against a government officer is specifically authorized by statute).
circuits. However, most courts have allowed suits to be brought against these lower ranking government officials, in their individual capacity, for conduct outside the scope of their official duties. The exception is the D.C. Circuit, which recently concluded that they are immune under the Westfall Act. The better reading is that the Westfall Act should be construed narrowly so as to allow recovery under the ATS, since the original purpose of the ATS was likely to provide a judicial remedy for violations of the law of nations by U.S. officials.

To date, only two ATS cases have gone to trial. In 2007, in the case of Romero v. Drummond Co., an Alabama jury became the first to issue a verdict in an ATS case brought against a corporation. The corporate defendant was accused of aiding and abetting Colombian paramilitaries in committing human rights violations amounting to “war crimes” in Colombia. Although the company was acquitted on all charges, the fact that a case built upon accomplice liability had even made it to trial sent shock waves through corporate America. In 2009, a second suit was filed against the Drummond coal company, again in the Northern District

88. See RSM Prod. Corp. v. Fridman, 643 F. Supp. 2d 382, 395 (S.D.N.Y. 2009) (explaining that foreign officials are protected under the FSIA from liability for acts taken in their official capacity in the Second, Fifth, Sixth, Ninth and D.C. Circuits but not in the Seventh and Fourth Circuits). The Supreme Court is expected to decide in Yousuf v. Samantar whether the FSIA extends to an individual acting in his official capacity and whether an individual no longer an official at the time suit is filed retains said immunity. 552 F.3d 371 (4th Cir. 2009), cert. granted, 130 S.Ct 49 (2009).


91. That the Westfall Act should be construed narrowly is supported by its legislative history. See H.R. REP. No. 100-700, at 5 (1988), reprinted in 1988 U.S.C.C.A.N. 5945, 5949 (“If an employee is accused of egregious misconduct, rather than mere negligence or poor judgment, then the United States may not be substituted as the defendant, and the individual employee remains liable.”) (emphasis added).


93. Romero, 552 F.3d at 1303.


of Alabama. This time plaintiffs have alleged corporate complicity with right-wing paramilitary squads in the murders of sixty-three men and four women between 1999 and 2006.

The other trial was Bowoto v. Chevron Corp., in which several members of a small Nigerian village accused one of the world’s largest oil companies of human rights violations. Chevron was accused of being involved in the shooting deaths of two activists at an offshore oil platform in the Niger Delta of Nigeria in 1998. On December 1, 2008, after a four-week trial and eight and a half years of litigation, a San Francisco jury decided in favor of the defendants. The outcome of that trial is now on appeal.

A third ATS case, Wiwa v. Shell, survived more than ten years of legal challenges and almost went to trial in 2009. It involved the execution of Nobel Peace Prize nominee Ken Saro-Wiwa and other environmentalist activists in Nigeria. The suit was filed by the Center for Constitutional Rights and EarthRights International in the Southern District of New York. The plaintiffs accused the British oil company, Royal Dutch Shell, and the head of its Nigerian operations, Brian Anderson, of, among other things, requesting, assisting, and financing Nigerian soldiers’ use of deadly force and massive, brutal raids against the Ogoni people throughout the early 1990s to repress a growing movement against the oil company. They also accused Shell of conspiring to bribe two witnesses to testify against Saro-Wiwa during his trial, which resulted in the death penalty. In June 2009, the parties agreed to settle the case for $15.5 million.

97. Id.
104. See Kennedy, supra note 101. Separately, the DOJ and SEC are investigating Shell’s dealings in Nigeria with Panalpina, a freight forwarding company accused of bribing Nigerian customs officials on Shell’s behalf in violation of the FCPA. See ROYAL DUTCH SHELL PLC, ANNUAL REPORT AND FORM 20-F FOR THE YEAR ENDED DECEMBER 31, 2008, at 16, available
The frequency of ATS suits has dramatically increased in recent years and there is no indication that the number of ATS filings will decline any time soon. Many prominent TNCs, including Bridgestone/Firestone, Caterpillar, Chevron, Chiquita, Coca-Cola, DaimlerChrysler, Exxon, Gap, Nestle, Pfizer, Texaco, UBS, and Yahoo, have been sued in federal court under the ATS. However, there is a danger that this trend may lead to a backlash: there is already some indication that federal courts are beginning to more closely scrutinize ATS claims at the outset.

To avoid an overreaction, lower courts should strive to strike the balance called for under Sosa, preventing illegitimate claims while at the same time recognizing new causes of action under the ATS that vindicate emerging international norms like the prohibition of foreign bribery.

II. A BRIEF HISTORY OF TRANSNATIONAL CORPORATE BRIbery

In the late eighteenth century, the bribery of federal officials was outlawed in the United States. Bribery was considered as much a crime against the federal government as piracy. Bribery is even one the named offenses in the Constitution upon which impeachment of the President of the United States may be based. On April 30, 1790 Congress passed “An Act for the Punishment of Certain Crimes” that included a section dealing with the bribery of federal officials.

Even prior to the passage of that Act, federal courts entertained cases involving bribery as a violation of both the common law of the United States and the law of nations. For example, Chief Justice John Jay delivered a charge to a grand jury in New York District Court instructing the grand jurors to “[d]irect your Attention [also] to the Conduct of the national officers, and let not [] any Corruptions[,] Frauds[,] Extortions[,] or


105. For a discussion of the application of the plausibility standard of pleadings, see infra Part III(C)(4).


criminal Negligences[,] with which you may find any of them justly chargeable, pass unnoticed.” Similarly, in United States v. Ravara, a consul from Genoa was successfully prosecuted for attempting to extort money from a British minister. In 1798, Robert Worral was prosecuted under federal common law for bribery of a Federal Commissioner of Revenue.

Even once it was widely accepted that federal courts had no common law jurisdiction in criminal matters, state courts continued to treat bribery as a violation of the law of nations, which was to be incorporated into the municipal law of the state. For example, in 1910, the Pennsylvania Court of Quarter Sessions held in Commonwealth v. Taraborrelli that the defendant’s attempt to corrupt an Italian consul residing in the United States, or his subordinate, with a bribe to obtain an exemption from military service violated not only the provisions of a consular convention or treaty between the United States and Italy but also “[t]he principles of the law of nations.”

 Prosecutions for bribery began to take on a new fervor in the 1920s and 1930s with the convictions of an ex-cabinet official and a federal judge. Albert Bacon Fall, Secretary of the Interior, was convicted of bribery in the acquisition of contracts and leases by the Pan-American Petroleum and Transport Company. In 1939, one of the most respected federal appeals court judges in the country, Martin T. Manton, resigned after allegations surfaced of his receipt of bribes in six separate cases.


111. United States v. Worral, 2 U.S. (2 Dall.) 384, 28 F. Cas. 774 (C.C.D. Pa. 1798); see Stephen B. Presser, Samuel Chase: In Defense of the Rule of Law and Against the Jeffersonians, 62 VAND. L. REV. 349, 367 (2009). Although bribery statutes existed by the time this case was decided, revenue commissioners were not specifically mentioned; therefore, Worral was prosecuted “upon the principles of common law.” Worral, 2 U.S. at 384, 28 F. Cas. at 778. However, Judge Samuel Chase was one of the first federal judges to maintain that there was no federal common law of crimes. Presser, supra, at 367. Furthermore, since this case involved domestic bribery, it did not involve a violation of the law of nations. However, as one historian noted, “[f]ew Federalists would . . . have been able to separate a violation of the law of nations from a completely internal matter such as counterfeiting or the bribery of a federal official.” Lenner, supra note 110, at 90.


113. Id. at 67.

114. NOONAN, supra note 4, at 565.

his resignation did not forestall his conviction in 1949 for conspiracy, for which he received the maximum sentence.\textsuperscript{116} These two landmark convictions marked a tipping point in the prosecution of bribery of public officials, and ultimately led to the passage of anti-bribery statutes in thirty-two states between 1947 and 1960, extending to “almost every class and occupation.”\textsuperscript{117}

During the mid-1970s the global escalation of corporate corruption reached another tipping point.\textsuperscript{118} The Watergate investigation, which led to the resignation of Richard Nixon, revealed that a number of American corporations had made illegal political contributions during the 1972 presidential campaign.\textsuperscript{119} Upon further investigation Congress and the SEC discovered U.S. corporations were also making secret contributions to foreign officials.\textsuperscript{120} These bribery schemes resulted in a series of most unfortunate events, ranging from the suicide of two high level corporate executives, to a bribery scandal involving the Honduran President that precipitated his ouster during a military coup.\textsuperscript{121}

Initially, the Congressional hearings focused on Lockheed Martin (Lockheed), the nation’s largest defense contractor.\textsuperscript{122} The federal government had loaned the company over $250 million in “bailout” money and Congress feared that Lockheed’s ability to repay depended on its projected sales figures, which in turn depended on Lockheed’s bribery of foreign officials.\textsuperscript{123} Ultimately, Congress’ worst fears were confirmed:

\begin{thebibliography}{99}
\bibitem{116} United States v. Manton, 107 F.2d 834 (2d Cir. 1939), \textit{cert. denied}, 309 U.S. 664 (1940).
\bibitem{117} \textit{Noonan, supra} note 4, at 579.
\bibitem{119} \textit{John C. Coffee, Jr., Beyond the Shut-Eyed Sentry: Toward a Theoretical View of Corporate Misconduct and an Effective Legal Response, 63 Va. L. Rev. 1099, 1115–16 (1977)}.
\bibitem{120} \textit{Id.}
\bibitem{121} \textit{Noonan, supra} note 4, at 656. The SEC exposed a scheme by United Brands to bribe Honduran President Oswaldo López Arellano with $1.25 million, and with the assurance of another $1.25 million upon the reduction of certain export taxes. \textit{Id.} Then owner of United Brands, Eli M. Black, was one of the aforementioned suicides. \textit{Id.} United Brands was later sold and renamed Chiquita Brands International.
\bibitem{122} \textit{Noonan, supra} note 4, at 654–63.
\bibitem{123} \textit{Id.} Although beyond the scope of this Article, the fact that the U.S. government has recently become the majority shareholder in other large American companies such as American International Group, Inc. (AIG) and General Motors, Inc. (GM) may limit enforcement of anti-bribery laws against these companies. It is possible these companies may be treated as instrumentalities or agencies of the state for purposes of derivative sovereign immunity. In conjunction with the foreign country exception of the Federal Tort Claims Act (FTCA), this may effectively shield these TNCs from liability from private civil actions predicated on their bribery overseas.
\end{thebibliography}
Lockheed confessed to having made questionable payments amounting to more than $30 million between 1970 and 1975.\footnote{Id. at 674. These payments were made in developing countries such as Iran, the Philippines, Indonesia, and Saudi Arabia, as well as in developed countries such as the Netherlands, Switzerland, Germany, Italy, and Japan. Id. at 659–63.}

However, Lockheed was not alone. Between 400 and 500 other publicly traded corporations, or approximately 1.5 percent of American corporations doing business abroad at the time, admitted to the SEC that, cumulatively, they had made over $300 million in secret payments to government officials to influence their official acts so as to obtain sale contracts or other improper business advantages.\footnote{See United States v. O’Grady, 742 F.2d 682, 700–01 (2d Cir. 1984) (citing H.R. Rep. No. 640, at 4 (1977)).}

The solution from the U.S. perspective was two-fold. First, Congress passed the Foreign Corrupt Practices Act in 1977.\footnote{Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (1977) (codified as amended at scattered sections of 15 U.S.C. 2006)). For the legislative history of the FCPA, see S. Rep. No. 95-114 (1977), reprinted in 1977 U.S.C.C.A.N. 4098; H.R. Rep. 95-831 (1977) (Conf. Rep.), reprinted in 1977 U.S.C.C.A.N. 4121.} The goal of the legislation was not only to criminalize bribery but also to change corporate culture.\footnote{S. Rep. No. 95-114 (1977), at 4100 reprinted in 1977 U.S.C.C.A.N. 4098.} The statute contains anti-bribery provisions covering virtually all U.S. persons and their agents as well as recordkeeping provisions for public companies to facilitate the enforcement of the FCPA under securities laws and regulations.\footnote{The FCPA’s anti-bribery provisions are codified at 15 U.S.C. §§ 78a, 78dd-1, 78dd-2, 78dd-3 (2006), and its recordkeeping provisions are codified at 15 U.S.C. §§ 78m, 78ff (2006).} For the first two decades following its enactment, the FCPA was seldom invoked.\footnote{See Michael V. Seitzinger, CRS Report to Congress: Foreign Corrupt Practices Act, at CRS-25 (1999), available at http://www.fas.org/irp/crs/Crsfcpa.htm (last visited Oct. 31, 2009).} However, the DOJ and SEC have dramatically increased their enforcement efforts over the last ten years.\footnote{Id. at 435–36 (citations omitted).} Additionally, there has been a significant rise in the United States in the amount of civil litigation predicated on FCPA violations.\footnote{Id. at 464–77 (citations omitted).}

Second, with the passage of the FCPA and later amendments the U.S. Congress attempted to give the concept of bribery universal legal significance, and largely succeeded. This global effort was, in part, a response to critics who said that the FCPA would put American businesses at a competitive disadvantage.\footnote{Vega, supra note 9, at 434 (citations omitted) (stating that between 1978 and 2000, U.S. prosecutors averaged only three FCPA prosecutions per year).} By enacting the FCPA, Congress articulated a clear position that bribery was universally wrong.\footnote{Id. at 464–77 (citations omitted).}
the FCPA was amended to make clear that the statute applied to U.S. persons acting within and beyond U.S. borders. These amendments also extended the FCPA's jurisdictional reach to any foreign company or alien acting within the United States or its territories. However, the United States would not have to go it alone. Immediately following the Lockheed hearings, several other countries, including the Netherlands, Italy, and Japan, launched their own investigations leading to arrests, resignations, indictments, trials, and in some instances, prison terms ranging from twenty months to four years.

These unilateral actions were quickly followed by multilateral efforts. The International Chamber of Commerce led the way by publishing its 1977 Report on Extortion and Bribery in International Business Transactions, but efforts to convince the United Nations to adopt an international convention against corruption fell through in the 1980s. After another round of corruption scandals relating to the Savings and Loan (S&L) Crisis, however, the tide changed. In 1993, Transparency International was founded and in 1996, the Organization of the American States entered into the Inter-American Convention Against Corruption (OAS Convention), the first multilateral compact for combating foreign bribery. The following year, the Organisation for Economic Co-operation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention) was opened for signature. A little over two decades after OECD diplomats had scoffed at bribery as being unimportant during the 1975 Senate subcommittee hearings, the same

134. 15 U.S.C. §§ 78dd-1(g) (2009) ("It shall . . . be unlawful . . . to corruptly do any act outside of the United States in [violation of this section]."); id. § 78dd-2(i) ("It shall also be unlawful for any United States person to corruptly do any act outside the United States in [violation of this section]."); id. § 78dd-3(a) ("It shall be unlawful for any person . . . while in the territory of the United States, corruptly to make use of the mails or any means or instrumentality of interstate commerce or to do any other act in [violation of this section].")

135. 15 U.S.C. §§ 78dd-3(a); see also H.R. REP. No. 105-802, at 19-20 (1998) ("[It is expected that the established principles of liability, including principles of vicarious liability . . . shall apply . . . regardless of the nationality of the officer, director, employee, agent, or stockholder.").

136. NOONAN, supra note 4, at 467-70.


representatives proclaimed the need to prevent bribery's devastating effects on developing countries.

Since then, there have been several other conventions and instruments evidencing a global standard prohibiting foreign bribery, including three prominent E.U. Conventions,141 the Asian Development Bank (ADB)/OECD Anti-Corruption Action Plan for Asia and the Pacific,142 the African Union (A.U.) Corruption Convention,143 the World Bank Governance and Anti-Corruption Strategy,144 and most recently, the U.N. Convention Against Corruption (UNCAC).145

The OECD Convention focuses primarily on the criminalization of bribery; however, the UNCAC, A.U. Convention, OAS Convention, ABD-OECD Action Plan, and the combined E.U. Conventions take a more comprehensive approach.146 They generally call not only for the criminalization of bribery but also for civil liability of legal persons, protection for whistleblowers, a long statute of limitations, and compensation for damages.147

The results of this internationalization of the prohibition against foreign bribery are impressive. Prior to the mid-1970s overseas bribery was accepted corporate policy. Today, most TNCs have adopted policies banning all direct and indirect payments to foreign officials.148 In 1977, the

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147. Id.
148. Vega, supra note 9, at 455–56. According to a 2008 survey conducted by KPMG, eighty-four percent of corporations have implemented FCPA or anti-corruption policies or procedures. See KPMG Forensic, 2008 Anti-Bribery and Anti-Corruption
United States became the first country to pass a law prohibiting bribery of foreign officials abroad. Since then, many other countries have exercised similar extraterritorial authority, and virtually every country has laws on the books prohibiting bribery of its own government officials and judiciary.

This new international norm is consistent with the recent, increased international cooperation in prosecuting foreign bribery and the enhanced role of victims in international criminal law. With the adoption of the Rome Statute in 1998, for example, the International Criminal Court (ICC) has put unprecedented emphasis on the role of victims in the criminal conviction process. Victims are allowed to participate in numerous stages of a trial, ranging from pre-trial settlement to actual investigation to eventual award of reparations. The policy considerations driving the promotion of victim participation include a desire to

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149. Vega, supra note 9, at 432-33.


151. Noonan, supra note 4, at 702 ("Bribery is universally shameful. Not a country in the world which [sic] does not treat bribery as criminal on its lawbooks.") (emphasis omitted).

152. See id.


preserve victims’ interests, facilitate restoration of the victims’ dignity, and promote reconciliation.155

Decisions from other treaty-based organizations have also given victims’ rights an almost inalienable status in international cases.156 As early as 1988, the Inter-American Court of Human Rights (IACtHR) held that the state’s duty to prosecute implies certain private rights for victims, including victim participation in enforcement.157 In 2006, the ICC began to allow direct victim participation in all court proceedings.158 In 2008, the Extraordinary Chambers in the Courts of Cambodia (ECCC) became the second international criminal tribunal to do so when it accorded victims the same rights to participation as other parties.159 The IACtHR, ICC and ECCC victim participation rights are similar in this regard to the French civil law system, in which victims of serious crime have the right to join and participate in ongoing criminal prosecutions as *parties civiles*, as well as rights to bring civil claims for damages.160

Finally, whistleblower protections for victims are also on the rise. In 2007, France introduced whistleblower protection legislation for its private sector.161 In February 2008, South Korea amended its Anti-Corruption Act to include whistleblower protection in the private sector.162 Other countries providing whistleblower protection include Belgium, Finland, Greece, Hungary, Israel, Japan, Mexico, New Zealand, Portugal, South Africa, the United Kingdom, and the United States.163

### III. Rediscovering the Proper Legal Framework

Modern ATS jurisprudence has not yet reached its statutory or constitutional limits. Human rights litigation has monopolized the debate over what constitutes a violation of the law of nations for purposes of the ATS for far too long. In order to move forward, stakeholders must

156. See *id.* at 784–85.
159. *Id.*
160. *Id.* at 474. ("This right to bring a civil claim before a juge d'instruction was recognized by the Cour de Cassation as early as 1906.").
162. See generally *id.*
163. *Id.*
rediscover the proper legal framework in which the ATS was originally conceived and then synthesize that understanding with the modern rules governing ATS cases, including the Supreme Court's seminal Sosa decision.

Historical context is critical to constructing the proper legal framework for a more balanced approach to the ATS. The original understanding of the statute's key terms can be gleaned from the earliest ATS judicial opinions and the writings of Emmerich de Vattel, a leading international law scholar in the late eighteenth century. These sources suggest the ATS is capable of playing a much more prominent role in international civil litigation, particularly with regard to disputes in which public and private rights intersect.

A. Taking a Positivist Approach to a Moral Problem

It is tempting to approach the question of whether the prohibition against foreign bribery is part of the law of nations as a moral question. "New" natural law theorists have insisted that whether a nation's law is unjust, or whether its custom or practice is censurable by the rest of the international community, cannot be determined apart from a discussion of various basic and irreducible aspects of human fulfillment.164 Incommensurable values—or as John Finnis calls them, "basic goods"—such as life, knowledge, sociability, and practical reasonableness (or freedom), can be enjoyed by members of the international community (so the argument goes) only when a set of conditions that rest on integrity and are free from corruption and bribery is created through law and government.165 These scholars view creating this ideal set of conditions as the joint responsibility of the international community at large.166

Similarly, international law scholars deeply entrenched in legal realism, such as those of the so-called New Haven School, have recognized that moral reasoning and policy choices play a critical role in the whole

164. See, e.g., John Finnis, Law and What I Truly Should Decide, 48 Am. J. Juris. 107, 112 (2003) (stating "[t]he principles of the rule of law are, at least in their main lines, moral requirements"); Robert P. George, Natural Law, 31 Harv. J.L. & Pub. Pol'y 171, 175, 196 (2008) (maintaining that there are certain incommensurable goods the fulfillment of which natural law theorists contend is the "justifying moral-critical point of law and legal systems," but also recognizing that complex legal "questions go beyond the application of moral principles"). Proponents maintain these "incommensurable goods" demanding human "fulfillment" are objective values that can be discerned through the exercise of reason.

165. John Finnis, Natural Law and Natural Rights 85–89 (1980). In addition to those listed, Finnis also includes play, aesthetic experience, and religion among the seven basic goods. Id.

166. See Robert P. George, In Defense of Natural Law 235–36 (1999) (arguing that the solution to many global problems requires the coordinated effort of the "complete" or self-sufficient community because a nation-state is not able to secure a citizens' overall well-being by itself).
process of authoritative decisionmaking. As Professor Koh put it, "the ‘new’ New Haven School [has] a renewed commitment to normativity: the recognition that positive theory should not be studied in isolation from normative ends." Most of these scholars judge universal, normative values by their degree of contribution to human dignity, which they place at the center of international law.

However, when determining whether foreign bribery violates the present-day law of nations, modern ATS case law looks beyond moral and ethical standards. When the Supreme Court found certain international laws to be actionable under the ATS, it based that decision on a more positivist kind of law of nations. The Sosa court noted there has been a change in the "prevailing conception of the common law" such that there is now "a general understanding that the law is not so much found or discovered as it is either made or created." The Supreme Court went out of its way in Sosa to reject the idea of law "as a discoverable reflection of human reason," looking at it instead "in a positivistic way, as a product of human choice."

For better or worse, this positivist approach to the law of nations is consistent with the dominant theory of international law during the early years of the United States. This Article focuses on the writings of Emmrich de Vattel because in 1789, when the ATS was enacted, Vattel’s dualist approach to the law of nations was more contemporary than the other leading international scholars of his day, including Hugo Grotius or William Blackstone. By that I mean two things. First, as demonstrated below, Vattel’s work was imminently more readable than the others. Perhaps the best evidence of this is the fact that Vattel’s work was republished more than fifty times. By comparison, the work of Hugo Grotius was reprinted less than a dozen times during the century.

171. Id. at 729, 744.
following the publication of Vattel’s work. Second, Vattel articulated a systematic way to transition from classical natural law theory to modern CIL at the precise moment in history when the Founding Fathers were formulating our American legal system. Thus, Vattel’s highly readable, relevant work played a pivotal role in bridging the gap between the old and new philosophies of law and government during the early years of the United States.

Both legal scholars and the courts, including the Supreme Court, have recognized the importance of the writings of Emmerich de Vattel to the Founders’ understanding of the law of nations. Vattel’s treatise, THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW, was widely read in America at the time of the passage of the ATS. In 1775, for example, Benjamin Franklin sent a note to Charles Dumas, an American diplomat in The Hague, thanking him for “the kind present [of his] edition of Vattel” and stating: “It came to us in good season, when the circumstances of a rising State make it necessary frequently to consult the law of nations.” Some scholars have argued “that a copy that Dumas, through Franklin, gave to the Philadelphia public library ‘undoubtedly was used by members of the Second Continental Congress . . .; by the leading men who directed the policy of the United Colonies until the end of the war; and later by the man who sat in the Convention of 1787 and drew up the Constitution of the United States.’”

173. Sosa, 542 U.S. at 714–16, 723–24 (citing Vattel four times in its attempt to return CIL to its proper historical context); see also U.S. Steel Corp. v. Multistate Tax Comm’n, 434 U.S. 452, 462 n.12 (1978) (“[Vattel was the] international jurist most widely cited in the first 50 years after the Revolution.”); Mark W. Janis, The American Tradition of International Law: Great Expectations 1789–1914, at 4 (2004) (“Blackstone, along with the Dutchman Grotius, and the Swiss Vattel, were principal sources of international law for early American lawyers.”).
174. See Vattel, supra note 4. The original French edition was published in 1758, and the first English edition was published in 1759. Both editions were widely circulated in America. The first American edition appeared in 1796, and was reprinted nineteen times in America by 1872. See Trout, supra note 172. This Article cites to one of the earliest of these subsequent editions published in 1797.
175. Letter from Benjamin Franklin to Charles Dumas (Dec. 19, 1775), in 2 The Revolutionary Diplomatic Correspondence of the United States 64, 64 (Francis Wharton ed., 1889).
stantial evidence suggests Vattel's views on the law of nations significantly influenced the passage of the ATS.\footnote{177}

Vattel strongly advocated a positive kind of law of nations. He maintained it is "necessary, on many occasions that nations should suffer certain things to be done, though in their own nature unjust and condemnable; because they cannot oppose them by open force, without violating the liberty of some particular state, and destroying the foundations of their natural society."\footnote{178} Statements such as this reflected a fundamental principle of sovereign equality Vattel described as "the natural liberty of nations"\footnote{179} or the "perfect equality of rights between independent nations."\footnote{180} For Vattel, equality was a natural right of sovereign states: "nations . . . are naturally equal and inherit from nature the same obligations and rights . . . . [A] small republic is no less a sovereign state than the most powerful kingdom."\footnote{181}

To apply this principle, Vattel distinguished the natural law of nations (what he called the "necessary" law of nations) from a more positivist "voluntary" law of nations.\footnote{182} The necessary law of nations corresponded to a kind of internal law that, while inviolable, only bound the conscience of a sovereign.\footnote{183} The voluntary law of nations, on the other hand, consisted of external rules derived from the nature of state-to-state relations but morally bound by the necessary law of nations. One source of these rules, for example, was the principle of non-intervention, which held that a sovereign state must "govern itself by its own authority and


\footnotetext{178}{Vattel, supra note 4, at lxiv.}

\footnotetext{179}{Id. at xv.}

\footnotetext{180}{Id. at 149; see also id. at 68 ("[A] nation ought not to suffer a foreigner to dictate laws to her."); id. at 156 (stating that the prince of the Inca Athualpa was "not at all accountable to [the Spaniards]" for the internal care of the government); id. at 160 ("[N]ations ought not to judge one another."). Other eighteenth-century lawyers understood that the law of nations was needed because the international community lacked any law-enforcing sovereign standing above all nations. See James Iredell's Charge to the Grand Jury of the Circuit Court for the District of South Carolina, Gazette of the United States, May 12, 1794, reprinted in 2 Documentary History of the Supreme Court of the United States, 1789–1800, at 459 (Maeva Marcus ed., 1988) (discussing "[t]he Law of Nations, by which alone all controversies between nation and nation can be determined").}

\footnotetext{181}{Vattel, supra note 4, at lxiii; see also id. at 462.}

\footnotetext{182}{Vattel, supra note 4, at lxii–lxiii.}

\footnotetext{183}{Id. at lxiii–lxvi.
Together, the "necessary" and "voluntary" branches formed what Vattel dubbed the "double" law of nations. The voluntary law comprised much less than the necessary (or natural) law; however, Vattel considered that limitation necessary to "avoid greater evils" against the principle of sovereign equality.

Vattel further divided the positive (or external) body of voluntary rights and obligations between sovereign nations into "perfect" and "imperfect" rights. Only "perfect" rights, according to Vattel, were actionable. Violations of imperfect rights, like violations of the internal law of conscience or even the sacred law, were not actionable. On this point, Vattel intentionally distanced himself from the classical natural law theories and even the Republican ideals of his predecessors.

In an effort to treat the subject more systematically, Vattel also divided the sources of the law of nations into three branches: conventional, customary, and universal. First, to the extent that parties agreed to and signed a treaty or other binding instrument, Vattel thought imperfect or internal rights could become perfect rights under the "conventional" law of nations. Second, a nation's customs and practices constituted "tacit consent" to certain rights and obligations being treated as perfect (at

184. Id. at 2.
185. Id. at xvii.
186. Id. at 383.
187. Id. at lxi—lxiii. This idea of perfect rights was also deeply rooted in other well-known writings on the law of nations referenced by the Supreme Court. See, e.g., 2 SAMUEL PUDFENDORF, DE JURE NATUAE ET GENTIUM LIBRI OCTO 127 (C.H. Oldfather & W.A. Oldfather trans., Clarendon Press 1934) (1688) ("Now an unjust act, which is done from choice, and infringes upon the perfect right of another is commonly designated by the one word, injury.") (emphasis added).
188. VATTEL, supra note 4, at lxii ("The imperfect right is unaccompanied by that right of compulsion.") (emphasis added); id. at lxiii ("[S]o long as they do not affect the proper and perfect rights of any other nation . . . other nations are bound to acquiesce in her conduct, since they have no right to dictate to her.").
189. See id. at vii (stating Hobbes "was mistaken in the idea that the law of nature does not suffer any necessary change" when applied to nations). Furthermore, Vattel agreed with his mentor, Christian Wolf, that "a rigid adherence to the law of nature cannot always prevail in that . . . society of nations," id. at xv, but thought it unnecessary to adopt Wolf's Republicanism ideal of civitas maxima, id. at xiii. Blackstone made a similar distinction between rules of civil conduct (based on municipal law) and rules of moral conduct (based on the law of nature and revealed law). See 1 WILLIAM BLACKSTONE, COMMENTARIES *45. However, Blackstone declared that all human laws (including the law of nations and municipal law) depend on natural law and divine law. Id. at *41—42. In particular, Blackstone believed the law of nations "depends entirely upon the rules of natural law, or upon mutual compacts, treaties, leagues, and agreements between these several communities: in the construction also of which compacts we have no other rule to resort to, but the law of nature." Id. at *43.
190. VATTEL, supra note 4, at lxv ("The several engagements into which nations may enter produce a new kind of law of nations, called Conventional, or of Treaties. As it is evident that a treaty binds none but the contracting parties, the conventional law of nations is not a universal but a particular law.").
least for those nations), unless or until such a nation specifically rejected
the rule as part of the "customary" law of nations.191 Finally, as explained
in a footnote by the editors of the American edition of 1849, nations
were presumed to have consented to the "universal voluntary law, or
those rules which are considered to have become law by the uniform
practice of nations in general and by the manifest utility of the rules
themselves."192 In order to rise to the level of a "universal" norm, Vattel
insisted that there must be empirical evidence that a concept be ac-
cknowledged by "all civilized nations."193

Vattel's three-tiered positive framework for the law of nations went
virtually unchallenged for over a century. During the early years of the
United States, the only notable American to take exception was James
Madison.194 Madison suggested treaties should be treated as separate and
independent of the other sources of the law of nations.195 Madison's view
must have carried some weight, because the ATS ultimately authorized
tort claims based on a "violation of the law of nations or a treaty of the
United States."196

Today, the law of nations is generally referred to as CIL.197 Some
assume the term includes conventional international instruments, such as
treaties, while others suggest CIL only reflects the customs and other
implied portions of the law of nations.198 Regardless, the decidedly posi-
tivist nature of the law of nations is now taken for granted.

191. Id. at lxv ("Certain maxims and customs, consecrated by long use, and observed by
nations in their mutual intercourse with each other as a kind of law, form the Customary Law
of Nations, or the Custom of Nations. This law is founded upon a tacit consent, or, if you
please, on a tacit convention of the nations that observe it towards each other. Whence it ap-
pears that it is not obligatory except on those nations who have adopted it, and that it is not
universal, any more than the conventional law.").
192. EMMERICH DE VATTEL, THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL
LAW APPLIED TO THE CONDUCT AND TO THE AFFAIRS OF NATIONS AND OF SOVEREIGNS, at
193. VATTEL, supra note 4, at xiii, 360, 470, 494. Vattel invoked Grotius for the proposi-
tion that the law of nations was a "system established by the common consent of nations," or
universal consent. Id. at v. Vattel also favored another then contemporary definition: the "laws
common to all nations." Id. at viii.
194. James Madison, An Examination of the British Doctrine, Which Subjects to Capture
a Neutral Trade, Not Open in Time of Peace, in 7 THE WRITINGS OF JAMES MADISON 204, 208,
238 (Gaillard Hunt ed., 1908).
195. See id.
197. See Khulumani v. Barclay Nat'l Bank, Ltd., 504 F.3d 254, 267 n.3 (2d Cir. 2007),
198. See generally Andrew T. Guzman, Saving Customary International Law, 27 Mich.
Law, 40 Va. J. INT'L. L. 449, 450–53 (2000); George Norman & Joel P. Trachtman, The Cus-
B. The Middle Ground

A.J. Bellia and Brad Clark, in their recently published article *The Federal Common Law of Nations*, insist that the law of nations is first and foremost about the relations between sovereign states. They argue the ATS was passed by Congress to "prevent state courts from offending the law of nations in ways that posed particular threats to the peace of the United States." They further demonstrate that historically, courts "enforced the law of nations in ways that avoided offending the sovereign rights of other nations." They present their approach as the middle ground between the Modernist view that the whole of CIL simply is federal common law, and the Revisionist view that CIL must first be affirmatively adopted by the political branches.

In large part, Vattel's writings strongly support this middle ground approach. Vattel referred to the law of nations as "voluntary" because it consisted of rules a nation was presumed to have voluntarily adopted when it became a civilized nation. Vattel articulated several fundamental principles underlying the voluntary law of nations, all of which dealt with the relations between sovereign states. To Bellia and Clark's credit, this author has been unable to find any other scholars who have recognized the importance of Vattel's notion of the "perfect" rights of sovereign states to the concept of the law of nations. However, their article focused on the structural support for their view of the law of nations in the constitutional allocation of powers under Article III. They did not attempt to catalog which violations of the law of nations should be recognized by federal courts. Consequently, they had little to say about the scope of private actions brought under the ATS.

There are three historical questions overlooked by Bellia and Clark that now need to be addressed in order to make sense of how the law of nations was employed in the ATS: first, who could seek judicial remedy for a violation of the law of nations; second, when was a nexus between a sovereign state's perfect rights and foreign commerce sufficient to trigger a violation of the law of nations; and third, to what extent could extraterritorial violations of the law of nations be punished? The answers

199. See generally Bellia & Clark, supra note 176.
200. *Id.* at 45.
201. *Id.* at 62.
202. VATTEL, supra note 4, at lxiv–lxvi.
203. *Id.* at lxiii–lxv.
205. *Id.* at 75 ("It is beyond the scope of this Article to catalogue those principles of the law of nations that the Founders would have deemed essential to upholding the constitutional allocation of powers."). They also stated that "the historical and structural paradigms we have identified do not, in and of themselves, definitively resolve all questions confronting courts today." *Id.* at 91.
to these questions potentially challenge Bellia and Clark’s conclusion that the law of nations only involves the perfect rights of sovereign nations.

C. Toward a More Balanced Approach to the Law of Nations

A more balanced approach to the ATS reveals several key aspects about violations of the present-day law of nations: first, a claim may be brought by certain persons whose individual rights intersect the perfect rights of sovereign states. These hybrid cases may include claims involving no direct state action and/or only economic damages. Second, a claim may require the exercise of universal jurisdiction in appropriate cases. Third, a claim not presently recognized in U.S. courts can and should be advanced through alternative transnational legal processes.

1. Judicial Cognizance of “Hybrid” International Cases

To determine whether a plaintiff has a viable ATS claim, most federal courts agree they must engage in two distinct analytical inquiries. First, the court must determine whether it has original subject matter jurisdiction under the ATS. The ATS, by its terms, confers jurisdiction when (1) an alien sues, (2) for a tort, (3) committed “in violation of the law of nations or a treaty of the United States.” Second, the court must determine whether to recognize a common law cause of action to provide a remedy for the alleged violation of international law.

The first inquiry concerns federal jurisdiction. The Supreme Court held that the ATS is jurisdictional in that it “gave the district courts ‘cognizance’ of certain causes of action.” This required, among other things, that courts conduct careful analysis of whether the underlying conduct is a violation of the present-day law of nations or a treaty of the United States, which has at least the possibility of a remedy in law. If the defendant is a private individual or corporation, then the Sosa court stated in a footnote that “[a] related consideration is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued.”

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209. Id. at 732 n.20. This implicitly affirms the cognoscibility of ATS claims against corporate defendants.
There is no “single, definitive, readily-identifiable source” of the present-day law of nations.210 Possible sources include all those recognized by Blackstone, Vattel, and the Supreme Court: (1) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; (2) international custom, as evidenced by a general practice accepted as law; (3) the general principles of law recognized by civilized nations; and (4) the rules of law reflected in judicial decisions and scholarly legal writings.211

Most of the international law derived from these sources involves state-to-state relations.212 The law of nations, as understood at the time of the passage of the ATS, was founded primarily on state consent, not on the law of nature. This meant that unless a nation affirmatively agreed to it, a right or obligation could not be treated as “perfect,” or actionable. By and large, the only international law actually consented to by nations dealt with relations between states, either express or implied. Early on, practical issues such as the rights of ambassadors naturally dominated the content of the law of nations.213 There were, however, certain fundamental principles to which all nations could be presumed to have consented by virtue of their standing as members of the civilized world. For example, all civilized nations were expected to provide safe passage for foreign citizens traveling through their territory.214

These perfect or actionable rights dealt not only with foreign relations, but also with foreign commerce. Both “simultaneously threatened serious consequences in international affairs.”215 While nations normally have “imperfect rights” to external commerce, Vattel claimed that “per-

210. Abdullahi v. Pfizer, Inc., 562 F.3d 163, 173 (2d Cir. 2009) (citing Flores v. S. Peru Copper Corp., 414 F.3d 233, 247–48 (2d Cir. 2003)). The Second Circuit further stated that “norms of customary international law are ‘discerned from myriad decisions made in numerous and varied international and domestic arenas.’” Id. at 176 (citing Flores, 414 F.3d at 247–48).

211. See Vietnam Ass’n for Victims of Agent Orange v. Dow Chem. Co., 517 F.3d 104, 116 (2d. Cir. 2008) (citations omitted); Khulumani, 504 F.3d at 267 (citations omitted). This list corresponds to the sources identified by Article 38 of the Statute of the International Court of Justice (ICJ), to which the United States and all members of the United Nations are parties. See Statute of the International Court of Justice art. 38(1), June 26, 1945, 59 Stat. 1055, 1060.

212. See Bellia & Clark, supra note 176, at 19.

213. See Vattel, supra note 4, at 488 (“But it is not on account of the sacredness of their person that ambassadors cannot be sued: it is because they are independent of the jurisdiction of the country to which they are sent.”); William Blackstone, 1 Commentaries *247–48 (stating “[t]he rights, the powers, the duties and the privileges of ambassadors are determined by the law of nature and nations, and not by any municipal constitutions,” and that ambassadors may be punished for few if any offenses, “however atrocious in [their] nature”).

214. See Vattel, supra note 4, at 417–19; William Blackstone, 1 Commentaries *253.

fect rights” to foreign commerce can be obtained by conventional agreements—a fact recognized by other well-known writers. Additionally, certain disruptions of foreign commerce, such as piracy or highway robbery, for example, were considered actionable in any jurisdiction, with or without a treaty, because they affected “the common safety of mankind.”

Once a state’s right was perfected, the appropriate response, according to Vattel, to a direct violation of that right by another nation was defensive or offensive war. Take, for instance, the perfect right of justice. According to Vattel, “justice is the basis of all society, the sure bond of all commerce.” Although nations are not to judge one another, as a general rule, Vattel reasoned that a nation that “despise[s] justice in general, is doing an injury to all nations.” Thus, other nations had the right to repress manifest injustice for their own defense and safety. For Vattel, the authority to declare a just war also permitted other means of compulsion to redress, deter, and punish an intentional act of injustice.

On the other hand, perfect rights were also violated by the conduct of private persons. Although not every injustice violated the law of nations, if a nation approved or ratified the act of an individual who offended the citizen of another country, the matter then became a public concern. According to Vattel, the ratifying nation was considered “the real author of the injury, of which the citizen was perhaps only the instrument.” This supports the conclusion of the Supreme Court in Sosa that the drafters of the ATS chiefly had in mind “hybrid” international

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216. VATTEL, supra note 4, at 145.
217. See, e.g., CHRISTIAN WOLFF, 2 JUS GENTIUM METHODO SCIENTIFICA PERTRAC-TATUM 43–108 (Joseph H. Drake trans., Clarendon Press 1934) (1764) (describing how by agreement nations can obtain “perfect rights” to commerce).
218. United States v. Furlong, 18 U.S. (5 Wheat.) 184, 197 (1820) (“[Piratical murder] is against all, and punished by all... within this universal jurisdiction.”) (quoting VATTEL, supra note 4, at 229).
219. VATTEL, supra note 4, at lxxii–lxxiv, 160–61; see ROBERT L. HOLMES, Can War Be Morally Justified? The Just War Theory, in JUST WAR THEORY 197, 201–02, 207–08 (Jean Bethke Elshtain ed., 1992) (concluding that Vattel was heavily influenced by the just war tradition that war could be used to enforce international crimes or offenses by states).
220. See VATTEL, supra note 4, at 160.
221. Id. at 161.
222. Vattel explained that “it is not always necessary to have recourse to arms, in order to punish a nation,” id. at 282, and envisioned the use of economic sanctions, id. During a civil war he also supported assisting the party with “justice on its side.” Id. at 156; see J. Andrew Kent, Congress’s Under-Appreciated Power to Define and Punish Offenses Against the Law of Nations, 85 Tex. L. Rev. 843 (2007) (arguing that because the eighteenth-century law of nations was founded on an analogy between individual persons and states, states—not just individuals—could be punished for such offenses).
223. VATTEL, supra note 4, at 161.
224. Id.
cases in which individuals were harmed or injured by the violation of a perfect right of a state. 225

In such cases where the law of nations was indirectly violated, Vattel maintained that the appropriate response was to seek judicial remedy before, or in lieu of, declaring war. If the offense took place within its own territory, the offended state was free to punish the malefactor. 226 If the offense occurred elsewhere, the offending country was expected to use its judicial system "to compel the transgressor to make reparation for the damage or injury, if possible, or to inflict on him an exemplary punishment; . . ." 227 The ATS was likely enacted to ensure that the latter was a viable option in the United States. Failure to provide an opportunity for reparations would have left the United States "in some measure an accomplice in the injury, and . . . responsible for it." 228

These conclusions are supported by the three earliest ATS cases. First, two of the three were brought against non-state actors. 229 This confirms that private individuals were subject to the law of nations in the early years of the United States. 230 Second, all three involved economic rather than physical injuries. 231 There was nothing particularly shocking about the underlying facts: no genocide, no torture. 232 The first two instances, Bolchos v. Darrel and O'Reilly de Camara v. Brooke, involved essentially commercial matters while the third, Adra v. Clift, amounted to a child custody battle between two aliens. 233 However, in each case the

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226. Vattel, supra note 4, at 161.
227. Id. at 163.
228. Id. at 162.
229. See Bolchos v. Darrel, 3 F. Cas. 810 (D.S.C. 1795) (No. 1607) (upholding ATS jurisdiction over an action for the return or restitution of slave property which was on a Spanish vessel seized as a prize of war); Adra v. Clift, 195 F. Supp. 857 (D. Md. 1961) (upholding ATS jurisdiction over a child-custody suit between Lebanese nationals because the unlawful taking of a minor child from the custody of her father was a tort, and the use of a falsified passport, concealing the child's identity and nationality, and wrongfully transporting the child across a border violated the law of nations). But see O'Reilly de Camara v. Brooke, 209 U.S. 45, 51 (1908) (suggesting in passing that the ATS may be applicable to a claim that a U.S. officer illegally seized alien property in a foreign state).
230. See also Lopes v. Schroder, 225 F. Supp. 292 (E.D. Pa. 1963) (dismissing an alien longshoreman's claim under the ATS because the unseaworthiness of a vessel was not a violation of the law of nations, but expressly stating that the ATS applied when individuals violated the law of nations).
231. See cases cited supra note 229.
232. This characterization is not intended to minimize the injustice of slaves being treated as property in Bolchos; however, the federal district court of South Carolina in that case arguably employed the ATS to perpetuate the inhumane institution of slavery rather than combat such gross human rights violations. Bolchos, 3 F. Cas. at 811.
233. See cases cited supra note 229. But see Taveras v. Taveraz, 477 F.3d 767, 774 (6th Cir. 2007) (suggesting Adra was effectively overruled by Sosa).
plaintiffs made a good faith argument that the circumstances posed a potential threat to the law of nations, and the courts agreed.\textsuperscript{234}

2. Use of Universal Jurisdiction

The previous Section suggests that the ATS was likely enacted to provide aliens with a judicial remedy for violations of the law of nations occurring here in the U.S. Such a statute was necessary because foreign courts would have had limited extraterritorial reach over violations occurring here, and an alien's only alternative would have been to have his own country engage in diplomacy with or declare war against the U.S. As Vattel put it, nature only gives nations the right to inflict punishment "for their own defence and safety."\textsuperscript{235}

However, Vattel also recognized there are occasions when any nation's courts may exercise jurisdiction over claims arising from extraterritorial violations of the law of nations.\textsuperscript{236} This so-called universal jurisdiction was rooted in the idea that certain offenses affect the "common safety" of all nations.\textsuperscript{237} For Vattel, private actors such as pirates, robbers, poisoners, assassins, and incendiaries fell into this category.\textsuperscript{238} Nation-states were free to punish even extraterritorial crimes because their villains "violate[d] all public security, and declare[d] themselves the enemies of the human race."\textsuperscript{239}

Vattel extended the same reasoning to tyrants. He foresaw the possibility that a sovereign might be such a "monster" that the other nations of the world would have the right to "exterminate" him.\textsuperscript{240} However, Vattel was short on specifics regarding the line between a nation unjustly treating its own citizens and a nation posing a risk to the rest of humankind.\textsuperscript{241} Some scholars have suggested that it was not

\begin{footnotes}
\item 234. Id.
\item 235. VATTEL, supra note 4, at 108.
\item 236. See, e.g., Talbot v. Janson, 3 U.S. (3 Dall.) 133, 159–60 (1795) (Iredell, J.) (stating "all ... trespasses committed against the general law of nations, are enquirable, and may be proceeded against, in any nation").
\item 237. VATTEL, supra note 4, at 108.
\item 238. Id.
\item 239. Id.
\item 240. Id. at 18 ("We seldom see such monsters as Nero."); id. at 156–57 ("monsters ... whom every brave man may justly exterminate"); id. at 159 (stating that religious persecution could rise to the level of "manifest tyranny").
\item 241. Id. at 155–57 (concluding, however, that it was not a violation of the law of nations for an Incan prince to put his own subjects to death and stating that, "[a]s to those monsters who, under title of sovereigns, render themselves the scourges and horror of the human race, they are savage beasts, whom every brave man may justly exterminate from the face of the earth").
\end{footnotes}
until Nuremburg that the world had more concrete examples of when enough is enough.242

Finally, Vattel envisioned situations in which both public and private actors are responsible for the same offense. "[W]hen, by its manners, and by the maxims of its government it accustoms and authorises its citizens indiscriminately to plunder and maltreat foreigners," a nation "in general is guilty of the crimes of its members."243 Referring to the "Usbecks" in northern Asia under Genghis Khan, Vattel concluded that the nation was "guilty of all the robberies committed by the individuals of which it [was] composed."244

However, it is difficult to reconcile judicial actions of one nation that were contrary to the interests of another with the doctrine of sovereign equality. To compensate, Vattel relied heavily on the notion that universal jurisdiction requires the consent of all nations on the specifics of each particular norm.245 Vattel flatly appealed to those rights and obligations which could be shown empirically to be widely accepted by all nations.246 Since then, the Sosa court has added the requirement that the empirical evidence not only demonstrate that the norm is universally accepted but also that it is well-defined.247 Finally, the Second Circuit has emphasized that these universal, specific norms of the international community must have evolved "out of a sense of legal obligation and mutual concern."248 Under these standards, universal jurisdiction has been used to enforce the law of nations without regard to territoriality. Courts have moved beyond piracy, safe travel, and ambassador rights to proscriptions against torture, slave trading, hijacking of aircraft, genocide, and war crimes.249

243. VATTEL, supra note 4, at 164.
244. Id.
245. Id. at xiii, 360, 469, 494. Some incommensurable rights are still not recognized under positive law. This is because they are the exception rather than the rule in international law. Adherence to these moral norms is best achieved through informal, transnational legal processes.
246. Id. at vi–vii.
248. Flores v. S. Peru Copper Corp., 414 F.3d 233, 248 (2d Cir. 2003). The Second Circuit has continued to impose this requirement in its post-Sosa decisions. See, e.g., Vietnam Ass'n for Victims of Agent Orange v. Dow Chem. Co., 517 F.3d 104, 116 (2d Cir. 2008).
3. The Possibility of a Private Remedy at Common Law

Once the court establishes jurisdiction, it must then determine whether a federal common law tort cause of action is available to provide a remedy for the alleged violation of international law.\(^{250}\) This presents an inherent limitation on a federal court's power to remedy the violation of international norms.\(^{251}\) There is no international equivalent to common tort law; therefore, the use of the phrase "tort only" in the statute has several implications.

First, it reflects an effort to hold individuals responsible for violations of the law of nations. As William Blackstone explained, "in vain would nations in their collective capacity observe these universal rules, if private subjects were at liberty to break them at their own discretion, and involve the two states in a war."\(^{252}\) There is considerable historical evidence that the ATS was passed in part because state courts had failed to hold individuals consistently liable for violating the law of nations.\(^{253}\)

In addition, even in the late eighteenth century the term "tort" was broad enough to encompass both physical and economic torts. At the time the Judiciary Act was enacted, "torts" included all those civil wrongs not arising from contract law.\(^{254}\) Furthermore, there is no indication that Congress intended to distinguish domestic law torts from international ones.\(^{255}\)

Finally, the term "tort" indicates that the international norm only has to suggest the potential for private remedy. If it does, federal common law can be used to fill in the gaps, so to speak. As the Sosa court explained, "[t]he jurisdictional grant is best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time."\(^{256}\)


\(^{251}\) See Sosa, 542 U.S. at 726, 729. Under Erie, judicial cognizance under the federal common law is limited to peculiarly federal interests such as foreign relations and foreign commerce. \textit{Id.}

\(^{252}\) \textit{WILLIAM BLACKSTONE, 4 COMMENTARIES *68.}

\(^{253}\) \textit{See JANIS, supra note 173, at 56 ("[I]t was the inability of the United States under the Articles of Confederation to live up to its obligations as a sovereign state under international law which proved to be one of the principal causes of the downfall of that early form of US government."); Beth Stephens, \textit{Federalism and Foreign Affairs: Congress's Power to “Define and Punish... Offenses Against the Law of Nations”}, 42 WM. & MARY L. REV. 447, 466 (2000).}

\(^{254}\) Filartiga v. Pena-Irala, 577 F. Supp. 860, 862 (E.D.N.Y. 1984) (relying on Sir Edward Coke's broad definition of a tort as any "wrong" that is "wrested" or "crooked" and as simply the "opposite of right").

\(^{255}\) \textit{Id.} at 862–63.

4. Judicial Caution Rooted in the Sovereignty of Foreign States

Once the two-part substantive analysis is successfully completed, there are still several procedural safeguards that must be satisfied. These include the principles of comity, forum non conveniens, the act of state doctrine and the political question doctrine. These all fall under the rubric of the Sosa court’s oft-repeated exhortation of judicial “caution” and are rooted in sovereignty concerns.

Today, sovereignty is seldom directly at issue in ATS litigation. In Filartiga and the first wave of cases filed after that seminal decision, the defendants were individual government officials and foreign governments. However, plaintiffs quickly realized that the ATS did not do away with sovereign immunity for nations and heads of state. Even after the Foreign Sovereign Immunities Act (FSIA) and Federal Tort Claims Act (FTCA) codified the restrictive theory of sovereign immunity, the U.S. and “foreign states” have continued to be entitled to a presumptive grant of immunity with certain exceptions.

In recent years, the focus of ATS litigation has shifted to corporate defendants in an effort to avoid the difficulties of sovereign immunity. However, this has only shifted the debate to more complex questions, such as the extent to which private individuals and corporations may be protected under the FSIA as an “agency” or “instrumentality” of the state.

As the Second Circuit noted, the five factors listed by the Sosa court do not require point-by-point application and analysis. However, these five factors still pose a “high bar to new private causes of action” under the ATS. In particular, the requirements that an ATS claim must be accepted by the civilized world and defined with a sufficient degree of specificity severely limit the number of viable claims.

In fact, the threshold requirement that a complaint be sufficient on its face to state a claim for relief may pose the greatest obstacle to future

263. Sosa, 542 U.S. at 727.
264. Id.
ATS litigation. In 2007, the Supreme Court announced the plausibility standard for pleadings in *Bell Atlantic Corp. v. Twombly*.²⁶⁵ According to the *Twombly* court, a complaint must go beyond reciting the elements of a cause of action.²⁶⁶ In 2009, the Supreme Court in *Ashcroft v. Iqbal* confirmed the general applicability of that standard *and made clear* any conclusory statements in the complaint are to be disregarded.²⁶⁷ Indeed, the Eleventh Circuit in *Sinaltrainal v. Coca-Cola*, recently dismissed an ATS case in part because the plaintiff could not meet the *Twombly/Iqbal* standard.²⁶⁸

Additionally, the fundamental principle of separation of powers requires courts to make sure that an ATS case does not interfere with U.S. foreign policy. The *Sosa* court suggested that principles of exhaustion might apply under certain circumstances,²⁶⁹ agreeing with the European Commission 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."²⁷⁰

Moreover, federal courts must still have personal jurisdiction over the defendants, not just the subject matter jurisdiction granted by the ATS.²⁷¹ For example, the $15.5 million settlement in *Wiwa v. Shell Petroleum Development Co. of Nigeria* was reached only after the Ninth Circuit vacated the district court's order dismissing the case for lack of

²⁶⁶. *Id.* at 555–56.
²⁶⁸. *Sinaltrainal v. Coca-Cola*, 578 F.3d 1252, 1266 (11th Cir. 2009); see also *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161, 166 (5th Cir. 1999) (upholding dismissal of an ATS suit alleging death threats, mental torture, house arrest, and surveillance because the plaintiff's conclusory statements "fail[ed] to provide adequate factual specificity as to what happened to him individually"). Although beyond the scope of this Article, this tougher threshold standard (and its resulting foreclosure on discovery) will have a disparate impact on international civil litigation for a number of reasons. The geographic distance between foreign parties, as well as the disparity in economic and political power between private plaintiffs and TNCs with their sovereign bedfellows make it more difficult for ATS plaintiffs to have access to the necessary evidence during the initial stages of litigation. Not unlike civil rights or employment cases, there is seldom a "smoking gun" document admitting complicity or intent in human rights cases. Therefore, most ATS cases must be built on circumstantial evidence about which a reasonable jury could disagree. The fact that such evidence must be painstakingly pieced together through costly discovery does not lessen, or in most cases outweigh, its probative value.
²⁷⁰. *Id.*
personal jurisdiction. The Ninth Circuit held the plaintiff had adequately alleged the defendant’s minimum contacts with the United States. 272

5. Incommensurable Rights and the Transnational Legal Process

The ATS was arguably drafted broadly enough by the first Congress to provide federal courts with the legislative or prescriptive jurisdiction to uphold nearly any inalienable right violated in an international dispute. If justice is a perfect right, for example, then the failure of the judicial branch to rise to such occasions would not only damage its reputation and relations with allied nations, but it would do inexcusable harm to the fundamental international principle of justice itself. 273 Admittedly this would involve courts in the task of looking to the “necessary” (natural) law of nations for guidance, but only because there is presumably no other choice in these brief moments in time when the positive law is found to be wholly unsatisfactory. 274

Alternatively, Vattel can be read more conservatively to say that the only legitimate way to remedy imperfect international rights, even incommensurable rights, is to ask other nations to comply or otherwise complain. By complain, Vattel meant to make an “officious and amicable representation” or to lawfully “intercede” without the threat of physical force.275 For Vattel, the goal of such efforts was to reach an agreement or consensus that could then be reflected in international law as a perfect right (at least between the parties to that agreement). In this context, moral arguments are presumably necessary and useful to the international law “perfecting” process. Once physical force is off the table, moral force can be allowed to speak. Even then, though, stakeholders must speak a common language; accordingly, most participants today use secular reasoning and avoid, for the most part, making reference to the sacred or holy.276

273. See William Blackstone, 1 Commentaries *61. Blackstone argued that “since in laws all cases cannot be foreseen or expressed, it is necessary that, when the general decrees of the law come to be applied to particular cases, there should be somewhere a power vested of excepting those circumstances, which (had they been foreseen) the legislator himself would have excepted.” Id.
274. This theory would be the international equivalent of Sterling Professor of Law Bruce Ackerman’s account of the constitutional history of the United States as a series of failed constitutional moments that led to support for large transformative ambitions such as the American Revolution, the Civil War, and the New Deal. See Bruce Ackerman, We the People: Vol. 1, Foundations 41–42 (1991).
275. Vattel, supra note 4, at 155, 159.
276. This may reflect the death of moral philosophy. On the other hand, it may simply be a carryover of the prejudices and protocols of the old regulatory model. Additionally, many of the participants in these new joint public-private sector efforts to develop international stan-
During the early years of the United States there was considerable use of international arbitration to resolve disputes. In today's international arena, this public discourse roughly equates to the preliminary stages of what several scholars call the "transnational legal process." This process was perhaps best summarized by Professor Koh:

[K]ey agents in promoting this process of internalization include transnational norm entrepreneurs, governmental norm sponsors, transnational issue networks, and interpretive communities. In this story, one of these agents triggers an interaction at the international level, works together with other agents of internalization to force an interpretation of the international legal norm in an interpretive forum, and then continues to work with those agents to persuade a resisting nation-state to internalize that interpretation into domestic law. Through repeated cycles of "interaction-interpretation-internalization," particular readings of applicable global norms are eventually domesticated into states' internal legal systems.

Once agreement is achieved through the varied transnational legal process, then U.S. courts can begin the arduous task of recognizing the international norm as part of the federal common law.

In the interim, however, U.S. courts can do more than wait for CIL to develop. Just as federal courts have increasingly turned to alternative dispute resolution (ADR) to resolve domestic litigation, particularly employment litigation, they should aggressively employ a similar mechanism for international disputes implicating incommensurable rights. In reality, this is probably already happening and would explain why most ATS cases have settled before going to trial.

IV. APPLICATION OF THE ATS TO FOREIGN BRIBERY

Using the above legal framework, an ATS claim against transnational corporations (TNCs) may be predicated on their bribery of foreign

dards still wear more than one hat. In these last two instances, it may simply be a matter of old dogs learning new tricks.

277. See JANIS, supra note 173, at 135 (noting the 536 awards of the Jay Treaty arbitrations between 1777 and 1804).
278. See, e.g., Koh, supra note 168, at 567-68.
279. Id.
280. Doe I v. Unocal Corp., 963 F. Supp. 880, 890-91 (C.D. Cal. 1997), aff'd in part, rev'd in part, 395 F.3d 932 (9th Cir. 2002), vacated and reh'g granted, 395 F.3d 978 (9th Cir. 2003), dismissed, 403 F.3d 708 (9th Cir. 2005) (en banc) (dismissing after the case settled out of court shortly before trial).
government officials. This conclusion is based on several assumptions. First, TNCs are subject to at least some legal obligations under the ATS. For several years, the basic notion of holding legal entities criminally liable generated considerable debate. This controversy culminated in the failed attempt to introduce criminal liability of corporations in the Rome Statute of the International Criminal Court. Since then, however, signatories to several international conventions have adopted the concept of corporate criminal liability. Furthermore, all (or nearly all) jurisdictions impose civil liability on TNCs in one form or another. Therefore, since the ATS merely authorizes federal courts to hear civil actions in “tort only,” most courts and scholars agree that ATS suits may be brought against TNCs. Even if that were not the case, individual liability of corporate officers and management is not strongly debated and can be almost equally effective.

Second, civil liability of TNCs for violating the law of nations under the ATS is achieved by courts applying domestic tort law. Again, there is considerable debate in the literature over the interplay between the statute’s phrases “tort only” and “a violation of the law of nations or a treaty.” However, the international norm against foreign bribery holds TNCs accountable by both criminal prosecution and private civil actions. Civil actions are universally accomplished using domestic laws, including the common law of tort. Therefore, as demonstrated below, a private tort action against a TNC for engaging in foreign bribery is squarely within the scope of CIL.

Finally, for purposes of this Article, it is assumed that the ATS does not extend liability for foreign bribery to foreign governments or their officials directly—an extension unsuccessfully attempted by the plaintiffs in RSM Productions v. Fridman. In a majority of circuits, any adverse governmental action taken by an official because of a bribe is deemed within his or her official capacity for purposes of immunity under the FSIA and not amendable to suit. The plaintiffs in RSM

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283. Id.
285. Id. at 395, n.8 (citing In Re Terrorist Attacks on Sept. 11, 2001, 538 F.3d 71, 80 (2d Cir. 2008), Byrd v. Corporacion Forestal y Industrial de Olancho S.A., 182 F.3d 380, 388 (5th Cir. 1999), Keller v. Centr. Bank of Nig., 277 F.3d 811, 815 (6th Cir. 2002), Chuidian v. Philippine Nat’l Bank, 912 F.2d 1095, 1101–03 (9th Cir. 1990), and Junquissit v. Sheikh Sultan Bin Khalifa Al Nahyan, 115 F.3d 1020, 1027 (D.C. Cir. 1997) for the majority rule that the immunity granted by the FSIA “extends to individual governmental officials for acts taken in their official capacity”).
Productions argued that under U.S. precedent, a Grenadian official's receipt of bribes violated international law. While this Article argues that is true, the Supreme Court also made clear in Amerada Hess II that the FSIA provides the sole basis for U.S. courts to exercise jurisdiction over a foreign state. Therefore, according to both a majority of circuit courts and the Southern District of New York, where individual government officials are treated as instrumentalities of the state, foreign officials cannot be held liable in their official capacity.

A. Application by Lower Federal Courts

A number of lower federal court decisions have seemingly concluded foreign bribery is not cognizable under the ATS. However, these cases largely beg the question and leave undone the sort of comprehensive analysis of CIL advocated by the Supreme Court. A summary of these decisions is set forth below.

1. IIT v. Vencap

The first appellate court to come close to addressing the foreign bribery issue was the Second Circuit in IIT v. Vencap in 1973. The Second Circuit held that ordinary corporate fraud was not a violation of international norms, and was therefore not a cognizable tort under the ATS.

IIT does not definitively exclude economic torts from the scope of the ATS for several reasons. First, it predated the Supreme Court's opinion in Sosa—a decision that signaled a return to the original scope of the law of nations which included purely commercial, non-shocking offenses. Second, global commerce has dramatically changed since IIT was decided. Third, and perhaps most importantly, IIT did not involve allegations of foreign bribery; unlike general corporate fraud, foreign

286. Id. at 391.
287. See Wiwa v. Royal Dutch Petroleum Co., No. 96 Civ. 8386(KMW), 2002 WL 319887, at *14 (S.D.N.Y. Feb. 28, 2002) (case attempting to establish vicarious liability under the ATCA of various individual and corporate defendants for actions taken by the State of Nigeria). But see RSM Prod. at 391 n.12 (“Plaintiffs have not even alleged that [one defendant] violated the law of nations, nor could they have under the formulation as revised under Sosa and Abdullahi.”).
289. But see Adam C. Belsky et al., Comment, Implied Waiver Under the FSIA: A Proposed Exception to Immunity for Violations of Peremptory Norms of International Law, 77 CAL. L. REV. 365 (1989) (arguing that courts should deny sovereign immunity when a state's violation of jus cogens injures an individual).
291. See id. at 1015. In fact, the Second Circuit later distinguished the underlying claims in IIT when finding allegations of torture actionable under the ATS in Filartiga v. Pena-Irala. Filartiga, 630 F.2d 876, 888 (2d Cir. 1980).
bribery directly implicates foreign government officials and therefore more closely reflects the sort of perfect rights arising from state-to-state relations that the law of nations protects.

2. Hamid v. Price Waterhouse

The only other appellate court to address a claim under the ATS predicated on purely commercial conduct, including bribery, was the Ninth Circuit in *Hamid v. Price Waterhouse*. The *Hamid* opinion arose from claims by depositors in the Bank of Credit and Commerce International that seventy-seven named defendants had committed corporate fraud and misused funds to finance international terrorism, narcotics trafficking, arms dealing, bribery of government officials, and approval of loans to bank insiders with no intent to seek repayment. The plaintiffs claimed that these activities violated the law of nations, thereby conferring jurisdiction pursuant to the ATS. Although the defendants’ conduct was international in scope, the Ninth Circuit held that “fraud, breach of fiduciary duty, and misappropriation of funds [including bribing bank regulators] are not appropriately considered breaches of the ‘law of nations.’” Rather, agreeing with the Second Circuit’s opinion in *IIT*, the Ninth Circuit deemed these activities to be “garden variety violations of statutes, banking regulations, and common law.” Furthermore, the appellate court found the plaintiffs’ complaint failed to meet the “stringent” requirement that the defendants’ conduct violate rules commanding the “general assent of civilized nations.”

However, the case did not reflect any consideration whatsoever of the possibility that the bribery of foreign officials itself violated international law, which suggests that it should not control. The *Sosa* opinion emphasized the importance of a more thorough, nuanced review of evidence of CIL in determining whether short-term arbitrary detention constituted a violation of the law of nations. Since the Ninth Circuit’s *Hamid* decision, the Second Circuit has relied on the OECD Anti-Bribery Convention to find that aiding and abetting is a violation of CIL.

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293. *Id.* at 1414.
294. *Id.* at 1417.
295. *Id.* at 1418.
296. *Id.*
298. *Id.* The court summarily concluded that “[b]ecause appellants’ claims of fraud, breach of fiduciary duty, and misappropriation of funds are not appropriately considered breaches of the ‘law of nations’ for purposes of jurisdiction under the Alien Tort Statute, Count IV was properly dismissed.” *Id.*
and thus actionable under the ATS. The Ninth Circuit in Hamid should have conducted a similar analysis of the probative value of all the existing anti-bribery conventions in support of foreign bribery, and hopefully will do so in a future case.

3. Several District Court Decisions

A few district courts have also had the opportunity to consider whether allegations of bribery are sufficient to state a claim under the ATS. The earliest such case was Mendonca v. Tidewater, Inc. The plaintiff Mendonca was a foreign employee who alleged he was forced by his employer to pay bribes to help the employer avoid taxes in his native country. Although it did not identify which treaties were cited by the plaintiff, the district court found that the plaintiff had failed to provide "solid support for his claim that the conduct complained of [rose] to the level recognized by the law of nations." In any event, the plaintiff was unlikely to have been able to satisfy the court, which asserted that the ATS applies "only to shockingly egregious violations of universally recognized principles of international law." As discussed in Part V(D)(1), this "shocking-only" standard is inappropriate post-Sosa.

In January 2004, a federal district court in Colorado in Maugein v. Newmont Mining Corp. rejected an ATS claim brought by plaintiff Patrick Maugein based on allegations that the defendant mine owners had bribed Peruvian judges to rule in their favor in a legal dispute over mining assets in Peru. In support of his claim that the defendants' conduct violated the law of nations, Maugein cited the OECD Convention as well as the OAS Convention Against Corruption. The judge admitted that "[c]ourts have reached differing conclusions as to the requirements for a treaty to provide a private remedy in tort" but found it did not have "to clear a path through this thicket" to decide Maugein's claim because the alleged bribes were not the proximate cause of his claimed injuries. Interestingly, Maugein was not a party to the underlying lawsuit filed in Peru but was rather a consultant working on contingency for the losing parties. Ironically, the defendants had attempted early on to

302. Id. at 302.
303. Id. (quoting Beanal v. Freeport-McMoran, Inc., 197 F.3d 161, 167 (5th Cir. 1999)).
305. Id. at 1130.
306. Id.
307. Id.
308. Id. at 1126–27.
discredit Maugein by accusing him of bribery and extortion. After the Peruvian court’s decision was finalized in Peru, Maugein unsurprisingly urged the losing parties to bring charges before the International Centre for Settlement of Investment Disputes (ICSID) alleging that the defendants had corrupted the Peruvian judicial system. When the ICSID dispute was finally settled, the parties expressly agreed in their settlement agreement not to assist or support Maugein in any of his potential claims. Nevertheless, the defendants continued their efforts to discredit Maugein in a Peruvian magazine article and in a book distributed in the United States telling their side of the story continued after the ICSID settlement. Based on these facts, the federal court concluded Maugein’s “economic interests, however characterized, were not the target of that [bribery] conduct.” Moreover, the district court ruled that defamation that does not involve the bribery of foreign officials is not a violation of the law of nations. Nothing in the Maugein decision, therefore, contradicts the notion that bribery of a foreign official causing an alien to be injured, economically or otherwise, is actionable under the ATS.

Since Sosa, the lower courts’ handling of bribery-based ATS claims has continued to be unpredictable. In late 2004, the district court for the Eastern District of New York held in Arndt v. Union Bank of Switzerland that German citizens could not bring a claim under the ATS against the successor of a German corporation that allegedly profited during the Nazi regime and failed to turn over assets belonging to the Holocaust victims.

In 2008, in Chowdhury v. WorldTel Bangladesh Holding, Ltd., the same Eastern District of New York district court considered evidence of bribery in support of a theory of aiding and abetting liability under the ATS. Initially, the court appeared open to the possibility that evidence that the defendant had bribed the Bangladeshi police to arrest and torture the plaintiff “[might] be actionable under the [ATS]” as aiding and abetting. However, the court quickly concluded the plaintiff in that particular

310. Id.
311. Id. (specifically Normandy Mining Ltd. expressly agreed not to assist or support Maugein in any of his claims).
312. Id.
313. Id. at 1130.
314. Id. at 1129–30.
case did not satisfy the *Twombly* plausibility standard. The court then attempted to foreclose on even the theoretical possibility of an aiding and abetting action based on bribery by insisting that the ATS requires not only state action but that the action be taken pursuant to a state policy. The court suggested that the ATS does not extend to situations in which the Bangladeshi police were aiding and abetting defendants who wanted to usurp a business opportunity. In a bit of twisted logic the court explained:

A private party can corruptly enlist state resources to accomplish his own ends, and if the means that the private party uses to make his agent, the state, accomplish that goal is the knowing violation of an international law norm, he should be liable as a principal for the violation. But that makes defendants principals, not aiders and abettors.

Construing the ATS so narrowly as to require action pursuant to a state policy (other than mere acquiescence to a private party’s unlawful agenda) is completely contrary to the original understanding of a violation of the law of nations at the time of the passage of the ATS.

In early 2009, a far better analysis of an ATS claim predicated on bribery was provided by the Southern District of New York in *RSM Production Corp. v. Fridman.* In that case, the district court could have been convinced that foreign bribery is actionable under the ATS as a violation of tacit or conventional international law. It questioned whether “an international instrument that ha[d] been ratified by only 37 countries sufficiently demonstrate[d] that bribery of a foreign public official is a ‘violation of international law’ within the meaning of the [ATS].” Recognizing that it did not have sufficient data to determine whether there was a custom prohibiting bribery, the court surmised that the plaintiffs could not have shown that the defendant had violated the law of nations because the defendant was the bribe-taker, not the bribe giver. In doing so, the court left open the possibility that private individuals and corporate defendants who make questionable payments to such officials may be in violation of the law of nations.

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320. *Id.*
321. *Id.* at 398.
322. *Id.*
B. Application as a Violation of the Conventional Law of Nations

In light of the foregoing case law, the adoption or execution of a treaty prohibiting foreign bribery may provide the best evidence that a prohibition of bribery is part of the law of nations—at least if enough nations are party to the treaty. Nevertheless, when a convention or treaty is sufficient, in and of itself, to provide a remedy under the ATS is a complex question. Further, some courts appear to draw a distinction between those treaties that are self-executing and those that require implementing domestic legislation, while other courts have held that limiting the inquiry to either narrow category is inappropriate. Some courts demand that international civil law give rise to the tort, while others find criminal codes equally convincing if they lend themselves to at least the possibility of a private civil remedy. Finally, some courts recognize that general norms apply to all potential defendants, while others require that the international law target particular types of defendants (for example, TNCs). These issues are explored below in the context of foreign bribery.

1. A Universal and Specific Criminal Offense

As mentioned earlier, there are no less than seven international anti-bribery conventions criminalizing foreign bribery, each signed and/or ratified by a number of countries. The OAS Convention has thirty-three signatories. All thirty members of the OECD plus eight other countries


324. See Flores v. S. Peru Copper Corp., 414 F.3d 233 (2d Cir. 2003). As discussed earlier, the definition of Vattel’s conventional law of nations overlaps considerably with the notion of “treaties,” which is also expressly invoked in the ATS. Here the terms are used interchangeably.


signed the OECD Anti-Bribery Convention, including all G7 countries. The European Union’s Criminal Law Convention on Corruption has forty-nine signatories, which is only slightly more than the forty-two signatories to its Civil Law Convention on Corruption. No fewer than forty-six member states have joined the related Group of States Against Corruption (GRECO), which focuses on capacity building. Twenty-eight countries have endorsed the ABD/OECD Action Plan. The efforts of the forty-four signatories to the A.U. Convention to combat corruption through international law have also been the focus of comparative law scholars. Finally, the most recent and largely subscribed to international anti-bribery conventions is the UNCAC, with 140 signatories to date.

The OECD Convention is one of the oldest and perhaps the most widely regarded of these agreements. It requires its signatories to criminalize the bribery of foreign public officials and to impose criminal penalties on those who give, offer, or promise any such bribes under their national laws—which all thirty-eight signatories have done. These countries provide more than two-thirds of the world’s exports.

As the first legally binding international convention on bribery, the UNCAC took anti-bribery efforts a step further by setting forth a framework for international cooperation in investigating and prosecuting cross-border cases. Article 38 of the UNCAC states: “Each State Party shall take such measures as may be necessary to encourage, in accordance with its domestic law, cooperation between, on the one hand, its

336. Id.
public authorities, as well as its public officials, and, on the other hand, its authorities responsible for investigating and prosecuting criminal offences.\textsuperscript{337}

Not only is there an amazing congruence between these various agreements over the definition of the conduct prohibited, but the terms are set out with a great deal of specificity as well.\textsuperscript{338} For example, the UNCAC criminalizes both active and passive bribery of foreign officials.\textsuperscript{339} These international conventions target private wrongdoers as well as state actors; in fact, most of the existing agreements explicitly focus on the bribe-givers rather than the bribe-takers,\textsuperscript{340} which evidences a universal intent to hold private individuals and corporations liable.

2. With the Possibility of a Private Civil Remedy

Although they lack express mandates for civil remedies, international agreements to criminalize bribery arguably evidence an international norm supporting a cause of action under the ATS. The Supreme Court in \textit{Sosa} admitted that even Blackstone’s three paradigmatic violations of the law of nations were derived from criminal codes existing in the late eighteenth century.\textsuperscript{341} In his majority opinion, Justice Souter assumed that both civil and criminal liability was well established for the Blackstonian offenses in the early United States. However, Justice Souter’s quotations from Vattel do not ascribe the same level of specificity for the civil remedy as they do for the criminal offense. In fact, these historical citations suggest the criminal law against piracy and the other Blackstonian offenses did most of the work in establishing these offenses as a violation of the law of nations. Yet, this did not preclude Justice Souter from concluding that a private civil action in tort may be brought for these mostly criminal violations. In the end, \textit{Sosa} can be fairly read to say the present-day law of nations need only provide for the “possibility” of a civil remedy.\textsuperscript{342}

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{337} UNCAC, \textit{supra} note 145, art. 38 (emphasizing the importance of robust “cooperation between national authorities”).
  \item \textsuperscript{338} Unlike the FCPA, the UNCAC does not explicitly provide an exception for facilitating payments. \textit{See} \textit{Stuart H. Deming, The Foreign Corrupt Practices Act and the New International Norms} 118 (2005). However, the Commentaries of the OECD Convention do carve out an exception for small facilitating payments. \textit{Id.} at 391. Likewise, the Juridical Committee Report accompanying the OAS Convention implies that party states may be able to exclude facilitating payments from their implementing legislation. \textit{Id.} at 103.
  \item \textsuperscript{339} UNCAC, \textit{supra} note 145, art. 15 (requiring criminalization of both).
  \item \textsuperscript{340} \textit{See}, \textit{e.g.}, OECD, \textit{supra} note 144, art. 1 (containing the typical language making it unlawful to “offer, promise or give” anything of value to a foreign public official).
  \item \textsuperscript{342} \textit{See id.} at 714.
\end{itemize}
\end{footnotesize}
International agreements other than the OECD Convention confirm the possibility of a civil remedy. The UNCAC, for example, mandates that nations provide a private cause of action for the victims of foreign bribery. Subtitled “Compensation for Damage,” Article 35 of the UNCAC states:

Each State Party shall take such measures as may be necessary, in accordance with the principles of its domestic law, to ensure that entities or persons who have suffered damages as a result of an act of corruption have the right to initiate legal proceedings against those responsible for that damage in order to obtain compensation.

Although Article 35 is cast in mandatory language, the travaux préparatoires state that “[w]hile article 35 does not restrict the right of each State Party to determine the circumstances under which it will make its courts available in such cases, it is also not intended to require or endorse the particular choice made by a State Party in doing so.” Thus, according to an implementation guide prepared by the United Nations Office on Drugs and Crime (UNODC), “[t]his does not require that victims should be guaranteed compensation or restitution, but legislative or other measures must provide procedures whereby it can be sought or claimed.” The official position of the United States is that its existing laws satisfy the Article 35 mandate for private remedies.

In addition to making foreign bribery a criminal and civil offense, Article 33 of the UNCAC requires states to consider enacting

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343. UNCAC, supra note 145, art. 35.
344. Id.
347. See Ad Hoc Comm. for the Negotiation of a Convention Against Corruption, supra note 312, ¶ 38 (stating that a country is free to “determine the circumstances under which it will make its courts available in such cases”).
whistleblower protection “against any unjustified treatment for any person who reports . . . any facts concerning [acts of corruption],” further empowering private attorneys general. 348 Article 34 enables nations to “consider corruption a relevant factor in legal proceedings to annul or rescind a contract, withdraw a concession or other similar instrument or take any other remedial action.” 349 Finally, Article 37 is available to encourage reporting of corrupt activities by requiring nations to consider “granting immunity from prosecution” in cases of self-incrimination. 350 Since it went into effect, the UNCAC has become the standard by which most countries and watchdog groups evaluate deficiencies in anti-corruption efforts. 351

Although none of the other anti-corruption instruments explicitly mandate a private right of action, they all acknowledge the importance of involving private parties in the fight against corruption and provide for specific measures to that end. For example, the A.U. Corruption Convention states that “State Parties undertake to . . . establish mechanisms to encourage participation by the private sector in the fight against unfair competition, respect for the tender procedures and property rights.” 352 Therefore, international law both prohibits foreign bribery and supports its private redress.

348. UNCAC, supra note 145, art. 33.
349. Id. art. 34.
350. Id. art. 37.
352. A.U. Convention, supra note 143, art. 11(2).
C. Application as a Violation of the Customary Law of Nations

Alternatively, these anti-bribery conventions constitute evidence that foreign bribery violates the customary law of nations. The customary law of nations is derived from the “customs and usages of civilized nations” and the broad acceptance of any emerging norm by the international community. The Second Circuit in Abdullahi held that “even declarations of international norms that are not in and of themselves binding may, with time and in conjunction with state practice, provide evidence that a norm has developed the specificity, universality, and obligatory nature required for ATS jurisdiction.”

This “tacit” CIL may include domestic laws implementing non-self-executing treaties as well as the myriad of decisions made by both international and domestic tribunals. The Second Circuit in Khulumani concluded CIL could be established by showing a pattern and practice of nations using domestic laws to remedy bribery-induced injuries.

The enactment of the FCPA in the United States, as well as similar legislation by numerous signatories to the international conventions (including major trading partners of the United States, such as the European Union, Australia, and Japan) clearly establish that nations have acted independently to outlaw foreign bribery. In fact, when Congress amended the FCPA in 1998 to conform with the OECD Convention’s requirement that states provide nationality jurisdiction over U.S. persons or firms who pay bribes in wholly foreign transactions, the Senate expressly relied on the “law of nations clause” as authorization for passing the FCPA.

D. Application as a Violation of the Universal Voluntary Law of Nations

Not only does foreign bribery violate the law of nations, it also implicates certain fundamental norms that merit peremptory authority over any bribe-giver. There is still considerable debate regarding the use of universal jurisdiction to hold corporations liable for violating the law of

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353. The Paquete Habana, 175 U.S. 677, 700 (1900).
354. Abdullahi v. Pfizer, Inc., 562 F.3d 163, 177 (2d Cir. 2009) (citation omitted). The Abdullahi court also stated that agreements “that have not been executed by federal legislation . . . are appropriately considered evidence of the current state of customary international law.” Id. at 176 (citation omitted).
355. See Sosa v. Alvarez-Machain, 542 U.S. 692, 734 (2004) (“[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.”) (quoting The Paquete Habana, 175 U.S. at 700).
nations. Some courts maintain that a claim must involve the most egregious and shocking jus cogens offenses in order to show that the acts were violations of the law of nations. Other courts are willing to relax this standard, but only for claimants who can show joint state action or "official complicity." Still others insist that if there is too much state action, courts should refuse to hear the case on grounds of the political question doctrine. All three points of this potentially fatal Bermuda triangle for ATS cases, and their impact on suits predicated on foreign bribery, are discussed below.

1. Jus Cogens Under the Mutual Concern Standard

Post-Sosa, U.S. courts have been gradually refining the list of violations of the law of nations that attach to non-state actors in the absence of any connection to state action. The California federal district court in Doe I v. Unocal Corp., for example, determined that a corporation could be held independently liable as a private actor under the ATS for certain offenses. According to Kadic v. Karadzic, even isolated cases of rape, torture, and summary execution "are actionable under the [ATS], without regard to state action, to the extent they are committed in pursuit of genocide or war crimes." Recent rulings have added slave trading,
slavery, and forced labor to that list.\textsuperscript{363} Thus, an alien can presently sue a corporation in tort under the ATS with regard to any of these so-called \textit{jus cogens} offenses, which literally translated means “compelling law.” However, \textit{jus cogens} has created a normative hierarchy that has led courts to read the ATS too narrowly. For example, courts in the Fifth Circuit\textsuperscript{364} and Second Circuit\textsuperscript{365} have attempted to limit ATS to claims based on only the most shocking violations of the law of nations.\textsuperscript{366} This is improper because a \textit{jus cogens} violation satisfies, but is not required to meet, the requirements of the ATS.\textsuperscript{367} Therefore, as I have argued thus far in the article, foreign bribery should be cognizable under the ATS, whether or not the norm is \textit{jus cogens}.

Alternatively, there are compelling arguments for expanding the scope of \textit{jus cogens}. Professors Criddle and Fox-Decent, for example, recently set forth a fiduciary theory that may give other fundamental norms peremptory authority.\textsuperscript{368} Although application of their theory to foreign bribery is beyond the scope of this Article, I would argue that there is no principled basis upon which to exclude foreign bribery from the list of \textit{jus cogens} offenses. On the contrary, foreign bribery implicates fundamental norms necessary for foreign relations and trade that merit its treatment as \textit{jus cogens}. The most appropriate test for \textit{jus cogens} is whether the transgressions are of “mutual” concern. Generally, this standard is satisfied in cases “involving States’ actions performed . . . towards or with regard to the other.”\textsuperscript{370} However, state action is not always necessary. The standard is also met where “nations of the world have demonstrated ‘by means of express international accords’ that the wrong is of mutual concern.”\textsuperscript{371} According to the Second Circuit, an important component of this test is “showing that the conduct in question is

\begin{itemize}
  \item \textsuperscript{363} See Wiwa v. Royal Dutch Petroleum Co., No. 96 Civ. 8386(KMW), 2002 WL 319887, at *9-10 (S.D.N.Y. Feb. 28, 2002).
  \item \textsuperscript{366} But see Doe v. Unocal, 395 F:3d 932, 945 n.14 (9th Cir. 2003) (defining \textit{jus cogens} as simply norms that are binding on all nations).
  \item \textsuperscript{367} Id. at 945, n.15.
  \item \textsuperscript{368} See Slawolsky, supra note 23, at 150.
  \item \textsuperscript{370} Abdullahi v. Pfizer, Inc., 562 F:3d 163, 185 (2d Cir. 2009) (citing Flores v. S. Peru Copper Corp., 414 F:3d 233, 249 (2d Cir. 2003)). This corresponds to the “perfect” or actionable rights of sovereign states.
  \item \textsuperscript{371} Id. at 185.
\end{itemize}
The prohibition against foreign bribery satisfies both of these requirements. The entry of over 180 nation states, in toto, into international agreements in over the last decade, and the subsequent passage by most of implementing domestic legislation, demonstrate that the world has acted in concert to outlaw bribery of government officials. As discussed earlier, they not only criminalize such conduct, they mandate civil remedies. In other words, acting out of a sense of mutual concern, "the nations [of the world] have made it their business, both through international accords and unilateral action," to demonstrate their intention to eliminate foreign bribery. Given this overwhelming evidence of international efforts to combat foreign bribery the offense should be included in the definition of jus cogens as a matter of mutual concern.

Moreover, foreign bribery poses a real threat to international peace and security. First, it can have a devastating effect on poor nations. Experts recognize the importance of globalization to poor nations and their ability to provide a decent standard of living for their populations. Globalization also offers enormous benefits for the rest of the world community. However, TNCs use bribery to manipulate poorer, developing countries into misappropriating funds or ignoring important health and safety regulations.

Second, foreign bribery poses a threat to national security by impairing relations with other countries. Trade agreements are strategically used to maintain regional stability and reduce the possibility of war. Most of the world's largest TNCs are from the United States, the European Union, and Japan. Foreign bribery by these corporations directly threatens relations between these countries because such conduct may foster distrust and resistance to foreign commerce.

Finally, foreign bribery on a grand scale implicates the most fundamental principles of international law. Just as genocide moves murder into the realm of universally actionable rights, so could a grand bribery scheme. After seeing the recent worldwide effects of Enron, MCI Worldcom, and other corporate corruption scandals, it is entirely plausible that a bribery scheme might also meet this demanding standard. Arguably, the U.N. Oil-for-Food Program and the A.G. Siemens fiascos already have.

372. Id. (citing Flores, 414 F.3d at 249).
373. Id. (citing Filaritiga v. Pena-Irala, 630 F.2d 876, 889 (2d Cir. 1980)).
374. See Shamir, supra note 7, at 637 (discussing the need of poor nations to attract and keep foreign investment is often paid for the citizens of the poor nation).
2. Aiding and Abetting

Alternatively, several circuit courts have recognized there is secondary liability for corporate acts facilitating the most shocking *jus cogens* offenses. Such secondary liability, according to the Second Circuit in *Kadic v. Karadzic*, requires the private actor to be operating under color of law, meaning "act[ing] together with state officials or with significant state aid."375

As discussed earlier, the district court in *Chowdhury* seemed to insist that aiding and abetting involve an underlying state policy rather than merely a state enticed to further a private actor's unlawful agenda. However, other courts have adopted a much broader concept of "aiding and abetting" that would encompass the bribery of foreign officials. For example, the Eleventh Circuit has extended the reach of corporate conspiracy liability to a large number of violations of international law.376 Had the jury verdict gone the other way, the defendant, Drummond Oil, would have been held liable for aiding and abetting not only the extrajudicial killing of three labor union leaders but also the "denial of fundamental rights to associate and organize."377 And in the next trial, it very well might.

Furthermore, courts recognize this aiding and abetting list will continue to grow as international criminal law continues to evolve. For example, although the *Filartiga* court held in 1980 that torture was actionable only if there was state action, the *Sosa* court implied that even isolated torture is now likely a violation.378 Indeed, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) held there is no need for a public official to be involved for a private individual to be responsible under CIL for the international crime of torture.379

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377. *See generally* *Romero v. Drummond Co.*, 552 F.3d 1303 (11th Cir. 2008). *But see* *Presbyterian Church v. Talisman Energy, Inc.*, 453 F. Supp. 2d 633, 663, 679 (S.D.N.Y. 2006) (dismissing the case because under the law of nations, "the offense of conspiracy is limited to conspiracies to commit genocide and to wage aggressive war," neither of which were alleged in the complaint).


It is indisputable that foreign bribery is one of the most common methods of aiding and abetting other more shocking crimes. For example, bribery played a prominent role in the judicial execution of two prominent activists in the recent Wiwa case which was eventually settled. Although bribery is frequently mentioned in passing as a precursor to severe human rights violations, the bribe itself is seldom analyzed as a potential violation of the law of nations.

More recently, however, in Khulumani v. Barclay National Bank, the Second Circuit allowed “aiding and abetting” to proceed as CIL violations under ATS in large part because of language in the OECD Anti-Bribery Convention. In fact, acceptance of bribes has been used as evidence of “willful blindness” to hold nations liable for torture under other laws. In the end, however, proceeding under a secondary liability theory ignores the unmistakable fact that foreign bribery itself offends the law of nations and should be included in the lists of jus cogens offenses permissible under the ATS.

3. Satisfying the Procedural Safeguards

A third issue always lurking in these cases is the necessity of satisfying procedural safeguards—particularly, courts must assess the sufficiency of the complaint and ensure that it states a claim for relief. Since the Supreme Court articulated the Twombly and Iqbal plausibility standards, procedural requirements have posed a challenge to plaintiffs bringing ATS claims. For example, the district court in Chowdhury v.


384. Zheng v. Ashcroft, 332 F.3d 1186 (9th Cir. 2003) (remanding a case in which an illegal alien was seeking relief from removal to China, and recognizing that the acceptance of bribes by Chinese police to allow refugees to pass through checkpoints constituted evidence of China's acquiescence or awareness of the torture). In this unique case, the government official’s acceptance of the bribe from a refugee trying to escape across the border constituted proof that the official knew or should have known the bribe-giver was facing an imminent threat. Id. at 1187. However, bribes also were alleged to have been directly responsible for facilitating the torture or other human rights abuses. See Wiwa, 2002 WL 319887.
WorldTel Bangledesh Holding, Ltd. suggested bribery could possibly give rise to an ATS claim, but found the particular allegations in the plaintiff’s complaint too vague and ambiguous to withstand dismissal.385

Moreover, the principles of comity, exhaustion, and forum non conveniens also pose a challenge in ATS cases. These doctrines require deference to foreign courts to the extent courts exist that have competing jurisdiction.386 Although international fora are generally not open to claims by private persons,387 there is some precedent for handling cases predicated on bribery in international fora. For example, in the late 1920s, a case involving two Mexican officers who shot a French national for failure to pay them a bribe was handled using international arbitration.388 Mexico was held responsible for their actions despite the fact that the officers were acting outside the scope of their authority.389

More recently, the World Bank’s International Centre for Settlement of Investment Disputes (ISCID) has arbitrated several cases involving bribery allegations.390 For example, in 2008 Argentina asked ISCID to reopen an earlier arbitration proceeding with Siemens and revise a $217 million arbitration award secured in 2007 by the German TNC because Argentina wanted arbitrators to consider new evidence that the disputed contract with Siemens for a national identification card system was secured by bribery.391 This came on the heels of Siemens entering plea agreements with German and U.S. authorities, in which they admitted to having paid several high-level Argentine officials multi-million dollar bribes.392

Finally, ATS claims predicated on foreign bribery must not impermissibly interfere with U.S. foreign policy. The Sosa court stated that courts should give “serious weight” to the Executive Branch’s view of the impact on foreign policy that permitting an ATS suit would likely have in a given case or type of case.393 Fortunately, most of the

389. Id.
390. See Vega, supra note 9, at 457–58 (citing three ISID cases involving bribery).
392. Id.
considerable body of international law against foreign bribery focuses on the bribe-giver not the bribe-taker. For example, the court in *RSM Production* noted that the OECD Convention only requires signatory countries to pass legislation making it a crime for an individual to bribe a foreign official. The OECD Convention does not attempt to regulate the behavior of foreign public officials directly.394 Of the seven international conventions addressing foreign bribery, only one, the UNCAC, extends liability to public officials.395 Therefore, there is little chance a federal court would hold that a foreign public official acted in direct violation of the international law.396

Consequently, cases predicated on foreign bribery do not necessarily create any political question problems. In the matter of *Environmental Tectonics v. W.S. Kirkpatrick, Inc.*, the plaintiff alleged its competitors had obtained a Nigerian defense contract through bribery of Nigerian government officials.397 The district court requested a Bernstein letter, that is, an opinion from the State Department on whether the act of state doctrine should be applied in the circumstances presented by a particular case. The State Department’s Legal Advisor responded by stating, in pertinent part, that “the State Department [was] satisfied that the conduct of American foreign policy relative to Nigeria [would] not be compromised by orderly federal court adjudication of ETC’s lawsuit.”398 Although the appellate court initially reversed the district court’s decision, ultimately the Supreme Court held the act of state doctrine does not apply because neither the claim nor any asserted defense required the court to declare invalid the official act of a foreign sovereign.399


395. UNCAC, supra note 145, at art. 15.

396. It should be noted that I disagree with this proposition as a matter of public policy. The historical notion of equality among states requires at the same time a broad conception of instrumentality for purposes of liability and a narrow conception of instrumentality for purposes of sovereign immunity. Once those fundamental principles are properly understood, it is an easy task to extend international law to hold foreign officials liable as bribe-takers. On the flip-side, there are compelling policy reasons why the United States should not be held liable for bribing certain foreign officials to be informants and spies in prosecuting the war on terrorism or drugs or similar efforts.


398. Id. at 1062.

CONCLUSION

Throughout history, bribery of foreign officials was commonly understood to violate the law of nations. However, under modern ATS case law, human rights violations have been generally perceived as the greater threat to our international community. Out of fear of the slippery slope, courts have narrowly circumscribed ATS lawsuits around these more sensationalized types of ATS claims and refused to open the door to any outliers raising only economic torts. As a result, foreign victims of bribery have been left without redress in U.S. courts. Ironically, until they are held liable for it, TNCs will continue to use bribery to facilitate the most horrid crimes against humanity. There is no reason to forego the opportunity provided by the ATS to use international civil litigation to help prevent the corruption of government officials where it starts, with bribery and the greed it fosters.

Balancing on the precipice of judicial cognizance and caution, federal courts are uniquely positioned to enforce CIL against foreign bribery. There is ample evidence to support judicial cognition of the prohibition against foreign bribery as an international norm with the possibility of a common law remedy against TNCs. Over half a dozen international anti-bribery conventions condemn bribe-giving in no uncertain terms, and virtually every country on the face of the earth has outlawed it. At the same time, enough of Vattel's doctrine of sovereign equality has been preserved in the substantive and procedural parts of the federal common law governing international disputes, including the act of state doctrine and other modern conflict of laws principles, to ensure that federal courts will exercise the necessary judicial caution to prevent ATS-actions predicated on foreign bribery from unduly burdening foreign relations or foreign commerce.