ARTICLE

The Original Meaning of the Law of Nations

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The Alien Tort Statute, originally enacted as part of the Judiciary Act of 1789, confers on federal courts jurisdiction over civil suits alleging violations of "the law of nations." Whereas scholars and lower courts alike have assumed that customary international law is the modern equivalent of the law of nations, this Article reveals that this conflation is mistaken. The term "the law of nations," as commonly used at the time of the statute's enactment, primarily reflected the dominant view that the law of nations was an extension of natural law. While some writers discussed rules derived from the implicit consent of nations (the modern equivalent of customary international law) in their commentaries on the law of nations, the prevailing view at the time was that it did not belong in a systematic treatise on the law of nations. The implication is that "the law of nations" as understood in the eighteenth century encompassed rules that are better conceptualized as peremptory rules of international law (jus cogens), rather than customary international law. This understanding is of critical importance under the Supreme Court's instruction that modern suits brought pursuant to the Alien Tort Statute rest on a norm that is comparable to the features of the eighteenth-century paradigms. By developing what I term the "revisionist historical paradigm," this Article provides a workable doctrinal framework to evaluate modern Alien Tort Statute litigation in line with recent Supreme Court jurisprudence.

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INTRODUCTION

It is a fairly uncontroversial statement that the starting point for interpreting a statute is the language of the statute itself.[1] This simple canon of construction, however, has limited application because statutory texts are often ambiguous or so old that a once-clear meaning has become difficult to decipher due to a change in linguistic expectations or legal culture.[2]

The latter case may be illustrated by the Alien Tort Statute ("ATS"), originally enacted as part of the Judiciary Act of 1789. Under this statute, district courts have original jurisdiction over any civil action by an alien for torts "committed in violation of the law of nations[.]"[3] The statute, one

1. *See* Sebelius v. Cloer, 133 S. Ct. 1886, 1896 (2013); *see also* Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980) ("We begin with the familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive."); Arthur W. Murphy, *Old Maxims Never Die: The "Plain-Meaning Rule" and Statutory Interpretation in the "Modern" Federal Courts*, 75 COLUM. L. REV. 1299 (1975).

2. *See* Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61, 61 (1994).

3. The present version of the ATS, dating back to 1948, 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." 28 U.S.C. § 1350 (2012). The original version of the statute, passed as a clause of the Judiciary Act of 1789, provided that federal district courts "shall also have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States." Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 77. Prior to the 1948 version, Congress revised the statute slightly in 1874 and 1911. *See* Thomas H. Lee, *The Safe-Conduct*

of Congress' earliest enactments that has remained largely dormant for two centuries,[4] has been relied on by noncitizens in recent decades to bring a variety of civil damages actions against multinational corporations in federal courts, primarily alleging human rights violations taking place abroad.[5] While academic commentaries have proliferated regarding the reach of the Alien Tort Statute after the Supreme Court's landmark decisions in *Sosa v. Alvarez-Machain*[6] and *Kiobel v. Royal Dutch Petroleum Co.*,[7] significant questions remain unanswered.[8]

This Article contributes to the discussion by challenging the prevailing view on the meaning of "the law of nations." Outlining the historical conceptions of the law of nations may seem like a purely academic exercise in satiating the curiosity of legal historians. However, it also has important practical relevance to any lawyer seeking to understand which civil suits claiming violation of international law are actionable in federal courts. In the seminal case of *Sosa v. Alvarez-Machain*, decided in 2004, the Supreme Court instructed courts to "require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the *18th-century paradigms*."[9] Thus the question remains: what are present-day law of nations violations?

Conventional wisdom holds that the term "law of nations" is the modern equivalent of customary international law.[10] Observing that customary international law descended from the law of nations,[11] modern

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Theory of the Alien Tort Statute, 106 COLUM. L. REV. 830, 832 n.5 (2006). This jurisdictional grant is authorized by Article I of the Constitution of the United States, which gives Congress the power to "define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations." U.S. CONST. Art. I, § 8, cl. 10.

4. *See* Lee, *supra* note 3, at 831–32.

5. The Alien Tort Statute has also been the central topic for academic debates over the status of international law in U.S. courts *See, e.g.*, Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997) [hereinafter Bradley & Goldsmith, *Critique of the Modern Position*]; Lea Brilmayer, *Federalism, State Authority, and the Preemptive Power of International Law*, 1994 SUP. CT. REV. 295, 309–10 [hereinafter Brilmayer, *Preemptive Power of the International Law*]; Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824 (1998) [hereinafter Koh, *Modern View*]; Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347 (1991).

6. Sosa v. Alvarez-Machain, 542 U.S. 692 (2004).

7. Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2013).

8. *See, e.g.*, *id.* at 1669 (Kennedy, J., concurring) ("The opinion for the Court is careful to leave open a number of significant questions regarding the reach and interpretation of the Alien Tort Statute."); Anthony J. Bellia Jr. & Bradford R. Clark, *The Alien Tort Statute and the Law of Nations*, 78 U. CHI. L. REV. 445, 445 (2011) ("Courts and scholars have struggled to identify the original meaning of the Alien Tort Statute (ATS).").

9. Sosa, 542 U.S. at 725 (emphasis added).

10. *See infra,* Part II.A.

11. *See, e.g.*, Siderman de Blake v. Republic of Arg., 965 F.2d 699, 714 (9th Cir. 1992) (describing customary international law as "the direct descendant of the law of nations.").

scholars and federal courts alike have conflated the use of the two terms.[12] The Second Circuit, for instance, explains that it has "consistently used the term 'customary international law' as a synonym for the term the 'law of nations.'"[13] The present exercise reveals that the conventional understanding of the term, at least in the ATS context, is mistaken.[14]

Some jurists at the time might have believed that the law of nations included laws deriving from the implicit consent of nations (the modern equivalent of customary international law);[15] however, the dominant view at the time was that the law of nations was an extension of natural law. Whereas modern customary international law deduces rules from the practice of states (drawing its legal force from implicit consent, a central tenet of positive law), natural law draws its legal force by the virtue of being inherent or universally cognizable human reason or nature.[16] The implication is that "the law of nations" encompasses rules that are better conceptualized as peremptory rules of international law (*jus cogens*), than as customary international law.

Of course, the difference in beliefs about sources does not necessarily mean that there are two different bodies of law. It may simply mean that there is disagreement about the source of a single body of law. For example, one chemist may believe that fire is caused by oxidation of flammable material while another believes that fire is caused by appearance of phlogiston. However, the differences in sources for these laws are of critical importance here because unlike customary international law, which includes a vast range of rules regulating contemporary inter-state relations,

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12. *See, e.g.*, Bellia Jr. & Clark, *supra* note 8, at 458 (stating that district courts have interpreted "the ATS to permit aliens to sue other aliens for actions taken outside the United States in violation of modern norms of customary international law"); David F. Klein, *A Theory for the Application of the Customary International Law of Human Rights by Domestic Courts*, 13 YALE J. INT'L L. 332, 336 (1998) ("By referring to 'the law of nations' as distinct from treaties, such litigants imply that the Alien Tort Statute is an effective congressional ratification of customary international law."); Eugene Kontorovich, *Implementing* Sosa v. Alvarez-Machain*: What Piracy Reveals about the Limits of the Alien Tort Statute*, 80 NOTRE DAME L. REV. 111, 112 (2004) (describing the law of nations as "now commonly called customary international law (CIL)"); Julian Ku & John Yoo, *Beyond Formalism in Foreign Affairs: A Functional Approach to the Alien Tort Statute*, 2004 SUP. CT. REV. 153, 201 (using "the law of nations" and "customary international law" interchangeably); *see also infra,* Part II.A. (collecting cases from the courts of appeals).

13. Flores v. S. Peru Copper Corp., 414 F.3d 233, 237 & n.2 (2d Cir. 2003); *see also* Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 116 & n.3 (2d Cir. 2010) ("In this opinion we use the terms 'law of nations' and 'customary international law' interchangeably.").

14. I limit my views on the meaning of the law of nation to the ATS context. While this Article may also offer insight into understanding the use of the term as it appears in Article I of the U.S. Constitution, I leave that topic for future scholarly debate.

15. According to the Restatement on Foreign Relations, customary international law is the law of international community that "results from a general and consistent practice of states followed by them from a sense of legal obligation." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987).

16. *See* Josef L. Kunz, *Natural-Law Thinking in the Modern Science of International Law*, 55 AM. J. INT'L L. 951, 951–52 (1961).

jus cogens norms are limited to a handful of norms considered to be the most fundamental principles of international law.[17] More importantly, whereas customary international law derives solely from the consent of states, *jus cogens* transcend consent, as exemplified by the theories underlying the judgments of the Nuremberg tribunals following World War II.[18]

The distinctions between customary international law and *jus cogens* have significant doctrinal implications. Importantly, this historical paradigm provides a workable framework to evaluate whether claims raised by ATS litigants in the modern era — ranging from terrorism and torture to extrajudicial killings — are actionable in federal courts. Because norms that are recognized as *jus cogens* violations are limited to those that are fundamental and universally accepted, this understanding of the law of nations sits well with the Supreme Court's instruction that the causes of actions recognized by the ATS ought to be modest, and are properly limited to international norms that are "specific, *universal*, and obligatory."[19] Unlike some of the lower courts that have conflated the law of nations with customary international law, the *Sosa* Court carefully drafted the opinion to avoid using both terms interchangeably. Instead the *Sosa* Court requires lower courts to evaluate present-day law of nations violations based on the historical understanding surrounding these terms.[20]

From an academic point of view, this Article helps reorient the debate over the meaning of the law of nations by developing a paradigm focusing on the *source* of a law in order to develop a *method* for evaluating ATS claims. This paradigm departs from prevailing accounts whose expeditions have been constrained by the modern conception of customary international law.[21] While privileging sources that have been favored by the

17. *See generally* Gordon A. Christenson, Jus Cogens*: Guarding Interests Fundamental to International Society*, 28 VA. J. INT'L L. 585 (1988).

18. Siderman de Blake v. Republic of Arg., 965 F.2d 699, 715 (9th Cir. 1992) ("The universal and fundamental rights of human beings identified by Nuremberg—rights against genocide, enslavement, and other inhumane acts . . . — are the direct ancestors of the universal and fundamental norms recognized as jus cogens.").

19. Sosa v. Alvarez-Machain, 542 U.S. 692, 732 (2004) (emphasis added) (quoting *In re* Estate of Marcos Human Rights Litig., 25 F.3d 1467, 1475 (9th Cir. 1994)) (internal quotation marks omitted).

20 *Id.* ("[F]ederal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted.").

21. The prevailing account typically blends descriptive assessments of whether sufficient international norms are formed with various normative theories to evaluate why certain modern torts should or should not be actionable under the ATS. *See, e.g.*, Michele Brandt, Comment, Doe v. Karadzic*: Redressing Non-State Acts of Gender-Specific Abuse under the Alien Tort Statute*, 79 MINN. L. REV. 1413 (1995); Jenny S. Lam, *Accountability for Private Military Contractors Under the Alien Tort Statute*, 97 CALIF. L. REV. 1459, 1465, 1498 (2009) ("Part III takes a step back to consider the broader arguments for and against PMC tort liability under the ATS . . . Given the lack of accountability for most PMC abuses thus far, the U.S. government can essentially circumvent customary international human rights law by contracting with PMCs."); Jennifer J. Rho, *Blackbeards of the Twenty-First Century: Holding*

Supreme Court in its discussion of the law of nations, other canonical publicists of the law of nations are consulted in order to present a more historically authentic view on the subject. Because no single account of the subject may fully capture the linguistic plurality and the contested scope of the term subscribed to by eighteenth-century jurists, this Article presents a broad sketch of accounts in order to develop the revisionist historical paradigm, with the hope that future research can build on this model to further uncover the meaning of this important historic term.

The contributions of this study are twofold. First, it presents a novel set of quantitative data historicizing the use of the terms "customary international law" and "the law of nations" in U.S. courts, revealing the relatively recent origin of the term "customary international law." The study then delves into the dominant legal paradigm subscribed to by early canonical writers in using the term "law of nations," developing the conceptual link between the law of nations and modern *jus cogen* norms. It is prudent here to acknowledge that this is not the first time that someone has argued that the term "the law of nations" should be read to include *jus cogens* norms. A small number of defendants in ATS proceedings, for instance, have raised this line of argumentation in an effort to limit the types of actions that they are liable for under the statute.[22] While these defendants pled for a narrow interpretation of the law of nations based on various doctrinal and normative grounds, this Article is the first to demonstrate, based on an examination of the shared legal paradigm subscribed to by jurists at the time of the ATS's enactment, that the best translation of the law of nations in the ATS context today is *jus cogens*.

The remainder of this Article proceeds in four steps. In Part I, I review the Supreme Court's seminal decisions in *Sosa* and *Kiobel* to ascertain the viability of ongoing ATS litigation. In Part II, I review the modern assumption equating customary international law with the law of nations and counter it with historical evidence documenting the natural law foundations of the law of nations. In Part III, I develop the "revisionist historical paradigm" and use a hypothetical to illustrate how the historical paradigm can help courts decipher which kinds of modern law of nations

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Cybercriminals Liable under the Alien Tort Statute, 7 CHI. J. INT'L L. 695 (2007); Matt A. Vega, *Balancing Judicial Cognizance and Caution: Whether Transnational Corporations are Liable for Foreign Bribery under the Alien Tort Statute*, 31 MICH. J. INT'L L. 385, 447 (2010) ("There is ample evidence to support judicial cognition of the prohibition against foreign bribery as an international norm…[and] federal courts will exercise the necessary judicial caution to prevent ATS-action . . . from unduly burdening foreign relations or foreign commerce.").

22. Alvarez-Machain v. United States, 331 F.3d 604, 612–13 (9th Cir. 2003), *rev'd.*, Sosa v. Alvarez-Machain, 124 S. Ct. 2739 (2004) ("Sosa urges a narrow reading of the 'law of nations' and a correspondingly strict interpretation of the 'specific, universal, and obligatory' requirement. He argues only violations of jus cogens norms, as distinguished from violations of customary international law, are sufficiently 'universal' and 'obligatory' to be actionable as violations of 'the law of nations' under the ATCA.").

violations are actionable under the ATS. I conclude with more general thoughts on legal positivism and international law's status in the post-*Erie* American jurisprudence.

I. *SOSA* AND *KIOBEL*: THE INCORPORATION DEBATE AND THE STATUS OF ALIEN TORT STATUTE LITIGATION IN U.S. COURTS

A. Prelude to Sosa

Derived from the English common law, the law of nations was of central importance to American law and politics since the founding days of the nation.[23] Such reverence for international norms reflects the Founding Fathers' observation that obeying the law of nations was critical to safeguarding the very existence of the fledgling nation by avoiding costly and unnecessary war with powerful European countries that may be instigated by one of its states refusing to abide by the law of nations.[24] Under the Founding Fathers' intellectual framework, both federal and state courts interpreted and applied the law of nations as general common law[25] even though state courts were not subject to Supreme Court review.[26]

And then came *Erie*. The Supreme Court's 1938 decision in *Erie Railroad Co. v. Tompkins*, which held that "[t]here is no federal general common law,"[27] raised the question of how the law of nations would fit into the American legal system. For several decades, this debate was largely academic because states rarely considered issues of the law of nations, and when they did, they tended "to adopt a very deferential attitude toward the federal government's views."[28]

The dominant view, dubbed the modern view, maintained that binding international norms, as interpreted by federal courts, has the status of self-executing federal common law.[29] Proponents of the modern view

23. *See* Julian G. Ku, *Customary International Law in State Courts*, 42 VA. J. INT'L L. 265, 271 (2001) [hereinafter Ku, *Customary International Law in State Courts*]; *see also* Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1557 (1984) ("[F]rom our national beginnings both state and federal courts have treated customary international law as incorporated and have applied it to cases before them without express constitutional or legislative sanctions."); Koh, *Modern View*, *supra* note 5, at 1830 ("Until 1842, federal and state courts alike construed customary international law with little regard to its federal or state character.").

24. David M. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition*, 85 N.Y.U. L. REV. 932, 945–47 (2010).

25. Swift v. Tyson, 41 U.S. 1, 18-19 (1842) (clarifying that *lex mercatoria* constituted general common law to be interpreted by federal courts sitting in diversity jurisdiction); Charles E. Clark, *State Law in the Federal Courts: The Brooding Omnipresence of* Erie v. Tompkins, 55 YALE L.J. 267, 274 (1946).

26. Ku, *Customary International Law in State Courts*, *supra* note 23, at 270.

27. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).

28. Bradley & Goldsmith, *Critique of the Modern Position*, *supra* note 5, at 871.

29. *See* Koh, *Modern View*, *supra* note 5, at 1834–35.

understand the federal status of international custom as integral to the conduct of foreign relations giving federal courts the authority to incorporate them into the federal common law based on the Constitution's grant of foreign relations power to the federal government.[30] This position rested in part on a historical claim that the law of nations has had the status of federal law since the beginning, and thus was unaffected by *Erie*'s abrogation of the general common law.[31] Two pillars of modern authority motivate this view. First, the Second Circuit's seminal decision in *Filártiga v. Peña-Irala*, declared that "the law of nations . . . has always been part of the federal common law."[32] Second, the Restatement (Third) of the Foreign Relations Law also maintains that "customary international law" is federal common law.[33]

The alternative view, referred to as the revisionist view, holds that states regulate binding international norms absent contrary commands by one of the political branches of the federal government. The revisionist view maintains that international norms prior to *Erie* had nonfederal status[34] thus *Erie*, according to Bradley and Goldsmith, barred federal courts from making federal common law on customary international law, akin to how they cannot make common law on torts.[35] This view is supported by case law. Judge Learned Hand, for instance, observed in a Second Circuit decision that New York courts' "interpretation of international law is controlling upon us, and we are to follow them so far as they have declared themselves."[36]

The animated debate that arose in legal academia and the proliferation of ATS litigation post-*Filártiga* set the stage for the Supreme Court's landmark decision in *Sosa*.

B. Sosa*: Modest Torts Allowed*

In *Sosa v. Alvarez-Machain*, the Supreme Court was tasked with deciding

30. Henkin, *supra* note 23, at 1560–62.

31. *Id.*

32. Filártiga v. Peña-Irala, 630 F.2d 876, 885 (2d Cir. 1980).

33. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, ch. 2, introductory note (1987).

34. Bradley & Goldsmith, *Critique of the Modern Position*, *supra* note 5, at 849. Indeed, since international law became part of the common law that various states of the union received from England, international law may have been "state law just as tort or contract law . . . ." Brilmayer, *Preemptive Power of the International Law*, *supra* note 5, at 301. *But see* Henkin, *supra* note 23, at 1555–57 (arguing that even if international law started out as state common law, the adoption of the federal Constitution would have federalized it).

35. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938) ("Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State."). *But see* Koh, *Modern View*, *supra* note 5, at 1831–35 (explaining that *Erie* did not change customary international law's status in U.S. law).

36. Bergman v. DeSieyes, 170 F.2d 360, 361 (2d Cir. 1948).

the basic parameters of the Alien Tort Statute. Alvarez-Machain, a Mexican national acquitted of murder after being abducted and transported to the United States, brought a claim under the Alien Tort Statute alleging that the arbitrary arrest constituted a violation of "the law of nations." The district court awarded summary judgment and $25,000 in damages to Alvarez on his ATS claim, and the Ninth Circuit affirmed the judgment.[37]

In the majority opinion authored by Justice Souter, the Supreme Court reversed the Ninth Circuit, holding that the scope of his claims did not fall under the range of actionable torts under the ATS. In reaching this conclusion, the Court made several important findings. First, it rejected Alvarez's claim that "the ATS was intended not simply as a jurisdictional grant, but as authority for the creation of a new cause of action for torts in violation of international law."[38] Noting that the ATS was placed as part of a statute otherwise exclusively concerned with federal court jurisdiction, the Court held that the statute was intended to address "the power of the courts to entertain cases concerned with a certain subject," rather than the power to mold substantive law.[39]

While all nine justices agreed that the ATS was only a jurisdictional statute, this did not preclude federal courts from recognizing as actionable some violations of international norms because "jurisdiction was originally understood to be available to enforce a small number of international norms that a federal court could properly recognize as within the common law enforceable without further statutory authority."[40] That is, the Court expressly recognized that "at the time of enactment the jurisdiction enabled federal courts to hear claims in a very limited category defined by the law of nations and recognized at common law."[41]

In referencing these norms, the Court recited three primary offenses against the law of nations — violation of safe conducts, infringement of the rights of ambassadors, and piracy — as the rubric for identifying modern law of nations violations.[42] The Court reasoned that "[i]t was this narrow set of violations of the law of nations, admitting of a judicial remedy and at the same time threatening serious consequences in international affairs, that was probably on minds of the men who drafted the ATS with its reference to tort."[43]

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37. Sosa v. Alvarez-Machain, 542 U.S. 692, 698 (2004).
38. *Id.* at 713.
39. *Id.*
40. *Id.* at 729.
41. *Id.* at 712.
42. The three offenses were recognized by William Blackstone in his *Commentaries on the Laws of England*. *See* Sosa, 542 U.S. at 715 (citing 4 *Commentaries* 68).
43. Sosa, 542 U.S. at 715.

It was under this "originalist" reading of the statute that the Supreme Court determined that Alvarez's claim did not fall under the ATS as a claim defined by the law of nations and recognized at common law at the time of the enactment of the ATS.[44] The Court held that Alvarez's claim, a general prohibition of arbitrary detention — broadly defined as officially sanctioned action exceeding authority to detain — did not have the status of international norms in line with "the certainty afforded by Blackstone's three common law offenses."[45]

This decision has been noteworthy because it endorsed a retail view of international custom, whereby federal courts selectively incorporate certain international norms, as opposed to the wholesale theory of international custom, where rules of international custom automatically become federal law.[46] It is also of note that the majority expressly rejected Justice Scalia's contention that *Erie* was "sufficient to close the door to further independent judicial recognition of actionable international norms."[47] Drawing on the Court's two centuries of jurisprudence declaring that "the domestic law of the United States recognizes the law of nations,"[48] the Court reasoned that "[i]t would take some explaining to say now that federal courts must avert their gaze entirely from any international norm intended to protect individuals."[49] The Court, in effect, endorsed the view that the ascendance of legal positivism is insufficient to displace the legal paradigm subscribed to by the people who enacted the law.

The *Sosa* Court did not elaborate upon what sorts of international norms are incorporated within the "18th-century paradigms," and since then lower courts have struggled to identify what constitutes actionable torts under the ATS.[50] Tension exists between the Supreme Court's instructions to keep the categories of actionable torts "modest," and the expansion of customary international law over the past century. Customary international law now covers a wide spectrum of rules, including the use of force, environmental law, immigration, and sovereign immunity. Because the *Sosa* Court only addressed suits between natural persons, the holding also left unaddressed whether other entities (e.g.,

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44. *Id.* at 712; *see also* Bellia Jr. & Clark, *supra* note 8, at 458 ("[T]he Court repeatedly emphasized the importance of historical context to a proper understanding of the ATS."). Of course, this Article does not assume for a second that originalism is the only game in town for statutory interpretation.

45. Sosa, 542 U.S. at 737.

46. For an excellent work summarizing this debate, see Ernest A. Young, Sosa *and the Retail Incorporation of International Law*, 120 HARV. L. REV. F. 28 (2007).

47. Sosa, 542 U.S. at 729.

48. *Id.* (citing Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 423 (1964) ("[I]t is, of course, true that United States courts apply international law as a part of our own in appropriate circumstances.")).

49. *See* Sosa, 542 U.S. at 730.

50. *See* Pamela J. Stephens, *Spinning* Sosa*: Federal Common Law, the Alien Tort Statute, and Judicial Restraint*, 25 B.U. INT'L L.J. 1, 33–35 (2007) (discussing post-*Sosa* lower court jurisprudence).

corporations) may be subject to suit under the ATS. It would take almost a decade for the Supreme Court to take on another ATS case.

C. Kiobel*: Presumption Against Extraterritoriality*

The next Supreme Court case addressing the ATS was *Kiobel v. Royal Dutch Petroleum*, which was supposed to address the question of whether corporations could be liable under the ATS. A group of Nigerian residents filed a putative class action against Dutch, British, and Nigerian corporations engaged in oil exploration. Plaintiffs alleged that defendants aided and abetted the Nigerian government in (1) extrajudicial killing; (2) crimes against humanity; (3) torture or cruel, inhuman, and degrading treatment; (4) arbitrary arrest and detention; (5) violation of the rights to life, liberty, security, and association; (6) forced exile; and (7) property destruction.[51] In the proceedings below, the Second Circuit found that the ATS did not confer jurisdiction over claims against corporations. This created a circuit split with the Seventh Circuit, the Ninth Circuit, the Eleventh Circuit, and the D.C. Circuit.[52] The Supreme Court then had a change of heart and asked the parties to brief on the extraterritoriality of the ATS.[53]

Applying the canon of construction recently adopted in the securities law context in *Morrison v. National Australia Bank Ltd.*,[54] the Court concluded that the presumption against extraterritoriality applied to claims

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51. Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 123 (2d Cir. 2010), *aff'd*, 133 S. Ct. 1659 (2013).

52. *See* Flomo v. Firestone Natural Rubber Co., 643 F.3d 1013, 1021 (7th Cir. 2011) ("[C]orporate liability is possible under the Alien Tort Statute[.]")); Doe VIII v. Exxon Mobil Corp., 654 F.3d 11, 39–57 (D.C. Cir. 2011) ("[T]he court concludes, guided by *Sosa,* that under the ATS, domestic law, i.e., federal common law, supplies the source of law on the question of corporate liability. The law of the United States has been uniform since its founding that corporations can be held liable for the torts committed by their agents. This is confirmed in international practice, both in treaties and in legal systems throughout the world."); Kiobel, 621 F.3d at 120 ("[C]ustomary international law has steadfastly rejected the notion of corporate liability for international crimes, and no international tribunal has ever held a corporation liable for a violation of the law of nations. We must conclude, therefore, that insofar as plaintiffs bring claims under the ATS against corporations, plaintiffs fail to allege violations of the law of nations, and plaintiffs' claims fall outside the limited jurisdiction provided by the ATS."); Sinaltrainal v. Coca-Cola Co., 578 F.3d 1252, 1263 (11th Cir. 2009) ("[C]orporate defendants are subject to liability under the ATS and may be liable for violations of the law of nations."); Sarei v. Rio Tinto, 550 F.3d 822, 831 (9th Cir. 2008) ("The ATS contains no such language and has no such legislative history to suggest that corporate liability was excluded and that only liability of natural persons was intended. We therefore find no basis for holding that there is any such statutory limitation."). For academic commentaries, *compare* Harold Hongju Koh, *Separating Myth From Reality About Corporate Responsibility Litigation*, 7 J. INT'L ECON. L. 263 (2004), *with* Julian G. Ku, *The Curious Case of Corporate Liability Under the Alien Tort Statute: A Flawed System of Judicial Lawmaking*, 51 VA. J. INT'L L. 353 (2010).

53. Human Rights at Harvard, *Kiobel v. Royal Dutch Petroleum Co.*, http://hrp.law.harvard.edu/areas-of-focus/alien-tort-statute/kiobel-v-royal-dutch-petroleum-co/.

54. *See* Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 255 (2010) ("When a statute gives no clear indication of an extraterritorial application, it has none.").

arising under the ATS, and that the presumption was not rebutted by the text, history, or purposes of the statute.[55] The Court ruled that the presumption against extraterritorial application was so weighty that "even where [ATS] claims touch and concern the territory of the United States, they must do so with sufficient force to displace [it]."[56]

Early commentaries declared *Kiobel* a death knell to ATS litigation. Roger Alford, for instance, has argued that the presumption against extraterritoriality, combined with a narrow interpretation of territoriality, is a mortal blow to the *Filártiga* human rights revolution.[57] These scholars have agreed that "the ATS is, if not dead, greatly diminished."[58] Critics of the decision, on the other hand, have denounced the decision as a result of the toxic mix of conservative activism, globalization-phobia, and corporate interests run amok.[59]

These commentaries seem premature.[60] As Justice Kennedy noted in his concurring opinion, *Kiobel* carefully left open "a number of significant questions regarding the reach and interpretation of the Alien Tort Statute."[61] One of those questions is when a litigant can overcome the presumption of non-extraterritoriality. The underlying facts of *Kiobel*, importantly, were plainly devoid of a nexus to the United States, rather they were all decisions of foreign corporations accrued in foreign territory. This holding thus leaves open litigation involving different fact patterns, including cases where American corporations do business abroad but make critical decisions on American territory.[62]

It was precisely these questions that have signaled a resurrection of ATS claims in lower courts. Following *Kiobel*, Judge Scheindlin in the Southern District of New York revived a twelve-year-old litigation by granting a motion for an order finding that corporations may be held liable under the ATS.[63] While the Second Circuit in *Kiobel* found that corporations as

55. Kiobel, 133 S. Ct. at 1669.

56. *Id.*

57. Roger P. Alford, *The Future of Human Rights Litigation After* Kiobel, 89 NOTRE DAME L. REV. 1749, 1754 (2014).

58. Samuel Moyn, *Why the Court was Right About the Alien Tort Statute*, FOREIGN AFFAIRS (May 2, 2013), *available at* http://www.foreignaffairs.com/articles/139359/samuel-moyn/why-the-court-was-right-abo-ut-the-alien-tort-statute.

59. *See* Austen L. Parrish, Kiobel, *Unilaterism, and the Retreat from Extraterritoriality*, 28 MD. J. INT'L L. 208, 209 (2013).

60. *See* Roxanna Altholz, *Chronicles of a Death Foretold: The Future of U.S. Human Rights Litigation Post-*Kiobel, 102 CALIF. L. REV. 1495 (2014) (arguing that reports about the death of U.S. human rights litigation are an exaggeration).

61. Kiobel, 133 S. Ct. at 1669 (Kennedy, J., concurring).

62. Sarah H. Cleveland, *After* Kiobel, 12 J. INT'L CRIM. JUST. 551, 551 (2014) (arguing that "claims that sufficiently 'touch and concern' the United States can and should include: conduct that occurs in part on US territory, perpetrators who are US nationals or domiciled in the United States, and other claims implicating significant US national interests, including piracy and the United States' important interest in denying safe haven to heinous human rights violators.").

63. *In re* S. Afr. Apartheid Litig., 2014 WL 1569423 (S.D.N.Y. Apr. 17, 2014).

juridical entities cannot be held liable under the ATS, Judge Scheindlin reasoned that the Supreme Court's decision to dismiss the *Kiobel* plaintiffs' claims on other grounds *sub silentio* reversed the Second Circuit's reasoning. Judge Scheindlin also reasoned that plaintiffs are entitled to an opportunity to allege additional facts that might show that some of the alleged wrongful conduct "'touch[es] and concern[s]' the United States with 'sufficient force' to overcome the presumption against extraterritorial application of the ATS."[64]

Given the careful language choice employed by the *Kiobel* Court, it seems more realistic to assume that some constituent act occurring within the forum would satisfy the territorial nexus.[65] Regardless of the precise standard that courts will adopt as to the kind of domestic nexus required to bring ATS claims in U.S. courts, *Kiobel* is a narrow holding that still leaves unanswered the critical question posed in *Sosa*, and repeated in Justice Breyer's concurrence in *Kiobel*: "[w]ho are today's pirates?"[66]

By drawing on early American court cases, as well as writers familiar to and drawn on by the members of the First Congress, the next Part gathers and evaluates historical evidence relevant to understanding the "18th-century paradigms." It showcases that the dominant writers at the time were followers of natural law, which in turn requires us to reassess the modern understanding of what the First Congress considered violations of the law of nations.

II. SCOPE AND CONTENT OF THE LAW OF NATIONS

A. The Modern Assumption

The term "customary international law" first appeared in a published judicial opinion in the United States in 1833 when the Supreme Court ruled on *United States v. Percheman*.[67] That case, however, did not explain or define the term,[68] and the term would not be used again in a published opinion in the United States for over a century.[69] After being recited by

64. *Id.* at *9 (quoting Nov. 26, 2013 Letter from Diane E. Sammons, counsel for plaintiffs to the Court, at 2 (quoting Kiobel, 133 S. Ct. at 1669)) (internal quotation marks ommitted).

65. This is the standard applied in the antitrust context, as established by seminal Supreme Court cases. Am. Banana Co. v. United Fruit Co., 213 U.S. 347, 354 (1909); United States v. Sisal Sales Corp., 274 U.S. 268, 271 (1927). Under the Foreign Trade Antitrust Improvement Act (FTAIA), also, the Sherman Act does not apply to conduct involving trade or commerce with foreign nations unless "such conduct has a direct, substantial and reasonable foreseeable effect . . . on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States." Foreign Trade Antitrust Improvements Act of 1982, Pub. L. No. 97-290, §§ 401–403, 96 Stat. 1246.

66. Kiobel, 133 S. Ct. at 1671 (Breyer, J., concurring in the judgment).

67. United States v. Percheman, 32 U.S. 51 (1833).

68. *Id.* at 65.

69. This excludes terms that would be construed as similar to customary international law. For

lower courts in at least four cases between 1950 and 1961,[70] the Supreme Court used the term for the first time since 1833 in the familiar case of *Banco Nacional de Cuba v. Sabbatino* in 1964.[71] Even in that case, the court only used the term once (in describing the allegations made in the complaint), in comparison to using "the law of nations" twenty times.[72]

The term's use gradually increased in U.S. courts in the latter decades of the twentieth century. As Table 1 illustrates, the term, which was rarely used before the 1950s, gradually took over the judicial discourse of American courts in the 1980s. This development should be of no surprise, given that the term was widely used in international circles in the latter part of the twentieth century,[73] and given that ATS litigation proliferated following the Second Circuit's seminal opinion in *Filártiga v. Peña-Irala*.[74]

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instance, in *The Paquete Habana*, the Supreme Court used the term "customary law" to refer to what appears to be a close family to customary international law. *See* The Paquete Habana, 175 U.S. 677, 707 (1900).

70. Aboitiz & Co v. Price, 99 F. Supp. 602, 609 (D. Utah 1951); United States v. Coplon, 88 F. Supp. 915, 920 (S.D.N.Y. 1950); Harris & Co. Adver., Inc. v. Republic of Cuba, 127 So.2d 687, 691 (Fla. Dist. Ct. App. 1961); Stephen v. Zivnostenska Banka, Nat'l Corp., 15 A.D.2d 111, 222 N.Y.S.2d 128 (1961), *aff'd sub nom.* Stephen v. Zivnostenska Banka, Nat'l Corp., 12 N.Y.2d 781, 186 N.E.2d 676 (1962).

71. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964).

72. As a point of comparison, the term "law of nations" appeared in twenty-eight federal and state court cases between 1764 and 1789, often times employing the same definition that the dominant thinkers at the time were employing. In 1781 (eight years prior to when the Supreme Court of the United States had issued its first decision), the Federal Court of Appeals, dealing with a capture and occupation of a British ship, held that "the law of nations, founded on every principle of reason, justice and morality, [requires] that one nation ought not to do an injury to another." The Resolution, 2 U.S. 1, 3 (1781).

73. Josef L. Kunz, *The Nature of Customary International Law*, 47 AM. J. INT'L L. 662, 662–63 (1953).

74. Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT'L L. 587, 589 (2002) ("The Filartiga decision paved the way for international human rights litigation in U.S. courts. Since the decision, numerous lawsuits have been brought in the United States challenging human rights abuses around the world, ranging from political oppression in Ethiopia, to genocide and war crimes in Bosnia, to violence by the Guatemalan military.").

Table 1: Number of Cases Using the Terminology in U.S. Courts[75]

Time Period	The Law of Nations	Customary International Law
1776–1900	1752	1
1900–1950	560	1
1951–1960	161	1
1961–1970	84	11
1971–1980	117	26
1981–1990	186	74
1991–2000	233	152
2000–2010	893	426

The rise in the use of the term "customary international law" has coincided with courts equating "customary international law" with "the law of nations." Among the federal courts of appeals,[76] the First Circuit,[77] Second Circuit,[78] Fourth Circuit,[79] Seventh Circuit,[80] Ninth Circuit,[81] and the Eleventh Circuit,[82] have conflated the use of the terms.[83] The Second

75. Data gathered by the author. Cases include both federal and state court cases. The word search in Westlaw Next was: ("law of nations" and "customary international law"). Note that the statistics for the use of the term "law of nations" in recent court cases is inflated in a sense that many courts quote the exact statutory language of the ATS, but exclusively use customary international law in ascertaining the scope of the statute. *See, e.g.*, Flomo v. Firestone Nat'l Rubber Co., 643 F.3d 1013, 1015 (7th Cir. 2011) ("The Alien Tort Statute confers on the federal courts jurisdiction over '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.' The principal issues presented by the appeal are whether a corporation or any other entity that is not a natural person (the defendant is a limited liability company rather than a conventional business corporation) can be liable under the Alien Tort Statute, and, if so, whether the evidence presented by the plaintiffs created a triable issue of whether the defendant has violated 'customary international law.").

76. The conflation is not limited to the ATS arena. Courts have also conflated the use of the term in other areas. *See* United States v. Bellaizac-Hurtado, 700 F.3d 1245, 1249 (11th Cir. 2012) ("[T]he phrase 'Offences against the Law of Nations' is understood today to mean violations of customary international law."). For the purpose of this Article, however, I will limit the investigation to the ATS context.

77. *See, e.g.*, United States v. Cardales-Luna, 632 F.3d 731, 745 (1st Cir. 2011) ("The 'Law of Nations' is generally understood to be the eighteenth and nineteenth-century term for 'customary international law.'" (citations omitted)).

78. *See, e.g.*, Velez v. Sanchez, 693 F.3d 308, 316 & n.3 (2d Cir. 2012) ("We have come to use the term 'customary international law' interchangeably with the 'law of nations.'").

79. *See, e.g.*, United States v. Dire, 680 F.3d 446, 464 (4th Cir. 2012) (observing that "'the law of nations,' . . . is today synonymous with customary international law.").

80. *See, e.g.*, Jogi v. Voges, 425 F.3d 367, 372 (7th Cir. 2005) ("[I]t is concerned with claims based on customary international law, or, in the statute's words, 'the law of nations.'").

81. *See, e.g.*, Abagninin v. AMVAC Chem. Corp., 545 F.3d 733, 738 (9th Cir. 2008) ("The law of nations is synonymous with 'customary international law. . . .'" (citation omitted)).

82. *See, e.g.*, Sinaltrainal v. Coca-Cola Co., 578 F.3d 1252, 1261 (11th Cir. 2009) ("A violation of the law of nations is broadly understood as a violation of the norms of customary international law.").

Circuit, the birthplace of modern ATS litigation,[84] has expressly noted that "the law of nations has become synonymous with the term 'customary international law.'"[85] While the Third Circuit, Fifth Circuit and the Sixth Circuit have refrained from equating the two terms, none have expressly rejected the conflation.[86]

But this conflation is mistaken, at least in the ATS context. In *Sosa*, the Supreme Court made clear that modern law of nations violations must be brought under the eighteenth-century framework. During the eighteenth century, "the law of nations" included, to a degree, what modern lawyers call customary international law but it also encompassed more broadly all of modern international law.[87] Emmerich de Vattel, for instance, divided the law of nations into four categories: (1) necessary law of nations; (2) voluntary law of nations; (3) conventional law of nations; and (4) customary law of nations. Necessary law of nations referred to laws directly flowing from natural law, ones that were immutable and binding, but only internally based on the conscience of the sovereign. Voluntary law of nations, also derived from natural law, create external rights and duties. Unlike necessary law of nations, voluntary law specifically governed conduct concerning the transaction between sovereigns, including war and treatment of enemy property. Conventional law of nations would be considered as treaties or inter-state agreements.[88]

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83. The important decision rendered by the Second Circuit in *Filartiga* used the term "customary international law" but did not explain why the Court was conflating the use of the terms. The conflation arose from defining law of nations from two sources: *United States v. Smith*, in which the Supreme Court found that law of nations "may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law." United States v. Smith, 18 U.S. 153, 160–61 (1820). The Court also relied on *Paquete Habana*, which confirmed that "customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects." The Paquete Habana, 175 U.S. 677, 700 (1900).

84. The ATS was invoked only twice in the late eighteenth century, and only once more over the next 167 years. *See* Moxon v. The Fanny, 17 F. Cas. 942 (D.C.D. Pa. 1793) (No. 9895); Bolchos v. Darrel, 3 F. Cas. 810 (D.S.C. 1795) (No. 1607). The eighteenth-century statute was reincarnated as a remedy for human rights violations in 1980 when the U.S. Court of Appeals for the Second Circuit held in *Filártiga v. Peña-Irala* that a Paraguayan family could use the ATS to sue in federal court the Paraguayan police officer who had tortured to death a seventeen-year-old family member in Paraguay. Filártiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980).

85. Viet. Ass'n for Victims of Agent Orange v. Dow Chem. Co., 517 F.3d 104, 116 (2d Cir. 2008).

86. *See, e.g.*, Ben-Haim v. Neeman, 543 F. App'x 152 (3d Cir. 2013); Taveras v. Taveraz, 477 F.3d 767, 772 (6th Cir. 2007); Beanal v. Freeport-McMoran, Inc., 197 F.3d 161, 165 (5th Cir. 1999).

87. Indeed, prominent writers frequently used the terms "international law" and "the law of nations" interchangeably up until the mid-twentieth century. *See, e.g.*, PHILIP C. JESSUP, A MODERN LAW OF NATIONS 5 (1948) ("International law, or the law of nations, is a term which has been used for over three hundred years.").

88. As Vattel explains, "The various agreements which Nations may enter into give rise to a new division of the Law of Nations which is called conventional, or the law of treaties." 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, intro., § 24, at 8 (photo.

The fourth category — customary law of nations — is what modern courts and scholars would refer to as "customary international law."[89] As Vattel explains, this form of law, observed by nations in their mutual intercourse with each other, "is founded upon a tacit consent."[90] This form of law only came to dominate the legal discourse (and eventually judicial opinions) with the rise of legal positivism in the nineteenth century.[91] Classical legal positivism was developed in England by John Austin and Jeremy Bentham, and introduced to the United States by writings of C.C. Langdell and Joseph Henry Beale.[92] Prior to the ascendance of positivist legal thought, eighteenth-century luminaries were concerned more with the law of nations based on natural law, rather than customary law of nations.[93]

The D.C. Circuit has recognized this distinction,[94] albeit in a footnote.[95] In *Doe v. Exxon Mobil Corp.*, Judge Judith Rogers, writing for the majority in a split opinion, observed that the Supreme Court in *Sosa* did not "treat as equivalent customary international law and the law of nations generally."[96] Indeed, in *Sosa* the notion of customary international law is not discussed until Part III.C, where the Court addresses whether Alvarez-Machain's abduction and arrest could be considered a violation of an international norm of a sufficiently specific character to be cognizable

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reprint 1993) (Charles G. Fenwick trans., Carnegie Inst. of Wash. 1916) (1758) (emphasis removed).

89. I acknowledge that there are some important differences between customary law of nations and customary international law. While the customary law of nations was based on state practice like modern customary international law, states were free to withdraw from rules of the customary law of nations, whereas all states are bound by modern customary international law (unless they become persistent objectors during its formation). *See* Curtis A. Bradley & Mitu Gulati, *Withdrawing from International Custom*, 120 YALE L.J. 202 (2010); William S. Dodge, *Withdrawing from Customary International Law: Some Lessons from History*, 120 YALE L.J. ONLINE 169 (2010), http://yalelawjournal.org/forum/withdrawing-from-customary-international-law-some-lessons-from-history. Nevertheless, it is undisputable that both concepts derive their legal authority from implied consent.

90. VATTEL, *supra* note 88, at 8.

91. For an excellent commentary on the decline of natural law and the ascendance of positivism as the theoretical foundation of the law of nations, see William S. Dodge, *Customary International Law, Congress, and the Courts: Origins of the Later-in-Time Rule, in* MAKING TRANSNATIONAL LAW WORK IN THE GLOBAL ECONOMY: ESSAYS IN HONOUR OF DETLEV VAGTS 531 (Pieter H.F. Bekker et al. eds., 2010).

92. ANTHONY J. SEBOK, LEGAL POSITIVISM IN AMERICAN JURISPRUDENCE 3 (1998).

93. *See infra* Part II.B.

94. Doe VIII v. Exxon Mobil Corp., 654 F.3d 11, 36 n.23 (D.C. Cir. 2011), *vacated on other grounds*, 527 F. App'x 7 (D.C. Cir. 2013). Note that the D.C. Circuit has rendered internally inconsistent opinions, having used customary international law as a substitute for the law of nations in other cases. *See* Sanchez-Espinoza v. Reagan, 770 F.2d 202, 206 (D.C. Cir. 1985) (describing law of nations as the "so-called 'customary international law,' arising from 'the customs and usages of civilized nations'").

95. Citing the D.C. Circuit opinion, the Fourth Circuit has endorsed this distinction. *See* Aziz v. Alcolac, Inc., 658 F.3d 388, 399 (4th Cir. 2011) ("[T]he D.C. Circuit rightly notes that customary international law is not synonymous with the law of nations, but rather that 'customary international law is one of the sources for the law of nations.'" (citing Doe VIII, 654 F.3d at 36 n.23)).

96. Doe VIII v. Exxon Mobil Corp., 654 F.3d at 36 n.23.

under the ATS.[97] Instead, the Court consistently used present-day "law of nations" to describe modern ATS lawsuits. This requires us to understand what the law of nations meant in the eighteenth century around the passage of the ATS.

A brief review of the statutory language is in order. By describing actionable torts in the Alien Tort Statute (originally the Judiciary Act of 1789) as those violating "the law of nations or a treaty of the United States,"[98] the First Congress refers to the law of nations and treaties separately. The use of the disjunctive is critical because it implies that the First Congress conceptualized "treaties" (i.e., conventional law of nations) as separate from and not included in "the law of nations."[99] This view would have been familiar to the canonical writers at the time. Vattel's treatise primarily concerned necessary and voluntary law of nations, the two categories of the law of nations deriving from natural law.[100] Indeed, Vattel's cursory treatment of conventional and customary law of nations was owed to his explicit assessment that commentaries on treaties and customs "belong rather to history than to a systematic treatise on the Law of Nations."[101] This historical backdrop, at the very least, suggests that the core meaning of the law of nations in the eighteenth century were the laws directly deriving from natural law; not rules based on consent, express (treaties) or implied (custom).

Of course, over the past two centuries natural law justifications for the law of nations have been subsumed by the dominance of legal positivism that has favored customary international law and the use of treaties. However, while the Court in *Sosa* acknowledged important legal differences between the eighteenth century and today, it nevertheless required that modern claims be based on the eighteenth-century conception of the law of nations. It is for this reason that the natural law foundation of the law of nations is the key to understanding the proper boundaries of claims brought under the ATS. The next Section attempts to capture that historical understanding.

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97. Sosa v. Alvarez-Machain, 542 U.S. 692, 735–37 (2004).

98 Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 77.

99. *See* Reiter v. Sonotone Corp., 442 U.S. 330, 339 (1979) ("Canons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings.").

100. VATTEL, *supra* note 88, at 11 ("The necessary law is derived immediately from nature; while this common mother of men merely recommends the observance of the voluntary Law of Nations in view of the circumstances in which Nations happen to find themselves, and for their common good. This double law, based upon fixed and permanent principles, is susceptible of demonstration, and it will form the principal subject of my work." (emphasis removed)).

101. *Id.*; *see also* Dodge, *supra* note 89, at 174 ("Although he sometimes mentioned customary law for completeness, Vattel doubted that it belonged 'within a systematic treatise on the Law of Nations.'" (citation omitted)).

B. Natural Law Origins of the Law of Nations

Benjamin Franklin, during a meeting at the Continental Congress in 1775, eagerly announced receiving three copies of Vattel's seminal book on the law of nations. Observing that "circumstances of a rising State made it necessary frequently to consult the law of nations," Franklin commented that Vattel had been "continually in the hands of the members of our Congress now sitting."[102]

While it is difficult to imagine that current members of Congress are well-versed in the works of modern international law luminaries, Benjamin Franklin was hardly an unusual politician of his time. In recent years, it was revealed by the records of the New York Society Library that President George Washington had borrowed Vattel's *The Law of Nations* on October 5, 1789—and never returned it.[103] George Washington also possessed an English translation of Grotius's *Law of War and Peace*, as well as an English translation of George Martens's *Law of Nations*.[104] It is also documented that the works of Samuel von Pufendorf and Jean Barbeyrac were widely available and cited in a number of important writings of the time.[105] The works of these canonical publicists were the primary materials the First Congress would have consulted in enacting the Alien Tort Statute.

One might begin to understand this legal paradigm through the title of Vattel's book itself — *The Law of Nations: Or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns*.[106] Vattel, whose work is continually used by the Supreme Court as the authoritative source of what the law of nations meant to the Founding Fathers,[107] observed that "the Law of Nations is in its origin merely the Law of Nature applied to Nations."[108] Vattel further assessed that certain characters of international norms were "immutable" and that "the obligations which it imposes are necessary and indispensable, Nations can

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102. Jesse S. Reeves, *The Influence of the Law of Nature Upon International Law in the United States*, 3 AM. J. INT'L L. 547, 552 (1909).

103. *See* Alison Flood, *George Washington's Library Book Returned, 221 Years Later*, THE GUARDIAN, May 20, 2010, http://www.theguardian.com/books/booksblog/2010/may/20/george-washington-library-book ("The former president borrowed The Law of Nations by Emer de Vattel on 5 October 1789, according to the records of the New York Society Library.").

104. *See* Brian Richardson, *The Use of Vattel in the American Law of Nations*, 106 AM. J. INT'L L. 547, 549 (2012).

105. Reeves, *supra* note 102, at 549 ("Citations of Grotius, Pufendorf, and Vattel are scattered in about equal numbers in the writings of the time.").

106. VATTEL, *supra* note 88.

107. *See* U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 462 n.12 (1978); Anthony D'Amato, *The Alien Tort Statute and the Founding of the Constitution*, 82 AM. J. INT'L L. 62, 64 n.9 (1988) ("The Supreme Court continues to use Vattel as the authoritative source of what the 'law of nations' meant to the Founding Fathers.").

108. VATTEL, *supra* note 88, at 4 (emphasis removed).

not alter it by agreement, nor individually or mutually release themselves from it."[109]

Blackstone's *Commentaries on the Laws of England*, arguably the most influential work relied on in *Sosa*,[110] also described the law of nations as inextricably derived from natural law. Blackstone understood the law of nations as "a system of rules, deducible by natural reason, and established by universal consent among the civilized inhabitants of the world."[111] Recognizing the impossibility for the "whole mankind to be united in one great society," Blackstone described the law of nations as "depend[ing] 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."[112] This principle is further revealed in Blackstone's rationale for including "piracy" as one of the three principal cases in which English law incorporated the law of nations as part of the common law: "[R]obbery and depredation upon the high seas, is an offence against the universal law of society . . . .[The pirate] has renounced all the benefits of society and government, and has reduced himself afresh to the savage state of nature by declaring war against all mankind . . . ."[113]

Of course, the influence of Blackstone and Vattel on the Founders' conception of the law of nations should not be exaggerated. Although works of Blackstone and Vattel have emerged as the crucial—and often exclusive—primary sources consulted by the Supreme Court in its treatment of eighteenth-century law of nations,[114] to rely on these two authors to the exclusion of other canonical publicists at the time overlooks competing conceptions of the law of nations that existed at the time.[115] Indeed, historical records reveal that the Founders not only relied on Vattel and Blackstone, but used the works of Grotius (*On the Law of War and Peace*), Pufendorf (*On the Law of Nature and Nations*), and Wolff (*A Scientific Method for Understanding the Law of Nations*) in determining the concept of

109. *Id.*

110. Blackstone's *Commentaries* was cited by the *Sosa* Court fourteen times, more than any other sources consulted. *See* Sosa v. Alvarez-Machain, 542 U.S. 692 (2004).

111. 4 WILLIAM BLACKSTONE, COMMENTARIES *66.

112. 1 WILLIAM BLACKSTONE, COMMENTARIES *43.

113. 4 WILLIAM BLACKSTONE, COMMENTARIES *71.

114. In both of the Supreme Court cases, *Sosa* and *Kiobel*, Vattel and Blackstone were the only eighteenth-century jurists cited by the Court. *See* Sosa, 542 U.S. 692; Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2013).

115. It is a subject of academic debate whether methodology in statutory interpretation constitutes "law." *See* Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology as "Law" and the Erie Doctrine*, 120 YALE L.J. 1898, 1902 (2011) ("[W]hether statutory interpretation methodology is 'law,' individual judicial philosophy, or something in between—remains entirely unresolved. The U.S. Supreme Court generally does not treat its statements about statutory interpretation methodology as law.").

the law of nations.[116] The works of these seminal figures were so important that they were sometimes used to override Vattel's conception of the law of nations. Vattel's work, while principally based on natural law principles, departed from other publicists at the time by advancing the theory that natural law binds nations more weakly than persons. His understanding of treaties, for instance, called for a number of exceptions to the binding nature of treaties insofar as treaties dealt with matters not controlled by natural law.[117] To the contrary, works of Pufendorf, Grotius, and Wolff tended to call for a stricter adherence to natural law principles.[118]

To the extent that there were conflicts between these writers, there is evidence that the Founders deferred to the more classic, natural law-based foundation of the law of nations. A paradigmatic example is a well-documented dispute between Alexander Hamilton and Thomas Jefferson in evaluating France's legal claims arising out of its two important treaties with the United States: the Treaty of Alliance and the Treaty of Amity and Commerce.[119] Hamilton advanced the Vattelian application to France's legal claims, arguing that the United States had the right to "suspend or void the French treaties."[120] Jefferson, on the other hand, drew on the works of Grotius, Wolff, and Pufendorf to argue that Vattel's views regarding the voidability of certain treaty obligations violated the law of nations: "[Vattel] is in opposition to Grotius, Puffendorf [sic], & Wolf [sic], who admit no such license against the obligation of treaties, & he is in opposition to the morality of every honest man . . . ."[121] It is worth nothing that it was Jefferson's view that ultimately prevailed in the Washington administration's determination that the treaties with France still obliged the United States.[122]

The theme that unified these canonical writers on the law of nations was the adherence (although varying in degrees) to the concept of

116. *See* Richardson, *supra* note 104, at 548, 558.

117. *Id.* at 553.

118. *See* 2 HUGO GROTIUS, DE JURE BELLI AC PACIS LIBRI TRES (James Brown Scott ed., Francis W. Kelsey trans., Carnegie ed. 1925) (1646); 2 SAMUEL PUFENDORF, DE JURE NATURAE ET GENTIUM 1331 (C.H. Oldfather & W.A. Oldfather trans., Carnegie ed. 1934) (1688); 2 CHRISTIAN WOLFF, JUS GENTIUM METHODO SCIENTIFICA PERTRACTATUM (Joseph H. Drake trans., Carnegie ed. 1934) (1764).

119. Treaty of Alliance Between the United States of America and His Most Christian Majesty, U.S.-Fr., Feb. 6, 1778, 8 Stat. 6 (annuled July 7, 1798); Treaty of Amity and Commerce Between the United States of America and His Most Christian Majesty, U.S.-Fr., Feb. 6, 1778, 8 Stat. 12 (annuled July 7, 1798).

120. Thomas Jefferson, Notes on Washington's Questions on Neutrality and the Alliance with France (May 6, 1793), *in* THE PAPERS OF THOMAS JEFFERSON DIGITAL EDITION (Barbara B. Oberg & Jefferson Looney eds., 2008).

121. Thomas Jefferson, Opinion on French Treaties, *in* 7 WORKS OF THOMAS JEFFERSON 283, 295 (1904).

122. Richardson, *supra* note 104, at 559.

immutable rules that derive from the principles of natural law. This shared understanding of the term is what we must look towards to ascribe meaning to the statute enacted by the First Congress. In bringing a grand jury charge in 1791, James Wilson closely followed the dominant understanding at the time in explaining to the grand jury that "[t]he law of nations has its foundation in the principles of natural law, applied to states."[123] In a famous speech delivered in 1793, Thomas Jefferson, then-Secretary of State, observed that "[l]aw of nations, by which this question is to be determined, is composed of . . . [m]oral law of our nature . . . [t]he Usages of nations . . . [and] [t]heir special Conventions."[124]

This conception of the law of nations was affirmed in early Supreme Court cases around the time of the First Judiciary Act.[125] In a 1794 case, *The Betsey*, the Supreme Court expressly acknowledged one of Vattel's categories of the law of nations. In deciding whether district courts had jurisdiction over admiralty cases, the Court observed that "[t]he rule authorising [sic] the exercise of jurisdiction over persons coming within the limits of a country, has been narrowed down, by the *voluntary law of nations*, to cases where there is either a local allegiance, or voluntary submission."[126] Recall that "voluntary law of nations," in Vattel's terms, was primarily derived from natural law. Indeed, the *Betsey* Court expressly acknowledged the law of nations in Vattel's terms, by citing his work ten times throughout the opinion.[127]

It is the backdrop of these natural law principles that formed the late eighteenth-century understanding of the law of nations. As explored in the next Section, modern customary international law derives its legal force not from natural law principles, but on positivist legal principles. It is for this reason that the modern assumption should be reexamined in defining the source and content of the law of nations.

C. The Structural Differences Between Customary International Law and the Law of Nations

Modern customary international law is generally understood to arise from the practices of nations followed out of a sense of legal obligation.[128] It covers rules ranging from environmental law to the law

123. The Hon. James Wilson, Esq., Charge to the Grand Jury for the District of Virginia 16 (May 23, 1791) (emphasis removed).

124. Thomas Jefferson, Opinion on French Treaties (Apr. 28, 1793), *in* 6 THE WRITINGS OF THOMAS JEFFERSON 219, 220 (Paul Leicester Ford ed., 1895).

125. The Supreme Court cited Vattel at least thirty times before 1865. *See* Paul Finkelman, *When International Law was a Domestic Problem*, 44 VAL. U. L. REV. 779, 784 (2010).

126. *The Betsey*, 3 U.S. 6, 11 (1794) (emphasis added).

127. As it was customary in earlier opinions of the day, the opinion uses "Vatt." to refer to Vattel's work. *See, e.g.*, *The Betsey*, 3 U.S. 6 (1794).

128. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES

governing wars.[129] Customary international law is derived from state practice and *opinio juris*. State practice refers to a general and consistent practice by a large (but not necessarily unanimous) number of states,[130] whereas *opinio juris* is the subjective assessment that the practice was legally binding in nature.[131]

The concept of modern customary international law is rooted in tacit consent, one of the primary tenets of legal positivism.[132] The fundamental bedrock of legal positivism is based on a belief that people are bound by laws that they have consented to, not by transcendental principles that exist independently of human preferences.[133] Treaty law is the clearest example of positive law making at the international level because states expressly consent to being bound by certain obligations. While modern customary international law can be distinguished from treaties in the sense that they do not require express consent, consent is still the driving force behind customary international law's legal framework.[134]

One needs to look no further than the basic structure of customary international law to observe the positivism underlying its taxonomy.[135] For example, customary international law is binding on all states after a certain threshold of consenting states is reached because it is assumed that states have implicitly consented to the norm by taking no action. Additionally,

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§ 102(2) (1987) (defining customary international law as a "general and consistent practice of states followed by them from a sense of legal obligation"); Bradley & Gulati, *supra* note 89, at 209 ("The standard definition of CIL is that it arises from the practices of nations followed out of a sense of legal obligation."); Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 U. CHI. L. REV. 1113 (1999).

129. Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT'L L. 757, 764 (2001).

130. The Statute of the International Court of Justice defines international custom as "evidence of a general practice accepted as law." I.C.J. STATUTE art. 38(1)(b) (June 26, 1945), *available at* http://www.icj-cij.org/documents/?p1=4&p2=2.

131. *See, e.g.*, G.I. Tunkin, *Remarks on the Juridical Nature of Customary Norms of International Law*, 49 CALIF. L. REV. 419, 423-24 (1961).

132. It is perhaps of no coincidence that Jeremy Bentham, who is credited with coining the term "international law," Edward Dumbauld, *Independence under International Law*, 70 AM. J. INT'L L. 425, 425 n.6 (1976) ("The expression 'international law' seems to have been originated by Jeremy Bentham in 1780."), was a fervent adherent to positivist legal thought. Bentham, who is also credited for pioneering the legal positivism movement in the English speaking world, famously denounced natural law as "nonsense upon stilts." Jeremy Bentham, *Nonsense Upon Stilts*, *in* BENTHAM RIGHTS, REPRESENTATION, AND REFORM: NONSENSE UPON STILTS AND OTHER WRITINGS ON THE FRENCH REVOLUTION, 319, 330 (Philip Schofield, Catherine Pease-Watkin, and Cyprian Blamires, eds., 2002) ("Natural rights is simple nonsense: natural and imprescriptible rights, rhetorical nonsense, nonsense upon stilts.").

133. JAMES LESLIE BRIERLY, LAW OF NATIONS 51 (1928).

134. *See* Lea Brilmayer, *International Law in American Courts: A Modest Proposal*, 100 YALE L.J. 2277, 2294 (1991) ("Consent can be expressed either through treaties or through the acquiescence reflected in customary international law . . . Customary international law is founded upon a less explicit form of consent, namely state practice (including acquiescence in the practice of other states.").

135. *See* M.W. Janis, *Individuals as Subjects of International Law*, 17 CORNELL INT'L L.J. 61 (1984) (describing positivists' influence on understanding the subjects of international law).

this implication can be combated when a state persistently objects (loud and often) to a norm thus opting out *before* the norm is crystallized as legally binding.[136] As the International Law Association explains, consent also underlies this exception to the rule: "[the persistent objector rule] respects States' sovereignty and protects them from having new law imposed on them against their will by a majority."[137]

Whereas customary international law relies on the implicit consent of nations, the law of nations, as understood in the eighteenth century, did not rely on consent — tacit or express. While writers in the eighteenth century did not always use the term "law of nations" to describe the same subject matter, the dominant view at the time was that the law of nations referred to certain immutable rules that all states were bound by, regardless of consent. It is for this reason that equating customary international law and the law of nations fatally overlooks the significant differences in the sources through which each body of law derives its legal force. The natural law foundation of the law of nations is more reflective of what modern international lawyers consider *jus cogens* norms. The conceptual link between *jus cogens* and the law of nations is detailed below.

D. The Conceptual Link Between Modern Jus Cogens Norms and Eighteenth-Century Law of Nations

Jus cogens norms are a small set of laws that occupy the highest status in international law. These norms "are said to arise from nearly universal practice and to be absolute in their character, such that they do not permit any exceptions — even in times of emergency."[138]

While the concept of *jus cogens* is understood by some to have a relatively recent origin that coincided with the human rights revolution following World War II,[139] its theoretical roots can be securely traced to natural law. *Jus cogens* norms are difficult to reconcile with a positivist legal framework because "the consent-based approach is hard-pressed to

136. Ted L. Stein, *The Approach of the Different Drummer: The Principle of Persistent Objector in International Law*, 26 HARV. INT'L L.J. 457, 457 (1985) (observing that the persistent objector principle "permits individual states to opt out of new and otherwise universal rules of international law").

137. Int'l Law Ass'n, *Committee on Formation of Customary International Law, Statement of Principles Applicable to the Formation of General Customary International Law: Report of the Sixty-Ninth Conference*, London, Section II.C.15, Cmt. (c) (July 25–29, 2000).

138. Bradley & Gulati, *supra* note 89, at 212; *see also* Christenson, *supra* note 17; Evan J. Criddle & Evan Fox-Decent, *A Fiduciary Theory of Jus Cogens*, 34 YALE J. INT'L L. 331 (2009).

139. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, § 102, Reporters' Note 6 (1987) ("The concept of *jus cogens* is of relatively recent origin."); *see also* Egon Schwelb, *Some Aspects of International* Jus Cogens *as Formulated by the International Law Commission*, 61 AM. J. INT'L L. 946 (1967).

explain why customary norms would bind persistent objectors or nullify subsequent conflicting treaties."[140]

On the other hand, natural law offers the theoretical foundation for the operation of peremptory norm in today's international law. Modern international law luminaries, including Louis Henkin and W. Michael Reisman, have suggested that *jus cogens* norms such as the prohibitions against slavery and military aggression derive their peremptory character from their inherent rational and moral authority rather than state consent.[141] The best expression of why any international legal system necessitates nonpositive sources of law is perhaps penned by J.L. Brierly in his classic, *The Law of Nations*: consent cannot of itself create an obligation; it can do so only within a system of law which declares that consent is duly given. To argue otherwise is to argue in a circle, and to fall back on "an unacknowledged source of obligation, which, whatever it may be, is certainly not the consent of the state."[142]

The similarities between *jus cogens* and eighteenth-century law of nations is revealed by examining the instances of law of nations violations identified by eighteenth-century writers. Vattel, for instance, assessed that both voluntary and necessary law of nations were to be obeyed to avoid producing "iniquitous and barbarous custom."[143] In the context of war, for instance, voluntary law of nations did not prohibit the use of force in all contexts, but prohibited those measures which are themselves odious, "such as poisoning, assassination, treason, the massacre of an enemy who has surrendered and from whom there is nothing to fear."[144] The underlying rationale for this prohibition under natural law is strikingly similar to that of *jus cogens* (i.e. that these are some of the few universal norms that are necessary to maintain a public world order).

Of course, one may argue natural law-based categories of the law of nations does not exactly correlate with today's *jus cogens* norms. For example, Vattel considered ambassador rights a rule of the voluntary law of nations, though not many would consider it a *jus cogens* norm today. These differences only suggest that the task of labeling laws as natural law should be undertaken through careful evaluation because of their contested nature. Indeed, writers including Christian Wolff maintained that the privileges upon foreign ministers were merely a matter of

140. Criddle & Fox-Decent, *supra* note 138, at 340.

141. LOUIS HENKIN, THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS 15 (1981); W. Michael Reisman, *Unilateral Action and the Transformations of the World Constitutive Process: The Special Problem of Humanitarian Intervention*, 11 EUR. J. INT'L L. 3, 15 n.29 (2000) ("In human rights discourse, jus cogens has . . . evolv[ed] into a type of super-custom, based on trans-empirical sources and hence not requiring demonstration of practice as proof of its validity.").

142. BRIERLY, *supra* note 133, at 37.

143. VATTEL, *supra* note 88, at 305.

144. *Id.* at 295.

institutional difference, owning its origin to custom and conventions; not the natural law of nations.[145] Even Vattel did not consider all privileges bestowed upon ambassadors as inviolable. For instance, under Vattel's conception, it was entirely within a sovereign's right to punish an ambassador who broaches plots of a dangerous tendency, such as encouraging a conspiracy against the sovereign.[146] Rather, it was the uncivilized and savage-like acts of extreme cruelty disproportionate to the nature and degree of the offense that constituted a violation of the voluntary and necessary law of nations because such acts would render it impossible for mutual correspondence between nations.[147] It is for this reason that we must resist limiting modern ATS suits to the norms identified by Blackstone (discussed further discussed *infra* Part III).

The predominance of natural law in the law of nations discourse of the eighteenth century should not be taken as an attack on legal positivism, nor a vindication of natural law theory. A first-year law student would be able to assess that natural law explanations of *jus cogens* uncomfortably blend law and morality, and confuse parochial and relativistic ethical norms with objective principles of legal right and obligation.[148] There is also a problem with indeterminacy associated with natural law. Whereas positivism tethers a legal norm securely to the entity that created it, with that same official entity calling the shots when the time comes to interpreting the law,[149] natural law does not easily resolve disputes over the scope or content of the law.

What remains true is that the dominance of positivism does not alter the Supreme Court's instructions in *Sosa* that actionable torts in the modern era ought to reflect the "18th-century paradigms."[150] To ignore the natural law roots of the law of nations in this respect is to depart from the eighteenth-century understanding of the term. It is for this reason that we should look towards what international law recognizes as "peremptory norms" to evaluate what torts are actionable under the ATS. This raises the question of what international norms have the status of *jus cogens*. The next Part addresses this question.

145. WOLFF, *supra* note 118, § 1059.

146. VATTEL, *supra* note 88, at 378–84.

147. *Id.*

148. Criddle & Fox-Decent, *supra* note 138, at 343.

149. Lea Brilmayer, *Untethered Norms After* Erie Railroad Co. v. Tompkins*: Positivism International Law, and the Return of the "Brooding Omnipresence"*, 54 WM. & MARY L. REV. 725, 726 (2013).

150. Sosa v. Alvarez-Machain, 542 U.S. 692, 725 (2004).

III. DEFINING THE SCOPE AND CONTENT OF THE LAW OF NATIONS: ACTIONABLE MODERN TORTS UNDER THE ALIEN TORT STATUTE

The *Sosa* Court observed that the purpose of the Alien Tort Statute was to address "violations of the law of nations, admitting of a judicial remedy and at the same time threatening serious consequences in international affairs."[151] Understanding that violations of "the law of nations" are violations of natural law, which share its roots with *jus cogens* and not customary international law, gets courts closer to understanding the eighteenth-century conception of the law of nations required by the *Sosa* Court.

The Vienna Convention on the Law of Treaties provides a useful starting point for defining what constitutes *jus cogens* violations. Identifying *jus cogens* as "peremptory norms," it explains that they are norms "from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."[152] In international legal circles, *jus cogens* norms are widely understood as those rules that derive from the legal conscience of mankind which are deemed absolutely essential to coexistence in the international community.[153]

The Restatement of Foreign Relations Law of the United States further assesses that the prohibition on the use of force, as codified in the UN Charter, constitutes *jus cogens* norms. It also endorses norms that create "international crimes" as those deserving *jus cogens* status. These norms "might include rules prohibiting genocide, slave trade and slavery, apartheid and other gross violations of human rights, and perhaps attacks on diplomats."[154] It is perhaps of no coincidence that these are the precise norms that Justice Breyer's concurrence in *Sosa* found to be a "subset of behavior" that is universally condemned.[155]

Federal courts have recognized a *jus cogens* norm as a "norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only be a subsequent norm of general international law having the same character."[156] Despite the methodological difficulty in ascertaining *jus cogens*

151. *Id.* at 715.

152. Vienna Convention on the Law of Treaties, art. 53, May 23, 1969, 1155 U.N.T.S. 332.

153. *See, e.g.*, Criddle & Fox-Decent, *supra* note 138, at 331–32.

154. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102, Reporters' note 6 (1987).

155. Sosa v. Alvarez-Machain, 542 U.S. 692, 762 (2004) (Breyer J., concurring) (listing "torture, genocide, crimes against humanity, and war crimes" as crimes to be universally condemned).

156. *See* Siderman de Blake v. Republic of Arg., 965 F.2d 699, 714 (9th Cir. 1992) (quoting Vienna Convention on the Law of Treaties, art. 53, May 23, 1969, 1155 U.N.T.S. 332).

norms, federal courts have agreed on certain basic principles in identifying them.

The Ninth Circuit and the D.C. Circuit, for instance, instruct that "[c]ourts seeking to determine whether a norm of customary international law has attained the status of *jus cogens* look to the same sources [as for customary international law], but must also determine whether the international community recognizes the norm as one 'from which no derogation is permitted.'"[157] While *jus cogens* and customary international law are related, they differ in one important respect; customary international law, like international law defined by treaties and other international agreements, rests on the consent of states. In contrast, a state is bound by *jus cogens* norms even if it does not consent to their application. As the Ninth Circuit has recognized, *jus cogens* norms supported prosecutions in the Nuremberg trials because the violations were of "[t]he universal and fundamental rights of human beings."[158]

Under this rubric, federal courts are tasked to develop case law to define the parameters of law of nations violations, giving due credence to international norms defining *jus cogens* violations.[159] This task is of critical importance, as *Kiobel* has already created split authority in the lower courts. Below, I use two recent cases from the Fourth Circuit and the Eleventh Circuit to further explicate this framework.

A. Chiquita Bananas *and* CACI

Within the Eleventh Circuit, family members of deceased banana plantation workers in Colombia brought a claim against Chiquita Fresh North America, LLC and Chiquita Brands International, Inc. (together "Chiquita") in the U.S. District Court for the Southern District of Florida.[160] Plaintiffs alleged that Chiquita formed an agreement with the Fuerzas Armadas Revolucionarias de Columbia ("FARC"). Based on this agreement, Chiquita provided financial support and in exchange FARC allegedly orchestrated attacks on civilian populations, extrajudicial killings, murders, forced displacements, threats, and intimidation against persons

157. *See id.* at 715 (quoting Comm. of U.S. Citizens Living in Nicar. v. Reagan, 859 F.2d 929, 940 (D.C. Cir. 1988) (quoting Vienna Convention, art. 53)).

158. *See id.* ("The universal and fundamental rights of human beings identified by Nuremberg — rights against genocide, enslavement, and other inhumane acts . . . — are the direct ancestors of the universal and fundamental norms recognized as *jus cogens*." (citation omitted)).

159. Almog v. Arab Bank, PLC, 471 F. Supp. 2d 257, 285 (E.D.N.Y. 2007). This framework conforms to the way common law was developed in early America following the English common law tradition. In the eighteenth century, references to the law of nations abounded in opinions, and institutional writers dealing with the common law regularly listed it as one of its principle sources. D.J. Ibbetson, *Natural Law and Common Law*, 5 EDINBURGH L. REV. 4 (2001).

160. Cardona v. Chiquita Brands Int'l, Inc., 760 F.3d 1185 (11th Cir. 2014).

including the plaintiffs.[161] Chiquita moved to dismiss under Federal Rules of Civil Procedure Rule 12(b)(6), arguing that the plaintiffs' claims did not constitute law of nations violations, and even if they did, they could not survive *Kiobel*. The district court denied the motion to dismiss[162], and the Eleventh Circuit, in a split opinion, reversed the trial court.

The Eleventh Circuit majority (composed of Judge Peter Fay and Judge David Sentelle) reached this conclusion on the basis that "[a]ny tort here, whether styled as torture or under some other theory, occurred outside the territorial jurisdiction of the United States."[163] For the majority, nothing less than the act having taken place within the United States was sufficient to displace the presumption.[164] Judge Beverly Martin, dissenting, saw the case as offering two important facts that displaced the presumption: Chiquita, unlike Royal Dutch Petroleum in *Kiobel*, was a corporation headquartered and incorporated within the United States; and the plaintiffs participated in the campaign of torture and murder in Colombia by "reviewing, approving, and concealing a scheme of payments and weapons shipments to Colombian terrorist organizations, all from their corporate offices in the territory of the United States."[165] In other words, under Judge Martin's framework, plaintiffs are able to overcome the *Kiobel* Court's presumption if the critical conduct (i.e., agreements between Chiquita and FARC) leading to alleged law of nations violations were executed in the United States.

It was this line of reasoning that led a unanimous panel of the Fourth Circuit to conclude, in the high-profile case of *Al-Shimari v. CACI*, that the plaintiffs seeking damages against an American corporation for the torture and mistreatment of foreign nationals at the Abu Ghraib prison in Iraq displaced the presumption against extraterritoriality.[166] According to the Fourth Circuit, the plaintiffs' claims, which included allegations that managers of the contractor based in the United States approved, encouraged, and/or attempted to cover up the alleged misconduct in Iraq, "touch[ed] and concern[ed]" the territory of the United States with sufficient force to displace the presumption against extraterritorial application of the ATS.[167]

The circuit split on the extraterritoriality question does little to ameliorate the larger question, which is, even when a claim survives the

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161. Second Amended Class Action Complaint for Damages, John Doe v. Chiquita Brands Int'l, Inc., No. 08-01916-MD, 760 F.3d 1185 (11th Cir. 2014), 2012 WL 8203711.

162. *In re* Chiquita Brands Int'l, Inc. Alien Tort Statute & S'holder Derivative Litig., 690 F. Supp. 2d 1296 (S.D. Fla. 2010).

163. Cardona, 760 F.3d at 1189.

164. *Id.* at 1191 ("The torture, if the allegations are taken as true, occurred outside the territorial jurisdiction of the United States.").

165. *Id.* at 1192 (Martin, J., dissenting) (footnote omitted).

166. Al Shimari v. CACI Premier Tech., Inc., 758 F.3d 516 (4th Cir. 2014).

167 *Id.* at 520 (citing Kiobel, 133 S. Ct. at 1669).

Kiobel presumption, whether it is based on violations of norms comparable to the eighteenth-century paradigm for the law of nations. While the Fourth Circuit did not reach this issue, the Eleventh Circuit theorized that the standard laid out in *Sosa* also precluded the plaintiff's claim, reasoning that "[n]othing in the complaint before us falls within Blackstone's three categories."[168]

The Eleventh Circuit's rationale, however, is inconsistent with the Supreme Court's instructions that modern courts observe the eighteenth-century *paradigms*; not just the substantive norms identified in Blackstone. Eighteenth-century jurists were mindful that natural law principles, as applied to the conduct of sovereigns, created external rules — implying that new rules may be constituted in the process of extending natural law principles to contemporaneous realities. Indeed, the *Sosa* Court recognized the possibility that a court might recognize a cause of action outside the law of nations as it existed at the time of the enactment of the ATS.

Attempting to derive actionable norms by looking to modern customary international law is equally problematic. With the proliferation of multilateral agreements in recent decades, there are norms that have gained widespread acceptance so as to constitute customary international law (e.g., depletion of ozone layers, climate change, loss of biological diversity),[169] but which are plainly insufficient to be considered violations of the law of nations. If plaintiffs brought a claim alleging that Chiquita's banana growing practice included pesticides that violated such a customary international law, it would fail under the revisionist historical paradigm, and not surprisingly, under the *Sosa* Court's instructions that ATS litigation be limited to a modest number of international norms.

A more doctrinally consistent approach would be to task district courts with determining whether the alleged law of nations violations were analogous to the *character* of the law of nations violations recognized by eighteenth-century jurists.[170] In *CACI*, for instance, not all of the reported hostilities against Abu Gharaib prisoners may rise to the level of law of

168. Chiquita, 760 F.3d 1185, at 1190.

169. Daniel Bodansky, *Customary (and Not So Customary) International Environmental Law*, 3 IND. J. GLOBAL LEGAL STUD. 105 (1995).

170. It is important to note for our purposes that the actual allegations, as set forth in pleadings, should control a court's assessment of what acts would rise to the level of law of nations violations. In the crimes against humanities context, for instance, premium should be placed on deciphering whether the complaint alleges "'massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims,' and 'systematic' as 'thoroughly organized action, following a regular pattern on the basis of a common policy and involving substantial public or private resources.'" Wiwa v. Royal Dutch Petroleum Co., 96-civ-8386, 2002 WL 319887, at *10 (S.D.N.Y. Feb. 28, 2002) (quoting Prosecutor v. Rutaganda, Case No. ICTR–96–3–T, 69 (Dec. 6, 1999)). To be considered a crime against humanity, moreover, the emphasis must not be on the individual but rather on the collective. Almog v. Arab Bank, PLC, 471 F. Supp. 2d 257, 275 (E.D.N.Y. 2007) (citing Prosecutor v. Tadic, Case No. IT–94–1–T, Opinion and Jud., 644 (May 7, 1997)).

nations violations because some might be considered proportionate to the needs of the war. The eighteenth-century paradigm only identifies torts that are *unnecessarily* committed as violations of the law of nations,[171] such as suspected "enemies" being "shot in the leg,"[172] "stripped naked,"[173] "kept in a cage,"[174] "beaten on [the] genitals with a stick,"[175] and "forcibly subjected to sexual acts."[176]

CONCLUSION

International law occupies an uncomfortable status in modern American law. While the acceleration of global integration has generated interest and conferred a degree of legitimacy to international law, some legal scholars still question whether international law is even law.[177] This uncomfortable status of international law is attributable to the dominance of legal positivism in the post-*Erie* world. As Oppenheim observed in the early twentieth century, "The Positivists recognize only a positive international law based on custom and treaties, and deny the very existence as well of a law of nature as of a natural international law."[178] Because international law does not mirror domestic law or its central enforcement mechanism, it is vulnerable to various positivist critiques.[179]

The ATS jurisprudence reminds us that it is both circular and impractical to insist on eliminating all law that cannot be securely traced to positive law. While many domestic legal scholars are quick to dismiss any legal frameworks that go beyond sovereign consent, because there are no

171. *See* VATTEL, *supra* note 88, at 294–95 ("What we have said is sufficient to give a general idea of the moderation with which, in most just war, a belligerent should use the right to pillage and devastate the enemy's country. Apart from the case in which there is question of punishing an enemy, the whole may be summed up in this general rule: All acts of hostility which injure the enemy without necessity, or which do not tend to procure victory and bring about the end of the war, are unjustifiable, and as such condemned by the natural law.").

172. Al Shimari v. CACI Premier Tech., Inc., 758 F.3d 516, 521 (4th Cir. 2014).

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW 201–02 (2005) (asking whether international law is "not law but politics" or "not law but morality," and concluding that "[i]t is politics, but a special kind of politics"); Joshua Kleinfeld, *Skeptical Internationalism: A Study of Whether International Law is Law*, 78 FORDHAM L. REV. 2451 (2010) (collecting sources discussing the legality of international law); *see also* JESSUP, *supra* note 87, at 5 ("The debate about the propriety of using the word 'law' in the term 'international law' is as old as the term. Much of that debate is fruitless because it rests upon the undeclared differences in underlying definition.").

178. L. Oppenheim, *Science of International Law: Its Tasks and Method*, 313 AM. J. INT'L L. 313, 326 (1908).

179. *See, e.g.*, ANTHONY D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW 130 (1971); J. Patrick Kelly, *The Twilight of Customary International Law*, 40 VA. J. INT'L L. 449, 452 (2000) ("I argue that CIL should be eliminated as a source of international legal norms and replaced by consensual processes.").

checks on human rulemaking some principles fundamentally abhorrent to a properly functioning international society must be legalized, such as states ought not to be allowed to liquidate a race or enter into treaties to enslave people. Peremptory norms are important in this respect, because they represents an unwritten "constitutional" guidance that checks the positive law making power of sovereign nations.[180] Because international law lacks a central police power, it relies upon internal mechanism and reciprocal sanctions to enforce its rules and principles. It is for this reason that canonical eighteenth-century jurists writing on the law of nations were concerned about the shared responsibilities of modern states that derived from natural law. The eighteenth-century American view of the law of nations, therefore, provides an important paradigm for the modern world in which positivist and natural law frameworks may coexist harmoniously.

Laws providing remedies in domestic forums against those who violate peremptory norms, such as the Alien Tort Statute, provide an important safeguard to each nation by sustaining venerable norms that are required to facilitate international relations.[181] It also allows us to recognize that classical positivist attitudes are not the only game in town, opening up a range of possibilities to understand competing sources of law as complementary aspects of a single juridical reality. Finally, it permits us to be candid about the persistence of nonpositive juridical phenomena and that norms describable as "brooding omnipresence" continue to play a role in our domestic legal order, welcome or not.

180. *See, e.g.*, Karen Parker & Lyn Beth Neylon, Jus Cogens*: Compelling the Law of Human Rights*, 12 HASTINGS INT'L & COMP. L. REV. 411, 423 (1989). Scholars have also conceptualized the law of nations as incorporated into U.S. constitutional law. *See* Anthony J. Bellia Jr. & Bradford R. Clark, *The Law of Nations as Constitutional Law*, 98 VA. L. REV. 729 (2012).

181. Sarah H. Cleveland, *The Alien Tort Statute, Civil Society, and Corporate Responsibility*, 56 RUTGERS L. REV. 971, 971 (2004) ("ATS litigation has played an important role in the recent overall global development of enforceable human rights norms . . . .").