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Lohengrin Revealed: The Implications of Sosa v. Alvarez-Machain for Human Rights Litigation Pursuant to the Alien Tort Claims Act

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"This old but little used section is a kind of legal Lohengrin; although it has been with us since the First Judiciary Act, no one seems to know whence it came."[1]

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1. IIT v. Vencap, Ltd., 519 F.2d 1001, 1015 (2d Cir. 1975). According to German legend, Lohengrin appears from nowhere to rescue a maiden and, upon inquiry into his origins, just as mysteriously vanishes. *See* ROBERT JAFFRAY, THE TWO KNIGHTS OF THE SWAN: LOHENGRIN AND HELYAS 11 (1910).

I. INTRODUCTION

On June 29, 2004, the United States Supreme Court issued its long-awaited decision in *Sosa v. Alvarez-Machain*.[2] The Court's opinion addressed for the first time in substantive detail Section 1350 of Title 28 of the U.S. Code. The so-called "Alien Tort Claims Act" ("ATCA") provides "[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."[3] Largely dormant from the time of its inclusion by the U.S. Congress in the Judiciary Act of 1789, the ATCA has proven contentious since its reinvigoration as a tool by which alien plaintiffs sought to hold foreign government officials liable in the United States for human rights violations.[4] Its more recent

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

3. 28 U.S.C. § 1350 (2000).

4. *See, e.g.*, Abebe-Jira v. Negewo, 72 F.3d 844 (11th Cir. 1996); Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995); Hilao v. Estate of Marcos (*In re* Estate of Ferdinand E. Marcos Human Rights Litigation), 25 F.3d 1467 (9th Cir. 1994); Filartiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980); Xuncax v. Gramajo, 886 F. Supp. 162 (D. Mass. 1995); Forti v. Suarez-Mason, 672 F. Supp. 1531 (N.D. Cal. 1987).

utilization against transnational corporations[5] for complicity in abuses associated with their foreign investment activities has created controversy between human rights advocates[6] and business interests.[7] Nevertheless, a body of ATCA jurisprudence has emerged from the opinions of lower federal courts confronted with the activities of transnational corporations, often in locations with long histories of disregard for even the most fundamental of human rights.[8]

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5. For purposes of this article, a "transnational corporation" is defined as "an economic entity operating in more than one country or a cluster of economic entities operating in two or more countries – whatever their legal form, whether in their home country or country of activity and whether taken individually or collectively." ESCOR, Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, ¶ 20, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2/2003 (Aug. 13, 2003).

6. For articles praising the use of the ATCA against transnational corporations, see, e.g., Logan M. Breed, *Regulating Our 21st Century Ambassadors: A New Approach to Corporate Liability for Human Rights Violations Abroad,* 42 VA. J. INT'L L. 1005 (2002); William S. Dodge, *Which Torts in Violation of the Law of Nations?,* 24 HASTINGS INT'L & COMP. L. REV. 351 (2001); Sarah M. Hall, *Multinational Corporations' Post-Unocal Liabilities for Violations of International Law,* 34 GEO. WASH. INT'L L. REV. 401 (2002); Beth Stephens, *The Amorality of Profit: Transnational Corporations and Human Rights,* 20 BERKELEY J. INT'L L. 45 (2002); Beth Stephens, *Taking Pride in International Human Rights Litigation,* 2 CHI. J. INT'L L. 485 (2001).

7. For articles criticizing the use of the ATCA against transnational corporations, see, e.g., Curtis A. Bradley, *The Alien Tort Statute and Article III,* 42 VA. J. INT'L L. 587 (2002); Curtis A. Bradley & Jack L. Goldsmith, *Federal Courts and the Incorporation of International Law,* 111 HARV. L. REV. 2260 (1998); Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position,* 110 HARV. L. REV. 816 (1997); Ivan Poullaos, Note, *The Nature of the Beast: Using the Alien Tort Claims Act to Combat International Human Rights Violations,* 80 WASH. U. L.Q. 327 (2002); Courtney Shaw, Note, *Uncertain Justice: Liability of Multinationals Under the Alien Tort Claims Act,* 54 STAN. L. REV. 1359 (2002).

8. *See, e.g.,* Aguinda v. Texaco, Inc., 303 F.3d 470 (2d Cir. 2002) (Peru and Ecuador); Bano v. Union Carbide Corp., 273 F.3d 120 (2d Cir. 2001) (India); Bigio v. Coca-Cola Co., 239 F.3d 440 (2d Cir. 2000) (Egypt); Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88 (2d Cir. 2000) (Nigeria); Beanal v. Freeport-McMoran, Inc., 197 F.3d 161 (5th Cir. 1999) (Indonesia); Hamid v. Price Waterhouse, 51 F.3d 1411 (9th Cir. 1995); Carmichael v. United Techs. Corp., 835 F.2d 109 (5th Cir. 1988) (Saudi Arabia); Mujica v. Occidental Petroleum Corp., 381 F. Supp. 2d 1164 (C.D. Cal. 2005) (Colombia); Bowoto v. Chevron Texaco Corp., 312 F. Supp. 2d 1229 (N.D. Cal. 2004) (Nigeria); Villeda v. Fresh Del Monte Produce, Inc., 305 F. Supp. 2d 1285 (S.D. Fla. 2003), *aff'd,* 416 F.3d 1242 (11th Cir. 2005) (Guatemala); Sinaltrainal v. Coca-Cola Co., 256 F. Supp. 2d 1345 (S.D. Fla. 2003) (Colombia); Rodriquez v. Drummond Co., 256 F. Supp. 2d 1250 (N.D. Ala. 2003) (Colombia); Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289 (S.D.N.Y. 2003) (Sudan); Abdullahi v. Pfizer, Inc., No. 01 Civ. 8118, 2002 U.S. Dist. LEXIS 17436 (S.D.N.Y. Sept. 17, 2002), *vacated,* 77 F. App'x 48 (2d Cir. 2003) (Nigeria); Flores v. S. Peru Copper Corp., 253 F. Supp. 2d 1510 (S.D.N.Y. 2002), *aff'd,* 343 F.3d 140 (2d Cir. 2003) (Peru); Sarei v. Rio Tinto, 221 F. Supp. 2d 1116 (C.D. Cal. 2002) (Papua New Guinea); *In re* World War II Era Japanese Forced Labor Litigation I, 164 F. Supp. 2d

In an opinion authored by Justice Souter, the Court unanimously rejected Alvarez's claim that his arrest and overnight detention by Mexican nationals acting at the request of the U.S. Drug Enforcement Administration was a tort in violation of the law of nations within the purview of the ATCA. As such, the Court dismissed his ATCA claim against his captors.[9] The Court refused to adopt Sosa's contention that the ATCA was merely jurisdictional and inoperative without congressional adoption of claims for relief actionable pursuant to the statute.[10] Rather, the Court inferred that Congress intended that the ATCA provide jurisdiction for "a relatively modest set of actions alleging violations of the law of nations."[11] The basis for these actions was provided by the common law.[12] The Court found no basis to find that Congress intended the ATCA to reach beyond three torts actionable in the late eighteenth century, specifically, violation of safe conduct, infringement of the rights of ambassadors, and piracy.[13] However, Justice Souter nevertheless concluded that modern federal courts could recognize additional torts based on the law of nations as long as they rested on "a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of [these] 18th-century paradigms."[14] The door to "further independent judicial recognition of actionable international norms" was thus "still ajar subject to vigilant doorkeeping."[15] This "vigilant doorkeeping" required federal courts to refuse to recognize private claims under federal common law for violations of international law norms that were not "specific, universal and obligatory."[16]

Although it did not address the issue of the liability of transnational corporations for human rights abuses pursuant to the

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1160 (N.D. Cal. 2001) (various locations throughout Asia); *In re* World War II Era Japanese Forced Labor Litigation II, 164 F. Supp. 2d 1154 (N.D. Cal. 2001) (various locations throughout Asia); Doe v. Unocal Corp., 110 F. Supp. 2d 1294 (C.D. Cal. 2000) (Burma); Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424 (D.N.J. 1999) (Germany); Eastman Kodak v. Kavlin, 978 F. Supp. 1078 (S.D. Fla. 1997) (Bolivia); Doe v. Unocal Corp., 963 F. Supp. 880 (C.D. Cal. 1997) (Burma).

9. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 742 (2004).
10. *Id.*
11. *Id.* at 746.
12. *Id.* at 742.
13. *Id.* at 743.
14. *Id.* at 749.
15. *Id.* at 752.
16. *Id.* at 753.

ATCA, the U.S. Supreme Court's opinion is crucial to the determination of such liability in pending and future cases.[17] This Article examines the implications of the U.S. Supreme Court's opinion in *Sosa v. Alvarez-Machain* for presently pending and future ATCA cases alleging violations of human rights involving the personal welfare of individuals. The Article commences with an overview of the ATCA itself and a summary of current ATCA litigation involving personal welfare rights. The Article then provides detailed discussion of the opinion in *Alvarez-Machain.* The opinion is then analyzed in the context of claims relating to personal welfare rights in presently pending and future ATCA litigation. The Article concludes that most claims involving personal welfare rights will not survive application of the *Alvarez-Machain* opinion by the lower federal courts.

II. THE HISTORICAL BACKGROUND TO *SOSA V. ALVAREZ-MACHAIN*

A. The Alien Tort Claims Act

Although a comprehensive history of the ATCA is beyond the scope of this Article, a brief review of its historical background is necessary to place the Supreme Court's opinion in *Sosa* in proper perspective. Judicial interpretation of the ATCA has been complicated by the complete absence of legislative history as well as judicial elaboration in opinions prior to the 1980s. The ATCA is not mentioned in the debates surrounding the adoption of the first Judiciary Act, and there is no evidence of what its drafters intended by its inclusion.[18] This lack of formal legislative history has served as a significant source of frustration for courts called upon to interpret its provisions in a contemporary context.[19] As a

17. It has been noted that "[e]very other Alien Tort Claims Act litigation forever is going to be referring to the analysis in this case." Stacey Harms & Samira Puskar, *The Court Opens the Door to International Human Rights Cases,* MEDILL NEWS SERV. (June 2004) (quoting Paul Hoffman, lead counsel for Alvarez-Machain).

18. *See* 1 ANNALS OF CONG. 782-833 (Joseph Gales ed., 1789); *see also* Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 812 (D.C. Cir. 1984) (Bork, J., concurring) (wherein Judge Bork noted "[t]he debates over the Judiciary Act in the House - the Senate debates were not recorded - nowhere mention the provision, not even, so far as we are aware, indirectly.").

19. *See, e.g.,* Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 104 n.10 (2d Cir. 2000) ("The original purpose of the ATCA remains the subject of some controversy . . . . [as] [t]he Act has no formal legislative history" and that the intent of the drafters was "a matter forever hidden from our view by the scarcity of relevant evidence."); Trajano v.

result, the oft-quoted characterization of the ATCA as "a kind of legal Lohengrin" which, despite its ancient standing, "no one seems to know whence it came," remained relevant to modern courts confronted with ATCA cases.[20]

The absence of formal legislative history led to considerable speculation as to what may have been the First Congress' legislative intent. Judicial speculation included the suggestion the ATCA was intended to ensure a federal forum for claims asserted by aliens against U.S. citizens or arising from events occurring in the United States.[21] According to this interpretation, the ATCA was necessary in order to prevent state courts from mishandling such cases and resultant-embarrassment to the United States.[22] Courts also attempted to delineate the specific torts intended by the First Congress to fall within the parameters of the ATCA.[23] More recently, one member of the U.S. Court of Appeals for the Ninth Circuit speculated the ATCA was adopted to ensure supremacy of the federal government's interpretation of international law over those proffered by the states and to further Congress' intent that "the new nation take its place among the civilized nations of the world."[24]

Commentators also widely speculated on this subject. Some commentators contended that the ATCA's original intent was related to national security and sovereignty considerations. These commentators concluded that the ATCA was intended to shield the United States from foreign threats resulting from erroneous interpretations of international law by the states,[25] protect the physical integrity of foreign ambassadors serving in the United

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Marcos, 978 F.2d 493, 498 (9th Cir. 1992) ("The debates that led to the Act's passage contain no reference to the Alien Tort Statute, and there is no direct evidence of what the First Congress intended to accomplish."); Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289, 304 (S.D.N.Y. 2003) ("Despite the fact that the ATCA has existed for over two hundred years, little is known of the framers' intentions in adopting it - the legislative history of the Judiciary Act does not refer to Section 1350.").

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

21. *Tel-Oren,* 726 F.2d at 782-83 (Edwards, J., concurring).

22. *Id.*

23. *Id.* at 813 (Bork, J., concurring) (listing violations of safe conduct, infringement on the rights of ambassadors and piracy as the torts intended by the First Congress to be within the scope of the ATCA).

24. Alvarez-Machain v. United States, 331 F.3d 604, 649 (9th Cir. 2003) (O'Scannlain, J., dissenting).

25. *See, e.g.,* Jeffrey Rabkin, *Universal Justice: The Role of Federal Courts in International Civil Litigation,* 95 COLUM. L. REV. 2120, 2125 (1995); Shaw, *supra* note 7, at 1364.

States,[26] prevent piracy,[27] and serve as a "badge of honor" signifying the arrival of the United States in the community of nations.[28] Other commentators focused upon economic realities confronting the United States at the time of the adoption of the ATCA. According to these commentators, the ATCA was intended to bolster the economy by encouraging immigration and foreign investment through the assurance the United States would conduct itself in accordance with the law of nations.[29] Interpretations also varied with respect to the breadth of the problems sought to be addressed by the ATCA. For example, one commentator speculated the ATCA was drafted to address a single problem, specifically, the punishment of torts committed by crews of U.S. vessels in the course of stopping and boarding ships suspected of aiding enemies in times of war.[30] By contrast, other commentators concluded the ATCA was intended from its inception to address

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26. *See, e.g.*, William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the "Originalists,"* 19 HASTINGS INT'L & COMP. L. REV. 221, 232-33 (1996); Rabkin, *supra* note 25, at 2125-26; Shaw, *supra* note 7, at 1364. This school of interpretation is based upon two incidents in early U.S. history. The first incident involved an assault by Chevalier De Longchamps, a French citizen, upon the French Consul General Marbois in Philadelphia in 1784. *See* Respublica v. De Longchamps, 1 U.S. (1 Dall.) 111 (1784). The second incident involved a forcible entry into the home of the Dutch Ambassador Van Berckel by a New York City constable for the purpose of effectuating an arrest of a servant. *See Report of John Jay, Secretary of Foreign Affairs, on Complaint of Minister of the United Netherlands*, 34 J. CONT. CONG. 109, 111 (1788). Although both perpetrators were ultimately convicted of violating the law of nations, such convictions were procured in state courts due to the absence of a federal statutory remedy. *See* Letter from Edmund Randolph, Governor of Virginia, to the Speaker of the House of Delegates (Oct. 10, 1787) (stating that "if the rights of an ambassador be invaded by any citizen it is only in a few States that any laws exist to punish the offender"), *quoted in* Flores v. S. Peru Copper Corp., 343 F.3d 140, 149 n.13 (2d Cir. 2003).

27. *See, e.g.*, Michael D. Pettyjohn, Comment, *"Bring Me Your Tired, Your Poor, Your Egregious Torts Yearning to See Green:" The Alien Tort Statute,* 10 TULSA J. COMP. & INT'L L. 513, 515 (2003); Peter Waldman & Timothy Mapes, *A Global Journal Report: Administration Sets New Hurdles for Human-Rights Cases,* WALL ST. J., Aug. 7, 2002, at B1.

28. *See, e.g.*, Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor,* 83 AM. J. INT'L L. 461 (1989); Shaw, *supra* note 7, at 1364.

29. *See, e.g.*, Rabkin, *supra* note 25, at 2125; Pettyjohn, *supra* note 27, at 515; Shaw, *supra* note 7, at 1364. This conclusion is based, in part, upon James Madison's statement to the Virginia Convention that "[w]e well know, sir, that foreigners cannot get justice done them in these [state] courts, and this has prevented many wealthy gentlemen from trading or residing among us." 3 ELLIOT'S DEBATES 583 (1888), *quoted in* Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 783 n.12 (1984) (Edwards, J., concurring).

30. *See* Joseph M. Sweeney, *A Tort Only in Violation of the Law of Nations,* 18 HASTINGS INT'L & COMP. L. REV. 445, 445 (1995).

public and private human rights abuses in violation of the law of nations.[31]

Equally missing as a source of modern interpretation was an established body of judicial precedent. The ATCA was an infrequent subject of judicial opinions prior to the 1980s. The first recorded judicial reference occurred in 1795 when a federal court in South Carolina concluded the ATCA granted jurisdiction with respect to a dispute concerning title to slaves seized on a captured enemy vessel.[32] Subsequent reference did not occur until 1908 when the U.S. Supreme Court suggested in passing the ATCA may be applicable to a claim that a U.S. officer illegally seized alien property in a foreign state.[33] The third judicial reference came in 1961 in *Adra v. Clift.*[34] In this child custody case between two aliens, the U.S. District Court for the District of Maryland held wrongful withholding of custody constituted an actionable tort and the misuse of a passport to gain the child's entry into the United States was a violation of international law.[35] The final significant reference to the ATCA prior to its reemergence in the 1980s was in the opinion of the U.S. Court of Appeals for the Ninth Circuit in *Nguyen Da Yen v. Kissinger.*[36] This case arose from the alleged illegal evacuation of children from Vietnam by the U.S. Immigration and Naturalization Service. In dicta, the court noted injuries accruing as a result of the evacuation could be addressed pursuant to the ATCA.[37] The court also noted participating private adoption agencies could be deemed joint tortfeasors.[38] In addition to these judicial opinions, the ATCA has been the subject of two opinions of the U.S. Attorney General dating from 1795 and 1907

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31. *See, e.g.,* Jordan J. Paust, *Human Rights Responsibilities of Private Corporations,* 35 VAND. J. TRANSNAT'L L. 801, 816-17 (2002). Professor Paust based this conclusion upon remarks made by President Thomas Jefferson during his Sixth Annual Message to Congress in 1806 wherein the President recognized a private duty to refrain from engaging in the slave trade based upon human rights considerations. *See id.* at 816 (citing United States v. Haun, 26 F. Cas. 227 (C.C.S.D. Ala. 1860) (No. 15,329)). Professor Paust's interpretation is additionally based upon similar statements made by John Quincy Adams in oral arguments before the U.S. Supreme Court in *The Schooner Amistad* case. *See* The Amistad, 40 U.S. (15 Pet.) 518 (1841).

32. *See* Bolchos v. Darrel, 3 F. Cas. 810 (C.C.D.S.C. 1795) (No. 1607).

33. *See* O'Reilly de Camara v. Brooke, 209 U.S. 45, 51 (1908).

34. Adra v. Clift, 195 F. Supp. 857 (D. Md. 1961).

35. *Id.* at 863-64.

36. Nguyen Da Yen v. Kissinger, 528 F.2d 1194 (9th Cir. 1975).

37. *Id.* at 1201-02 n.13.

38. *Id.* at 1201 n.13.

respectively.[39] However, other sources of interpretation were absent prior to the watershed opinions of the U.S. Court of Appeals for the Second Circuit in *Filartiga v. Peña-Irala*[40] and *Kadic v. Karadzic*.[41]

B. ATCA Personal Welfare Jurisprudence and Transnational Corporations

Personal welfare human right claims have been advanced in nine cases.[42] Three opinions have concluded the defendants'

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39. *See* 26 Op. Att'y Gen. 250, 253 (1907) (wherein the attorney general concluded the ATCA "provides a forum and a right of action" to Mexican nationals injured as a result of the diversion of the Rio Grande by a U.S. irrigation company if such act was deemed to be a tort in violation of the law of nations); *see also* 1 Op. Att'y Gen. 57, 59 (1795) (wherein the attorney general concluded the ATCA provided a remedy for aliens injured as a result of the participation of U.S. citizens in the plundering of British property off the coast of Sierra Leone by French naval forces in violation of principles of neutrality).

40. 630 F.2d 876 (2d Cir. 1980) (holding that torture perpetrated by a Paraguayan police official upon a private citizen of Paraguay violated the law of nations and was actionable by the victim's survivors pursuant to the ATCA).

41. 70 F.3d 232 (2d Cir. 1995) (holding offenses of universal concern such as genocide, war crimes, torture and summary execution perpetrated by a private individual against other private individuals violates the law of nations, is actionable pursuant to the ATCA and does not present nonjusticiable issues pursuant to the political question and act of state doctrines).

42. *See* Bigio v. Coca-Cola Co., 239 F.3d 440, 448 (2d Cir. 2000) (claim that Coca-Cola Company unlawfully occupied a factory located on the plaintiffs' property in Helipolis, Egypt, which was confiscated in 1962 by the government of President Gamal Abdel-Nasser because the plaintiffs were Jewish); *see also* Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88 (2d Cir. 2000) (claims by political activists alleging imprisonment, torture and execution by the Nigerian government at the instigation of Royal Dutch Petroleum Company, Shell Transport and Trading Company and their wholly owned subsidiary Shell Petroleum Development Company of Nigeria in response to opposition to oil exploration activities); Carmichael v. United Techs. Corp., 835 F.2d 109 (5th Cir. 1988) (claims of arbitrary detention and torture in Saudi Arabia as a result of the plaintiff's inability to pay debts accrued by his employer or obtain releases thereof); Mujica v. Occidental Petroleum Corp., 381 F. Supp. 2d 1164 (C.D. Cal. 2005) (claims alleging extrajudicial killing, torture, crimes against humanity, cruel, inhuman and degrading treatment and war crimes arising from aerial bombing of Santo Domingo, Colombia by Occidental Petroleum's private security contractor); Bowoto v. ChevronTexaco Corp., 312 F. Supp. 2d 1229 (N.D. Cal. 2004) (claims by Nigerian villagers alleging that ChevronTexaco, by and through its subsidiary, ChevronTexaco Overseas Petroleum, Inc., and Chevron Nigeria Limited collaborated with the Nigerian government in the commission of summary execution, crimes against humanity, torture, cruel, inhuman or degrading treatment and violations of the rights to life, liberty and security occurring during attacks upon villages in the Ogoni region of Nigeria); Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289 (S.D.N.Y. 2003) (claims by current and former non-Muslim residents of southern Sudan alleging that Talisman collaborated with the Sudanese government in committing extrajudicial killings, forcible displacement, war crimes, confiscation and destruction of

alleged conduct constituted torts in violation of the law of nations. Specifically, in *Eastman Kodak Co. v. Kavlin,* the district court held that liability pursuant to the ATCA reaches conspiracies between state and private actors "to perpetrate illegal acts through the coercive use of state power," in this case, arbitrary detention contrary to legitimate penological interests.[43] Although the plaintiff's detention was not accompanied by torture, he was nonetheless detained under conditions "horrendous by any contemporary standard of human decency" which was a readily foreseeable result of the defendants' conspiracy with Bolivian officials.[44] Furthermore, even assuming that arbitrary detention was required to be prolonged in order to be actionable, the court found no reason why imprisonment for a period of ten days could not be considered prolonged.[45]

This conclusion was affirmed in *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, wherein the district court held that transnational corporations could be liable for conspiracy and aiding and abetting human rights violations.[46] This conclusion was based upon opinions interpreting international law precedents which characterized private party liability for conspiracy and aiding and abetting as arising from practical assistance, encouragement, or moral support which has a substantial effect on the occurrence of the violation and is perpetrated with actual or constructive knowledge that it will facilitate the alleged violations.[47] The district court also held slavery and war crimes to

property, kidnapping and rape, stemming from its oil exploration activities in the country); Abdullahi v. Pfizer, Inc., No. 01 Civ. 8118, 2002 U.S. Dist. LEXIS 17436 (S.D.N.Y. Sept. 17, 2002), *vacated,* 77 F. App'x 48 (2d Cir. 2003) (claims alleging injuries suffered by children as a result of negligence in the testing of the antibiotic Trovaflozacin Mesylate (Trovan) in Kano, Nigeria); Abrams v. Societe Nationale des Chemins de Francais, 175 F. Supp. 2d 423 (E.D.N.Y. 2001), *rev'd,* 332 F.3d 173 (2d Cir. 2002), *vacated by,* Societe Nationale des Chemins de Francais v. Abrams, 542 U.S. 901 (2004) (claims alleging complicity of French national railroad company in violations of the law of nations associated with the deportation of French nationals to Nazi concentration camps in World War II); Eastman Kodak Co. v. Kavlin, 978 F. Supp. 1078 (S.D. Fla. 1997) (claim of arbitrary detention and extortion in Bolivia as a result of a commercial dispute).

43. *Kavlin*, 978 F. Supp. at 1091 ("It would be a strange tort system that imposed liability on state actors but not on those who conspire with them.").

44. *Id.* at 1094.

45. *Id.*

46. *Presbyterian Church of Sudan,* 244 F. Supp. 2d at 320-24.

47. *See* Prosecutor v. Furundzija, Case No. IT-95-17/1-T, Judgment, ¶ 235 (Dec. 10, 1998).

be actionable pursuant to the ATCA.[48] Finally, private parties could be liable for displacement of civilian populations, the uncompensated confiscation of property, torture, and persecution of ethnic and religious minorities to the extent that these violations occurred in the course of commission of genocide and war crimes.[49]

Most recently, in *Mujica v. Occidental Petroleum Corp.*, the U.S. District Court for the Central District of California held that claims alleging extrajudicial killing, torture, crimes against humanity, and war crimes were actionable pursuant to the ATCA.[50] The claims of extrajudicial killing and torture were recognizable international norms as a result of their inclusion within the prohibitions set forth in the Torture Victim Protection Act ("TVPA").[51] The claim alleging crimes against humanity was cognizable based upon their recognition by the Nuremberg Charter and the international criminal tribunals arising from events in the former Yugoslavia and Rwanda.[52] War crimes also were actionable as a result of their criminalization in the Geneva Conventions and U.S. law.[53] However, cruel, inhuman, and degrading treatment was not actionable pursuant to the ATCA as its recognition would "allow foreign plaintiffs to litigate claims in U.S. courts that bear a strong resemblance to intentional infliction of emotional distress."[54] Such a result would result in "broad swaths of conduct" serving as the basis for ATCA claims.[55]

The majority of opinions have rejected claims that torts allegedly committed by transnational corporations are within the law of nations as to be actionable pursuant to the ATCA. For example, in *Bigio v. Coca-Cola Co.*, the Second Circuit concluded "[h]owever reprehensible, neither racial or religious discrimination in general nor the discriminatory expropriation of property in particular is . . . an act of universal concern . . . or sufficiently similar to [such] acts" absent commission by state officials or a

48. *Presbyterian Church of Sudan*, 244 F. Supp. 2d at 326-27.

49. *Id.* at 324-28.

50. Mujica v. Occidental Petroleum Corp., 381 F. Supp. 2d 1164, 1178-81 (C.D. Cal. 2005).

51. *Id.* at 1178-79. The TVPA provides civil liability for "an individual who, under actual or apparent authority, or color of law, of any foreign nation subjects an individual to torture . . . or extrajudicial killing." 28 U.S.C. § 1350 (2000).

52. *See Mujica*, 381 F. Supp. 2d at 1180.

53. *See id.* at 1181.

54. *Id.* at 1183.

55. *Id.*

private party acting under color of state law.[56] The plaintiffs failed to demonstrate that Coca-Cola was complicit in the confiscation of their property by the Egyptian government.[57]

A similar conclusion was reached by the Fifth Circuit in *Carmichael v. United Technologies Corp.*[58] The court affirmed the district court's dismissal of the complaint on the basis that, although the ATCA confers jurisdiction over private parties who "conspire in, or aid and abet, official acts of torture by one nation against the citizens of another nation," the plaintiff failed to demonstrate the defendants were involved in or aware of his arrest, incarceration and mistreatment.[59] Absent such evidence, the Fifth Circuit concluded the plaintiff failed to demonstrate any causal connection between the defendants' conduct and his imprisonment and torture.[60]

The same conclusion was also reached by the district court in *Abdullahi v. Pfizer, Inc.*[61] The court held private actors violate international law when their misconduct "is either listed as an act 'of universal concern' in [section] 404 [of the Restatement of the Law of Foreign Relations] or is sufficiently similar to the listed acts for us to treat them as though they were incorporated into [section] 404 by analogy."[62] Pfizer's drug testing procedures, however reprehensible, did not rise to the level of a violation of universal concern.[63] Nevertheless, the court found that Pfizer was a state actor as the actions of the Nigerian government in approving the testing procedures, assigning physicians to assist in the process and fraudulently altering documents and silencing critics rendered the government and Pfizer joint participants in the Trovan testing protocol.[64]

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56. Bigio v. Coca-Cola Co., 239 F.3d 440, 448 (2d Cir. 2000).

57. *Id.* at 449.

58. Carmichael v. United Techs. Corp., 835 F.2d 109 (5th Cir. 1988).

59. *Id* at 113-14 (5th Cir. 1988).

60. *Id.* at 115.

61. Abdullahi v. Pfizer, Inc., No. 01 Civ. 8118, 2002 U.S. Dist. LEXIS 17436 (S.D.N.Y. Sept. 17, 2002).

62. *Id.* at *14 (citing *Bigio,* 239 F.3d at 448); *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF U.S. § 404 (1987) (listing piracy, participation in the slave trade, attacks on or hijacking of aircraft, genocide, war crimes and acts of terrorism as international law violations of "universal concern").

63. *Abdullahi,* 2002 U.S. Dist. LEXIS 17436, at *14.

64. *Id.* at *17-18. The U.S. Court of Appeals for the Second Circuit did not address the issue of what torts are within the law of nations in order to be actionable in its decision vacating the district court's opinion. *See* Abdullahi v. Pfizer, Inc., 77 Fed. App'x 48, 53 (2d Cir. 2003).

Closely related to the above-referenced cases are claims alleging harm to the personal welfare of individuals as a result of violation of environmental standards.[65] The federal courts have largely rejected ATCA claims arising from alleged harm to personal welfare as a result of violations of international environmental standards. For example, in *Beanal v. Freeport-McMoran, Inc.,* the Fifth Circuit dismissed the plaintiff's environmental tort claim due to the absence of specific names, dates, locations, times, and facts that would place the defendants on notice of their factual basis.[66] The court further held the defendants' alleged violation of the Rio Declaration on the Environment and Development did not rise to the level of "shockingly egregious violations of universally recognized principles of international law."[67] Rather, the Rio Declaration merely stated "a general sense of environmental responsibility . . . abstract rights and liberties devoid of articulable or discernable standards."[68]

Similar reasoning also supported the dismissal of the plaintiff's cultural genocide claim. The international conventions cited by the plaintiff in support of his claim of a right to cultural development were "amorphous" and failed to "proscribe or identify conduct that would constitute cultural genocide."[69] These

65. *See* Aguinda v. Texaco, Inc., 303 F.3d 470 (2d Cir. 2002) (claims by 55,000 Ecuadorians and Peruvians alleging environmental degradation of rain forests occurring as a result of Texaco, Inc.'s oil production operations); *see also* Bano v. Union Carbide Corp., 273 F.3d 120 (2d Cir. 2001) (claims of environmental degradation and ensuing physical injuries resulting from release of methyl isocyanate from pesticide plant in Bhopal, India in December 1984); Beanal v. Freeport-McMoran, Inc., 197 F.3d 161 (5th Cir. 1999) (claims of environmental degradation and genocide by the leader of the Lambaga Adat Suki Amungme tribe arising from the operation of an open pit copper, gold and silver mine by Freeport-McMoran, Inc. and Freeport-McMoran Copper & Gold, Inc. in the Indonesian province of Irian Jaya); Flores v. S. Peru Copper Corp., 253 F. Supp. 2d 510 (S.D.N.Y. 2002), (claims of violations of the rights to life, health and sustainable development arising from the operation of a copper mine and refinery by Southern Peru Copper Corporation in Ilo, Peru), *aff'd,* 414 F.3d 233 (2d Cir. 2003); Sarei v. Rio Tinto, 221 F. Supp. 2d 1116 (C.D. Cal. 2002) (claims of war crimes, genocide, racial discrimination, environmental degradation, and violations of the rights to life, health and sustainable development arising from the operation of a gold and copper mine by Rio Tinto on the island of Bougainville in Papua New Guinea).

66. *Beanal,* 197 F.3d at 165.

67. *Id.* at 167.

68. *Id.*

69. *Id.* at 168, n.7. (citing International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), art. 27, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966) (providing ethnic minorities "shall not be denied the right . . . to enjoy their own culture"); International Covenant on Economic, Social and Cultural Rights, G.A. Res.

"vague and declaratory international documents" also presented application problems as they were "devoid of discernible means to define and identify conduct that constitutes a violation of international law."[70] Finally, the court held the plaintiff failed to demonstrate that cultural genocide had achieved "universal acceptance as a discrete violation of international law."[71] This conclusion was especially warranted by the express refusal of the drafters of the Genocide Convention to include cultural genocide within its prohibitions.[72]

Federal courts have also dismissed environmental tort claims based upon the rights to life, health, and sustainable development. In *Sarei v. Rio Tinto,* the district court rejected these claims on the bases that such rights lacked sufficient specificity, were not universally recognized and did not have generally accepted meanings in the international community.[73] Furthermore, a holding that the mining operation violated the rights to life and health would be contrary to international law principles that permit states to exploit their natural resources in an unfettered fashion as long as it does not injure other states.[74] However, it bears to note the court in *Sarei* concluded that it possessed jurisdiction with respect to the claim that the defendants violated the U.N. Convention on the Law of the Sea by failing to take necessary measures to prevent or reduce pollution damaging to human health and marine life.[75] Although the United States had not ratified the Convention, the court held it was still bound to uphold its purposes and principles.[76] Furthermore, the Convention represented the law of nations as it had been ratified by 166 states at the time of the court's opinion.[77]

2200A (XXI), art. 1(1), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966) (providing all peoples enjoy the right to "freely pursue their . . . cultural development")).

70. *Id.*

71. *Id.*

72. *Id.* at 168 n.8.

73. Sarei v. Rio Tinto, 221 F. Supp. 2d 1116, 1158-60 (C.D. Cal. 2002).

74. *Id.* at 1159 (citing *Beanal,* 197 F.3d at 167 n.6; Amlon Metals, Inc. v. FMC Corp., 7745 F. Supp. 668, 671 (S.D.N.Y. 1991)).

75. *Id.* at 1161-62 (citing United Nations Convention on the Law of the Sea, Dec. 10, 1982, U.N. Doc. A/CONF.62/122, *reprinted in* 21 I.L.M. 1261).

76. *Id.* (citing Mayaguezanos por la Salud y el Ambiente v. United States, 38 F. Supp. 2d 168, 175, n.3 (D.P.R. 1999)).

77. *Id.*

The U.S. Court of Appeals and District Court for the Southern District of New York utilized similar reasoning in rejecting claims of violation of the rights to life, health and sustainable development. In *Flores v. Southern Peru Copper Corp.*, the district court noted that, although severe environmental pollution necessarily has an impact on human life, the plaintiffs failed to demonstrate that such pollution and resultant injury violated well-established rules of customary international law.[78] The human health impact of pollution was of growing international concern, but there was no "general consensus among nations that a high level of pollution, causing harm to humans, is universally unacceptable."[79] International instruments cited by the plaintiffs in support of their claims elucidated rights but did not identify concomitant prohibitions.[80] This absence rendered the principles they represented insufficiently determinate for purposes of subject matter jurisdiction pursuant to the ATCA.[81] The plaintiffs' efforts to render these principles actionable through the utilization of multiple affidavits and opinions of professors were equally unconvincing.[82] To the contrary, customary international law provides that the appropriate balance between economic development and environmental protection lies within the sound discretion of each state with respect to land within its borders.[83] In addition, international law is not violated by pollution occurring exclusively within a state's borders.[84]

The Second Circuit agreed with the district court's conclusions on appeal.[85] In order to qualify as customary international law for purposes of the ATCA, the Second Circuit held the principle must have universal acceptance by states that accede out of a sense of legal obligation and must be of mutual

78. Flores v. S. Peru Copper Corp., 253 F. Supp. 2d 510, 519 (S.D.N.Y. 2002).

79. *Id.*

80. *See id.* at 519-20, n.14.

81. *Id.* at 525.

82. *Id.* at 521 n.17.

83. *Id.* at 521-22 (citing U.N. Conference on Environment and Development, Rio de Janeiro, Braz., June 3-14, 1992, *Rio Declaration on Environment and Development,* princ. 2, U.N. Doc. A/CONF.151/26 (Aug. 12, 1992) ("States have . . . the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.")).

84. *Id.* at 522 (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF U.S. § 601 (1987)).

85. Flores v. S. Peru Copper Corp., 343 F.3d 140 (2d Cir. 2003).

concern involving their relations with one another.[86] Furthermore, these principles must be ascertainable by "concrete evidence of the customs and practices of States."[87] Treaties, conventions and other international instruments that fail to set forth specific rules that cannot be readily discerned or applied in a "rigorous, systematic or legal manner" do not constitute customary international law principles enforceable pursuant to the ATCA.[88]

The purported customary international law basis for the plaintiffs' claims failed to meet these standards. The Second Circuit concluded the rights to life and health alleged by the plaintiffs were "vague and amorphous" and could not support an ATCA claim.[89] The international instruments cited by the plaintiffs in support on these claims, specifically, the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the Rio Declaration on the Environment and Development, expressed "virtuous goals" but were otherwise "boundless and indeterminate."[90] These instruments proclaimed "only nebulous notions that are infinitely malleable" rather than "clear, definite and unambiguous" principles upon which an ATCA claim may be based.[91]

The same reasoning was applicable to the plaintiffs' claim with respect to intra-national pollution. The plaintiffs sought to establish a prohibition upon such pollution as a principle of customary international law. However, the treaties and conventions relied upon by the plaintiffs failed to contain a specific prohibition upon intra-national pollution, had not been ratified by the United States, or were vague and aspirational.[92] For example, although ratified by 148 states, the International Covenant on Civil and Political Rights did not contain a specific prohibition upon intra-national pollution and was non-self executing in the United States.[93] The American Convention on Human Rights also failed to specifically prohibit such pollution, had not been ratified by the United States and was not "universally embraced by all of the

86. *Id.* at 154-55.
87. *Id.* at 156.
88. *See id.* at 158.
89. *See id.* at 160.
90. *Id.*
91. *Id.* at 161.
92. *See id.* at 163-65.
93. *Id.* at 163-64.

prominent States within the region in which it purports to apply."[94] The same conclusion held true for the International Covenant on Economic, Social and Cultural Rights.[95] Although Article 24 of the Convention on the Rights of the Child expressly addresses environmental pollution, it does not establish prohibitions upon or parameters for such pollution and has not been ratified by the United States.[96] Plaintiffs' reliance upon United Nations General Assembly resolutions and other multinational declarations of principles also failed as bases for ATCA claims due to their aspirational nature and failure to create binding and definable standards for state conduct.[97] Decisions of the International Court of Justice also could not serve as a source of customary international law as its decisions lack binding effect except between the parties and in respect of the particular case.[98] Customary international law principles also could not be derived from decisions of the European Court of Human Rights as it was only empowered to "interpret and apply" the rules set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms.[99]

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94. *Id.* at 164.

95. *See id.*

96. *Id.* at 165. Article 24 of the Convention on the Rights of the Child provides, in part, that states "take appropriate measures . . . to combat disease and malnutrition . . . through . . . the provision of adequate nutritious foods and clean drinking water, taking into consideration the dangers and risks of environmental pollution." Convention on the Rights of the Child, G.A. Res. 44/25, art. 24, U.N. GAOR, 44th Sess., Supp. No. 489, U.N. Doc. A/44/25 (Nov. 20, 1989).

97. *Flores,* 343 F.3d at 165-69. These declarations included the Universal Declaration, the American Declaration of the Rights and Duties of Man and the Rio Declaration on the Environment and Development. *See Rio Declaration on the Environment and Development, supra* note 83, princ. 1 (environmental protection and sustainable development); *see also* American Declaration on the Rights and Duties of Man, O.A.S. Res. XXX (1948), *reprinted in* BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM, OEA/Ser.L.V/II.82, doc. 6, rev. 1, at 17 (1992); Universal Declaration of Human Rights, G.A. Res. 217A, arts. 3, 25(1), U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948) (right to life and right to health).

98. *Flores,* 343 F.3d at 169 (citing Statute of the International Court of Justice, art. 59, June 26, 1945, 59 Stat. 1055).

99. *Id.* at 170 (citing European Convention for the Protection of Human Rights and Fundamental Freedoms art. 32, Europ. T.S. No. 5, 213 U.N.T.S. 211 (1968)).

III. THE PROCEDURAL HISTORY OF *SOSA V. ALVAREZ-MACHAIN*

A. The Factual Background to Sosa v. Alvarez-Machain

The factual background to *Sosa v. Alvarez-Machain* is well known due to the U.S. Supreme Court's previous opinion.[100] Nevertheless, a brief description of the relevant facts is warranted in order to place the U.S. Supreme Court's most recent opinion in context.[101] The plaintiff Humberto Alvarez-Machain ("Alvarez") is a citizen of Mexico.[102] Alvarez was indicted by a federal grand jury in Los Angeles, California, in 1990 for alleged complicity in the kidnapping, torture, and murder of U.S. Drug Enforcement Administration ("DEA") agent Enrique Camarena-Salazar ("Camarena") and his Mexican pilot Alfredo Zavala-Avelar in Guadalajara, Mexico, in February 1985.[103] The U.S. District Court for the Central District of California issued a warrant for Alvarez's arrest after his indictment.[104]

Although the United States negotiated with Mexican officials to obtain custody of Alvarez, no formal request for extradition was made.[105] Rather, DEA officials approved a plan to use Mexican nationals not affiliated with the governments of the United States or Mexico to arrest Alvarez in Mexico and bring him to the United States for trial.[106] Specifically, Hector Berellez, the DEA agent in charge of the Camarena murder investigation, retained Antonio Garate-Bustamante ("Garate"), a Mexican citizen and DEA operative, to contact Mexican nationals willing to participate in the arrest.[107] Through operatives, Garate retained Jose Francisco Sosa,

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100. *See* United States v. Alvarez-Machain, 504 U.S. 655 (1992) (holding Alvarez's forcible abduction from Mexico at the behest of agents employed by the U.S. Drug Enforcement Administration did not violate the United States-Mexico Extradition Treaty of 1978 as to bar his prosecution for alleged complicity in the torture and murder of Drug Enforcement Administration special agent Enrique Camarena-Salazar).

101. The following statement of facts is derived from the opinion of Circuit Judge M. Margaret McKeown of the U.S. Court of Appeals for the Ninth Circuit in *Alvarez-Machain v. United States,* 331 F.3d 604 (9th Cir. 2003).

102. *Id.* at 609.

103. *Id.* Alvarez was charged with conspiracy to commit violent acts in furtherance of racketeering activity (18 U.S.C. §§ 371, 1959 (2000)); committing violent acts in furtherance of racketeering activity (18 U.S.C. § 1959(a)(2)); conspiracy to kidnap a federal agent (18 U.S.C. § 1201(a)(5)); kidnapping of a federal agent (18 U.S.C. § 1201(a)(5)); and felony murder of a federal agent (18 U.S.C. §§ 1111(a), 1114).

104. *Alvarez-Machain,* 331 F.3d at 609.

105. *Id.*

106. *Id.*

107. *Id.*

a former Mexican police officer, to participate in Alvarez's arrest.[108] This operation occurred on April 2, 1990, when Sosa and others abducted Alvarez from his office in Guadalajara, held him overnight in a motel in Mexico, and subsequently transported him to El Paso, Texas where he was arrested by U.S. federal agents.[109] Alvarez was arraigned and transported to Los Angeles, California for trial. He remained in federal custody from April 1990 until December 1992.[110]

Alvarez moved to dismiss the indictment on the basis that the federal court lacked jurisdiction because his arrest was in violation of the extradition treaty between the United States and Mexico.[111] While rejecting the claim that the government engaged in outrageous conduct, the district court nevertheless held it lacked jurisdiction to try Alvarez as his abduction violated the U.S.-Mexico Extradition Treaty.[112] The U.S. Court of Appeals for the Ninth Circuit affirmed the dismissal of the indictment and ordered Alvarez's repatriation.[113] The U.S. Supreme Court reversed these opinions and remanded the case for trial,[114] holding Alvarez's forcible abduction did not violate the Extradition Treaty. Furthermore, federal courts retain the power to try persons for crimes even when their presence has been forcibly procured.[115] The Court did note, however, that Alvarez's abduction "may be in violation of general international law principles," thereby permitting him to pursue civil remedies at a later date.[116]

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108. It was alleged Sosa was promised a recommendation for employment with the Mexican Attorney-General's office if the arrest operation was successful. *Id.*

109. *Id.*

110. *Id.*

111. *Id.; see also* Extradition Treaty, U.S.-Mex., May 4, 1978, 31 U.S.T. 5059.

112. United States v. Caro-Quintero, 745 F. Supp. 599 (C.D. Cal. 1990).

113. United States v. Alvarez-Machain, 946 F.2d 1466 (9th Cir. 1991). The Ninth Circuit relied upon its previous holding in *United States v. Verdugo-Urquidez,* 939 F.2d 1341 (9th Cir. 1991). In that case, the court held the forcible abduction of a Mexican national (also indicted for participation in Camarena's murder) with the authorization and participation of the United States was a violation of the U.S.-Mexico Extradition Treaty. *Id.* at 1350. Although the treaty did not expressly prohibit forcible abduction, the court held such conduct violated the "purpose" of the treaty. This violation gave the offended nation the right to file a formal protest as well as the defendant the right to contest the district court's jurisdiction. *Id.* at 1352-58. The remedy for such a violation was dismissal of the indictment and repatriation of the defendant to Mexico. *Id.* at 1355-58.

114. United States v. Alvarez-Machain, 504 U.S. 655, 656 (1992).

115. *Id.* at 670 (citing Ker v. Illinois, 119 U.S. 436 (1886)).

116. *Id.* at 669.

Alvarez was tried for Camarena's kidnapping, torture, and murder in 1992. However, after the presentation of the government's case, the district court judge granted Alvarez's motion for judgment of acquittal on the ground of insufficient evidence to support a guilty verdict. The district court specifically concluded the government's case was based on "suspicion and . . . hunches but . . . no proof," and the theory of the prosecution's case was "whole cloth, the wildest speculation."[117] As a result, Alvarez was repatriated to Mexico.

In 1993, Alvarez initiated a civil action in the United States District Court for the Central District of California alleging numerous constitutional and tort claims arising from his abduction, detention and trial.[118] Sosa, Garate, five unnamed Mexican nationals, the United States and four DEA agents were listed as defendants.[119] The district court substituted the United States for the DEA agents, except Sosa and Garate, on all non-constitutional claims.[120] The United States was substituted for Garate by later stipulation of the parties.[121] Sosa's interlocutory appeal of the district court's substitution order was subsequently dismissed by the U.S. Court of Appeals for the Ninth Circuit for lack of appellate jurisdiction.[122] The Ninth Circuit also affirmed the district court's dismissal of the constitutional claims arising from Alvarez's kidnapping and detention in Mexico and its denial of the defenses based on qualified immunity and the statute of limitations with respect to claims asserted pursuant to the Federal Tort Claims Act.[123] However, the Ninth Circuit reversed the district court's dismissal of Alvarez's claim asserted pursuant to the TVPA.[124]

117. Alvarez-Machain v. United States, 331 F.3d 604, 610 (9th Cir. 2003).

118. Alvarez's complaint, as amended, alleged claims sounding in: (1) kidnapping; (2) torture; (3) cruel, inhuman and degrading treatment or punishment; (4) arbitrary detention; (5) assault and battery; (6) false imprisonment; (7) intentional infliction of emotional distress; (8) false arrest; (9) negligent employment; (10) negligent infliction of emotional distress; and (11) violations of the Fourth, Fifth and Eighth Amendments to the U.S. Constitution relating to these torts. *Id.* at 610 n.1.

119. *Id.* at 610.

120. *Id.*

121. *Id.*

122. Alvarez-Machain v. United States, 107 F.3d 696, 700 n.2 (9th Cir. 1997).

123. *Id.* at 703-04.

124. *Id.* at 704.

B. The District Court Opinion

The district court was confronted with numerous motions for summary judgment on remand from the Ninth Circuit Court of Appeals.[125] The district court's holding with respect to Alvarez's claim pursuant to the ATCA is of particular relevance. The district court's holding on the ATCA affected three causes of action dependent upon international norms: kidnapping; cruel, inhuman and degrading treatment; and prolonged arbitrary detention. With respect to Alvarez's claim of kidnapping, Sosa contended the Ninth Circuit precedent rejected kidnapping as an action in violation of international law.[126] Sosa further contended there was an absence of universal consensus with respect to whether kidnapping violates international norms.[127] Sosa also alleged Alvarez lacked standing to assert a violation of Mexico's territorial sovereignty that occurred as a result of the kidnapping.[128] Finally, Sosa contended the U.S. Supreme Court's previous holding that Alvarez's abduction did not violate the U.S.-Mexico Extradition Treaty rendered the kidnapping lawful pursuant to international law.[129]

The district court rejected these contentions and granted Alvarez's motion for summary judgment with respect to his claim of kidnapping. Initially, the court concluded, although the Ninth Circuit's opinion in *United States v. Matta-Ballesteros* declined to grant *jus cogens* status to kidnapping, it did not decide whether kidnapping violated customary international law or was actionable pursuant to the ATCA.[130] *Jus cogens* status is not necessary in order to render a breach of customary international norms

125. Alvarez-Machain v. United States, 1999 U.S. Dist. LEXIS 23304 (C.D. Cal. Mar. 18, 1999). The district court denied Sosa's motion to substitute the United States, granted the motion of the four DEA agents and Garate for summary judgment, granted in part and denied in part the United States' motion for summary judgment, granted in part and denied in part Sosa's motion for summary judgment and granted in part and denied in part Alvarez's motion for summary judgment.

126. *Id.* at *59-60 (citing United States v. Matta-Ballesteros, 71 F.3d 754, 764 n.5 (9th Cir. 1995) (noting the U.S. Court of Appeals for the Ninth Circuit held that "kidnapping . . . does not qualify as a *jus cogens* norm, such that its commission would be justiciable in our courts even absent domestic law").

127. *Id.* at *60 (noting the numerous international abductions that have occurred since 1835 and the absence of an explicit prohibition in international agreements).

128. *Id.* at *62.

129. *Id.* at *62-64.

130. *Id.* at *60.

actionable.[131] Rather, the ATCA only requires the international norm be "specific, universal and obligatory."[132]

This conclusion was also sufficient to defeat Sosa's claim that Alvarez was improperly raising territorial sovereignty claims properly belonging to Mexico.[133] Instead, Alvarez was simply asserting a cause of action bestowed upon him by the express language of the ATCA.[134] Furthermore, the occurrence of international abductions did not inevitably lead to the conclusion that such actions did not violate international law.[135] In fact, the opposite conclusion had been reached in the majority of scholarly analyses of the topic.[136] Finally, the district court noted the U.S. Supreme Court's previous opinion in *United States v. Alvarez-Machain* only concluded that the abduction did not violate the U.S.-Mexico Extradition Treaty and did not conclude such abduction was consistent with customary norms of international law.[137] As a result, the district court concluded "'specific, universal and obligatory' norms of international law prohibit state-sponsored transborder abductions."[138] Although these norms did not rise to the level of *jus cogens,* they were nevertheless "sufficiently established and articulated to support a cause of action under the [ATCA]."[139]

The court also accepted Alvarez's claim that the defendants' conduct constituted prolonged arbitrary detention in violation of the ATCA.[140] The relatively short period of Alvarez's detention was not relevant to this determination.[141] Rather, the court deemed Sosa's detention arbitrary due to the absence of lawful authority for the arrest from Mexican authorities.[142] This detention remained arbitrary until such time as Alvarez entered U.S. custody.[143] As such, the court granted summary judgment on Alvarez's claim of

131. *Id.* at *62.
132. *Id.* at *61.
133. *Id.* at *62.
134. *Id.*
135. *Id.* at *61.
136. *Id.*
137. *Id.* at *63-64.
138. *Id.* at *64.
139. *Id.* at *64-65.
140. *Id.* at *69-70 (citing Martinez v. City of Los Angeles, 141 F.3d 1373 (9th Cir. 1998); Forti v. Suarez-Mason, 672 F. Supp. 1531 (N.D. Cal. 1987)).
141. *Id.* at *71.
142. *Id.* at *71 n.36.
143. *Id.* at *72 n.37.

prolonged arbitrary detention from the time of his arrest in Mexico to the time of his entry into the United States.[144] The district court entered judgment against Sosa in the amount of $25,000 for his actions constituting kidnapping and prolonged arbitrary detention.[145]

However, the court was not sympathetic to Alvarez's claims of cruel, inhuman, and degrading treatment. The court agreed with Sosa's contention that there was no "universal consensus regarding the content of the tort [of cruel, inhuman and degrading treatment] at the time of the events in this case."[146] Although international law prohibited such treatment prior to 1990, events occurring after Alvarez's detention established the parameters of such treatment for ATCA purposes.[147] As such, the court granted Sosa's motion for summary judgment with respect to Alvarez's claim of cruel, inhuman and degrading treatment.[148]

C. The Ninth Circuit Court of Appeals' Opinion

The U.S. Court of Appeals for the Ninth Circuit affirmed Sosa's liability pursuant to the ATCA although on different grounds than those provided by the district court.[149] The Ninth Circuit first addressed the issue of actionable claims pursuant to the ATCA. The Ninth Circuit rejected Sosa's contention that only violations of *jus cogens* norms, as distinguished from customary international law, were sufficiently "specific, universal and obligatory" to be actionable as violations of the law of nations

144. *Id.*

145. *Id.* at *78.

146. *Id.* at *68.

147. The court specifically noted that the U.S. Senate did not ratify the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment until October 1990. *Id.* at *68 n.34.

148. The court also based its order on the previous holding of the U.S. Court of Appeals for the Ninth Circuit that no conduct occurred in Mexico which would violate the Due Process Clause of the U.S. Constitution. *See* Alvarez-Machain v. United States, 107 F.3d 696, 702 (9th Cir. 1997). As a result, Alvarez could not raise a triable issue of fact with respect to this claim as its viability was dependent upon the existence of conduct sufficient to violate the U.S. Constitution. *See Alvarez-Machain,* 1999 U.S. Dist. LEXIS 23304, at *68.

149. Alvarez-Machain v. United States, 331 F.3d 604 (9th Cir. 2003). On appeal, a three-judge panel of the Ninth Circuit affirmed Sosa's liability pursuant to the ATCA and upheld the district court's award of damages. Alvarez-Machain v. United States, 266 F.3d 1045, 1064 (9th Cir. 2001). The Ninth Circuit subsequently agreed to rehear the case *en banc.* Alvarez-Machain v. United States, 284 F.3d 1039, 1040 (9th Cir. 2002).

pursuant to the ATCA.[150] The court agreed the violation of a *jus cogens* norm was sufficient but not necessary to satisfy the "specific, universal and obligatory" standard.[151] The imposition of a *jus cogens* requirement in order to state an actionable claim pursuant to the ATCA would deviate from the history and text of the ATCA as such norms did not exist at the time of its enactment.[152] Furthermore, the content of *jus cogens* norms remains uncertain and subject to controversy.[153] Thus, the requirement of such a norm prior to the imposition of liability pursuant to the ATCA would render the statute inoperative.

The Ninth Circuit then addressed Alvarez's claims with respect to his transborder abduction. The Ninth Circuit specifically examined two issues. First, the court rejected Alvarez's claim that the violation of Mexican sovereignty that occurred during his arrest was a violation of the law of nations, thereby permitting him to assert a claim pursuant to the ATCA. The Ninth Circuit agreed it was indisputable that there was a general norm of international law prohibiting acts of sovereignty offensive to the territorial integrity of other states dating back to the earliest decisions of the U.S. Supreme Court.[154] It was further indisputable that law enforcement authorities of one state could not exercise their functions in the territory of another state without the latter's consent.[155] However, the court concluded Alvarez did not

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150. *Alvarez-Machain*, 331 F.3d at 613.

151. *Id.* at 613 (citing Papa v. United States, 281 F.3d 1004, 1013 (9th Cir. 2002); Martinez v. City of Los Angeles, 141 F.3d 1373, 1383-84 (9th Cir. 1998); Hilao v. Estate of Marcos (*In re* Estate of Marcos Human Rights Litigation), 25 F.3d 1467, 1475 (9th Cir. 1994)).

152. *Id.* at 614. For a history of the development of *jus cogens* norms, see IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 515 (5th ed. 1998).

153. *Alvarez-Machain*, 331 F.3d at 614 (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF U.S. § 102 n.6 (1987)). As noted by Professor Brownlie, "more authority exists for the category of *jus cogens* than exists for its particular content." BROWNLIE, *supra* note 152, at 516-17.

154. *Alvarez-Machain*, 331 F.3d at 615 (citing The Apollon, 22 U.S. (9 Wheat.) 362, 371 (1824) (wherein Justice Story stated "it would be monstrous to suppose that our . . . officers were authorized to enter into foreign ports and territories, for the purpose of seizing vessels which had offended against our laws"); The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116, 136 (1812) (wherein Chief Justice Marshall recognized the "exclusive and absolute" nature of territorial jurisdiction)).

155. *Id.* (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF U.S. § 432(2) (1987) ("A state's law enforcement officers may exercise their functions in the territory of another state only with the consent of the other state, given by duly authorized officials of that state."); M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE 255 (4th ed. 2002) (recognizing the rule prohibiting law

demonstrate he was the proper proponent to vindicate Mexico's national interests. The ATCA creates a remedy for torts in violation of the law of nations and not a remedy for all violations of international law.[156] The interest protected by the ATCA is personal to affected individuals and does not concern the separate rights of aggrieved national governments.[157] To permit Alvarez to assert Mexico's rights arising from the violation of its sovereignty by the DEA would, in the Ninth Circuit's opinion, "lead to the judiciary's intrusion into matters that are appropriately reserved for the Executive branch."[158]

In addition, the Ninth Circuit refused to recognize transborder abduction as a violation of customary international law. The court specifically noted there is no acceptance of such a norm either in the United States or the international community.[159] Rather, applicable international instruments merely speak to general prohibitions upon restricting freedom of movement.[160] Furthermore, the U.S.-Mexico Extradition Treaty in force at the time of the events in question did not prohibit transborder abduction. The United States and Mexico did not reach an

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enforcement officials from one state operating in another state without consent as "grounded in the notion that international law is designed to protect the sovereignty and territorial integrity of states by restricting impermissible state conduct"); L. OPPENHEIM, OPPENHEIM'S INTERNATIONAL LAW § 119, at 387-88 (Robert Jennings & Arthur Watts eds., 9th ed. 1992) ("It is . . . a breach of international law for a state without permission to send its agents into the territory of another state to apprehend persons accused of having committed a crime.")).

156. *Id.* at 616.

157. *Id.*

158. *Id.*

159. *Id.* at 617.

160. *See, e.g.*, American Convention on Human Rights art. 7(1)-(2), O.A.S. T.S. No. 36, OAS Off. Rec. OEA/Ser4v/II 23, doc. 21, rev. 2 (1975) ("[E]very person has the right to personal liberty and security" which shall not be denied "except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto."); American Declaration of the Rights and Duties of Man, *supra* note 97, art. VIII ("Every person has the right to fix his residence within the territory of the state of which he is a national, to move about freely within such territory, and not to leave it except by his own will."); International Covenant on Civil and Political Rights, *supra* note 69, art. 12 ("[E]veryone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence."); Universal Declaration of Human Rights, *supra* note 97, art 13(1) ("Everyone has the right to freedom of movement and residence within the borders of each state.").

agreement prohibiting transborder arrests until 1994.[161] This agreement had yet to be submitted by the president to the Senate for ratification and, in any event, expressly prohibits civil lawsuits arising from its violation. As a result, the court concluded there was no specific, universal or obligatory norm with respect to transborder abductions.[162] Rather, this was a case where "aspiration has not yet ripened into obligation."[163]

The second issue addressed by the Ninth Circuit was whether there existed a specific, universal, and obligatory norm enforceable pursuant to the ATCA with respect to arbitrary arrest and detention. In concluding that such a norm existed, the Ninth Circuit initially noted that prohibitions upon arbitrary arrest and detention were contained in every major human rights instrument[164] as well as 119 national constitutions.[165] The court also noted that such a conclusion was consistent with previous case law recognizing an international norm prohibiting detentions not in accordance with law or incompatible with principles of justice or human dignity.[166] On the basis that neither applicable case law nor the *Restatement of Foreign Relations Law* imported "a separate temporal requirement for purposes of ATCA liability," the Court rejected Sosa's contention that Alvarez's detention was insufficiently prolonged in order to constitute a violation of the norm.[167] Applying this standard to the case, the Ninth Circuit

161. *See* Treaty to Prohibit Transborder Abductions, U.S.-Mex., Nov. 23, 1994, *reprinted in* MICHAEL ABBELL, EXTRADITION TO AND FROM THE UNITED STATES, at A-287, A-303 (2002).

162. *Alvarez-Machain,* 331 F.3d at 619-20.

163. *Id.* at 620.

164. *See, e.g.,* African Charter on Human and Peoples' Rights art. 6, June 27, 1981, 21 I.L.M. 58 (1992) (prohibiting arbitrary arrest and detention); American Convention on Human Rights, *supra* note 160, art. 7(3) ("[N]o one shall be subject to arbitrary arrest or imprisonment."); European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 99, art. 5(1) (requiring deprivations of liberty be "in accordance with a procedure prescribed by law"); International Covenant on Civil and Political Rights, *supra* note 69, art. 9 (obligating states to refrain from "arbitrary arrest or detention"); Universal Declaration of Human Rights, *supra* note 97, art. 9 ("[N]o one shall be subjected to arbitrary arrest, detention, or exile.").

165. *Alvarez-Machain,* 331 F.3d at 620 (citing M. Cherif Bassiouni, *Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions,* 3 DUKE J. COMP. & INT'L L. 235, 260-61 (1993)).

166. *Id.* at 621 (citing Martinez v. City of Los Angeles, 141 F.3d 1373, 1384 (9th Cir. 1998); Hilao v. Estate of Marcos, 103 F.3d 789, 795 (9th Cir. 1996)).

167. The court stated that prolonged arbitrary detention may qualify as a *jus cogens* norm. *Id.* at 622 (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF U.S. §

concluded that Alvarez's arrest and detention in Mexico were arbitrary as they lacked a legal basis.[168]

The final issue relevant to the ATCA was damages. The court first addressed the issue of choice of law for damages. Noting this issue was one of first impression in the circuit, the court began its inquiry by observing that the forum jurisdiction primarily determines choice of law.[169] As federal jurisdiction was predicated on the ATCA, federal common law applied to the choice of law determination.[170] Pursuant to federal common law, the court applied the *Restatement of Conflict of Laws.*[171] Applying the section of the *Restatement* relating to tort claims, the court concluded that the United States had the most significant relationship to the occurrence and the parties.[172] Specifically, the Ninth Circuit held that the case was "a series of events that began and ended in the United States, and which are inextricably intertwined with the United States government."[173] U.S. interests were paramount in this case because the United States was a party, the case arose

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702 cmts. a, n (1987)). However, there is no requirement that every arbitrary detention be prolonged in order to be actionable. *Id.* (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF U.S. § 702 cmt. h (1987) (providing "a single, brief, arbitrary detention by an official of a state party" may violate international law). Rather, the length of detention is relevant to the determination of its arbitrariness. *Id.*

168. *Id.* at 623. The court specifically refused to give extraterritorial effect to the U.S. arrest warrant, thereby permitting its enforcement against Alvarez in Mexico. *Id.* at 623-31.

169. *Id.* at 633 (citing Zicherman v. Korean Air Lines Co., 516 U.S. 217, 228-29 (1996)).

170. *Id.* (citing Chan v. Soc'y Expeditions, Inc., 123 F.3d 1287, 1297 (9th Cir. 1997)).

171. *Id.* (citing Bickel v. Korean Air Lines Co., 83 F.3d 127, 130 (6th Cir. 1996); Schoenberg v. Exportadora de Sal, S.A., 930 F.2d 777, 782 (9th Cir. 1991)).

172. *Id.* at 634 (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS, § 145 (1967)). Section 145 of the Restatement provides, in part, that the "rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6." The factors identified in Section 6 are: the needs of the interstate and international systems; the relevant policies of the forum; the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue; the protection of justified expectations; the basic policies underlying the particular field of law; certainty, predictability and uniformity of result; and ease in the determination and application of the law to be applied. *Id.* at 634 n.39.

The court refused to apply Section 146 of the Restatement, which provides for a presumption in favor of "the local law of the state where the injury occurred." *Id.* at 634 n.38. The court's refusal was based upon the international character of the tort, which distinguished it from "a classic personal injury claim," and the absence of physical or mental injury resulting from physical harm as described in Section 146. *Id.*

173. *Id.* at 634.

from a federal criminal prosecution, and the actions at issue involved an individual employed as an agent of a federal agency.[174] Although Alvarez was arrested in Mexico by Mexican citizens, U.S. policy of providing a civil remedy for victims of human rights violations, as expressed in the ATCA, took precedence over applicable principles of Mexican law.[175] The court also refused to apply California state law due to the presence of "international law principles of universal concern" and the ATCA's "unique place among federal statutory tort causes of action."[176]

The Ninth Circuit then addressed the issue of the scope of damages. Although noting the absence of an established body of case law with respect to the ATCA, the court nonetheless held that Sosa could only be liable for those activities that took place before the United States took Alvarez into custody.[177] This limitation was based upon two conclusions. First, Sosa's participation in Alvarez's arrest and detention occurred almost exclusively within Mexico.[178] Second, the delivery of Alvarez to U.S. law enforcement personnel in Texas broke the chain of causation set in motion by Sosa's initial act of misconduct.[179] The acts of law enforcement personnel in the United States "set in motion a supervening prosecutorial mechanism which met all of the procedural requisites of federal due process and ultimately received the blessing of the United States Supreme Court."[180] At that point in time, the U.S. criminal justice system began its prosecution, thereby breaking the link to Sosa's misconduct in Mexico. As such, Alvarez was entitled to damages only from his arrest to the point in time at which he was remanded to the custody of U.S. authorities.[181]

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174. *Id.* at 634-35.

175. *Id.* at 635. For example, the court noted limitations upon damages, including the unavailability of punitive damages, pursuant to Mexican law were not consistent with U.S. policy as expressed in the ATCA.

176. *Id.* (citing Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 641 (1981); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 427 n.25 (1964)).

177. *Id.* at 636-37.

178. *Id.*

179. *Id.* (citing Heck v. Humphrey, 512 U.S. 477, 484 (1994); Townes v. City of New York, 176 F.3d 138, 147 (2d Cir. 1999); Barts v. Joyner, 865 F.2d 1187, 1195 (11th Cir. 1989); Smiddy v. Varney, 665 F.2d 261, 266 (9th Cir. 1981)).

180. *Id.*

181. *Id.*

D. The U.S. Supreme Court Opinion

On June 29, 2004, the Supreme Court unanimously agreed that Alvarez could not pursue a remedy in federal court pursuant to the ATCA (i.e., Alien Torts Statute, or "ATS", in the opinion).[182] Justice Souter's majority opinion constituted the first substantive exposition of the ATCA in its 215-year history. Despite denying relief to Alvarez, the Court refused to interpret the ATCA in such a manner as to deny relief to all victims of human rights abuses.[183]

The Court first addressed Alvarez's contention that the ATCA is not merely a jurisdictional statute but rather acts as authority for the creation of a new cause of action for torts in violation of international law. The Court dismissed this interpretation as "implausible" given the placement of the ATCA in the Judiciary Act, "a statute otherwise exclusively concerned with federal-court jurisdiction."[184] This placement meant that the ATCA was a jurisdictional statute intended to address the power of federal courts to "entertain cases concerned with a certain topic."[185]

However, this interpretation did not lead to the conclusion that the ATCA was stillborn upon its creation due to the absence of concomitant legislation creating a list of torts actionable pursuant to the statute. Instead, the Court concluded that federal courts were entitled to entertain claims upon the adoption of the jurisdictional grant contained within ATCA, as torts in violation of the law of nations were recognized in common law existing at the time.[186] The Court particularly noted that the United States received the law of nations as it existed upon its independence.[187] This law of nations consisted of "general norms governing the behavior of national states with each other" and "a body of judge-made law regulating the conduct of individuals situated outside domestic boundaries and consequently carrying an international savor."[188] These bodies of law overlapped where violations of the law of nations gave rise to a judicial remedy, as well as threatened

182. Sosa v. Alvarez-Machain, 542 U.S. 692, 697 (2004).

183. *See id.* at 728-31 (discussing the relevance of international norms intended to protect individuals on judicial court decisions).

184. *Id.* at 713.

185. *Id.* at 714.

186. *Id.*

187. *Id.* (citing Ware v. Hylton, 3 Dall. 199, 281 (1796)).

188. *Id.* at 715.

serious consequences for the United States in the conduct of international affairs.[189] This overlap was limited to three offenses, specifically, violation of safe conduct, infringement of the rights of ambassadors, and piracy.[190] The Court concluded that "this narrow set of violations . . . was probably on the minds of the men who drafted the [ATCA] with its reference to tort."[191]

Justice Souter readily conceded that there was no legislative record that expressly supported this conclusion.[192] Nevertheless, the Court concluded that the ATCA was intended to have practical effect upon its adoption rather than await future implementing legislation.[193] The Court specifically noted that the Continental Congress in 1781 adopted a resolution calling upon state legislatures to "provide expeditious, exemplary and adequate punishment" for "the violation of safe conducts or passports . . . of hostility against such as are in amity . . . with the United States, . . . infractions of the immunities of ambassadors and other public ministers . . . [and] infractions of treaties and conventions to which the United States are a party."[194] Furthermore, the First Congress recognized the importance of the law of nations in legislation to punish certain offenses in violation thereof as criminal offenses.[195] Based upon this background, the Court concluded "[i]t would have been passing strange for Ellsworth[196] and this very Congress to vest federal courts expressly with jurisdiction to entertain civil causes brought by aliens alleging violations of the law of nations, but to

189. *Id.*

190. *Id.*

191. *Id.*

192. Justice Souter admitted that "despite considerable scholarly attention, it is fair to say that a consensus understanding of what Congress intended has proven elusive." *Id.* at 718-19.

193. In reaching this conclusion, Justice Souter specifically noted, "[T]here is every reason to suppose that the First Congress did not pass the [ATCA] as a jurisdictional convenience to be placed on the shelf for use by a future Congress or state legislature that might, some day, authorize the creation of causes of action or itself decide to make some element of the law of nations actionable for the benefit of foreigners." *Id.* at 719.

194. *Id.* at 716 (citing 21 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, at 1136-37 (Gaillard Hunt ed. 1912).

195. *See* Act for the Punishment of Certain Crimes Against the United States, §§ 8, 28, 1 Stat. 112, 113-14, 118 (1790) (recognizing as criminal offenses murder, robbery or other capital crimes committed on the high seas, violations of safe conduct and assaults against ambassadors).

196. Oliver Ellsworth of Connecticut, who was the principal draftsman of the ATCA, was a member of the Connecticut legislature that heeded the Congressional resolution and adopted implementing legislation. Sosa v. Alvarez-Machain, 542 U.S. at 719.

no effect whatever until the Congress should take further action."[197]

The historical record existing immediately after the adoption of the ATCA also supported this conclusion. Early federal cases addressing the ATCA gave no intimation that further implementing legislation was necessary.[198] The 1795 opinion of Attorney General William Bradford with respect to the criminal prosecution of U.S. citizens participating in a French raid upon a British slave colony in Sierra Leone recognized the possibility of a civil remedy for the aggrieved without specific reference to the need for implementing legislation.[199] The reasonable inference from these precedents was that the ATCA had immediate effect upon its adoption. As a result, the Court held "[t]here is too much in the historical record to believe that Congress would have enacted the [ATCA] only to leave it lying fallow indefinitely."[200]

This history also led the Court to conclude that the ATCA conferred jurisdiction upon federal courts for "a relatively modest set of actions alleging violations of the law of nations."[201] This "modest set of actions" included torts corresponding to Blackstone's three primary offenses, specifically, violation of safe conducts, infringement of the rights of ambassadors and piracy.[202] The Court found no basis to suspect that Congress intended to include other offenses against the law of nations within the ATCA's jurisdictional grant.[203] However, the Court also found that there were no congressional developments in the intervening 191 years from the adoption of the ATCA to its modern expression in

197. *Id.*

198. *See, e.g.,* Bolchos v. Darrel, 3 F. Cas. 810 (C.C.D.S.C. 1795) (No. 1607) (holding the ATCA served as the jurisdictional basis for the exercise of admiralty jurisdiction over a claim brought by a French privateer against the mortgagee of a British slave trading vessel); Moxon v. The Fanny, 17 F. Cas. 942 (Pa. 1793) (No. 9895) (holding the ATCA could not serve as the basis for federal jurisdiction for a damages claim arising from the seizure of a British ship by a French privateer in U.S. waters).

199. *See* 1 Op. Att'y Gen, *supra* note 39, at 59. While expressing reservations about criminal prosecution of the perpetrators, Attorney General Bradford was far more certain of the likelihood of tort liability pursuant to the ATCA. In this regard, Attorney General Bradford stated "there can be no doubt that the company or individuals who have been injured by these acts of hostility have a remedy by a civil suit in the courts of the United States; jurisdiction being expressly given to these courts in all cases where an alien sues for a tort only, in violation of the laws of nations, or a treaty of the United States . . . ." *Id.*

200. Sosa v. Alvarez-Machain, 542 U.S. at 719.

201. *Id.* at 720.

202. *Id.*

203. *Id.* at 724.

Filartiga v. Peña-Irala that has precluded courts from "recognizing a claim under the law of nations as an element of common law."[204]

Nevertheless, the absence of amendments to or abolition of the ATCA did not lead Justice Souter to adopt an unrestrained view of the causes of action over which courts could exercise jurisdiction. Rather, claims based upon the present-day law of nations were required 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 [the Court has] recognized."[205] This restraint was justified for several reasons. Initially, the "prevailing conception" of the common law changed since 1789 from one of discovery of governing principles to wholesale judicial creation.[206] The perception of federal common law also changed with the Court's opinion in *Erie Railway Co. v. Tompkins.*[207] The legacy of *Erie,* specifically, the abolition of the federal general common law and its withdrawal to specialized fields or where necessary in interstitial areas of federal interest, militated in favor of a policy of "legislative guidance before exercising innovative authority over substantive law."[208]

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204. *Id.* at 724-725. In his concurring opinion, Justice Scalia objected to the perceived expansion of federal jurisdiction to include violations of customary international law beyond those within the contemplation of the First Congress. According to Justice Scalia, the Framers would be "quite terrified" by the expansion of federal jurisdiction beyond piracy, violations of safe conduct, interference with ambassadors and foreign sovereign immunity. *Id.* at 749. Rather, Justice Scalia concluded that "[t]he notion that a law of nations, redefined to mean the consensus of states on *any* subject, can be used by a private citizen to control a sovereign's treatment of *its own citizens* within *its own territory* is a 20th-century invention of internationalist law professors and human-rights advocates." *Id.* at 749-750 (emphasis in original).

205. *Id.* at 725.

206. *Id.* The Court noted in 1789 that the common law was accepted as "a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute." *Id.* (citing Black and White Taxicab & Transfer Co. v. Brown and Yellow Taxicab & Transfer Co., 276 U.S. 518, 533 (1928) (Holmes, J., dissenting)). However, the formulation of common law principles in the modern era has increasingly relied on the exercise of judicial discretion. As noted by Justice Oliver Wendell Holmes, Jr. in 1881, "[i]n substance the growth of the law is legislative . . . [because] the very consideration which judges most rarely mention, and always with an apology, are the secret root from which the law draws all the juices of life. I mean, of course, considerations of what is expedient for the community concerned." OLIVER WENDELL HOLMES, JR., THE COMMON LAW 35 (Howe ed., 1963).

207. 304 U.S. 64 (1938).

208. Sosa v. Alvarez-Machain, 542 U.S. at 726. With respect to the ATCA, the Court specifically noted it "would be remarkable to take a more aggressive role in exercising a jurisdiction that remained largely in shadow for much of the prior two centuries." *Id.*

However, the holding in *Erie* did not preclude "further independent judicial recognition of actionable international norms."[209] Rather, Justice Souter concluded, "judicial power should be exercised on the understanding that the door is still ajar subject to vigilant doorkeeping, and thus open to a narrow class of international norms today."[210] According to the Court, *Erie* did not bar judicial recognition of all new substantive rules of federal common law; rather, it permitted such recognition in "identified limited enclaves."[211] For over two centuries, one of these enclaves included the law of nations.[212] The Court was unwilling to instruct federal courts to "avert their gaze entirely" from such norms, including those intended to protect individuals.[213] Such aversion was not within the understanding of the First Congress, which also would not have, according to the Court, "expected federal courts to lose all capacity to recognize enforceable international norms simply because the common law might lose some metaphysical cachet on the road to modern realism."[214] Rather, the legitimacy of limited recognition of international norms by federal courts has been assumed since the U.S. Court of Appeals for the Second Circuit's decision in *Filartiga*.[215] The Court noted that the U.S. Congress has not contravened this legitimacy, but has supplemented judicial determinations in this field through the adoption of the TVPA.[216] Absent further congressional guidance, there was no evidence that Congress had "shut the door to [consideration of] the law of nations entirely" in federal courts.[217]

The Court determined that the legislative branch had the right to create private rights of action in the absence of an express provision within existing statutes.[218] This deference to the U.S. Congress is prudent in the intersection of private rights of action and international norms due to the "possible collateral consequences of making international rules privately actionable."[219]

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209. *Id.* at 729.
210. *Id.*
211. *Id.*
212. *Id.*
213. *Id.* at 730.
214. *Id.*
215. *Id.* at 731.
216. *Id.*
217. *Id.*
218. *Id.* at 727 (citing Correctional Serv. Corp. v. Malesko, 534 U.S. 61, 68 (2001); Alexander v. Sandoval, 532 U.S. 275, 286-87 (2001)).
219. *Id.*

These consequences include potential implications for U.S. foreign relations, which make courts particularly wary of impingement upon the discretion of the executive and legislative branches to manage foreign affairs.[220] Judicial recognition of causes of action and the fashioning of remedies to address violations should thus proceed, if at all, with "great caution."[221] Finally, there is no congressional mandate to U.S. courts to define new violations of international law actionable pursuant to the ATCA.[222] Although the TVPA provided such a mandate through the establishment of "an unambiguous and modern basis for federal claims of torture and extrajudicial killing,"[223] the mandate was limited to this narrow range of claims. Further, Congress expressly manifested its intent to limit judicial interpretation of human rights norms through declarations that ratified instruments are not self-executing.[224]

As a result, the Court placed limitations on claims recognizable pursuant to the ATCA's grant of jurisdiction. The Court concluded international law norms were not recognizable under federal common law if they have "less definite content and acceptance among civilized nations than the historical paradigms familiar when [the ATCA] was enacted."[225] The Court cited piracy and torture as two offenses consisting of definite conduct and having acceptance among civilized nations.[226] These offenses were examples of "a handful of heinous actions" that were specific, universal and obligatory as to be actionable pursuant to the

220. *Id.*

221. *Id.* In his concurring opinion, Justice Scalia acknowledged the potential adverse consequences arising from the exercise of federal jurisdiction over claims arising under customary norms of international law. In Justice Scalia's view, such consequences were not reasons for courts to exercise "great caution" in adjudicating such claims. Rather, such consequences were reasons why courts were not granted nor could be thought to possess federal common-law-making powers with respect to the recognition of private causes of action arising from the violation of customary international law. *Id.* at 747 (Scalia, J., concurring).

222. *Id.* at 728.

223. *Id.* (citing H.R. REP. NO. 102-367, pt.1, at 3 (1991)).

224. *See, e.g.,* Genocide Convention Implementation Act of 1987, 18 U.S.C. § 1092 (2000) (providing U.S. ratification of the Convention on the Prevention and Punishment of the Crime of Genocide does not create a substantive or procedural right of private enforcement); 138 CONG. REC. 8071 (1992) (declaring the substantive provisions of the International Covenant on Civil and Political Rights are not self-executing).

225. Sosa v. Alvarez-Machain, 542 U.S. at 753.

226. *Id.* (citing United States v. Smith, 5 Wheat. 153, 163-80 (1820) (piracy); Filartiga v. Peña-Irala, 630 F.2d 876, 890 (2d Cir. 1980) (torture)).

ATCA.[227] Thus, claims of violation of such norms were to be gauged against the current state of international law, utilizing sources recognized by the Court dating back to the decision in *The Paquete Habana*.[228]

The Court then examined the two human rights instruments by which Alvarez claimed the existence of an international norm prohibiting arbitrary arrest. The Court dismissed the first of these instruments, the Universal Declaration of Human Rights, on the basis that it was a statement of aspirations only and does not impose binding obligations upon national governments by its own force and effect.[229] More importantly, the Court rejected the creation of such a norm on the basis of a prohibition contained within the International Covenant on Civil and Political Rights.[230] Although binding as a matter of international law, the Covenant was ratified in the United States on the express understanding that it was not self-executing and thus did not create obligations enforceable in federal courts.[231]

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227. *Id.* (citing *In re* Estate of Marcos Human Rights Litigation, 25 F.3d 1467, 1475 (9th Cir. 1994) ("Actionable violations of international law must be of a norm that is specific, universal and obligatory."); Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 781 (1984) (Edwards, J., concurring) (concluding the limits of the ATCA's jurisdictional grant are defined by violations of "definable, universal and obligatory norms")).

228. 175 U.S. 677, 700 (1900) ("[W]here there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators . . . for trustworthy evidence of what the law really is."). In his concurring opinion, Justice Scalia expressed doubt that federal courts would limit themselves in such a manner as suggested in the majority opinion. Justice Scalia noted "[f]or over two decades now, unelected federal judges have been usurping [Congress and the Executive's] lawmaking power by converting what they regard as norms of international law into American law." Sosa v. Alvarez-Machain, 542 U.S. at 765 (Scalia, J., concurring). The majority's failure to condemn this trend was evidence that the Court was "incapable of admitting that some matters - *any* matters - are none of its business." *Id.* (emphasis in original). According to Justice Scalia, the majority's opinion was an example of "Never Say Never Jurisprudence" in which the Court "ignores its own conclusion that the [ATCA] provides only jurisdiction, wags a finger at the lower courts for going too far, and then - repeating the same formula the ambitious lower courts *themselves* have used - invites them to try again." *Id.* (emphasis in original).

229. Sosa v. Alvarez-Machain, 542 U.S. at 734-35. The Court specifically noted Eleanor Roosevelt, one of the primary forces behind the adoption of the Universal Declaration, characterized it as "'a statement of principles . . . setting up a common standard of achievement for all peoples and all nations . . . [and] not a treaty or international agreement . . . impos[ing] legal obligations." *Id.* at 734 (citing EVAN LUARD, THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS 39, 50 (1967)).

230. *Id.*

231. *Id.*

The Court also concluded there was no specific, universal, and obligatory international norm sanctioning arbitrary detention occurring entirely within the borders of one state. The Court described the implications of Alvarez's claim as "breathtaking" in that it would "support a cause of action in federal court for any arrest, anywhere in the world, unauthorized by the law of the jurisdiction in which it took place, and would create a cause of action for any seizure of an alien in violation of the Fourth Amendment."[232] Such a result was inconsistent with applicable statutory and case law.[233] Any inability to demonstrate Sosa was acting on behalf of the U.S. government at the time of Alvarez's detention would require a further broadening of these principles to include conduct by private parties.[234]

In addition, Alvarez's claim lacked the necessary "state policy" and "prolonged" nature to qualify as a specific and universal norm.[235] Although the exact meaning of these terms remained an open question, the Court held that they clearly required "a factual basis beyond relatively brief detention in excess of positive authority."[236] Even assuming Alvarez's detention was "prolonged" and the result of "state policy," it remained impossible to determine if and when such detention achieved the degree of certainty necessary to violate international law characteristic of the offenses of piracy, interference with ambassadors, and violation of safe conduct identified by Blackstone.[237] As such, the Court concluded the principle advanced by Alvarez in his claim remained, "in the present, imperfect world . . . an aspiration that exceeds any binding customary rule having the specificity [the Court] requires."[238] The creation of a private cause of action under such circumstances in furtherance of this aspiration would, in the Court's judgment, exceed the bounds of exercisable residual common law discretion possessed by the

232. *Id.* at 736.

233. *Id.* (citing 42 U.S.C. § 1983 (2000); Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971) (creating damages remedies in federal courts for activities of law enforcement personnel in violation of the Fourth Amendment)).

234. *Id.*

235. *Id.* (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF U.S. § 702 (1987)).

236. *Id.* at 756-57.

237. *Id.* at 757.

238. *Id.*

federal judiciary. As a result, the Court reversed the judgment of the U.S. Court of Appeals for the Ninth Circuit.

IV. THE MULTINATIONAL ENTERPRISE UNBOUND: THE IMPLICATIONS OF *ALVAREZ-MACHAIN* FOR FUTURE ATCA LITIGATION

The Supreme Court's decision in *Alvarez-Machain* left the door slightly open to "further independent judicial recognition of actionable international norms" under the ATCA.[239] The following discussion analyzes various international human rights instruments in light of *Alvarez-Machain* to determine which instruments are "specific, universal and obligatory" enough for an actionable ATCA claim against transnational corporations.

A. Human Rights Associated with Personal Welfare

1. Security

The right to security appears in seven international and regional human rights instruments. The most widespread recognition of the right to security is in the International Covenant on Civil and Political Rights ("ICCPR").[240] However, the ICCPR offers no elaboration on the parameters of this right. Even assuming the right to security could be adequately defined, Article 9(1) merely establishes a right without creating a concomitant prohibition upon its violation. As such, Article 9(1) cannot be convincingly characterized as establishing a readily definable right or definitive statement of infringing conduct as to be specific for purposes of the ATCA.

Furthermore, although the ICCPR is universal, it is not obligatory. The ICCPR is clearly universal given its ratification by 152 states at the time of the preparation of this Article.[241] The United States is among these states, having signed the ICCPR on October 5, 1977, and ratified it on September 8, 1992.[242] However, in its reservations, declarations, and understandings adopted during the course of debate in the U.S. Senate, Article 9 was

239. *Id.* at 752.

240. International Covenant on Civil and Political Rights, *supra* note 69, art. 9(1) ("Everyone has the right to . . . security of person.").

241. Office of the United Nations High Comm'r for Human Rights, Status of Ratifications of the Principal International Human Rights Treaties 12 (June 2004).

242. *Id.* at 11.

designated as non-self-executing.[243] This declaration renders Article 9 non-binding on the United States in the absence of implementing legislation, which has not been enacted to date. The absence of such implementing legislation also renders Article 9 unenforceable in U.S. courts.[244] The implementing legislation, rather than the ICCPR itself, is to be given effect as law in the United States.[245]

This conclusion is not altered by resort to regional human rights instruments. Although three instruments in the Inter-American human rights system establish a right to security, none of these instruments goes beyond the mere creation of the right to define its parameters or conduct in violation thereof.[246] Furthermore, two of these instruments are not universal. Specifically, the American Convention on Human Rights ("ACHR") is not universal to the extent that it has only been ratified by twenty-five of the thirty-four states within the Inter-American system.[247] Of the nine states failing to ratify the ACHR, two are of primary importance, specifically, Canada and the United States.[248] A stronger case may be advanced for the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women given its ratification by thirty-one states.[249] Nevertheless, once again the absence of ratifications by Canada and the United States prevents the recognition of the right to security as possessing universal status.[250] The failure of the United States to ratify the ACHR and the

243. INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, 138 CONG. REC. S4781-01, art. III(1) (daily ed. Apr. 2, 1992) [hereinafter ICCPR CONG. REC.].

244. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF U.S. § 111(3) (1987) ("[A] 'non-self-executing' agreement will not be given effect as law in the absence of necessary implementation.").

245. *Id.* § 111 cmt. h.

246. Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women art. 4(c), June 9, 1994, 33 I.L.M. 1534 (granting every woman the right to personal security)[hereinafter ICPPEVW]; American Convention on Human Rights, *supra* note 160, art. 7(1) ("Every person has the right to . . . security."); American Declaration on the Rights and Duties of Man, *supra* note 97, art. I ("Every human being has the right to . . . the security of his person.").

247. Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, *available at* http://cidh.org/Basicos/basic4.htm.

248. *Id.*

249. Organization of American States, Inter-American Convention to Prevent and Punish Torture, Dec. 9, 1985, O.A.S.T.S. No. 67, *available at* http://www.oas.org/juridico/english/Sigs/a-51.html.

250. *Id.*

Eradication of Violence Against Women deprives these documents of an obligatory nature and further renders them nonactionable pursuant to the ATCA. Only the American Declaration of the Rights and Duties of Man may possess universal status as the founding instrument for the Inter-American human rights system and one of the foundations of the Organization of American States ("OAS").[251] Nevertheless, the American Declaration is, as its title implies, merely a declaration of aspirations lacking enforceability in U.S. courts.[252]

This conclusion also is not altered by reference to the right to security in United Nations' human rights instruments.[253] None of these instruments defines the right to security or conduct in violation thereof. It bears to note that, although not defining the right to security, the Declaration on the Protection of All Persons from Enforced Disappearance does provide that enforced disappearance violates "human dignity."[254] However, the Declaration fails to define the term "enforced disappearance" and thus cannot be characterized as possessing the requisite degree of specificity. Furthermore, although each of these three resolutions may be characterized as universal given their adoption by the United Nations General Assembly, they are, in a manner identical to the American Declaration, nonactionable declarations of aspirations. This conclusion is consistent with the holding in *Sosa v. Alvarez-Machain* that statements of aspirations such as the Universal Declaration of Human Rights ("UDHR") are not

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251. U.N. Enable, *Compilation of International Norms and Standards Relating to Disability, Part III: Regional Human Rights*, *available at* http://www.un.org/esa/socdev/enable/discom302.htm.

252. The American Declaration was neither conceived nor drafted as a treaty and did not create a contractual judicial obligation. Advisory Opinion, Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights, 1989 Inter-Am. C.H.R. (ser. A) No. 10, at 9 (July 14, 1989), *available at* http://www.corteidh.or.ccr/seriea)ing/index.html.

253. Declaration on the Elimination of Violence Against Women, G.A. Res. 48/104, art. 3(c), U.N. GAOR, 48th Sess., Supp. No. 49, U.N. Doc. A/Res/48/104 (Dec. 20, 1993) ("Women are entitled to the right to . . . security of person."); Declaration on the Protection of All Persons from Enforced Disappearance, G.A. Res. 47/133, art. 1(2), U.N. GAOR, 47th Sess., Supp. No. 49, U.N. Doc. A/Res/47/133 (Dec. 18, 1992) (noting acts of enforced disappearance violate the right to security of the person); Universal Declaration of Human Rights, *supra* note 97, art. 3 ("Everyone has the right to . . . security of person.").

254. Declaration on the Protection of All Persons from Enforced Disappearances, *supra* note 253, art. 1(1).

obligatory and cannot be used as the basis of a cause of action in U.S. courts.[255]

2. Life

The right to life appears in ten human rights instruments. As noted with respect to the right to security, the right to life is universally recognized in the ICCPR.[256] However, the ICCPR offers no further elaboration other than that this right, however it may be defined, is to be protected by law. Thus, the right to life in ICCPR cannot be convincingly characterized as establishing a right specific enough for purposes of the ATCA. Furthermore, as previously noted, although the ICCPR is universal, it is not obligatory for purposes of the ATCA. In its reservations, declarations and understandings, the U.S. Senate designated Article 6 as non-self-executing.[257] This declaration renders Article 6 non-binding on the United States in the absence of implementing legislation and thus unenforceable in U.S. courts.

The right to life is referenced in two additional human rights conventions. The Convention on the Rights of the Child ("CRC") recognizes that "every child has the inherent right to life."[258] This right requires states to "ensure to the maximum extent possible the survival and development of the child."[259] This elaboration, however, is insufficient to render Article 6 specific for purposes of the ATCA. Although survival of the child is inarguably identical to preservation of life, the scope of the legal obligation to contribute to the child's "development" is an open question. Even more nonspecific is the requirement to ensure the survival of the child to the "maximum extent possible." Not only is it uncertain as to what form such protection is to take, be it financial or through the adoption of appropriate social legislation, but it is equally unclear what constitutes the "maximum extent possible" or limitations that render further supportive efforts impossible.

In any event, compliance with the requirements of the CRC is not obligatory upon the United States. This Convention is one of the most universal of all of the principal international human

255. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 755 (2004).

256. International Covenant on Civil and Political Rights, *supra* note 69, art. 6(1) ("Every human being has the inherent right to life.").

257. ICCPR CONG. REC., *supra* note 243, art. 3(1).

258. Convention on the Rights of the Child, *supra* note 96, art. 6(1).

259. *Id.* art. 6(2).

rights treaties, having been ratified by 192 states at the time of the preparation of this Article.[260] Only two states have failed to ratify or accede to the Convention. One of these states is the United States, which signed the Convention on February 16, 1995, but has failed to ratify it.[261] The absence of ratification renders the Convention nonobligatory and therefore non-actionable in U.S. courts.

The Geneva Convention Relative to the Protection of Civilian Persons in Time of War ("Geneva Convention IV")[262] and the Protocol Relating to the Protection of Victims of Non-International Armed Conflicts ("Protocol II") both contain protections of the right to life.[263] Although it does not define life, Articles 3 and 32 of Geneva Convention IV prohibit acts resulting in "[v]iolence to life" and the "extermination of protected persons."[264] Similarly, Protocol II prohibits acts resulting in "violence to life."[265] Furthermore, the universality of these instruments is indisputable. Geneva Convention IV has been ratified or acceded to by 192 states, including the United States, which ratified it on August 2, 1955.[266] Protocol II has been ratified or acceded to by 157 states.[267]

Despite the United State's ratification, however, there is no indication that Geneva Convention IV manifests an intention to be self-executing without the enactment of enabling legislation, nor that the United States intended such result at the time of its ratification.[268] Furthermore, the creation of a private remedy

260. Status of Ratifications of the Principal International Human Rights Treaties, *supra* note 241.

261. *Id.* at 11. The other state failing to ratify or accede to the Convention on the Rights of the Child is Somalia. *Id.* at 10.

262. Geneva Convention Relative to the Protection of Civilian Persons in Time of War arts. 3(1)(a), 32, Oct. 21, 1950, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV].

263. Protocol Additional to the Geneva Convention Relating to the Protection of Victims on Non-International Armed Conflicts (Protocol II) art. 4(2)(a), June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Protocol II].

264. Geneva Convention IV, *supra* note 262.

265. Protocol II, *supra* note 263.

266. Int'l Comm. of the Red Cross [ICRC], *States Party to the Geneva Conventions*, *available at* http://www.icrc.org/web/eng/siteeng0.nsf/html/genevaconventions.

267. ICRC, *States Party to the Geneva Convention Protocols*, *available at* http://www.icrc.org/web/eng/siteeng0.nsf/html/genevaconventions.

268. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF U.S. § 111 (4)(a)-(c) (1987) (providing an international agreement is non-self-executing "if the agreement manifests an intention that it shall not become effective as domestic law without the enactment of implementing legislation; if the Senate in giving consent to a treaty, or

actionable in U.S. courts as a result of such violation is inconsistent with the general rule that affected individuals do not have direct remedies against human rights violators except where expressly provided by international agreement.[269] In any event, both instruments, Geneva Convention IV and Protocol II, have very limited applicability, specifically, the protection of civilian populations in the event of war in the case of Geneva Convention IV and protection of persons in the event of non-international conflicts in the case of Protocol II. These limitations make their application to transnational corporations unlikely.

This result is not altered by resort to regional or United Nations' human rights instruments. Two of the instruments in the Inter-American human rights system establishing the right to life fail to go beyond the mere creation of the right and define its parameters or conduct in violation thereof.[270] Furthermore, one of these instruments, the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, is not universal given the absence of ratifications by Canada and the United States.[271] And, as previously discussed, while the American Declaration of the Rights and Duties of Man may be universal as one of the founding instruments of the OAS, it is merely a declaration of aspirations lacking legal standing in U.S. courts.

The right to life as set forth in the ACHR presents different issues.[272] Article 4(1) not only provides every person with the right to have his life respected but requires that this right be subject to legal protections from the moment of conception.[273] The addition of required legal protection and implicit prohibition upon acts inconsistent with the preservation of life as well as a chronological reference point for the attachment of this right arguably lends it an air of specificity absent from pronouncements in other human

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Congress by resolution, requires implementing legislation, or if implementing legislation is constitutionally required").

269. *Id.* § 703 cmt. c.

270. ICPPEVW, *supra* note 246, art. 4(a) ("Every woman has the right to . . . have her life respected."); *see also* American Declaration on the Rights and Duties of Man, *supra* note 97, art. 1 ("Every human being has the right to life.").

271. Inter-American Commission of Women, *Status of Signing and Ratification of the Convention of Belem do Para* (2000), *available at* http://www.oas.org/cim/English/laws.rat.belem.htm.

272. American Convention on Human Rights, *supra* note 160, art. 4(1) ("Every person has the right to have his life respected.").

273. *Id.*

rights instruments. However, the ACHR is not universal, and thus not obligatory on the United States.

None of the United Nations' human rights instruments referring to the right to life define the right or conduct deemed to be in violation.[274] Although the Declaration on the Protection of All Persons from Enforced Disappearance does provide that such practice "constitutes a grave threat to the right to life," it fails to possess the requisite degree of specificity given the absence of a definition for the term "enforced disappearance."[275] Furthermore, despite their universal nature, each of these resolutions is a nonactionable declaration of aspirations and thus not obligatory.

3. Health

The right to health is instrumental to the determination of personal welfare. This right is set forth in eight human rights instruments. The right to health established in these instruments presents the same difficulties as the rights associated with security and life with respect to enforcement pursuant to the ATCA.

The right to health appears most prominently in three covenants and conventions. The first such instrument is the International Covenant on Economic, Social and Cultural Rights ("ICESCR"). Article 12(1) provides "[t]he States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health."[276] States are instructed to achieve full realization of this right through efforts to reduce infant mortality, improve environmental hygiene, prevent, treat and control epidemic, endemic and occupational diseases and assure the provision of medical services to all persons.[277] This right, along with other rights secured by the ICESCR, has been recognized by 149 states at the

274. Declaration on the Elimination of Violence Against Women, *supra* note 253, art. 3(a) ("Women are entitled to . . . [t]he right to life."); Declaration on the Protection of All Persons from Enforced Disappearances, *supra* note 253, art. 1(1) (noting acts of enforced disappearance constitute "a grave threat to the right to life"); Universal Declaration of Human Rights, *supra* note 97, art. 3 ("Everyone has the right to life.").

275. Declaration on the Protection of All Persons from Enforced Disappearances, *supra* note 253, art. 1(1).

276. International Covenant on Economic, Social and Cultural Rights, *supra* note 69, art. 12(1).

277. *Id.* art. 12(2)(a)-(d).

time of the preparation of this article and is thus universal in scope.[278]

Despite this universal recognition, the right to health as set forth in the ICESCR is not specific or obligatory as to be enforceable pursuant to the ATCA. What constitutes good health, let alone its "highest attainable standard," is not defined in the ICESCR or subject to universal agreement. There are wide differences in health standards between the states party to the ICESCR. These differences not only span members of the developed and developing world but also encompass differences between private and government subsidized health care models in the developed world.[279] As previously noted, Article 12(2) does provide some guidance to states with respect to their duties regarding public health. However, these statements constitute goals rather than specific actions required of states to achieve the "highest attainable standard" of health.[280] Article 12 thus lacks the requisite degree of specificity necessary to be actionable pursuant to the ATCA.

Article 12 also lacks the required obligatory nature to be actionable pursuant to the ATCA. Initially, although all members of the developed world and the most populous states in the developing world (except Indonesia and Pakistan) are parties, ICESCR has never been ratified by the United States.[281] Even assuming the absence of ratification is irrelevant to its obligatory nature, the language of the ICESCR itself overcomes any attempt to render its provisions mandatory. For example, Article 2(1) conditions achievement of the goals set forth in the ICESCR on availability of state resources.[282] Article 2(1) also lacks an obligatory nature to the extent it permits progressive

278. Status of Ratifications of the Principal International Human Rights Treaties, *supra* note 241, at 11.

279. *See generally* U.N. Dev. Programme [UNDP], Human Development Report Office, *Occasional Paper: Inequality in the U.S. Healthcare System*, U.N. Doc. 2005/36 (2005) (*prepared by* Devi Sridhar), *available at* http://hdr.undp.org/docs/publications/background_papers/2005/HDR2005_Sridhar_Devi_36.pdf

280. International Covenant on Economic, Social and Cultural Rights, *supra* note 69, art. 12.

281. Status of Ratifications of the Principal International Human Rights Treaties, *supra* note 241, at 11.

282. International Covenant on Economic, Social and Cultural Rights, *supra* note 69, art. 2(1) (conditioning the undertaking of steps to attain the rights set forth in the Covenant on each state's "available resources").

implementation of the rights set forth therein without establishing a time within which states are to achieve their realization.[283] Furthermore, there are no required methods by which states are to implement these rights. Rather, states are instructed to use "all appropriate means."[284] Additional evidence of the nonobligatory nature of the ICESCR may be found in Article 4, which permits states to limit the enjoyment of such rights as is "compatible with the nature of these rights and . . . for the purpose of promoting the general welfare in a democratic society."[285] States are thus free to limit or ignore rights contained within the ICESCR as long as there is some excuse consistent with the amorphous standard of "promotion of the general welfare." The leeway granted to states as a result of this provision is far too great to allow for the conclusion that the ICESCR imposes specific and obligatory standards upon signatory states.

The second convention referencing the right to health is the CRC. In language identical to the ICESCR, Article 24(1) of the CRC provides for state recognition of the right of children to "enjoyment of the highest attainable standard of health."[286] States are instructed to "pursue full implementation of this right" through efforts to diminish infant and child mortality, ensure the provision of medical services to children and mothers, combat disease and malnutrition through access to "adequate nutritious foods and clean drinking water," and provide parents with basic knowledge of children's health and nutrition.[287] In addition, states are instructed to take "all effective and appropriate measures" to ensure abolition of traditional practices detrimental to children's health.[288] This right and ensuing obligations are universal due to their recognition by 192 states at the time of the preparation of this Article.[289]

Despite this universal recognition, the right to health as set forth in the CRC is not specific or obligatory for the same reasons as the ICESCR. This right is rendered nonspecific by the use of the

283. *Id.* (providing states are to achieve "progressively the full realization of the rights recognized in the present Covenant").

284. *Id.*

285. *Id.* art. 4.

286. Convention on the Rights of the Child, *supra* note 96, art. 24(1).

287. *Id.* art. 24(2)(a)-(f).

288. *Id.* art. 24(3).

289. Status of Ratifications of the Principal International Human Rights Treaties, *supra* note 241.

term "highest attainable standard," which is not defined in the CRC or subject to universal agreement.[290] As previously noted in the discussion of the ICESCR, there are wide differences in health standards between the states party to the CRC. Article 24 does provide some guidance with respect to improving health standards for children. However, these statements constitute goals rather than specific actions, and it is also unclear whether such actions constitute "all effective and appropriate measures" to ensure the health of children.[291] Article 24 thus lacks the requisite degree of specificity necessary to be actionable pursuant to the ATCA.

Article 24 also lacks the required obligatory nature to be actionable pursuant to the ATCA. Despite its universal nature given its ratification by 192 states, the United States is one of two states that have failed to ratify or accede to the CRC.[292]

In addition, the language of the CRC renders its provisions nonobligatory. For example, Article 24(4) lacks an obligatory nature to the extent it permits progressive implementation of the rights set forth therein without establishing a time within which states are to achieve their realization.[293] Furthermore, there are no required methods by which states are to achieve and implement these rights. Although Article 24 sets forth the ends to be achieved, the measures by which to accomplish these ends are absent. There is thus an absence of means that a court could impose upon a state to achieve the goals of Article 24.

The third convention referencing the right to health is Protocol I to the Geneva Conventions Relating to the Protection of Victims of International Armed Conflicts ("Protocol I").[294]

Article 11(1) requires the protection of the physical and mental health and integrity of persons in the power of adverse parties during an international conflict.[295] Protocol I further prohibits endangerment of such persons' health as a result of "any unjustified act or omission" including physical mutilation and

290. Convention on the Rights of the Child, *supra* note 96, art. 24(1).

291. *Id.* art. 24(3).

292. Status of Ratifications of the Principal International Human Rights Treaties, *supra* note 241.

293. Convention on the Right of the Child, *supra* note 96, art. 24(4) (providing states are to achieve "progressively the full realization of the right recognized in the present article").

294. Protocol Additional to the Geneva Conventions Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I].

295. *Id.* art. 11(1).

experimentation.[296] Although "unjustified acts or omissions" are not defined, their meaning may be ascertained from prohibitions that immediately follow, such as physical mutilation and medical or scientific experimentation.[297] Article 11 also does not contain the ambiguous terminology that plagues the health-related provisions of the ICESCR and CRC such as "highest attainable standard of health," "all effective and appropriate means" and "general welfare in a democratic society."[298] In so doing, it is more specific than the health-related provisions of these instruments.

Furthermore, the universality of Protocol I is indisputable, having been ratified or acceded to by 162 states at the time of preparation of this article.[299] However, Protocol I is not obligatory upon the United States as it has not ratified or acceded to Protocol I. As such, the obligations set forth therein are not binding on the United States, nor is it an adequate basis for private civil litigation in U.S. courts. Even if Protocol I were to be ratified by the United States, there is no reason to believe the U.S. Senate would manifest an intention for it to be self-executing without the enactment of enabling legislation. In any event, Protocol I is very limited in scope, specifically, the protection of victims of international armed conflict, thereby rendering its application to transnational corporations unlikely.

The right to health is also referenced in two Inter-American human rights instruments. Article XI of the American Declaration of the Rights and Duties of Man provides, in part, that "[e]very person has the right to the preservation of his health through sanitary and social measure relating to food, clothing, housing and medical care, to the extent permitted by public and community resources."[300] Although the American Declaration may be universal as one of the founding instruments of the OAS, it is not specific or obligatory for purposes of enforcement in a private civil action in the United States. Article XI fails to elaborate on the steps to be taken by states to preserve the health of their

296. *Id.*

297. *Id.* art. 11(2)(a)-(b).

298. Convention on the Rights of the Child, *supra* note 96, arts. 24(1), 24(3); International Covenant on Economic, Social and Cultural Rights, *supra* note 69, arts. 4, 12.

299. Int'l Comm. of the Red Cross [ICRC], *States Party to the Geneva Convention and their Additional Protocols* (Dec. 4, 2005), http://www.icrc.org/Web/eng/siteeng9.nsf/html/party_gc.

300. American Declaration on the Rights and Duties of Man, *supra* note 97, art. 9.

citizenry.[301] Specifically, the "sanitary and social measures" to be undertaken are not set forth in any detail other than that they should relate to food, clothing, housing and medical care.[302] Additional evidence of the nonspecific nature of Article XI may be found in its language limiting the obligation of states to "the extent permitted by public and community resources," an undefined standard permitting states to ignore or limit health protections.[303] This wide discretion leads to the conclusion that Article XI is nonspecific as well as nonobligatory. Furthermore, the American Declaration is merely a statement of goals and aspirations rather than a mandatory body of standards enforceable upon states in a court of law.[304]

The right to health is elaborated upon in greater detail in the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights.[305] Article 10 states that "[e]veryone shall have the right to health, understood to mean the enjoyment of the highest level of physical, mental and social well-being."[306] Article 10 sets forth six separate obligations for states to achieve this goal, including universal primary health care, immunization programs, disease treatment and prevention, education and "[s]atisfaction of the health needs of the highest risk groups and of those whose poverty makes them the most vulnerable."[307]

This provision remains nonspecific despite the elaboration of these obligations. As previously noted with respect to the ICESCR and CRC, what constitutes enjoyment of health at its "highest level" remains subject to debate.[308] Although Article 10(2) does provide some guidance to states with respect to improving health standards, these statements do not place specific duties on states enforceable by courts. The means by which states are to achieve universal primary health care, prevent and treat disease, and

301. *Id.*
302. *Id.*
303. *Id.*
304. *Id.* pmbl.
305. Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, 1988 O.A.S. T.S. No. 69 (1988), *reprinted in* BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM, OEA/Ser.L.V/II.82 doc.6 rev.1, art. 10(1), at 67 (1992).
306. *Id.*
307. *Id.* art. 10(2)(a)-(f).
308. International Covenant on Economic, Social and Cultural Rights, *supra* note 69, art. 12.

educate citizens are undefined and left to the discretion of individual states.[309] Of perhaps greatest uncertainty is the identification of "high risk groups" and those in "poverty" whose health needs are identified as of primary urgency. Not only does Article 10 fail to set forth means for identifying such groups, but it also fails to establish standards by which "satisfaction" of these groups' health needs may be measured. Thus, these statements constitute goals rather than specific actions required of states to achieve the enjoyment of health at its "highest level."

Article 10 also lacks the required universal and obligatory nature to be actionable pursuant to the ATCA. Only nineteen of the thirty-four states constituting the membership of the Inter-American human rights system are party to the Additional Protocol.[310] Of these nineteen, only thirteen states have ratified or acceded to its provisions.[311] Further evidence of the absence of universality is the failure of two important members of the Inter-American human rights system to sign the Additional Protocol, specifically the United States and Canada.[312] The absence of U.S. ratification of the underlying American Convention and signature or ratification of the Additional Protocol renders it nonobligatory.

Finally, the right to health is set forth in three United Nations' declarations.[313] Despite their apparent universal nature stemming from their adoption by the United Nations General Assembly, none of these declarations is specific or obligatory. The Declaration on the Elimination of Violence Against Women merely refers to the entitlement of women to the "highest standard attainable of physical and mental health" without further elaboration and is thus as nonspecific as other instruments

309. *Id.* Art. 12(2)(c); Convention on the Right of the Child, *supra* note 96, art. 24(2)(e).

310. Org. of American States, *Signatures and Current Status of Ratification of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights* 1-2 (2004)), *available at* http://www.cidh.org/Basicos/basic6.htm.

311. *Id.*

312. *Id.*

313. Declaration on the Elimination of Violence Against Women, *supra* note 253, art. 3(f) ("Women are entitled to [t]he right to the highest standard attainable of physical and mental health."); Declaration on the Rights of the Child, G.A. Res. 1386, art. 4, U.N. GAOR, 14th Sess., Supp. No. 16, U.N. Doc. A/4354 (Nov. 20, 1959) (providing that children have the right to health); Universal Declaration of Human Rights, *supra* note 97, art. 25 ("Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family.").

containing similar references.[314] Principle 4 of the Declaration of the Rights of the Child is equally vague in bestowing upon children the entitlement to "grow and develop in health."[315] Further language attempting to elaborate upon this entitlement by providing for pre-natal and post-natal care, nutrition, housing, recreation, and medical services is unhelpful to the extent that each of these methods of achieving healthy growth and development is prefaced by "adequate."[316] The undefined use of this term also renders the UDHR's reference to a standard of living "adequate" for health equally vague and nonspecific.[317] Furthermore, despite their universal nature, each of these resolutions is a nonactionable declaration of aspirations and thus not obligatory.[318]

4. Healthy Environment

The right to a healthy environment is set forth in six international and regional human rights instruments.[319] The right initially appears in Article 12(2)(b) of the ICESCR, which provides "[t]he steps to be taken by the States Parties to the present Covenant to achieve the full realization of [the right to health] shall include those necessary for . . . [t]he improvement of all aspects of environmental and industrial hygiene."[320] As previously noted with respect to its right to health, despite its universal recognition, the right to "environmental hygiene" as set forth in the ICESCR is not specific or obligatory as to be enforceable pursuant to the ATCA.[321] What constitutes "environmental hygiene" or acceptable standards thereof are not defined in the ICESCR and are not subject to universal

314. Declaration on the Elimination of Violence Against Women, *supra* note 253, art. 3(f).

315. Declaration on the Rights of the Child, *supra* note 313, art. 4.

316. *Id.*

317. Universal Declaration of Human Rights, *supra* note 97, art. 25.

318. Declaration on the Elimination of Violence Against Women, *supra* note 231, pmbl; Declaration on the Rights of the Child, *supra* note 313, pmbl.; Universal Declaration of Human Rights, *supra* note 97, pmbl.

319. United Nations Convention on the Law of the Sea, *supra* note 75, arts. 207, 213, 235 (requiring states to adopt measures to eliminate, reduce or control marine pollution from land-based sources and providing for state responsibility and liability for marine pollution); *Rio Declaration on the Environment and Development*, *supra* note 83, princ. 4 (deeming environmental protection to be an integral part of economic development).

320. International Covenant on Economic, Social and Cultural Rights, *supra* note 69, art. 12(2)(b).

321. *Id.*

agreement. Furthermore, Article 12(2), including the improvement of environmental hygiene, constitutes a statement of goals rather than specific actions required of states to achieve the "highest attainable standard" of health.[322]

This statement of goals also lacks the required obligatory nature to be actionable pursuant to the ATCA due to the absence of U.S. ratification and the language of the ICESCR itself. Of specific application with respect to environmental hygiene is Article 25, which provides "[n]othing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources."[323] Environmental protection is thus secondary to the exploitation of natural resources. This subordination of environmental interests not only renders the right to environmental hygiene nonobligatory but also nonspecific as "enjoyment" and "full and free utilization of natural wealth and resources" are not defined in the ICESCR. This lack of readily cognizable standards prevents the enforcement of the ICESCR's environmental standards pursuant to the ATCA.

The right to a healthy environment is also set forth in Protocol I to the Geneva Conventions. Article 55 requires protection of the environment against "widespread, long-term and severe damage" during international warfare.[324] The duty of care owed by states engaged in such warfare is defined as refraining from methods and means of warfare intended or expected to cause such damage to the environment and attacks on the environment by way of reprisals.[325] This standard is specific to the extent it adopts tort standards and defines prohibited warfare as such where the environmental impact was intended, known, or should have been known.

If Article 55 lacks adequate definition, it is in the determination of the impact of the warfare on the environment, which must be "widespread, long-term and severe."[326] Although obviously necessary in order to differentiate between permissible and prohibited forms of warfare, these three qualifications are insufficiently specific for purposes of private civil litigation

322. *Id.* art 12(1).
323. *Id.* art. 25.
324. Protocol I, *supra* note 294, art. 55(1).
325. *Id.* art. 55(1)-(2).
326. *Id.* art. 55(1).

pursuant to the ATCA. Article 55 defines the purpose of its measures as the protection of the health and survival of impacted peoples.[327] Theoretically, this could include untold numbers of people dispersed over a geographic area spanning hundreds, if not thousands, of miles. Not only is the geographic scope of such impact undefined, but distinctions between areas suffering the primary effects of prohibited forms of warfare and other areas suffering secondary effects are absent as well. Specific chronological limitations are also absent from the prohibition upon forms of warfare having "long-term" effects. Although rendered somewhat clearer by the stated purposes of Article 55, what constitutes a "severe" environmental impact remains an open question and is far too indeterminate to serve as the basis for private civil litigation. Finally, Protocol I is not obligatory upon the United States due to the absence of ratification or accession and is very limited in scope, thereby rendering its application to transnational corporations unlikely.

The right to a healthy environment also appears in the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights. Article 11 provides that "[e]veryone shall have the right to live in a healthy environment . . . [and] States Parties shall promote the protection, preservation and improvement of the environment."[328] Article 11 cannot provide the basis for an ATCA claim, since it is not specific, universal, or obligatory. As previously noted with respect to the ICESCR, the term "healthy environment" remains indeterminate without an accompanying definition, which is completely absent from Article 11.[329] Furthermore, Article 11 lacks the required universal and obligatory nature due to its ratification by only thirteen of the thirty-four states constituting the membership of the Inter-American human rights system and the absence of signature or ratification by Canada and the United States.[330]

Environmental protection is specifically referenced in two U.N. declarations. Article 13(c) of the Declaration on Social

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327. *Id.*

328. Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, *supra* note 305, art. 11(1)-(2).

329. *Id.*

330. Status of Ratifications of the Principal International Human Rights Treaties, *supra* note 241.

Progress and Development provides that one of the main goals of social progress and development is "[t]he protection and improvement of the human environment."[331] This goal is to be attained, in part, through the establishment of national and international legal and administrative measures.[332] This instruction is more specific than the ICESCR or the Additional Protocol to the extent it defines what actions states are to undertake in order to protect, preserve and improve the environment. Nevertheless, these directives do not impose readily enforceable obligations upon states with respect to pollution originating from enumerated sources and damaging identified sectors of the environment. The obligation to protect and improve the environment is also subject to the sovereignty of states over their natural wealth and resources.[333] This condition further renders the Declaration on Social Progress nonspecific as states may defend environmentally harmful practices as exercises of sovereignty. This defense further negates any contention the environmental provisions of the Declaration are obligatory by providing states with an excuse the definition of which is within their sole determination. Furthermore, the punishment of violations through the creation of an enforcement mechanism is not addressed in the Declaration, let alone compensable in national courts possessing authority to grant appropriate remedies. Finally, like all other declarations of the United Nations General Assembly, the Declaration on Social Progress is a nonactionable statement of aspirations.

Environmental protection as provided in the Rio Declaration on the Environment and Development presents similar problems. The Rio Declaration provides that environmental protection is an integral part of economic development.[334] The level of environmental protection contemplated by this statement is not sufficient to provide judicially enforceable standards. The Rio Declaration fails to set forth what specific actions states are to take to achieve balance between environmental protection and development.[335] Furthermore, Principle 2 grants states the sovereign right to exploit their natural resources within their

331. Declaration on Social Progress and Development, G.A. Res. 2542, art. 13(c), U.N. GAOR, 24th Sess., Supp. No. 30, U.N. Doc. A/7630 (Dec. 11, 1969).

332. *Id.* art. 25(a).

333. *Id.* art. 3(d).

334. *Rio Declaration on the Environment and Development*, *supra* note 83, princ. 4.

335. *Id.*

boundaries pursuant to their own environmental policies.[336] As in the case of the Declaration on Social Progress, this condition renders the Rio Declaration nonspecific as states may defend environmentally harmful practices as exercises of sovereignty over their natural resources.[337] Any specific policy is also qualified by recognition that environmental standards applicable in one state may be inappropriate in another state or may impose unacceptable economic and social costs.[338] This is particularly the case with respect to standards in developed and developing states.[339] The wide differences in environmental standards between states and in particular members of the developed and developing world further cloud the definiteness of the Rio Declaration and render it incapable of judicial enforcement.

Leaving aside the nonbinding nature of declarations, the Rio Declaration's lack of specificity also renders it nonobligatory. The exceptions for resource exploitation and social and economic costs provide states with explanations to justify any scheme of environmental protection or the absence thereof.[340] As such, there is no obligation that may be enforced upon states. Even if such obligations existed, the Rio Declaration lacks enforcement mechanisms. The Rio Declaration therefore cannot serve as the basis for future ATCA actions.

The U.N. Convention on the Law of the Sea has also served as the basis for ATCA claims in U.S. courts. Three articles have been specifically cited in such claims. Article 207 requires states to adopt laws and regulations and undertake measures to "prevent, reduce and control pollution of the marine environment from land-based sources."[341] This obligation is to include efforts to minimize the release of "toxic, harmful or noxious substances, especially those which are persistent, into the marine environment."[342] Article 213 requires enforcement of laws, regulations and standards adopted pursuant to Article 207 as well as rules and standards established by international organizations, and conferences.[343] Finally, Article 235 provides that states are

336. *Id.*
337. *Id.*
338. *Id.*
339. *Id.*
340. *Id.* princ. 2.
341. U.N. Convention on the Law of the Sea, *supra* note 75, art. 207(1)-(2).
342. *Id.* art. 207(5).
343. *Id.* art. 213.

responsible for fulfilling their obligations with respect to preservation of the marine environment and are liable in accordance with international law for any failures.[344] States are also responsible for establishing avenues of recourse within their respective legal systems for injured parties and "prompt and adequate compensation" for damages resulting from failure to protect the marine environment.[345]

Unlike the general instruction to adopt protective measures contained in the Declaration on Social Progress, these articles impose specific obligations upon states with respect to pollution originating from an enumerated source and damaging to an identified sector of the environment. States are obligated to adopt and enforce national laws and regulations as well as abide by international standards designed specifically to prevent, reduce and control such pollution.[346] Although undefined, particular emphasis is to be placed upon preventing the release of toxic, harmful and noxious substances.[347] Violations of these obligations are compensable in national courts, which are authorized to grant appropriate remedies, including monetary relief. To this extent, the articles of the Law of the Sea Convention relating to land-based sources of marine pollution are remarkably specific.

Furthermore, these obligations are universally recognized by the international community. The Law of the Sea Convention has been ratified or acceded to by 149 states at the time of preparation of this article.[348] This list includes every developed state and most of the developing world, including, significantly, China, India, and the Russian Federation.[349] However, the United States is one of thirty-nine states yet to ratify or accede to the Law of the Sea Convention.[350] As a result, despite its high degree of specificity and its universal acceptance, the Law of the Sea Convention is not obligatory on the United States and cannot serve as the basis for a private civil action pursuant to the ATCA.

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344. *Id.* art. 235(1).
345. *Id.* art. 235(2).
346. *Id.* art. 235.
347. *Id.* art. 207 (5).
348. U.N. Division for Ocean Affairs and the Law of the Sea, Chronological Lists of Ratifications of, Accessions and Successions to the U.N. Convention on the Law of the Sea (2006), *available at* http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm.
349. *Id.*
350. *Id.*

5. Summary and Extrajudicial Execution

Closely related to the right to security, life, and health is the right to be free from summary or extrajudicial execution. This right appears in four treaties, conventions and declarations. However, unlike the previously discussed rights, it is much more difficult to conclude this right is not specific, universal and obligatory for purposes of the ATCA.

The most universal recognition of the right to be free from summary or extrajudicial execution is in Geneva Convention IV and the ICCPR. Article 6(1) of the ICCPR simply states that "[n]o one shall be arbitrarily deprived of his life."[351] The ICCPR fails to define the circumstances constituting such a deprivation from which states are to abstain. The universal nature of the ICCPR is insufficient to overcome this lack of specificity for purposes of the ATCA. Furthermore, as previously noted, Article 6 is not obligatory as it has been designated as non-self-executing in the United States, and no implementing legislation is currently in force and effect.

The prohibition upon summary execution in Geneva Convention IV presents a more difficult issue. Article 3(1)(a) prohibits "murder of all kinds."[352] This prohibition is further elaborated upon in Article 3(1)(d), which bars the "passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all judicial guarantees which are recognized as indispensable by civilized people."[353] Although the definitions of "regularly constituted court" and "indispensable judicial guarantees" may be subject to interpretation, Section 3(1)(d) is a classic restatement of the widely accepted definition of summary or extrajudicial execution.[354] Furthermore, as previously noted, the universality of Geneva Convention IV is indisputable.[355] Thus, Geneva

351. International Covenant on Civil and Political Rights, *supra* note 69, art. 6(1).

352. Geneva Convention IV, *supra* note 262, art. 3(1)(a).

353. *Id.* art. 3(1)(d).

354. *See, e.g.*, RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF U.S. § 702 cmt. f (1987) (defining summary execution as the killing of an individual "other than as lawful punishment pursuant to conviction in accordance with due process of law, or as necessary under exigent circumstances").

355. Orna Ben-Naftali & Keren R. Michaeli, *'We Must Not Make a Scarecrow of the Law': A Legal Analysis of the Israeli Policy of Targeted Killings*, 36 CORNELL INT'L L.J. 233, 283 (2003).

Convention IV meets the specific and universal portions of Justice Souter's standard.

However, Geneva Convention IV is not obligatory upon the United States such as to create a cause of action pursuant to the ATCA. Despite its ratification by the United States, there is no indication that Geneva Convention IV manifests an intention to be self-executing without the enactment of enabling legislation, the United States intended such result at the time of ratification, or that such a result is consistent with general principles of international human rights law. In any event, as previously established, Geneva Convention IV has a very limited scope that makes its application to transnational corporations unlikely.

Similar conclusions are reached through application of regional and United Nations' human rights instruments. The right to be free from summary execution as defined in the ACHR suffers from the same problem as the ICCPR. Specifically, Article 4(1) merely prohibits arbitrary deprivations of life without defining conduct constituting such deprivation.[356] Furthermore, the ACHR is not universal or obligatory.

The sole United Nations' instrument respecting summary execution is also nonactionable pursuant to the ATCA. For one, the specificity of the Principles on the Effective Prevention and Investigation of Extra-Legal Arbitrary and Summary Execution ("the Principles") is questionable. The Principles place numerous duties on states with respect to summary executions, including prohibition, prevention and investigation.[357] However, the Principles do not provide a definition of "extra-legal, arbitrary and summary execution." Even assuming the definition may be ascertained from other international instruments or from the prohibitions contained within the Principles themselves, the universal nature of the Principles is subject to question given that it constitutes nothing more than a resolution of the U.N. Economic and Social Council, a far less globally representative institution than the General Assembly. Thus, the Principles are due less recognition as an expression of universal values than General Assembly resolutions. In any event, regardless of their universal

356. American Convention on Human Rights, *supra* note 160, art. 4(1) ("No one shall be arbitrarily deprived of his life.").

357. Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, E.S.C. Res. 1989/65, arts. 1-13, 1989 U.N. ESCOR, Supp. No. 1, U.N. Doc. E/1989/89 (May 24, 1989).

nature and widespread use of mandatory language, the Principles are nonactionable declarations of aspirations and thus not obligatory.

However, unlike the rights to security, life, and health, the right to be free from summary execution has been identified as part of the customary international law of human rights. Section 702 of the *Restatement of Foreign Relations* provides, in part, that a state violates international law if, "as a matter of state policy, it practices, encourages or condones . . . the murder . . . of individuals."[358] State-sponsored murder of individuals is prohibited to the extent it occurs "other than as lawful punishment pursuant to conviction in accordance with due process of law, or as necessary under customary law."[359] Freedom from such practices is further defined as *jus cogens,* thereby rendering void international agreements providing otherwise.[360]

The designation of a customary standard of international human rights as a peremptory norm[361] does not necessarily render it actionable pursuant to Justice Souter's opinion in *Sosa v. Alvarez-Machain.* Justice Souter refused to recognize Alvarez's detention as an actionable violation of international human rights law even though arbitrary detention has been defined as *jus cogens.*[362] Although he attempted to distinguish Alvarez's detention from *jus cogens* by holding that it was not "prolonged," Justice Souter further opined that, even assuming the detention to be prolonged, it remained impossible for the Court to determine if and when such detention achieved the degree of certainty necessary to violate international law characteristic of traditional offenses within the meaning of the ATCA such as piracy, interference with ambassadors, and violation of safe conduct.[363] As such, Justice Souter refused to create a private cause of action

358. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF U.S. § 702(c) (1987).

359. *Id.* § 702 cmt. f.

360. *Id.* cmt. n.

361. A peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character. Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331.

362. Sosa v. Alvarez-Machain, 542 U.S. 692, 737-38 (2004). Prolonged arbitrary detention is defined as a peremptory norm in the Restatement of Foreign Relations Law. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF U.S. § 702 cmt. n (1987).

363. Sosa v. Alvarez-Machain, 542 U.S. at 737.

pursuant to the ATCA for the violation of a norm considered peremptory by the international community.

Justice Souter's reasoning is not directly applicable to the peremptory norm existing with respect to summary or extrajudicial execution for two reasons. First, the violations vary so widely as to render Justice Souter's holding with respect to arbitrary detention inapplicable to summary execution. Justice Souter may be correct that the determination of when a detention becomes prolonged as to violate international law renders it uncertain for purposes of creating a private cause of action.[364]

Such shades of gray are not present in a case of summary execution, which consists of the absence or disregard of judicial procedures and protections, including due process of law, followed by the killing of a human being. Violations of this norm are far easier to determine than what circumstances constitute prolonged detention.

More importantly, unlike arbitrary detention, extrajudicial killings are actionable pursuant to U.S. law.[365] Specifically, the TVPA provides civil liability for a person who "under actual or apparent authority, or color of law, of any foreign nation subjects an individual to extrajudicial killing."[366] This statute empowers U.S. courts to adjudicate such claims by U.S. citizens and aliens. The TVPA has created "an unambiguous and modern basis for federal claims of . . . extrajudicial killing."[367] This express statutory basis differentiates claims of extrajudicial killing from arbitrary detention. Not only do claims of arbitrary detention lack an express statutory basis, but they also lack specificity. By contrast, claims of extrajudicial killing are defined within the TVPA as "a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples."[368] As previously noted with respect to Geneva Convention IV, although the definitions of "regularly constituted

364. *Id.*

365. U.S. law does not recognize a cause of action specifically enumerated as arbitrary detention. *See* 28 U.S.C. § 2680(h) (2000) (lifting tort immunity for federal investigative or law enforcement officers only if a detention constitutes false imprisonment); *see also* 28 U.S.C. §§ 2241-2255 (establishing procedures for the issuance of writs of habeas corpus for persons in the custody of the United States in violation of the U.S. Constitution).

366. 28 U.S.C. § 1350.

367. H.R. REP. NO. 102-367, at 3 (1991).

368. 28 U.S.C. § 1350.

court" and "indispensable judicial guarantees" may be subject to interpretation, the definition of extrajudicial killing in the TVPA is identical to the internationally accepted definition.[369] Furthermore, the recognition of a federal cause of action for extrajudicial killing gives this human rights violation an obligatory nature absent from prolonged detention. Thus, unlike the rights to security, life, and health, the right to be free from summary or extrajudicial killings is specific, universal, and obligatory as to be actionable pursuant to the ATCA.

6. Torture and Cruel, Inhuman, or Degrading Treatment

The right to be free from torture and other cruel, inhuman, or degrading treatment appears in thirteen international and regional human rights instruments. The initial category of instruments consists of four international conventions prohibiting torture and other cruel, inhuman or degrading treatment but pertaining primarily to other topics. The International Covenant on Civil and Political Rights provides that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."[370] Article 37(a) of the CRC contains an identical prohibition with respect to children.[371] Geneva Convention IV contains two prohibitions upon such treatment. Article 3(1)(a) prohibits acts of torture and cruel treatment committed against persons taking no part in hostilities by state parties during armed conflicts not of an international character.[372] Article 32 further prohibits torture by state parties of such persons in their custody.[373] Protocol II to the Geneva Conventions prohibits torture and cruel treatment of civilian populations during non-international armed conflicts.[374]

The universal nature of these conventions is beyond question. However, none of these conventions are actionable pursuant to the ATCA for identical reasons. First, each of these conventions lacks the requisite degree of specificity. Although each of these conventions expressly prohibits torture and other cruel, inhuman or degrading treatment, none of the conventions defines the

369. *Id.*; Geneva Convention IV, *supra* note 262, art. 3(1)(d).
370. International Covenant on Civil and Political Rights, *supra* note 69, art. 7.
371. Convention on the Rights of the Child, *supra* note 96, art. 37(a).
372. Geneva Convention IV, *supra* note 262, art. 3(1)(a).
373. *Id.* art. 32.
374. Protocol II, *supra* note 263, art. 4(2)(a)-(h).

prohibited behaviors. Furthermore, none of these instruments are obligatory upon the United States. The prohibitions contained in the CRC and Protocol II are not legally binding due to the absence of ratification by the United States.[375] The prohibition contained within the Civil and Political Rights Covenant is equally nonobligatory as Article 7 has been declared to be non-self-executing in the United States.[376] Despite its ratification by the United States, Geneva Convention IV is not obligatory as there is no evidence it is self-executing or that such result was intended at the time of ratification or is consistent with general principles of international human rights law. The limited possibility of application of Geneva Convention IV to the activities of transnational corporations further minimizes its importance.

The second category of instruments relating to torture and cruel, inhuman or degrading treatment is those within the Inter-American system of human rights.[377] There are three instruments in this classification. Article 5(2) of the American Convention on Human Rights grants every person the right to be free from torture and cruel, inhuman or degrading punishment or treatment.[378] Similarly, Article 4(d) of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women grants every woman the right to be free from torture.[379] The Inter-American human rights system also contains a convention focused exclusively on torture. The Inter-American Convention to Prevent and Punish Torture obligates states to take "effective measures" to prohibit and punish torture occurring within their jurisdiction.[380]

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375. Elizabeth Burleson, *Juvenile Execution, Terrorist Extradition, and Supreme Court Discretion to Consider International Death Penalty Jurisprudence*, 68 ALB. L. REV. 909, 915-16 (2005); *see also* 145 CONG. REC. S35-02, 1999 WL 3713 (statement of Pres. Clinton) (stating Congress had not ratified Protocol II when President Reagan submitted it to the Senate pursuant to its advise and consent role).

376. ICCPR CONG. REC., *supra* note 243, art. 3(1).

377. *See* American Convention on Human Rights, *supra* note 160; ICPPEVW, *supra* note 246; Inter-American Convention to Prevent and Punish Torture art. 6, 25 I.L.M. 519 (Dec. 9, 1985) [hereinafter IACPPT], *available at* http://www.oas.org/juridico/english/Treaties/a-51.html.

378. American Convention on Human Rights, *supra* note 160, art. 5(2) ("No one shall be subjected to torture or to cruel, inhuman or degrading punishment or treatment.").

379. ICPPEVW, *supra* note 246, art. 4(d) ("Every woman has the right . . . not to be subjected to torture.").

380. IACPPT, *supra* note 377, art. 6.

None of these conventions may serve as the basis for jurisdiction pursuant to the ATCA.[381] The American Conventions on Human Rights and the Prevention, Punishment and Eradication of Violence Against Women suffer from three shortcomings. Initially, these conventions merely prohibit torture and cruel, inhuman or degrading treatment without defining the prohibited practices. Second, neither of these conventions is universal. The absence of U.S. ratification of these instruments renders their prohibitions upon torture and cruel, inhuman or degrading punishment or treatment nonobligatory.

By contrast, the Inter-American Convention to Prevent and Punish Torture does not suffer from a lack of specificity. The Convention defines torture as "any act intentionally performed whereby physical or mental pain or suffering is inflicted on a person for purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty, or for any other purpose."[382] This definition includes methods utilized to "obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish."[383] States are required to prevent the occurrence of torture through the criminalization of such conduct in their national law.[384] Further specificity is found in provisions identifying those persons to whom this prohibition is applicable[385] and eliminating circumstances under which such conduct may be justified.[386]

However, despite this high degree of specificity, the Inter-American Convention to Prevent and Punish Torture is incapable of serving as a basis for private civil litigation in the United States. The universal nature of the Inter-American Torture Convention may be challenged due to the absence of ratification by the United

381. *See generally* 28 U.S.C. § 1350 (2000); Sosa v. Alvarez-Machain, 542 U.S. 692, 732 (2004) (citing In re Estate of Marcos, Human Rights Litigation, 25 F.3d 1467, 1475 (9th Cir. 1994)) (stating that for a violation of international law to be actionable, the norm must be specific, universal and obligatory).

382. IACPPT, *supra* note 377, art. 2.

383. *Id.*

384. *Id.* art. 6.

385. *Id.* art. 3(a)-(b) (prohibiting torture conducted by public servants or employees or those acting at their instigation).

386. *Id.* art. 5 (prohibiting justification for torture due to the existence of a state of war, siege, emergency, domestic disturbance or strife, suspension of constitutional guarantees, political instability or other disasters).

States and Canada.[387] The absence of U.S. ratification or accession also renders the Convention's prohibitions upon torture nonobligatory.

The third category of instruments relating to torture and cruel, inhuman or degrading treatment consists of five resolutions of the U.N. General Assembly.[388] The oldest of these instruments, the UDHR, provides that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."[389] By comparison, three of the declarations relate to specific circumstances in which torture or cruel, inhuman or degrading treatment or punishment may occur. The Declaration on the Protection of Women and Children in Emergency and Armed Conflict calls upon states to abide by their obligations pursuant to the Geneva Conventions, including efforts to spare women and children from torture and degrading treatment in the course of military operations and criminal prosecution of persons engaging in acts of torture.[390] The Declaration on the Protection of All Persons from Enforced Disappearances notes the connection between acts of enforced disappearance and violations of the right to be free from torture and cruel, inhuman or degrading treatment or punishment.[391] Torture and other cruel, inhuman, or degrading treatment or punishment is also prohibited by Article 3(h) of the Declaration on the Elimination of Violence Against Women.[392]

Assuming these declarations represent universal consensus as expressed in the collective judgment of the U.N. General

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387. The Inter-American Convention to Prevent and Punish Torture had been ratified or acceded to by sixteen states at the time of preparation of this article. Org. of American States, *Status of Ratification of the Inter-American Convention to Prevent and Punish Torture* 1-2 (2004), http://www.oas.org/juridico/English/Sigs/a-51.html (last visited Mar. 12, 2006). In addition to the United States and Canada, the Convention was not in force and effect in Jamaica, among other nations. *Id.*

388. *See* Universal Declaration of Human Rights, *supra* note 97; Declaration on the Protection of Women and Children in Emergency and Armed Conflict, G.A. Res. 3318, U.N. GAOR 29th Sess., Supp. No. 31, U.N. Doc. A/9631 (Dec. 14, 1974); Declaration on the Protection of All Persons from Enforced Disappearances, *supra* note 253; Declaration on the Elimination of Violence Against Women, *supra* note 253.

389. Universal Declaration of Human Rights, *supra* note 97, art. 5.

390. Declaration on the Protection of Women and Children in Emergency and Armed Conflict, *supra* note 388, arts. 3-5.

391. Declaration on the Protection of All Persons from Enforced Disappearances, *supra* note 253, art. 1(2).

392. Declaration on the Elimination of Violence Against Women, *supra* note 253, art. 3(h) (providing women are entitled "not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment").

Assembly, they still may not serve as the basis for jurisdiction pursuant to the ATCA. Each of these declarations suffers from a lack of specificity due to their failure to define conduct within their collective prohibitions. Regardless of their universal nature and use of mandatory language prohibiting torture in general or under specific circumstances, these declarations are nonactionable statements of aspirations and thus not obligatory.

The General Assembly addressed this topic directly in the Declaration on the Protection of All Persons from Being Subject to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. In contrast to the previously referenced declarations, this Declaration does not suffer from a lack of specificity with respect to torture.[393] Torture is defined as the infliction of severe physical or mental pain or suffering intentionally inflicted by or at the instigation of a public official for purposes of obtaining information, confession to a crime or as a form of punishment or intimidation.[394] The Declaration condemns all such acts as a violation of the UDHR and prohibits states from permitting or tolerating their occurrence.[395] States are required to undertake "effective measures" to prevent such acts from being practiced within their jurisdiction.[396] Further specificity is found in the elimination of circumstances justifying such practices including war or threat thereof, internal political instability and other public emergencies.[397] Nevertheless, the Declaration on the Protection of All Persons from Being Subject to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment is a nonactionable statement of aspirations.

The final instrument relating to the right to be free from torture is the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment.[398] This instrument is the most

393. By contrast, cruel, inhuman or degrading treatment or punishment is not defined in the Declaration and lacks the requisite degree of specificity for purposes of enforcement pursuant to the ATCA.

394. Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment, G.A. Res. 3452, art. 1(1), U.N. GAOR, 30th Sess., Supp. No. 34, U.N. Doc. A/1034 (Dec. 9, 1975).

395. *Id.* arts. 2, 3.

396. *Id.* art. 4.

397. *Id.* art. 3.

398. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 46, art. 1, U.N. GAOR, 39th Sess., Supp. No. 51, U.N. Doc. A/RES/39/46, (Dec. 10, 1984) [hereinafter Convention Against Torture], *available at* http://www.un.org.documents/ga/res/39/a39r046.htm.

widely recognized human rights convention relating to torture and cruel, inhuman or degrading treatment and punishment having been ratified or acceded to by 136 states at the time of preparation of this article.[399] The Convention sets forth a definition of torture similar to that contained in the previously discussed Torture Declaration.[400] States are required to undertake "effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under [their] jurisdiction."[401] In this regard, each state is to ensure torture is an offense punishable pursuant to its criminal laws.[402] National laws must further provide for civil redress for torture victims, including "an enforceable right to fair and adequate compensation" and "means for as full rehabilitation as possible."[403] No exceptions to these prohibitions are permitted.[404] The Convention does not define cruel, inhuman or degrading treatment or punishment. Nevertheless, states are obligated to undertake measures to prevent such conduct when it is "committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."[405] It may be concluded from this language that the Torture Convention is specific, universal and obligatory at least with respect to practices constituting torture. However, the Convention is rendered nonobligatory as a result of its ratification by the United States. Although the United States ratified the Torture Convention effective October 1994, the substantive provisions of the Convention were declared to be non-self-

399. Status of Ratifications of the Principal International Human Rights Treaties, *supra* note 241, at 12.

400. Convention Against Torture, *supra* note 398, art. 1. Torture is defined as:

> [A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain and suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

Id.

401. *Id.* art. 2(1).

402. *Id.* art. 4(1).

403. *Id.* art. 14(1).

404. *Id.* art. 2(2) (prohibiting exceptions for war or the threat thereof, political instability or other public emergency).

405. *Id.* art. 16(1).

executing.[406] As such, the Torture Convention on its face is not actionable pursuant to the ATCA.

However, in a manner similar to the right to be free from summary execution, the right to be free from torture and cruel, inhuman, or degrading treatment or punishment has been identified as part of the customary international law of human rights pursuant to Section 702 of the *Restatement of Foreign Relations.*[407] Torture as a norm of customary international law as defined by the *Restatement* is identical to the U.N. General Assembly's Torture Declaration.[408] Freedom from such practices is further defined as *jus cogens,* thereby rendering void international agreements providing otherwise.[409]

As previously noted with respect to summary execution, the designation of a customary standard of international human rights as a peremptory norm does not necessarily render it actionable pursuant to Justice Souter's opinion in *Sosa v. Alvarez-Machain.*[410] However, Justice Souter's reasoning is not applicable in this circumstance as torture is actionable pursuant to U.S. law.[411] The TVPA provides civil liability for a person who "under actual or apparent authority, or color of law, of any foreign nation subjects an individual to torture."[412] In a manner identical to summary execution, this express statutory basis differentiates claims of torture from arbitrary detention. Not only does arbitrary detention lack an express statutory basis, but it also lacks specificity.

By contrast, torture is defined within the Act as the intentional infliction of severe pain or suffering, whether physical or mental, against a person in the offender's custody or physical control for the purpose of obtaining information or a confession from the victim or a third person, inflicting punishment for an act committed or allegedly committed by the victim or third person,

406. U.S. Reservations, Declarations and Understandings, Convention Against Torture, art. 3(1).

407. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF U.S. § 702(d) (1987) ("A state violates international law if, as a matter of state policy, it practices, encourages or condones . . . torture or other cruel, inhuman, or degrading treatment or punishment.").

408. *Id.* cmt. g.

409. *Id.* cmt. n.

410. *See generally* Sosa v. Alvarez-Machain, 542 U.S. 692, 725 (2004) (stating that a claim based on international law must be based on a norm of international character with sufficient specificity to be actionable).

411. 28 U.S.C. § 1350 (2000) (enacting protections for the victims of torture at the hands of a person acting under actual or apparent color of law).

412. *Id.*

intimidating or coercing the victim or a third person or for any discriminatory reason not otherwise provided.[413] "Mental pain or suffering" is defined in the Act as prolonged mental harm caused by or resulting from the intentional infliction or threatened infliction of severe physical pain or suffering, the administration or application or threatened administration or application of mind altering substances or other procedures calculated to profoundly disrupt the senses or personality, threats of imminent death or similar threats directed at a third person.[414] Although the meaning of some terms within the Act, such as "severe" and "prolonged" pain and suffering, are subject to reasonable disagreement, the definition of torture in the TVPA is identical to the definition contained within the U.S. reservations, declarations and understandings with respect to the Torture Convention.[415] Additionally, the recognition of a federal cause of action for torture gives this human rights violation an obligatory nature absent from other violations such as prolonged detention. Thus, the right to be free from torture is specific, universal and obligatory as to be actionable pursuant to the ATCA.

Justice Souter's reasoning also is not directly applicable to the peremptory norm existing with respect to cruel, inhuman or degrading treatment or punishment. In its statement of reservations, declarations and understandings with respect to the Torture Convention, the United States noted that cruel, inhuman or degrading treatment or punishment as utilized in the Convention means such punishment as is prohibited by the Fifth,

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413. *Id.*

414. *Id.*

415. The U.S. Reservations, Declarations and Understandings with respect to the Torture Convention define torture as an act:

> [S]pecifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from: (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.

U.S. Reservations, Declarations and Understandings, Convention Against Torture, art. 2(1)(a). This definition is qualified by the requirement the acts be directed against persons in the offender's custody or physical control. *Id.*

Eighth, and Fourteenth Amendments to the U.S. Constitution.[416] As a result, the absence of a definition of cruel, inhuman or degrading treatment or punishment in the Torture Convention is of minimal importance. Although offending conduct is subject to reasonable disagreement, its meaning is nevertheless ascertainable from judicial opinions defining cruel, unusual and inhumane treatment pursuant to the U.S. Constitution. Given the equivalence between these definitions, it is tempting to conclude instances of cruel, inhuman or degrading treatment or punishment are actionable pursuant to Title 42 of the U.S. Code, which provides for civil liability for every person who, under color of law, deprives any U.S. citizen or other person within the jurisdiction of any rights, privileges or immunities secured by the Constitution.[417] However, the civil liability provided by Title 42 is limited to U.S. citizens or other persons within the jurisdiction of the United States.[418] Aliens outside the jurisdictional reach of the U.S. legal system are thus excluded from this group of potential plaintiffs.[419] This lack of an express statutory basis for claims available to all persons differentiates cruel, inhuman or degrading treatment or punishment from torture. Thus, the right to be free from cruel, inhuman or degrading treatment or punishment is specific and universal but not obligatory as to be actionable pursuant to the ATCA.

B. Human Rights Associated with Personal Freedom

1. Liberty

The right to liberty appears in eight treaties, conventions, and declarations. These instruments include two global conventions, the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child. The Civil and Political Rights Covenant provides "[e]veryone has the right to liberty of person."[420] Article 37(b) of the Convention on the Rights of the Child prohibits states from depriving children of their liberty in an

416. *Id.* art. 1(2).

417. 42 U.S.C. § 1983 (2000) (stating that any person who under color of law causes a citizen or person within the jurisdiction of the U.S. to be deprived of constitutional and/or statutory rights shall be subject to civil liability).

418. *Id.*

419. *Id.*

420. International Covenant on Civil and Political Rights, *supra* note 69, art. 9(1).

unlawful or arbitrary manner.[421] As previously noted, the universal nature of these conventions is beyond question. However, neither of these conventions is actionable due to the absence of specificity and their nonobligatory nature. Although both conventions recognize the right to liberty and the CRC prevents states from unlawfully and arbitrarily depriving children of such right, neither convention defines what is meant by the term "liberty." Furthermore, the CRC has not been ratified by the United States, and U.S. ratification of the Civil and Political Rights Covenant was with the express reservation that Article 9 be non-self-executing.[422]

The right to liberty also is recognized within the Inter-American system of human rights. The American Declaration of the Rights and Duties of Man, the founding document of the Inter-American human rights system, recognizes that "[e]very human being has the right to ... liberty."[423] Article 7(1) of the American Convention on Human Rights grants every person the right to personal liberty.[424] This right is not subject to deprivation "except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto."[425] Similarly, Article 4(c) of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women grants every woman the right to personal liberty.[426]

None of these instruments however may serve as the basis for jurisdiction pursuant to the ATCA. The American Conventions on Human Rights and the Prevention, Punishment and Eradication of Violence Against Women suffer from three shortcomings in this regard. Initially, in an identical manner to global conventions recognizing the right to liberty, the American Conventions on Human Rights and the Prevention, Punishment and Eradication of Violence Against Women merely recognize the right to liberty

421. Convention on the Rights of the Child, *supra* note 96, art. 37(b).

422. Status of Ratifications of the Principal International Human Rights Treaties, *supra* note 241, at 11; *see also* Sosa v. Alvarez-Machain, 542 U.S. 692, 728 (2004) (stating that when the Senate ratified the International Convention on Civil and Political Rights, it declared that the substantive provisions of the document were not self-executing); Alfred de Zayas, *Human Rights Implications of the Demjanjuk Case*, ISBA GLOBE, Jan. 1994, *reprinted in* 140 CONG. REC. E1211-06 (1994), 1994 WL 261644.

423. American Declaration on the Rights and Duties of Man, *supra* note 97, art. 1.

424. American Convention on Human Rights, *supra* note 160, art. 7(1).

425. *Id.* art. 7(2).

426. ICPPEVW, *supra* note 246, art. 4(c) ("Every woman has the right to . . . personal liberty.").

without defining the attributes of this right.[427] The ACHR does attempt to define those behaviors deemed to be in violation of the right to personal liberty, but this effort fails as it is difficult to determine whether an act is violating a given right without first defining the right. In addition, Article 7(2) of the ACHR permits interference with this undefined right if such interference is consistent with a national constitution or laws adopted pursuant thereto.[428] Such unfettered discretion granted to states does not serve to render the right to personal liberty any more specific. Any corresponding effort to define conduct in violation of the right to personal liberty is absent from the Convention on the Prevention, Punishment and Eradication of Violence Against Women. Furthermore, as previously noted, neither of these conventions may be deemed universal. The specific absence of U.S. ratification of these instruments renders their recognition of personal liberty nonobligatory.

In contrast, the American Declaration of the Rights and Duties of Man defines the right to liberty as the ability "to move about freely within [the territory of the state in which he is a national]."[429] However, Article VIII fails to define the circumstances pursuant to which states may legitimately restrict the exercise of the right to personal liberty. Further undefined are those instances rendering such restrictions illegitimate. This wide discretion residing in states to determine the bounds of the right to personal liberty thus renders it nonspecific. Furthermore, although the American Declaration may be universal as one of the founding instruments of the OAS, it is a declaration of goals and aspirations rather than a mandatory body of standards enforceable upon states in a court of law.

Three resolutions of the U.N. General Assembly specifically reference the right to liberty. Initial recognition of the right to liberty occurred in the UDHR, which provides that "[e]veryone has the right to . . . liberty."[430] The right of women to liberty is recognized in Article 3(c) of the Declaration on the Elimination of Violence Against Women.[431] Neither of these declarations

427. American Convention on Human Rights, *supra* note 160, art. 7(1).
428. *Id.* art. 7(2).
429. American Declaration on the Rights and Duties of Man, *supra* note 97, art. 8.
430. Universal Declaration of Human Rights, *supra* note 97, art. 3.
431. Declaration on the Elimination of Violence Against Women, *supra* note 253, art. 3(c) ("Women are entitled . . . to the right to liberty.").

establishes the attributes of this right nor elaborates upon conduct deemed to be in violation thereof. The final declaration relates to specific circumstances in which personal liberty may be violated. The Declaration on the Protection of All Persons from Enforced Disappearance provides that such practice violates the "liberty . . . of the person."[432] However, like the previous declarations, the Declaration on Enforced Disappearance also fails to establish the attributes of the right to liberty. Furthermore, the Declaration does not define the term "enforced disappearance" which violates the right to liberty. As such, this declaration cannot be characterized as possessing the requisite degree of specificity as to be actionable pursuant to the ATCA. Furthermore, although each of these three resolutions may be characterized as universal given their adoption by the United Nations General Assembly, they are nonactionable statements of aspirations.

2. Enforced Disappearance

Related to the right to liberty is the right to be free from enforced disappearance. This right initially appeared in the Declaration on the Protection of All Persons from Enforced Disappearance adopted by the U.N. General Assembly in 1992.[433] The Declaration generally notes acts of enforced disappearance are offenses to human dignity, violations of the right to liberty and security, may result in torture or other cruel, inhuman or degrading treatment or punishment, and pose a grave threat to the right to life.[434] Despite this generality, the Declaration contains several specific provisions. For example, the Declaration requires states to adopt "effective legislative, administrative, judicial or other measures to prevent and terminate acts of enforced disappearance."[435] States are to achieve this goal through criminalization of acts of enforced disappearance[436] and providing for civil liability for perpetrators and state authorities on whose behalf they have acted.[437] Furthermore, public authorities and their

432. Declaration on the Protection of All Persons from Enforced Disappearances, *supra* note 253, art. 1(2).

433. *Id.* art. 2(1) (prohibiting states from practicing, permitting or tolerating acts of enforced disappearance).

434. *Id.* art. 1(2).

435. *Id.* art. 3.

436. *Id.* art. 4(1).

437. *Id.* art. 5.

agents are prohibited from ordering disappearances,[438] and no circumstances, including war or the threat thereof, political instability or other public emergency, may be used as justification for such practice.[439] Detainees are required to be held at an "officially recognized place of detention," and states are to maintain accurate information on their location,[440] including reliable means by which their release may be verified.[441] Victims of detentions failing to conform to these requirements and their families shall have the right to obtain adequate compensation for all losses proximately resulting from the detention.[442] Nevertheless, the Declaration does not provide a context within which these rights and duties are to be effective by failing to define the term "enforced disappearance." Furthermore, the Declaration is nonobligatory as a General Assembly resolution lacking national legal effect.

The standards set forth in the Declaration on the Protection of All Persons from Enforced Disappearances have been adopted in a legally binding format in the Inter-American Convention on Forced Disappearance of Persons.[443] This Convention requires states to "undertake not to practice, permit or tolerate the forced disappearance of persons"[444] and provide for the punishment of such acts in their national criminal codes.[445] The Convention also tracks other requirements of the Declaration. For example, Article VIII prohibits public authorities and their agents from ordering disappearances.[446] In a manner similar to Article 7 of the Declaration, Article X of the Convention provides that no circumstances may be used as justification for disappearances.[447] States are similarly required to hold detainees in an "officially recognized place of detention" and account for all such persons to

438. *Id.* art. 6(1).
439. *Id.* art. 7.
440. *Id.* art. 10.
441. *Id.* art. 11.
442. *Id.* art. 19.
443. Inter-American Convention on Forced Disappearance of Persons art. 1(a)-(d), June 9, 1994, 33 I.L.M. 1429 (imposing a duty upon states to prohibit forced disappearance of persons and punish such acts occurring within their jurisdiction).
444. *Id.* art. 1(a).
445. *Id.* art. 3.
446. *Id.* art. 8.
447. *Id.* art. 10 (prohibiting war or the threat thereof, political instability or other public emergency as justifications for enforced disappearance).

family.[448] Most importantly, unlike the Declaration, the Convention provides a context within which these rights and duties attach by defining forced disappearances.[449] This definition is very specific, identifying the required acts and perpetrators and describing the injury caused as a result thereof. However, the Convention lacks universal support as evidenced by its ratification by less than half of the members of the Inter-American human rights system.[450] The Convention also is not obligatory given the absence of ratification by the United States.[451]

The right to be free from enforced disappearance is also part of the customary international law of human rights.[452] The *Restatement* further defines this freedom as *jus cogens.*[453] Nevertheless, Justice Souter's refusal to create a private cause of action pursuant to the ATCA for violation of the right to be free from arbitrary detention, a norm that is considered peremptory by the international community, is applicable to the norm existing with respect to enforced disappearance.

The specificity of enforced disappearance renders Justice Souter's holding with respect to the lack of specificity of arbitrary detention inapplicable. Although the determination of what constitutes a prolonged detention as to violate international law renders it uncertain for purposes of creating a private cause of action, there is no such uncertainty with respect to enforced disappearance. As defined by the Inter-American Convention,

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448. *Id.* art. 11.

449. Forced disappearance is defined as:

> [T]he act of depriving a person or persons of their freedom, in whatever way, perpetrated by agents of the state or by persons or groups of persons acting with the authorization, support, or acquiescence of the state, followed by an absence of information or a refusal to acknowledge that deprivation of freedom or to give information on the whereabouts of that person, thereby impeding his or her recourse to the applicable legal remedies and procedural guarantees.

Id. art. 2.

450. Org. of American States, *Status of Ratification of the Inter-American Convention on Forced Disappearance of Persons* 1-2 (2004). At the time of preparation of this article, the Inter-American Convention on Forced Disappearance had been ratified by Argentina, Bolivia, Costa Rica, Guatemala, Mexico, Panama, Paraguay, Peru, Uruguay and Venezuela. *Id.*

451. *Id.*

452. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF U.S. § 702(c) (1987) (providing a state violates international law if, "as a matter of state policy, it practices, encourages or condones . . . the disappearance of individuals").

453. *Id.* cmt. n.

enforced disappearance consists of four elements.[454] There are two required acts, the deprivation of a person's freedom and the absence of information or refusal to acknowledge such deprivation.[455] The perpetrators must be agents of the state or persons or groups of persons acting with the authorization, support, or acquiescence of the state.[456] Finally, these acts must result in impediment of recourse to applicable procedural protections and legal remedies.[457] Violations of this norm are thus far easier to determine than those alleging prolonged detention.

However, although U.S. law recognizes the liability of federal investigative and law enforcement officers for false imprisonment, there is no recognized cause of action in the United States for enforced disappearance.[458] The most similar proceeding to enforced disappearance recognized in the United States is the habeas corpus proceeding in which an individual challenges his or her detention.[459] However, habeas corpus only determines the lawfulness of the detention. The very filing of the habeas corpus petition belies the element of enforced disappearance requiring the refusal to provide information to the detainee. The filing of such petition also prevents the occurrence of the required element of injury, specifically, the impediment of recourse to applicable procedural protections and legal remedies. Thus, although specific, the right to be free from forced disappearance is not actionable pursuant to the ATCA.

3. Arbitrary Detention

The right to be free from arbitrary or unlawful arrest is recognized in the International Covenant on Civil and Political Rights.[460] Unlike its recognition of the right to liberty, the Civil and Political Rights Covenant defines the right to be free from arbitrary arrest and detention and places specific duties upon states. Specifically, arrests and detentions must be in accordance

454. Inter-American Convention on Forced Disappearance of Persons, *supra* note 443, art. 2.

455. *Id.*

456. *Id.*

457. *Id.*

458. 28 U.S.C. § 2680(h) (2000).

459. *See generally* 28 U.S.C. §§ 2241-2255 (2000).

460. International Covenant on Civil and Political Rights, *supra* note 69, art. 9(1) ("No one shall be subjected to arbitrary arrest or detention.").

with national law.[461] This requires states to adopt procedural protections for detainees, including notice of the grounds for detention at the time of the arrest and prompt notice of charges thereafter.[462] Detainees are required to be brought before a magistrate in a prompt manner and are further entitled to a trial within a reasonable time.[463] Such persons are generally subject to release pending trial, although release may be contingent on guarantees for appearance at subsequent proceedings.[464] Detainees are entitled to challenge the lawfulness of their detention,[465] and victims of detentions deemed unlawful are to be provided with "an enforceable right to compensation."[466] Although the implementation of these rights is left to the discretion of national governments, their parameters are definite enough to be considered specific for purposes of the ATCA. However, the ICCPR is not actionable due to the U.S. reservation that Article 9 is not self-executing.

The right to be free from arbitrary or unlawful arrest is extended to children by the Convention CRC, which requires any arrest, detention or imprisonment of a child "be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time."[467] The rights extended to children with respect to their detention are not as specific as those set forth in the ICCPR. Undoubtedly, the right of detained children to "prompt access" to legal assistance, the right to challenge their detention before an appropriate court or other "independent and impartial authority" and receive a "prompt decision" create readily definable duties for states.[468] However, other rights granted to detained children are vague and defy universal meaning. For example, it is unclear what is required in order to treat children "with humanity and respect for the inherent dignity of the human person" or in a manner taking into account "the needs of persons of his or her age."[469] Equally vague is the state's discretion to sever contact between the child and his or her

461. *Id.*
462. *Id.* art. 9(2).
463. *Id.* art. 9(3).
464. *Id.*
465. *Id.* art. 9(4).
466. *Id.* art. 9(5).
467. Convention on the Rights of the Child, *supra* note 96, art. 37(b).
468. *Id.* art. 37(d).
469. *Id.* art. 37(c).

family if such contact is not in the child's "best interest" or for other "exceptional circumstances."[470] The Convention offers no elaboration on the meaning of these terms or how states may satisfy their obligations. As a result, only a portion of the rights accruing to detained children pursuant to the CRC are specific enough as to be enforceable in a court of law. In any event, the CRC is not actionable pursuant to the ATCA due to the absence of U.S. ratification.

The American Declaration of the Rights and Duties of Man, one of its implementing instruments, the ACHR, and the UDHR cast little new light on the rights of detainees. The American Declaration and the ACHR prohibit detentions other than as that occur pursuant to national constitutions or laws,[471] although only the ACHR characterizes detentions contrary thereto to be "arbitrary."[472] In a manner similar to the ICCPR, the ACHR requires arrestees to be advised of the basis for their detention as well as prompt notice of charges if filed.[473] The American Declaration and the ACHR further entitle detainees to challenge the legality of their detention and proceed to trial without unreasonable delay.[474] The ACHR also adopts language within the ICCPR with respect to pretrial release upon the provision of security.[475] These rights are specific to the extent they are similar or identical to those set forth in the ICCPR and CRC. By contrast, the UDHR is nonspecific as it merely establishes the right to be free from arbitrary arrest and detention without further elaboration.[476] In any event, the UDHR and American Declarations are nonobligatory statements of aspirations, and the American Convention is not universal or obligatory.

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470. *Id.*

471. American Convention on Human Rights, *supra* note 160, art. 7(2) ("No one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto."); American Declaration on the Rights and Duties of Man, *supra* note 97, art. 25 (stating "[n]o person shall be deprived of his liberty except in the cases and according to the procedures established by pre-existing law" and all such persons shall be entitled to a hearing to determine the legality of their detention).

472. American Convention on Human Rights, *supra* note 160, art. 7(3).

473. *Id.* art. 7(4).

474. *Id.* art. 7(5); American Declaration on the Rights and Duties of Man, *supra* note 97, art. 25.

475. American Convention on Human Rights, *supra* note 160, art. 7(5).

476. Universal Declaration of Human Rights, *supra* note 97, art. 9 ("No one shall be subjected to arbitrary arrest [or] detention.").

The right to be free from arbitrary detention has been identified as part of the customary international law of human rights.[477] The detention must be prolonged and practiced as state policy in order to violate customary international law.[478] Freedom from such practices is further defined as *jus cogens*.[479] However, Justice Souter refused to recognize Alvarez's detention as an actionable violation of international human rights law despite its apparent *jus cogens* status.[480]Although he attempted to distinguish Alvarez's detention on the basis it was not "prolonged," Justice Souter also held that, even assuming the detention to be prolonged, it remained impossible for the Court to determine if and when such detention achieved the degree of certainty necessary to violate international law characteristic of offenses traditionally within the meaning of the ATCA.[481] As a result, Justice Souter refused to create a private cause of action pursuant to the ATCA for the violation of a norm considered peremptory by the international community. Given this holding and the absence of recognition of such claims pursuant to applicable statutory law, arbitrary detention, regardless of its prolonged nature, is not actionable pursuant to the ATCA.[482]

C. Human Rights Associated with Perceived Status

1. Genocide

Two human rights instruments reference the right to be free from genocide. Initially, Article 6 of the elements of crimes as established by the International Criminal Court defines genocide as consisting of one of six specific acts. These acts include killing, causing serious bodily or mental harm, deliberately inflicting conditions of life calculated to bring about physical destruction, imposing measures to prevent births, and forcibly transferring children.[483] There are three common elements to these acts. First,

477. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF U.S. § 702(e) (1987) (providing a state violates international law if, "as a matter of state policy, it practices, encourages or condones . . . prolonged arbitrary detention").

478. *Id.* cmt. h.

479. *Id.* cmt. n.

480. Sosa v. Alvarez-Machain, 542 U.S. 692, 756-57 (2004).

481. *Id.* at 757.

482. *See* sources cited *supra* note 365.

483. Int'l Criminal Court, Elements of Crimes, U.N. Doc. PCNICC/2000/1/Add.2, art. 6(a)-(e) (May 8, 2000).

the victim must be a member of "a particular national, ethnical, racial or religious group."[484] Second, the perpetrator's intent in engaging in the conduct must be to "destroy, in whole or in part" a particular group.[485] Finally, the conduct must occur in the context of "a manifest pattern of similar conduct directed against that group or that could itself effect such destruction."[486]

The definitions of genocide to be enforced by the International Criminal Court establish the necessary conduct, the intent of the perpetrator, the identity of the victim and the context in which such conduct occurs. In this regard, these definitions are among the most well-defined in international human rights law. Such specificity is essential given the intended purpose of the definitions to serve as the basis for criminal prosecution. As these definitions meet the requirements of due process with respect to providing notice of criminal conduct, they also possess the necessary degree of specificity in order to be actionable pursuant to the ATCA.

However, the universal and obligatory nature of the documents establishing the International Criminal Court is subject to question. The instrument establishing the International Criminal Court, the Rome Statute, had 139 signatories at the time of the preparation of this Article.[487] However, only ninety-seven states, approximately one-half of the international community, have ratified or acceded to the Statute.[488] Although significant, the ratification or accession by only half of the global community raises serious questions with respect to the universal recognition of the Court as well as the principles for which it stands. This includes the definition of various crimes subject to the Court's jurisdiction, including genocide. Even assuming the Rome Statute and International Criminal Court have been universally recognized, the Statute is not obligatory on the United States due to the absence of ratification.[489]

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484. *Id.* arts. 6(a)(2), (b)(2), (c)(2), (d)(2), (e)(2).

485. *Id.* arts. 6(a)(3), (b)(3), (c)(3), (d)(3), (e)(3).

486. *Id.* arts. 6(a)(4), (b)(4), (c)(5), (d)(5), (e)(7).

487. United Nations, Ratification of the Rome Statute of the International Criminal Court 1 (2004). The Rome Statute of the International Criminal Court was adopted on July 17, 1998 by the U.N. Diplomatic Conference on the Establishment of an International Criminal Court. *See id.*

488. *Id.* at 1.

489. *Id.* at 6. The United States signed the Rome Statute on December 31, 2000 but has not ratified its obligations or acceded to its terms.

The Convention on the Prevention and Punishment of the Crime of Genocide presents a more viable basis for a civil action pursuant to the ATCA. The Convention provides that genocide, whether occurring in time of peace or war, is a crime under international law.[490] Conduct associated with genocide also is punishable as a crime, including conspiracy or direct and public incitement to commit genocide and attempts to commit or complicity in genocide.[491] The Convention defines genocide as consisting of three specific elements. The perpetrator must first engage in a specific act. For purposes of the Convention, this act consists of killing, causing serious bodily or mental harm, deliberately inflicting conditions of life calculated to bring about physical destruction of a particular group of people, measures designed to prevent births, and the forcible transfer of children.[492] The second element is the perpetrator's intent in committing these acts, specifically, the "intent to destroy, in whole or in part" a particular group of people.[493] The final element of the offense is the identity of the victims. In order to constitute genocide, the perpetrator's conduct must be directed at "a national, ethnical, racial or religious group."[494] Persons committing such acts are subject to punishment regardless of their status as "constitutionally responsible rulers, public officials or private individuals."[495] States are required to adopt necessary legislation to implement the Convention with specific emphasis upon providing "effective penalties" for persons found guilty of genocide or genocide-related conduct.[496] These penalties are to be assessed after a trial by a tribunal in the state where the offense was committed or an international penal tribunal.[497]

In a manner identical to the Statute of the International Criminal Court, the definitions of genocide set forth in the Convention establish the necessary conduct, the intent of the perpetrator, the identity of the victim, and the context in which

490. Convention on the Prevention and Punishment of the Crime of Genocide art. 1, Jan. 12, 1951, 102 Stat. 3045, 78 U.N.T.S. 277.
491. *Id.* art. 3(a)-(e).
492. *Id.* art. 2(a)-(e).
493. *Id.* art. 2.
494. *Id.*
495. *Id.* art. 4.
496. *Id.* art. 5.
497. *Id.* art. 6.

such conduct occurs.[498] To the extent these definitions are identical to those in the Statute of the International Criminal Court, they possess the necessary degree of specificity in order to be actionable pursuant to the ATCA. However, unlike the Rome Statute, the Genocide Convention is universal given its ratification or accession by 136 states at the time of the preparation of this Article.[499] The United States is one of these parties, having signed the Convention in December 1948 and ratified it in November 1988.[500]

The more significant issue is whether the Genocide Convention is obligatory on the United States as to serve as the basis for a private civil action pursuant to the ATCA. In addition, it bears to note that genocide is part of the customary international law of human rights.[501] This prohibition is further defined as *jus cogens.*[502] Despite this recognition, genocide cannot serve as the basis for a private cause of action pursuant to the ATCA.

The specificity of genocide renders Justice Souter's holding in *Sosa v. Alvarez-Machain* with respect to the lack of definiteness of prohibited conduct inapplicable. However, there is no recognized private cause of action for genocide pursuant to applicable U.S. law.[503] The Genocide Convention only requires states to adopt legislation defining genocide and genocide-related acts and procedures by which perpetrators may be charged, tried, and punished.[504] The definitions of genocide contained in the Convention have their origin in criminal law.[505] This includes the terms "conspiracy," "incitement," "attempt," and "complicity."[506] Other phraseology of the Convention is criminal in its intent and scope with utilization of such terms as "charges" and procedures for assessing and punishing persons adjudicated "guilty" of

498. *Id.* art 2.

499. United Nations, Ratification of the Convention on the Prevention and Punishment of the Crime of Genocide 1 (2004).

500. *Id.* at 5.

501. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF U.S. § 702(a) (1987) (providing a state violates international law if, "as a matter of state policy, it practices, encourages or condones genocide").

502. *Id.* cmt. n.

503. 18 U.S.C. § 1092 (2000).

504. Convention on the Prevention and Punishment of the Crime of Genocide, *supra* note 490, art. 5.

505. *See id.* arts. 3, 5, 6.

506. *Id.* art. 3(a)-(e).

genocide.[507] It may be concluded that the Genocide Convention only requires states to criminalize acts of genocide. The express language of the Convention does not require states to provide for civil liability for such acts in their national laws.

The United States recognized this distinction in legislation implementing the Genocide Convention. The Genocide Convention Implementation Act was placed in Title 18 relating to federal criminal offenses.[508] Genocide, attempts to commit genocide, and direct and public incitement to commit genocide are described as "basic offenses."[509] These basic offenses are subject to criminal punishment, including imprisonment and fines.[510] Jurisdiction of U.S. courts is limited to "offenses" committed

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507. *Id.* arts. 5, 6.

508. 18 U.S.C. §§ 1091-1093 (2000).

509. Genocide and attempt to commit genocide are defined as:

> Whoever, whether in time of peace or in time of war . . . with the specific intent to destroy, in whole or in substantial part, a national, ethnic, racial, or religious group as such –
> (1) kills members of that group;
> (2) causes serious bodily injury to members of that group;
> (3) causes the permanent impairment of the mental faculties of members of the group through drugs, torture, or similar techniques;
> (4) subjects the group to conditions of life that are intended to cause the physical destruction of the group in whole or in part;
> (5) imposes measures intended to prevent births within the group; or
> (6) transfers by force children of the group to another group;
> or attempts to do so, shall be punished....

Id. § 1091(a).

The term "national group" is defined as "a set of individuals whose identity as such is distinctive in terms of nationality or national origins." *Id.* § 1093(5). "Ethnic groups" are defined as "a set of individuals whose identity as such is distinctive in terms of common cultural traditions or heritage." *Id.* § 1093(2). "Racial groups" and "religious groups" are similarly defined to include sets of individuals distinctive in terms of "physical characteristics or biological descent" in the case of race and "common religious creed, beliefs, doctrines, practices or rituals" in the case of religion. *Id.* § 1093(6), (7). "Substantial part" is defined as "a part of a group of such numerical significance that the destruction or loss of that part would cause the destruction of the group as a viable entity within the nation of which such group is a part." *Id.* § 1093(8). Incitement is defined as "urg[ing] another to engage imminently in conduct in circumstances under which there is a substantial likelihood of imminently causing such conduct." *Id.* § 1093(3). Incitement is punishable by a fine of no more than $500,000 or imprisonment for no more than five years or both. *Id.* § 1091(c).

510. Punishment for an act of genocide involving the killing of members of a group is death or imprisonment for life and a fine of not more than $ 1 million or both. *Id.* § 1091(b)(1). All other offenses except incitement are punishable by a fine of not more than $1 million or imprisonment for twenty years or both. *Id.* § 1091(b)(2). By contrast, incitement is punishable by a fine of no more than $500,000 or imprisonment for no more than five years or both. *Id.* § 1091(c).

within the United States or in instances when the "alleged offender" is a U.S. national.[511] Most importantly, the Act's provisions are not to "be construed as creating any substantive or procedural right enforceable by law by any party in any proceeding."[512] The implication from this language is that the scope of the Genocide Convention Implementation Act is limited to the Convention's express requirements, the criminalization of genocide and genocide-related conduct, and its effective prosecution and punishment.

Unlike arbitrary detention and enforced disappearance, states possess universal jurisdiction to define and punish genocide.[513] Other offenses included on this list are aircraft hijacking, slave trading, war crimes and, most importantly, piracy.[514] As Justice Souter deemed piracy to be one of the offenses originally intended to be within the scope of the ATCA, it is tempting to conclude its equation to genocide as an offense of universal concern confers the same status on genocide. However, this leap of logic fails since, despite genocide's universal status, there must still be a basis for the initiation and prosecution of a private civil action through appropriate provisions within national law. Universal jurisdiction has been traditionally exercised in the form of criminal prosecution.[515] Although universal jurisdiction and its traditional exercise do not preclude the application of civil law, the state must nonetheless "provide a remedy in tort or restitution for victims."[516] With its provisions limited to the definition, prosecution, and punishment of the criminal offenses of genocide and genocide-related acts, the Genocide Convention Implementation Act does not provide such a civil remedy for victims. The Genocide Convention is thus not obligatory upon the United States in such a manner as to provide a basis for a private cause of action pursuant to the ATCA.

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511. *Id.* § 1091(d)(1)-(2).

512. *Id.* § 1092.

513. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF U.S. § 404 (1987) ("A state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern.").

514. *Id.*

515. *Id.* § 404 cmt. b.

516. *Id.*

2. Racial Discrimination

The right to be free from discrimination on the basis of race or ethnicity is recognized in the ICCPR. This Covenant provides each state is to undertake "to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, color . . . [or] national . . . origin."[517] The meaning of the terms "race," "color," and "national origin" are self-evident and do not require definitions in order to be specific. This nondiscrimination provision is applicable to all individuals and all rights secured by the Covenant. No derogation from the Covenant's provisions is permitted if it is based solely on racial discrimination.[518] Furthermore, as previously established, ICCPR is universally accepted.

These provisions, however, are not obligatory for two reasons. First, as is also the case with other provisions of the ICCPR, Article 2 is not self-executing.[519] Even assuming this provision to be self-executing, the language of Article 2 lacks a mandatory nature. Rather than requiring states to disregard race in the implementation of the rights established by ICCPR, Article 2 provides only that states "undertake to respect and ensure" these rights without discrimination.[520] This language implies states attempt to extend such rights without distinctions based on race. States may satisfy their obligations as long as such efforts are underway regardless of their ultimate success. Language clearly mandating efforts to eliminate discrimination and requiring their ultimate success was available, but apparently overlooked, by the drafters. As a result, the race and ethnicity provision within ICCPR is not obligatory.

For similar reasons, the race provisions within the ICESCR also are not obligatory. In a manner similar to ICCPR, the ICESCR provides states "undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, color . . . [or] national origin."[521] The meaning of the terms "race," "color," and "national

517. International Covenant on Civil and Political Rights, *supra* note 69, art. 2(1).
518. *Id.* art. 4(1).
519. ICCPR CONG. REC., *supra* note 243, art. 3(1).
520. International Covenant on Civil and Political Rights, *supra* note 69, art. 2(1).
521. International Covenant on Economic, Social and Cultural Rights, *supra* note 69, art. 2(2).

origin" are once again self-evident. The nondiscrimination provision is expressly applicable to all rights secured by the Covenant.[522] Furthermore, as previously established, the ICESCR is universally accepted.

However, these provisions are not obligatory for two reasons. First, the ICESCR is nonobligatory due to the absence of U.S. ratification. Even assuming the absence of such ratification had no relevance to its obligatory nature, the language of the Covenant itself overcomes any attempt to render its provisions mandatory. Article 2(2) provides only that states "undertake to guarantee" these rights without discrimination.[523] Although the utilization of the term "guarantee" commands greater mandatory meaning than its counterpart in the ICCPR, this language still leads to the conclusion that states may satisfy their obligations as long as they undertake such efforts with the belief such efforts will ultimately prove successful. Far more specific language, including methods by which states are to implement the ICESCR and reference to the time within which the goals of the ICESCR were to be achieved, was apparently ignored by the drafters. In addition, Article 2(1) conditions achievement of the ICESCR's goals on availability of state resources.[524] Additional evidence of the nonobligatory nature of the ICESCR exists in Article 4 which permits states to limit the enjoyment of such rights on the amorphous basis on compatibility with "the general welfare in a democratic society."[525] As a result, the race provision within the ICESCR is not obligatory.

The right to be free from discrimination is extended to children by the CRC, which requires states to take "all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of status."[526] This right is rendered nonspecific by the failure of the CRC to define what is intended by the prohibition upon discrimination based upon "status." Further uncertainty results from the remainder of this provision which prohibits such discrimination based not on the child's "status" but rather the "status of the child's parents, legal guardians or family members."[527] Even assuming "status" can be

522. *Id.*
523. *Id.*
524. *Id.* art. 2(1).
525. *Id.* art. 4.
526. Convention on the Rights of the Child, *supra* note 96, art. 2(2).
527. *Id.*

equated to race or ethnicity, the CRC is not actionable pursuant to the ATCA due to the absence of U.S. ratification.

Race discrimination is specifically addressed in the International Convention on the Elimination of All Forms of Racial Discrimination. This instrument is the most widely-recognized human rights convention relating to race discrimination having been ratified or acceded to by 177 states at the time of preparation of this Article.[528] Unlike the previously discussed instruments, the Convention defines those actions constituting race discrimination.[529] By elaborating upon discriminatory acts, the basis for such acts and the intent or result of such acts, this definition lends a degree of specificity not present in other covenants and conventions. States condemn racial discrimination as defined in the Convention and pledge to "undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms."[530] This pledge to undertake steps leading to the elimination of racial discrimination may be criticized for lack of specificity and obligatory nature as previously set forth with respect to similar language in the ICCPR and ICESCR. However, unlike the language in these Covenants, the Convention on Racial Discrimination provides a chronological reference, specifically, "without delay." Furthermore, Article 2 elaborates on the type of activities states are required to undertake, including elimination of acts or practices of discrimination by public authorities and institutions, refraining from sponsoring, defending or supporting racial discrimination, amending, rescinding or nullifying laws having the effect of creating or perpetuating racial discrimination, and adopting legislation to bring such discrimination to an end within its jurisdiction.[531]

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528. Status of Ratifications of the Principal International Human Rights Treaties, *supra* note 241, at 11.

529. Article 1(1) defines "racial discrimination" as:

> [A]ny distinction, exclusion, restriction or preference based on race, color, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

International Convention on the Elimination of All Forms of Racial Discrimination art. 1(1), Sept. 28, 1966, 660 U.N.T.S. 195.

530. *Id.* art. 2(1).

531. *Id.* art. 2(1)(a)-(d).

The Convention also requires states to guarantee equal treatment before all tribunals, security of the person, political rights and economic, social and cultural rights without racial distinctions.[532] It may be concluded from this language that the Convention on Racial Discrimination is specific, universal, and obligatory. However, the Convention is rendered nonobligatory as a result of its ratification by the United States. Although the United States ratified the Convention on Racial Discrimination effective November 1994, the substantive provisions of the Convention were declared to be non-self-executing.[533] As such, the Convention on Racial Discrimination is not actionable pursuant to the ATCA.

The right to be free from racial discrimination has been identified as part of the customary international law of human rights pursuant to Section 702 of the *Restatement of Foreign Relations Law*.[534] Freedom from such practices is further defined as *jus cogens*.[535] Nevertheless, these designations do not necessarily render it actionable pursuant to *Sosa v. Alvarez-Machain.*

Based on *Sosa v. Alvarez-Machain*, only a portion of the Convention on the Elimination of All Forms of Racial Discrimination is obligatory upon the United States in such a manner as to provide a basis for a private cause of action pursuant to the ATCA. Unlike torture and summary execution, the justiciability of racial discrimination practiced against persons not within the jurisdiction of the United States is limited. Although civil rights claims alleging discrimination on the basis of race are actionable pursuant to Title 42 of the United States Code, most such actions are limited to citizens of the United States or those

532. *Id.* art. 5(a)-(e). Political rights include the right to vote and stand for election, take part in the conduct of public affairs and enjoy equal access to public service. *Id.* art. 5(c). Economic, social and cultural rights include rights to freedom of movement and residence, the right to leave the country and return, the right to nationality, marriage and choice of spouse, property rights (including inheritance), freedom of thought, conscience, religion, opinion, expression, assembly and association, free choice of employment, and the rights to housing, health care, participation in cultural activities and access to places and services available to the general public. *Id.* art. 5(d)-(f).

533. U.S. Reservations, Declarations and Understandings, International Convention on the Elimination of All Forms of Racial Discrimination, 140 CONG. REC. S7634-02, art. 3 (daily ed. June 24, 1994).

534. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF U.S. § 702(f) (1987) ("A state violates international law if, as a matter of state policy, it practices, encourages or condones . . . systematic racial discrimination.").

535. *Id.* cmt. n.

within its jurisdiction.[536] Protections extended to make and enforce contracts, sue, participate in civil and criminal proceedings as a party or witness, and enjoy the "full and equal benefit of all laws and proceedings for the security of persons and property" are only applicable to "persons within the jurisdiction of the United States."[537] Protections with respect to the inheritance, purchase, lease, sale, holding, and conveyance of property rights are similarly extended only to citizens of the United States.[538] The civil liability provided by Title 42 of the U.S. Code for every person who, under color of law, deprives another of any rights, privileges or immunities secured by the Constitution is also limited to U.S. citizens or other persons within the jurisdiction of the United States.[539] The same conclusion is applicable to determining eligibility for federal benefits.[540]

There are some rights upon which race cannot be used as a discriminatory factor and thus making violations of those rights actionable by persons outside the jurisdiction of the United States. For example, the right to "full and equal enjoyment" of goods, services, facilities, and places of public accommodation regardless of race, color, or national origin is extended to "all persons" regardless of their citizenship or the presence of U.S. jurisdiction.[541] Such persons are also entitled to be free, at any such establishment, from discrimination on the basis of race, color, or national origin required by any "law, statute, ordinance, regulation, rule or order."[542] District courts possess subject matter jurisdiction with respect to all claims alleging violation of these rights.[543]

The same conclusion may be reached with respect to the prohibition of unlawful employment practices. Title 42 defines such practices to include refusals to hire, discharges and discrimination with respect to compensation, terms, conditions or privileges of employment on the basis of race, color, or national

536. *See, e.g.*, 42 U.S.C. §§ 1981-1983 (2000).
537. 42 U.S.C. § 1981(a) (2000).
538. *Id.* § 1982.
539. *Id.* § 1983.
540. *Id.* § 2000d.
541. *Id.* § 2000a. This section provides that "[a]ll persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages and accommodations of any place of public accommodation . . . without discrimination or segregation on the ground of race, color . . . or national origin." *Id.*
542. *Id.* § 2000a-1.
543. *Id.* § 2000a-6.

origin.[544] The limitation, segregation, or classification of employees on such basis also is unlawful to the extent it deprives persons of employment opportunities or adversely affects their status as an employee.[545] Persons for purposes of the employment provisions of Title 42 are defined to include individuals without reference to citizenship or their presence within the jurisdiction of the United States.[546] Although subsequent sections exempt the employment of aliens under certain circumstances,[547] the prohibitions upon discrimination on the basis of race, color, and national origin remain with respect to the operation of business entities incorporated in a foreign state but controlled by a U.S. employer.[548] Thus, to the extent federal statutory law protects the rights of non-citizens and such protections overlap with protections set forth within the Convention on the Elimination of All Forms of Racial Discrimination, aliens may utilize U.S. courts to assert their right to be free from discrimination on the basis of race, color, or national origin.

The remaining five instruments relating to race discrimination consist of U.N. General Assembly resolutions and an instrument within the Inter-American system of human rights. Three of these instruments specifically prohibit states from conditioning enjoyment of the rights provided therein on the basis of race, color, or national origin.[549] As previously noted, the terms "race,"

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544. *Id.* § 2000e-2(a)(1).

545. *Id.* § 2000e-2(a)(2).

546. *Id.* § 2000e(a).

547. *Id.* § 2000e-1(a) ("This subchapter shall not apply to an employer with respect to the employment of aliens outside any State."); *see also* § 2000e-1(b) (exempting compliance with equal employment opportunity practices in the event such compliance would violate the laws of the foreign jurisdiction where the employment services are rendered); § 2000e-1(c)(2) (exempting compliance with equal employment opportunity practices with respect to the foreign operations of an employer that is not a foreign person controlled by a U.S. employer).

548. *Id.* § 2000e-1(c)(1) (requiring compliance with equal employment opportunity practices by employers incorporated pursuant to foreign law but controlled by a U.S. employer). Control is determined by examination of "the interrelation of operations; the common management; the centralized control of labor relations; and the common ownership or financial control of the employer and the corporation." *Id.* § 2000e-1(c)(3)(A)-(D).

549. Declaration on the Rights of Persons Belonging to National, Ethnic, Religious or Linguistic Minorities, G.A. Res. 47/135, art. 2(1)-(2), U.N. GAOR, 47th Sess., 92d plen. mtg., U.N. Doc. 47/135 (Dec. 18, 1992) ("Persons belonging to national or ethnic . . . minorities . . . have the right to enjoy their own culture . . . [and] participate effectively in cultural . . . social, economic and public life."); *see also* American Declaration on the Rights and Duties of Man, *supra* note 97, art. 2 ("All persons are equal before the law . . .

"color," and "national origin" are self-evident and do not require definitions in order to be specific. Furthermore, in a manner similar to the previously discussed covenants, the nondiscrimination provisions are expressly applicable to all rights secured by these declarations. In addition, two instruments require states to protect the rights of racial and ethnic minorities or a designated population within their jurisdiction from discrimination on the basis of race, ethnicity or national origin.[550] By contrast, one instrument simply acknowledges all forms of discrimination as inconsistent with the goals of social progress and development.[551] This acknowledgement lacks specificity to the extent it fails to prohibit discrimination with respect to the enjoyment of an identified right or requires states to take action to protect the rights of racial or ethnic minorities. In any event, despite the universality of these instruments, they are not obligatory given their declaratory nature.

3. Discrimination on the Basis of Religion

The right to be free from discrimination on the basis of religious affiliation or practice is recognized in the ICCPR. The ICCPR requires each state to undertake "to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as . . . religion."[552] As noted with respect to the terms "race," "color," and "national origin," "religion" is self-evident and does not require a definition in order to be specific. This nondiscrimination provision is expressly applicable to all individuals and all rights secured by the Covenant without derogation.[553]

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without distinction as to race."); Universal Declaration of Human Rights, *supra* note 97, art. 2 ("Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, color . . . or national origin.").

550. Declaration on the Rights of Persons Belonging to National, Ethnic, Religious or Linguistic Minorities, *supra* note 549, art. 1(1)-(2) ("States shall protect the existence and the . . . ethnic . . . identity of minorities within their respective territories" and "shall adopt appropriate legislative and other measures to achieve those ends."); *see also* Declaration on the Rights of the Child, *supra* note 313, art. 10 (providing children are entitled to protection from racial discrimination).

551. Declaration on Social Progress and Development, *supra* note 331, art. 12(b) (noting social progress and development require "[t]he elimination of all forms of discrimination").

552. International Covenant on Civil and Political Rights, *supra* note 69, art. 2(1).

553. *Id.* art. 4(1).

Despite the universal acceptance of the ICCPR, its religious discrimination provisions are not obligatory due to their non-self-executing nature. In addition, Article 2 merely requires states to "undertake to respect and ensure" rights without religious discrimination, thereby permitting states to satisfy their obligations without regard to their ultimate success.[554] As a result, the religion provision within the ICCPR is not obligatory.

For similar reasons, the religious discrimination provision within the ICESCR also is not obligatory. The ICESCR provides that states "undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to . . . religion."[555] Furthermore, as previously established, the Economic, Social and Cultural Rights Covenant is universally accepted. However, this provision is not obligatory due to the absence of U.S. ratification. Furthermore, as previously noted with respect to race discrimination, the language of the Covenant focusing on efforts to prevent discrimination rather than their ultimate success and conditioning such efforts on state resources and "the general welfare in a democratic society" renders the nondiscrimination provisions nonobligatory.[556]

Freedom from religious discrimination is extended to children by the CRC, which requires states to take "all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of status."[557] This right is rendered nonspecific by the failure of the Convention to define what is intended by the prohibition upon discrimination based on the child's "status" or that of his parents, legal guardians, or family members. Even assuming "status" can be equated to religious practices, the CRC is not actionable pursuant to the ATCA due to the absence of U.S. ratification.

The CRC also requires states to respect the right of children to freedom of religion.[558] However, this freedom is subject to numerous undefined exceptions. These exceptions include legally imposed restraints "necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of

554. *Id.* art. 2(1).

555. International Covenant on Economic, Social and Cultural Rights, *supra* note 69, art. 2(2).

556. *Id.* art. 2(2).

557. Convention on the Rights of the Child, *supra* note 96, art. 2(2).

558. *Id.* art. 14(1).

others."[559] No explanation of these restrictions is offered in the Convention. It appears, however, that any restraint is permissible assuming it is adopted pursuant to law and can in some manner be related to public necessity or the rights of others. Leaving aside the issue of the absence of U.S. ratification of the Convention, such a standard lacks specificity and defies application by courts seeking to determine if a particular restraint possesses the necessary justification.

Unlike racial discrimination, the right to be free from discrimination on the basis of religion is also set forth in Geneva Convention IV and Protocol II.[560] Article 27 of Geneva Convention IV states all protected persons are entitled to "respect" for their religious practices and convictions.[561] Similar protection is accorded to victims of non-international armed conflict by Protocol II.[562] However, Geneva Convention IV conditions such respect on the adoption of control and security measures as necessitated by war.[563]

The universal nature of these conventions is beyond question. However, neither of these conventions is actionable pursuant to the ATCA. Initially, both conventions lack the requisite degree of specificity. The requirement to respect religious practices of affected populations is readily definable to the extent it prohibits actions such as forcible conversion, destruction of places of worship and prohibitions upon religious rites. Beyond these readily abhorrent practices, the parameters of the required respect remain indeterminate. These parameters are all the more difficult to ascertain given the exception for control and security measures set forth in Geneva Convention IV. This exception could in fact swallow the protection wholesale by permitting interference with the conduct of religious rituals or, in extreme cases, the destruction of places of worship on the bases of the need to assert control of a particular area or collective security. Such an exception is particularly vague in circumstances involving armed conflict in

559. *Id.* art. 14(2).

560. Geneva Convention IV, *supra* note 262, art. 28; Protocol II, *supra* note 263, art. 4(1).

561. Geneva Convention IV, *supra* note 262, art. 28.

562. Protocol II, *supra* note 263, art. 4(1) (requiring respect for religious convictions and practices of civilians during non-international armed conflicts).

563. Geneva Convention IV, *supra* note 262, art. 27 ("Parties to the conflict may take such measures of control and security in regard to protected persons as may be necessary as a result of the war.").

which instantaneous decisions are often required by military personnel possessing broad discretion and perhaps operating with incomplete knowledge.

Furthermore, neither of these instruments is obligatory upon the United States. Despite its ratification by the United States, Geneva Convention IV is not obligatory as there is no evidence it is self-executing or that such result was intended at the time of ratification.[564] Despite its universal nature, Protocol II does not create legally binding obligations due to the absence of ratification by the United States. The limited possibility of application of Geneva Convention IV and Protocol II to the activities of multinational enterprises further minimizes their importance.

Freedom of religious practice is a feature of the Inter-American system of human rights protections. Article 12 of the American Convention on Human Rights grants everyone the right to freedom of conscience and religion.[565] This freedom is defined to include the freedom to maintain or change one's beliefs and individually or collectively profess and disseminate such beliefs in private or public.[566] States are prohibited from imposing restrictions impairing the maintenance of religion or the ability to change beliefs.[567] In establishing these rights, the American Convention contains the most complete definition of religious freedom of any human rights instrument.

Nevertheless, this specificity is overcome by limitations which may be imposed pursuant to law for purposes of "public safety, order, health or morals or the rights or freedoms of others."[568] No further explanation of these restrictions is offered in the Convention, but they are at least as broad as limitations set forth in the CRC. To the extent those limitations could be used to justify any restrictions on the exercise of religion, the exceptions within the American Convention present equal opportunities for the imposition of restraints. Leaving aside the issues of universality

564. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF U.S. § 111(4)(a)-(c) (1987) (providing the creation of a private remedy actionable in U.S. courts is inconsistent with the general rule that affected individuals do not have direct remedies against human rights violators except where expressly provided by international agreement).

565. American Convention on Human Rights, *supra* note 160, art. 12(1).

566. *Id.*

567. *Id.* art. 12(2).

568. *Id.* art. 12(3).

and obligation given the absence of U.S. ratification of the American Convention, such a standard defies judicial application.

The remaining five instruments relating to religious discrimination consist of U.N. General Assembly resolutions and an instrument within the Inter-American system of human rights.[569] These instruments protect the profession of religious beliefs, prohibit discrimination or require states to protect religious expression.[570] The most complete instrument in this regard is the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities. The Declaration provides for two of the three previously noted rights with respect to religion. Article 2 grants members of religious minorities the right to "profess and practice their own religion" and "participate effectively" in religious life.[571] States are obligated to protect the existence of religious minorities.[572] This protection is to be memorialized in "appropriate legislative and other measures."[573] Opportunities to develop and express religious beliefs are to be encouraged through the creation of "favorable conditions" under which such development and expression may occur.[574]

Although development and expression are subject to the undefined vagaries of "national law" and "international standards," the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities is nonetheless more specific than its other declaratory counterparts. The Universal and American Declarations prohibit states from

569. Declaration on the Rights of Persons Belonging to National, Ethnic, Religious or Linguistic Minorities, *supra* note 549, arts. 1(1), 2(1)-(2) ("States shall protect the existence and the . . . religious . . . identity of minorities within their respective territories" and "[p]ersons belonging to . . . religious . . . minorities . . . have the right to . . . profess and practice their own religion [and] participate effectively in . . . religious . . . life."); Declaration on Social Progress and Development, *supra* note 331, art. 12(b) (noting social progress and development require "[t]he elimination of all forms of discrimination"); Declaration on the Rights of the Child, *supra* note 313, art. 10 (providing children are entitled to protection from religious discrimination); American Declaration on the Rights and Duties of Man, *supra* note 97, art. 2 ("All persons are equal before the law . . . without distinction as to . . . creed."); Universal Declaration of Human Rights, *supra* note 97, arts. 2, 18 ("Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as . . . religion" and "[e]veryone has the right to freedom of thought, conscience and religion.").

570. *Id.*

571. Declaration on the Rights of Persons Belonging to National, Ethnic, Religious or Linguistic Minorities, *supra* note 549, art. 2(1)-(2).

572. *Id.* art. 1(1).

573. *Id.* art. 1(2).

574. *Id.* art. 4(2).

conditioning enjoyment of the rights provided therein on the basis of religion.[575] In a manner similar to the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities, the Declaration of the Rights of the Child requires states to protect children from religious discrimination.[576] By contrast, the Declaration on Social Progress and Development merely acknowledges that all forms of discrimination are inconsistent with the goals of social progress and development.[577] This acknowledgement lacks specificity to the extent it fails to identify religious groups, beliefs, and practices as subject to protection. In any event, despite the specificity of any of these instruments and their universal acceptance, they are not obligatory given their declaratory nature.

One further distinction between racial and religious discrimination is worthy of mention. Unlike racial discrimination, discrimination on the basis of religious beliefs or practices has not been deemed to be *jus cogens*.[578] Despite the absence of this status, U.S. law has nonetheless recognized the importance of the cause of international religious freedom. The primary legal recognition of this freedom is set forth in the International Religious Freedom Act of 1998.[579] This statute recognizes the importance of religion to the origin and existence of the United States as well as its legacy for providing refuge for those suffering religious persecution abroad.[580] The statute further recognizes the universal nature of religious freedom.[581] Given this heritage and the universality of this freedom, the statute condemns religious persecution, seeks to direct foreign assistance to states that do not engage in gross violations of the right to freedom of religion, restates U.S. commitment to securing religious liberty abroad, and

575. American Declaration on the Rights and Duties of Man, *supra* note 97, art. 2 ("All persons are equal before the law . . . without distinction as to . . . creed"); *see also* Universal Declaration of Human Rights, *supra* note 97, art. 2 (providing "[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as . . . religion.").

576. Declaration on the Rights of the Child, *supra* note 313, princ. 10 (providing children are entitled to protection from religious discrimination).

577. Declaration on Social Progress and Development, *supra* note 331, art. 12(b) (noting social progress and development require "[t]he elimination of all forms of discrimination").

578. *See* BROWNLIE, *supra* note 152, at 515.

579. 22 U.S.C. §§ 6401-6481 (2000).

580. *Id.* § 6401(a)(1).

581. *Id.* § 6401(a)(2)-(3).

renews efforts to secure such liberty through appropriate diplomatic, political, commercial, charitable, educational and cultural channels.[582] These initiatives and commitments are established as official U.S. policy.[583]

The president is authorized to respond to violations of religious freedoms, including those deemed to be "particularly severe," through condemnation, cancellation of exchanges, suspension of financial and security assistance, and denial of export licenses and procurement opportunities.[584] Despite the recognition of the importance of religious freedom, the International Religious Freedom Act does not grant standing to private parties to initiate litigation in the United States with respect to international violations of such right.[585] Rather, the sole remedies rest in the exercise of presidential discretion.[586] The initiation of private litigation could interfere with the executive branch's conduct of foreign policy and ability to speak with one voice on behalf of the United States.[587] This possibility, as well as the absence of an express statutory grant of private standing, differentiates religious discrimination from *jus cogens* offenses such as torture and enforced disappearance.

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582. *Id.* § 6401(b).

583. *Id.*

584. *Id.* §§ 6441-6442, 6445(a). Violations of religious freedoms are defined as:

> [A]rbitrary prohibitions on, restrictions of, or punishment for ... assembling for peaceful religious activities such as worship, preaching, and prayer, including arbitrary registration requirements; speaking freely about one's religious beliefs; changing one's religious beliefs and affiliation; possession and distribution of religious literature, including Bibles; or raising one's children in the religious teachings and practices of one's choice; or any of the following acts if committed on account of an individual's religious belief or practice: detention, interrogation, imposition of an onerous financial penalty, forced labor, forced mass resettlement, imprisonment, forced religious conversion, beating, torture, mutilation, rape, enslavement, murder, and execution.

Id. § 6402(13)(A)-(B).

"Particularly severe violations of religious freedom" are defined to include "torture or cruel, inhuman, or degrading treatment or punishment; prolonged detention without charges; causing the disappearance of persons by the abduction or clandestine detention of those persons; or other flagrant denial of the right to life, liberty, or the security of persons." *Id.* § 6402(11).

585. *Id.* §§ 6401-6481.

586. *Id.* §§ 6331-6342.

587. *See* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363 (2000) (recognizing the importance of the president's ability to speak for the United States with one voice in matters of foreign policy).

D. Human Rights Associated with Armed Conflict

1. War Crimes and Crimes Against Humanity

Prohibitions upon the commission of war crimes and crimes against humanity are set forth in the greatest detail in one human rights instrument.[588] The Elements of Crimes as established by the International Criminal Court contains the most definitive description of war crimes ever enunciated by an international body. War crimes are defined to include willful killing, torture and cruel treatment, the infliction of great suffering, mutilation, rape and other sexual violence, forced pregnancy, enforced prostitution and sterilization, biological, medical and scientific experimentation, destruction, pillaging and appropriation of property, compelling military service in hostile forces, denial of due process, deportation and displacement of civilians, confinement, hostage taking, attacks upon civilian populations, improper uses of flags and insignia, attacking protected objects, and the use of poison and poisoned weapons.[589]

Crimes against humanity are defined in similar detail. The International Criminal Court has defined crimes against humanity to include murder, extermination, enslavement, forcible transfer of civilian populations, imprisonment, torture, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, sexual violence, persecution, enforced disappearance, apartheid, and other inhumane acts.[590] Each of these definitions establishes the three fundamental elements to defining any offense, specifically, the prohibited act, the identity of the victim, and the requisite intent of the perpetrator.[591] Although isolated elements of

588. Although war crimes and crimes against humanity are defined and subject to prosecution and punishment by other human rights instruments, these documents are limited to specific conflicts rather than operating without geographic or chronological restraint. *See, e.g.,* Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994); Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993).

589. Int'l Criminal Court, Elements of Crimes, *supra* note 483, art. 8(2).

590. *Id.* art. 7.

591. For example, the war crime of willful killing is defined as the killing of one or more persons, the membership of such persons in a protected class as established by the Geneva Conventions and awareness on the part of the perpetrator of the factual circumstances establishing the victim's protected status. *Id.* art. (8)(2)(a)(i). By contrast, willful killing is defined as a crime against humanity if the perpetrator killed one or more

some of the defined crimes are subject to interpretation, these difficulties are extremely isolated and are of little impact upon the otherwise overwhelmingly specificity of the code.[592] Instead, this elaboration of crimes was deemed specific enough by the one hundred ratifying states to serve as the basis for the abdication of national sovereignty in favor of international criminal prosecution.[593] As such, it would undoubtedly be specific enough to serve as the basis for tort claims alleged as part of a civil lawsuit.

Nevertheless, as previously discussed with respect to the right to be free from genocide, the universal and obligatory nature of the documents establishing the International Criminal Court are subject to question. Approximately one-half of the international community has ratified or acceded to the Rome Statute.[594] Although significant, this history raises serious questions with respect to the universal recognition of the Court as well as the principles for which it stands including the definition of war crimes and crimes against humanity. Even assuming the Rome Statute and International Criminal Court have been universally recognized, the Statute is not obligatory on the United States due to the absence of ratification. Assuming the universality of the Statute and the definitions set forth therein and their acceptance by the United States, there is no reason to believe the U.S. Senate would manifest an intention for it to serve as the basis for civil litigation pursuant to the ATCA. With its provisions limited to the definition, prosecution and punishment of the war crimes, the Rome Statute does not provide such a civil remedy for genocide victims.

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persons as part of "a widespread or systematic attack directed against a civilian population" and the perpetrator knew or intended the conduct to be part of such an attack. *Id.* art. 7(1)(a).

592. Examples in this regard include the terms "severe" or "great" physical or mental pain in defining the war crime of inhuman treatment and humiliating or degrading treatment utilized in establishing the war crime of outrages upon personal dignity. *Id.* arts. 8(2)(a)(ii)(2), (2)(a)(iii), (2)(b)(xxi), (2)(c)(i)-3 to -4, (2)(c)(ii). Similar difficulties may arise from the terms "great suffering" and "serious injury to body or to mental or physical health" used in the definition of inhumane acts within the article relating to crimes against humanity. *Id.* art. (7)(1)(k).

593. Currently, there are 100 state parties to the ICC. *See* American Non-Governmental Organizations Coalition for the International Criminal Court, ICC Ratifications, http://www.amicc.org/icc_ratifications.html.

594. United Nations, Ratification of the Rome Statute of the International Criminal Court, *supra* note 487, at 1.

In a manner similar to piracy, war crimes are also offenses which states possess universal jurisdiction to define and punish.[595] As piracy has been determined to be one of the offenses originally intended to be within the scope of the ATCA, it may be concluded war crimes are also actionable. However, despite universal status, there must still be a basis for the initiation and prosecution of a private civil action through appropriate provisions within national law. Universal jurisdiction has been traditionally exercised in the form of criminal prosecution.[596] Although universal jurisdiction does not preclude the application of civil law to such offenses, the state must nonetheless provide a private remedy.[597] U.S. law provides no such civil remedy for war crime victims.[598] This failure is further evidence the responsibilities arising from the International Criminal Court are not obligatory on the United States as to provide a basis for a private cause of action pursuant to the ATCA.

2. Displacement of Civilian Populations

The ICCPR grants everyone lawfully within the territory of a state the freedom to choose his residence.[599] This right is not subject to restrictions other than as adopted by law or necessary for the protection of "national security, public order, public health or morals or the rights and freedoms of others."[600] In addition, states are prohibited from engaging in "arbitrary or unlawful interference" with an individual's right to his or her home.[601] The ICCPR makes no further reference to rights associated with residence or the establishment and maintenance of one's home.

To the extent such rights can be equated with a prohibition upon forcible displacement of civilian populations, the exceptions render them nonspecific for purposes of judicial enforcement. No

595. *See* Eugene Kontorovich, *The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation*, 45 INT'L L. J. 183, 188 (2004).

596. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF U.S. § 404, cmt. b (1987).

597. *Id.*

598. U.S. law only provides for criminal liability for perpetrators of war crimes. 18 U.S.C. § 2441(a) (providing for fine, imprisonment and potential death sentence for persons convicted of committing war crimes inside or outside of the United States).

599. International Covenant on Civil and Political Rights, *supra* note 69, art. 12(1) ("Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.").

600. *Id.* art. 12(3).

601. *Id.* art. 17(1).

explanations of these exceptions are offered in the Covenant. Beyond physical violence or the threat thereof utilized against a civilian population resulting in the abandonment of residences, the parameters of the exceptions remained undefined. As such, any interference is permissible even if it is not legally sanctioned, assuming it can in some manner be related to national security, public necessity or preservation of the rights of others. The task of defining the limitations of these exceptions is more onerous given the difficulties inherent in determining the scope of state police powers to ensure national security and protect public health, order, and morals. The breadth of these powers eases the burden on states to demonstrate the necessity of their exercise. In addition, the use of the term "arbitrary" in Article 17(1) implies such restrictions will be invalidated only in instances where they lack substantial evidentiary support.

This uncertainty as to the circumstances under which states may interfere with the freedom to choose one's residence and interfere with one's home also defeats the obligatory nature of these provisions. Despite the alleged mandatory nature of these rights, they are nonobligatory to the extent they can be readily evaded utilizing the broad and vague language of the exceptions. Furthermore, the indefinite nature of the exceptions renders successful judicial challenge to their utilization unlikely, either due to the inability to exclude state action from their breadth or judicial unwillingness to countermand actions deemed lawful and necessary by foreign governments. This conclusion is further bolstered by the non-self-executing nature of the ICCPR.

Identical issues plague similar rights established by the CRC and the ACHR. Article 16 of the CRC prohibits "arbitrary or unlawful interference" with children's homes.[602] By contrast, Article 22 of the ACHR grants every person the right to reside in territories in which they are lawfully present.[603] However, this right is subject to restrictions necessary to "prevent crime or to protect national security, public safety, public order, public morals, public health or freedoms of others."[604]

If such rights may be interpreted to include prohibition of forcible displacement of civilian populations, the exceptions render them nonspecific. In a manner similar to the ICCPR, no

602. Convention on the Rights of the Child, *supra* note 96, art. 16(1).
603. American Convention on Human Rights, *supra* note 160, art. 22(1).
604. *Id.* art. 16(3).

explanations of these exceptions are offered in either Convention. With respect to the ACHR, any interference short of physical violence or the threat thereof may be deemed is permissible as log as it can be related to crime suppression, national security, public necessity or preservation of the rights of others. The broad scope of the police powers and judicial acquiescence to state definitions make the establishment of limitations all the more difficult. In a manner similar to Article 17 of the ICCPR, the use of the term "arbitrary" in the CRC implies such restrictions will be invalidated only in instances where they lack substantial evidentiary support. This is a very unlikely occurrence other than with respect to the most egregious violations. This uncertainty as to the circumstances under which states may interfere with the freedom to choose one's residence and interfere with one's home further defeats the obligatory nature of these provisions. Finally, neither instrument is obligatory given the absence of U.S. ratifications.

Displacement of civilian populations is specifically prohibited by Protocol II of the Geneva Conventions. Article 17 provides, in part, "[t]he displacement of civilian populations shall not be ordered for reasons related to [non-international armed] conflict."[605] However, this prohibition may be disregarded for purposes of ensuring the security of such civilians or other "imperative military reasons."[606] Although more specific than the rights to move about and be free from arbitrary interference with one's residence, these limitations render the right to be free from forcible displacement nonspecific. The determination of the need to provide security for civilian populations is committed to the discretion of the political branches as well as military commanders. The likelihood of judicial questioning of such exercises of discretion is unlikely especially given the absence of any requirement of necessity for such evacuation. Even broader is the exception for "imperative military reasons" which are also committed to the discretion of the political branches and military commanders and a most unlikely subject for judicial consideration let alone condemnation.[607] These exceptions seriously impede any judicial enforcement of the right to be free from displacement, if not remove this right, entirely from such consideration. Furthermore, despite its universal nature, Protocol II does not

605. Protocol II, *supra* note 263, art. 17(1).
606. *Id.*
607. *Id.*

create legally binding obligations due to the absence of ratification by the United States and is further minimized in importance by the limited circumstances to which it is applicable.

Finally, the relevant U.N. declarations are not specific or obligatory to serve as the basis for private civil litigation. The UDHR contains no express prohibition upon the displacement of civilian populations. Rather, it merely prohibits "arbitrary interference" with the maintenance of one's home.[608] This right is nonspecific to the extent that any interference may be justified on the basis it is supported by substantial evidence and is thus not arbitrary. Furthermore, unlike previous instruments establishing this right, there is no accompanying list of circumstances justifying restrictions. Thus, any restriction is permissible assuming it has some evidentiary support in order to escape characterization as arbitrary.

By contrast, the Declaration on the Protection of Women and Children in Emergency and Armed Conflict specifically addresses forced displacement of civilians. Article 5 requires states to prosecute the forcible eviction of women and children by belligerents as crimes.[609] "Forcible eviction" is a broad term encompassing any and all ousters which involve force of any kind regardless of severity or the identity of the party to whom it is directed.[610] Furthermore, Article 5 does not contain any exceptions under which such evictions may be justified. However, despite its broad prohibition, lack of exceptions, and universal nature, it is nonobligatory in the same manner as the Universal Declaration due to its status as a statement of aspirations rather than of binding principles of law.

V. CONCLUSION

The optimism with which human rights advocates greeted the U.S. Supreme Court's decision in *Sosa v. Alvarez-Machain* is unwarranted. The only claims asserted against transnational corporations surviving *Sosa* are those alleging summary and extrajudicial execution, torture, and perhaps racial discrimination. The door which Justice Souter described as "still ajar" with respect to "a narrow class of [modern] international norms" is shut to

608. Universal Declaration of Human Rights, *supra* note 97, art. 12.

609. Declaration on the Protection of Women and Children in Emergency and Armed Conflict, *supra* note 388, art. 5.

610. *Id.*

other human rights claims absent a change of direction by the Court or congressional guidance.[611]

As a result, transnational corporations have been largely freed from the restraints imposed upon their behavior by the ATCA and holdings of federal courts in the twenty-five years since the groundbreaking decision of the U.S. Court of Appeals for the Second Circuit in *Filartiga v. Peña-Irala*.[612] The opinion in *Sosa* further weakens the contention that transnational corporations are "right-and-duty-bearing unit[s]" pursuant to national and international law.[613] This characterization of transnational corporations is of particular importance due to their unique role as de facto ambassadors of the United States and propagators of American economic, political, and cultural values.[614]

Accountability for compliance with international human rights standards will be increasingly dependent upon efforts independent of litigation in U.S. federal courts. Shareholders and potential investors may impact compliance with such standards through socially responsible investing and divestiture, especially if conducted by institutional investors. National governments, international organizations, and non-governmental organizations also may impact compliance through the adoption of initiatives designed to establish, preserve and protect basic human rights.[615] However, the primary burden for ensuring compliance with human rights standards will be placed upon transnational corporations themselves. This burden may be met by a commitment to human rights as evidenced by codes of conduct, statements of corporate principles, ethical guidelines, social accountability standards, voluntary reporting efforts and similar initiatives. A critique of the

611. Sosa v. Alvarez-Machain, 542 U.S. at 752 (2004).

612. 630 F.2d 876 (2d Cir. 1980).

613. John Dewey, *The Historic Background of Corporate Legal Personality*, 35 YALE L.J. 655, 656 (1926).

614. Breed, *supra* note 6, at 1006, 1012.

615. *See, e.g.*, Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, *supra* note 5, ¶¶ 2-14; United Nations Global Compact Org., What is the Global Compact? (2000), http://www.unglobalcompact.org/AboutTheGC; Bureau of Democracy, Human Rights & Labor, U.S. Dep't of State, Voluntary Principles on Security and Human Rights (2000), http://www.state.gov/g/drl/rls/2931.htm; Org. for Econ. Cooperation and Dev. [OECD], Committee on International Investment and Multinational Enterprises, *The OECD Declaration and Decisions on International Investment and Multinational Enterprises: Basic Texts*, OECD Doc. DFFE/IME(2000)20 (Nov. 8, 2000); Social Accountability Int'l, Overview of S.A. 8000 (2002), http://www.sa-intl.org (follow "SA8000" hyperlink) (last visited Aug. 8, 2006).

effectiveness of these efforts is beyond the scope of this article.[616] It suffices to note that the entrustment of the protection of human rights to transnational corporations should give all parties, including impacted populations, international and non-governmental organizations, and human rights advocates, considerable cause for alarm.

616. For a comprehensive discussion of the effectiveness of corporate codes of conduct and other efforts to institutionalize human rights, see Mark B. Baker, *Tightening the Toothless Vise: Codes of Conduct and the American Multinational Enterprise,* 20 WIS. INT'L L.J. 89 (2001).