Note

Still Crying Out for Clarification: The Scope of Liability Under the Alien Tort Statute After *Sosa*

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Introduction

Concurring in the D.C. Circuit's landmark case of *Tel-Oren v. Libyan Arab Republic*,[1] Judge Harry T. Edwards remarked that international human rights litigation under the Alien Tort Statute[2] ("ATS") was an "area of the law that crie[d] out for clarification by the Supreme Court."[3] When Judge Edwards wrote these words, the ATS—originally enacted as part of the Judiciary Act of 1789[4] and essentially dormant since then—had recently been "resurrected"[5] by the Second Circuit in *Filartiga v. Pena-Irala*,[6] the first case to recognize

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1 Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984). For a discussion of *Tel-Oren*, see *infra* Part I.B.2.

2 28 U.S.C. § 1350 (2000). The statute provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." *Id.*

3 *Tel-Oren*, 726 F.2d at 775 (Edwards, J., concurring).

4 *Id.*

5 Aron Ketchel, Note, *Deriving Lessons for the Alien Tort Claims Act from the Foreign Sovereign Immunities Act*, 32 YALE J. INT'L L. 191, 191 (2007).

6 Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980).

the ATS as a vehicle for international human rights litigation in U.S. district courts. Still, uncertainty lingered; there was no well-developed body of decisional law construing the ATS,[7] and the original purpose of the statute remained unclear.[8] This uncertainty gave some courts—including the D.C. Circuit in *Tel-Oren*—pause as they confronted new civil suits under international human rights law. Hence Judge Edwards's call for clarification from the Supreme Court.

Some twenty years after *Tel-Oren*, the High Court finally attempted to provide that long-awaited guidance in *Sosa v. Alvarez-Machain*.[9] In that case, a Mexican national, Alvarez, brought a civil action against Sosa, a fellow Mexican national, in federal district court. Alleging that the U.S. Drug Enforcement Agency ("DEA") had hired Sosa to abduct Alvarez and bring him to the United States to stand trial for his role in the torture and murder of a DEA agent,[10] Alvarez sued Sosa (among others), claiming that his seizure constituted a tort committed in violation of international law, and that the ATS applied to such a violation.[11] Alvarez argued that because the ATS granted federal courts jurisdiction to hear claims for "tort[s] . . . committed in violation of the law of nations,"[12] his claim for "arbitrary arrest and detention"[13] was cognizable under the statute because the conduct alleged violated customary international law.[14] Sosa countered that the ATS was unavailable as a source of relief because the statute was merely jurisdictional—that it neither created nor authorized courts to recognize any cause of action without further congressional enactment.[15] In other words, Sosa contended that customary international law could not provide a cause of action; only Congress could. At last, the Supreme Court was positioned to respond to Judge Edwards's call for clarification that had gone unanswered for two decades.

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7 *See Filartiga*, 630 F.2d at 878 (describing the ATS as a "rarely-invoked provision").

8 *See* discussion *infra* Part I.A.

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

10 *Id.* at 697–98.

11 *Id.* at 698–99.

12 28 U.S.C. § 1350 (2000). The term "law of nations" has been supplanted by "customary international law." Both terms refer to "the customary rules and obligations that regulate[ ] interactions between states and certain aspects of state interaction with individuals." Ralph G. Steinhardt, *Laying One Bankrupt Critique to Rest:* Sosa v. Alvarez-Machain *and the Future of International Human Rights Litigation in U.S. Courts*, 57 VAND. L. REV. 2241, 2242 n.1 (2004). This Note uses the terms interchangeably.

13 *See Sosa*, 542 U.S. at 699.

14 *Id.* at 735–36.

15 *Id.* at 714.

Although Alvarez's claim ultimately failed,[16] the Court's holding in *Sosa* nonetheless appeared to be a modest victory for human rights advocates, many of whom had long celebrated the ATS as a means of enforcing international human rights law in U.S. courts.[17] The Supreme Court rejected Sosa's argument that the ATS was "stillborn" and that there "could be no claim for relief without a further statute expressly authorizing adoption of causes of action."[18] And the Court cited with approval the line of ATS cases that had featured the broadest interpretations of the statute, including the Second Circuit's decision in *Filartiga*,[19] which arguably stood for the proposition that the ATS provides a basis for alien victims of certain human rights abuses to bring private lawsuits against their assailants.[20] Ultimately, *Sosa* seemed to be a harbinger of more—and more successful—human rights litigation in U.S. courts.[21]

But ATS cases since *Sosa* have shown that this initial optimism was misplaced. Far from resolving the disagreement among courts and scholars regarding the nature of the ATS, *Sosa*'s aftermath has featured a new round of vigorous and divisive debate among the circuits as to the place of international law in U.S. courts and the workings of the laconic statute.[22] This debate has brought increasing frustration of ATS claims in certain U.S. courts.[23] Despite the Supreme Court's much anticipated pronouncement, litigation under the ATS, it seems, is once again an "area of the law that cries out for clarification."[24]

This Note identifies the terms and the stakes of the post-*Sosa* debate about the nature of the ATS and suggests that the most pressing issue regarding the statute's application is no longer *what* constitutes a cognizable claim under the ATS but rather *who may be amenable to suit* under the ATS. Although *Sosa* did not address the latter issue

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16 *See infra* Part II.A.

17 *See, e.g.*, Benjamin Berkowitz, Recent Development, Sosa v. Alvarez-Machain*: United States Courts as Forums for Human Rights Cases and the New Incorporation Debate*, 40 HARV. C.R.-C.L. L. REV. 289, 296–97 (2005); Steinhardt, *supra* note 12, at 2246–47; *see also* Linda Greenhouse, *Human Rights Abuses Worldwide Are Held to Fall Under U.S. Courts*, N.Y. TIMES, June 30, 2004, at A21.

18 *Sosa*, 542 U.S. at 714.

19 *See id.* at 731–32.

20 *See* Filartiga v. Pena-Irala, 630 F.2d 876, 889–90 (2d Cir. 1980).

21 *See* Greenhouse, *supra* note 17.

22 *See infra* notes 125–26 and accompanying text.

23 *See infra* Part II.B.

24 Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 775 (D.C. Cir. 1984) (Edwards, J., concurring).

directly, this Note contends that the Court's holding regarding the kinds of claims for which the ATS provides jurisdiction compels a broad approach to the question of who is amenable to suit under the ATS. This question is particularly urgent today: although by and large suits under the ATS during the first twenty years of its revival involved foreign defendants, the controversial tactics of the "War on Terror" have led to an increasing number of ATS suits filed against U.S. nationals.[25] These suits bring to the foreground the problem of the ATS's scope and raise issues about sovereign immunity and the extent to which U.S. nationals should be treated differently from foreign defendants in ATS suits.

In light of the recent challenges to the viability of the ATS, this Note argues that courts interpreting the statute should be guided by the principles underpinning the jurisprudence of 42 U.S.C. § 1983, the Civil Rights Act of 1871, which has become the "dominant civil mechanism for vindicating constitutional rights in America."[26] The operational similarities between the ATS and § 1983 have been noted by several courts,[27] and the Second Circuit has explicitly turned to certain § 1983 principles in applying the ATS.[28] But this Note proposes moving beyond the current case law and advocates a wholesale grafting of § 1983 doctrine—including its definitions of rights, obligations, and, perhaps most importantly, immunities—onto the ATS. Indeed, this Note calls for nothing less than the reconceptualization of the ATS as a kind of "international § 1983."

Bringing § 1983 to bear on the ATS is not only consistent with *Sosa* and the line of ATS cases it endorsed, but is also necessary for the continued legitimacy and viability of the ATS as the basis for human rights litigation in U.S. courts. As this Note shows, the principles underpinning § 1983 provide a framework for construing the scope of the ATS that ensures the equitable administration of the statute—and thus the legitimacy of U.S. courts as arbiters of international

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25 *See infra* Part II.B.

26 MARK R. BROWN & KIT KINPORTS, CONSTITUTIONAL LITIGATION UNDER § 1983, at v (2003).

27 *Cf.* Kadic v. Karadžić, 70 F.3d 232, 245 (2d Cir. 1995) (construing language in the Torture Victim Act by looking to jurisprudence under 42 U.S.C. § 1983); Filartiga v. Pena-Irala, 630 F.2d 876, 885 n.18 (2d Cir. 1980) (discussing 42 U.S.C. § 1983 in the context of jurisdiction over extraterritorial torts).

28 *See Kadic*, 70 F.3d at 245 ("The 'color of law' jurisprudence of 42 U.S.C. § 1983 is a relevant guide to whether a defendant has engaged in official action for purposes of jurisdiction under the Alien Tort [Statute].").

law—as well as the continued availability of the ATS as a basis for international human rights claims.

Part I revisits the seminal cases that gave shape to the pre-*Sosa* ATS doctrine—cases containing the seeds of the most crucial post-*Sosa* debate about the statute, namely, the debate about who may be sued under the ATS. Part II focuses on *Sosa* itself, addressing how the Supreme Court engaged with the line of cases leading up to the decision and exploring the ramifications of the opinion for future ATS litigation. Specifically, Part II demonstrates that the *Sosa* Court's opinion should be understood as an unequivocal endorsement of what the Court refers to as the "modern line" of ATS cases, a series that begins with *Filartiga*.

Despite the *Sosa* Court's endorsement of these cases, however, Part II goes on to show that recent ATS litigation has featured a series of frustrating defeats for plaintiffs. Two recent decisions, *Ibrahim v. Titan Corp.*[29] and *In re Iraq and Afghanistan Detainees Litigation*,[30] illustrate this phenomenon and show the difficulties that courts face as they attempt to define who can and cannot be held liable under the ATS. After analyzing these two recent cases, the Note proposes a solution to the "scope of liability" problem under the ATS.

Part III proposes that human rights litigation under the ATS should be guided by the principles underpinning the jurisprudence of 42 U.S.C. § 1983. After briefly introducing that statute and the key concepts that comprise § 1983 doctrine, Part III demonstrates why § 1983 provides an appropriate approach to ATS litigation.

Fully implementing an international § 1983 regime under the ATS not only will involve the courts recognizing § 1983 jurisprudence as their guide to ATS litigation, but also will necessarily involve action by Congress to remove the statutory impediments to equal treatment of foreign and U.S. defendants in cases arising under the ATS. Accordingly, Part III concludes by recommending that Congress amend the Federal Employees Liability Reform and Tort Compensation Act of 1988,[31] commonly known as the Westfall Act, by providing an exception for torts committed in violation of international human rights law. Such an amendment would not leave federal employees entirely without immunity; rather, it would replace the Westfall Act's absolute

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29 Ibrahim v. Titan Corp., 391 F. Supp. 2d 10 (D.D.C. 2005).

30 *In re* Iraq & Afg. Detainees Litig., 479 F. Supp. 2d 85 (D.D.C. 2007).

31 28 U.S.C. § 2679 (2000). This statute currently provides employees of the federal government with absolute immunity from liability for torts committed within the scope of their employment. *See id.* § 2679(d)(1).

immunity with a qualified immunity similar to that provided defendants in § 1983 cases.

I. The Birth and Rebirth of the ATS

A. The ATS in Its Historical Moment

Writing for the Court in *Sosa*, Justice Souter began the discussion of Alvarez's ATS claim by quoting Judge Friendly's famous description of the ATS as a "legal Lohengrin": like the famous knight of Arthurian legend, "'no one seems to know whence [the ATS] came.'"[32] Although not everyone agrees that the origins of the ATS are entirely inaccessible,[33] the lack of direct evidence of congressional intent has certainly fueled the debate about its operation.[34] This Part briefly explores what we know of the original purpose of the ATS, a basic understanding of which is a necessary prerequisite to comprehend the debates accompanying the statute's rebirth in the modern line of ATS cases.

1. The ATS as an "Interactive" Jurisdictional Statute

The First Congress passed what we now call the ATS as part of the Judiciary Act of 1789, which created the federal district courts. Section 9 of the Judiciary Act, in which the ATS appeared, was dedicated almost exclusively to defining the jurisdiction of the newly created courts.[35] As it was enacted, the statute provided that the district courts would "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."[36]

Despite the Supreme Court's general reluctance to imply a cause of action where Congress has not expressly provided one, the *Sosa* Court found that the early history of the ATS showed that the ATS was meant to "interact" with the common law of its time.[37] Just as it

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32 Sosa v. Alvarez-Machain, 542 U.S. 692, 712 (2004) (quoting IIT v. Vencap, Ltd., 519 F.2d 1001, 1015 (2d Cir. 1975)).

33 *See, e.g.*, Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AM. J. INT'L L. 461, 463–64 (1989); William R. Casto, *The Federal Courts' Protective Jurisdiction over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467, 488–510 (1986).

34 *See* Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 812 (D.C. Cir. 1984) (Bork, J., concurring) (finding no direct evidence of congressional intent).

35 Act of Sept. 24, 1789, ch. 20, § 9, 1 Stat. 73, 76–78.

36 *Id.* § 9, 1 Stat. at 77.

37 *Sosa*, 542 U.S. at 714.

does today, the common law in 1789 included the law of nations,[38] a body of law that contains its own causes of action. In pointing out that giving courts "cognizance" of causes of action would have been understood as a grant of jurisdiction—and "not power to mold substantive law"[39]—the *Sosa* Court put to rest decades of confusion over whether the ATS was solely jurisdictional or actually created certain causes of action. What the statute provided, the Court concluded, was something in between: the ATS laid the jurisdictional foundation that allowed the newly formed district courts to hear causes of action arising under the law of nations.[40]

2. The Law of Nations in 1789

But what was the law of nations in 1789? Courts and scholars invariably answer this question by looking to William Blackstone, to whom the First Congress looked as well.[41] Volume Five, Book Four, Chapter Five of Blackstone's *Commentaries* is titled, "Of Offences Against the Law of Nations."[42] Although Blackstone points out that "offences against this law are principally incident to whole states or nations,"[43] he does recognize that private individuals can also violate the law of nations, in which case

> it is then the interest as well as duty of the government, under which they live, to animadvert upon them with a becoming severity, that the peace of the world may be maintained. For in vain would nations, in their collective capacity, observe these universal rules, if private subjects were at liberty to break them at their own discretion . . . .[44]

Though the sanction for an individual's violation of the law of nations should be severe, there were, Blackstone explained, only three principal offenses against the law of nations for which individuals could be held liable: (1) violation of safe-conducts (i.e., violation of

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38 *See* Steinhardt, *supra* note 12, at 2255 ("[*Sosa*] may be viewed as an unremarkable reaffirmation of the traditional doctrine, famously articulated in *Paquete Habana*, that 'international law is part of our law and must be ascertained and administered by courts of justice' . . . .").

39 *Sosa*, 542 U.S. at 713.

40 *See id.* at 714–15.

41 *See id.* at 715; Casto, *supra* note 33, at 489 (noting that "Blackstone informed the drafters of the Judiciary Act that under the common law private individuals must conform their conduct to the law of nations").

42 WILLIAM BLACKSTONE, 4 COMMENTARIES *66.

43 *Id.* at 66–67.

44 *Id.* at 68.

the rights of a foreign national who is legally in one's country),[45] (2) infringement of the rights of ambassadors, and (3) piracy.[46]

3. The "Classical Paradigm" of International Law

This relatively limited definition of the law of nations for the purposes of the ATS was one reason why for nearly two centuries the ATS essentially lay dormant.[47] Also responsible for this dormancy, however, was the rise in the nineteenth century of the traditional view or "classical paradigm"[48] of international law, the central tenet of which was that international law established "substantive principles for determining whether one country has wronged another."[49] In other words, according to this view, international law governed the relationships between states, not individuals. As this theory took root, suits against individuals under international law—even the kinds Blackstone imagined—became anomalous and remained so until the middle of the twentieth century.[50]

The "predominantly statist"[51] understanding of international law began to give way in the years following World War II, when the Nuremberg Tribunal's celebrated judgment signaled the beginning of a break with the classical paradigm[52]: "[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."[53]

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45 *See* Thomas H. Lee, *The Safe-Conduct Theory of the Alien Tort Statute*, 106 COLUM. L. REV. 830, 836–37 (2006).

46 BLACKSTONE, *supra* note 42, at 68. Echoing what is now a rather uncontroversial point among ATS scholars, the *Sosa* Court remarked that "[i]t was this narrow set of violations of the law of nations . . . that was probably on minds of the men who drafted the ATS." *Sosa*, 542 U.S. at 715.

47 *See* Jeffrey M. Blum & Ralph G. Steinhardt, *Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act After* Filartiga v. Peña-Irala, 22 HARV. INT'L L.J. 53, 55–56 (1981) (noting that courts had sustained jurisdiction under the ATS in only two cases prior to 1980).

48 *See id.* at 64–67.

49 Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 422 (1964).

50 *See* Blum & Steinhardt, *supra* note 47, at 56.

51 Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 792 n.22 (D.C. Cir. 1984) (Edwards, J., concurring).

52 *See* Blum & Steinhardt, *supra* note 47, at 64 (noting that "the growth of human rights norms since 1945 has cast doubt upon the restrictive view's continuing validity").

53 INT'L MILITARY TRIBUNAL, 22 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 466 (1948). Blum and Steinhardt point out that "the international community affirmed the Nuremberg Principles in the Geneva Conventions of 1949." Blum & Steinhardt, *supra* note 47, at 68.

But although the movement away from the classical paradigm had begun in earnest by the late-1940s and early-1950s, it was not until 1980 that the ramifications of this movement were fully realized in the U.S. It was, of course, in that year that the Second Circuit decided *Filartiga v. Pena-Irala* with an opinion that marked a definitive break with the classical paradigm of international law and forever altered the status of international human rights law in U.S. courts. It is to that landmark decision that this Note now turns.

B. The Beginning of the "Modern" Line of ATS Cases

1. Filartiga v. Pena-Irala

Plaintiffs in *Filartiga* were citizens of Paraguay whose family member, Joelito Filartiga, they contended, was tortured to death by Americo Norberto Pena-Irala, Inspector General of Police in Asuncion, Paraguay.[54] Shortly after Joelito's sister, Dolly, came to the U.S. seeking political asylum, Pena-Irala also entered the country.[55] When Dolly learned of his presence, she caused Pena-Irala to be served with a civil complaint alleging wrongful death by torture, with the cause of action arising under a number of international human rights instruments.[56] The complaint alleged jurisdiction under the ATS.[57]

The U.S. District Court for the Eastern District of New York dismissed the case on jurisdictional grounds, construing "the law of nations," as used in the ATS, to exclude the law governing a state's treatment of its own citizens.[58] The Second Circuit reversed,[59] and in a magisterial opinion laid the analytical foundation for subsequent human rights cases brought under the ATS.

The *Filartiga* court assumed that the ATS was merely a jurisdictional statute.[60] Yet the way the court approached the jurisdictional question involved the threshold substantive question as to whether the

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54 Filartiga v. Pena-Irala, 630 F.2d 878 (2d Cir. 1980). Dr. Joel Filartiga was a self-described "longstanding opponent" of the regime of President Alfredo Stroessner, and the torture and murder of his son Joelito, was thought to be in retaliation for Dr. Filartiga's political activities. *Id.*

55 *Id.*

56 *Id.* at 879. These instruments included "the U.N. Charter; the Universal Declaration on Human Rights; the U.N. Declaration Against Torture; the American Declaration of the Rights and Duties of Man; and other pertinent declarations, documents and practices constituting the customary international law of human rights and the law of nations." *Id.*

57 *Id.*

58 *Id.* at 876, 880.

59 *Id.* at 878.

60 *See id.* at 880.

alleged conduct (i.e., torture) constituted a tort committed in violation of the law of nations for which individuals could seek recovery and be held liable under the ATS.[61] The Second Circuit concluded that for a claim to be cognizable under the ATS, the claim must allege the violation of a "settled rule of international law"[62]—a rule that had garnered the "general assent of civilized nations."[63] After reviewing a number of international legal instruments, including the United Nations Charter, the Universal Declaration of Human Rights, and, most importantly, the Declaration on the Protection of All Persons from Being Subjected to Torture,[64] the court concluded that "deliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human rights, regardless of the nationality of the parties. Thus, whenever an alleged torturer is found and served with process by an alien within our borders, [the ATS] provides federal jurisdiction."[65]

Filartiga was revolutionary for two principal reasons. First, the court established that certain norms of customary international law were enforceable by private lawsuits in U.S. federal courts, and, more importantly, that those norms were not limited to the ones the First Congress would have had in mind when the ATS was enacted. Rather, international legal norms were constantly evolving, and "courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today."[66]

Second, the court defied the "classical paradigm" of international law by allowing a suit to go forward which involved neither states in conflict with each other, nor an individual in conflict with a state, nor even a national of one state in conflict with a national of another.

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61 *See id.* at 880–85. The case thus required the court to ascertain the rights and obligations existing under the law of nations. In doing so, the Second Circuit followed the Supreme Court's famous guidance laid down in the early nineteenth century. *See id.* at 880. In *United States v. Smith*, 18 U.S. (5 Wheat.) 153 (1820), the Supreme Court explained that the law of nations "may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognising and enforcing that law." *Id.* at 160–61.

62 *Filartiga*, 630 F.2d at 881 (quotation omitted).

63 *Id.* (quotation omitted).

64 *Id.* at 881–82.

65 *Id.* at 878.

66 *Id.* at 881. Importantly, these norms did not have to provide explicitly a private right of action in order to be cognizable under the ATS; if the right was well defined, the court could imply a cause of action where it found a violation of international law. *Id.* at 885–89; *see also* Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 777 (D.C. Cir. 1984) (Edwards, J., concurring) (endorsing *Filartiga* court's conclusion that claims brought under the ATS were cognizable where plaintiff alleged substantive violation of the law of nations).

Rather, *Filartiga* featured a private lawsuit between two citizens of the same state in a U.S. court. It thus established that individuals have obligations to each other under international law.[67]

That said, the *Filartiga* court did not entirely abandon the traditional, predominantly statist view of international law, for the international norm announced by the court applied specifically to deliberate torture "perpetrated under color of official authority."[68] In other words, the court found that the defendant had to have some official connection to a state to be held liable under the ATS. Why the court imposed this limitation is not clear; some of the international legal documents from which it inferred the norm against torture, though binding only on states, nonetheless express the prohibition as affecting all individuals.[69] Furthermore, the suit was against Pena-Irala in his individual capacity—the Paraguayan government was not a party to the litigation. Nor did Pena-Irala attempt to claim diplomatic immunity from suit.[70]

In the end, by limiting its holding to individuals who were state actors, the court, it appears, attempted to find some middle ground between the traditionally statist model and a new vision of international law as binding on individuals. But the court left open the question of what it meant to act under color of official authority. Thus, although the *Filartiga* opinion did much to expand and clarify how the ATS was to be applied, it left this crucial question about the statute's scope unanswered.

2. *The D.C. Circuit Speaks:* Tel-Oren v. Libyan Arab Republic

The D.C. Circuit's first major ATS case following *Filartiga* showed just how controversial the Second Circuit's decision was. In *Tel-Oren*, the D.C. Circuit produced three concurring opinions[71] in its decision to affirm the dismissal of an ATS suit by Israeli citizens against, inter alia, Libya and the Palestine Liberation Organization ("PLO") arising out of a 1978 attack on a civilian bus in Israel.[72] Be-

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67 Marc Rosen, Note, *The Alien Tort Claims Act and the Foreign Sovereign Immunities Act: A Policy Solution*, 6 CARDOZO J. INT'L & COMP. L. 461, 476 (1998).

68 *Filartiga*, 630 F.2d at 878.

69 *See, e.g.*, Universal Declaration of Human Rights, G.A. Res. 217A, at 71, 73, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948) (stating simply that "[n]o one shall be subjected to torture").

70 *Filartiga*, 630 F.2d at 879.

71 *Tel-Oren*, 726 F.2d at 775 (Edwards, J., concurring); *id.* at 798 (Bork, J., concurring); *id.* at 823 (Robb, J., concurring).

72 *Id.* at 775 (per curiam).

cause Judge Edwards's concurrence has had the most enduring significance in the D.C. Circuit, this Note focuses on that opinion.

Judge Edwards noted first that jurisdiction over Libya was barred by the Foreign Sovereign Immunities Act ("FSIA"),[73] which, with a few narrow exceptions,[74] provides foreign states with immunity from suit in U.S. courts.[75] The issue of the PLO's liability was more difficult. Because the PLO was not a "recognized state," it could not claim immunity under the FSIA.[76]

But this non-state status nonetheless created problems for the plaintiffs' ATS claim. Unlike his concurring colleagues, Judge Edwards "endorse[d] the legal principles set forth in *Filartiga*."[77] But, Judge Edwards explained, even though the *Filartiga* court correctly implied a right of action based on the international condemnation of torture—a right which the *Tel-Oren* plaintiffs also invoked—the facts of *Tel-Oren* were distinguishable because unlike the *Tel-Oren* defendants, the defendant in *Filartiga* "acted under color of state law, although in violation of it."[78] Action with the imprimatur of the state, Judge Edwards opined, was a necessary element for jurisdiction to lie in an ATS torture case because the international prohibition that the *Filartiga* court had recognized was a prohibition against "*official torture.*"[79] Because the PLO was not a state, its agents necessarily could not act under color of state law; and consequently, according to Judge Edwards, the plaintiffs could not state a claim under the ATS.[80]

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73 *Id.* at 775 n.1 (Edwards, J., concurring). The FSIA provides in pertinent part that "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States . . . ." 28 U.S.C. § 1604 (2000).

74 *See* 28 U.S.C. § 1605. By way of example, two such exceptions are waiver of immunity and actions based on commercial activity carried on in the United States by the foreign state. *Id.* § 1605(a)(1)–(2).

75 The FSIA aspect of the 1986 *Tel-Oren* decision was uncontroversial, and all three concurring judges accepted it without discussion. Today, however, the decision most likely would be different. In 1996, Congress passed the Antiterrorism and Effective Death Penalty Act (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (1996), which provided a new exception under the FSIA for cases "in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support . . . for such an act . . . ." § 221(a)(1), 110 Stat. at 1241. Thus, the *Tel-Oren* plaintiffs might have fared very differently if the suit had been filed after the passage of the AEDPA. For a recent case involving facts similar to *Tel-Oren* in which plaintiffs likely will succeed in their ATS suit, see *Almog v. Arab Bank, PLC*, 471 F. Supp. 2d 257, 285 (E.D.N.Y. 2007).

76 *See Tel-Oren*, 726 F.2d at 791 (Edwards, J., concurring).

77 *Id.*

78 *Id.*

79 *Id.* at 791, 792–93.

80 *Id.* at 792–93.

Although he refused to "stretch *Filartiga*'s reasoning to incorporate torture perpetrated by a party other than a recognized state or one of its officials acting under color of state law,"[81] Judge Edwards did recognize the trend in international law toward imposing not only rights but also obligations on individuals.[82] He described two distinct kinds of "individual liability" under international law: (1) that imposed on individuals acting "under color of state law," and (2) that imposed on "individuals acting separate from any state's authority or direction."[83] The defendant in *Filartiga* fell "squarely within the first meaning"[84] while the PLO was just as squarely within the second.[85]

Yet Judge Edwards's classifications of individuals for the purpose of ATS litigation were, and still are, unclear. What exactly did it mean to act "under color of state law"? If individuals who did *not* act under color of law acted "separate" from a state's authority or direction, did it necessarily follow that an individual acting under color of law acted *with* the state's authority or direction? For instance, could it be said that Pena-Irala acted with the state's authority or direction when he tortured Joelito Filartiga? Perhaps. But the *Filartiga* court did not indicate that it needed to determine the state's role in Joelito's death to impose liability on Pena-Irala as an individual. Evidently, the *Filartiga* court believed that some affiliation with a state was necessary to impose liability, but exactly what kind of affiliation remained uncertain. And, as the Note now demonstrates, Judge Edwards's attempt to clarify the requirements of *Filartiga* ironically resulted in the de facto rejection of that case's approach to the ATS.

C. The Battle Lines Are Drawn: Sanchez-Espinoza *and* Kadic

1. Sanchez-Espinoza *and the Problem of the Individual-Capacity Suit*

Sanchez-Espinoza v. Reagan[86] was until very recently the most notable ATS suit brought against U.S. government officials for violations of international law. The ATS plaintiffs[87] were twelve citizens of Nicaragua who sued President Ronald Reagan, CIA Director William

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81 *Id.* at 792.

82 *Id.* at 792–93.

83 *Id.* at 793.

84 *Id.*

85 *Id.*

86 Sanchez-Espinoza v. Reagan, 770 F.2d 202 (D.C. Cir. 1985).

87 The lawsuit involved other groups of plaintiffs and other theories of liability that are beyond the scope of this Note. *See id.* at 205.

Casey, former Secretary of State Alexander Haig, and Secretary of Defense Caspar Weinberger, among other high-ranking government officials.[88] The complaint alleged that these officials had, by assisting the Nicaraguan Contras, facilitated "scores of attacks upon innocent Nicaraguan civilians" resulting in "summary execution, murder, abduction, torture, rape, wounding, and the destruction of private property and public facilities."[89]

As explained in Part I.B of this Note, *Filartiga* had made it clear that a violation of "universally accepted norms of the international law of human rights"[90]—official torture, specifically—constituted a cognizable claim under the ATS "regardless of the nationality of the parties,"[91] while Judge Edwards's *Tel-Oren* concurrence adverted to the fact that "international covenants, agreements and declarations" suggested that "summary execution" and torture were subject to "unequivocal international condemnation."[92] Thus, given the facts alleged in *Sanchez-Espinoza*, the pieces seemed to be in place for the plaintiffs to survive defendants' motion to dismiss the ATS claim. Yet, even as the *Sanchez-Espinoza* court purported to follow *Filartiga* and Judge Edwards's concurrence, it broke with these precedents by employing reasoning that not only would result in the dismissal of the suit before it, but also would become a seemingly impenetrable barrier to ATS litigation in the D.C. Circuit in the future.[93]

Writing for the court, then-Judge Scalia focused on the fact that most of the defendants were sued both individually[94] and in their official capacities.[95] The distinction between individual- and official-capacity suits was central to Judge Scalia's reasoning in that he treated the two different forms of pleading as effectively constituting two dif-

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88 *Id.* at 205 & n.1.

89 *Id.* at 205.

90 Filartiga v. Pena-Irala, 630 F.2d 876, 878 (2d Cir. 1980).

91 *Id.*

92 Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 791 n.20 (D.C. Cir. 1984) (Edwards, J., concurring).

93 *See infra* Part II.B.

94 Thomas Enders, Assistant Secretary of State for Inter-American Affairs, was sued in his individual capacity only, and the complaint did not specify in what capacity former Secretary of State Alexander Haig was sued. *Sanchez-Espinoza*, 770 F.2d at 205 n.1.

95 *Id.* at 205. As the Supreme Court has explained, "official-capacity suits generally represent only another way of pleading an action against an entity of which an officer is an agent . . . . Suits against state officials in their official capacity therefore should be treated as suits against the State." Hafer v. Melo, 502 U.S. 21, 25 (1991) (quotations omitted). Individual-capacity suits, on the other hand, seek to hold defendants personally liable for the alleged conduct. *Id.* at 27; *see also infra* Part III.A.

ferent suits, one against the sovereign and one against the individual defendants.[96]

Insofar as the defendants were sued in their individual capacities, the court found the suit barred because "customary international law . . . does not reach private, non-state conduct of this sort for the reasons stated by Judge Edwards in *Tel-Oren* . . . ."[97] But this professed reliance on *Tel-Oren* is at best curious and at worst disingenuous. In *Tel-Oren*, Judge Edwards indicated that the plaintiffs failed to state a claim against the PLO under international law because the defendants were not affiliated with a recognized state and thus could not engage in official torture.[98] And no such disconnect had been at issue in *Filartiga*, where plaintiffs successfully made out an ATS claim against Pena-Irala individually, after finding he had acted under color of a recognized state's law when he tortured Joelito Filartiga.[99]

For Judge Edwards, then, the keystone for ATS liability was some degree of official authority. But neither his *Tel-Oren* concurrence nor the Second Circuit's *Filartiga* decision held, as *Sanchez-Espinoza* did, that individuals could not be held personally liable for acts performed as government officials. Indeed, this scenario is exactly what the court found sufficient in *Filartiga*: the plaintiffs' suit was not against the sovereign but against Pena-Irala individually for acts he undertook as a government official.[100] In other words, *Filartiga*, which Judge Edwards endorsed without qualification in *Tel-Oren*, involved an *individual-capacity* lawsuit—the very kind that Judge Scalia found barred in *Sanchez-Espinoza*.

Because the suit could not proceed against the defendants in their individual capacities, Judge Scalia effectively converted it into a suit against the sovereign (i.e., the United States), which, in order to proceed, required the court to find "[a] waiver of sovereign immunity."[101] The court dispensed with this issue without much discussion, holding, simply, that "[t]he Alien Tort Statute itself is not a waiver of sovereign immunity."[102]

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96 *See Sanchez-Espinoza*, 770 F.2d at 206–07.

97 *Id.* (quotation omitted).

98 *See supra* text accompanying notes 76–80. By negative inference, if defendants had been affiliated with a recognized state, then the court could have held them individually liable.

99 Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 791 (D.C. Cir. 1984) (Edwards, J., concurring).

100 *See supra* text accompanying notes 68–70.

101 *See Sanchez-Espinoza*, 770 F.2d at 207.

102 *Id.*

As Part II shows, this reasoning has had devastating consequences on subsequent ATS cases in the D.C. Circuit. *Sanchez-Espinoza*'s questionable treatment of ATS precedent has left ATS plaintiffs between the Scylla of the now-barred individual-capacity suit and the Charybdis of the official-capacity suit against the sovereign, which was also barred.

2. Kadic v. Karadžić *and the Importation of § 1983*

Even as the scope of the ATS contracted in the D.C. Circuit, it expanded in the Second Circuit. *Kadic v. Karadžić*,[103] perhaps the most celebrated ATS case of all, involved a suit by Croat and Muslim citizens of Bosnia-Herzegovina against Radovan Karadžić, the infamous leader of the genocidal campaign carried out by Bosnian-Serb military forces during the Bosnian civil war.[104] The district court found the central issue in the case to be whether Karadžić could be considered a state actor under international law.[105] Plaintiffs advanced two alternative theories in support of their contention that Karadžić was a state actor: that he (1) undertook official acts in his capacity as President of the self-proclaimed Bosnian-Serb republic, "Srpska," that led to the atrocities alleged, or (2) acted in collaboration with—or under the color of law of—the government of the former Yugoslavia to cause the alleged atrocities.[106] Citing Judge Edwards's concurrence in *Tel-Oren*, the district court dispensed with plaintiffs' first theory, holding that Karadžić was not a state actor in his capacity as President of the "Bosnian-Serb warring military faction," Srpska, because the faction did "not constitute a recognized state any more than did the PLO, as it existed at the time that [the D.C. Circuit] decided *Tel-Oren*."[107] Plaintiffs' second theory also failed as the district court decided to follow the Fifth Circuit's statement that "the Alien Tort Statute does not confer subject matter jurisdiction over private parties who conspire in or aid and abet, official acts of torture."[108] Accordingly, the district court dismissed the case.[109]

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103 Kadic v. Karadžić, 70 F.3d 232 (2d Cir. 1995).

104 *Id.* at 236–37.

105 *See* Doe v. Karadzic, 866 F. Supp. 734, 739–41 (S.D.N.Y. 1994), *rev'd sub nom.* Kadic v. Karadžić, 70 F.3d 232, 251 (2d Cir. 1995).

106 *Kadic*, 70 F.3d at 236–37 (referencing the complaints filed in the district court).

107 *Doe*, 866 F. Supp. at 741.

108 *Id.* at 740 (quotation omitted).

109 *Id.* at 744.

The Second Circuit reversed,[110] rejecting both of the district court's findings. First, at least with respect to some claims, Karadžić's status as a state actor was irrelevant.[111] The court rejected the notion that "the law of nations, as understood in the modern era, confines its reach to state action" and held that "certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals."[112] The court's survey of international legal documents found that the prohibitions against genocide and war crimes extended to private individuals regardless of their affiliation with a state.[113]

The court found, however, that, just as in *Filartiga*, the prohibitions against torture and summary execution were held to apply only to state action.[114] But the *Kadic* court expanded the scope of liability for these violations by expanding the state action concept to include action by private individuals "in concert" with a state.[115] In what has become arguably one of the most controversial aspects of the opinion, the court wrote:

> The "color of law" jurisprudence of 42 U.S.C. § 1983 is a relevant guide to whether a defendant has engaged in official action for purposes of jurisdiction under the Alien Tort Act. A private individual acts under color of law within the meaning of section 1983 when he acts together with state officials or with significant state aid.[116]

Thus, while an inquiry into Karadžić's affiliation with the former Yugoslavia was necessary to establish liability for torture and summary execution, the standard for state action seemingly was relaxed.[117] In fact, the court explained, "it is likely that the state action concept, where applicable for some violations like 'official' torture, requires merely the semblance of official authority."[118]

This turn to § 1983 marked a tectonic shift in ATS litigation and has since been the source of vigorous debate among courts.[119] *Filar-*

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110 *Kadic*, 70 F.3d at 251.

111 *Id.* at 239.

112 *Id.*

113 *Id.* at 241–43.

114 *Id.* at 243.

115 *See id.* at 245.

116 *Id.* (citations omitted).

117 *See id.* at 245.

118 *Id.*

119 *Compare id.* (applying § 1983 jurisprudence), *with* Doe v. Exxon Mobil Corp., 393 F. Supp. 2d 20, 25–26 (D.D.C. 2005) (rejecting § 1983 jurisprudence).

tiga and *Tel-Oren*, although alluding in part to § 1983 doctrine by imposing a requirement that a defendant act under color of official authority,[120] appeared to limit the scope of the ATS to government officials. What the *Kadic* court accomplished by its wholesale importation of § 1983 doctrine into ATS analysis was to extend the ATS to private individuals who acted together with the government and thus acted or purported to act with the sanction of the state. Thus Karadžić, though not an official of the government of Yugoslavia, could nonetheless be held to act under color of Yugoslav law because he acted in concert with the Yugoslav government.[121] This ability to hold private individuals liable under the ATS suggested a new wave of possible defendants, including, most notably, multinational corporations.[122]

But the progressive vision of the Second Circuit is not shared universally among U.S. courts. Take, for example, a recent district court opinion that represents the prevailing view of the ATS in the D.C. Circuit—where many high profile ATS cases are decided—about the validity of the Second Circuit's turn to § 1983:

> Recently . . . a few courts have held individuals liable for Alien Tort Statute violations when they acted under color of law. These courts have borrowed heavily from 42 U.S.C. § 1983 color of law jurisprudence. Reasoning in these cases is unpersuasive, however. Grafting § 1983 color of law analysis onto international law claims would be an end-run around the accepted principle that most violations of international law can be committed only by states. Recognizing acts under color of law would dramatically expand the extraterritorial reach of the statute . . . . [B]asing liability for Alien Tort Statute violations on color of law jurisprudence is a similar overreach.[123]

As we will see, the reasoning underpinning the D.C. Circuit's opposition to *Kadic* not only is flawed, but also poses a threat to the

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120 *See* Tel-Oren v. Libyan Arab Republic, 726 F.2d 775, 791–93 (D.C. Cir. 1984) (Edwards, J., concurring); Filartiga v. Pena-Irala, 630 F.2d 876, 889–90 (2d Cir. 1980).

121 *Kadic*, 70 F.3d at 245.

122 *See generally* Linda A. Willett et al., *The Alien Tort Statute and Its Implications for Multinational Corporations*, BRIEFLY, Sept. 2003, at 1 (reviewing ATS suits against corporations); Tim Kline, Note, *A Door Ajar or a Floodgate?: Corporate Liability After* Sosa v. Alvarez-Machain, 94 KY. L.J. 691 (2006) (surveying ATS suits against various business organizations); Courtney Shaw, Note, *Uncertain Justice: Liability of Multinationals Under the Alien Tort Claims Act*, 54 STAN. L. REV. 1359 (2002) (discussing lawsuit against Unocal for alleged complicity in human rights violations perpetrated by Burmese military).

123 *Exxon Mobil Corp.*, 393 F. Supp. 2d at 26 (citations omitted) (footnote omitted).

continued viability and legitimacy of the ATS, and thus runs afoul of the Supreme Court's holding in *Sosa*, to which this Note now turns.

II. Sosa *and Its Aftermath*

A. The Meaning of Sosa

As discussed in the Introduction to this Note, the Supreme Court's long-awaited decision in *Sosa* was met with mixed reviews. Though many in the human rights community celebrated the decision, some courts and scholars professed disappointment about the lack of clarity in the guidance it offered to lower courts.[124] The above-referenced quote from the District Court for the District of Columbia demonstrates that although *Sosa* was supposed to resolve the question of how lower courts were to apply the ATS, disagreement about the statute's application after *Sosa* is as vigorous as before.[125]

There are, it seems, two reasons for this continuing disagreement about the operation of the ATS. First, the Supreme Court's guidance in *Sosa* about the nature of the ATS is dispersed throughout the Court's opinion, and thus defies easy recitation. Second, while the Court ultimately did decide a question over which oceans of ink had been spilled by judges and scholars during the last quarter century, namely, whether the ATS was a viable basis for international human rights litigation in U.S. courts,[126] the Court did not directly answer the even more contentious question about the statute's scope: who may be sued under the ATS? But despite the lack of an explicit holding concerning the scope of the ATS, the Court's position still can be discerned upon a careful analysis of what the Court *does* hold. By focusing on the central point the Court makes, it becomes clear that

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124 *See, e.g.*, Kiobel v. Royal Dutch Petroleum Co., 456 F. Supp. 2d 457, 462 (S.D.N.Y. 2006) (noting that the *Sosa* Court "provide[d] little guidance concerning which acts give rise to an ATS claim"); Berkowitz, *supra* note 17, at 290 (arguing that *Sosa* "failed to create a standard with sufficient definition and administrability to be readily applied by courts"); *The Supreme Court, 2003 Term—Leading Cases*, 118 HARV. L. REV. 248, 446 (2004) ("*Sosa* failed to articulate a clear conception of the interaction between customary international law and domestic law, and offers little guidance to lower courts both within ATS doctrine and beyond.").

125 *Compare Exxon Mobil Corp.*, 393 F. Supp. 2d at 26 (stating that the use of § 1983 analysis is an "end-run around the accepted principle that most violations of international law can be committed only by states"), *and* Bowoto v. Chevron Corp., No. C 99-02506 SI, 2006 U.S. Dist. LEXIS 63209, at *25 (N.D. Cal. Aug. 21, 2006) (same), *with* Aldana v. Del Monte Fresh Produce, N.A., 416 F.3d 1242, 1247 (11th Cir. 2005) (construing state action requirement for claim of torture by looking to § 1983 jurisprudence), *and* Chavez v. Carranza, 413 F. Supp. 2d 891, 899 (W.D. Tenn. 2005) (same).

126 *See, e.g.*, THE ALIEN TORT CLAIMS ACT: AN ANALYTICAL ANTHOLOGY (Ralph G. Steinhardt & Anthony D'Amato eds., 1999).

Sosa instructs courts to follow the Second Circuit's approach when deciding "scope of liability" questions in ATS litigation.[127]

The most important aspect of the *Sosa* decision was the Court's rejection of petitioner Sosa's contention that the ATS was "still-born"[128] in 1789, that is, that courts could not hear claims arising under customary international law without further legislative authorization to do so. In dismissing this argument, the Court surmised that "the First Congress did not pass the ATS as a jurisdictional convenience to be placed on the shelf for use by a future Congress or state legislature that might, someday, authorize the creation of causes of action."[129] Rather, concluded the Court, the jurisdictional grant of the ATS is "best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability."[130]

Also central to the Court's decision was its recognition that the body of common law out of which causes of action would have come in 1789 has continued to evolve, and now provides a basis for more and different claims than courts recognized in the late-eighteenth century.[131] In light of the ever-changing nature of customary international law, *Sosa* instructs courts to look to the current state of the law of nations in deciding whether to recognize a claim.[132] The Court hastened to add, however, that this judicial power was to be "exercised on the understanding that the door is still ajar" with regard to cognizable claims under the ATS, but that this opening should be "subject to vigilant doorkeeping."[133] Accordingly, the Court follows *Filartiga* in requiring that claims under the ATS may include only violations of norms that are "of international character accepted by the civilized world"[134] and are "defined with a specificity comparable to the features of the 18th-century paradigms [the Court] ha[s] recognized."[135]

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127 *See* Steinhardt, *supra* note 12, at 2244 (noting that the *Sosa* Court "effectively put alien tort litigation where it was after *Filártiga* and before exaggerated interpretations of the ATS by its critics gained a patina of academic legitimacy").

128 *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 714 (2004).

129 *Id.* at 719.

130 *Id.* at 724.

131 *Id*. at 724–25, 729–31.

132 *Id.* at 733.

133 *Id.* at 729.

134 *Id.* at 725.

135 *Id.*

Put differently, *Sosa* ultimately was an endorsement of what the Court called "the modern line"[136] of ATS cases beginning with *Filartiga* and reaching its high point in *Kadic*. Although some contend that the guidance *Sosa* provides to lower courts for determining what constitutes a violation of international law could have been more definite,[137] the better argument is that *Sosa* instructed courts to follow *Filartiga* and its progeny to determine whether a claim constitutes a violation of international law.[138]

If nothing else is clear to lower courts and scholars from the *Sosa* decision, it should be this: the ATS is alive and well, and the judicial power over claims of certain human rights violations should be exercised. But despite *Sosa*'s endorsement of the most celebrated cases in international human rights litigation, ATS suits since *Sosa* have been more noteworthy for their futility than their viability.

Two recent, much-publicized cases illustrate this phenomenon. The claims advanced in these cases are not unlike those advanced in the paradigmatic cases of *Filartiga* and *Kadic*. Nor are the defendants, at least in most respects, atypical: they are, like Pena-Irala and Karadžić before them, government officials and private individuals who acted in concert with a state. Yet what sets them apart from previous defendants, and what seems to prove dispositive in the courts' determinations that they cannot be held liable under the ATS, is the particular government with which they are affiliated, the government of the United States.

B. The End of the Line for the ATS?

Two cases decided since *Sosa*, *In re Iraq and Afghanistan Detainees Litigation*[139] and *Saleh v. Titan Corp.*,[140] illustrate the principal obstacles to ATS litigation in U.S. courts today, namely, (1) the problem of absolute immunity from tort liability for U.S. government officials' acts taken abroad and (2) what might be called the "*Sanchez-Espinoza* fallacy," the notion that private individuals cannot be held liable under the ATS. The first threatens the legitimacy of the ATS regime: if U.S. nationals are immune from suit for violations of international

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136 *Id.* at 724–25.

137 *See supra* note 124.

138 *See* Steinhardt, *supra* note 12, at 2293 ("[*Sosa*] offers a modest, crucial, and timely endorsement of the *Filártiga* paradigm. The Court criticized not a single final decision under the ATS, other than the [*Sosa*] litigation itself, and cited with approval a number of decisions that adhere to *Filártiga*'s principles.").

139 *In re* Iraq & Afg. Detainees Litig., 479 F. Supp. 2d 85 (D.D.C. 2007).

140 Saleh v. Titan Corp., 436 F. Supp. 2d 55 (D.D.C. 2006).

law, why should the rest of the world give any credence to U.S. courts' imposition of liability on foreign nationals for such violations? There is, in other words, a double standard in ATS cases; this double standard results in the inequitable administration of the statute.

The second obstacle, stemming from the *Sanchez-Espinoza* court's misreading of circuit precedent, threatens the continued viability of ATS litigation, and thus runs afoul of the Supreme Court's endorsement of that viability in *Sosa*. If individual-capacity suits under the ATS are barred, thereby requiring all ATS suits to proceed against a sovereign, this renders the ATS well nigh meaningless because of the bar of sovereign immunity. After a discussion of these two cases in which we see these obstacles play out, this Note proposes that ATS litigation—including ATS suits against U.S. nationals—should be guided by § 1983 principles.

1. In re Iraq and Afghanistan Detainees Litigation

In 2005, five Iraqi and four Afghani nationals filed suit against former Secretary of Defense Donald Rumsfeld and a number of high-ranking U.S. military officers, alleging that U.S. military personnel tortured them while they were detained in connection with the wars in Iraq and Afghanistan.[141] Plaintiffs advanced several theories of liability, including violations of their rights under the Fifth and Eighth Amendments to the U.S. Constitution and of international norms prohibiting torture.[142] Plaintiffs invoked the ATS as the jurisdictional basis for the latter claim.[143] Following defendants' motion to dismiss, the court rejected all of plaintiffs' claims.[144]

Although the court's treatment of plaintiffs' constitutional claims was sound in light of the current state of the law regarding the extraterritorial application of the Constitution to nonresident aliens,[145] its

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141 *Detainees Litig.*, 479 F. Supp. 2d at 88. The other defendants were Colonel Janis Karpinski, Lieutenant General Ricardo Sanchez, and Colonel Thomas Pappas. *Id.*

142 *Id.* at 91.

143 *Id.* Notably, this lawsuit sought to hold defendants liable *in their individual capacities*; the suit was against not only the United States, but also the defendants as individuals. *Id.* at 90. Plaintiffs sued Secretary Rumsfeld both in his individual and official capacities. *Id.* As discussed, *supra*, an official-capacity suit actually is a suit against the sovereign (here the United States) whom the named defendant represents.

144 *Id.* at 119.

145 Following the Supreme Court's decisions in *Johnson v. Eisentrager*, 339 U.S. 763 (1950), and *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), the court in *Detainees Litigation* held, simply, that the Fifth Amendment did not apply to these plaintiffs. *Detainees Litig.*, 479 F. Supp. 2d at 95.

The extent to which *Eisentrager* and *Verdugo-Urquidez* retain their precedential value after

dismissal of the ATS claims was less persuasive, albeit reflective of what seems to be the majority view of courts and scholars regarding the liability of U.S. officials in ATS suits.[146] Plaintiffs argued that the treatment to which they were subjected while in custody violated the international prohibition against torture,[147] the same claim advanced by the Filartiga family in that litigation. Defendants countered by claiming that they were entitled to absolute immunity from such a suit pursuant to the Federal Employees Liability Reform and Tort Compensation Act of 1988, commonly known as the Westfall Act.[148] The court agreed with defendants, finding that because they were federal employees acting within the scope of their employment, they were immune from tort liability.[149] Because the Westfall Act is critical to this Note's analysis, a brief explanation of its workings is required.

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the Supreme Court's decision in *Boumediene v. Bush*, 128 S. Ct. 2229 (2008), however, is unclear. So too, in turn, is the fate of claims like those advanced in *Detainees Litigation*. On the one hand, *Boumediene* arguably is *sui generis*: the decision might stand for nothing other than the proposition that non-U.S. citizens being held at Guantanamo Bay, Cuba, have habeas corpus rights under the U.S. Constitution. On the other hand, though, the Court uses language suggesting that its holding might apply more broadly. Specifically, the Court's treatment of *Eisentrager*, which the *Boumediene* Court read as setting forth a multifactor test to determine the reach of the Suspension Clause, *Boumediene*, 128 S. Ct. at 2259, suggests that detainees held by the U.S. at other locations outside the United States also might have habeas rights. *See id. See generally* Anthony J. Colangelo, *De Facto Sovereignty:* Boumediene *and Beyond*, 77 GEO. WASH. L. REV. (forthcoming Feb. 2009).

As for the plaintiffs' Eighth Amendment claims, the *Detainees Litigation* court dismissed those just as easily: under *Ingraham v. Wright*, 430 U.S. 651, 664 (1977), the Eighth Amendment applies only to persons convicted of crimes. Plaintiffs were never convicted of a crime and were thus unable to assert rights under the Eighth Amendment. *Detainees Litig.*, 479 F. Supp. 2d at 103.

146 *Cf.* Ralph G. Steinhardt, *Theoretical and Historical Foundations of the Alien Tort Claims Act and Its Discontents: A Reality Check*, 16 ST. THOMAS L. REV. 585, 596 (2004) (explaining that for U.S. employees or contractors, "their only liability even conceivably lies under the Federal Tort Claims Act, not [the ATS]").

147 *Detainees Litig.*, 479 F. Supp. 2d at 88.

148 *Id.* at 92. Congress passed the Westfall Act to amend the Federal Tort Claims Act ("FTCA") in response to the Supreme Court's decision in *Westfall v. Erwin*, 484 U.S. 292 (1988), *superseded by statute*, Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, 102 Stat. 4563, *as recognized in* Gutierrez de Martinez v. Lamagno, 515 U.S. 417, 425–26 (1995). *Westfall* had limited absolute immunity to official conduct that was "discretionary in nature." *Westfall*, 484 U.S. at 296–98. The Westfall Act broadened the scope of immunity to include absolute immunity for all acts of government employees taken within the scope of their office or employment, other than those in violation of the Constitution or those for which recovery against a government officer is specifically authorized by statute. *See* 28 U.S.C. § 2679(b)(1)–(2) (2000).

149 *Detainees Litig.*, 479 F. Supp. 2d at 114.

a. The Westfall Act

The Westfall Act provides federal employees with absolute immunity from most tort liability for any "negligent or wrongful act or omission" committed "while acting within the scope of [their] office or employment."[150] Accordingly, if the Attorney General certifies that a federal employee was acting within the scope of her employment at the time of the alleged act or omission, the lawsuit is converted into one against the United States,[151] that is, the federal employee is dismissed as a party, and the United States is substituted as the defendant.[152] From that point forward, the Federal Tort Claims Act ("FTCA") governs the suit.[153]

The Westfall Act makes two exceptions to this otherwise broad protection for federal employees. The Act does not apply where a plaintiff brings either (1) a "Bivens"[154] action, seeking damages for a constitutional violation, or (2) an action under a federal statute that authorizes recovery against a government employee.[155]

Although the plain language of the Westfall Act suggests that it is a sweeping grant of immunity to federal employees, the legislative history of the Act shows that it was not intended to provide the kind of blanket immunity that courts—like the one in *Detainees Litigation*—have understood it to provide. For instance, Congress was careful to maintain an exception for actions under *Bivens* for constitutional rights violations.[156] The House Report explained the need for this exception:

> Courts have drawn a sharp distinction between common law torts and constitutional or Bivens torts. Common law torts are the routine acts or omissions which occur daily in the course of business and which have been redressed in an evolving manner by courts for, at least, the last 800 years.[157]

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150 28 U.S.C. § 2679(b)(1).

151 *Id.* § 2679(d)(1).

152 *Id.*

153 Osborn v. Haley, 127 S. Ct. 881, 888 (2007).

154 *See* 28 U.S.C. § 2679(b)(2)(A); Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 395–97 (1971) (holding that money damages are available upon violation of Fourth Amendment by federal officials). *Bivens* is commonly referred to as the "federal counterpart of a claim brought pursuant to 42 U.S.C. § 1983." *See, e.g.*, Rasul v. Myers, 512 F.3d 644, 652 n.2 (D.C. Cir. 2008).

155 28 U.S.C. § 2679(b)(2)(B).

156 *See id.* § 2679(b)(2)(A).

157 H.R. REP. NO. 100-700, at 6 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5945, 5950. As an example of the kind of "common law torts" for which the Westfall Act was supposed to provide immunity, the Report offered the mundane example of a suit "for damages predicated upon a

The Report goes on to point out that "[i]f an employee is accused of egregious misconduct, rather than mere negligence or poor judgment, then the United States may not be substituted as the defendant, and the individual employee remains liable."[158]

Significantly, the latter statement appears not in the section of the Report describing the *Bivens* exception, but rather in the section describing the general operation of the statute. In other words, the "egregious conduct" to which the Report refers is not limited to *Bivens* violations, but instead would seem to include tortious conduct that rises above the level of the acts or omissions that occur in the course of daily business.

b. The Detainees Litigation *Court's Analysis of the Westfall Act*

In *Detainees Litigation*, plaintiffs contended that the Westfall Act's reference to "negligent or wrongful" acts did not cover the alleged acts of torture.[159] In other words, plaintiffs argued that defendants could not invoke immunity because defendants had committed intentional torts. The district court disagreed. Although Congress had not defined the term "wrongful" in the statute, the court accorded the term its plain meaning: having no legal sanction.[160] And, the court concluded, "[i]t is axiomatic that intentional torts are not legally sanctioned, so it follows that the Westfall Act applies to intentional torts."[161] Absent interpretive ambiguity, the court declined to review the legislative history of the Westfall Act, which plaintiffs had cited in

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government maintenance worker's negligent failure to place a caution sign on a wet floor." H.R. REP. NO. 100-700, at 5, *reprinted in* 1988 U.S.C.C.A.N. 5945, 5949.

158 H.R. REP. NO. 100-700, at 5, *reprinted in* 1988 U.S.C.C.A.N. 5945, 5949.

159 *In re* Iraq & Afg. Detainees Litig., 479 F. Supp. 2d 85, 110 (D.D.C. 2007).

160 *Id.* at 111.

161 *Id.*

their opposition papers and had urged the court to consider.[162] In sum and substance, the court granted defendants' motions to dismiss.[163]

The dismissal of the case does not mark its end but rather its conversion to a suit under the FTCA,[164] the statute specifying where the United States has waived sovereign immunity and may be subject to tort liability. But in cases like these, the conversion effectively is the termination of the action because the FTCA makes clear that the United States does not waive sovereign immunity for acts committed outside its borders.[165] And because it is unclear whether nonresident aliens located outside the United States (with the exception of those being held at Guantanamo Bay, Cuba) have rights under the U.S. Constitution,[166] the *Bivens* exception to the Westfall Act is probably also unavailing.

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162 *Id.* at 110–11. Plaintiffs also challenged defendants' argument, buttressed by the Attorney General's certification as required under the Act, that the alleged acts fell within the scope of the defendants' employment. *Id.* at 113–14. The Attorney General's certification is not binding on a court, and, as plaintiffs did here, parties can request judicial review of the certification. *Id.* at 113. Plaintiffs' argument against the certification rested not on any established legal doctrine, but rather on a per se rule that plaintiffs themselves proposed to the court, namely, "that violations of *jus cogens* international law are never within the scope of employment." *Id.* As plaintiffs explained in their opposition to defendants' motions to dismiss, a per se rule is warranted because a sovereign cannot approve a violation of a *jus cogens* prohibition. Plaintiffs' Consol. Opposition to Defendants' Motions to Dismiss at 66, *Detainees Litig.*, 479 F. Supp. 2d 85 (No. 06-145). This is because a *jus cogens* norm, under the Vienna Convention on the Law of Treaties, is "a norm from which no derogation is permitted." Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 332, 344; *see also* Belhas v. Ya'alon, 515 F.3d 1279, 1286–87 (D.C. Cir. 2008) (collecting cases addressing *jus cogens* norms). As one court famously put it: "by definition, the law of any particular state is either identical to the *jus cogens* norms of international law, or it is invalid." Doe v. Unocal Corp., 395 F.3d 932, 948 (9th Cir. 2002), *vacated*, 395 F.3d 978 (9th Cir. 2003). "That the [Ninth Circuit's 2002 *Unocal* opinion] was later vacated does not deprive its reasoning of persuasive power." *In re* "Agent Orange" Prod. Liab. Litig., 373 F. Supp. 2d 7, 83 (E.D.N.Y. 2005) (Weinstein, J.). At bottom, plaintiffs argued that the conduct alleged—torture—could not have been "the kind of conduct [an] employee is employed to perform." *Detainees Litig.*, 479 F. Supp. 2d at 113. Framing the alleged conduct in terms of "det[ention]" and "interrogati[on]," the *Detainees Litigation* court rebuffed plaintiffs yet again, finding that such conduct *was* "the kind[ ] of conduct the defendants were employed to perform." *Id.* at 114.

163 *Detainees Litig.*, 479 F. Supp. 2d at 88.

164 *See* 28 U.S.C. § 2679(d)(1) (2000) ("Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court, shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.").

165 *See* 28 U.S.C. § 2680(k).

166 *See supra* note 145.

The result of the D.C. District Court's reading of the Westfall Act is problematic for two reasons. First, it evinces a double standard that distinguishes between federal employees' conduct abroad, which in effect is given blanket immunity from U.S. and international law, and federal employees' conduct at home, where the potential for *Bivens* liability always looms. Also troubling is the double standard for suits under the ATS involving U.S. government officials and suits involving foreign government officials; the latter, as we have seen, cannot claim the sanctuary of sovereign or diplomatic immunity.

As it stands now, the Westfall Act threatens the legitimacy of ATS litigation. Continuing to enforce the ATS in this uneven fashion diminishes the international legitimacy of the U.S. courts, which continue to impose liability on foreign defendants while dismissing cases against U.S nationals. To remedy that double standard, Part IV of this Note proposes amending the Westfall Act to replace the absolute immunity that it currently provides to U.S. government officials with a § 1983-type "qualified immunity," which would extend to not only U.S. government officials but also all foreign defendants.[167]

2. Ibrahim v. Titan Corp. *and* Saleh v. Titan Corp.[168]

The plaintiffs in *Ibrahim* and *Saleh* sued private government contractors who provided interpreters and interrogators to the U.S. military in Iraq. Plaintiffs alleged that they or their decedents were tortured while in U.S. custody at the Abu Ghraib prison.[169] The district court recognized that, after *Sosa*, jurisdiction was proper,[170] but nonetheless dismissed the ATS claims in *Ibrahim* in a holding that relied principally on *Sanchez-Espinoza*:

> [T]he question is whether the law of nations applies to *private actors* like the defendants in the present case. The Supreme Court has not answered that question, but in the D.C. Circuit the answer is no. . . . [*Sanchez-Espinoza*] . . . stat[ed] quite clearly that the law of nations "does not reach private,

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167 *See infra* Part IV.

168 The district court did not consolidate these cases because they featured different plaintiffs and one different claim. But, as the court pointed out, the "factual allegations of the two cases are virtually indistinguishable from one another," and the treatment of the ATS claim in *Ibrahim* was extended to *Saleh*. Saleh v. Titan Corp., 436 F. Supp. 2d 55, 57 (D.D.C. 2006). For this reason, this Note deals with the two cases as though they were one and the same.

169 *Saleh*, 436 F. Supp. 2d at 56; Ibrahim v. Titan Corp., 391 F. Supp. 2d 10, 12 (D.D.C. 2005).

170 *Ibrahim*, 391 F. Supp. 2d at 13.

> non-state conduct of this sort for the reasons stated by Judge Edwards in *Tel-Oren v. Libyan Arab Republic*" . . . .[171]

Perhaps anticipating the critique of *Sanchez-Espinoza* that this Note makes, the court, in a footnote, recalled Judge Edwards's comment that "torture by private parties acting under 'color of law,' as compared to torture by private parties 'acting separate from any states [sic] authority or direction,' would be actionable under the ATS."[172] But just as the court appears, in this sentence, to recognize the flaw in *Sanchez-Espinoza*'s understanding of *Tel-Oren*, it proceeds to make the same error in the next sentence. "For rather obvious reasons," the court writes, "these plaintiffs disavow any assertion that the defendants were state actors: if defendants were acting as agents of the state, they would have sovereign immunity under *Sanchez-Espinoza*."[173] In other words, even as the court recognizes that *private parties* (i.e., non-governmental parties) acting under color of law may be liable for torture under the ATS, the court follows *Sanchez-Espinoza* in dismissing the possibility of individual-capacity suits against those parties.

The logic of this proposition is even more flawed than that which underpins *Sanchez-Espinoza*'s suggestion that government officials can be sued only in their official capacity. The logic might be restated as follows. The *Ibrahim* court accepts the proposition that private parties may be held liable for action under color of law. But, the court goes on, if a private party is alleged to have acted under color of law, he is no longer a private party; instead, he is a government official and thus, following *Sanchez-Espinoza*, may be sued only in his official capacity. Because official-capacity suits are in fact suits against the sovereign,[174] suits proceeding on a "color of law" theory necessarily are barred by sovereign immunity. The court's reasoning in *Ibrahim* is thus inherently contradictory.

Given the chance to revisit this flawed logic in the subsequent case of *Saleh*, which featured essentially the same ATS claim, the court seemed to acknowledge the inconsistency of *Tel-Oren* and *Sanchez-Espinoza*, as well as the contradictions in its own logic in *Ibrahim*:

> The plaintiffs in this case, apparently thinking they see daylight in footnote 3 of the *Ibrahim* opinion, have run to it,

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171 *Id.* at 14 (citations omitted) (quotation omitted).

172 *Id.* at 14 n.3 (citing Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 793 (D.C. Cir. 1984) (Edwards, J., concurring)).

173 *Ibrahim*, 391 F. Supp. 2d at 14 n.3 (citation omitted).

174 *See* discussion *supra* note 95; *see also* Hafer v. Melo, 502 U.S. 21 (1991).

> arguing that the Supreme Court's *Sosa* opinion approved Judge Edwards's view in *Tel-Oren* that torture by private parties would be actionable under the ATS if the private parties were acting under color of law, and alleging that these defendants were indeed acting under color of law. The argument is rejected. *Sanchez-Espinoza* is controlling Circuit precedent and is not cast in doubt by the other cases upon which plaintiff relies. *Sosa* did not overrule that precedent . . . . *Sanchez-Espinoza* makes it clear that there is no middle ground between private action and government action, at least for purposes of the Alien Tort Statute.[175]

In an effort to pull itself out from the logical wreckage of *Ibrahim*, the court once again falls into untenable contradictions in an effort to dispense with an ATS claim. Rather than try to reconcile Judge Edwards's *Tel-Oren* concurrence, which recognizes that private parties may incur liability under the ATS,[176] with *Sanchez-Espinoza*, which effectively does not, the court appears to reject *Tel-Oren* in favor of *Sanchez-Espinoza*. This seemingly deliberate choice is problematic for two reasons. First, *Sanchez-Espinoza* effectively incorporates Judge Edwards's concurrence,[177] so at the very least the district court should provide an explanation for its decision to sever the two cases. Second, and more importantly, in pointing to the fact that *Sosa* did not overrule *Sanchez-Espinoza* as support for the *Saleh*/*Ibrahim* court's approach to the ATS, the court, although technically correct insofar as the *Sosa* opinion does not mention *Sanchez-Espinoza* explicitly, fundamentally misreads the Supreme Court's opinion. If *Sosa* is nothing else, it is an endorsement of *Filartiga* and of the viability of ATS litigation in general.[178] And even if the Supreme Court did not overrule *Sanchez-Espinoza*, the Court might well have called into question its continued validity.

The D.C. Circuit has rendered the ATS a legal nullity by relying stubbornly on *Sanchez-Espinoza* to stunt ATS litigation against (1) government officials and (2) private parties acting under color of law. Rejecting *Sanchez-Espinoza* is thus necessary for courts to carry out

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175 Saleh v. Titan Corp., 436 F. Supp. 2d 55, 57–58 (D.D.C. 2006) (citations omitted) (footnote omitted).

176 *See supra* Part I.B.2.

177 *See* Sanchez-Espinoza v. Reagan, 770 F.2d 202, 206–07 (D.C. Cir. 1985) (concluding that the law of nations "does not reach private, non-state conduct . . . for the reasons stated by Judge Edwards in *Tel-Oren v. Libyan Arab Republic*").

178 *See* Steinhardt, *supra* note 12, at 2255.

the Supreme Court's instructions in *Sosa*. As the Note proposes below, *Sanchez-Espinoza*'s approach must be replaced with *Kadic*'s.

III. Section 1983 and ATS Litigation

This Note has argued that *Sosa v. Alvarez-Machain* should be read as an endorsement of *Filartiga v. Pena-Irala* insofar as the latter case stands for the viability of human rights litigation under the ATS. But as this Note has shown, applying *Filartiga* has never been a simple or uncontroversial matter. And despite *Sosa*'s endorsement of *Filartiga*, courts remain unsure of—or perhaps resistant to—*Filartiga*'s approach to the ATS.

Part I's survey of the most significant ATS cases demonstrated that much of the difficulty that courts faced in applying *Filartiga* came from the Second Circuit's failure to address the crucial question as to the scope of liability under the ATS. Although the *Filartiga* court explained that the defendant in that case was amenable to suit because he acted "under color of official authority,"[179] the court left to the imagination precisely where the outermost bounds of that concept fell. And subsequent courts struggled to chart the terrain. For Judge Edwards in *Tel-Oren*, only those defendants acting on behalf of a recognized state acted "under color of law." The *Sanchez-Espinoza* court read Judge Edwards's opinion as limiting suits to government officials, who could be sued only in their official capacities. Meanwhile, the *Kadic* court adopted the most expansive vision yet, holding liable private individuals acting in concert with a state. Tellingly, none of these courts—not even the *Sanchez-Espinoza* court[180]—repudiated the Second Circuit's holding in *Filartiga*; they simply struggled to apply it.

In other words, the real source of controversy and debate surrounding the ATS was not the question on which the *Sosa* Court focused its energy (i.e., whether the ATS was a dead letter without further congressional action). Apart from Judge Bork's concurrence in *Tel-Oren*,[181] no opinion of any significance had ever embraced such a narrow reading of the ATS or challenged *Filartiga*'s holding on that question. Rather, the more crucial question seems always to have

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179 Filartiga v. Pena-Irala, 630 F.2d 876, 878 (2d Cir. 1980).

180 The *Sanchez-Espinoza* court relied on Judge Edwards's *Tel-Oren* concurrence, which itself purported to adopt the Second Circuit's approach to the ATS in *Filartiga*. *See Sanchez-Espinoza*, 770 F.2d at 206–07 (D.C. Cir. 1985); Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 776 (D.C. Cir. 1984) (Edwards, J., concurring).

181 *Tel-Oren*, 726 F.2d at 811 (Bork, J., concurring).

been about the scope of liability under the statute; more specifically, how (or, indeed, whether) the *Filartiga* court answered that question. After returning to *Filartiga* once more to propose a reading of that case that answers this vexing question, this Part then shows why the § 1983 approach to applying the ATS is supported by precedent and by policy.

A. Filartiga *and the Color of Law: Section 1983*

The confusion surrounding *Filartiga*'s holding is itself confusing. This Part argues that a sensible reading of *Filartiga* on the official authority issue is not that the court failed to address what it means to act under color of official authority, but rather that *the court did not need to address the meaning of the concept*. Though *Filartiga*'s holding was unprecedented, the language in which it was couched recalled one of the most deeply rooted doctrines in U.S. law, the color-of-law doctrine of 42 U.S.C. § 1983.

1. Forms of § 1983 Suits

Section 1983 provides in pertinent part that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .[182]

Since it was enacted as the Civil Rights Act of 1871, § 1983 has been the principal vehicle for civil rights litigation in the United States. Although not limited to so-called constitutional torts, the statute is available to individuals seeking to obtain a remedy for the deprivation of a constitutional right by a person acting under color of state[183] law.[184] Although government employment and action taken within the scope of such employment is sufficient to establish that a

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182 42 U.S.C. § 1983 (2000).

183 When the Supreme Court decided *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, one hundred years after the passage of the Civil Rights Act of 1871, the Court extended the application of constitutional torts litigation from suits against state officials and private parties acting in concert with the states, to constitutional violations by federal officials. *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 389 (1971).

184 *See* West v. Atkins, 487 U.S. 42, 48 (1988).

defendant acts under color of law,[185] the Supreme Court has also recognized, importantly, that governmental officials may be liable when their action exceeds the scope of their official authority.[186]

Government officials may be sued either in their official capacity, in which case the plaintiff is actually seeking to hold the government liable, or in their individual capacity, in which case the government officials are subject to personal liability.[187] As in *Sanchez-Espinoza*, the difference between these two types of suits is somewhat confusing. Indeed, in the same year that *Sanchez-Espinoza* was decided, the Supreme Court found it necessary to define more clearly the distinction in *Kentucky v. Graham*,[188] and returned to it again in *Hafer v. Melo*[189] in 1991.

The latter case featured an individual-capacity suit under § 1983 against Hafer, the Auditor General of Pennsylvania, alleging that she violated several state employees' constitutional rights by discharging them.[190] Hafer argued that she could not be held liable in her individual capacity because the firings were undertaken in the course of her official duties.[191]

The Court rejected this argument, and went on to point out the crucial difference between being sued *in one's official capacity* and being sued *in one's personal capacity for acts undertaken pursuant to official authority*:

> The requirement of action under color of state law means that Hafer may be [personally] liable for discharging respondents *precisely because of her authority as auditor general*. . . .
>
> . . . .
>
> . . . Congress enacted § 1983 "to enforce provisions of the Fourteenth Amendment against those who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it."[192]

Thus, the threat of the individual-capacity suit holds government employees to a higher standard than individuals unaffiliated with the

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185 *See id.* at 49–50.

186 *See* Screws v. United States, 325 U.S. 91, 111 (1945).

187 Hafer v. Melo, 502 U.S. 21, 25 (1991) (explaining the difference between official- and individual-capacity suits).

188 Kentucky v. Graham, 473 U.S. 159, 165–66 (1985).

189 *Melo*, 502 U.S. at 25.

190 *Id.* at 23–24.

191 *Id.* at 23.

192 *Id.* at 27–28 (emphasis added) (citation omitted) (quotation omitted).

government. Although this might, at first blush, seem harsh, the *Bivens* Court explained why this higher standard is necessary:

> Respondents [the federal agents] seek to treat the relationship between a citizen and a federal agent unconstitutionally exercising his authority as no different from the relationship between two private citizens. In so doing, they ignore the fact that power, once granted, does not disappear like a magic gift when it is wrongfully used. An agent acting—albeit unconstitutionally—in the name of the United States possesses a far greater capacity for harm than an individual trespasser exercising no authority other than his own.[193]

Taken together, *Hafer* and *Bivens* stand for the proposition that action on behalf of the government, far from being shielded from liability, actually is subject to greater scrutiny because of its capacity to inflict greater harm.

2. Liability of Private Parties Under § 1983

Under § 1983, this heightened responsibility for the protection of constitutional rights extends not only to government employees but also to private parties acting under color of law. Although, as the Court has confessed, "cases deciding when private action might be deemed that of the state have not been a model of consistency,"[194] generally there are four types of private-party action that qualify as action under color of law[195]: (1) where a private party performs a "public function" or employs "powers traditionally exclusively reserved to the [s]tate";[196] (2) where the state compels the private party to commit the wrongful act;[197] (3) where the nexus between the state and the action of the private party is such that the "action of the latter may be fairly treated as that of the [s]tate itself";[198] and (4) where the private party is a willing participant in a joint action with the state.[199] For example, the *Kadic* court applied the joint-action standard, and

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193 Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 391–92 (1971).

194 Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374, 378 (1995) (quotation omitted).

195 Craig Forcese, Note, *ATCA's Achilles Heel: Corporate Complicity, International Law and the Alien Tort Claims Act*, 26 YALE J. INT'L L. 487, 502 (2001).

196 Jackson v. Metro. Edison Co., 419 U.S. 345, 352 (1974).

197 Adickes v. S. H. Kress & Co., 398 U.S. 144, 170 (1970) (holding state action could exist where restaurant's discriminatory policy reflected a state-enforced custom).

198 *Jackson*, 419 U.S. at 351.

199 Lugar v. Edmondson Oil Co., 457 U.S. 922, 941 (1982) (holding that corporate creditor acted under color of state law when it acted jointly with the Commonwealth of Virginia to deprive plaintiff of his property).

explained that "[a] private individual acts under color of law within the meaning of section 1983 when he acts together with state officials or with significant state aid."[200] Though courts and scholars have criticized this multiplicity of approaches,[201] variety is necessary because of myriad factual situations in which private parties interact with and act on behalf of the state. In other words, these differing approaches might be looked upon simply as different paths to the same goal: to rein in a state-affiliated actor's greater capacity for harm.

3. Qualified Immunity

Because of the heightened responsibility that they bear, state actors face greater exposure to suit. The Supreme Court acknowledges this exposure and seeks to balance state-affiliated actors' responsibility with the cost to society of "the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office."[202] The Court strikes this balance by allowing defendants sued under § 1983 and *Bivens* to assert a defense of qualified or "good faith" immunity.[203]

To prevail on a defense of qualified immunity, a defendant must show that he or she did not "violate clearly established statutory or constitutional rights of which a reasonable person would have known."[204] This standard, according to Professor Barbara Armacost, effectively strikes the balance the Supreme Court sought; Armacost writes that "limiting constitutional damages liability to cases involving truly blameworthy conduct" is a worthwhile aim because doing so could well "maintain the special status of constitutional rights in the public consciousness."[205] Providing state actors with absolute immunity would deprive individuals of an "important means of vindicating constitutional guarantees,"[206] while leaving them totally exposed would encourage frivolous litigation and chill public service.[207] Accordingly, limiting claims to those based on violations of the law so

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200 Kadic v. Karadžić, 70 F.3d 232, 245 (2d Cir. 1995).

201 *See, e.g.*, Forcese, *supra* note 195, at 502 (arguing that the distinctions among categories are not always clear).

202 Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982).

203 *Id.* at 815.

204 *Id.* at 818.

205 Barbara E. Armacost, *Qualified Immunity: Ignorance Excused*, 51 VAND. L. REV. 583, 679–80 (1998).

206 *Harlow*, 457 U.S. at 809.

207 *Id.* at 827–28 (Burger, C.J., dissenting).

egregious that any reasonable person would be aware of them as violations seems to be the optimal regime.[208]

B. Section 1983 and the ATS

The foregoing discussion of § 1983 makes clear that suits under that statute operate similarly to suits under the ATS. Generally both involve suits for rights violations against defendants who are somehow affiliated with a government. The *Filartiga* court recognized this similarity; not only did the court there express its holding in language that invoked § 1983, but also the court suggested more explicitly in footnote 18 the analogous *operation* of the two statutes, stating that "[c]onduct of the type alleged here would be actionable under 42 U.S.C. § 1983 or . . . the Constitution, if performed by a [U.S.] government official."[209]

Given this acknowledged similarity, *Filartiga* compels but one logical conclusion: the scope of liability under the ATS should be informed by § 1983 doctrine. Thus, when the *Kadic* court explains that "[t]he 'color of law' jurisprudence of 42 U.S.C. § 1983 is a relevant guide to whether a defendant has engaged in official action for purposes of jurisdiction under the Alien Tort Act,"[210] it was not expanding the reach of the ATS doctrine so much as it was returning that doctrine to its modern roots in *Filartiga*—a case that no court seriously questions, and one which, after *Sosa*, bears the stamp of Supreme Court approval.

Still, courts refusing to follow this approach often look to *Sanchez-Espinoza* for authority, though that case makes no reference whatever to § 1983 or "color of law" jurisprudence; in fact, *Sanchez-Espinoza* actually cites with approval Judge Edwards's opinion in *Tel-Oren*, which embraced *Filartiga*'s "color of law" approach.[211] What courts look to in *Sanchez-Espinoza* is, of course, the *Sanchez-Espinoza* court's understanding of the nature of suits against government actors. According to the *Sanchez-Espinoza* court, suits against government officials for actions taken pursuant to their official duties must be official-capacity suits, i.e., suits against the sovereign. This part of the opinion not only was inconsistent with *Tel-Oren*—which the *Sanchez-Espinoza* court purported to follow—in light of *Hafer v. Melo*, but also this point in *Sanchez-Espinoza* is now probably bad

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208 *See id.* at 818–19 (majority opinion).

209 *See* Filartiga v. Pena-Irala, 630 F.2d 876, 885 n.18 (2d Cir. 1980).

210 Kadic v. Karadžić, 70 F.3d 232, 245 (2d Cir. 1995).

211 *See supra* Part I.C.1.

law.[212] Coupled with the Supreme Court's endorsement in *Sosa*, the questionable status of *Sanchez-Espinoza* suggests the legal basis for the § 1983 approach demonstrated by *Kadic*.

The *Kadic* approach also is superior because it comports with *Sosa* in that it preserves the viability of the ATS as a basis for human rights claims in U.S courts. As Part II's discussion of *Ibrahim* and *Saleh* showed, the looming presence of *Sanchez-Espinoza*'s reasoning as to the scope of the ATS effectively rendered the statute a legal nullity in the D.C. Circuit. By incorporating the teachings of *Kentucky v. Graham* and *Hafer v. Melo*, the § 1983 color-of-law doctrine removes the shield of government employment and makes state actors' subjection to the higher standards of conduct appropriate given state actors' greater capacity to do harm. Under *Sanchez-Espinoza*, the ATS essentially is a dead letter because, according to the D.C. Circuit, all suits against government officials are barred by sovereign immunity.[213] This is plainly inconsistent with the *Sosa* Court's affirmation of the viability of ATS litigation, and accordingly should be rejected.

C. Amending the Westfall Act

Rejecting *Sanchez-Espinoza* and embracing a § 1983 approach to the ATS is only the first step in eliminating the obstacles that confront ATS litigation. The second step will involve replacing the absolute immunity currently afforded U.S. government employees with § 1983-type qualified immunity. Currently, the Westfall Act provides absolute immunity to federal government employees for acts taken within the scope of their employment. There is an exception for suits alleging "violation of the Constitution of the United States"[214] (i.e., *Bivens* actions) for which there exists only qualified immunity, as *Detainees*

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212 *See* Richard Henry Seamon, *U.S. Torture as a Tort*, 37 RUTGERS L.J. 715, 766 (2006). Professor Seamon's article touches on many of the points made in this Note and ultimately proposes that Congress enact legislation making U.S. officials personally liable for torture under the same circumstances they would be under 42 U.S.C. § 1983. *Id.* at 805–06. Professor Seamon's approach, though similar to the one advocated by this Note, most likely would prove unworkable simply because § 1983 claims require plaintiffs to demonstrate the violation of a constitutional right or some other right created by statute. Given that recent Supreme Court cases are unclear about the extent to which the Constitution applies to non-U.S. citizens who are injured while outside the United States, *see supra* note 145, and that federal statutes do not generally apply extraterritorially, it is unclear what the source of plaintiffs' rights would be under this regime. Under the regime advocated by this Note, customary international law as construed by U.S. courts would supply the rights available to all ATS plaintiffs.

213 *See supra* Part I.C.1.

214 28 U.S.C. § 2679(b)(2)(A) (2000).

Litigation shows.[215] But the Westfall Act potentially protects all sorts of illicit conduct by federal employees working abroad, where the Constitution does not apply. International human rights law should fill this legal vacuum, but the Westfall Act tends to stifle the ATS as a means to enforce that law.

The Westfall Act not only immunizes conduct that otherwise would be actionable under international law, but also threatens the legitimacy of the ATS as a legal regime. As an increasing number of ATS cases are filed against U.S. government officials and government contractors, a gulf between the treatment of U.S. and foreign defendants in ATS cases is widening. Even as the most celebrated ATS cases of the modern era have been those in which U.S. courts have held foreign government officials liable for human rights abuses, and, in doing so, refused to acknowledge defendants' claims of sovereign immunity, the presence of the Westfall Act enables U.S. defendants to escape liability in this very way. *Sosa* established that the ATS is to be a viable basis for the enforcement of international human rights in U.S. courts, but in order for our courts to be internationally recognized arbiters of international law, our courts must be able to administer the statute under a uniform standard. Section 1983 should provide that standard, and Congress should amend the Westfall Act to enable this uniform application.

Specifically, Congress should add to the Westfall Act an exception for "violations of the law of nations for which 28 U.S.C. § 1350 provides jurisdiction." The addition of this provision would not alter *Sosa*'s guidance about the ways in which courts should define international prohibitions; and therefore the number of viable claims would necessarily remain small.[216] But it would remove the blanket immunity currently afforded federal employees working abroad.

When amending the Westfall Act Congress should make clear to the courts that the new provision should be administered similarly to the *Bivens* exception: qualified immunity should remain available as an affirmative defense. This immunity will, of course, not be identical to § 1983/*Bivens* immunity because the source of rights that plaintiffs invoke under the ATS is not the Constitution but rather international law. Still, the courts could develop a similar test whereby defendants would be held liable for violating clearly established rights under international law. Such a test—which would apply uniformly to U.S.

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215 *See supra* Part II.B.1.

216 *See supra* notes 130–35 and accompanying text.

nationals and foreigners—might be thought of as one and the same with the test that *Sosa* implemented regarding claims cognizable under the ATS. Put differently, if the conduct alleged violates a prohibition that is specific, universal, obligatory, and "defined with a specificity comparable to the features of the 18th-century paradigms" the Court has recognized,[217] then the defense of qualified immunity should fail insofar as a "reasonable person" should be on notice as to the existence of the norm.

Conclusion

Animating this Note throughout has been the *Sosa* Court's unabashed endorsement of the ATS as a viable basis for human rights litigation in U.S. courts. Taking *Sosa* seriously means removing the doctrinal and statutory impediments that recently have prevented the ATS from playing this important role in our legal system and replacing them with enabling principles. What this Note ultimately suggests is that reconceiving the ATS as an international § 1983 is the best way to implement *Sosa*'s endorsement.

Of course, this is easier said than done. And even if this Note's prescriptions were implemented, there is no doubt that many courts, already skittish about applying international law or interfering with the foreign relations of the United States—especially in the context of national security—would continue to find ways to avoid having to decide ATS suits on the merits. For example, the political question doctrine, though to this point not typically applied in ATS suits, might become more appealing to some courts, especially in suits involving U.S. government officials. So too might the state secrets doctrine, which was recently applied in a *Bivens* action arising out of a high-profile "extraordinary rendition" case.[218]

But courts' continued avoidance in the face of a growing disregard of human rights that has accompanied the "war on terror" has begun to look more like abdication of the judicial role than mere prudence. As the moral authority of the United States abroad continues to deteriorate, perhaps only the courts can check the abuses by the executive branch that have led to this decline. A fair, equitable, and robust ATS regime could mark a step toward redeeming the moral

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217 Sosa v. Alvarez-Machain, 542 U.S. 692, 725, 732 (2004).

218 *See* El-Masri v. United States, 479 F.3d 296, 300 (4th Cir. 2007), *cert. denied*, 128 S. Ct. 373 (2007).

credibility of the United States by demonstrating to the world our commitment to vindicating human rights abuses—even (or perhaps especially) when those abuses are perpetrated by our own citizens.