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THE THIRD WAVE: THE ALIEN TORT STATUTE AND THE WAR ON TERRORISM

Julian G. Ku*

INTRODUCTION

For a number of years, commentators have argued (and some courts have agreed) that § 1350 of the 1789 Judiciary Act, the Alien Tort Statute (“ATS”),¹ does not authorize federal courts to hear lawsuits by alien plaintiffs alleging violations of international law.² In last term’s decision in *Sosa v. Alvarez-Machain*,³ the Supreme Court largely rejected this challenge and preserved the federal courts’ authority to hear lawsuits claiming certain violations of international law pursuant to the ATS.⁴

Although the *Sosa* Court characterized its holding as narrow and limited,⁵ the *Sosa* decision is not likely to end the controversy over ATS litigation. Indeed, there are good reasons to believe that post-*Sosa* ATS lawsuits will prove substantially more controversial than the pre-*Sosa* lawsuits that led to the *Sosa* decision itself.

Unlike the “first wave” of ATS lawsuits that generally involved suits by aliens against other aliens, or the “second

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¹ 28 U.S.C. § 1350 (2000).

² See, e.g., *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984) (Bork, J., concurring) (opining that the ATS does not provide a cause of action for private plaintiffs); Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997); A.M. Weisburd, *State Courts, Federal Courts, and International Cases*, 20 YALE J. INT’L L. 1, 38-44 (1995).

³ 124 S. Ct. 2739 (2004).

⁴ See *id.* at 2761. The Court’s decision was hardly persuasive on its own purportedly formalist terms, as John Yoo and I argue in a forthcoming article. Julian Ku & John Yoo, *BEYOND FORMALISM IN FOREIGN AFFAIRS: A FUNCTIONAL APPROACH TO THE ALIEN TORT STATUTE*, 2004 SUP. CT. REV. 153, 164-76 (2004). But for the purposes of my discussion here, the persuasiveness of the Court’s decision is no longer at issue.

⁵ *Sosa*, 124 S. Ct. at 2764.

wave" of ATS lawsuits against multinational corporations alleged to be "aiding and abetting" foreign government violations of customary international law ("CIL"), what I call the "third wave" of ATS lawsuits are directed at the legality of the actions of the U.S. government itself. This third wave has already manifested itself in lawsuits arising out of U.S. mistreatment of prisoners held in Iraq, alleged mistreatment of detainees held in Guantanamo Bay, and the rendition of suspected terrorists to third countries for interrogation. For this reason, the *Sosa* Court's decision to preserve federal courts' power to recognize causes of action under international law pursuant to the ATS has kept the door ajar for a third wave of ATS lawsuits challenging the U.S. government's conduct of the war on terrorism.

My goal in this Article is neither to celebrate nor to condemn this coming wave of ATS litigation. Rather, my more modest task is to describe examples of this new wave of ATS litigation, challenging the U.S. government's conduct of the war on terrorism, to explain why the *Sosa* decision will not prevent this wave of litigation, and to discuss why the coming wave of ATS litigation will highlight the role of the executive branch in the administration of international law in U.S. courts. I suggest, as a doctrinal matter, that the executive branch has a crucial, yet largely unexplored, role to play in the application of international law by the courts, especially customary international law. The third wave of ATS lawsuits will, I believe, test the importance of this role.

I. A THIRD WAVE OF LITIGATION UNDER THE ALIEN TORT STATUTE

The ATS, as interpreted by the Supreme Court in *Sosa* and by lower federal courts, permits alien plaintiffs to bring lawsuits in federal courts for violations of customary international law and/or a treaty of the United States. The

potentially broad scope of this statute has led to a number of lawsuits, most of which allege violations of international human rights law.⁶

A. *The First and Second Waves of Alien Tort Statute Litigation*

The various types of ATS lawsuits alleging violations of international human rights can be classified into three waves. The very first lawsuit brought under the ATS, the seminal case of *Filartiga v. Pena-Irala*,⁷ was brought against a Paraguayan government official who allegedly violated international law proscriptions against torture in his treatment of another Paraguayan national. The *Filartiga* case, in addition to opening the door to future ATS lawsuits, also provided a model for the first wave of ATS lawsuits.⁸ Such "first wave" lawsuits shared a number of characteristics.

For instance, first wave lawsuits were generally brought against foreign government officials acting under the color of foreign law. Such officials might have been, as in *Filartiga*, relatively low-level government officials who could not seek the protection of foreign sovereign immunity.⁹ Other higher level officials, who appeared to qualify for sovereign immunity, were nonetheless exposed to liability for their actions because of questions about the status of the government actor in question. Thus, in *Kadic v. Karadzic*,¹⁰ head of state immunity was not recognized

⁶ The vast majority of ATS cases have alleged violations of international human rights law, but there are exceptions. See, e.g., *Argentine Republic v. Amerasia Hess*, 488 U.S. 428 (1989) (alleging violation of CIL in Argentine plane's attack on neutral ship during Falklands Island War).

⁷ 630 F.2d 876 (2d Cir. 1980).

⁸ Dean Koh has gone so far as to call *Filartiga* the "Brown v. Board of Education" of the international human rights movement. Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2366 (1991).

⁹ For instance, in *Filartiga*, the defendants were former low-level government officials. *Id.* at 2367.

¹⁰ 70 F.3d 232 (2d Cir. 1995).

where the defendant's State, the Serbian Republic of Bosnia, was not recognized by the United States.¹¹ For obvious reasons, however, foreign sovereigns whom had been recognized by the U.S. government generally have been held immune from ATS lawsuits, despite efforts to argue that such immunity was "waived" in the context of serious violations of basic fundamental human rights protections.¹²

For this reason, the classic ATS lawsuit during the first decade after *Filartiga* involved claims by alien plaintiffs against alien individual defendants.¹³ Such defendants often failed to defend these claims and courts often entered default judgments. Such judgments were rarely collected, but defendants who had judgments entered against them could not live or visit the United States without the danger of having their assets attached.

Although this first wave of ATS lawsuits generated some criticism in the legal academy on the ground that the ATS did not actually authorize such lawsuits, they did not appear to cause serious foreign policy concerns that drew the serious attention of either the executive or legislative branches.¹⁴ Indeed, the U.S. government sometimes cited such lawsuits as a demonstration of its commitment to the enforcement of international human rights laws. Moreover, only a few such lawsuits were filed.¹⁵

¹¹ *Id.* at 248.

¹² *See, e.g.,* *Prinz v. Federal Republic of Germany*, 26 F.3d 1166 (D.C. Cir. 1994).

¹³ *See, e.g.,* *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995); *Trajano v. Marcos*, 878 F.2d 1439 (9th Cir. 1989); *Forti v. Suarez-Mason*, 694 F. Supp. 707 (N.D. Cal. 1988); *Guinto v. Marcos*, 654 F. Supp. 276 (S.D. Cal. 1986).

¹⁴ The executive branch's support for the use of ATS lawsuits varied from administration to administration. *Compare* Brief for the United States as Amicus Curiae, *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995) (Nos. 94-9035, 94-9069), *with* Brief for the United States as Amicus Curiae, *Trajano v. Marcos*, 978 F.2d 493 (9th Cir. 1989) (No. 86-2448). Despite the changing positions, the *Marcos* brief did not actually challenge the ATS in general. Rather, it opposed the use of the ATS in the particular case at hand.

¹⁵ Between 1980 and 1990, only thirty-one such lawsuits were filed based on a

Beginning in the mid-1990s, however, the breadth and frequency of ATS lawsuits increased dramatically when alien plaintiffs began suing U.S. and foreign corporations under the ATS.¹⁶ Because the general rule of international law applies its prohibitions to governments, such lawsuits proceeded on the theory that corporations “aided and abetted” foreign governments in their violation of international human rights law.

*Doe v. Unocal Corp.*¹⁷ is the classic example of the “second wave” of ATS litigation. Doe, representing a class of Burmese nationals, sued Unocal for allegedly supporting and, in some cases, directly participating in the violation of international human rights law during the construction of an oil pipeline.¹⁸ Although the government of Burma allegedly committed the violations of international law, Unocal would be liable on the theory that its activities “aided and abetted” the Burmese government’s abuses. Because Burma enjoyed foreign sovereign immunity, only Unocal was actually sued.¹⁹

Not surprisingly, U.S. and foreign corporations proved more attractive defendants than foreign government officials, primarily because corporations had substantial assets within the jurisdiction of U.S. federal courts. Corporations found themselves sued, or facing threat of suit, for a variety of alleged international human rights abuses.²⁰

search of Westlaw’s “ALLCASES” database using the search terms (“alien tort statute” or “alien tort claims act” and da(after 1980 and before 1991)).

¹⁶ Between 1990 and 2000, seventy-nine such lawsuits were filed based on a search of Westlaw’s “ALLCASES” database using the search terms (“alien tort statute” or “alien tort claims act” and da(after 1980 and before 1991)).

¹⁷ 27 F. Supp. 2d 1174 (C.D. Cal. 1998).

¹⁸ *Id.* at 1178-80.

¹⁹ *Id.*; GARY CLYDE HUFBAUER & NICHOLAS K. MITROKOSTAS, AWAKENING MONSTER: THE ALIEN TORT STATUTE OF 1789, 9 (Institute for International Economics 2003).

²⁰ One recent study has suggested that the threat of such lawsuits may deter billions of dollars of foreign investment in developing countries. *Id.* at 1.

Unlike first wave ATS defendants, second wave ATS defendants could and did defend themselves in court. Drawing upon some of the arguments developed by academic critics of the ATS, corporations facing ATS lawsuits sought a judicial determination that the ATS did not actually authorize such lawsuits. Although *Sosa* did not involve a corporate defendant, the corporate defense bar was actively involved in the case both at the appellate level and before the Supreme Court.²¹ Additionally, foreign governments, whose conduct was implicitly being challenged by such lawsuits, began to file official and unofficial protests against such lawsuits.²²

B. *The Third Wave*

As the corporate bar, with increasing support from the U.S. government, began challenging the use of the ATS, alien plaintiffs found a new source of possible human rights abuses—the U.S. government itself. After the attacks of September 11, 2001, the U.S. government launched a wide variety of military activities, including the detention of thousands of aliens captured in Afghanistan, and later Iraq, as well as in third party countries.

Three of the most controversial elements of the U.S. war on terror arose from the detention of aliens suspected of terrorist activities in Guantanamo Bay, Cuba, the treatment of Iraqi prisoners of war at the Abu Ghraib prison in Iraq, and the “rendition” of aliens to third party countries. International human rights groups and foreign governments charged the U.S. military with violating international human rights and laws of war obligations in the detention and interrogation of these foreign nationals.²³

²¹ See, e.g., Brief of Amici Curiae in support of Petitioner by National Association of Manufacturers, *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739 (2004).

²² See, e.g., *Sosa*, 124 S. Ct. at 2766 n.21 (describing protest by government of South Africa).

²³ See, e.g., HUMAN RIGHTS FIRST, GETTING TO GROUND TRUTH: Investigating

Thus, in 2004, alien plaintiffs began filing lawsuits directly challenging the conduct of U.S. government officials, particularly military officials, in the administration of Guantanamo Bay and portions of Iraq, as well as in the rendition of aliens to third party countries.

Three recently filed lawsuits illustrate the potential of third wave ATS lawsuits to challenge these policies of the U.S. government. In *Rasul v. Bush*,²⁴ four U.K. nationals, who had been detained by the United States at Guantanamo Bay, filed a claim under the ATS against the Secretary of Defense, the Chairman of the Joint Chiefs of Staff, and various other U.S. military and government officials.²⁵ The U.K. nationals alleged that they were systematically tortured by U.S. military and civilian personnel in violation of their rights under the U.S. Constitution, federal laws, international treaties, and CIL.²⁶ The lawsuit, filed in the U.S. District Court for the District of Columbia, claims jurisdiction under the general federal question statute and the ATS seeks \$10 million in damages.²⁷

Second, in *Saleh v. Titan*,²⁸ detainees at the notorious Abu Ghraib prison in Iraq sued the Titan Corporation and other military contractors hired by the U.S. government to support occupation operations in Iraq.²⁹ The plaintiffs, ten Iraqi nationals formerly detained at Abu Ghraib, allege that Titan knowingly participated in alleged torture and other forms of abuse. The lawsuit, filed in the U.S. District

U.S. Abuses in the "War on Terror," available at http://www.humanrightsfirst.org/us_lawPDF/detainees/Getting_to_Ground_Truth_090804.pdf (2004).

²⁴ *Rasul v. Rumsfeld* (complaint available at http://www.ccr-ny.org/v2/legal/september_11th/sept11Article.asp?ObjID=1VSkOOGX7D&Content=455).

²⁵ *Ex-Guantanamo Inmates File Suit*, N.Y. TIMES, Oct. 28, 2004, at A10.

²⁶ *Id.*

²⁷ *Id.*

²⁸ 2004 WL 3104662.

²⁹ Terri Somers, *Lawsuit Ties Titan to Abuse at Iraq Prison*, SAN DIEGO TRIB., July 2, 2004, available at http://www.signonsandiego.com/uniontrib/20040702/news_1b2titan.html.

Court in the Southern District of California, claims violations of the U.S. Constitution and RICO, as well as treaties and CIL pursuant to the ATS.³⁰

Third, in *Arar v. Ashcroft*,³¹ a Canadian national sued the U.S. Attorney General, the Secretary of Homeland Security, and the Director of the Federal Bureau of Investigation, along with several officials, for their involvement in his rendition to Syria, where he allegedly suffered torture and other abuse at the hands of Syrian interrogators for weeks.³² The U.S. officials allegedly detained Arar in violation of his constitutional right to due process and then rendered him to Syrian authorities knowing that he would be subject to torture and other abuse in violation of federal laws prohibiting torture.³³ The lawsuit, filed in the U.S. District Court for the Eastern District of New York, claims jurisdiction under general federal question and also under the Torture Victim Protection Act. Interestingly, the Plaintiff could also have claimed jurisdiction under the ATS but chose, probably for strategic reasons, not to do so. Still, the practice of renditions is highly controversial, and it is likely that future plaintiffs will sue for damages arising out of such renditions pursuant to the ATS.

All of these lawsuits reflect a shift in focus for ATS litigation. Whereas previous ATS lawsuits alleged an underlying violation of international law by a foreign government, the ATS terrorism lawsuits represent the first time that the U.S. government's conduct itself has been the basis for ATS litigation. Moreover, while many of the complaints allege violations of U.S. constitutional law, the plaintiffs' right to seek U.S. constitutional protections is

³⁰ *Id.*

³¹ *Arar v. Ashcroft*, No 04-CV-0249-DGT-VVP (E.D.N.Y.) (documents available at http://www.ccr-ny.org/v2/legal/september_11th/sept11Article.asp?ObjID=zPvu7s2XVJ&Content=377).

³² Tim Harper, *Arar deportation 'within law': Ashcroft*, TORONTO SUN, NOV. 21, 2003.

³³ *Id.*

uncertain given their status as aliens.³⁴ In contrast, their ATS claims, brought under CIL and treaty law, suffer from no such difficulties.³⁵

While the U.S. government has pledged that it will abide by international treaties and federal statutes prohibiting conduct such as torture, Guantanamo, Abu Ghraib, and renditions will hardly be the only controversial aspects of the U.S. government's conduct of the war on terrorism. Freedom of Information Act lawsuits have suggested that there is evidence of broader violations of international human rights law than previously suspected.³⁶ Moreover, information has surfaced suggesting that the U.S. military's conduct in Afghanistan also may have violated international human rights law.³⁷

The re-election of President George W. Bush, after a campaign based largely on his commitment to the continuing war on terrorism,³⁸ suggests that the U.S.

³⁴ See, e.g., *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990).

³⁵ It is likely that the U.S. government retains sovereign immunity for its actions, but it is quite likely that U.S. government officials and, to an even greater degree, its military contractors will not be able to avail themselves of the same protections. Suits against U.S. government officials may avoid sovereign immunity on the theory that federal officials were either acting outside the scope of their authority, or that they were acting in violation of clearly established statutory or treaty violations that a reasonable person could have believed. 14 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 3655 (3d ed. 2004).

³⁶ Kate Zernike, *Newly Released Reports Show Early Concern on Prison Abuse*, N.Y. TIMES, Jan. 6, 2005, at A1, available at <http://www.freerepublic.com/focus/f-news/1314999/posts>.

³⁷ Angie C. Marek & Edward T. Pound, *A Lingerin Prison Scandal*, U.S. NEWS & WORLD REP., Jan. 10, 2005, at 30-31.

³⁸ President Bush laid out his approach in his famous September 20, 2001 speech.

"Our response involves far more than instant retaliation and isolated strikes. Americans should not expect one battle, but a lengthy campaign unlike any other we have ever seen. It may include dramatic strikes visible on TV and covert operations secret even in success. We will starve terrorists of funding, turn them one against another, drive them from place to place until there is no refuge or no rest. And we will pursue nations that provide aid or safe haven to terrorism. Every nation in every region now

government's aggressive and controversial policies will continue. Certainly, Bush's nomination of Alberto Gonzales as the Attorney General for his second term suggests he will not back away from his aggressive tactics. Gonzales is widely regarded as a key legal architect behind many of the policies now being challenged in the ATS suits.³⁹

In sum, there is every reason to believe that a third wave of ATS litigation is emerging. Unlike the two previous waves of litigation, however, the underlying conduct being challenged is that of the U.S. government and its officials.

II. *SOSA V. ALVAREZ-MACHAIN* AND THE ALIEN TORT STATUTE

This section considers the impact of the Supreme Court's decision in *Sosa* on the coming third wave of ATS litigation.

A. *Sosa and the Challenge to the ATS*

The Supreme Court in *Sosa* considered the question of whether the ATS served merely to create jurisdiction in the federal courts for violations of CIL and treaties or whether it also created a cause of action for alien plaintiffs. The text of the ATS, which was drafted in 1789 as part of the

has a decision to make: Either you are with us or you are with the terrorists. From this day forward, any nation that continues to harbor or support terrorism will be regarded by the United States as a hostile regime."

President George W. Bush, Address to a joint session of Congress (Sept. 20, 2001), available at <http://archives.cnn.com/2001/US/09/20/gen.bush.transcript>.

Bush's second inaugural address suggests, if anything, a more aggressive foreign policy: "So it is the policy of the United States to seek and support the growth of democratic movements and institutions in every nation and culture, with the ultimate goal of ending tyranny in our world." President George W. Bush, Inaugural Address (Jan. 20, 2005), available at <http://www.whitehouse.gov/news/releases/2005/01/20050120-1.html>.

³⁹ See, e.g., Michael Isikoff, *Unanswered Questions: Alberto Gonzales will likely be confirmed. But that won't stop the widening scandal over Gitmo detainees*, NEWSWEEK, Jan. 17, 2005, at 36.

Judiciary Act, has been the subject of substantial argument, both in the courts and in the legal academy. It reads, in its current form:

The district courts [of the United States] 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.⁴⁰

In *Sosa*, the Court considered, and in some ways accepted, the main argument raised by the critics of the ATS, who claimed that the ATS was best read to create only jurisdiction for federal courts.⁴¹ The Court did not, however, accept the next step in the critics' analysis, which would have held that Congress was required to subsequently create a specific cause of action to support any lawsuit claiming a violation of the law of nations.

Instead, the Court held that, even though the plain language of the ATS created jurisdiction only, federal courts remained empowered to accept a certain limited number of such lawsuits pursuant to their general common law powers. The Court explained that:

[A]lthough the ATS is a jurisdictional statute creating no new causes of action, the reasonable inference from the historical materials is that the statute was intended to have practical effect the moment it became law. The jurisdictional grant is best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time.⁴²

⁴⁰ 28 U.S.C. § 1350 (2000).

⁴¹ *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2761 (2004) (the ATS "is a jurisdictional statute").

⁴² *Id.*

Because it is likely that federal courts at the time the ATS was enacted would have treated the law of nations as a portion of the general common law, and because federal courts at the time were generally empowered to apply federal common law, the Court found it reasonable to allow modern federal courts to continue to recognize such claims. As Justice Souter, writing for the Court, expressed: "It would take some explaining to say now that federal courts must avert their gaze entirely from any international norm intended to protect individuals."⁴³

B. Keeping the Door "Ajar"

Although the *Sosa* Court decided to, in its words, keep the door "ajar"⁴⁴ for federal courts to hear claims by aliens alleging violations of customary international law, it believed it was placing limitations on that power. It held that "courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized."⁴⁵

The Court did not elaborate substantially on how to apply this standard for recognizing CIL.⁴⁶ It cited three lower court cases that had recognized CIL causes of action that were "specific, universal, and obligatory."⁴⁷ It also explained in a footnote that, in appropriate cases, international law might require plaintiffs to exhaust local

⁴³ *Id.* at 2764-65.

⁴⁴ *Id.* at 2764.

⁴⁵ *Id.* at 2761-62.

⁴⁶ *Id.*

⁴⁷ See *id.* at 2766 (citing *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 781 (D.C. Cir. 1984); and *In re Estate of Marcos Litigation*, 25 F.3d 1467, 1475 (9th Cir. 1994)).

remedies or alternative remedies before bringing their case to U.S. federal court.⁴⁸

The Court then applied this new standard to dismiss Alvarez-Machain's claim that "arbitrary arrest" is a violation of CIL that is cognizable in federal courts.⁴⁹ The Court surveyed the sources Alvarez-Machain cited as evidence of a CIL norm against any arbitrary detentions in excess of positive legal authority and found insufficient support for treating such a norm as CIL. Such a norm is largely an "aspiration" and "exceeds any binding customary rule having the specificity we require."⁵⁰

This analysis does not necessarily clarify the Court's new limiting standard because the lower court in the case, on the same facts, found that Alvarez-Machain's claim that "arbitrary detention" did constitute a violation of CIL norms because they were "specific, universal, and obligatory."⁵¹ Noting that leading scholars, major international human rights instruments, and decisions by international human rights tribunals agreed that "arbitrary detention" was indeed a violation of CIL, the Ninth Circuit had little difficulty holding that Alvarez-Machain had properly stated a cause of action under CIL.⁵² Indeed, the only clear difference between the analysis of the Supreme Court and the Ninth Circuit appeared to turn entirely on the length of Alvarez's detention.⁵³ While the Ninth Circuit refused to read a "lengthy detention" requirement into the definition of arbitrary detention, the Supreme Court held otherwise.⁵⁴ But the basis of the Court's holding is unclear

⁴⁸ See *id.* at 2766 n.21.

⁴⁹ *Sosa*, 124 S. Ct. at 2769.

⁵⁰ *Id.* at 2769.

⁵¹ *Alvarez-Machain v. United States*, 331 F.3d 604, 620 (9th Cir. 2003).

⁵² *Id.*; *Sosa*, 124 S. Ct. at 2769.

⁵³ *Id.*

⁵⁴ Compare *Sosa*, 124 S. Ct. at 2769 ("It is enough to hold that a single illegal detention of less than a day, followed by the transfer of custody to lawful authorities and a prompt arraignment, violates no norm of customary international law so well defined as to support the creation of a federal remedy."), with *Alvarez-Machain*, 331

given the substantial support from international sources marshaled by both Alvarez-Machain and the Ninth Circuit for its reading of the CIL norm.

In the end, application of the Supreme Court's new test for determining CIL norms will, as Justice Scalia's concurrence in *Sosa* predicts,⁵⁵ almost certainly require extensive lower court experimentation. Certainly, the actual standard, as articulated by the Court, "definable, specific, universal, and obligatory," has been applied by almost every lower court, including the lower court in *Sosa* itself.⁵⁶ While it is too early to say that the Court's new rule will be no more restrictive than the pre-*Sosa* rule, it is also far too early to say that it will operate as restrictively as Justice Souter's opinion implies. Certainly there is no reason to believe that any of the third wave lawsuits face serious difficulties meeting the new test set forth by *Sosa*, especially because such lawsuits generally allege violations of CIL, such as torture, that the Court has explicitly recognized as meeting its new test.⁵⁷

III. THE EXECUTIVE BRANCH AND CONTROL OVER INTERNATIONAL LAW

Sosa alludes to one potential obstacle to third wave ATS lawsuits. In a footnote, Justice Souter suggests that the executive branch's views on the effect of an ATS suit on U.S. foreign policy should, in appropriate circumstances, be given great deference.⁵⁸ This allusion highlights one of the least explored obstacles to successful ATS lawsuits: the use of executive statements of interest. Because of the historic

F.3d at 622 ("We simply hold, consistent with international law, that there is no freestanding temporal requirement nor any magical time period that triggers the norm.").

⁵⁵ *Sosa*, 124 S. Ct. at 2769-75 (Scalia, J., concurring).

⁵⁶ *Alvarez-Machain*, 331 F.3d at 621.

⁵⁷ See, e.g., *id.* at 2761 (citing *Filartiga*, 630 F.2d at 876).

⁵⁸ *Id.* at 2766 n.21.

role of the executive branch in the application of international law—especially CIL—in domestic courts, the coming third wave of ATS lawsuits will likely spur greater use of this power.

A. *The Source of Executive Branch Control over Customary International Law*

Historically, the executive branch always has played an important role in the supervision of cases involving CIL in domestic federal and state courts. While it is true that the Supreme Court has declared (and reaffirmed in *Sosa*) that customary “international law is part of our law,” the Court has also recognized that judicial interpretation of CIL is subject to override by the executive branch in appropriate cases.

The basis for executive branch control over CIL was not identified by *The Paquete Habana* Court.⁵⁹ It likely arises from the executive’s broad control over U.S. foreign policy. This authority, which Justice Sutherland has famously described as giving the “President alone . . . the power to speak or listen as a representative of the nation,”⁶⁰ is often understood to flow from the vesting of “executive power” in the President as well as the allocation of the treaty-making and ambassadorial appointment powers.⁶¹ Although no court has directly considered this question, the executive branch has understood its power to speak and its general discretion to conduct foreign policy to include the power to interpret CIL on behalf of the United States. This makes some practical sense because much of CIL has been traditionally formed by State practice and, under the U.S. system, the President controls most of what would

⁵⁹ See generally *The Paquete Habana*, 175 U.S. 677 (1900).

⁶⁰ *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936).

⁶¹ For the most recent defense of the executive power theory, see Michael D. Ramsey & Saikrishna B. Prakash, *The Executive Power Over Foreign Affairs*, 111 YALE L.J. 231 (2001).

constitute State practice on behalf of the United States. For example, President Truman unilaterally, but uncontroversially as a matter of domestic law, declared that the United States would recognize a new rule of CIL governing legal rights to the continental shelf abutting U.S. territory and beyond U.S. territorial waters.⁶² Such a unilateral declaration binds the United States under international law and probably also binds U.S. courts if the question is ever presented to them.⁶³ For this reason, Professor Henkin has explained that "it is the executive branch, far more than the courts, that acts for the United States to help legislate customary international law."⁶⁴

The President's power over CIL is not exclusive. The Constitution allocates to Congress the power to "define and punish . . . [o]ffences against the Law of Nations."⁶⁵ Although this delegation to Congress is explicit, it has never been interpreted to be exclusive. Rather, the power is understood to support congressional modifications or repeals of certain executive interpretations of CIL.⁶⁶

⁶² Policy of the United States with Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf, Proclamation No. 2667, 10 Fed. Reg. 12,303 (Sept. 28, 1945).

⁶³ The enforceability of the Truman Proclamation in domestic courts was assumed and never challenged. See, e.g., *Matson Nav. Co. v. United States*, 141 F. Supp. 929, 934 (Ct. Cl. 1956) (rejecting party's interpretation of Proclamation). See also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, pt. V, introductory note at 3-8 (summarizing U.S. recognition of customary law rules governing aspects of the law of the sea) and § 102 n.2 (calling proclamation "instant customary law").

⁶⁴ Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1562 (1984).

⁶⁵ U.S. CONST. art. I, § 8. For instance, Congress acted in 1953 to confirm the validity of the Proclamation by legislation. Outer Continental Shelf Lands Act, 43 U.S.C. § 1331 (1953). See S. REP. NO. 411 of the Committee on Interior and Insular Affairs, 83d Cong., 1st Sess., at 7 (1953). ("The committee is also of the opinion that legislative action is necessary in order to confirm and give validity to Presidential Proclamation 2667 of September 8, 1945 . . .").

⁶⁶ Beth Stephens, *Federalism and Foreign Affairs: Congress's Power to "Define and Punish . . . Offenses Against the Law of Nations,"* 42 WM. & MARY L. REV. 447, 538-39 (2000) (describing executive branch's role in developing CIL).

B. *CIL in Domestic Courts*

The status of CIL in domestic federal and state courts has divided commentators. Traditionally, CIL was understood to be part of the general common law that was independently applied by both federal and state courts.⁶⁷ But commentators have debated whether CIL also forms part of the Laws of United States under Article III or Article VI.⁶⁸ If so, CIL could serve as the basis for federal court jurisdiction and/or preempt inconsistent state law. As part of the laws of the United States, some have argued that federal court interpretations of CIL could also bind the executive branch in the same way that other federal statutory or treaty law binds the executive branch.⁶⁹

Courts themselves have consistently treated CIL as part of the common law and, until 1980, no court held that CIL formed part of the laws of the United States under Articles III and VI.⁷⁰ The Supreme Court did not assert the right to review state court interpretations of CIL due to the lack of a

⁶⁷ See RESTATEMENT (THIRD) OF U.S. FOREIGN RELATIONS LAW, pt. I, ch. 2, introductory note at 40. For a brief discussion of dissenters to this traditional view, see Julian G. Ku, *Customary International Law in State Courts*, 42 VA. J. INT'L L. 1, 277 n.52 (2001).

⁶⁸ The literature on this question is voluminous and can be divided into three camps. One group holds that CIL is part of the laws of the United States under both Article III and Article VI. See, e.g., Beth Stephens, *The Law of Our Land: Customary International Law as Federal Law after Erie*, 66 FORDHAM L. REV. 393 (1997). Another group holds that CIL is not federal law under either Article III or Article VI. See, e.g., Bradley & Goldsmith, *supra* note 2, at 822. Finally, one group splits the difference holding the CIL is federal law for purposes of Article III but not for Article VI. See, e.g., Michael D. Ramsey, *International Law as Non-preemptive Federal Law*, 42 VA. J. INT'L L. 555 (2002).

⁶⁹ See, e.g., Jordan J. Paust, *The President is Bound by International Law*, 81 AM. J. INT'L L. 377 (1987).

⁷⁰ The most famous case interpreting international law, *The Paquete Habana*, did not consider the status of CIL and had asserted jurisdiction in admiralty. Another leading Supreme Court case, *Banco Nacional v. Sabbatino*, did not explicitly consider the question either, although it did cite a law review article that argued for treating CIL as federal law. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427 n.25 (1964).

federal question.⁷¹ But prior to that decision, courts did not typically reach the question of whether CIL formed part of federal or state law.

For my purposes, the key question is the relationship between a domestic court's interpretation and application of CIL and the views of the executive branch. It is significant that the Court has never interpreted CIL to restrain executive branch activity unless the executive branch stated that it would be bound by CIL.⁷²

The most famous example of judicial interpretation of CIL against the U.S. government is found in *The Paquete Habana*,⁷³ where the Court held that naval officers had violated CIL rules prohibiting seizure of fishing vessels. Although the naval officers lost, the Court appeared to rely heavily on the fact that the President, through his Secretary of the Navy, had issued an order to all naval officers to respect the CIL of war in their conduct of military operations.⁷⁴ The Court's view that CIL is subordinated to executive action is further buttressed by the statement that CIL is "part of our law" absent any treaty, statute, or "controlling executive or legislative act."⁷⁵

The best example of the way in which courts have subordinated their interpretations of CIL to executive authority can be found in the interaction between the courts and the executive on the proper application of the CIL of foreign sovereign immunity. The CIL of foreign

⁷¹ On a number of occasions, the Supreme Court refused appellate jurisdiction over state court interpretations of CIL because it believed CIL did not create a federal question. See, e.g., *N.Y. Life Ins. v. Hendren*, 92 U.S. 286 (1875).

⁷² See, e.g., *Authority of the Federal Bureau of Investigation to Override Customary or Other International Law in the Course of Extraterritorial Law Enforcement Activities*, 13 Op. Off. Legal Couns. 163, 170-71 (1989) (discussing whether Congress and the executive can override CIL).

⁷³ *The Paquete Habana*, 175 U.S. 677 (1900).

⁷⁴ *Id.* at 712 (describing order of the Secretary of Navy to institute a blockade "in pursuance of the laws of the United States, and the law of nations applicable to such cases").

⁷⁵ *Id.* at 700.

sovereign immunity has been applied by both federal and state courts since at least 1812 when Chief Justice Marshall first announced the doctrine for the U.S. Supreme Court in *The Schooner Exchange v. McFadden*.⁷⁶ Over the years, however, the CIL of foreign sovereign immunity has changed from a rule of absolute immunity to a more complex rule of restrictive immunity. While courts have been leaders in making this change, they have always given great deference to executive views on whether and how the CIL of foreign sovereign immunity applied to a particular case.⁷⁷

Indeed, in 1945, the Supreme Court held that the executive branch's policy toward the extension of the CIL of foreign sovereign immunity to ships "by a foreign government" bound the Court.⁷⁸ Thus, the government's failure to adopt the more expansive rule of CIL was "controlling."⁷⁹ Further,

We can only conclude that it is the national policy not to extend the immunity in the manner now suggested, and that it is the duty of the courts, in a matter so intimately associated with our foreign policy and which may profoundly affect it, not to enlarge an immunity to an extent which the government, although often asked, has not seen fit to recognize.⁸⁰

The enactment of the Foreign Sovereign Immunities Act of 1976⁸¹ did not end the role of the executive in supervising judicial interpretation of this area of CIL. While much of the CIL of foreign sovereign immunity was codified by Congress, some areas, such as the rules governing head of

⁷⁶ See generally *The Schooner Exchange v. McFaddon*, 11 U.S. 116 (1812).

⁷⁷ For a review of the evolution of foreign sovereign immunity doctrine in domestic courts, see Ku, *supra* note 67, at 307-22.

⁷⁸ *Republic of Mexico v. Hoffman*, 324 U.S. 30, 38 (1945).

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ 28 U.S.C. § 1602 et seq. (2005).

state immunity, remained part of the common law over which the executive continued to supervise. Thus, courts relied on executive determinations to dismiss a lawsuit against Jean Bertrand Aristide, the then-exiled leader of Haiti, noting that "[i]n this matter the courts are bound by executive decision."⁸²

Such cases demonstrate, at the very least, that the executive branch's authority over foreign policy extends in some instances to the interpretation of CIL by domestic courts. As John Yoo and I have argued, these cases, along with the general rule that the President is not bound by CIL, mean that CIL is best understood as a species of state common law.⁸³ Even if CIL is a kind of federal law, it is not the kind of federal law for which courts have the same sort of mandate under Article III to interpret independent of executive branch control. At least in the context of the CIL of foreign sovereign immunity not codified by Congress, the President appears to hold some amount of power to determine the rule of CIL for domestic courts, including federal courts.

C. *Sosa and the Executive Branch*

Although *Sosa* involved a claim that U.S. officials violated CIL, the Court did not directly consider the executive branch's power over the interpretation of CIL. But the Court's decision only obliquely touches on this possibility.

In a footnote, the Court acknowledges that the executive branch's views on the effect of a particular ATS lawsuit on foreign policy could be given "serious weight" in the determination of whether to permit a particular ATS

⁸² *Lafontant v. Aristide*, 844 F. Supp. 128, 135 (E.D.N.Y. 1994). In a similar case, the Eleventh Circuit denied Manuel Noriega's claim of head of state immunity on the grounds that this would go against the executive branch's policy of pursuing and capturing him. *United States v. Noriega*, 117 F.3d 1206 (11th Cir. 1997).

⁸³ *Ku & Yoo*, *supra* note 4, at 199-220.

lawsuit to go forward.⁸⁴ It used the example of an ATS lawsuit against South African corporations for damages during the apartheid era to illustrate how the executive branch's views might require case-specific deference by the courts.⁸⁵

*In re South African Apartheid Litigation*⁸⁶ involved a group of plaintiffs seeking damages for alleged human rights abuses by a number of South African corporations during the apartheid era.⁸⁷ With the support of the current South African government, the executive branch filed a statement of interest conveying its view that permitting a lawsuit against South African companies to continue would interfere with the conduct of U.S. foreign policy.⁸⁸ The executive branch's statement also conveyed the views of the government of South Africa that these lawsuits undercut the policy embodied by the country's Truth and Reconciliation Commission, which "deliberately avoided a 'victors' justice' approach to the crimes of apartheid"⁸⁹

Although a federal district court found this analysis compelling enough to cite it as one basis for dismissing the South Africa lawsuit,⁹⁰ the broader applicability of the Court's suggestion here is unclear. The Court couched the rule in non-binding language, referring to "case specific deference" with a court giving "serious weight" to executive views. This is a far cry from earlier courts' declarations that they were "bound by executive determinations" in the context of foreign sovereign immunity.⁹¹

⁸⁴ *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2766 n.21 (2004).

⁸⁵ *Id.*

⁸⁶ *In re S. African Apartheid Litig.*, 238 F. Supp. 2d 1379 (Jud. Pan. Mult. Lit. 2002).

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Sosa*, 124 S. Ct. at 2765 n.21.

⁹⁰ *In re S. African Apartheid Litig.*, 346 F. Supp. 2d 538, 554 (S.D.N.Y. 2004).

⁹¹ *See, e.g., Republic of Mexico*, 324 U.S. at 30.

Left unanswered by the Court is what to do when the executive branch has made a plain and unequivocal statement of its view of whether and how a rule of CIL should be applied. The executive branch did not make such a statement in *Sosa*, and the Court did not rely on the executive branch's views in reaching its determination that Alvarez-Machain's claim did not rise to a level of universal consensus to qualify as a rule of CIL (although that was in fact the executive branch's view).

Should the executive branch attempt a more frontal assault on the ability of the Court to independently interpret CIL, the Court has suggested in its latest sovereign immunity case that it will consider a rule requiring deference to executive branch views.⁹²

In sum, *Sosa* recognizes, but does not squarely address, the scope of executive powers to bind a domestic court's interpretation of CIL. It suggests that the Court will adopt a rule of great deference, but it is unclear whether that deference will rise to the level of complete submission that characterized judicial attitudes toward the CIL of foreign sovereign immunity. The scope of executive power to define and to control the interpretation of CIL remains uncertain.

CONCLUSION

Sosa leaves the door ajar for a new wave of ATS lawsuits challenging the legality of U.S. conduct of the war on terrorism. This war, which involves a number of actions of questionable legality under customary international law, has already sparked a number of lawsuits challenging key elements of the U.S. government's strategy for detaining and interrogating suspected terrorists. Unlike previous waves of ATS lawsuits, the third wave of ATS lawsuits will

⁹² See generally *Republic of Austria v. Altmann*, 124 S. Ct. 2240 (2004).

directly challenge the conduct of the U.S. government itself, usually under customary international law.

My prediction is that the third wave of ATS lawsuits, however meritorious, will lead defendants to test the scope of the executive branch's power to control judicial interpretations of CIL. In fact, executive branch supervision of the application of CIL by domestic federal and state courts has a solid historical and doctrinal pedigree. This executive power may pose the greatest obstacle to the emerging third wave.

