No. 03-339

IN THE

Supreme Court of the United States

JOSE FRANCISCO SOSA,
Petitioner,

vs.

HUMBERTO ALVAREZ-MACHAIN, et al.,

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED

1. Whether the Alien Tort Claims Act ("ATCA"), is only a grant of jurisdiction, or whether it authorizes the federal courts to hear and decide claims made by aliens for torts committed in violation of the law of nations.

2. Whether the actions authorized by the ATCA are limited to suits for violations of *jus cogens* norms of international law.

3. Whether Dr. Alvarez' abduction constitutes a tort in violation of the law of nations actionable under the ATCA. .

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

CASES

CONSTITUTION, STATUTES, TREATIES RULES, AND RESOLUTIONS

ATTORNEY GENERAL OPINIONS

LEGISLATIVE HISTORIES

SCHOLARLY AUTHORITIES

OTHER AUTHORITIES

OPINIONS BELOW

The opinion of the court of appeals *en banc* (Pet. App. 1a-108a) is reported at 331 F. 3d 604. The panel decision of the court of appeals (Pet. App. 109a-139a) is reported at 266 F. 3d 1045. The district court's orders of March 18, 1999 (Pet. App. 176a-219a) and May 18, 1999 (Pet. App. 172a-175a), and its judgment of September 9, 1999, (Pet. App. 140a-171a) are unreported.

JURISDICTION

This Court has jurisdiction based upon 28 U.S.C. § 1254(1) (2000).

STATEMENT OF THE CASE

Petitioner Francisco Sosa was one of several Mexican nationals who forcibly kidnapped Respondent Dr. Humberto Alvarez-Machain from his medical office in Guadalajara, Mexico, on April 2, 1990, held him *incommunicado*, and transported him to El Paso, Texas. What "authorization" there was for this illegal operation came from the Deputy Administrator of the Drug Enforcement Administration ("DEA") – not from the President of the United States, nor the Attorney General, nor the Secretary of State, nor any other member of the cabinet. According to his own sworn testimony, not even then-DEA Administrator Jack Lawn was aware of the operation, 331 F. 3d at 642, n 1. The motivation for the operation was the extraterritorial enforcement of U.S. criminal law – not the neutralization of a terrorist threat or any other national security concern.

Despite Mexico's formal protest,[1] this Court ruled that Respondent's kidnapping did not violate the terms of the extradition treaty between the United States and Mexico, *United States v. Alvarez-Machain*, 504 U.S. 655, 669 (1992). In November 1992, Dr. Alvarez went to trial in United States District Court in Los Angeles before Judge Edward Rafeedie. On December 14, 1992, Judge Rafeedie, who sentenced other defendants to life in prison for their roles in the death of Agent Camarena, directed a verdict of acquittal,[2] emphasizing that the prosecution of Dr. Alvarez was based on "wild speculation" and "hunches" that did not add up to sufficient evidence of Respondent's participation in the crime. Petitioner and the government *amicus curiae* now stress the brutality of Camarena's death in order to deprive Respondent of even a modest civil remedy for the wrongs he suffered at Sosa's hands.

Invoking the Alien Tort Claims Act, 28 U.S.C. § 1350 (2000) ("ATCA," "Act," or "Section 1350"),[3] a short and unambiguous provision of the First Judiciary Act of 1789, Dr. Alvarez sued Sosa and others "for a tort only committed in violation of the law of nations or a treaty of the United States." It has been conceded that Sosa acted under color of official authority, *United States v. Caro-Quintero*, 745 F. Supp. 599, 609 (C.D. Cal. 1990), but his motion to have the United States substituted as defendant under the Westfall Act, 28 U.S.C.

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[1] *Brief for the United Mexican States as Amicus Curiae in Support of Affirmance*, *reprinted in* 31 I.L.M. 934 (1992).

[2] *Alvarez-Machain v. Sosa*, 331 F. 3d 604, 610 (9th Cir. 2003) (*en banc*).

[3] The ATCA is sometimes referred to as the "Alien Tort Statute" or the "Alien Tort Act." In this brief, Respondent uses the title and acronym employed by the vast majority of courts, including the *en banc* court below.

§2679 (2000), was denied. Sosa did not appeal that disposition, and it is not before this Court. [4]

Although the facts concerning Dr. Alvarez's treatment during the abduction were disputed at trial, it is not disputed that he was taken from his medical office, driven away in an unmarked car, held against his will in a motel in another town, not allowed to contact his family until after he was finally turned over to waiting DEA agents in Texas the following day. The district judge did not find Dr. Alvarez' testimony about his physical treatment credible but awarded him $25,000.00 in damages because there was no doubt that he had suffered emotional distress as the result of Sosa's actions.[5] A panel of the Court of Appeals affirmed, *Alvarez-Machain v. United States* 266 F.3d 1045, 1064 (9th Cir. 2001) and the *en banc* panel affirmed, *Alvarez-Machain v. United States* 331 F.3d 604, 641 (9th Cir. 2003) (*en banc),* finding that Dr. Alvarez' right to be free of arbitrary arrest and detention had been violated.

SUMMARY OF ARGUMENT

This Court is confronted with two competing views of the alien tort claims provision of the First Judiciary Act of 1789, and two competing views of the status of the law of

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[4] The United States was substituted as a defendant for all of the other individual defendants, and the *en banc* decision below ruled that federal officers and the United States can only be sued for torts in violation of the law of nations under the Federal Tort Claims Act. *Alvarez-Machain*, 331 F.3d at 631.

[5] Though Respondent strongly disagrees with the district court's evaluation of the facts of this case and of his credibility and testimony, he recognizes that under the rules governing the District Court's findings he is not in a position to challenge them on appeal.

nations and the power of low-level executive employees to violate it. Dr. Alvarez relies on the plain words of the ATCA and the overwhelming historical evidence that the First Congress intended the federal courts to hear and decide claims of "torts committed in violation of the law of nations." This view has been adopted by every lower federal court to consider the issue.

Petitioner Sosa and his *amici* ask this Court to adopt an interpretation of the ATCA which renders it meaningless from its inception and which is at odds with the plain words of the statute and the overwhelming weight of the historical evidence. Sosa contends that the ATCA threatens the prosecution of the war against terrorism and American business interests. There is simply no evidence to support this extreme position. The ATCA has often provided a forum for victims of egregious human rights violations, but the ATCA does nothing to undermine our national or economic security. Instead, the ATCA has been a beacon to the world and reflects a commitment to the rule of law from the Founders to a time in which respect for fundamental rights has become a matter of profound international concern.

1. Though Petitioner repeatedly finds it "inconceivable" that the First Congress would have authorized the federal courts to enforce the law of nations in so many words, *Pet. Brf.* at 16, the uniform decisions of the lower courts that the ATCA means what it says are fully in keeping with the ATCA's history and Congressional intent. Indeed, not a single member of the *en banc* panel below, *including the five dissenters*, accepted Petitioner's argument, opting instead for an interpretation that is (a) faithful to the plain language of the ATCA by preserving the meaning of every word in the statute and not just one; (b) consistent with the understanding of the First Congress and early judicial and Executive interpretations of the act and confirmed by Congress in 1991 when it adopted the Torture

Victim Protection Act ("TVPA"); (c) consistent with this Court's long-standing precedents on the status of international law as law of the United States; and (d) consistent with the separation of powers in a way that Petitioner's effort to have the judiciary rewrite the statute is not. The *en banc* court's interpretation of the ATCA is consistent with the *unanimous* disposition of the issue before this Court by lower courts across the country for the last twenty-four years.

Sosa's version of the ATCA's history, on the other hand, disregards the transitory tort doctrine, well-established in English and American law in 1789 and well-understood by the framers of the Act as vitiating any concern that the exercise of jurisdiction necessarily involves some extraterritorial or "universal" application of U.S. law.

2. The ATCA does not allow claims based upon norms the United States does not accept, as Petitioner asserts. In his Petition for Certiorari, Petitioner urged the Court to limit the category of actionable claims under the ATCA to violations of *jus cogens*. Petitioner now abandons that argument, apparently convinced that nothing in this Court's precedents or in decisions under the ATCA requires a customary norm to qualify as *jus cogens* in order to be justiciable. To the contrary, a *jus cogens* violation may be logically *sufficient* to satisfy the ATCA but it cannot be *necessary*, as the courts below have ruled. In reframing the issue now, Petitioner asserts what no party denies, namely that the courts will not find a violation of the law of nations or a treaty of the United States if the Executive branch has opted out of some customary norm. But it does not follow that every agent of the Executive branch has that power and therefore enjoys some prophylactic immunity from all ATCA cases simply by violating the law of nations.

3. In order to suggest that Dr. Alvarez' treatment was not a violation of the law of nations, Petitioner offers an antiseptic version of the kidnapping. However, it is undisputed

that Sosa had no legal authority to arrest or abduct Dr. Alvarez-Machain under Mexican, United States, or international law. The right to be free of unlawful seizure has an ancient pedigree and is fundamental to the modern evolution of human rights law, traceable to the Nuremberg trials after World War II and the critical support of the United States over the decades since that time. The government has repeatedly drawn on these principles in its foreign policy and in litigation before the International Court of Justice.

This case does not involve any question of corporate liability under the ATCA, despite the submission of corporate *amici* supporting Petitioner. Nor does it involve any challenge to the President's authority to combat terrorism at home and abroad, despite the *amicus curiae* brief submitted by the United States.

This case challenges, in the limited context of a suit for money damages, only the legal authority of low-level DEA agents to hire bounty hunters, without high-level government authorization, in violation of Congressional restrictions on such conduct,[6] to abduct a Mexican national in Mexican territory and force him into this country to be tried for a crime that occurred in Mexico, all over the protest of the Mexican government. Surely if the facts of this case were reversed and a U.S. citizen were kidnapped by Mexican agents in a criminal case, the government of the United States would insist on a more faithful adherence to the rule of law.

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[6] These restrictions are discussed in detail in Respondent's Brief in *United States v. Alvarez-Machain*, No 03-485.

ARGUMENT

I. THE ALIEN TORT CLAIMS ACT REQUIRES NO FURTHER LEGISLATION TO PROVIDE A FEDERAL FORUM FOR TORTIOUS VIOLATIONS OF INTERNATIONAL LAW.

A. Petitioner's Interpretation of the ATCA Is Inconsistent with the Plain Language of the Statute and Renders All But One Word Of It Meaningless.

The Alien Tort Claims Act 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."[7] 28 U.S.C. § 1350. For over two centuries, the ATCA has been applied rarely but always consistently with the interpretation that it authorizes the federal courts to hear and resolve claims of tortious violations of the law of nations without further Congressional action. In recent years, reflecting modern developments in international human rights law, the ATCA has been employed to redress well-defined human rights violations such as the right to be free from torture and genocide. Since 1984, defendants have

[7] The original version of the Alien Tort Claims Act in the First Judiciary Act provided in relevant part that the district courts shall "have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States." Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 77. Until the early 20th century, the term "law of nations" – now supplanted by the term "customary international law" – was used to denote the customary rules and obligations that regulated interactions between states and certain aspects of state interactions with individuals. *Restatement (Third) of the Foreign Relations Law of the United States* § 111 Introductory Note (1987) ("*Restatement (Third)*").

argued that an express cause of action should be required for suits under the ATCA,[8] but every court to address this issue has rejected it,[9] establishing a consistent body of law. In this very case, not a single one of the eleven judges below, *including the five dissenters,* adopted Sosa's analysis.

The dominant reason for this extraordinary uniformity is that Petitioner's argument is inconsistent with the plain

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[8] Only two circuit judges, writing only for themselves in cases separated by twenty years, have accepted this argument. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 798 (D.C. Cir. 1984) (Bork, J., concurring), *cert. denied*, 470 U.S. 1003 (1985); *Al-Odah v. United States*, 321 F.3d 1134, 1145 (D.C. Cir. 2003) (Randolph, J., concurring).

[9] *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 103-06 (2d Cir. 2000), *cert. denied*, 532 U.S. 941 (2001); *Abebe-Jira v. Negewo*, 72 F.3d 844, 848 (11th Cir. 1996), *cert. denied*, 519 U.S. 830 (1996); *Kadic v. Karadzic*, 70 F.3d 232, 241 (2d Cir. 1995), *cert. denied*, 518 U.S. 1005 (1996); *Hilao v. Estate of Marcos*, 25 F.3d 1467, 1475-76 (9th Cir. 1994), *cert. denied*, 513 U.S. 1126 (1995); *Trajano v. Marcos*, 978 F.2d 493, 503 (9th Cir. 1992), *cert. denied*, 508 U.S. 972 (1993); *Papa v. United States*, 281 F.3d 1004, 1013 (9th Cir. 2002); *Presbyterian Church of Sudan v. Talisman Energy*, 244 F.Supp. 2d 289, 320 (S.D.N.Y. 2003); *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161, 165 (5th Cir. 1999); *Estate of Lacarno Rodriguez v. Drummond*, 256 F. Supp.2d 1250, 1258 (N.D. Ala. 2003) *Cabello v. Fernandez-Larios*, 157 F.Supp.2d 1345, 1365 (S.D. Fla. 2001); *Iwanowa v. Ford Motor Company*, 67 F.Supp.2d 424 (D.N.J. 1999); *Jama v. I.N.S.*, 22 F. Supp. 2d 353, 362-63 (D.N.J. 1998); *Doe v. Islamic Salvation Front (FIS)*, 993 F. Supp. 3, 7 (D.D.C. 1998); *Xuncax v. Gramajo*, 886 F. Supp. 162, 179 (D. Mass. 1995); *Paul v. Avril*, 812 F. Supp. 207, 212 (S.D.Fla. 1993); *Forti v. Suarez-Mason*, 694 F. Supp. 707, 709 (N.D. Cal. 1988). Petitioner neither cites not distinguishes this uniform body of principle, adopted over the last twenty years by the Second, Fifth, Ninth, and Eleventh circuit courts of appeals and numerous district courts across the country. *See Amicus* Brief of National and Foreign Scholars, § I.

language of the ATCA. By its terms, the statute establishes jurisdiction over (i) "any civil action" (originally "all causes") (ii) by an "alien" plaintiff, (iii) suing for a "tort only," (iv) "in violation of" international law in either customary or treaty form. This language is neither complicated nor ambiguous. So long as the plaintiff is not a citizen of the United States, the statute is satisfied if the underlying wrong takes tortious form and is in violation of international law. *See Caminetti v. United States*, 242 U.S. 470, 490 (1917) ("If the words are plain, they give meaning to the act, and it is neither the duty nor the privilege of the courts to enter speculative fields in search of a different meaning.").

Petitioner's narrow focus on the word "jurisdiction" as though it fully resolved the issue before the Court, *Pet. Brf.* at 10, treats the other words in the statute as if they bear neither meaning nor relevance. This Court has never endorsed so cavalier an approach to the language of a statute.[10]

Congress had and has the power to provide additional statutory causes of action for violations of the law of nations (and did so in the TVPA), Petitioner's suggestion that it *must* do so before Section 1350 can be satisfied invites the Court to rewrite the ATCA. Nothing in the statute explicitly or implicitly requires any additional implementing act. The eighteenth-century lawyers who drafted the statute fully understood both the remedial consequences of "torts" – even in

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[10] *See Alaska Dept. of Env. Conservation v. E.P.A.*, 124 S. Ct. 983, 1002 n 13 (2004) ("It is . . . 'a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'") (quoting *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001)).

the absence of statutory definition or implementation – and the place of the "law of nations" within American law.[11]

1. "***A tort only***." Petitioner argues that tort law was in a "nascent" or "infant" state in 1789 and did not fully evolve until the nineteenth century with the publication of some treatises on the subject. *Pet. Brf.* at 7, 24 *et seq*. But it was not some miracle of foresight that enabled Congress to use the word "tort" in the statute. Lawyers of the time, including the draftsman of the First Judiciary Act, Oliver Ellsworth, fully understood that "tort" referred to a variety of civil wrongs that were distinguishable from violations of the law of contract and property and that these wrongs were actionable in the absence of statutory permission. Although the body of law governing the right to sue for damages inflicted by another was not recognized at the time as the field of law now called "Torts," the underlying concepts date back centuries.[12]

Prior to the enactment of the First Judiciary Act, Blackstone observed in his COMMENTARIES that:

> Personal actions are such where by a man claims a debt, or personal duty, or damages in lieu thereof: and, likewise, whereby a man claims a satisfaction in

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[11] Even Professor Bradley, who has led the academic attack on ATCA, concedes that "there would have been no reason for the First Congress to create a federal statutory cause of action for torts in violation of the law of nations. The law of nations was considered at the time to be part of the general common law, which could be applied by courts in the absence of controlling positive law to the contrary." Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 *Va. J. Int'l L.* 587, 595 (2002).

[12] *See, e.g.*, Robert J. Kaczorowski, *The Common-law Background of Nineteenth-Century Tort Law,* 51 Ohio St. L.J. 1127, 1199 (1990); *See* John Henry Wigmore, *Responsibility for Tortious Acts: Its History,* in 3 Association of American Law Schools, Select Essays in Anglo-American Legal History, (1909) at 474-573.

> damages for some injury done to his person or property. The former are said to be founded on contracts, *the latter upon torts or wrongs* . . . of the former nature are all actions upon debt or promises; of the latter all actions for trespasses, nuisances, assaults, defamatory words, and the like.

2 William Blackstone Commentaries *117 at 69 (emphasis supplied). Blackstone also noted that criminal and civil liability could arise out of the same act: "for . . . assault, battery, wounding, and mayhem, an indictment may be brought *as well as an action*; and frequently both are accordingly prosecuted; the one at the suit of the crown for the crime against the public, the other at the suit of the party injured, to make him a reparation in damages." *Id.* at *123 (emphasis supplied).

There was no understanding that such suits required further definition by statute or that the propriety of the action depended on some statutory authorization to sue. To the contrary, the injured party was entitled to a "remedy by suit or action in the courts of common law . . . ." *Id.*, at *118.[13] As shown more fully in the Brief of Professors of Federal Jurisdiction and Legal History as *Amici Curiae* in Support of Respondents ("hereinafter Historians' *Amicus* Brief"), Sosa's interpretation of the ATCA requires the Court to assume that the drafters of

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[13] *See also* 3 William Blackstone Commentaries, at *123 ("wherever the common law gives a right or prohibits an injury, it also gives a remedy by action; and therefore, wherever a new injury is done, a new method of remedy must be pursued."). In *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803), Chief Justice Marshall cited precisely this passage, stating that "it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy, by suit or action at law, when that right is invaded." In attempting to minimize the value of this contemporary understanding, *Pet. Brf.* at 10-11, Petitioner cites *Alexander v. Sandoval*, 532 U.S.275, 288 (2001), and *Cannon v. University of Chi.*, 441 U.S. 677, 699 (1979), on the erroneous assumption that a right to sue can only be created by statute.

the First Judiciary Act used the word "tort" in some innovative and specialized way that was directly contrary to its well-established common law meaning.

2. "***Committed in violation of***." The use of the word "violation" in the statute independently confirms the uniform interpretation of the ATCA by the lower courts. "Violation" does not appear in any provision of Section 9 of the First Judiciary Act other than in the alien tort provision, nor does it appear in any other section of Chapter 85 defining the jurisdiction of the federal district courts.[14] Unlike other, purely jurisdictional statutes now codified in Title 28 of the United States Code, there is no reference to additional legislation and certainly no requirement that the case "arise under" federal law.[15]

That contrast must be assumed to have been deliberate, and it is instructive. Though separated by decades, the

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[14] Petitioner also argues that the title of Chapter 85 ("District Courts: Jurisdiction") implies that Section 1350 does not create a cause of action. *Pet. Brf.* at 11-12. But this Court has long held that a statute's title and its placement are not to be relied upon when the language of the statute, as here, is clear. *Brotherhood of R.R. Trainmen v. Baltimore & Ohio Ry. Co.*, 331 U.S. 519, 529 (1947).

[15] As fully explained in the Historians' *Amicus* Brief, pp 16-18, the first three clauses of Section 9 contemplated that Congress *might* enact legislation under which a criminal prosecution or civil suit might be brought, and the federal courts enjoyed exclusive jurisdiction. But the last three, including the alien tort provision, were quite distinct. In this latter group, there is no mention of "the laws of the United States," and, under the fourth and fifth clauses, the district courts' jurisdiction was concurrent with that of the state courts, evincing the expectation that the suits thereunder were to be brought at common law. That also distinguishes the ATCA from the jurisdictional provisions cited by Petitioner, *Pet. Brf.*, at 11, involving suits commenced by the United States, 28 U.S.C. § 1345, or involving the partition of lands where the United States is a tenant in common or joint tenant. 28 U.S.C. § 1347.

requirement under Section 1350 that a plaintiff show a "violation" of the law of nations stands in marked contrast to the requirement under the federal question jurisdiction statute that the plaintiff's claim "arise under" federal law, 28 U.S.C. § 1331, and it is especially significant, as then-district judge Rymer noted in *Handel v. Artukovic*, 601 F. Supp. 1421, 1427 (C.D. Cal. 1985): "the 'violation' language of section 1350 may be interpreted as explicitly granting a cause of action" even if "the 'arising under' language of section 1331 cannot." *Id*., at 1426-27 . The dissent below, which was joined by Judge Rymer, does not dispute this conclusion.

Interpreting the ATCA to require a separate enabling statute rewrites the text as though it provided federal jurisdiction over civil actions by aliens only for torts "*arising under statutes defining*" violations of the law of nations or a treaty of the United States. Judicial redrafting of that sort is foreclosed by the first principles of statutory construction: the original text does not allow it and the contemporary consequence would be to render the ATCA meaningless.[16]

3. "***The law of nations or a treaty of the United States***." Petitioner's interpretation of the ATCA is also foreclosed by the "law of nations" language in the statute. The law of nations was part of the law of the United States when the First Judiciary Act was adopted, and it defined actionable rights even without legislative implementation or incorporation by Congress. *See*

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[16] Citing no authority other than a law review article, Petitioner argues that the early cases interpreting the ATCA imply that the word "torts" refers only to wrongs under the law of prize. Pet. Br. at 29 n 9. This interpretation, implausible for many reasons, cannot be accepted because it renders ATCA superfluous from the day of its passage. Such wrongs would have been subsumed within the district court's admiralty and maritime jurisdiction. *See* William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the "Originalists*," 19 Hastings Int'l & Corp. L. Rev. 221, 243-53 (1996).

Historians' *Amicus Brf.*, at 11-21. To suggest, as Petitioner does, that the "law of nations" was unenforceable unless explicitly incorporated by Congress is directly contrary to the common understanding of international law at the time, as expressed by the Executive Branch, the courts, and the Congress itself.

a. ***The Executive Branch.*** Only six years after the First Judiciary Act, Attorney General Bradford recognized the status of the ATCA as the basis for an alien's suit to enforce international norms, without further Congressional action. The Attorney General was asked to consider the potential liability of U.S. citizens who had aided the French in attacking the British colony in Sierra Leone, in violation of the state-to-state obligations of neutrality. He concluded that torts in violation of the law of nations would be cognizable at common law, just as any other tort would be, *i.e.*, without the statutory permission Petitioner now argues is required:

> ... [T]here can be no doubt that the company or individuals who have been injured by these acts of hostility *have a remedy by 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 law of nations, or a treaty of the United States.

Breach of Neutrality, 1 *Op. Att'y Gen.* 57, 59 (1795). The injured aliens to whom Attorney General Bradford refers had no explicit statutory right to sue in tort, other than the ATCA, but Attorney General Bradford concluded nonetheless that the aliens' injury in violation of the law of nations or a treaty of the United States would be actionable in federal district court under

the predecessor to section 1350.[17] There is no hint that the Attorney General believed that Congress needed to act, as Sosa now claims, to implement ATCA. That the failure to provide such a civil remedy might cause an international incident, as Petitioner concedes, *Pet. Brf.* at 21-22, reinforces the propriety of ATCA actions.

Petitioner trivializes this contemporaneous statement from the Attorney General on the primary issue in this case, Pet. Br. at 37-38, n.13, by implausibly characterizing it as an overstatement. *See Historians' Amicus* Brief, at 20 n 14. But that explanation, as far-fetched as it is, still offers no escape from Attorney General Bradford's plain opinion, namely that the ATCA was available to remedy violations of the law of nations without any supplemental Congressional action.

b. ***The Judicial Branch***. Contemporaneous court decisions reinforce Attorney General Bradford's analysis.[18] In

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[17]Bradford's understanding was affirmed by Attorney General Bonaparte in 1907, after Mexico and the United States entered into a bilateral treaty defining the boundary between the two states and protecting certain riparian rights for both countries. Although the treaty provided for no private rights or obligations, the Attorney General concluded that an action under the ATCA would be proper, on the ground that the statutory precursor to the ATCA "provide[s] a right of action *and* a forum" if "the diversion of the water [of the Rio Grande] was an injury to substantial rights of citizens of Mexico *under the principles of international law* or by treaty, *and could only be determined by judicial decision*." Attorney General of the United States, *Mexican Boundary – Diversion of the Rio Grande*, 26 Op. Att'y Gen. 250, 252 (1907) (emphasis supplied).

[18] In its *amicus* submission, the Justice Department attempts to minimize the importance of these cases by arguing that the courts "considered Section 1350's predecessor only as a potential alternative basis for jurisdiction." This half-truth obscures the fact that the courts not only *considered* the statute as an alternate basis but also *accepted* it as such.

Bolchos v. Darrel, 3 F. Cas. 810 (D. S. Car. 1795), rendered only six years after the Judiciary Act, the plaintiff sought restitution for the value of slaves on a captured Spanish ship. The court recognized that it had jurisdiction in admiralty (an area of common law jurisdiction informed by the law of nations), but declared that, "as the [ATCA] gives this court concurrent jurisdiction ... where an alien sues for a tort, in violation of the law of nations, or a treaty of the United States, I dismiss all doubt" as to jurisdiction. *Id.* at 810. According to the court, both the law of nations and a treaty with France provided a rule of decision: "the law of nations would adjudge neutral property, thus circumstanced, to be restored to its neutral owner; but the 14th article of the treaty with France alters that law, by stipulating that the property of friends found on board the vessels of an enemy shall be forfeited." *Id.* at 811.

Nowhere in the opinion did the court make any mention of any additional Congressional action needed to allow the plaintiff to invoke substantive rights under the treaty or the law of nations. The latter rights already existed in American law by virtue of the incorporation of the law of nations into the common law of the United States. 1 James Kent, COMMENTARIES ON AMERICAN LAW 195 (13th ed. 2001); Edwin Dickinson, *The Law of Nations as Part of the National Law of the United States*, 101 *U. Pa. L. Rev.* 26, 35-36 (1952).

Similarly, in *Moxon v. The Fanny*, 17 F. Cas. 942 (1793), the district court for the district of Pennsylvania considered whether an action for the return of a ship allegedly seized in violation of international law could be brought under the ATCA. The court stated, "[n]either does this suit for a specific return of the property, appear to be included in the words of the [ATCA].... It cannot be called a suit for a tort only, when the property, as well as damages for the supposed trespass, are sought for." *Id.* at 947-48. There is no suggestion that a specific cause of action, above and beyond the tort in

question, was required. To the contrary, the suit failed not for lack of a cause of action but for the failure to plead it correctly.

Contemporary decisions by this Court and state courts under the law of nations also conclusively foreclose Petitioner's contention that customary international law rights at the founding of the Republic did not give rise to enforceable rights unless they were "otherwise authorized," *Pet. Brf.* at 29-30. *See, e.g.*, *Ware v. Hylton*, 3 U.S. (3 Dall.) 198 (1796); *Respublica v. De Longchamps*, 1 U.S. (1 Dall.) 111 (1784) (applying international law in criminal case without any legislative enactment).

In *The Nereide*, 13 U.S. (9 Cranch) 388 (1815), this Court confirmed that customary international law created enforceable rights even without any enactment or codification, declaring "[i]f it be the will of the government to apply to Spain any rule respecting captures which Spain is supposed to apply to us, the government will manifest that will by passing an act for the purpose. *Till such an act be passed*, the Court is bound by the law of nations which is a part of the law of the land." *Id.* at 423 (emphasis supplied). As shown in § I.C. 1, *infra*, customary international law remains an area in which no affirmative legislative act is required to "authorize" its application in U.S. courts. *See* Louis Henkin, *International Law as U.S. Law*, 82 MICH. L. REV. 1555, 1561 (1984) ("International law…is 'self-executing' and is applied by courts in the United States without any need for it to be enacted or implemented by Congress.") .

c. ***The Legislative Branch***. Contending that it is "inconceivable" that the First Congress meant what it actually said in the ATCA, Petitioner and his *amici* attempt to introduce uncertainty into the statute by perpetuating one judge's observation in 1975 that the statute is a "legal Lohengrin. . ." However, since 1975, when Judge Friendly made this statement, significant archival research makes it possible to

determine "whence it came."[19] In 1781, eight years prior to the Constitution of the United States and the First Judiciary Act, the Continental Congress, lacking the legislative power to do more, urged the newly independent states to enact judicial remedies for violations of the treaties of the United States and the law of nations. 21 JOURNAL OF THE CONT. CONG. 1774-1789, at 1137. The resolution specifically urged the States to "authorise suits to be instituted for damages by the party injured, and for compensation to the United States for damage sustained by them from an injury done to a foreign power by a citizen." *Id.* One year later, the Connecticut legislature passed "An Act to Prevent Infractions of the Laws of Nations," criminalizing specific violations of the law of nations and providing a tort-based remedy for injuries "to any foreign Power or to the Subjects thereof." *See* Acts and Laws of the State of Connecticut, in America 83 (1784).

That only one state followed the recommendation epitomized the inability of the Continental Congress to assure that the law of nations would be given effect in the new nation, including within the courts of the various states. This threat to the young Republic's international standing and security was made clear three years later when a French citizen, the Chevalier De Longchamps, assaulted the French Consul

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[19] *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975) (Friendly, J.). *See* Kenneth C. Randall, *Federal Jurisdiction over International Law Claims: Inquiries into the Alien Tort Statute*, 18 N.Y.U. J. Int'l L. & Pol. 1 (1985); William R. Castro, *The Federal Court's Protective Jurisdiction over Torts Committed in Violation of the Law of Nations*, 18 Conn. L. Rev. 467, 488-89 (1986); Anne-Marie Burley [Slaughter], *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 Am. Int'l L. 461 (1989); William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the "Originalists,"* 19 Hastings Int'l Comp. L. Rev. 221 (1996); Historian's *Amicus Brf.*, at 3-11.

General, Francis Marbois, on the streets of Philadelphia. *See Respublica v. de Longchamps*, 1 U.S. (1 Dall.) 111 (1784). As developed more fully in the Historians' *Amicus* Brief, the diplomatic outcry was immediate and sustained, but the national government was powerless, and the Continental Congress was obliged to explain to Marbois that its authority was limited by "the nature of a federal union in which each State retains a distinct and absolute sovereignty in all matters not expressly delegated to Congress leaving to them only that of advising in many of those cases in which other governments decree." 28 JOURNALS OF THE CONT. CONG. 1774-1789, at 314. The Pennsylvania Supreme Court eventually convicted de Longchamps for an offense against the law of nations, which, without legislative enactment, "in its full extent, . . . [is] part of the law of this State." *de Longchamps*, 1 U.S. (1 Dall.) at 116.[20]

There can be no doubt that Marbois could also have brought a common law tort action against his assailant in state court, and for Petitioner to argue that Marbois must have been powerless because there was no statute authorizing the action is to treat torts in violation of the law of nations *less favorably* than other torts. There is absolutely no basis in the historical record for that conclusion.

Four years after the Marbois incident, confronting a similar incident involving the Dutch Ambassador in New York City, the Secretary for Foreign Affairs, John Jay, conceded that "the foederal [sic] Government does not appear . . . to be vested with any judicial Powers competent to the Cognizance and Judgment of such Cases." Secretary for Foreign Aff. Rep. on the complaint of Minister of United Netherlands (Mar. 25, 1788), *reprinted in* 34 Journals of the Cont. Cong. 109, 111

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[20] The prosecution was led by William Bradford, later Attorney General of the United States, and author of the 1795 opinion on the ATCA, *supra,* at 15.

(1788). There can be no doubt that the delegates to the Constitutional Convention, like the members of the First Congress, had this recent experience in mind when they recalibrated the scales of power in the young Republic. At the Convention, Edmund Randolph and James Madison specifically complained about this weakness of the national government. 1 M. Farrand, The Records of the Federal Convention of 1787 24-25 (1911) (Randolph); *id*. at 316 (Madison). Madison later supported the Constitution on the ground that "[t]hese articles [of confederation] contain[ed] no provision for the case of offenses against the law of nations; and consequently [left] it in the power of any indiscreet member to embroil the Confederacy with foreign nations." THE FEDERALIST NO. 42, at 264-65 (J. Madison) (C. Rossiter ed., 1961).

The Constitution and the First Judiciary Act together transformed the recommendations in the 1781 resolution into law, granting to Congress the power to define and punish offences against the law of nations, U.S. CONST, art. I, § 8, cl. 10. In short order, Congress established the federal courts' criminal jurisdiction over wrongs "cognizable under the authority of the United States," Judiciary Act of 1789, ch. 20, §§ 9 & 11, 1 Stat. at 76-77, 78-79, and the federal courts' civil jurisdiction over "all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States." Judiciary Act of 1789, ch. 20, § 9, 1 Stat. at 77.[21] The following year, Congress defined some of the international crimes that were "cognizable under the authority of the United

[21]Sosa suggests that the unexpressed limitation on ATCA which he asks this Court to read into the statute reflects some undocumented compromise with the anti-federalists. *Pet. Brf.* at 16-18. In truth the lack of debate about the alien tort provision of the Judiciary Act shows that it was broadly accepted by Federalists and Anti-federalists alike.

States." In doing so, it identified the offences contained in the 1781 resolution, such as violations of safe-conducts and assaults on ambassadors and public ministers, *see* An Act for the Punishment of Certain Crimes against the United States, ch. 9, § 28, 1 Stat. 112, 118 (1790), but it also allowed the federal courts "to pronounce on additional offenses as they arose.... [B]oth the district and the circuit courts obtained jurisdiction over statutory and common law crimes in violation of the law of nations." Anne-Marie Burley [Slaughter], *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 *Am. J. Int'l L.* 461, 477 (1989).

Although the federal judiciary's power to enforce common law crimes was soon curtailed, *United States v. Hudson*, 11 U.S. (7 Cranch) 32 (1812), "its authority with respect to torts remained unchallenged." Burley, *supra*, at 477-78. Indeed, "for a considerable period in early American judicial history, the federal courts were free to develop a common law for civil cases . . . without provoking serious objection." Stewart Jay, *Origins of the Federal Common Law, Part 2*, 133 *U. Pa. L. Rev.* 1231, 1276 (1985).[22]

Given the notoriety of the Marbois incident, the prominence of the 1781 resolution, and the necessity of providing civil relief to aliens injured by violations of the law of nations, the fact that Congress then, as now, felt no additional need to define actionable international torts is not surprising. The simple explanation is truer to the text: Congress did not think it necessary to do more than it did to provide a

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[22]Emmerich de Vattel, the leading 18th-century publicist on the law of nations, *United States Steel Corp. v. Multistate Tax Comm.*, 434 U.S. 452, 462 n 12 (1978), underscored that providing a private remedy for foreigners injured by violations of international or domestic law was an essential means of reducing friction between nations. 2 EMMERICH DE VATTEL, THE LAW OF NATIONS, ch. 6, §§ 71 and 78 (Chitty, ed. 1852)

federal forum for these actionable violations of the law of nations. Sosa's interpretation, by contrast, would render the ATCA nugatory from its inception.

B. The Framers Understood the Transitory Tort Doctrine and Provided a Federal Forum in Which Such Claims Could Be Heard.

The Framers understood that tort suits between aliens fell within the individual states' general jurisdiction. Even before the American Revolution, civil actions in tort were routinely considered transitory, in that the tortfeasor's wrongful act created an obligation to make reparations, that followed him across national boundaries and was enforceable wherever he was found. This Court has traced the transitory tort doctrine to Lord Mansfield's opinion in *Mostyn v. Fabrigas*, 1 Cowp. 161 (K.B. 1774), noting that

> The courts in England have been open in cases of trespass other than trespass upon real property, [i.e. civil torts] to foreigners as well as to subjects, and to foreigners against foreigners when found in England, for trespass committed within the realm and out of the realm, or within or without the king's foreign dominions

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McKenna v. Fisk, 42 U.S. 241, 249 (1843). The state courts understood and regularly exercised this power.[23] Indeed, the

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[23] *See, e.g.*, *Watts v. Thomas*, 5 Ky. (2 Bibb) 458, 1881 WL 853 (1811); *Stout v. Wood*, 1 Blackf. 70 (Ind. Circ. Ct. 1820); *Taxier v. Sweet*, 2 U.S. (2 Dall.) 81, 84 (Sup. Ct. Penn. 1766); *Pease v. Burt*, 3 Day 485, 1806 WL 202, at *2 (Conn 1806) ("[A]ll rights of a personal nature are transitory. A right to personal property; a right to a personal action, whether founded on a contract, or on tort . . . extend to, and may be exercised, and enforced in, any other civilized country, where the

author of the First Judiciary Act, Oliver Ellsworth, who had also been a member of the Continental Congress that adopted the 1781 resolution, *supra*, and of the Connecticut legislature that implemented those recommendations, *supra*, had himself applied the transitory tort doctrine in 1786, while a sitting judge in Connecticut Superior Court. *Stoddard v. Bird*, 1 Kirby 65, 68, 1786 WL 19 at *2 (Conn. 1786) (Ellsworth, J.) ("Right of action [for the tort of false imprisonment] against an administrator is transitory, and the action may be brought wherever he is found.").

In these transitory tort actions, "[t]he theory of the foreign suit is that, although the act complained of was subject to no law having force in the forum, it gave rise to an obligation, which, like other obligations, follows the person, and may be enforced wherever the person may be found." *Slater v. Mexican Nat'l Ry. Co.*, 194 U.S. 120, 126 (1904). The general jurisdiction of the state courts extended to transitory torts, protecting each state's legitimate interest in the resolution of disputes brought within its borders. *See Dennick v. Central Ry. Co.,* 103 U.S. 11, 18 (1880) (recognizing transitory tort doctrine.) Then, as now, a narrow construction of the ATCA would simply give state courts exclusive authority over such tort claims. *See* William R. Casto, *The Federal Courts' Protective Jurisdiction Over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467, 510 (1986) (noting that a narrow construction of ATCA will vest state courts with jurisdiction, perhaps exclusive, over such claims.).

The First Congress would have had no reason to interfere with the states' right to hear ordinary transitory tort suits, but it would understandably have wished to assure the possibility of a federal forum for that limited subset of transitory torts that also involve a violation of the law of nations

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parties happen to be.")

or a treaty of the United States. Otherwise, the nation faced the prospect of multiple and inconsistent interpretations of international law, and the Framers' recent experience under the Articles of Confederation had confirmed that such a prospect was intolerable. *See* Historians' *Amicus Brf*, at 3-11. Section 1350 simply filled the need for that federal option. *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427 n 25 (1964) (describing Section 1350 as one of many statutes "reflecting a concern for uniformity in this country's dealings with foreign nations and . . . a desire to give matters of international significance to the jurisdiction of federal institutions.").

The contemporary interpretation of the ATCA is fully consistent with its language and history, and it also works no unprecedented enlargement of federal judicial power. The scope of the ATCA has seemed to increase only because all branches of government have accepted fundamental international human rights norms as part of the "law of nations." That the ATCA would be available to implement these commitments in appropriate cases is fully in keeping with the ATCA's language, context and intent. In defiance of both, Petitioner's proposed interpretation rests on his unsupported incredulity that the Founding generation would authorize federal courts to implement the law of nations and enforce the Nation's international commitments.

C. The *En Banc* Court's Interpretation of the ATCA Is Consistent with This Court's Traditional Approach to Both International Law as Law of the United States and to Causes of Action Generally.

1. International Law as Law of the United States

This Court has explicitly approved the application of international law in U.S. courts in the absence of Congressional enactment:

> International law is part of our law, and must be ascertained and administered by the courts of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. *For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and as evidence of these, to the works of jurists and commentators* who by years of labor, research, and experience have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.

The Paquete Habana, 175 U.S. 677, 700 (1900) (emphasis supplied). *See generally Talbot v. Janson*, 3 U.S. (3 Dall.) 133 (1795); *United States v. Smith*, 18 U.S. (5 Wheat.) 153 (1820); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S 398 (1964).

In *Paquete Habana* and its progeny, this Court articulated strict criteria for proving the content and

applicability of the law of nations when Congress has not addressed the international norm. As a consequence, contrary to the Petitioner's assertion, *Pet. Brf.* at 40-43, the ATCA does not and cannot enforce unratified or non-self-executing treaties.[24] Nor does the ATCA convert non-binding resolutions of the United Nations into law.

Paquete Habana and its progeny require the courts to identify the content of the law of nations by determining the existence *vel non* of a consistent state practice recognized out of a sense of legal obligation (*opinio juris*). *Restatement (Third), supra,* n 7, § 102(2). Customary international law consists of the actual rules that States abide by, or accede to, out of a sense of legal obligation and mutual concern. Although the process of ascertaining customary norms can be more laborious than domestic legal analysis, the Founders were quite familiar with this process. This Court has often employed the traditional means of determining the existence and scope of customary norms even without the authorization of Congress.

Contrary to Petitioner's hyperbolic recitation of abusive *claims* under the ATCA, the actual *decisions* of the courts under the ATCA show a judiciary familiar with this process, successfully distinguishing between norms that are "specific, universal, and obligatory,"[25] and those that are not.

In *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), the Second Circuit reached the unremarkable conclusion that the prohibition against torture was a violation of a "specific,

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[24]Nor can the ATCA be judicially limited to the enforcement of self-executing treaties, because that would delete the "law of nations" provision of the statute.

[25] *See, e.g. In re Estate of Ferdinand Marcos, Human Rights Litigation*, 25 F.3d 1467, 1475 (9th Cir. 1994) (torture); *Kadic v. Karadzic*, 70 F.3d 232, 241 (2d Cir. 1995), *cert. denied*, 518 U.S. 1005 (1996) (genocide).

universal, and obligatory" norm of customary international law, relying on multiple, reinforcing forms of evidence, as dictated by *Paquete Habana*. No government has disagreed with that conclusion,[26] based as it was *inter alia* on treaties in consistent form, laws and constitutions of states around the world, resolutions of international organizations condemning torture, the merely factual defenses offered by non-conforming states, the writings of publicists, and a brief from the United States supporting the exercise of jurisdiction. *Id.*, at 882-84. These authorities were consulted not because they were binding as a treaty might be, but because they offered conclusive evidence that states considered torture illegal as a matter of international

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[26] Some of Petitioners' *amici*, including the government of the United States and of three foreign states, oppose the use of the ATCA to redress torts in violation of international law that occur outside of U.S. territory. *See, e.g., U.S. Amicus Brf.* at 46-50. Notably, the transitory tort doctrine is ignored by these amici, even though it is well-known in the domestic law of each of them. But even on its own terms, the argument is unconvincing: the presumption against the extraterritorial application of U.S. law, which under this Court's precedent plainly applies to the DEA's statutory authority to arrest suspects abroad, *see* Dr. Alvarez' Brief in No. 03-485, cannot apply to common law transitory torts brought within the personal jurisdiction of U.S. courts by the defendant's very presence. To argue otherwise makes nonsense of this Court's transnational rulings in *Slater* and its progeny, as well as its history tutorial in *McKenna*, not to mention the briefs filed by the U.S. government supporting jurisdiction in *Filartiga* and *Karadzic*, infra. Moreover, because the law of nations consists in norms that are "specific, universal, and obligatory," courts interpreting the ATCA have carefully established that the wrongs at issue do not involve idiosyncratic norms. This is fully consistent with Attorney General Bradford's contemporaneous understanding of the ATCA's reach and its obvious application to extraterritorial conduct such as piracy. Finally, the explicit references in the ATCA to "aliens" and to the "law of nations" confirm that Congress intended that the ATCA would apply to conduct outside the United States. This was, of course, the view of Attorney General Bradford in 1795. *See* pp. 14-15, *supra*.

law. This is no more at odds with the judicial role than this Court's meticulous historical analysis of the norm protecting domestic fishing vessels from seizure as prize in times of war, *Paquete Habana*, 175 U.S. at 687-712, or the international norm defining piracy, *United v. Smith*, *supra*, or the lack of a norm limiting the right of states to nationalize the property of aliens, *Sabbatino*, 376 U.S. at 428-31.

Subsequent ATCA cases, including the cases cited by Petitioner, *Pet. Brf.* at 45, n. 14, show that the courts are not receptive to cases that do not satisfy the high burden of proof.[27] *See, e.g., Flores v. Southern Peru Copper Corp.*, 343 F.3d 140 (2d Cir. 2003) (environmental torts not in violation of customary international law).[28] In these cases, the courts

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[27] For his cause of action analysis, Petitioner and his *amici* rely heavily on Judge Bork's separate concurrence in *Tel-Oren v. Libyan Arab Republic*, *supra*, a *per curiam* dismissal the Solicitor General described at the time as "hav[ing] little, if any, precedential value." Brief of the United States as Amicus Curiae Filed in Opposition to Petition for Certiorari, at 9, *Tel-Oren v. Libyan Arab Republic*, 726 F. 2d 774 (D.C. Cir. 1984) (No. 83-2052). Although Judge Bork proffered the cause of action analysis relied upon by Sosa, his concurrence actually preserved the result in *Filartiga*, emphasizing that "the international law rule invoked in *Filartiga* was the proscription of official torture, a principle that is embodied in numerous international conventions and declarations, that is 'clear and unambiguous' in its application to the facts in *Filartiga*, [630 F.2d] at 884, and about which there is universal agreement 'in the modern usage and practice of nations.'" 726 F.2d at 819-20. Petitioner's similar reliance on Judge Randolph's concurrence in *Al Odah v. United States*, 321 F.3d 1134, 1145 (D.C. Cir. 2003), is similarly misplaced. *Pet Brf*, at 42. In *Al Odah*, a case resolved under *habeas* principles, no other member of the panel joined Judge Randolph's separate concurrence concerning the ATCA.

[28] For a more comprehensive description of cases rejecting ATCA claims, *see Brief of Human Rights Organizations*, at §I.

naturally give weight to the expressed positions of the Executive branch on the existence and meaning of a particular norm. But it does not follow that the customary norm does not exist just because a low level official violated it in a particular case; otherwise *Paquete Habana*, which has stood for over a century, would be incoherent. The fact that the Justice Department has taken litigation positions on behalf of Sosa and the United States in no way suggests that the United States has altered its consistent view that extraterritorial, nonconsensual abductions violate international law.

Nor is it unusual, unprecedented, imprudent or unconstitutional for federal courts to fashion common law principles to govern those aspects of ATCA litigation not governed by the express Congressional incorporation of tort law and the "law of nations."

Petitioner also objects to any interpretation of the ATCA that allows the federal courts to employ traditional federal common law techniques to facilitate the litigation of tortious international law violations under the ATCA. *Pet. Brf.* at 26-33. This argument is flawed in its premises.

Initially, Petitioner simply repeats his earlier contention that Congress intended the ATCA to be exclusively jurisdictional, *Pet. Brf.* at 27-30, and he cites *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981), for the proposition that "The vesting of jurisdiction in the federal courts does not in and of itself give rise to authority to formulate federal common law." *Id.*, at 640-41. A more complete analysis of *Radcliff Materials* must acknowledge that it unanimously recognized the "need and authority in some limited areas to formulate what has come to be known as 'federal common law' in cases in which a "federal rule of decision is necessary to protect uniquely federal interests,"

including "our relations with foreign nations." *Id.*, at 638-41 (1981).[29]

Petitioner now asserts that *Sabbatino* only stands for a rule of deference to the political branches, *Pet. Brf.* at 30, but nothing in *Radcliff Materials* or *Sabbatino* suggests that the political branches have plenary and exclusive control over the law of nations as the law of the United States. "Primacy," *Pet. Brf.* at 32, is not exclusivity, and the Framers certainly never understood that the federal judiciary's power to construe customary international law was subordinate to the concurrent authority of the political branches.[30]

For example, Petitioner and the government as *amicus curiae* stress the Constitutional power of Congress to "define and punish offences against the law of nations," and doubtless Congress can statutorily specify those offences or correct judicial "errors" in that regard, but it can also take the half-way step of directing federal courts to hear cases where such

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[29] *Accord Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425 (1964) ("we are constrained to make it clear that an issue concerned with a basic choice regarding the competence and function of the Judiciary and the national Executive in ordering our relationships with other members of the international community must be treated exclusively as an aspect of federal law.").

[30] Indeed, in ATCA cases other than this one, the Executive Branch has endorsed the power of the courts to apply the strict standards of customary international law and thereby to develop federal common law. *See, e.g.*, Memorandum for the United States to the Court of Appeals for the Second Circuit in *Filartiga v. Pena Irala*, (No. 79-6090), at 1, *reprinted in* 19 I.L.M. 585 (1980) ("Customary international law is federal law, to be enunciated authoritatively by the federal courts.") Congress expressed a similar understanding in the legislative history of the Torture Victim Protection Act, S. Rep. No. 102-249, at 6 n. 6 (1991) ("International human rights cases predictably raise legal issues – such as interpretations of international law – that are matters of federal common law and within the particular expertise of federal courts.").

offences are alleged, as in the ATCA itself. *Ex parte Quirin*, 317 U.S. 1, 27(1942). And even when Congress is silent, the Court may apply federal common law "necessarily informed both by international law principles and by articulated congressional policies." *First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 623 (1983) (O'Connor, J.) (citing, *inter alia,* the International Court's decision *in Case Concerning The Barcelona Traction, Light & Power Co.*, 1970 I.C.J. 3, for international standards of corporate law, *id.*, at 630 n.20). As shown below, the "articulated congressional policy" in this case fully supports *Filartiga* and its progeny.

The famous dictum of Justice Brandeis in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938), that "[t]here is no federal general common law," is too thin a reed to support Petitioner's claim that the federal courts must await permission from the political branches before consulting and applying the law of nations. Nothing in *Erie* suggests that this Court intended to displace more than a century of precedent and practice treating the law of nations as a legitimate and salutary example of federal common law. Philip Jessup, *The Doctrine of Erie Railroad v. Tompkins Applied to International Law*, 33 Am. J. Int'l L. 740 (1939).

Moreover, Petitioner's extension of *Erie* from its diversity context to the ATCA leads to the absurd conclusion that, in the absence of some supplemental cause of action legislation, "the law to be applied in any case is the law of the State," *Erie*, 304 U.S., at 78, threatening the very chaos that the founding generation thought it had avoided and that this Court

has repeatedly and recently disapproved. *American Ins. Ass'n v. Garamendi*, 123 S. Ct. 2374 (2003).[31]

In the ATCA, Congress authorized the federal courts to hear and decide cases involving tortious violations of the law of nations, but guided always by this Court's criteria for proving the content of customary international law. As is the case in many other contexts, including 42 U.S.C. § 1983, Congress did not supply detailed rules to govern the litigation of such cases. Thus, to make this grant of decision-making authority effective, the federal courts in ATCA cases must derive federal common law rules to govern such issues as statutes of limitation, standing to sue, exhaustion of remedies, third party complicity and the like. At any time Congress may disapprove of such common law rules of decision or the entire grant of decision-making authority in the ATCA.

2. Causes of Action

Petitioner invokes this Court's precedents for determining whether a substantive statute creates a private right of action, *e.g.*, *Guardians Ass'n v. Civil Serv. Comm'n,* 463 U.S. 582 (1983); *Alexander v. Sandoval*, 532 U.S. 275 (2001); and *Cannon v. University of Chic.*, 441 U.S. 677 (1979). *Pet. Brf.* at 9. None of these cases dealt with the language of a

[31] Petitioner's position tracks the arguments of the academic "revisionists" on the status of customary international law as law of the United States, *see* authorities cited at *Pet. Brf.* at 31-33, without acknowledging the failure of this critique to convince any court that their position is correct. Nor do Petitioner's address the numerous and persuasive critiques of the "revisionists"' view. *See, e.g.*, Ryan Goodman & Derek P. Jinks, *Filartiga's Firm Footing: International Human Rights and Federal Common Law*, 66 Fordham L. Rev. 463 (1997); Harold Hongju Koh, *Is International Law Really State Law*, 111 Harv. L. Rev. 1824 (1998); Gerald Neuman, *Sense and Nonsense about Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 Fordham L. Rev. 371 (1997).

statute that brought with it a common law right of action, and they are therefore readily distinguishable. Equally important, these cases make Congressional intent the dominant consideration in determining whether a statute creates a private right of action or not. *See also Touche Ross & Co. v. Redington,* 442 U.S. 560, 575-76 (1979) ("The central inquiry remains whether Congress intended to create, either expressly or by implication, a private cause of action."). As shown above, in this case, the ample textual, historical, and structural evidence of Congress's intent in passing the ATCA makes the test in *Sandoval* unnecessary and inappropriate. Certainly the difference between the vocabulary of rights in 1789 and the approach embodied in *Sandoval* cautions against using the convenient analysis offered by Petitioner.

Even on its own terms, however, the ATCA satisfies the *Sandoval* criteria, taken together. Petitioner focuses on only one of these, namely the presence or absence of "'rights creating' language." *Sandoval*, 532 U.S. at 288. But the ATCA's reference to a "tort in violation of the law of nations" qualifies if not as "rights-creating language," then certainly as rights-recognizing language, which better fits a statute that also establishes subject matter jurisdiction over an identifiable set of claims instead of creating some administrative or regulatory regime.

Petitioner ignores the other *Sandoval* criteria but the ATCA clearly satisfies them. *Sandoval* makes clear, for example, that a statute that focuses on the individuals protected implies an intent to confer rights on a particular class of persons. *Id*., at 289. *See also Gonzaga Univ. v. Doe*, 532 U.S. 273, 284 (2003): "For a statute to create such private rights, its text must be phrased in terms of the persons benefitted." *Id*., at 284 (*citing Cannon v. Univ. of Chicago,* 441 U.S. 677 (1979), 692 n.13). The ATCA clearly identifies a "class of persons protected versus regulated persons" by focusing on aliens who

are victimized by tortious violations of international law. *Sandoval*, 532 U.S. at 289. This is not a statute that focuses on regulating an agency or providing funds to some recipient. *Id*. at 289. And, in contrast to the administrative "methods of enforcement" provided by the statute in *Sandoval* and similar cases, here the ATCA clearly refers to a mode of enforcement that is quintessentially judicial. There was no need to create a separate remedial scheme in addition to the ATCA itself.

D. The Petitioner's Interpretation of the ATCA Fundamentally Mischaracterizes the Torture Victim Protection Act and Other Congressional and Executive Actions.

Petitioner's interpretation of the ATCA is incompatible with the enactment of the Torture Victim Protection Act of 1992 ("TVPA"), 28 U.S.C. § 1350 note. Congress expressly viewed the TVPA as reaffirming a pre-existing cause of action (and extending it to U.S. citizens), not as creating a new one. According to the House Report, "[t]he TVPA would establish an unambiguous and modern basis for a cause of action that has been successfully maintained under an existing law, section 1350 of the Judiciary Act of 1789 . . . ." H.R. Rep. No. 367, 102d Cong., 1st Sess., pt. 1 (1991).

Significantly, the House Report referred to the *Filartiga* decision with approval, affirmed the importance of ATCA, and indicated that the ATCA "should not be replaced." *Id.* The Senate Report contains virtually identical language. S. Rep. No. 249, 102d Cong., 1st Sess. (1991). Congress was also fully aware of the fractured opinions in *Tel-Oren* and Judge Bork's

views and, according to its principal sponsor, the TVPA was adopted to "lay it all to rest".[32]

The House Report also contradicts Petitioner's argument that "the actions of the 102nd Congress undermine, rather than support, implication of an ATCA cause of action," *Pet. Brf.* at 44. To the contrary, Congress was well aware that

> claims based on torture or summary executions *do not exhaust the list of actions that may appropriately be covered by section 1350.* That statute should remain intact *to permit suits based on other norms that already exist or may ripen in the future into rules of customary international law*.

H.R. Rep. No. 102-367, 102nd Cong. 1st., pt 1,at 4 (1991) *reprinted in* 1992 U.S.C.C.A.N. 84,86. Petitioner's contention that "aliens do not have a cause of action to sue for other alleged violations of international law," *Pet. Brf.*, at 44, is not supported by the text of the TVPA and is directly contradicted by its history.[33]

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[32] Torture Victim Protection Act of 1989, Hearings Before the Subcomm. on Immigration and Refugee Affairs of the Senate Comm. on the Judiciary, 101st Cong. 36, 65 (1990) (statement of Senator Specter).

[33] In numerous judicial decisions, the courts have found significance in the fact that Congress had a clear opportunity to revise or restrict the ATCA in light of *Tel-Oren* and did the opposite. *See, e.g., Wiwa v. Royal Dutch Petroleum Company*, 226 F.3d 88, 105 (2d Cir. 2000), *cert. denied*, 532 U.S. 941 (2001); *Cabello v. Fernandez-Larios*, 157 F.Supp. 2d 1345, 1365 (S.D. Fla. 2001); *Doe v. Islamic Salvation Front (FIS)*, 993 F.Supp. 3, 7 (D.D.C. 1998); *Abebe-Jira v. Negewo*, *supra,* 72 F.3d at 848; *Kadic v. Karadzic*, 70 F.3d 232, 241 (2d Cir. 1995).

Sosa and his *amici* invoke the TVPA as an implicit limit on the ATCA, as though the codification of *Filartiga* and its extension to U.S. citizens implicitly requires similar legislative authorization of specific "torts in violation of the law of nations or a treaty of the United States." As shown above, in order to make this argument, Petitioner has to distort the text and ignore the TVPA's explicitly stated intent.

No one, including Dr. Alvarez, argues that subsequent legislative history should be controlling authority in determining a prior Congress's intent. But this Court has observed that subsequent action by Congress "should not be rejected out of hand as a source that a court may consider in the search for legislative intent," *Andrus v. Shell Oil Co.*, 446 U.S. 657, 666 (1980). This is especially true here, given the similarities between the ATCA and the TVPA and the fact that "the earlier statute is broad but the subsequent statutes more specifically address the topic at hand." *Food and Drug Administration v. Brown & Wilkinson*, 529 U.S. 120, 143 (2000).

Nor can it be said that the TVPA is useful solely for the light it sheds on the original intent behind the ATCA: its significance lies in the evidence it offers that Congress approved the post-*Filartiga* trajectory of the Act and rejected the restrictive approach proposed by Judge Bork.[34] Equally important, in passing the TVPA only 13 years ago Congress could have repudiated the interpretation of ATCA challenged here. It could have expressed separation of powers concerns or any of the other concerns now expressed by Sosa and his *amici*. Instead Congress endorsed ATCA as a vehicle for U.S. courts to hear human rights claims. *See Lorillard v. Pons*, 434 U.S.

[34] It is axiomatic that Congress is presumed to know the law, including recent precedents directly applicable to the issue before it. *Cannon v. Univ. of Chi.*, 441 U.S. 677, 696-99 (1979).

575, 580-81 (1978). "Judicial interpretation and application, *legislative acquiescence*, and the passage of time have removed any doubt that a private cause of action exists for a violation of § 10(b) and Rule 10b-5, and constitutes an essential tool for enforcement of the 1934 Act's requirements." *Basic, Inc. v. Levinson*, 485 U.S. 224, 231 (1988) (*citing Ernst & Ernst*, 425 U.S. at 196; *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 730 (1975)) (emphasis supplied).

E. "Foreign Policy Implications" Do Not Justify a Prophylactic Barrier to All ATCA Litigation. Petitioner's Approach Circumvents Congressional Process and Violates the Separation of Powers.

Sosa and his *amici* assert that the separation of powers is a "compelling factor counseling hesitation" in the recognition of a cause of action under the ATCA. *See Pet.* Brf. at § III B. Repeatedly invoking the separation of powers, Petitioner and his *amici* actually pose the more certain threat to the separation of powers by asking this Court to amend the ATCA through limitations that are unwarranted by its text and context, without convincing the Congress that these limitations are necessary. The separation of powers should not lead the Court to interpret a statute – or any part of it – in such a way as to read it off the books.

The Justice Department argues that ATCA cases are inherently nonjusticiable because the types of claims that are being asserted today under the ATCA are inherently fraught with foreign policy implications, raising the possibility that citizens of U.S. allies will be sued under the ATCA or that litigation under the Act will compromise the war on terrorism. Of course, this case has no relation whatsoever to the war on terrorism. Failure to provide redress to Respondent is more likely to cause offense to our ally Mexico, which is precisely

why the ATCA was passed at the birth of the Republic. The main change over time is that the United States now enjoys unrivaled power when in 1789 the United States had much to fear from other nations. This reality should not alter the meaning of this statute. Even in the early days, the Founders entrusted the interpretation and enforcement of the law of nations to the nascent federal courts.

To suggest that the courts are powerless to prevent abusive or politically-charged cases is disingenuous.[35] The courts are equipped with all the doctrinal machinery necessary to assure that only legal standards, not political judgments, are considered, including *inter alia* the political question doctrine, the act of state doctrine, and *forum non conveniens*.[36] These

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[35] In ATCA litigation including *Filartiga, inter alia*, the Executive branch has assured the courts that proceeding with a case may be *more* consistent with the foreign policy interests of the United States than denying a remedy to the victims of human rights abuses. "[B]efore entertaining a suit alleging a violation of human rights, a court must first conclude that there is a consensus in the international community that the right is protected and that there is a widely shared understanding of the scope of this protection. . . When these conditions have been satisfied there is little danger that judicial enforcement will impair our foreign policy efforts. To the contrary, a refusal to recognize a private cause of action in these circumstances might seriously damage the credibility of our nation's commitment to the protection of human rights." Memorandum for the United States Submitted to the Court of Appeals for the Second Circuit in *Filartiga v. Pena-Irala*, 630 F. 2d 876 (2d Cir. 1980), *reprinted in* 19 I.L.M. 585, 604 (1980)("Filartiga Memorandum").

[36] *See, e.g., Kadic v. Karadzic*, 70 F.3d 232, 248-249 (2d Cir. 1995) ("We do not read *Filartiga* to mean that the federal judiciary must always act in ways that risk significant interference with United States foreign relations"). *Accord Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161 (5th Cir. 1999) (dismissed for failure to prove international standards); *Hamid v. Price Waterhouse*, 51 F.3d 1411 (9th

doctrines erect a crucial fact-dependent screen to guarantee that politically sensitive cases are excluded.

The political question doctrine for example is typically used to dismiss lawsuits that improperly enmesh the judiciary in matters that have been textually committed to a coordinate branch of government or that require the application of standards that are not judicially manageable. *Baker v. Carr*, 369 U.S. 186, 217 (1962). In the context of human rights litigation under the ATCA, courts have carefully distinguished those cases that do implicate the political question doctrine from those that do not. In the words of the Second Circuit, "universally recognized norms of international law provide judicially discoverable and manageable standards for adjudicating suits brought under the Alien Tort Act, which obviates any need to make initial policy decisions of the kind normally reserved for nonjudicial discretion." *Kadic*, 70 F.3d at 249. The application of the political question doctrine in specific ATCA cases is a case-by-case issue for future decisions.

Rather than acknowledge the power and flexibility of these doctrines, the Petitioner and the government as *amicus curiae* assert as a constitutional matter that the Executive branch is in complete and exclusive control of international relations. But "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." *Baker v. Carr*, 369 U.S. 186, 211 (1962). "[U]nder the Constitution, one of the Judiciary's characteristic roles is to interpret statutes, and [it] cannot shirk this

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Cir. 1995) (same); *Anderman v. Federal Republic of Austria*, 256 F. Supp. 2d 1098 (C.D.Cal., Apr. 15, 2003) (dismissed under political question doctrine); *Sarei v. Rio Tinto PLC*, 221 F. Supp. 2d 1116 (C.D.Cal. 2002) (act of state doctrine barred adjudication of environmental tort and racial discrimination claims).

responsibility merely because our decision may have significant political overtones." *Japan Whaling Association v. American Cetacean Society*, 478 U.S. 221, 230 (1986). In any event, there are times when the Executive branch has in its international relations recognized that the ATCA establishes both subject matter jurisdiction and a cause of action for serious violations of international law.[37]

This Court need not puzzle over the government's failure to acknowledge, let alone resolve, this discrepancy in its most recent filing. When an administrative agency construes an organic statute under which it exercises authority pursuant to congressional delegation, the Court will generally defer to that interpretation to the extent that it reflects some specialized expertise. *Chevron USA Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-43 (1984). But

> [when] the only or principal dispute relates to the meaning of the statutory term, the controversy must

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[37]The *amicus* brief submitted by International Jurists sets forth numerous such statements. The government's most recent *amicus* brief also contradicts its own submissions in litigation under the ATCA. In *Filartiga v. Pena-Irala*, the government argued that the law of nations as it had evolved obligated every state to respect the right of its own citizens to be free of torture and that this obligation bound the United States as well, even in the absence of additional Congressional enactments. According to the government, the modern-day torturer had – like the pirate in the eighteenth century – become *hostis humani generis*, the enemy of all mankind, and therefore liable wherever he might be found. *See Filartiga* Memorandum, at 601-606. The United States took a similar position fifteen years later in *Kadic v. Karadzic*, 70 F . 3d at 240 ("The Executive Branch has emphatically restated in this litigation its position that private persons may be found liable under the Alien Tort Act for acts of genocide, war crimes, and other violations of international humanitarian law. *See Statement of Interest of the United States* at 5-13").

> ultimately be resolved, not on the basis of matters within the special competence of the Secretary, but by *judicial* application of canons of statutory construction.

Barlow v. Collins, 397 U.S. 159, 166 (1970) (emphasis supplied).

Statutes such as the ATCA are administered by the courts, not by the Justice Department, and whether a statute authorizes claims to be heard in federal courts is for the courts to determine.. Nor will the courts defer when the interpretation offered by the government is inconsistent with the facial requirements of the statute and legislative intent, and this is especially true if the government's interpretation changes over time. *Immigration and Naturalization Service v. Cardoza-Fonseca*, 480 U.S. 421, 488 (1987); *Southeastern Community College v. Davis*, 442 U.S. 397, 411 (1979).

Of course, neither the political question doctrine nor the act of state doctrine nor any of the other doctrines designed to avoid separation of powers concerns are at issue in this case, though Sosa and the government have had more than a decade to raise such issues. By this Court's standards, this case does not raise separation of powers concerns preventing the courts from compensating Dr. Alvarez for his injuries. Congress has authorized the federal courts to hear the claims Dr. Alvarez has made.[38] The fact that a Mexican national may be found liable for damages for Dr. Alvarez' abduction under the ATCA cannot plausibly be argued to put the Judiciary in conflict with the Executive branch of government. The fact that the courts reject the Government's view about this particular abduction or even the Government's litigation position on the scope of the

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[38]As Justice Jackson emphasized in *Youngstown Sheet & Tube Co v. Sawyer*, 343 U.S. 579, 637-38 (1952), presidential power is necessarily diminished when Congress has spoken.

law of nations in this case is not cause for any constitutional concern. Otherwise, the courts would simply be required to implement any particular Administration's view of international law in any case before them. At least since *Marbury v. Madison*, this Court's understanding of its constitutional duty is inconsistent with any contention that it must defer in all circumstances to Executive authority regarding the law of nations.

F. The War on Terrorism and the Prospect of Corporate Liability for Complicity in Human Rights Violations Abroad Are Irrelevant to This Case.

Petitioner and the government justify the blanket claim that ATCA cases are categorically nonjusticiable by implying that the ATCA poses an unacceptable risk to the war against terrorism. In particular, they raise the prospect of suits against this Nation's allies as an obstacle in the war on terrorism.[39] But this cannot happen: foreign governments – friendly or otherwise – can only be sued under the Foreign Sovereign Immunities Act,[40] and this Court has held that the ATCA does not provide subject matter jurisdiction for lawsuits against

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[39] If ATCA cases truly posed such a threat, the government would surely have sought legislative reform of the ATCA in Congress. The absence of such action speaks volumes about the absence of any necessary conflict between the pursuit of human rights remedies and this country's national or economic security.

[40] 28 U.S.C. §§ 1330, 1601 *et seq*. Even lawsuits filed under the Foreign Sovereign Immunities Act are subject to significant restrictions. *See, e.g.*, *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993) (Saudi Arabia immune from lawsuit filed by U.S. citizen alleging torture). Moreover, FSIA lawsuits are far more likely to raise sensitive political concerns than ATCA suits and FSIA lawsuits are routinely filed against this Nation's allies.

foreign governments. *Argentine Republic v. Amerada Hess Shipping Corp.*, 428 U.S. 428, 436 (1989). In support of its assertion that ATCA cases could have serious implications for the war on terrorism, the government cites *Al-Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003), but the ATCA claim in that case was dismissed. Under the Court of Appeals decision in this case, ATCA actions cannot be brought against federal officials, but must be brought under the Federal Tort Claims Act, if at all. *Alvarez-Machain,* 331 F. 3d at 631.

There is considerable irony in the government's reliance on Judge Bork's concurrence in *Tel-Oren* that interpreted the ATCA to *deprive* a plaintiff of a remedy for a terrorist attack. In the twenty years since *Tel-Oren* was decided, and especially in the aftermath of the September 11th attacks, which surely qualify as crimes against humanity, the law of nations has developed to the point that the victims of terrorist attacks could use the ATCA to seek compensation from the terrorists, including those aiders and abettors of terrorism who may use the corporate form. *See Amicus of September 11th Families*. Of course, this case does not require this Court to recognize a claim under ATCA for terrorist attacks any more than it requires a decision about the legality of abducting alleged terrorists as part of the war against terrorism.

Equally irrelevant to this case are the circumstances under which a corporation may be found liable for human rights abuses. No part of Dr. Alvarez' case turns on any issue of corporate complicity for international law violations. Moreover, contrary to the dire warnings of some of Petitioner's *amici*, no court has ever held a corporation liable for human rights abuse simply because it was doing business at a time and place when abuses were occurring generally.

A variety of cases are currently pending in federal and state courts which draw on the centuries-old tradition of imposing individual liability for certain violations of

international law.[41] But many ATCA corporate cases have been dismissed, either because plaintiffs could not establish a violation of international law, *see e.g., Flores*, *supra*, or because of the political question doctrine: especially in the context of cases arising out of World War II against Japanese and German government entities or corporations, the treaties ending the war have been interpreted to render additional compensation or reparations a matter for the Executive branch. *See, e.g.*, *Hwang Geum Joo v. Japan*, 332 F,3d 679 (D.C. Cir. 2003). If anything, the corporate cases that have actually been decided reaffirm that

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[41] Article IV of the Genocide Convention, for example, requires that persons committing genocide be punished, "whether they are constitutionally responsible rulers, public officials or private individuals." Convention for the Prevention and Punishment of the Crime of Genocide, art. IV, Feb. 23, 1989, 78 U.N.T.S. 277. Common Article 3 of the Geneva Conventions of 1949, similarly bind non-state actors when they are parties to an international armed conflict, and the anti-slavery regime is similar in not requiring state action. Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Feb. 2, 1956, 6 U.S.T. 3114, T.I.A.S. 3362, 75 U.N.T.S. 31; Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Feb. 2, 1956, 6 U.S.T. 3217, T.I.A.S. 3363, 75 U.N.T.S. 85; Convention Relative to the Treatment of Prisoners of War, Feb. 2, 1956, 6 U.T.S. 3316, T.I.A.S. 3364, 75 U.N.T.S. 135; Convention Relative to the Protection of Civilian Persons in Time of War, Feb. 2, 1956, 6 U.S.T. 3516, T.I.A.S. 3365, 75 U.N.T.S. 287. These regimes do not distinguish between natural and juridical individuals, and international law would not protect a corporation that engaged in the slave trade or committed acts of genocide, or provided corporate cover for a piracy ring.

the courts have the necessary tools to distinguish non-justiciable or frivolous cases from those that are meritorious. This case is not a suitable vehicle for this Court's consideration of the ATCA in a corporate context.[42]

II. A *JUS COGENS* VIOLATION IS SUFFICIENT BUT NOT NECESSARY TO SATISFY THE REQUIREMENTS OF THE ALIEN TORT CLAIMS ACT.

Petitioner offers only a cursory answer to the second question on which *certiorari* was granted, namely whether the category of claims actionable under the ATCA is limited to violations of *jus cogens*.[43] The Court should decline any invitation to redraft the statute by raising the threshold above

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[43] Under Sup. Ct. Rule 14(1)(a), "[o]nly the questions set out in the petition, or fairly included therein, will be considered by the Court." Petitioner reframes the question from his *certioriari* petition and responds that a cause of action under the ATCA "should extend only to those norms to which the United States has assented," *Pet. Brf.* at (i), an argument that has nothing to do with *jus cogens* norms. The meaning of *jus cogens* is described in Section 102 of the *Restatement (Third) of Foreign Relations Law*:

> Some rules of international law are recognized by the international community of states as peremptory, permitting no derogation, and prevailing over and invalidating international agreements and other rules of international law in conflict with them. Such a peremptory norm is subject to modification only by a subsequent norm of international law having the same character.

American Law Institute, *Restatement (Third) of Foreign Relations Law*, §102, cmt. k. *See* Vienna Conv. on the Law of Treaties, May 23, 1969, Art. 53, 1155 U.N.T.S. 331, 344.

the already demanding requirement that the tort be – in the words actually used by Congress – in violation of "the law of nations or a treaty of the United States." A customary norm need not qualify as *jus cogens* in order to be justiciable generally[44] or specifically under ATCA. The standard for finding that a norm is part of the law of nations is demanding and more than sufficient in theory and in practice, to weed out insubstantial claims.

The lower courts have already noted the distinction between the "law of nations" and *jus cogens*. In *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699 (9th Cir. 1991), for example, the court determined that the "law of nations" (or customary international law) arises out of the "general and consistent practice of states followed by them from a sense of legal obligation," *id.,* at 715 (citing *Restatement (Third)* §102(2)), and defined the process by which it will determine whether a purported norm of customary international law satisfies that high standard. There is nothing in ATCA's language that requires or allows the higher and more controversial *jus cogens* standard.

Sosa's argument is also inconsistent with the decisions of every circuit court of appeals to address the issue, each of which has defined the category of actionable claims under the ATCA without any necessary reference to the *jus cogens* doctrine. "Actionable violations of international law must be of a norm that is specific, universal, and obligatory." *In re Estate of Ferdinand E. Marcos*, 25 F.3d 1467, 1474 (9th Cir. 1994) ("*Estate II*"). The "specific, universal, and obligatory" standard allows the court to distinguish between genuinely

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[44] *See, e.g., The Paquete Habana*, 175 U.S. 677 (1900), in which the government's interference with domestic coastwise fishing vessels in time of war violated an established customary international norm, but there was no showing that it was a *jus cogens* norm.

customary international law and merely idiosyncratic or aspirational norms. *See, e.g., Flores v Southern Peru Copper Corp., supra* (environmental claims); *Guinto v. Marcos*, 654 F. Supp. 276, 280 (S.D. Cal. 1986). For example, the mere fact that many or even all nations consider an act a violation of their domestic law does not suffice to create a principle of customary international law.[45] Where there is diversity of opinion internationally (e.g. freedom of expression norms) the "specific, universal, and obligatory" test is unlikely to be satisfied. *Guinto v. Marcos*, *supra*. Interpreting ATCA to apply to violations of the law of nations, in accordance with its actual words, has not created nor will it create any flood of ATCA cases.

III. RESPONDENT'S ABDUCTION WAS AN ARBITRARY ARREST UNDER INTERNATIONAL LAW

Respondent's abduction was an arbitrary arrest under well-established international law.[46] Indeed, the principle that an arrest without lawful authority is unlawful dates back at least as far as the Magna Carta.[47] The courts below determined as a matter of fact that Respondent was seized in his office at night by armed, unknown men, acting without legal authority, dragged to a waiting car, and detained against his will pursuant

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[45] *See, e.g., Benjamins v British European Airways* 572 F.2d 913 (2d Cir. 1978), *cert. denied*, 439 US 1114 (1979).

[46] Dr. Alvarez' abduction also violated the customary norm prohibiting transborder abduction. Dr. Alvarez discusses those norms in detail in his brief in *United States v Alvarez-Machain,* No 03-485, §I (C)(1).

[47] *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 186 (1963).

to no legal authority. His family was not informed of his whereabouts for days. There can be no serious dispute that this treatment violated Respondent's right to be free of arbitrary arrest and detention, a right recognized in virtually every multilateral and regional human rights treaty,[48] affirmed in the national constitutions of the majority of states in the world.[49]

The government of the United States has drawn on these principles before the International Court of Justice and

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[48] Article 9 of the Universal Declaration of Human Rights, *adopted* Dec. 10, 1948, G.A. Res. 217A (III), U.N. Doc A/810 at 71 (1948), for example provides that "[n]o one shall be subjected to arbitrary arrest, detention or exile." Article 9 of the International Covenant on Civil and Political Rights, *adopted* Dec. 16, 1966, *entered into force* March 23, 1976, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, similarly provides that "No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law." *See also* Article 5 of the European Convention; Article 7(3) of the American Convention; Article 6 of the African Charter of Human and People's Rights.

As noted in the Human Rights Organizations Amicus Brief, § III, not one of the international texts establishing this norm provides that an arbitrary detention is only wrongful if it is "prolonged." *See Paul v. Avril*, 901 F. Supp. 330, 336 (S. D. Fla. 1994) (awarding damages to an individual detained for less than ten hours). The courts below were correct in the limited weight it gave to the *Restatement's* anomalous departure from the international standard. Section 702(e) of the *Restatement (Third)* defines "prolonged arbitrary detention" as a violation of international law, and the commentary to that section provides that "arbitrary detention violates customary law if it is prolonged and practiced as state policy."

[49] See 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. 325, 360– 61 (1993).

prevailed in *Case Concerning United States Diplomatic and Consular Staff in Tehran (United States v Iran)*, 1980 I.C.J. 42 at ¶ 91. The courts that have addressed this issue have repeatedly held that the arbitrary arrest and detention violate international law.[50] In *Martinez v. City of Los Angeles*, 141 F.3d at 1384, for example, the court found a "clear international prohibition against arbitrary arrest and detention" and established that the ATCA reaches such conduct. Under *Martrinez*, "detention is arbitrary if 'it is not pursuant to law; it may be arbitrary also if it is incompatible with the principles of justice or with the dignity of the human person.'" *Id.*, *citing Restatement (Third) of the Foreign Relations Law of the United States* §702 cmt. h (1987).

After investigating Respondent's abduction, the United Nations Working Group on Arbitrary Detention, established by the U.N. Human Rights Commission, concluded that

> [t]he detention of Humberto Alvarez-Machain is declared to be arbitrary, being in contravention of article nine of the Universal Declaration of Human Rights and article 9 of the International Covenant on Civil and Political Rights and principle two of the body of principles [governing arbitrary detention] adopted by the [United Nations] General Assembly in resolution 43/173....

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[50] *See, e.g.*, *Martinez v. City of Los Angeles*, 141 F.3d 1373, 1384 (9th Cir. 1998); *Siderman de Blake v. Argentina*, 965 F.2d at 717.; *Committee of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 940 (D.C. Cir. 1988); *De Sanchez v. Banco Central de Nicaragua*, 770 F.2d 1395, 1397 (5th Cir. 1985); *Xuncax v. Gramajo*, 886 F. Supp. 162, 184-85 (D. Mass 1995); *Paul v. Avril*, 901 F. Supp. 330, 335 (S.D. Fla. 1994); *Forti v. Suarez Mason*, 672 F. Supp. 1531, 1541 (N.D. Cal. 1987).

Report of the Working Group on Arbitrary Detention, U.N. Commission on Human Rights, 50th Sess., Agenda Item 10, at 140, U.N. Doc. E/CN.4/1994/27 (1993), at 139-40.

The lower courts were correct in finding that Respondent's abduction was lawless and constituted arbitrary arrest under international law. Any other finding is irreconcilable with the core concept of the rule of law recognized in Anglo-American jurisprudence for centuries and embraced by international human rights law.

CONCLUSION

For all these reasons the judgment should be affirmed.

Dated: February 27, 2004

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