Peremptory No More: *JUS COGENS* and Human Rights Violations by Transnational Corporations Pursuant to the Alien Tort Claims Act

Lucien J. Dhooge

On June 29, 2004, the United States Supreme Court issued its long-awaited decision in *Sosa* v. *Alvarez-Machain}* The Court's opinion addressed for the first time in substantive detail Section 1350 of Title 28 of the U.S. Code, the so-called "Alien Tort Claims Act" (ATCA). Largely dormant from the time of its inclusion by the U.S. Congress in the Judiciary Act of 1789, the ATCA has proven contentious since its reinvigoration as a tool by which alien plaintiffs sought to hold foreign government officials liable in the United States for human-rights violations.[2] Its more recent utilization against transnational corporations for complicity in abuses associated with their foreign investment activities has created controversy between human-rights advocates and business interests/

In an opinion authored by Justice Souter, the Court unanimously rejected Alvarez's claim that his arrest and overnight detention by Mexican nationals acting at the request of the U.S. Drug Enforcement Administration (DEA) was a tort in violation of the law of nations within the purview of the ATCA. The Court therefore dismissed his ATCA claim against his captors. However, the Court refused to adopt Sosa's contention that the ATCA was merely jurisdictional, but rather inferred that Congress intended the ATCA provide jurisdiction for "a relatively modest set of actions alleging violations of the law of nations."[4] Although Congress intended the ATCA to reach only three torts actionable in the late eighteenth century—namely violation of safe conduct, infringement of the rights of ambassadors and piracy— Justice Souter nevertheless concluded modem federal courts could recognize additional torts based on the law of nations, as long as they rested on "a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of [these] 18th-century paradigms." The door to further independent judicial recognition of actionable international norms was thus still ajar subject to vigilant doorkeeping."[6] This "vigilant doorkeeping required federal

Associate Professor of Business Law, Eberhardt School of Business, University of the Pacific.

[1] **Sosa v. Alvarez-Machain, 542 U.S. 692 (2004).**

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

[3] **For purposes of this article, a "transnational corporation" is defined as ' an economic entity operating in two or more countries—whatever their legal form, whether in their home country or country of activity, and whether taken individually or collectively." U.N. ESCOR, Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights, 55th Sess., 22d mtg. at 52, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2/2003, f 20 (Aug. 13,2003).**

[4] *Sosa,* **542 U.S. at 746.**

[5] *Id.* **at 749.**

[6] *Id. it* **752.**

courts to refuse to recognize private claims under federal common law for violation of international law norms that are not "specific, universal and obligatory."[7]

Justice Souter's opinion came as a relief to human-rights organizations. Despite their defeat, Alvarez-Machain's attorneys characterized the decision as "a huge human rights victory" and having "lost the battle . . . but won the war on the [ATCA]."[8] Less effusive commentators concluded Justice Souter's opinion "erases any doubt about the validity of the ATCA for addressing egregious human rights cases"[9] and "clarifies, once and for all, [that the] ATCA does allow victims of human-rights violations to sue."[10] Under the Court's reasoning, victims of human- rights violations by transnational corporations would be able to bring their claims to U.S. courts "as long as the violations are clear."[11] According to human-rights advocates, examples of such "clear violations" include genocide, war crimes, torture, slavery, prolonged arbitrary detention and crimes against humanity.[12] These human- rights abuses were characterized as "core violations," which could be encompassed by Justice Souter's opinion.[13] The Court's apparent willingness to embrace claims based upon such "core violations" was viewed by some commentators as "a green light [to lower courts and academics] to keep trying to bring [ATCA] claims for all sorts of alleged international injustices."[14] Indeed, several human-rights advocates expressed their intent to continue to bring ATCA claims against transnational corporations based upon the Court's holding in *Sosa*.[15]

This article examines the implications of the U.S. Supreme Court's opinion in *Sosa* v. *Alvarez-Machain* for currently pending and future ATCA cases alleging

[7] *Id.* **at 753.**

[8] **Stacey Harms & Samira Puskar,** *The Court Opens the Door to International Human Rights Cases,* **MEDILL NEWS SERV. (June 2004) (quoting Paul Hoffman, lead counsel for Alvarez-Machain, and Professor William Aceves, who filed an** *amicus curiae* **brief on behalf of Alvarez-Machain in the U.S. Supreme Court).**

[9] **Press Release, International Labor Rights Fund,** *Leading Human Rights Lawyer Hails Supreme Court Decision Upholding Alien Tort Claims Act* **(June 29, 2004) (on file with author) (quoting Terry Collingsworth, executive director of the International Labor Rights Fund).**

[10] **Jacqueline Koch,** *Not in Their Backyard,* CORPWATCH **(July 14, 2004),** *available at* **http://www.laborrights.org/press/atca_corpwatch_0704.htm (quoting Terry Collingsworth);** *see also* **Adam Liptak,** *U.S. Courts' Role in Foreign Feuds Comes Under Fire,* **N.Y.** TIMES, **Aug. 3, 2003, at 1 (quoting Harold Hongju Koh, dean of the Yale Law School, as stating, "Like it or not, foreign disputes are going to come into our courts [a]nd if they raise issues of concern to us, our courts ought to be able to adjudicate those concerns").**

[11] **Harms & Puskar,** *supra* **note 8 (quoting Reed Brody, special counsel for Human Rights Watch).**

[12] **Linda Greenhouse,** *Human Rights Abuses Worldwide are Held to Fall Under U.S. Courts,* **N.Y.** TIMES, **June 30,2004,atA21.**

[13] *Id.*

[14] **Jonathan H. Adler,** *Sosa Justice,* NAT'L REV. **(July 21, 2004),** *available at* **http:// www.nationalreview.com/adler/adler200407210842.asp;** *see also* **Harms & Puskar,** *supra* **note 8.**

[15] **Bob Egelko,** *Supreme Court Rejects Suit Over U.S.-Hired Kidnap But Majority Backs Foreigners ' Right to Sue for Grave Abuses,* **WASH. POST, June 30,2004, at A13 (quoting Rick Herz, counsel for EarthRights International, that the organization was "going to continue to seek to hold abusers, and the corporations that assist them, accountable");** *see also* **Press Release, International Labor Rights Fund,** *supra* **note 9 (quoting Natacha Thys, assistant general counsel for the International Labor Rights Fund, that "'***Alvarez* **allows all of our ATCA suits to go forward: Unocal, ExxonMobil, Coca Cola, Drummond, Occidental, Del Monte and Daimler/Chrysler").**

violation of human rights deemed to be *jus cogens.* The article commences with overviews of *jus cogens,* the ATCA and current human-rights litigation against transnational corporations. This litigation is analyzed in the context of the *Sosa* opinion. The article concludes that, despite the optimism of human-rights advocates, most claims alleging *jus cogens* violations will not survive application of the *Sosa* criteria by the lower federal courts.

I. The Historical Background to *SOSA V. ALVAREZ-MACHAIN*

A. *Jus Cogens and Human Rights*

States are generally free to vary or disregard most principles of international law within the bounds of agreements existing between them.[16] However, there are a small number of principles that are binding on states regardless of their consent and which they are not permitted to ignore. These principles are deemed to be statements of the "compelling law" and are otherwise designated as peremptory norms or *jus cogens.*[17] The Vienna Convention on the Law of Treaties defines *jus cogens* as a norm "accepted and recognized by the international community of states as a whole •.. from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."[18] Norms identified as *jus cogens* enjoy "a higher rank in the international hierarchy" than treaties or customary rules, thereby prohibiting derogation other than through means possessing the same normative force.[19] This status also obligates states to punish or extradite persons violating such norms and may serve as the basis for the exercise of universal jurisdiction.[20]

It is self-evident that the vast majority of international law principles lack *jus cogens* status. However, there is no general agreement on those principles constituting *jus cogens* or criteria for their identification. Rather, as noted by one commentator, "[t]he full content of the category of *jus cogens* remains to be worked out in the practice of states and in the jurisprudence of international tribunals."[21] This same uncertainty exists in the field of international human-rights law. There is no universal agreement on those norms that have reached the status of *jus cogens,* the

[16] LASSA OPPENHEIM, OPPENHEIM'S INTERNATIONAL LAW, **§2, at 7-8 (Robert Jennings & Arthur Watts, eds., 9th ed. 1992). For a history of the development** *of jus cogens* **norms,** *see* **I** AN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW **515 (5th ed. 1998).**

[17] CLAIRE DE THAN & EDWIN SHORTS, INTERNATIONAL CRIMINAL LAW AND HUMAN RIGHTS**;9 (2003).**

[18] **Vienna Convention on the Law of Treaties art. 53, May 23,1969, entered mto force Jan. 27,1980, 1155 U.N.T.S. 332,81.L.M. 679.**

[19] **Prosecutor v. Furundzija, Case No. IT-95-17/1-T, 1153 (Int'l Cnm. Tnb. for Former Yugoslav*, Tnal Chamber, Dec. 10,1998).**

[20] **Universal jurisdiction is defined as the authority of a state "to define and ^nbe p^ment for certain offenses recognized by the community of nations as of universal concern.** ^STATEMENT (TH'W)) OF FOREIGN RELATIONS LAW OF THE UNITED STATES **§404 (1987) [hereinafter** RESTATEMENT OF FOREIGN RELATIONS LAW],

[21] OPPENHEIM, *supra* note **16,** §2, at **7-8; 5**** *also* BROWNLIE, *supra* note **6,** a **516-17** (noting more **authority exists for the category of** *jus cogens* **than exists for its particu ar con en**

methodology for identifying such norms or the consequences associated with attaining such status.[22] For example, the *Restatement of Foreign Relations Law* has identified eight human-rights protections as *jus cogens.* These protections are freedom from genocide, slavery, summary or extrajudicial killing, disappearance, torture or other cruel, inhuman or degrading treatment, prolonged arbitrary detention and systematic racial discrimination.[23] By contrast, other commentators have included war crimes and crimes against humanity as additional *jus cogens* norms.[24] In any event, the element common to these disparate offenses is the threat they pose to "the security, peace or essential values of society as a whole . . . [which requires their] redress by the international community as a matter of urgency."[25] For purposes of this article, the most comprehensive definition of *jus cogens* will be used, encompassing the eight protections identified in the *Restatement of Foreign Relations Law* as well as the additional offenses of war crimes and crimes against humanity.

B. *The Alien Tort Claims Act*

The ATCA provides, "The 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."[26] Judicial interpretation has been complicated by the complete absence of both legislative history and judicial elaboration in opinions prior to the 1980s. The ATCA is not mentioned in the debates surrounding the adoption of the first Judiciary Act,[27] and there is no evidence of what its drafters intended by its inclusion.[28]

This lack of formal legislative history has served as a significant source of frustration for courts called upon to interpret its provisions in a contemporary context.[29] Judicial speculation as to Congressional intent included the suggestion the ATCA was intended to ensure a federal forum for claims asserted by aliens against

[22] DE THAN & SHORTS, *supra* **note 17, at 10.**

[23] RESTATEMENT OF FOREIGN RELATIONS LAW, *supra* **note 20, §702(a-f).**

[24] DE THAN & SHORTS, *supra* **note 17, at 10.**

[25] *Id.*

[26] 28 U.S.C. §1350(2000).

[27] *See* ANNALS OF CONG. **782-833 (J. Gales ed. 1789).**

[28] *See, e.g.,* **Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 812 (D.C. Cir. 1984) (Bork, J., concurring) (wherein Judge Bork noted, "The debates over the Judiciary Act in the House—the Senate debates were not recorded—nowhere mention the provision, not even, so far as we are aware, indirectly").**

[29] *See, e.g.,* **Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 104 n.10 (2d Cir. 2000) ("The original purpose of the ATCA remains the subject of some controversy ... [as] [t]he Act has no formal legislative history" and that the intent of the drafters was "a matter forever hidden from our view by the scarcity of relevant evidence"); Trajano v. Marcos, 978 F.2d 493, 498 (9th Cir. 1992) ("The debates that led to the Act's passage contain no reference to the Alien Tort Statute, and there is no direct evidence of what the First Congress intended to accomplish"); Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F.Supp.2d 289, 304 (S.D.N.Y. 2003) ("Despite the fact that the ATCA has existed for over two hundred years, little is known of the framers' intentions in adopting it—the legislative history of the Judiciary Act does not refer to Section 1350").**

U.S. citizens or arising from events occurring in the United States.[30] According to this interpretation, the ATCA was necessary in order to prevent state courts from mishandling such cases and resultant embarrassment to the United States.[31] Courts also attempted to delineate the specific torts intended by the First Congress to fall within the parameters of the ATCA.[32]

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

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

[31] *Id.* **This school of interpretation is based upon two incidents in early U.S. history. The first incident involved an assault by Chevalier De Longchamps, a French citizen, upon the French Consul General Marbois in Philadelphia in 1784.** *See* **Respublica v. De Longchamps, 1 U.S. (1 Dali.) Ill (1784). The second incident involved a forcible entry into the home of the Dutch Ambassador Van Berckel by a New York City constable for the purpose of effectuating an arrest of a servant.** *See Report of John Jay, Secretary of Foreign Affairs, on Complaint of Minister of the United Netherlands,* **34 J CONT. CONG. 109, 111 (1788). Although both perpetrators were ultimately convicted of violating the law of nations, the convictions were procured in state courts, due to the absence of a federal statutory remedy.** *See* **Letter from Edmund Randolph, Governor of Virginia, to the Speaker of the House of Delegates (Oct. 10, 1787) (stating that "if the rights of an ambassador be invaded by any citizen it is onlyin a fw Ste that any laws exist to punish the offender"),** *quoted in* **Flores v. S. Peru Copper Corp., 3 , n. (Cir. 2003);** *see also* **3 ELLIOT'S** DEBATES **583 (1888),** *quoted in Tel-Oren.* **726 F.2d at 783 nJ2 (Edwards J., concurring) (quoting James Madison's statement to the Virginia Convention. e we now, sir, a foreigners cannot get justice done them in these [state] courts, and this has prevented many wealthy gentlemen from trading or residing among us");** *but see* **Jordan IPaust,** *Human R.ghtsResponses of Private Corporations.* **35** VAND. **J.** TRANSNAT'L **L. 801, 816 (2002) (citing remarks made by President Thomas Jefferson during his Sixth Annual Message to Congress in 1806, wherein he reco^ized a pnvate duty to refrain from engaging in the slave trade, based upon hurnan ngh« c^,de^t.™S rt S,mnar statements were made by John Quincy Adams in oral arguments before the U.S. Supreme Court in The Schooner Amistad, 40 U.S. 518 (15 Pet.) (1841).**

[32] *Tel-Oren* **726 F 2d at 813 (Bork, J., concurring) (listing violations of safe conduct, infringement on the** ambassadors and piracy as the torts intended by the hv the First Coneress to be within the scope of the rights **of ATCA).**

[33] **Bolchos v. Darrel, 3 F. Cas. 810 (C.C.D.S.C. 1795) (No. 160).**

[34] **O'Reilly de Camara v. Brooke, 209 U.S. 45,51 (1908).**

" 195 F.Supp. 857 (D. Md. 1961).

[16] *Id* **at 863-64.**

[37] **528 F.2d 1194 (9th Cir. 1975).**

U.S. Immigration and Naturalization Service. In dicta, the court noted injuries accruing as a result of the evacuation could be addressed pursuant to the ATCA.[38] The court also noted participating private adoption agencies could be deemed joint tortfeasors.[39] In addition to these judicial opinions, the ATCA has been the subject of two opinions of the U.S. Attorney General dating from 1795 and 1907, respectively.[40] However, other sources of interpretation were absent prior to the watershed opinions of the U.S. Court of Appeals for the Second Circuit in *Filartiga* v. *Pena-Irala* [4,] and *Kadic* v. *Karadzic* [42]

C. *Current ATCA Human Rights Litigation Alleging Violations of Jus Cogens by Transnational Corporations*

Human rights attaining the status of *jus cogens* have been the subject matter of twelve cases.[43] The primary focus of these opinions has been the identification of

[n] *Id.* **at 1201-02 n.13.**

[19] *Id.* **at 1201 n.13.**

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

[41] **630 F.2d 876 (2d Cir. 1980) (holding torture perpetrated by a Paraguayan police official upon a private citizen of Paraguay violated the law of nations and was actionable by the victim's survivors pursuant to the ATCA).**

[42] **70 F.3d 232 (2d Cir. 1995) (holding offenses of universal concern such as genocide, war crimes, torture and summary execution perpetrated by a private individual against other private individuals violates the law of nations and is actionable pursuant to the ATCA).**

[43] *See* **Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88 (2d Cir. 2000) (claims by political activists alleging imprisonment, torture and execution by the Nigerian government at the instigation of Royal Dutch Petroleum Company, Shell Transport and Trading Company and their wholly owned subsidiary Shell Petroleum Development Company of Nigeria in response to opposition to oil exploration activities);** *see also* **Beanal v. Freeport-McMoran, Inc., 197 F.3d 161 (5th Cir. 1999) (claim of genocide by the leader of the Lambaga Adat Suki Amungme tribe arising from the operation of an open pit copper, gold and silver mine by Freeport-McMoran, Inc. and Freeport-McMoran Copper & Gold, Inc. in the Indonesian province of Irian Jaya); Carmichael v. United Techs. Corp., 835 F.2d 109 (5th Cir. 1988) (claims of arbitrary detention and torture in Saudi Arabia as a result of the plaintiffs inability to pay debts accrued by his employer); Bowoto v. ChevronTexaco Corp., 312 F.Supp.2d 1229 (N.D. Cai. 2004) (claims by Nigerian villagers alleging that ChevronTexaco, by and through its subsidiary, ChevronTexaco Overseas Petroleum, Inc., and Chevron Nigeria Limited collaborated with the Nigerian government in the commission of summary execution, crimes against humanity, torture and cruel, inhuman or degrading treatment occurring during attacks upon villages in the Ogoni region of Nigeria); Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F.Supp.2d 289 (S.D.N.Y. 2003) (claims by current and former non- Muslim residents of southern Sudan alleging that Talisman collaborated with the Sudanese government in committing extrajudicial killings and war crimes stemming from its oil exploration activities); Sarei v. Rio Tinto, 221 F.Supp.2d 1116 (C.D. Cai. 2002) (claims of war crimes, genocide and racial discrimination arising from the operation of a gold and copper mine by Rio Tinto on the island of Bougainville in Papua New Guinea); Eastman Kodak Co. v. Kavlin, 978 F.Supp. 1078 (S.D. Fla. 1997) (claim of arbitrary detention in Bolivia as a result of a commercial dispute). Five other cases remained undecided at the time of the preparation of this article.** *See* **Ibrahim v. Titan Corp., No. 04-CV-01248 (D.D.C. filed July 27, 2004) (claims alleging extrajudicial killing, torture and cruel, inhuman and degrading treatment arising**

actionable conduct pursuant to the ATCA. Two opinions have concluded the defendants' alleged violations of *jus cogens* constituted torts in violation of the law of nations. In *Eastman Kodak Co.* v. *Kavlin*, the district court held that liability pursuant to the ATCA reaches conspiracies between state and private actors "to perpetrate illegal acts through the coercive use of state power," in this case, arbitrary detention contrary to legitimate penological interests.[44] Although the plaintiffs detention was not accompanied by torture, he was nonetheless detained under conditions "horrendous by any contemporary standard of human decency" which was a readily foreseeable result of the defendants' conspiracy with Bolivian officials.[45] Furthermore, even assuming that arbitrary detention was required to be prolonged in order to be actionable, the court found no reason why imprisonment for a period of ten days could not be considered prolonged.[46]

A similar conclusion was reached in *Presbyterian Church of Sudan* v. *Talisman Energy, Inc.*, in which the district court held transnational corporations could be liable for conspiracy and aiding and abetting *jus cogens* violations[47] This conclusion was based upon opinions interpreting international law precedents that characterized private party liability for conspiracy and aiding and abetting as arising from practical assistance, encouragement or moral support that has a substantial effect on the occurrence of the violation and is perpetrated with actual or constructive knowledge it will facilitate the alleged violations.[48] The district court

from the detention of Iraqi nationals at the Abu Ghraib prison); A1 Rawi v. Titan Corp., No. 04-CV-01143 (S.D. Cal. filed June 9, 2004) (claims alleging extrajudicial killing, torture and cruel, inhuman and degrading treatment arising from the detention of Iraqi nationals at the Abu Ghraib prison); Mujica v. Occidental Petroleum, No. 03-2860 (C.D. Cal. filed Apr. 23, 2003) (claims alleging extrajudicial killing, torture, crimes against humanity, cruel, inhuman and degrading treatment and war crimes arising from aerial bombing of Santo Domingo, Colombia by Occidental Petroleum's private security contractor); Arias v. DynCorp, No. 01-CV-01357 (D.D.C. filed Sept. 11, 2001) (claims of torture, crimes against humanity and genocide arising from spraying of herbicides in an effort to eradicate cultivation of coca and poppy plants in Ecuador); Doe v. ExxonMobil Corp., No. 01-CV-01357 (D. D C. filed June 11, 2001) (claims by villagers of extrajudicial killing, torture and crimes against humanity arising from the utilization of the Indonesian military to provide security for ExxonMobil s natural gas facility in Aceh, Indonesia).

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

[45] *Id.* **at 1094.**

[16] *Id.*

[47] *Presbyterian Church of Sudan,* **244 F.Supp .2d at 320-24 (citing Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, June 26, 1987, 108 Stat. 463, 23 I.L.M. 1027 [hereinafter Torture Convention]; Convention on the Prevention and Punishment of the Crime of Genocide, Jan 12 1951 102 Stat 3045, 78 U.N.T.S. 277 [hereinafter Genocide Convention]; Agreement for the Prosecution and Punishment of Major War Criminals of the European, Axis, and Establishing;the Charter of the International Military Tribunal, Aug. 8, 1945, 59 Stat. 1544 82 U.NXS. 279; Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, U.N. Doc. S/RES/955** *(Nov.* **8, 1994), Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993)).**

[48] *See* **Prosecutor v. Furundzija, Int'l Criminal Tnb. for the Former Yugoslavia. Case NaIT-95- 7/1-T, Judgment of Dec. 10,1998, at 235;** *see also* **United States v. Krauch, 8** TR. WAR CRIM. **69 (1948).**

also held slavery and war crimes to be actionable pursuant to the ATCA.[49] Private parties could also be liable for torture and persecution of ethnic minorities, to the extent that these violations occurred in the course of commission of genocide and war crimes.[50]

However, the majority of opinions have rejected claims the torts allegedly committed by transnational corporations are within the law of nations, so as to be actionable pursuant to the ATCA. For example, in *Beanal* v. *Freeport-McMoran, Inc.*, the Fifth Circuit dismissed the plaintiffs cultural genocide claim. The international conventions cited by the plaintiff in support of his claim of a right to cultural development were "amorphous" and failed to "proscribe or identify conduct that would constitute cultural genocide."[51] These "vague and declaratory international documents" also presented application problems, because they were "devoid of discernible means to define and identify conduct that constitutes a violation of international law."[52] Finally, the court held the plaintiff failed to demonstrate that cultural genocide had achieved "universal acceptance as a discrete violation of international law."[53] This conclusion was especially warranted by the express refusal of the drafters of the Genocide Convention to include cultural genocide within its prohibitions.[54]

The Fifth Circuit also affirmed the district court's dismissal of the plaintiffs complaint in *Carmichael* v. *United Technologies Corp.* The basis of the dismissal was that, although the ATCA confers jurisdiction over private parties who "conspire in, or aid and abet, official acts of torture by one nation against the citizens of another nation," the plaintiff failed to demonstrate the defendants were involved in or aware of his arrest, incarceration and mistreatment.[55] Absent such evidence, the Fifth Circuit concluded the plaintiff failed to demonstrate any causal connection between the defendants' conduct and his imprisonment and torture.[56]

Four opinions have addressed the justiciability of *jus cogens* claims pursuant to various abstention doctrines. In *Kavlin,* the district court refused to apply forum non conveniens on the basis that Bolivia did not provide an adequate alternative forum.[57] In support of this conclusion, the court cited statements of the

[49] *Presbyterian Church of Sudan,* **244 F.Supp. at 326-27.**

[50] *Id.* **at 324-28.**

[51] **Beanal v. Freeport-McMoran, Inc., 197 F.3d 161,167 (5th Cir. 1999) (citing the International Covenant on Civil and Political Rights, G.A. Res. 2200 A(XXI), art. 27, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966) (providing ethnic minorities "shall not be denied the right... to enjoy their own culture") [hereinafter Civil and Political Rights Covenant]; International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), art. 1(1), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966) (providing all peoples enjoy the right to "freely pursue their . . . cultural development")) [hereinafter Economic, Social and Cultural Rights Covenant].**

[52] *Id.* **at 168.**

[53] *Id.*

[54] *Id.*

[55] **Carmichael v. United Techs. Corp., 835 F.2d 109, 113-14 (5th Cir. 1988).**

[56] *Id.* **at 115.**

[57] **Eastman Kodak Co. v. Kavlin, 978 F.Supp. 1078, 1087 (S.D. Fla. 1997). Forum non conveniens is a discretionary doctrine, permitting a court to dismiss a claim even if it is a permissible venue possessing jurisdiction over the claim. Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 507 (1947). Courts must engage in a**

Bolivian Minister of Justice, academics, the former legal counsel to the Bolivian House of Representatives and the U.S. State Department that Bolivia's judicial system was overburdened, corrupt, susceptible to political influence and lacking in public credibility.[58] These opinions were of particular importance to the court, because the entire basis of the plaintiffs complaint was the deprivation of rights through the defendants' manipulation of the Bolivian judicial system.[59] This reasoning was echoed in *Presbyterian Church of Sudan*, in which the district court determined Sudan did not provide an adequate alternative forum for the plaintiffs' claims, because of the alleged complicity of its government in the human-rights violations at issue.[60] In addition, two courts rejected application of forum non conveniens on the basis of deference to the choice of forum by a U.S. resident[61] and the interest of the United States in vindicating international human-rights violations, as expressed in the ATCA[62]

two-step process in deciding whether to dismiss a claim based upon forum non conveniens. The first step consists of determining whether an adequate alternative forum exists. Piper Aircraft Co. v. Reyno, 454 U.S. 235,254 n.22 (1981); *see also Gilbert,* **330 U.S. at 506-07. If such a forum exists, the court must then balance a series of factors involving the private interests of the parties and the public interest in maintaining the litigation in the selected forum.** *Gilbert,* **330 U.S. at 508-09. Public interest factors include court congestion, the unfairness of imposing jury duty on a community with no relation to the litigation, the interest of the community in having localized controversies decided at home and avoidance of problems associated with conflict of laws and the application of foreign law.** *Id.* **Private interest factors include ease of access to evidence, the cost for witnesses to attend trial, the availability of compulsory process, and other factors that might shorten the trial or make it less expensive.** *Id.* **at 508. The burden of demonstrating the existence of an adequate alternative forum and that the balance of private and public interests "tilt strongly in favor of trial in the foreign forum" rests with the defendant. R. Maganial & Co. v. M.G. Chem. Co., 942 F.2d 164, 167 (2d Cir. 1991). Failure to meet this burden will result in denial of the defendant's request, because "[t]he plaintiffs choice of forum should rarely be disturbed."** *Gilbert,* **330 U.S. at 508.**

[58] *Kavlin,* **978 F.Supp.. at 1085-86. The Minister of Justice described the Bolivian judicial system as "a collection agency" and the penal system "an agent of extorsion [sic]."** *Id.* **at 1085. Academic opinions offered by the plaintiff characterized the judicial system as "notoriously corrupt, "unusually susceptible to improper outside influence" and conducive to bribery.** *Id.* **The court also cited the opinion of the U.S. State Department that the Bolivian justice system is "overburdened, afflicted by the corruption of some judges, and lacking public credibility . . . . [and populated by] judges [who] are underpaid, poorly disciplined, and susceptible to political influence."** *Id.* **at 1086.**

[59] *Id.* **at 1086.**

[60] Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F.Supp.2d 289, 335-36 (S.D.N.Y. 2003). The court specifically noted, "it would be perverse, to say the least, to require plaintiffs to bring this suit in the courts of the very nation that has allegedly been conducting genocidal activities to try to eliminate them."/«/, at336.

" *See* **Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 101 (2d Cir. 2000) (noting two of the plaintiffs resided in the United States at the time of initiation of the litigation);** *see also Presbyterian Church of Sudan,* **244 F.Supp.2d at 338 (noting two of the plaintiffs resided in Illinois and Iowa).**

[62] *See Wiwa. 226* **F.3d at 105-06 (holding the ATCA "expresses a policy favoring receptivity by [U.S.] courts to [human-rights] suits" that would be frustrated by an interpretation of forum non conveniens that permitted U.S. courts to "exercise their jurisdiction conferred by the 1789 Act only for as long as it takes to dismiss the case"). The court also noted the U.S. forum did not involve substantial inconvenience or cost associated with the transportation of physical evidence, documents and witnesses, and any additional cost and inconvenience incurred by the defendants in litigating in the United States were more than offset by the cost and inconvenience to the plaintiffs of having to pursue their claims m a foreign venue.** *Id.* **at**

The act-of-state and political question doctrines and comity as they relate to *jus cogens* were addressed in two opinions.[63] Application of the act-of-state doctrine was rejected by the district court in *Presbyterian Church of Sudan.* The court held adjudication of the plaintiffs' claims was not barred as world opinion unanimously condemned genocide, war crimes and torture.[64] Adjudication of the plaintiffs' claims was also consistent with U.S. foreign policy with respect to Sudan.[65] The mere existence of a complex diplomatic relationship between the United States and Sudan did not militate in favor of dismissal without evidence of a detrimental effect upon such relations.[66] Given the long-standing U.S. condemnation of Sudan, any detrimental effect upon the complex diplomatic relationship between the states arising as a result of adjudication of the plaintiffs' claims would be "a mere drop in the bucket."[67]

Furthermore, the court refused to grant international comity with regard to Sudan's alleged campaign of genocide on the basis of the U.S. interest in the vindication of human-rights violations as expressed in the ATCA.[68] Sudanese interests in the outcome of ongoing peace negotiations between warring factions in the country were not subject to deference, because Talisman failed to specify how or

106-07; *see also Presbyterian Church of Sudan,* **244 F.Supp.2d at 340 (citing the "grave nature" of the human-rights violations at issue in refusing to apply forum non conveniens to the plaintiffs' claims).**

[63] The act-of-state doctrine has been described as "a non-jurisdictional, prudential doctrine based on the notion that the courts of one country will not sit in judgment on the acts of the government of another [state], done within its own territory." Underhill v. Hernandez, 168 U.S. 250, 252 (1897); *see also* **W.S. Kirkpatrick & Co., Inc. v. Envtl. Tectonics Corp., 493 U.S. 400, 406 (1990); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398,428 (1964). In** *Sabbatino,* **the U.S. Supreme Court delineated a three-part test to assist courts in determining whether the act-of-state doctrine bars consideration of specific claims. This test consists of balancing the degree of codification or consensus concerning the particular area of international law at issue, the implications of judicial resolution of the issue for U.S. foreign relations and whether the government whose actions are at issue remains in existence at the time of the court's decision.** *Sabbatino,* **376 U.S. at 428. The political question doctrine provides that a nonjusticiable political question ordinarily involves one or more of the following factors:**

> **[1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.**

Baker v. CatT, 369 U.S. 186,217 (1962).

International comity is defined as "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation." Hilton v. Guyot, 159 U.S. 113, 164 (1895). The decision whether to abstain from exercising jurisdiction on the basis of international comity lies within the discretion of the district court. Finanz AG Zurich v. Banco Economico S.A., 192 F.3d 240, 245-46 (2d Cir. 1999); *see also* **Jota v. Texaco, Inc., 157 F.3d 153,160 (2d Cir. 1998).**

[64] *Presbyterian Church of Sudan,* **244 F.Supp.2d at 345.**

[65] *Id.* **at 345-46.**

[66] *Id.*

[67] *Id.*

[68] *Id.* **at 342-43 (characterizing comity under such circumstances as "a grotesque miscarriage of justice").**

why the adjudication of the plaintiffs' claims would interfere with efforts to resolve hostilities. Rather, continuation of the litigation was consistent with the policy of the United States, which had previously condemned human-rights violations in Sudan and declared it to be a state sponsor of terrorism.[70]

The political question doctrine was equally inapplicable to the plaintiffs' claims. Initially, the court found the adjudication of human-rights claims was committed to the federal judiciary through the ATCA.[71] Although the plaintiffs' claims presented difficult and sensitive issues for resolution in a politically charged context, this fact alone did not mandate reflexive invocation of the doctrine.[72] This conclusion was reinforced by the fact the standards of behavior applicable to Talisman's behavior were readily ascertainable from universally recognized norms of international law.[73] Additionally relevant in this regard was the universal condemnation of genocide, war crimes and torture as violations of customary and codified international law.[74] Finally, adjudication of the plaintiffs' claims would not contradict U.S. foreign policy toward Sudan or violate any specific agreement between the states.[75]

By contrast, the district court dismissed the plaintiffs' claims in *Sarei* on the basis of the act-of-state doctrine. The court initially ascertained the existence of an official act of a foreign sovereign, namely Papua New Guinea's so-called "Copper Act."[76] The activities undertaken pursuant to the Copper Act, including the construction and operation of the mine on Bougainville, involved official acts of the government of Papua New Guinea.[77] The court found there was a "strong likelihood" that it would be required to assess the legality of these official acts if the plaintiffs were permitted to proceed with their claims.[78] Furthermore, correspondence from the U.S. State Department established the possibility of serious damage to U.S. foreign policy objectives if adjudication of the plaintiffs' claims were permitted to proceed.[79] Finally, the government responsible for the operation of the Bougainville copper mine and associated human-rights violations was still in power.

The possibility of interference expressed by the executive branch was also relevant to application of the political question doctrine. Specifically, if it proceeded

[69] *Id.* **at 343**

[70] *Id.* **(citing the Sudan Peace Act, Pub. L. No. 107-245,116 Stat. 1504 (2002) (codified in 50 U.S.C.)).**

[71] *Id.* **at 347.**

[n] *Id.*

[73] *Id.*

[74] *Id.* **at 349.**

[/5] *Id.*

[76] **Sarei v. Rio Tinto, 221 F.Supp.2d 1116,1188 (C D. Cal. 2002).**

[77] *Id.*

[79] *U.* **rt'lfJl (citing Letter from William H. Taft, IV, Legal Advisor, U.S. Department^-State to> the Honorable Robert D. McCallum, Assistant Attorney General, Civil Division, U S^ Dep rtmen of Justice 1-2 (Oct. 31,2001) (on file with author) wherein the State Department express^ oncem ^ ^ud cat™ of the plaintiffs' claims could have 'Very grave" consequences for U S "Papua New Guinea bilateral relations and a "potentially serious adverse impact on the [multilateral, U -sponsore peace process [in Bougainville]," the outcome of which was crucial to U.S. interests).**

[K] *Id.* **at 1193**

with adjudication of the plaintiffs' claims in light of the State Department's expressed foreign policy concerns, the court would be expressing a lack of respect for the executive branch.[81] Proceeding with the litigation in light of such concerns would also subject the U.S. Government to potential embarrassment from multifarious pronouncements by various departments on a single issue.[82]

Finally, the court decided to abstain from determination of the plaintiffs' claims pursuant to the doctrine of international comity. The court noted the existence of a conflict between the grant of federal jurisdiction pursuant to the ATCA and Papua New Guinea's Compensation Act, which required the initial filing of claims such as those brought by the plaintiffs in its national courts.[83] This legislation, when combined with the occurrence of all of the acts at issue and the presence of all but one of the plaintiffs in Papua New Guinea, weighed in favor of granting comity to its courts with respect to adjudication of the plaintiffs' claims.[84]

II. THE PROCEDURAL HISTORY OF SOSA V. ALVAREZ-MACHAIN

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

Humberto Alvarez-Machain (Alvarez), a citizen of Mexico, was indicted by a federal grand jury in Los Angeles, California, in 1990 for alleged complicity in the kidnapping, torture and murder of DEA agent Enrique Camarena-Salazar and his Mexican pilot Alfredo Zavala-Avelar in Guadalajara, Mexico, in February 1985. Although the United States negotiated with Mexican officials to obtain custody of Alvarez, no formal request for extradition was made. Rather, DEA officials approved a plan to use Mexican nationals not affiliated with the governments of the United States or Mexico to arrest Alvarez and bring him to the United States for trial. Hector Berellez, the DEA agent in charge of the Camarena murder investigation, retained Antonio Garate-Bustamante (Garate), a Mexican citizen and DEA operative, to contact Mexican nationals willing to participate in the arrest. Through operatives, Garate retained Jose Francisco Sosa, a former Mexican police officer, to participate in Alvarez's arrest. This operation occurred on April 2, 1990, when Sosa and others abducted Alvarez from his office in Guadalajara, held him overnight in a motel in Mexico and subsequently transported him to El Paso, Texas, where he was arrested by U.S. federal agents. Alvarez was arraigned and transported to Los Angeles, California, for trial.

Alvarez moved to dismiss the indictment on the basis that the federal court lacked jurisdiction, because his arrest was in violation of the extradition treaty between the United States and Mexico.[85] While rejecting the claim that the government engaged in outrageous conduct, the district court nevertheless held it

[81] *Id.* **at 1198.**
[12] *Id.*
[83] **Mat 1201.**
[84] *Id.* **at 1206.**
[85] *See* **Extradition Treaty, May 4, 1978, U.S.-Mex., 31 U.S.T. 5059.**

lacked jurisdiction to try Alvarez, because his abduction violated the U.S.-Mexico Extradition Treaty.[86] The U.S. Court of Appeals for the Ninth Circuit affirmed the dismissal of the indictment and ordered Alvarez's repatriation.[87] The U.S. Supreme Court reversed and remanded the case for trial.[88] The Court held Alvarez's forcible abduction did not violate the Extradition Treaty, and federal courts retain the power to try persons for crimes, even when their presence has been forcibly procured.[89] The Court did note, however, that Alvarez's abduction "may be in violation of general international law principles," thereby permitting him to pursue civil remedies at a later date.[90]

Alvarez was tried for Camarena's kidnapping, torture and murder in 1992. After the presentation of the government's case, the district court judge granted Alvarez's motion for judgment of acquittal on the ground of insufficient evidence to support a guilty verdict.[91] As a result, Alvarez was repatriated to Mexico.

In 1993, Alvarez initiated a civil action in the United States District Court for the Central District of California, alleging numerous constitutional and tort claims arising from his abduction, detention and trial.[9"] Sosa, Garate, five unnamed Mexican nationals, the United States and four DEA agents were listed as defendants.[93] On motions by Sosa and Alvarez for summary judgment, the district court held kidnapping and arbitrary detention to be "specific, universal and obligatory" and therefore actionable pursuant to the ATCA.[94] The district court entered judgment against Sosa in the amount of $25,000.[95] The court also held that there was no "universal consensus" regarding the definition of cruel, inhuman and degrading treatment at the time of the events in this case and granted summary judgment in favor of Sosa with respect to this claim.[96]

The U.S. Court of Appeals for the Ninth Circuit affirmed Sosa's liability pursuant to the ATCA, although on different grounds than those provided by the

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

[87] United States v. Alvarez-Machain, 946 F.2d 1466 (9th Cir. 1991).

[88] United States v. Alvarez-Machain, 504 U.S. 655 (1992).

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

[90] *Id.* **at 669.**

[91] The district court concluded the government's case was based on suspicion and hunches but... no proof," and the theory of the prosecution's case was "whole cloth, the wildest speculation." Alvarez- Machain v. United States, 331 F.3d 604,610 (9th Cir. 2003).

[92] Alvarez's complaint, as amended, alleged claims sounding in: (1) kidnapping; (2) torture, (3) cruel, inhuman and degrading treatment or punishment; (4) arbitrary detention; (5) assault and battery. (6) false imprisonment; (7) intentional infliction of emotional distress; (8) false arrest; (9) negligent employment, (10) negligent infliction of emotional distress; and (11) violations of the Fourth, Fifth and Eighth Amendments to the U.S. Constitution. *Alvarez-Machain,* **331 F.3d at 610 n.l.**

[93] *Id.* **at 610. The district court substituted the United States for the DEA agents except Sosa and Garate, on all non-constitutional claims. The United States was substituted for Garate by later stipulation of the parties**

[94] Alvarez-Machain v. United States, 1999 U.S. Dist. LEXIS 23304, at *60-*71 (CD Cal. Mar. 18,1999). The district court also denied Sosa's motion to substitute the United States, gran e e mo ion o e our DEA agents and Garate for summary judgment and granted in part and enie in pa e ni e es motion for summary judgment.

[5] *Id.* **at *78.**

[96] *Id* **at *68.**

district court. The Ninth Circuit did adopt the district court's "specific, universal and obligatory" standard to determine whether a violation of the law of nations is actionable pursuant to the ATCA.[97] However, the court rejected Alvarez's claim that he could assert an ATCA claim based upon the breach of Mexican sovereignty occurring during his arrest.[98] In addition, the Ninth Circuit refused to recognize transborder abduction as a violation of customary international law.[99] The court did conclude there was a specific, universal and obligatory norm prohibiting arbitrary arrest and detention.[100] As such, applying federal choice-of-law principles,[101] the Ninth Circuit concluded Alvarez was entitled to damages incurred as a result of his arrest and detention in Mexico.[102]

B. *The U.S. Supreme Court Opinion*

The U.S. Supreme Court granted certiorari on December 1, 2003, to determine the issue of whether Alvarez was entitled to a remedy pursuant to the ATCA.[103] In an opinion dated June 29, 2004, the Court unanimously agreed that Alvarez could not pursue a remedy in federal court pursuant to the ATCA. However, Justice Souter's majority opinion refused to interpret the ATCA in such a manner as to deny relief to all victims of human-rights abuses.

The Court initially addressed Alvarez's contention that the ATCA is not merely a jurisdictional statute, but rather acts as authority for the creation of a new cause of action for torts in violation of international law. The Court dismissed this interpretation as "implausible," given the placement of the ATCA in the Judiciary Act, "a statute otherwise exclusively concerned with federal-court jurisdiction."[104] However, this interpretation did not lead to the conclusion that the ATCA was

[97] *Alvarez-Machain.* **331 F.3d at 613-14.**

[98] *Id.* **at 615-16 (concluding Alvarez was not the proper party to vindicate Mexico's national interest in its sovereignty).**

[99] *Id.* **at 617-20 (noting the absence of specific prohibitions upon transborder abduction in applicable international instruments and the United States-Mexico Extradition Treaty in force at the time of the events in question). Transborder abduction was not prohibited until 1994.** *See* **Treaty to Prohibit Transborder Abductions, Nov. 23, 1994, U.S.-Mex.,** *reprinted in* MICHAEL ABBELL, EXTRADITION TO AND FROM THE UNITED STATES, **at A-287, A-303 (2002). However, this agreement has yet to be submitted by the President to the Senate for ratification.**

[100] *Alvarez-Machain,* **331 F.3d at 620-21 (citing prohibitions upon arbitrary arrest and detention in every major human-rights instrument as well, as 119 national constitutions). Alvarez's arrest and detention in Mexico were arbitrary, because they violated Mexican sovereignty and attempted to enforce illegally a U.S. arrest warrant in a foreign state.** *Id.* **at 623.**

[101] *Id.* **at 633-35 (applying federal choice-of-law principles, based upon the significant relationship of the United States to the events at issue, the status of the United States as a party to the litigation, the origin of the case from a federal criminal prosecution, the policy of the United States to provide a civil remedy for victims of human-rights violations as expressed in the ATCA and the presence of international law principles of universal concern).**

[102] *Id.* **at 636-37 (noting Sosa's participation in Alvarez's arrest and detention occurred almost exclusively within Mexico and the breaking of the chain of causation set in motion by Sosa's initial misconduct in Mexico by the subsequent delivery of Alvarez to U.S. law enforcement personnel in El Paso, Texas).**

[103] *See* **Sosa v. Alvarez-Machain, 540 U.S. 1045 (2003) (order granting petition for certiorari).**

[104] **Sosa v. Alvarez-Machain, 542 U.S. 692,742 (2004).**

stillborn upon its creation, due to the absence of concomitant legislation creating a list of actionable torts. Instead, the Court endorsed the conclusion that federal courts were entitled to entertain claims upon the adoption of the jurisdictional grant contained within the ATCA, because torts in violation of the law of nations were recognized in common law existing at the time.[105] The Court particularly noted the United States received the law of nations as it existed upon its independence.[106] This law of nations consisted of "general norms governing the behavior of national states with each other" and "a body of judge-made law regulating the conduct of individuals situated outside domestic boundaries and consequently carrying an international savor."[107] These bodies of law overlapped where violations of the law of nations gave rise to a judicial remedy as well as threatened serious consequences for the United States in the conduct of international affairs.[108] This overlap was limited to three offenses, namely violation of safe conduct, infringement of the rights of ambassadors and piracy.[109] The Court concluded that "this narrow set of violations ... was probably on the minds of the men who drafted the [ATCA] with its reference to tort."[110]

Justice Souter readily conceded there was no legislative record expressly supporting this conclusion.[111] Nevertheless, the Court concluded the ATCA was intended to have practical effect upon its adoption.[112] The Court specifically noted the principal draftsman of the ATCA, Oliver Ellsworth of Connecticut, served in the Continental Congress that, in 1781, adopted a resolution calling upon state legislatures to "provide expeditious, exemplary and adequate punishment" for "the violation of safe conducts or passports ... of hostility against such as are in amity • ■ . with the United States, . .. infractions of the immunities of ambassadors and other public ministers .. . [and] infractions of treaties and conventions to which the United States are a party."[113] Furthermore, the First Congress recognized the importance of the law of nations in legislation to punish certain offenses in violation thereof as criminal offenses.[114] Based upon this background, the Court concluded, It

1U.

Id. **(citing Ware v. Hylton,3 Dali. 199,281 (1796) (Wilson, J.)).**

Id. **at 743.**

[111] **Justice Souter admitted that "despite considerable scholarly attention, it is fair to say that a consensus understanding of what Congress intended has proven elusive."** *Id.* **at 745.**

[112] **In reaching this conclusion, Justice Souter specifically noted: . „ ^ i**

> **[T]here is every reason to suppose that the First Congress did not pass t e [ ] as a jurisdictional convenience to be placed on the shelf for use y a uture Congress or state legislature that might, some day, authorize the creation o causes of action or itself decide to make some element of the law of nations actionable for the benefit of foreigners.**

Id.

[113] *Id.* **at 743-44 (citing 21** JOURNALS OF THE CONTINENTAL CONGRESS **1136-37 (G. Hunt, ed. 1912))**

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

would have been passing strange for Ellsworth and this very Congress to vest federal courts expressly with jurisdiction to entertain civil causes brought by aliens alleging violations of the law of nations, but to no effect whatever until the Congress should take further action."[115]

The historical record existing immediately after the adoption of the ATCA also supported this conclusion. Early federal cases addressing the ATCA gave no intimation that further implementing legislation was necessary."[6] The 1795 opinion of Attorney General William Bradford with respect to the criminal prosecution of U.S. citizens participating in a French raid upon a British slave colony in Sierra Leone recognized the possibility of a civil remedy for the aggrieved without specific reference to the need for implementing legislation.[117] The reasonable inference from these precedents was that the ATCA had immediate effect upon its adoption. As a result, the Court held, "[t]here is too much in the historical record to believe that Congress would have enacted the [ATCA] only to leave it lying fallow indefinitely."[118]

This history also led the Court to conclude the ATCA conferred jurisdiction upon federal courts for "a relatively modest set of actions alleging violations of the law of nations."[119] This "modest set of actions" was torts arising from the violation of safe conducts, infringement of the rights of ambassadors and piracy. However, the Court found there were no Congressional developments in the intervening 191 years from the adoption of the ATCA to its modem expression in *Filartiga* v. *Pena-Irala* that precluded courts from "recognizing a claim under the law of nations as an element of common law."[120]

Nevertheless, the absence of amendments to or abolition of the ATCA did not lead Justice Souter to adopt an unrestrained view of the causes of action over which courts could exercise jurisdiction. Rather, claims based upon the present-day law of nations were required to "rest on a norm of international character accepted

[115] Sosa, 542 U.S. at 746.

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

[117] *See* **1 Op. Att'y Gen,** *supra* **note 40, at 59. While expressing reservations about criminal prosecution of the perpetrators, Attorney General Bradford was far more certain of the likelihood of tort liability pursuant to the ATCA. In this regard, Attorney General Bradford stated:**

> **But there can be no doubt that the company or individuals who have been injured by these acts of hostility have a remedy by a civil suit in the courts of the United States; jurisdiction being expressly given to these courts in all cases where an alien sues for a tort only, in violation of the laws of nations, or a treaty of the United States.**

Id.

Sosa, **542 U.S. at 746.**

"'Id.

[120] *Id.* **at 749. In his concurring opinion, Justice Scalia concluded the Framers would be "quite terrified" by the expansion of federal jurisdiction beyond piracy, violations of safe conduct, interference with ambassadors and foreign sovereign immunity.** *Id.* **at 764 (Scalia, J., concurring). This expansion was "a 20th-century invention of internationalist law professors and human-rights advocates."** *Id.*

by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms [the Court has] recognized."[121] This restraint was justified, because the "prevailing conception" of the common law had changed since 1789 from one of discovery of governing principles to wholesale judicial creation.[122] The perception of federal common law also changed with the Court's opinion in *Erie Railway Co.* v. *Tompkins*.[123] The legacy of *Erie* militated in favor of a policy of "legislative guidance before exercising innovative authority over substantive law."[124]

However, the holding in *Erie* did not preclude "further independent judicial recognition of actionable international norms."[125] Rather, Justice Souter concluded, "judicial power should be exercised on the understanding that the door is still ajar subject to vigilant doorkeeping, and thus open to a narrow class of international norms today."[126] According to the Court, *Erie* did not bar judicial recognition of all new substantive rules of federal common law, but rather permitted such recognition in "identified limited enclaves."[127] For over two centuries, one of these enclaves included the law of nations. The Court was unwilling to instruct federal courts to "avert their gaze entirely" from such norms, including those intended to protect individuals.[12] Such aversion was not within the understanding of the First Congress, which also would not, according to the Court, have "expected federal courts to lose all capacity to recognize enforceable international norms simply because the common law might lose some metaphysical cachet on the road to modem realism."[129] Rather, the legitimacy of limited recognition of international norms by federal courts had been assumed since *Filartiga*, and that legitimacy had not been contravened by the U.S. Congress.[130] Absent Congressional guidance, there was no evidence Congress had "shut the door to [consideration of] the law of nations entirely" in federal courts.[131]

The Court determined the decision to create private rights of action was best left to the legislative branch, in the absence of an express provision within existing

[121] *Id.* **at 749.**

[122] **The Court noted that, in 1789, the common law was accepted as "a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute.** *Id.* **(citing Black and White Taxicab & Transfer Co. v. Brown and Yellow Taxicab & Transfer Co., 276 U.S. 518, 533 (1928) (Holmes, J., dissenting)). However, the formulation of common law principles in the modem era has increasingly relied on the exercise of judicial discretion. As noted by Justice Oliver Wendell Holmes, Jr. in 1881, the "the secret root from which the law draws all the juices of life . . [is] considerations of what is expedient for the community concerned."** OLIVER WENDELL HOLMES, **JR.,** THE COMMON **Law 31-32 (Mark DeWolfe Howe, ed,, 1963).**

[23] **304 U.S. 64 (1938) (abolishing federal common law and approving its withdrawal to specialized fields or where necessary in interstitial areas of federal interest).**

[24] *Sosa,* **542 U.S. at 750. With respect to the ATCA, the Court specifically noted it "would be remarkable to take a more aggressive role in exercising a jurisdiction that remained largely in sha ow ormuc o t e prior two centuries."** *Id.*

[25] *Id.* **at 752.**

statutes.[lj2] This deference to the U.S. Congress was prudent, because of the "possible collateral consequences of making international rules privately actionable."[133] Judicial recognition of causes of action and the fashioning of remedies to address violations should thus proceed, if at all, with "great caution."[134] Finally, there is no Congressional mandate to U.S. courts to define new violations of international law actionable pursuant to the ATCA. Although the Torture Victim Protection Act of 1991[135] provides such a mandate through the establishment of "an unambiguous and modem basis for federal claims of torture and extrajudicial killing,"[136] the mandate was limited to this narrow range of claims. More common is the expression by Congress of its intent to limit judicial interpretation of human-rights norms through declarations that ratified instruments are not self-executing.[137]

As a result, Justice Souter placed limitations on claims recognizable pursuant to the ATCA's grant of jurisdiction. The Court concluded international law norms were not recognizable under federal common law if they had "less definite content and acceptance among civilized nations than the historical paradigms familiar when [the ATCA] was enacted."[138] The Court cited piracy and torture as two offenses consisting of definite conduct and having acceptance among civilized nations.[139] These offenses were examples of "a handful of heinous actions" that were specific, universal and obligatory, so as to be actionable pursuant to the ATCA.[140] Claims of violation of such norms were thus to be gauged against the current state of international law, using sources recognized by the Court, dating back to the decision in *The Paquete Habana*.[uf]

[132] *Id.* **at 750.**

[m]*Id.*

[134] *Id.* **at 751. In Justice Scalia's view, such consequences were not reasons for courts to exercise "great caution" in adjudicating such claims but rather were reasons why courts were not granted nor could be thought to possess federal common-law-making powers with respect to the recognition of private causes of action arising from the violation of customary international law.** *Id.* **at 763 (Scalia, J., concurring).**

[135] **Pub. L. No. 102-256,106 Stat. 73 (1992) (codified at 28 U.S.C. 1350 note (2000)).**

[136] **H.R. REP. No. 102-367, at 3 (1991).**

[137] *See, e.g.,* **Genocide Convention Implementation Act of 1987, 18 U.S.C. §1092 (2000) (providing U.S. ratification of the Convention on the Prevention and Punishment of the Crime of Genocide does not create a substantive or procedural right of private enforcement).**

[138] *Sosa,* **542 U.S. at 753.**

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

[140] *Id.* **at 753 (citing** *In re* **Estate of Marcos Human Rights Litigation, 25 F.3d 1467, 1475 (9th Cir. 1994) ("Actionable violations of international law must be of a norm that is specific, universal and obligatory"); Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 781 (Edwards, J., concurring) (concluding the limits of the ATCA's jurisdictional grant are defined by violations of "definable, universal and obligatory norms")).**

[141] **175 U.S. 677, 700 (1900) (providing "where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators ... for trustworthy evidence of what the law really is"). In his concurring opinion, Justice Scalia doubted federal courts would limit themselves in such a manner. Justice Scalia noted, "For over two decades now, unelected federal judges have been usurping [Congress and the Executive's] lawmaking power by converting what they regard as norms of international law into American law."** *Sosa,* **542 U.S. at 765 (Scalia, J., concurring). The majority's failure to condemn this trend was evidence that the Court was "incapable of admitting that some matters—***any* **matters—are none of its business."** *Id.* **(emphasis in original). According to Justice Scalia, the majority's**

The Court then examined the two human-rights instruments by which Alvarez claimed the existence of an international norm prohibiting arbitrary arrest. The Court dismissed the first of these instruments, the Universal Declaration of Human Rights, on the basis that it was a statement of aspirations only and did not impose binding obligations upon national governments by its own force and effect.[142] More importantly, the Court rejected the creation of such a norm on the basis of a prohibition contained within the International Covenant on Civil and Political Rights. Although binding as a matter of international law, the Covenant was ratified by the United States on the express understanding that it was not self-executing and thus did not create obligations enforceable in federal courts.[143]

Applying these standards to Alvarez's claims, the Court concluded there was no specific, universal and obligatory international norm sanctioning arbitrary detention occurring entirely within the borders of one state. The Court described the implications of Alvarez's claim as "breathtaking," in that it would "support a cause of action in federal court for any arrest, anywhere in the world, unauthorized by the law of the jurisdiction in which it took place, and would create a cause of action for any seizure of an alien in violation of the Fourth Amendment."[144] Such a result was inconsistent with applicable statutory and case law.[145] Any inability to demonstrate Sosa was acting on behalf of the U.S. Government at the time of Alvarez's detention would require a further broadening of these principles to include conduct by private parties.[146] In addition, Alvarez's claim lacked the necessary "state policy" and "prolonged" nature to qualify as a violation of a specific and universal norm.[147] Although the exact meaning of these terms remained an open question, the Court held that they clearly required "a factual basis beyond relatively brief detention in excess of positive authority."[148] Even assuming Alvarez's detention was "prolonged" and the result of "state policy," it remained impossible to determine whether and when that detention achieved the degree of certainty necessary to violate international law characteristic of the offenses of piracy, interference with ambassadors and violation of safe conduct.[149] As such, the Court concluded the

opinion was an example of "Never Say Never Jurisprudence" in which the Court ignores its own conclusion that the [ATCA] provides only jurisdiction, wags a finger at the lower courts for going too far, and then—repeating the same formula the ambitious lower courts *themselves* **have used invites them to try again."** *Id.* **(emphasis in original). .**

[142] *Sosa,* **542 U.S. at 755. The Court specifically noted Eleanor Roosevelt, one of the primary forces behind the adoption of the Universal Declaration, characterized it as "'a statement of principles . setting up a common standard of achievement for all peoples and all nations ... [and] not a treaty or international agreement... imposing] legal obligations."** EVAN LUARD, **THE** INTERNATIONAL PROTECTION OF HUMAN **RIGHTS 39,50 (1967).**

[143] *Sosa,* **542 U.S. at 755.**

[44] *Id.* **at 756.**

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

[146] *Id.*

[147] *Id.* **(citing** RESTATEMENT OF FOREIGN RELATIONS LAW, *supra* **note 20, §702).**

[148] *Id.* **at 756-57.**

[149] *Id* **at 757.**

principle advanced by Alvarez in his claim remained, "in the present, imperfect world ... an aspiration that exceeds any binding customary rule having the specificity [the Court] requires."[150] The creation of a private cause of action under such circumstances would, in the Court's judgment, exceed the bounds of exercisable residual common law discretion possessed by the federal judiciary.

III. The Transnational Corporation Unbound: The Implications of *Sosa* for Future ATCA Litigation Alleging *Jus Cogens* Violations

A. *Human Rights Associated with Personal Welfare*

1. Summary and Extrajudicial Execution

The most universal recognition of the right to be free from summary or extrajudicial execution is in Geneva Convention IV and the International Covenant on Civil and Political Rights. Article 6(1) of the Civil and Political Rights Covenant states, "No one shall be arbitrarily deprived of his life."[151] The Covenant fails to define the circumstances constituting such a deprivation from which states are to abstain. Although the Civil and Political Rights Covenant is clearly universal, given its ratification by 152 states, its universality is insufficient to overcome this lack of specificity.[152] Furthermore, Article 6 is not obligatory, because it has been designated as non-self-executing by the United States, and no implementing legislation is currently in force.[153]

The prohibition upon summary execution in Geneva Convention IV presents a more difficult issue. Article 3(l)(a) prohibits "murder of all kinds."[154] This prohibition is further elaborated upon in Article 3(l)(d), which bars the "passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all judicial guarantees which are recognized as indispensable by civilized people."[155] Although the definitions of "regularly constituted court" and "indispensable judicial guarantees" may be subject to interpretation, Section 3(1)(d) is a classic restatement of the widely accepted definition of summary or extrajudicial execution.[156] Furthermore, the universality of

[150] *Id.*

[151] **Civil and Political Rights Covenant,** *supra* **note 51, art. 6(1).**

[152] OFFICE OF THE **U.N.** HIGH COMM'R FOR HUMAN RIGHTS, STATUS OF RATIFICATIONS OF THE PRINCIPAL INTERNATIONAL HUMAN RIGHTS TREATIES 11 (June 2004). **The United States signed the** Covenant on October 5,1977, and **ratified it** effective September 8, 1992.

[153] **U.S. Reservations, Declarations and Understandings, International Covenant on Civil and Political Rights, 138** CONG. **REC. S4781-01,art. 111(1) (daily ed. Apr. 2, 1992) (declaring Article 6 of the Covenant to be non-self-executing).**

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

[155] *Id.* **art. 3(1)(d).**

[156] *See, e.g.*. RESTATEMENT OF FOREIGN RELATIONS LAW, *supra* **note 20, §702 cmt. f (defining summary execution as the killing of an individual "other than as lawful punishment pursuant to conviction in accordance with due process of law, or as necessary under exigent circumstances").**

Geneva Convention IV is indisputable.[157] Thus, Geneva Convention IV meets the specific and universal portions of Justice Souter's standard.

However, Geneva Convention IV is not obligatory upon the United States in such a way as to create a cause of action pursuant to the ATCA. Despite its ratification by the United States, there is no indication that Geneva Convention IV manifests an intention to be self-executing without the enactment of enabling legislation, nor that the United States intended that result at the time of ratification.[158] Furthermore, the creation of a private remedy actionable in U.S. courts as a result of such a violation is inconsistent with the general rule that affected individuals do not have direct remedies against human-rights violators, except where expressly provided by international agreement.[159] In any event, Geneva Convention IV has very limited applicability, specifically, the protection of civilian populations in the event of war. This limitation makes its application to transnational corporations unlikely.

Similar conclusions are reached through application of regional and United Nations human-rights instruments. The right to be free from summary execution, as defined in the American Convention on Human Rights, suffers from the same problem as the Civil and Political Rights Covenant. Article 4(1) prohibits arbitrary deprivations of life without defining the conduct constituting that deprivation.[160] Furthermore, the American Convention is not universal or obligatory.[161]

Summary or extrajudicial execution is also referenced in the Principles on the Effective Prevention and Investigation of Extra-Legal Arbitrary and Summary Execution. The Principles place numerous duties on states with respect to summary executions, including prohibition, prevention and investigation.[162] However, the Principles do not provide a definition of "extra-legal, arbitrary and summary execution." Even assuming the definition may be ascertained from other international instruments or from the prohibitions contained within the Principles themselves, the universal nature of the Principles is subject to question, given that they constitute nothing more than a resolution of the U.N. Economic and Social

[157] **Geneva Convention** IV **has been ratified or acceded to by** 192 **states, including the Unit^ Sates, which signed** it **on August** 12, 1949, **and ratified it on August** 2, 1955. See INT L COMM. OF THE RE C OS , States Parties and Signatories to Geneva Convention IV1-8 (2004).

[158] RESTATEMENT OF FOREIGN RELATIONS LAW, *supra* **note** 20, §[111] te[n0]) . L[0]r **hprnm e effective agreement is non-self-executing "if the agreement manifests an intention i at ì s a [n] cnnsent to a as domestic law without the enactment of implementing legislation, ì e ena g**

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

Iso American Convention on Human Rights, OAS Treaty Se**ies No. 36, at 1,OAS Off. Ree. OEA/Ser4v/II 23, doc. 21 rev 2 art 4(1) (1975) ("No one shall be arbitrarily deprived of his *■**

[161] **The American Convention is no! universal to the extent it has been ratified by twenty-five of thethirty-four states within the Inter-American [hu]^'[n]®[h]« [S]^[fica], Canada and the United States. See** AMERICAN CONVENTS ON HUMAN RIGHTS 1-2 **(2004).**

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

Council. As such, despite their universal nature and widespread use of mandatory language, the Principles are nonactionable declarations of aspirations and thus not obligatory.

The designation as *jus cogens* does not necessarily render the prohibition of summary or extrajudicial execution actionable pursuant to Justice Souter's opinion in *Sosa*. Justice Souter refused to recognize Alvarez's detention as an actionable violation of international human-rights law, even though arbitrary detention has been defined as *jus cogens.*[m] Although he attempted to distinguish Alvarez's detention from *jus cogens* by holding that it was not "prolonged," Justice Souter further opined that, even assuming the detention to be prolonged, it remained impossible for the Court to determine whether and when such detention achieved the degree of certainty necessary to violate international law characteristic of traditional offenses within the meaning of the ATCA, such as piracy, interference with ambassadors and violation of safe conduct.[164]

Justice Souter's reasoning is not directly applicable to the peremptory norm existing with respect to summary or extrajudicial execution, for two reasons. Initially, the violations vary so widely as to render Justice Souter's holding inapplicable. Justice Souter may be correct that the determination of when a detention becomes sufficiently prolonged to violate international law renders it uncertain for purposes of creating a private cause of action. Such shades of gray are not present in a case of summary execution, which consists of the absence or disregard of judicial procedures and protections, including due process of law, followed by the killing of a human being. Violations of this norm are far easier to determine than the circumstances that render a detention prolonged.

More importantly, unlike arbitrary detention, extrajudicial killings are actionable pursuant to U.S. law.[165] The Torture Victim Protection Act provides civil liability for a person who "under actual or apparent authority, or color of law, of any foreign nation subjects an individual to extrajudicial killing."[166] This statute empowers U.S. courts to adjudicate such claims by U.S. citizens and aliens. The Torture Victim Protection Act has created "an unambiguous and modem basis for federal claims of .. . extrajudicial killing."[167] This express statutory basis differentiates claims of extrajudicial killing from arbitrary detention. Not only do claims of arbitrary detention lack an express statutory basis, but they also lack specificity. By contrast, extrajudicial killing is defined within the Torture Victim Protection Act as "a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees

[165] Sosa v. Alvarez-Machain, 542 U.S. 692,753-57 (2004).

[164] *Id.* **at 757.**

[165] U.S. law does not recognize a cause of action specifically enumerated as arbitrary detention. *See* **28 U.S.C. §2680(h) (2000) (lifting tort immunity for federal investigative or law enforcement officers only if a detention constitutes false imprisonment);** *see also* **28 U.S.C. §§2241-55 (establishing procedures for the issuance of writs of habeas corpus for persons in the custody of the United States in violation of the U.S. Constitution).**

[166] 28 U.S.C. §1350 note.

[167] H.R. REP. NO. 102-367, *supra* **note 136, at 3.**

which are recognized as indispensable by civilized peoples."[168] As previously noted with respect to Geneva Convention IV, although the definitions of "regularly constituted court" and "indispensable judicial guarantees" may be subject to interpretation, the definition of extrajudicial killing in the Torture Victim Protection Act is identical to the internationally accepted definition.[169] Furthermore, the recognition of a federal cause of action for extrajudicial killing gives this human- rights violation an obligatory nature absent from prolonged detention. Thus, the right to be free from summary or extrajudicial killings is specific, universal and obligatory and therefore actionable pursuant to the ATCA.

2. Torture and Cruel, Inhuman or Degrading Treatment or Punishment

The right to be free from torture and other cruel, inhuman or degrading treatment appears in thirteen international and regional human-rights instruments. The initial category of instruments consists of four international conventions prohibiting torture and other cruel, inhuman or degrading treatment but pertaining primarily to other topics. The International Covenant on Civil and Political Rights provides, "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."[170] Article 37(a) of the Convention on the Rights of the Child contains an identical prohibition with respect to children.[171] Geneva Convention IV contains two prohibitions upon such treatment. Article 3(l)(a) prohibits acts of torture and cruel treatment committed against persons taking no part in hostilities by state parties during armed conflicts not of an international character.[172] Article 32 further prohibits torture by state parties of such persons in their custody.[173] Protocol II to Geneva Convention IV prohibits torture and cruel treatment of civilian populations during non-international armed conflicts.

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

¡"28 U.S.C. §1350 note.

See supra **note 156 and accompanying text.**

[170] **Civil and Political Rights Covenant,** *supra* **note 51, art. 7.**

[171] **Convention on the Rights of the Child, G.A. Res. 44/25, art. 37(a), U.N. GAOR 44th Sess., Supp. No. 49, U.N. Doc. A/44/25 (Nov. 20, 1989).**

[2] **Geneva Convention**

[m] *Id.* **art. 32.** . . . . .

[174] **Protocol Additional to the Geneva Convention Relating to the Protection of Vi«,ms on Non- Intemational Armed Conflicts (Protocol II) art. 4(a), (e), June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Protocol III.**

[175] **The Convention on the Rights of the Child has been ratified by 192 states.** OFFICE OF THE **U.N.** HIGH **COMM'R** FOR HUMAN RIGHT!, STATUS OF RATIFICATIONS OF THE P.UNC.PAL INTERNATIONAL HUMAN RIGHTS TREATIES, *supra* **note 152, at 11. Protocol II has been ratified or acced^ to by 157 states^** INT L COMM, OF THE RED CROSS, STATES PARTIES AND SIGNATORIES TO GENEVA C

7 (2004); *see also supra* **notes 152,157 and accompanying text.**

prohibitions contained in the Convention on the Rights of the Child and Protocol II are not legally binding, because they have not been ratified by the United States.[176] The prohibition contained within the Civil and Political Rights Covenant is equally nonobligatory, because Article 7 has been declared to be non-self-executing by the United States.[177] Despite its ratification by the United States, Geneva Convention IV is not obligatory, because there is no evidence it is self-executing or that such a result was intended at the time of ratification or is consistent with general principles of international human-rights law.[178] The limited possibility of application of Geneva Convention IV to the activities of transnational corporations further minimizes its importance.

Three conventions within the Inter-American system of human rights constitute the second category of instruments relating to torture and cruel, inhuman or degrading treatment. Article 5(2) of the American Convention on Human Rights grants every person the right to be free from torture and cruel, inhuman or degrading punishment or treatment.[179] Similarly, Article 4(d) of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women grants every woman the right to be free from torture.[180] The Inter-American human-rights system also contains a convention focused exclusively on torture. The Inter- American Convention to Prevent and Punish Torture obligates states to take "effective measures" to prohibit and punish torture occurring within their jurisdiction.[181]

None of these conventions may serve as the basis for jurisdiction pursuant to the ATCA. The American Conventions on Human Rights and the Prevention, Punishment and Eradication of Violence Against Women suffer from three shortcomings. Initially, these conventions merely prohibit torture and cruel, inhuman or degrading treatment, without defining the prohibited practices. Second, neither of these conventions is universal.[182] The absence of U.S. ratification of these instruments renders their prohibitions nonobligatory.

[176] The only two states that have not ratified the Convention on the Rights of the Child are the United States and Somalia. OFFICE OF THE U.N. HIGH COMM'R FOR HUMAN RIGHTS, STATUS OF RATIFICATIONS OF THE PRINCIPAL INTERNATIONAL HUMAN RIGHTS TREATIES, *supra* note 152, at 9. The U.S. is one of thirty-five states that has not ratified or acceded to Protocol **II.** *See* INT'L COMM. OF THE RED CROSS, STATES PARTIES AND SIGNATORIES TO GENEVA CONVENTION PROTOCOL **II,** *supra* note 175, at 1 -7.

[177] **U.S. Reservations, Declarations and Understandings, International Covenant on Civil and Political Rights,** *supra* **note 153, art. III(l).**

[178] *See supra* **notes 158-159 and accompanying text.**

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

[180] **Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women art. 4(d), June 9, 1994, 33 I.L.M. 1534 (stating, "Every woman has the right ... not to be subjected to torture").**

[181] **Inter-American Convention to Prevent and Punish Torture, O.A.S. Treaty Series No. 67 (1987),** *reprinted in* BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM, **OEA/Ser.L.V/II.82 doc.6 rev.l, art. 6, at 83.**

[182] **The Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women has been ratified by thirty-one states, but has not been ratified by Canada or the United States. ORG. OF AM. STATES, STATUS OF RATIFICATION OF THE INTER-AMERICAN CONVENTION ON THE**

By contrast, the Inter-American Convention to Prevent and Punish Torture does not suffer from a lack of specificity. The Convention defines torture as "any act intentionally performed whereby physical or mental pain or suffering is inflicted on a person for purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty, or for any other purpose."[183] This definition includes methods used to "obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish."[184] Such conduct is prohibited, and states are required to undertake "effective measures" to prevent their occurrence, including criminalization of such conduct in their national law.[185] Further specificity is found in provisions identifying those persons to whom these prohibitions are applicable[186] and eliminating circumstances under which such conduct may be justified.[187]

However, despite this high degree of specificity, the Inter-American Convention to Prevent and Punish Torture is incapable of serving as a basis for private civil litigation in the United States. The universal nature of the Inter- American Torture Convention may be challenged on the basis of the absence of ratification by the United States and Canada.[188] The absence of U.S. ratification or accession also renders the Convention's prohibitions upon torture nonobligatory.

The third category of instruments relating to torture and cruel, inhuman or degrading treatment consists of five resolutions of the U.N. General Assembly. The oldest of these instruments, the Universal Declaration of Human Rights, provides, "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."[189] By comparison, three of the declarations relate to specific circumstances in which torture or cruel, inhuman or degrading treatment or punishment may occur. The Declaration on the Protection of Women and Children in Emergency and Armed Conflict calls upon states to abide by their obligations pursuant to the Geneva Conventions, including efforts to spare women and children from torture and degrading treatment in the course of military operations and

PREVENTION, PUNISHMENT AND ERADICATION OF VIOLENCE AGAINST WOMEN 1-2 (2004); *see also supra* note 161 and accompanying text.

[183] Inter-American Convention to Prevent and Punish Torture, *supra* note 181, art .

[184] *Id.*

[1,5] *Id* art 6

[186] *Id.* In. 3(a-b) (prohibiting torture conducted by public servants or employees or those actmg at their instigation).

[187] *Id.* art. 5 (prohibiting justification for torture due to the existence o a state o war, siege, emCTgency, domestic disturbance or strife, suspension of constitutional guarantees, po I ica ty

'"Ler-American Convention to Prevent and Punish Torture has *«"

thirty-one states. ORG. OF AM. STATES, STATUS OF RATIFICATION OF Till^ NTER-AMBU(:AN <COITION

TO PREVENT AND PUNISH TORTURE 1-2 (2004). In addition to the me ' •

Convention was not in force and effect in

text (discussing the universality of instruments in the Inter-Arne

of ratification by Canada and the United States^ U N. GAOR, 3d Sess., 1st plen.

Universal Declaration of Human Rights, G.A. Res. 21/A, at Mtg., U.N. Doc. A/810 (Dec. 12,1948).

criminal prosecution of persons engaging in acts of torture.[190] The Declaration on the Protection of All Persons from Enforced Disappearances notes the connection between acts of enforced disappearance and violations of the right to be free from torture and cruel, inhuman or degrading treatment or punishment.[191] Torture and other cruel, inhuman or degrading treatment or punishment is also prohibited by Article 3(h) of the Declaration on the Elimination of Violence Against Women.[192]

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

The General Assembly addressed this behavior directly in the Declaration on the Protection of All Persons from Being Subject to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[193] In contrast to the previously- referenced declarations, this Declaration does not suffer from a lack of specificity with respect to torture.[194] Torture is defined as the infliction of severe physical or mental pain or suffering intentionally inflicted by or at the instigation of a public official for purposes of obtaining information, confession to a crime or as a form of punishment or intimidation.[195] The Declaration condemns all such acts as a violation of the Universal Declaration of Human Rights and prohibits states from permitting or tolerating their occurrence.[196] States are required to undertake "effective measures" to prevent such acts from being practiced within their jurisdiction.[197] Further specificity is found in the elimination of circumstances justifying such practices including war or threat thereof, internal political instability and other public emergencies.[198] Nevertheless, the Declaration on the Protection of All Persons from Being Subject to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment is a nonactionable statement of aspirations.

[190] Declaration on the Protection of Women and Children in Emergency and Armed Conflict, G.A. Res. 3318, arts. 4, 5, U.N. GAOR, 29th Sess., Supp. No. 31, U N. Doc. A/9631 (Dec. 12, 1974).

[191] Declaration on the Protection of All Persons from Enforced Disappearances, G.A. Res. 47/133, art. 1(2), U.N. GAOR, 47th Sess., Supp. No. 49, U.N. Doc. A/47/49 (Dec. 18,1992).

[192] Declaration on the Elimination of Violence Against Women, G.A. Res. 48/104, art. 3(h), U.N. GAOR, 48th Sess., Supp. No. 49, U.N. Doc. A/48/49 (Dec. 20, 1993) (providing women are entitled "not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment").

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

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

[195] Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment, *supra* **note 193, art. 1(1).**

[196] *Id.* **arts. 2,3.**

[191] *Id.* **art. 4.**

[198] *Id.* **art. 3.**

The final instrument relating to the right to be free from torture is the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment. This instrument is the most widely-recognized human-rights convention relating to torture and cruel, inhuman or degrading treatment and punishment having been ratified or acceded to by 136 states.[199] The Convention sets forth a detailed definition of torture. States are required to undertake "effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under [their] jurisdiction."[201] In this regard, each state is to ensure torture is an offense punishable pursuant to its criminal laws.[202] National laws must further provide for civil redress for torture victims, including "an enforceable right to fair and adequate compensation" and "means for as full rehabilitation as possible."[203] No exceptions to these prohibitions are permitted.[204] The Convention does not define cruel, inhuman or degrading treatment or punishment. Nevertheless, states are obligated to undertake measures to prevent such conduct when it is "committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."[205] It may be concluded from this language that the Torture Convention is specific, universal and obligatory at least with respect to practices constituting torture. However, the Convention is rendered nonobligatory as a result of its ratification by the United States. Although the United States ratified the Torture Convention effective October 1994, the substantive provisions of the Convention were declared to be non-self-executing.[206] As such, the Torture Convention, standing alone, is not actionable pursuant to the ATCA.

As previously noted with respect to summary execution, the designation of a customary standard of international human rights as a peremptory norm does not necessarily render it actionable pursuant to the ATCA. However, Justice Souter's reasoning in *Sosa* is not applicable, because torture is actionable pursuant to U.S. law. The Torture Victim Protection Act provides civil liability for a person who

[199] OFFICE OF THE U.N. HIGH COMM'R FOR HUMAN RIGHTS, STATUS OF RATIFICATIONS OF THE **Principal International Human Rights Treaties,** *supra* **note 152, at 11.**

Torture Convention, *supra* **note 47, art. 1. Torture is defined as:**

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

Id.

[illegible]

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

[203] *Id.* **art. 14(1).**

[204] *Id.* **art. 2(3) (prohibiting exceptions for war or the threat thereof, political instability or other public emergency).**

[205] *Id.* **art. 16(1).**

[206] **U.S. Reservations, Declarations and Understandings, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 136 CONG. REC. S17486-01, art. 111(1) (daily ed. Oct. 27, 1990).**

"under actual or apparent authority, or color of law, of any foreign nation subjects an individual to torture."[207] In a manner identical to summary execution, this express statutory basis differentiates claims of torture from arbitrary detention. Torture is defined within the Act as the intentional infliction of severe pain or suffering, whether physical or mental, against a person in the offender's custody or physical control for the purpose of obtaining information or a confession from the victim or a third person, inflicting punishment for an act committed or allegedly committed by the victim or third person, intimidating or coercing the victim or a third person or for any discriminatory reason not otherwise provided.[208] "Mental pain or suffering" is defined in the Act as prolonged mental harm caused by or resulting from the intentional infliction or threatened infliction of severe physical pain or suffering, the administration or application or threatened administration or application of mind altering substances or other procedures calculated to profoundly disrupt the senses or personality, threats of imminent death or similar threats directed at a third person.[209] Although the meanings of some terms within the Act, such as "severe" and "prolonged" pain and suffering, are subject to disagreement, the definition of torture in the Torture Victim Protection Act is identical to the definition contained within the U.S. reservations, declarations and understandings with respect to the Torture Convention.[210] Additionally, the recognition of a federal cause of action for torture gives this human-rights violation an obligatory nature absent from other violations, such as prolonged detention. Thus, the right to be free from torture is specific, universal and obligatory and therefore actionable pursuant to the ATCA.

Justice Souter's reasoning also is not directly applicable to the peremptory norm existing with respect to cruel, inhuman or degrading treatment or punishment. In its statement of reservations, declarations and understandings with respect to the Torture Convention, the United States noted cruel, inhuman or degrading treatment or punishment, as used in the Convention, means such punishment as is prohibited by the Fifth, Eighth and Fourteenth Amendments to the U.S. Constitution.[211] As a

[207] **28 U.S.C. §1350(2000).**

20*tjd*

[208] *Id.*

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

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

U.S. Reservations, Declarations and Understandings, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* **note 206, art. 11(1 Xa). This definition is qualified by the requirement the acts be directed against persons in the offender's custody or physical control.** *Id.* **art. 11(1)(b).**

[211] *Id.* **art. 1(1).**

result, the absence of a definition of cruel, inhuman or degrading treatment or punishment in the Torture Convention is of minimal importance. Although offending conduct is subject to disagreement, its meaning is nevertheless ascertainable from judicial opinions defining cruel, unusual and inhumane treatment pursuant to the U.S. Constitution. Given the equivalence between these definitions, it is tempting to conclude instances of cruel, inhuman or degrading treatment or punishment are actionable pursuant to Title 42 of the U.S. Code, which provides for civil liability for every person who, under color of law, deprives another person of any rights, privileges or immunities secured by the Constitution.[212] However, the civil liability provided by Title 42 is limited to U.S. citizens or other persons within the jurisdiction of the United States. Aliens outside the jurisdictional reach of the U.S. legal system are excluded from this group of potential plaintiffs. This lack of an express statutory basis for claims available to all persons differentiates cruel, inhuman or degrading treatment or punishment from torture. Thus, the right to be free from cruel, inhuman or degrading treatment or punishment is specific and universal but not obligatory, as is necessary to be actionable pursuant to the ATCA.

B. *Human Rights Associated with Personal Freedom*

1. Enforced Disappearance

The right to be free from enforced disappearance initially appeared in the Declaration on the Protection of All Persons from Enforced Disappearance adopted by the U.N. General Assembly in 1992.[213] The Declaration notes that acts of enforced disappearance are offenses to human dignity, violations of the right to liberty and security, may result in torture or other cruel, inhuman or degrading treatment or punishment and pose a grave threat to the right to life. Despite this generality, the Declaration contains several specific provisions. For example, the Declaration requires states to adopt "effective legislative, administrative, judicial or other measures to prevent and terminate acts of enforced disappearance. States are to achieve this goal through criminalization of acts of enforced disappearance and providing for civil liability for perpetrators and state authorities on whose behalf they have acted.[216] Furthermore, public authorities and their agents are prohibited from ordering disappearances, and no circumstances, including war or the threat thereof, political instability or other public emergency, may be used as justification for such a practice.[217] Detainees are required to be held at an "officially recognized place of detention," and states are to maintain accurate information on their location,

[212] 42U.S.C. §1983.

[213] Declaration on the Protection of All Persons from Enforced Disappearance, . . [es]; '„IT,™ 191, art. 2(1) (prohibiting states from practicing, permitting or tolerating acts of enforced disappearance).

[2U] *Id.* art. 1(2).

[216] *Id.* arts. 4(1), 5.

[217] *Id.* arts. 6,7.

including reliable means by which their release may be verified.[218] Victims of detentions failing to conform to these requirements and their families have the right to obtain adequate compensation for all losses proximately resulting from the detention.[219] Nevertheless, the Declaration does not provide a context within which these rights and duties are to be effective by failing to define the term "enforced disappearance." Furthermore, the Declaration is nonobligatory, as a U.N. General Assembly resolution lacking national legal effect.

The standards set forth in the Declaration on the Protection of All Persons from Enforced Disappearances have been adopted in a legally binding format in the Inter-American Convention on Forced Disappearance of Persons.[220] This Convention requires states to "undertake not to practice, permit or tolerate the forced disappearance of persons" and to provide for the punishment of such acts in their national criminal codes.[221] The Convention also tracks other requirements of the Declaration. For example, Article VIII prohibits public authorities and their agents from ordering disappearances. In a manner similar to Article 7 of the Declaration, Article X of the Convention provides that no circumstances may be used as justification for disappearances.[222] States are similarly required to hold detainees in an "officially recognized place of detention" and account for all such persons to family.[223] Most importantly, unlike the Declaration, the Convention provides a context within which these rights and duties attach, by defining enforced disappearances.[224] This definition is very specific, identifying the required acts and perpetrators and describing the injury caused as a result thereof. Enforced disappearance consists of four elements. There are two required acts, the deprivation of a person's freedom and the absence of information or refusal to acknowledge the deprivation. The perpetrators must be agents of the state or persons or groups of persons acting with the authorization, support, or acquiescence of the state. Finally, these acts must result in impediment of recourse to applicable procedural protections and legal remedies.

However, the Inter-American Convention on Forced Disappearance of Persons lacks universal support, as evidenced by its ratification by fewer than half of

[218] *Id.* **arts. 10,11.**

[219] *Id.* **art. 19.**

[220] **Inter-American Convention on Forced Disappearance of Persons art. I(a-d), June 9, 1994, 33 I.L.M. 1429 (imposing a duty upon states to prohibit forced disappearance of persons and punish such acts occurring within their jurisdiction).**

[221] *Id.* **art. I(a-b).**

[222] *Id.* **art. X (prohibiting war or the threat thereof, political instability or other public emergency as justifications for enforced disappearance).**

[223] *Id.* **art. XI.**

[224] **Forced disappearance is defined as:**

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

Id. **art. II.**

the members of the Inter-American human-rights system.[225] The Convention also is not obligatory, given the absence of ratification by the United States.[226] Furthermore, although U.S. law recognizes the liability of federal investigative and law enforcement officers for false imprisonment, there is no recognized cause of action for enforced disappearance.[227] The most similar proceeding to enforced disappearance recognized in the United States is the habeas corpus proceeding, in which an individual challenges his or her detention.[228] However, habeas corpus determines only the lawfulness of the detention. The very filing of the habeas corpus petition may belie the element of enforced disappearance requiring the refusal to provide information to the detainee. The filing of such a petition also prevents the occurrence of the required element of injury, specifically, the impediment of recourse to applicable procedural protections and legal remedies. Thus, although specific, the right to be free from enforced disappearance is not actionable pursuant to the ATCA.

2. Arbitrary Detention

The right to be free from arbitrary or unlawful arrest is recognized in the International Covenant on Civil and Political Rights.[229] The Civil and Political Rights Covenant defines this right and places specific duties upon ^ states. Specifically, arrests and detentions must be in accordance with national law." This requires states to adopt procedural protections for detainees, including notice of the grounds for detention at the time of arrest and prompt notice of charges thereafter. Detainees are required to be brought before a magistrate in a prompt manner and are further entitled to a trial within a reasonable time."[32] Such persons are generally subject to release pending trial, although release may be contingent on guaranties for appearance at subsequent proceedings.[233] Detainees are entitled to challenge the lawfulness of their detention,[234] and victims of detentions deemed unlawful are to be provided with "an enforceable right to compensation. Although the implementation of these obligations is left to the discretion of national governments, their parameters are definite enough to be considered specific for purposes of the

[225] **Org. of Am. States, Status of Ratification of the Inter-American Convention on Forced Disappearance OF Persons 1-2 (2004). The Inter-American Convention on Forced Disappearance has been ratified by Argentina, Bolivia, Costa Rica, Guatemala, Mexico, Panama, Paraguay, Peru, Uruguay and Venezuela.** *Id.*

[226] *Id.*

[227] **28 U.S.C. §2680(h) (2000).**

28 u ^ ^ 002241 ^

[229] **Civil and Political Rights Covenant,** *supra* **note 51, art. 9(1) (providing, "No one shall be subjected to arbitrary arrest or detention").**

[230] *Id.*

[231] *Id.* **art. 9(2).**

[232] *Id.* **art. 9(3).**

[233] *Id*

[234] *Id.* art. 9(4).

[235] *Id.* art 9(5),

ATCA. However, the Civil and Political Rights Covenant is not actionable, because of the U.S. reservation that Article 9 is not self-executing.[236]

The right to be free from arbitrary or unlawful arrest is extended to children by the Convention on the Rights of the Child, which requires that any arrest, detention or imprisonment of a child "be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time."[237] The rights extended to children with respect to their detention are not as specific as those set forth in the Civil and Political Rights Covenant. Undoubtedly, the right of detained children to "prompt access" to legal assistance, the right to challenge their detention before an appropriate court or other "independent and impartial authority" and to receive a "prompt decision" create readily definable duties for states.[238] However, other rights granted to detained children are vague and defy universal meaning. For example, it is unclear what is required in order to treat children "with humanity and respect for the inherent dignity of the human person" or in a manner taking into account "the needs of persons of his or her age."[239] Equally vague is the state's discretion to sever contact between the child and his or her family if such contact is not in the child's "best interest" or for other "exceptional circumstances."[240] The Convention offers no elaboration on the meaning of these terms or how states may satisfy their obligations. As a result, only a portion of the rights accruing to detained children pursuant to the Convention on the Rights of the Child are specific enough to be enforceable in a court of law. In any event, the Convention on the Rights of the Child is not actionable pursuant to the ATCA, because of the absence of U.S. ratification.[241]

The American Declaration of the Rights and Duties of Man, one of its implementing instruments, the American Convention on Human Rights, and the Universal Declaration of Human Rights cast little new light on the rights of detainees. The American Declaration and Convention prohibit detentions other than as occur pursuant to national constitutions or laws,[242] although only the American Convention characterizes detentions contrary thereto as "arbitrary."[243] In a manner similar to the Civil and Political Rights Covenant, the American Convention requires arrestees to be advised of the basis for their detention and given prompt notice of

[236] **U.S. Reservations, Declarations and Understandings, International Covenant on Civil and Political Rights,** *supra* **note 153, art. 111(1).**

[237] **Convention on the Rights of the Child,** *supra* **note 171, art. 37(b).**

[238] *Id.* **art. 37(d).**

[239] **/d.art. 37(c).**

[240] *Id.*

[241] *See supra* **note 176 and accompanying text.**

[242] **American Convention on Human Rights,** *supra* **note 160, art 7(2) (providing, "No one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto"); American Declaration on the Rights and Duties of Man, O.A.S. Res. XXX, art. XXV (1948),** *reprinted in* BASIC **Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82, doc. 6, rev. 1, at 17 (1992) (stating, "No person shall be deprived of his liberty except in the cases and according to the procedures established by pre-existing law" and all such persons shall be entitled to a hearing to determine the legality of their detention).**

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

charges, if filed.[244] The American Declaration and Convention further entitle detainees to challenge the legality of their detention and to proceed to trial without unreasonable delay."[4] The American Convention also adopts language within the Civil and Political Rights Covenant with respect to pretrial release upon the provision of security.[246] These rights are specific to the extent they are similar or identical to those set forth in the Civil and Political Rights Covenant and Convention on the Rights of the Child. By contrast, the Universal Declaration is nonspecific, as it merely establishes the right to be free from arbitrary arrest and detention without further elaboration.[247] In any event, the Universal and American Declarations are nonobligatory statements of aspirations and the American Convention is not universal or obligatory.[248]

The right to be free from prolonged arbitrary detention has been identified as part of the customary international law of human rights and *jus cogens.*[241] However, Justice Souter refused to recognize Alvarez's detention as an actionable violation of international human-rights law, despite this status.[250] Although he attempted to distinguish Alvarez's detention on the basis it was not "prolonged," Justice Souter also held that, even assuming the detention to be prolonged, it remained impossible for the Court to determine whether and when that detention achieved the degree of certainty necessary to violate international law characteristic of offenses traditionally within the meaning of the ATCA."[51] As a result, Justice Souter refused to create a private cause of action pursuant to the ATCA for the violation of a norm considered peremptory by the international community. Given this holding and the absence of recognition of such claims pursuant to applicable statutory law, arbitrary detention, regardless of its prolonged nature, is not actionable pursuant to the ATCA.[252]

C. *Human Rights Associated with Perceived Status*

1. Genocide

Article 6 of the elements of crimes as established by the International Criminal Court defines genocide as consisting of one of six specific acts. These acts

[244] *Id.* **art. 7(4).**

Id. **art. 7(5); American Declaration on the Rights and Duties of Man,** *supra* **note 242, art. XXV.**

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

[247] **Universal Declaration of Human Rights,** *supra* **note 189, art. 9 (providing, o one s a e su jec to arbitrary arrest [or] detention").**

See supra **note 161 and accompanying text.**

[249] **Restatement of Foreign Relations Law,** *supra* **note 20, §702(e), cmt. n.**
Sosa v. Alvarez-Machain, 542 U.S. 692,753-57 (2004).

[252] **U.**

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

include killing, causing serious bodily or mental harm, deliberately inflicting conditions of life calculated to bring about physical destruction, imposing measures to prevent births and forcibly transferring children.[253] There are three common elements to these acts. First, the victim must be a member of "a particular national, ethnical, racial or religious group."[254] Second, the perpetrator's intent in engaging in the conduct must be to "destroy, in whole or in part" a particular group.[255] Finally, the conduct must occur in the context of "a manifest pattern of similar conduct directed against that group or that could itself effect such destruction."[256]

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

However, the universal and obligatory nature of the documents establishing the International Criminal Court is subject to question. The instrument establishing the International Criminal Court, the Rome Statute, currently has 139 signatories.[257] However, only 97 states, approximately one-half of the international community, have ratified or acceded to the Statute.[258] Although significant, the ratification or accession by only half of the global community raises serious questions with respect to the universal recognition of the Court as well as the principles for which it stands. This includes the definition of various crimes subject to the Court's jurisdiction, including genocide. Even assuming the Rome Statute and International Criminal Court have been universally recognized, the Statute is not obligatory on the United States, because of the absence of ratification.[259]

The Convention on the Prevention and Punishment of the Crime of Genocide presents a more viable basis for a civil action pursuant to the ATCA. The Convention provides that genocide, whether occurring in time of peace or war, is a crime under international law.[260] Conduct associated with genocide also is punishable as a crime, including conspiracy or direct and public incitement to commit genocide and attempts to commit or complicity in genocide.[261] The

[253] **International Criminal Court, Elements of Crimes, art. 6(a-e), May 8, 2000, U.N. Doc. PCNICC/2000/1/Add .2.**

[254] *Id.* **art. 6(a)(2), (b)(2), (c)(2), (d)(2), (e)(2).**

[255] *Id.* **art. 6(a)(3), (b)(3), (cX3), (dX3), (eX3).**

[256] *Id.* **art. 6(aX4), (bX4), (cX5), (dX5), (eX7).**

[257] **U.N., RATIFICATION OF THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 1 (2004). The Rome Statute of the International Criminal Court was adopted on July 17, 1998, by the U.N. Diplomatic Conference on the Establishment of an International Criminal Court.**

[258] *Id.* **at 1.**

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

[260] **Genocide Convention,** *supra* **note 48, art. 1.**

[261] *Id.* **art. 3(a-e).**

Convention defines genocide as consisting of three specific elements. The perpetrator must first engage in a specific act. For purposes of the Convention, this act consists of killing, causing serious bodily or mental harm, deliberately inflicting conditions of life calculated to bring about physical destruction of a particular group of people, measures designed to prevent births or the forcible transfer of children.[2] The second element is the perpetrator's intent in committing these acts, specifically, the "intent to destroy, in whole or in part" a particular group of people.[2 3] The final element of the offense is the identity of the victims. In order to constitute genocide, the perpetrator's conduct must be directed at "a national, ethnical, racial or religious group."[264] Persons committing such acts are subject to punishment regardless of their status as "constitutionally responsible rulers, public officials or private individuals."[265] States are required to adopt necessary legislation to implement the Convention with specific emphasis upon providing "effective penalties" for persons found guilty of genocide or genocide-related conduct.[266] These penalties are to be assessed after a trial by a tribunal in the state where the offense was committed or an international tribunal.[267]

In a manner identical to the Statute of the International Criminal Court, the definitions of genocide set forth in the Convention establish the necessary conduct, the intent of the perpetrator, the identity of the victim and the context in which such conduct occurs. To the extent these definitions are identical to those in the Statute of the International Criminal Court, they possess the necessary degree of specificity to be actionable pursuant to the ATCA. However, unlike the Rome Statute, the Genocide Convention is universal, given its ratification or accession by 136 states. The United States is one of these parties, having ratified the Convention in November 1988.[269]

The more significant issue is whether the Genocide Convention is obligatory, so as to serve as the basis for a private civil action pursuant to the ATCA It bears noting that the prohibition of genocide is further defined as *jus cogens.* Despite this recognition, genocide cannot serve as the basis for a private cause of action pursuant to the ATCA.

The specificity of genocide renders inapplicable Justice Souter s holding in *Sosa* with respect to the lack of definiteness of prohibited conduct. However, there is no recognized private cause of action for genocide pursuant to applicable U.S. law. The Genocide Convention requires states only to adopt legislation defining genocide and genocide-related acts and procedures by which perpetrators may be charged,

I

d

[264] *Id.*

[265] *Id.* art. 4.

[266] *Id.* art. 5.

[267] *Id.* art. 6.

[268] UN., Ratification of the Convention on the Prevention and Punishment of the Crime of Genocide 1 (2004).

[269] *Id.* at 5.

[270] Restatement of Foreign Relations Law, *supra* note 20, §702(a), cmt. n.

tried and punished.[271] The definitions of genocide contained in the Convention have their origin in criminal law. This includes the terms "conspiracy," "incitement," "attempt" and "complicity." [72] Other phraseology of the Convention is criminal in its intent and scope, using such terms as "charges" and procedures for assessing and punishing persons adjudicated "guilty" of genocide.[273] It may be concluded that the Genocide Convention requires states only to criminalize acts of genocide. The express language of the Convention does not require states to provide for civil liability for such acts in their national law.

The United States recognized this distinction in legislation implementing the Genocide Convention. The Genocide Convention Implementation Act was placed in Title 18, relating to federal criminal offenses.[274] Genocide, attempts to commit genocide and direct and public incitement to commit genocide are described as "basic offenses."[275] These basic offenses are subject to criminal punishment, including imprisonment and fines.[276] Jurisdiction of U.S. courts is limited to "offenses" committed within the United States or in instances when the "alleged offender" is a U.S. national.[277] Most importantly, the Act's provisions are not to "be

[271] **Genocide Convention,** *supra* **note 48, art. 5.**

[272] *Id.* **art. 3(a-e).**

[273] *Id.* **arts. 5, 6.**

[274] **18 U.S.C. §§1091-1093 (2000).**

[275] **Genocide and attempt to commit genocide are defined as:**

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

Id. **§ 1091 (a)(1 -6).**

The term "national group" is defined as "a set of individuals whose identity as such is distinctive in terms of nationality or national origins." *Id.* **§1093(5). "Ethnic groups" are defined as "a set of individuals whose identity as such is distinctive in terms of common cultural traditions or heritage."** *Id.* **§1093(2). "Racial groups" and "religious groups" are similarly defined to include sets of individuals distinctive in terms of "physical characteristics or biological descent" in the case of race and "common religious creed, beliefs, doctrines, practices or rituals" in the case of religion.** *Id.* **§1093(6), (7). "Substantial part" is defined as "a part of a group of such numerical significance that the destruction or loss of that part would cause the destruction of the group as a viable entity within the nation of which such group is a part."** *Id.* **§1093(8). Incitement is defined as "urg[ing] another to engage imminently in conduct in circumstances under which there is a substantial likelihood of imminently causing such conduct."** *Id.* **§1093(3).**

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

[277] *Id.* **§ 1091 (d)(l -2).**

construed as creating any substantive or procedural right enforceable by law by any party in any proceeding."[278] The implication of this language is that the scope of the Genocide Convention Implementation Act is limited to the Convention's express requirements, the criminalization of genocide and genocide-related conduct and its effective prosecution and punishment.

Genocide is also an offense that states possess universal jurisdiction to define and to punish.[279] Other offenses included on this list are aircraft hijacking, slave trading, war crimes and, most importantly, piracy.[28"] As Justice Souter deemed piracy to be one of the offenses originally intended to be within the scope of the ATCA, it is tempting to conclude that its equation to genocide as an offense of universal concern renders genocide equally actionable pursuant to the ATCA. This leap of logic fails, however, because, despite its universal status, there must still be a basis for the initiation and prosecution of a private civil action through appropriate provisions within national law. Universal jurisdiction has been traditionally exercised in the form of criminal prosecution.[281] Although universal jurisdiction and its traditional exercise do not preclude the application of civil law, the state must nonetheless "provide a remedy in tort or restitution for victims."[8"] With its provisions limited to the definition, prosecution and punishment of the criminal offenses of genocide and genocide-related acts, the Genocide Convention Implementation Act does not provide such a civil remedy for victims. The Genocide Convention is thus not obligatory upon the United States in such a manner as to provide a basis for a private cause of action pursuant to the ATCA.

2. Racial Discrimination

The right to be free from discrimination on the basis of race or ethnicity is recognized in the International Covenant on Civil and Political Rights. This Covenant provides each state is to undertake "to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, color . . . [or] national . . . origin."[283] The meaning of the terms "race, color and national origin" are self-evident and do not require definitions in order to be specific. This nondiscrimination provision is applicable to all individuals and all rights secured by the Covenant. No derogation from the Covenant's provisions is permitted if it is based solely on racial discrimination.[284] Furthermore, as previously established, the Civil and Political Rights Covenant is universally accepted.

* Statement of Fore.gn Relates Law, ***supra* note 20, §404**

to define and prescribe punishment for certain offenses recognize *y* universal concern").

™*Id.*

[281] *Id.* **§404 cmt. b.**

[282] *Id.*

[283] **Civil and Political Rights *Covenant, supra* note 52, art. 2(1).**

[284] *Id.* **art. 4(1).**

"[8S] *See supra* **note 152 and accompanying text.**

However, these provisions are not obligatory for two reasons. First, as is also the case with other provisions of the Civil and Political Rights Covenant, Article 2 is not self-executing.[286] Even assuming this provision to be self-executing, the language of Article 2 lacks a mandatory nature. Rather than requiring states disregard race in the implementation of the rights established by the Covenant, Article 2 provides only that states "undertake to respect and ensure" these rights without discrimination. This language implies states attempt to extend such rights without distinctions based on race. States may satisfy their obligations as long as such efforts are underway regardless of their ultimate success. Language clearly mandating efforts to eliminate discrimination and requiring their ultimate success was available, but apparently overlooked, by the drafters. As a result, the race and ethnicity provision within the Civil and Political Rights Covenant is not obligatory.

For similar reasons, the race provisions within the International Covenant on Economic, Social and Cultural Rights also are not obligatory. In a manner similar to the Civil and Political Rights Covenant, the Economic, Social and Cultural Rights Covenant provides states "undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, color . . . [or] national origin."[287] The meaning of the terms "race," "color" and "national origin" are once again self-evident. The nondiscrimination provision is expressly applicable to all rights secured by the Covenant. Furthermore, the Economic, Social and Cultural Rights Covenant is universally accepted having been ratified or acceded to by 149 states.[288]

However, these provisions are not obligatory for two reasons. First, the Economic, Social and Cultural Rights Covenant is nonobligatory, because of the absence of U.S. ratification. Even assuming the absence of such ratification had no relevance to its obligatory nature, the language of the Covenant itself overcomes any attempt to render its provisions mandatory. Article 2(2) provides only that states are "undertake to guarantee" these rights without discrimination. Although the use of the term "guarantee" commands greater mandatory meaning than its counterpart in the Civil and Political Rights Covenant, this language still leads to the conclusion that states may satisfy their obligations as long as they undertake such efforts with the belief they will ultimately prove successful. Far more specific language, including methods by which states are to implement the Covenant and reference to the time within which the goals of the Covenant were to be achieved, was apparently ignored by the drafters. In addition, Article 2(1) conditions achievement of the Covenant's goals on availability of state resources.[289] Additional evidence of the nonobligatory nature of the Covenant exists in Article 4 which permits states to limit the enjoyment of such rights on the amorphous basis of compatibility with "the general welfare in a

[286] **U.S. Reservations, Declarations and Understandings, International Covenant on Civil and Political Rights,** *supra* **note 153, art. III(l).**

[287] **International Covenant on Economic, Social and Cultural Rights,** *supra* **note 52, art. 2(2).**

[288] **Office of the U N. High Comm'r for Human Rights, Status of Ratifications of the Principal International Human Rights Treaties,** *supra* **note 152, at 11.**

[289] **Economic, Social and Cultural Rights Covenant,** *supra* **note 52, art. 2(1).**

democratic society."[290] As a result, the race provision within the Economic, Social and Cultural Rights Covenant is not obligatory.

The right to be free from discrimination is extended to children by the Convention on the Rights of the Child, which requires states to take "all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of status."[291] This right is rendered nonspecific by the failure of the Convention to define what is intended by the prohibition upon discrimination based upon "status." Further uncertainty results from the remainder of this provision, which prohibits such discrimination based not on the child's "status," but rather on the "status of the child's parents, legal guardians or family members." Even assuming "status" can be equated to race or ethnicity, the Convention on the Rights of the Child is not actionable pursuant to the ATCA, because of the absence of U.S. ratification.[292]

Race discrimination is specifically addressed in the International Convention on the Elimination of All Forms of Racial Discrimination. This instrument is the most widely-recognized human-rights convention relating to race discrimination, having been ratified or acceded to by 177 states.[293] Unlike the previously discussed instruments, the Convention defines those actions constituting race discrimination.[294] By elaborating upon discriminatory acts and their basis, intent and result, this definition lends a degree of specificity not present in other covenants and conventions. States condemn racial discrimination as defined in the Convention and pledge to "undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms."[295] This pledge to undertake steps leading to the elimination of racial discrimination may be criticized for lack of specificity and obligatory nature, as previously set forth with respect to similar language in the Civil and Political Rights and Economic, Social and Cultural Rights Covenants. However, unlike the language in those Covenants, the Convention on Racial Discrimination provides a chronological reference, specifically, without delay." Furthermore, Article 2 elaborates on the type of activities each state is required to undertake, including elimination of acts or practices of discrimination by public authorities and institutions, refraining from sponsoring, defending or

[291] **Convention on the Rights of the Child,** *supra* **note 171, art. 2(2).**

See supra **note 176 and accompanying text.**

[293] **Office of the U.N. High Comm'r for Human Rights, Status of Ratifications Principal International Human Rights Treaties,** *supra* **note 152, at 11**

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

> **any distinction, exclusion, restriction or preference based on race, co or, escen , or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of uman ng an fundamental freedoms in the political, economic, social, culture or any o er le**

International Convention on the Elimination of All Forms of Racial **Discrimination art. 1(1), SepL** 28, **1966, 660 U.N.T.S. 195.** *See generally* **Peter W. Schroth & Virginia S- Mueller,** *Racial Discrimination. The United States and the International Convention,* 4 HUM. RTS. 171(197).

[295] **International Convention on the Elimination of All Forms of Racial Discnmnation,** *supra* **note 294, art. 2(1).**

supporting racial discrimination, amending, rescinding or nullifying laws having the effect of creating or perpetuating racial discrimination and adopting legislation to bring such discrimination to an end within its jurisdiction/[96]

The Convention also defines those rights to be free from distinctions on the basis of race. States are obligated to guarantee equal treatment before all tribunals, security of the person, political rights and economic, social and cultural rights without racial distinctions.[297] It may be concluded from this language that the Convention on Elimination of All Forms of Racial Discrimination is specific, universal and obligatory. However, the Convention is rendered nonobligatory as a result of its ratification by the United States. Although the United States ratified the Convention on Racial Discrimination effective November 1994, the substantive provisions of the Convention were declared to be non-self-executing.[298] As such, the Convention on Racial Discrimination is not actionable pursuant to the ATCA.

The designation of freedom from racial discrimination as *jus cogens* does not necessarily render it actionable pursuant to Justice Souter's opinion in *Sosa*. Applying Justice Souter's reasoning, only a portion of the Convention on the Elimination of All Forms of Racial Discrimination is obligatory upon the United States in such a manner as to provide a basis for a private cause of action pursuant to the ATCA. Unlike torture and summary execution, the justiciability of racial discrimination practiced against persons not within the jurisdiction of the United States is limited. Although civil rights claims alleging discrimination on the basis of race are actionable pursuant to Title 42 of the United States Code, most such actions are limited to citizens of the United States or those within its jurisdiction. Protections extended to make and enforce contracts, sue, participate in civil and criminal proceedings as a party or witness and enjoy the "full and equal benefit of all laws and proceedings for the security of persons and property" are applicable only to "persons within the jurisdiction of the United States."[299] Protections with respect to the inheritance, purchase, lease, sale, holding and conveyance of property rights are similarly extended only to citizens of the United States.[300] The civil liability provided by Title 42 of the U.S. Code for every person who, under color of law, deprives another of any rights, privileges or immunities secured by the Constitution is also limited to U.S. citizens or other persons within the jurisdiction of the United

[296] *Id.* **art. 2(l)(a-d).**

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

[291] **U.S. Reservations, Declarations and Understandings, International Convention on the Elimination of All Forms of Racial Discrimination, 140 CONG. Rec. S7634-02, art. Ill (daily ed. June 24 1994)**

[299] **42 U.S.C. §1981(a) (2000).**

^ *Id.* **§1982.**

States.[301] The same conclusion is applicable to determining eligibility for federal benefits.[302]

There are some rights upon which race cannot be used as a discriminatory factor and which are actionable by persons outside the junsdiction of the United States. For example, the right to "foil and equal enjoyment" of goods, services, facilities and places of public accommodation regardless of race, color or national origin is extended to "all persons" regardless of their citizenship or presence within the United States.[303] Such persons are also entitled to be free, at any such establishment, from discrimination on the basis of race, color or national origin required by any "law, statute, ordinance, regulation, rule or order."[304] District courts possess subject matter jurisdiction with respect to all claims alleging violation of these rights.[305]

The same conclusion may be reached with respect to the prohibition upon unlawful employment practices. Title 42 defines such practices to include refusals to hire, discharges and discrimination with respect to compensation, terms, conditions or privileges of employment on the basis of race, color or national origin.[306] The limitation, segregation or classification of employees on that basis also is unlawful to the extent it deprives persons of employment opportunities or adversely affects their status as employees.[307] Persons, for purposes of the employment provisions of Title 42, are defined to include individuals without reference to citizenship or their presence within the jurisdiction of the United States.[308] Although subsequent sections exempt the employment of aliens under certain circumstances,[309] the prohibitions upon discrimination on the basis of race, color and national origin remain with respect to the operation of business entities incorporated in a foreign state but controlled by a U.S. employer.[310] Thus, to the extent federal statutory law protects the rights of non-citizens and its protections overlap with protections set forth within

[301] *Id.* **§1983.**

[302] *Id.* **§2000d.**

[303] *Id.* **§2000a. This section provides, "All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages and accommodations of any place of public accommodation . . . without discrimination or segregation on the ground of race, color ... or national origin."**

[304] *Id.* **§2000a-l**.

[305] *Id.* **§2000a-6.**

[306] *Id.* **§2000e-2(aXl).**

[307] *Id.* **§2000e-2(a)(2).**

[308] *Id.* **§2000e(a).**

[309] *Id.* **§2000e-l(a) (providing, "This subchapter shall not apply to an employer with respect to the employment of aliens outside any State");** *see also* **§2000e-l(b) (exempting compliance with equal employment opportunity practices in the event such compliance would violate the laws of the foreign jurisdiction where the employment services are rendered); §2000e-l(cX2) (exempting compliance with equal employment opportunity practices with respect to the foreign operations of an employer that is not a foreign person controlled by a U.S. employer).**

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

the Convention on the Elimination of All Forms of Racial Discrimination, aliens may use U.S. courts to assert their right to be free from discrimination on the basis of race, color or national origin.

The remaining five instruments relating to race discrimination consist of U.N. General Assembly resolutions and an instrument within the Inter-American system of human rights. Three of these instruments specifically prohibit states from conditioning enjoyment of the rights provided therein on the basis of race, color or national origin.[311] As previously noted, the terms "race," "color" and "national origin" are self-evident and do not require definitions in order to be specific. Furthermore, in a manner similar to the previously discussed covenants, the nondiscrimination provisions are expressly applicable to all rights secured by these declarations. In addition, two instruments require states to protect the rights of racial and ethnic minorities or a designated population within their jurisdiction from discrimination on the basis of race, ethnicity or national origin.[312] By contrast, one instrument simply acknowledges that all forms of discrimination are inconsistent with the goals of social progress and development.[313] This acknowledgement lacks specificity to the extent it fails to prohibit discrimination with respect to the enjoyment of an identified right or requires states to take action to protect the rights of racial or ethnic minorities. In any event, despite the universality of these instruments, they are non-binding statements of aspirations, rather than obligatory statements of law.

D. *Human Rights Associated with Armed Conflict*

1. War Crimes and Crimes Against Humanity

Prohibitions upon the commission of war crimes and crimes against humanity are set forth in the greatest detail in one human-rights instrument.[314] The

[311] **Declaration on the Rights of Persons Belonging to National, Ethnic, Religious or Linguistic Minorities, G. A. Res. 47/135, art. 2(1-2), U.N. GAOR, 47th Sess., Supp. No. 49, U.N. Doc. A/47/49 (Dec. 18, 1992) (providing, "Persons belonging to national or ethnic . . . minorities . . . have the right to enjoy their own culture . . . [and] participate effectively in cultural . . . social, economic and public life");** *see also* **American Declaration on the Rights and Duties of Man,** *supra* **note 242, art. II (providing, "All persons are equal before the law . . . without distinction as to race"); Universal Declaration of Human Rights,** *supra* **note 189, art. 2 (providing, "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, color ... or national origin").**

[312] **Declaration on the Rights of Persons Belonging to National, Ethnic, Religious or Linguistic Minorities,** *supra* **note 311, art. 1(1-2) (providing, "States shall protect the existence and the . . . ethnic . . . identity of minorities within their respective territories" and "shall adopt appropriate legislative and other measures to achieve those ends");** *see also* **Declaration on the Rights of the Child, G.A. Res. 1386 (XIV), art. 10, U.N. GAOR, 14th Sess., Supp. No. 16, U.N. Doc. A/4354 (Nov. 20, 1959) (providing children are entitled to protection from racial discrimination).**

[313] **Declaration on Social Progress and Development, G.A. Res. 2542 (XXIV), art. 12(b), U.N. GAOR, 24th Sess., Supp. No. 30, U.N. Doc. A/7630 (Dec. 11, 1969) (noting social progress and development require "[t]he elimination of all forms of discrimination").**

[314] **Although war crimes and crimes against humanity are defined and subject to prosecution and punishment by other human-rights instruments, these documents are limited to specific conflicts rather than operating without geographic or chronological restraint.** *See, e.g.,* **Statute of the International**

Elements of Crimes, as established by the International Criminal Court, contains the most definitive description of war crimes ever enunciated by an international body. War crimes are defined to include willful killing, torture and cruel treatment, the infliction of great suffering, mutilation, rape and other sexual violence, forced pregnancy, enforced prostitution and sterilization, biological, medical and scientific experimentation, destruction, pillaging and appropriation of property, compelling military service in hostile forces, denial of due process, deportation and displacement of civilians, confinement, hostage taking, attacks upon civilian populations, improper uses of flags and insignia, attacking protected objects and the use of poison and poisoned weapons.[315]

Crimes against humanity are defined in similar detail. The International Criminal Court has defined crimes against humanity to include murder, extermination, enslavement, forcible transfer of civilian populations, imprisonment, torture, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, sexual violence, persecution, enforced disappearance, apartheid and other inhumane acts.[316] Each of these definitions establishes the three fundamental elements of any offense, namely the prohibited act, the identity of the victim and the requisite intent of the perpetrator.[317] Although isolated elements of some of the defined crimes are subject to interpretation, these difficulties are rare and have little impact upon the otherwise overwhelming specificity of the code.[318] Instead, this elaboration of crimes was deemed specific enough by the ninety-seven ratifying states to serve as the basis for giving up part of their national sovereignty in favor of international criminal prosecution. As such, it would undoubtedly be specific enough to serve as the basis for tort claims alleged as part of a civil lawsuit.

Nevertheless, as previously discussed with respect to the right to be free from genocide, the universal and obligatory nature of the documents establishing the International Criminal Court are subject to question. Approximately one-half of the international community has ratified or acceded to the Statute, thereby raising serious doubts with respect to the universality of the definitions of war crimes and

Criminal Tribunal for Rwanda, *supra* **note 47; Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991,** *supra* **note 47.**

[315] **International Criminal Court, Elements of Crimes,** *supra* **note 253, art. 8(2)(a-e).**

[316] **Kart. 7(l)(a-k).**

[317] **For example, the war crime of willful killing is defined as the killing of one or more persons, the membership of such persons in a protected class as established by the Geneva Conventions and awareness on the part of the perpetrator of the factual circumstances establishing the victim's protected status.** *Id.* **art. (8)(2)(a)(i). By contrast, willful killing is defined as a crime against humanity if the perpetrator killed one or more persons as part of "a widespread or systematic attack directed against a civilian population" and the perpetrator knew or intended the conduct to be part of such an attack.** *Id.* **art. 7(1 Xa).**

[318] **Examples in this regard include the terms "severe" or "great" physical or mental pain in defining the war crime of inhuman treatment and humiliating or degrading treatment utilized in establishing the war crime of outrages upon personal dignity.** *Id.* **art. 8(2Xa)(ii)(2), (2XaXiii), (2)(bXxxi), (2XcXi)-3-4, (2XcXii). Similar difficulties may arise from the terms "great suffering" and "serious injury to body or to mental or physical health" used in the definition of inhumane acts within the article relating to crimes against humanity.** *Id.* **art. (7X1)(k).**

crimes against humanity contained therein.[319] Furthermore, the Rome Statute is not obligatory on the United States, which has not ratified it.[320] Assuming the universality of the Statute and the definitions set forth therein and their acceptance by the United States, there is no reason to believe the U.S. Senate would manifest an intention for it to serve as the basis for civil litigation pursuant to the ATCA. With its provisions limited to the definition, prosecution and punishment of the war crimes, the Rome Statute does not provide such a civil remedy for genocide victims.

In a manner similar to piracy, war crimes are also offenses that states possess universal jurisdiction to define and to punish.[321] As piracy has been determined to be one of the offenses originally intended to be within the scope of the ATCA, it may be concluded war crimes are also actionable. However, despite its universal status, there must still be a basis for the initiation and prosecution of a private civil action through appropriate provisions within national law. Universal jurisdiction has been traditionally exercised in the form of criminal prosecution.[322] Although universal jurisdiction does not preclude the application of civil law to such offenses, the state must nonetheless provide a private remedy.[323] U.S. law provides no such civil remedy for war-crime victims.[324] This failure is further evidence the responsibilities arising from the International Criminal Court are not obligatory on the United States, so as to provide a basis for a private cause of action pursuant to the ATCA.

CONCLUSION

The optimism with which human-rights advocates greeted the U.S. Supreme Court's decision in *Sosa* with respect to "core violations" is unwarranted. The only *jus cogens* claims able to satisfy the "universal, specific and obligatory" standard are those alleging summary and extrajudicial execution, torture and perhaps racial discrimination. The transnational corporation has been unbound from the restraints imposed upon its behavior by the ATCA and holdings of federal courts in the twenty-five years since the groundbreaking decision in *Filartiga* v. *Pena-Irala*.[325] As a result, accountability for compliance with international human-rights standards will be increasingly dependent upon efforts independent of litigation in U.S. federal courts. These efforts will include socially responsible investing and initiatives designed to establish, preserve and protect human rights adopted by national governments and international and non-governmental organizations. However, the primary burden for ensuring compliance with human-rights standards will be placed

[319] U.N., Ratification of the Rome Statute of the International Criminal Court, *supra* **note 257, at 1.**

[320] *See supra* **note 259 and accompanying text.**

[321] *See supra* **note 280 and accompanying text.**

[322] *See supra* **note 281 and accompanying text.**

[323] *See supra* **note 282 and accompanying text.**

[324] U.S. law provides only for criminal liability for perpetrators of war crimes. 18 U.S.C. §2441(a) (2000) (providing for fine, imprisonment and potential death sentence for persons convicted of committing war crimes inside or outside of the United States).

[325] 630 F.2d 876 (2d Cir. 1980).

upon transnational corporations themselves. This burden may be met by the adoption and application of codes of conduct, statements of corporate principles, ethical guidelines, social accountability standards, voluntary reporting efforts and similar initiatives. A critique of the effectiveness of these efforts is beyond the scope of this article. Nevertheless, the entrustment of human-rights protections to transnational corporations should give all impacted parties, including civilian populations and nongovernmental organizations, cause for concern.