

# A REALIST DEFENSE OF THE ALIEN TORT STATUTE

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## ABSTRACT

*This Article offers a new justification for modern litigation under the Alien Tort Statute (ATS), a provision from the 1789 Judiciary Act that permits victims of human rights violations anywhere in the world to sue tortfeasors in U.S. courts. The ATS, moribund for nearly 200 years, has recently emerged as an important but controversial tool for the enforcement of human rights norms. “Realist” critics contend that ATS litigation exasperates U.S. allies and rivals, weakens efforts to combat terrorism, and threatens U.S. sovereignty by importing into our jurisprudence undemocratic international law norms. Defenders of the statute, largely because they do not share the critics’ realist assumptions about international relations, have so far declined to engage with the cost-benefit critique of ATS litigation and instead justify the ATS as a key component in a global human rights regime.*

*This Article addresses the realists’ critique on its own terms, offering the first defense of ATS litigation that is itself rooted in realism—the view that nations are unitary, rational actors pursuing their security in an anarchic world and obeying international law only when it suits their interests. In particular, this Article identifies three flaws in the current realist ATS critique. First, critics rely on speculation about catastrophic future costs without giving sufficient weight to the actual history of ATS litigation and to the prudential and substantive limits courts have already imposed on it. Second, critics’ fears about the sovereignty costs that will arise when federal courts incorporate international-law norms into domestic law are overblown because U.S. law already reflects the limited set of universal norms, such as torture and genocide, that are actionable under the ATS. Finally, this realist critique fails to overcome the incoherence created by contending that the exercise of jurisdiction by the*

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*courts may harm U.S. interests while also assuming that nations are unitary, rational actors.*

*Moving beyond the current realist ATS critique, this Article offers a new, positive realist argument for ATS litigation. This Article suggests that, in practice, the U.S. government as a whole pursues its security and economic interests in ATS litigation by signaling cooperativeness through respect for human rights while also ensuring that the law is developed on U.S. terms. This realist understanding, offered here for the first time, both explains the persistence of ATS litigation and bridges the gap that has frustrated efforts to weigh the ATS's true costs and benefits.*

#### TABLE OF CONTENTS

INTRODUCTION.....	1119
I. THE ATS, REALISM, AND REVISIONISM .....	1125
A. <i>The Alien Tort Statute</i> .....	1126
B. <i>Revisionism</i> .....	1129
C. <i>Sosa and Functional Approaches</i> .....	1132
D. <i>Revisionism and International Relations Theory</i> .....	1135
II. THE REALIST CRITIQUE OF ATS LITIGATION.....	1138
A. <i>Courts' Competence in Foreign Affairs</i> .....	1139
B. <i>Contradictions in the Realist Critique</i> .....	1141
C. <i>The Problematic Functional Arguments Against ATS         Litigation</i> .....	1143
1. <i>Sovereignty Costs</i> .....	1143
2. <i>Foreign Policy Costs</i> .....	1149
3. <i>Human Rights Costs</i> .....	1159
III. THE STRATEGIC BENEFITS OF ATS LITIGATION .....	1163
A. <i>The ATS's Strategic Purpose in 1789</i> .....	1163
B. <i>The ATS's Twenty-First Century Strategic Function</i> .....	1165
IV. WEIGHING THE COSTS AND BENEFITS OF ATS LITIGATION.....	1173
CONCLUSION .....	1176

## INTRODUCTION

The Alien Tort Statute (ATS) has fascinated scholars since the Second Circuit roused it from a 200-year-old slumber in 1980, holding that it enabled Paraguayans to sue their own government officials in United States courts for torture committed in Paraguay.<sup>1</sup> This once-obscure provision of the 1789 Judiciary Act—giving federal courts jurisdiction over civil actions “for a tort only, committed in violation of the law of nations”—has become a unique vehicle for global human rights litigation.<sup>2</sup>

Modern ATS litigation has inspired a sharp debate, which continues to rage about both its historical pedigree and the status of customary international law (CIL) as federal common law.<sup>3</sup> But doctrine and history aside, the ATS’s critics have also issued increasingly dire warnings about its strategic costs for the United States. Critics contend that ATS litigation irritates both allies and rivals, weakens efforts to combat terrorism, and threatens U.S. sovereignty through the importation of undemocratic norms developed by human rights groups, elite academics, and U.N. bureaucrats.<sup>4</sup>

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1. See *Filartiga v. Pena-Irala*, 630 F.2d 876, 885, 887 (2d Cir. 1980). Although the acts alleged were committed in Paraguay three years earlier, personal jurisdiction existed over the defendant, a former police official, because he was living illegally in Brooklyn when the suit was filed. See *id.* at 878–79, 885. For a detailed discussion of *Filartiga* and a comprehensive history of ATS litigation, see JEFFREY DAVIS, *JUSTICE ACROSS BORDERS: THE STRUGGLE FOR HUMAN RIGHTS IN U.S. COURTS* (2008).

2. 28 U.S.C. § 1350 (2006). The current version reads in full: “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.” *Id.* See Curtis A. Bradley, *The Costs of International Human Rights Litigation*, 2 CHI. J. INT’L L. 457, 473 (2001) [hereinafter Bradley, *Costs*] (observing that international human rights litigation is uniquely concentrated in U.S. courts because of the ATS). In 1993, Belgium enacted a statute providing universal jurisdiction for war crimes, crimes against humanity, and genocide, but it was scaled back enormously a decade later. See Steven R. Ratner, *Belgium’s War Crimes Statute: A Postmortem*, 97 AM. J. INT’L L. 888, 889–91 (2003).

3. CIL consists of norms that arise from state practices and a sense of obligation rather than treaties. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987). The doctrinal and historical debate over modern ATS litigation began when self-styled “revisionists” launched a bracing critique of the “modern position” that CIL is generally part of the federal common law enforceable by U.S. courts through, among other mechanisms, the ATS. See, e.g., Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 816–17 (1997) [hereinafter Bradley & Goldsmith, *Modern Position*]. In 2004, the Supreme Court permitted ATS litigation to continue, but was vague enough so that both sides believed they had won. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 712 (2004) (interpreting the ATS as a jurisdictional statute that nonetheless makes actionable violations of a limited set of CIL norms). For more on revisionism and the modern position, see *infra* notes 60–78 and accompanying text. For a summary of the debate regarding the ATS’s original purpose and current status, see, for example, Curtis A. Bradley, Jack L. Goldsmith & David H. Moore, *Sosa, Customary International Law, and the Continuing Relevance of Erie*, 120 HARV. L. REV. 869 (2007).

4. See GARY CLYDE HUFBAUER & NICHOLAS K. MITROKOSTAS, *AWAKENING MONSTER: THE*

In 2003, the ATS was likened to an “awakening monster” threatening to cause, among other things, a 10% drop in U.S. global trade.<sup>5</sup>

The ATS’s defenders have disputed some of these arguments, but they have engaged the cost-benefit critique only sporadically and incompletely.<sup>6</sup> They focus instead on the ATS’s role in advancing a global human rights regime.<sup>7</sup> As a result, much of the cost-benefit critique has gone unanswered. This Article is the first to articulate a rational-choice defense of ATS litigation that fully addresses its strategic costs and benefits for the United States.

Critics and defenders of ATS litigation start with radically different assumptions about international relations (IR). The critique of ATS litigation is, for the most part, grounded in realism—the influential view that the global system is anarchic, populated solely by unitary

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ALIEN TORT STATUTE OF 1789, at 14 (2003) (predicting that expanding ATS litigation against corporations will cause severe disruption to the U.S. and global economies); Daniel Abebe, *Not Just Doctrine: The True Motivation for Federal Incorporation and International Human Rights Litigation*, 29 MICH. J. INT’L L. 1 (2007) (using international relations realism to argue for greater judicial deference to executive-branch views in ATS cases); Bradley, *Costs*, *supra* note 2, at 460–70 (discussing foreign policy and sovereignty costs for the U.S. and global community from ATS litigation); Julian Ku & John Yoo, *Beyond Formalism in Foreign Affairs: A Functional Approach to the Alien Tort Statute*, 2004 SUP. CT. REV. 153, 154–55 (2004) [hereinafter, Ku & Yoo, *Beyond Formalism*] (concluding that a functional analysis of the ATS reveals that the costs of ATS litigation in federal courts outweigh its benefits); John O. McGinnis & Ilya Somin, *The Political Economy of Customary International Law and the Alien Tort Claims Statute* (April 29–30, 2010) [hereinafter McGinnis & Somin, *Political Economy*] (transcript available at [http://www.law.northwestern.edu/searlecenter/papers/McGinnis\\_ATS.pdf](http://www.law.northwestern.edu/searlecenter/papers/McGinnis_ATS.pdf)) (discussing sovereignty, foreign policy, and economic costs for the United States from ATS litigation); Mark E. Rosen, *The Alien Tort Statute: An Emerging Threat to National Security* (2003), <http://www.nftc.org/default/usa%20engage/ATS%20-%20An%20Emerging%20Threat%20to%20National%20Security.pdf> (contending that ATS lawsuits against private military contractors will interfere with the pursuit of U.S. national security policy).

5. HUFBAUER & MITROKOSTAS, *supra* note 4, at 26, 38 (predicting that billion-dollar awards in ATS lawsuits will prompt massive disinvestment by U.S. multinational corporations from target countries, causing at least a 10% drop in U.S. global trade).

6. See, e.g., HARRY AKOH, *HOW A COUNTRY TREATS ITS CITIZENS NO LONGER EXCLUSIVE DOMESTIC CONCERN: A HISTORY OF THE ALIEN TORT STATUTE LITIGATIONS IN THE UNITED STATES FOR HUMAN RIGHTS VIOLATIONS COMMITTED IN AFRICA 1980–2008*, at 312 (2009) (concluding that ATS litigation in Africa has had a positive effect on human rights in the target countries, advancing the stated U.S. foreign policy of promoting human rights abroad); Sarah H. Cleveland, *The Alien Tort Statute, Civil Society, and Corporate Responsibility*, 56 RUTGERS L. REV. 971, 971 (2004) (arguing that ATS litigation does not harm U.S. foreign relations, nor America’s “standing as an international leader in the promotion and protection of human rights”); Richard L. Herz, *The Liberalizing Effects of Tort: How Corporate Complicity Liability Under the Alien Tort Statute Advances Constructive Engagement*, 21 HARV. HUM. RTS. J. 207, 209–10 (2008) (rejecting the U.S. government’s argument that ATS litigation harms efforts at democratic reform and thwarts the U.S. foreign policy goal of respecting human rights). In addition, Sarah Cleveland focuses on human rights benefits and stresses the courts’ procedural and prudential mechanisms for limiting ATS litigation that might interfere with the conduct of foreign relations. See Cleveland, *supra*, at 981–82.

7. See *infra* notes 114–26 and accompanying text.

nation-states, and shaped by a small set of great powers balancing one another.<sup>8</sup> For the pure realist, the international system is a set of “billiard balls colliding.”<sup>9</sup> Realists argue that nations comply with international law only when it serves their core interests of protecting their security and sovereignty.<sup>10</sup>

Drawing on realism, critics conclude that ATS litigation is inefficient and welfare-negative for the United States. For example, they argue that a controversial ATS lawsuit against multinational corporations for aiding and abetting apartheid-era abuses in South Africa punishes companies with ties to the United States, leading to the loss of investment.<sup>11</sup> Such suits are said to provoke a backlash against the United States in affected countries and antagonize its allies whose multinationals are being sued.<sup>12</sup> Critics contend that U.S. courts, meanwhile, may use the ATS to import into U.S. law “raw” international law norms that have not been approved by the democratic process through legislation or treaty making, weakening U.S. sovereignty.<sup>13</sup>

In contrast, ATS defenders eschew IR realism and instead assume that geopolitics can be influenced by international law independent of state interests, that regime type matters, and that legal enforcement of human rights norms can cause them to be internalized in nations.<sup>14</sup> These

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8. Robert O. Keohane, *Theory of World Politics: Structural Realism and Beyond*, in *NEOREALISM AND ITS CRITICS* 158, 158 (Robert O. Keohane ed., 1986).

9. Daniel H. Nexon & Thomas Wright, *What's at Stake in the American Empire Debate*, 101 *AM. POL. SCI. REV.* 253, 256 (2007) (internal quotation marks omitted) (describing realism in the context of the American empire debate).

10. See Abebe, *supra* note 4, at 17–21; *infra* notes 112–15 and accompanying text. For a discussion of realism, see *infra* notes 99–114 and accompanying text. For a discussion of realism's impact on U.S. foreign affairs law more generally, see Robert Knowles, *American Hegemony and the Foreign Affairs Constitution*, 41 *ARIZ. ST. L.J.* 87, 95–102 (2009).

11. See *In re S. Afr. Apartheid Litig.*, 346 F. Supp. 2d 538 (S.D.N.Y. 2004), *aff'd in part, vacated in part, remanded sub nom. Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007), *aff'd without opinion sub nom. Am. Isuzu Motors, Inc. v. Ntsebeza*, 553 U.S. 1028 (2008) (affirming by default for lack of quorum). The Bush administration urged that the suits be dismissed, citing, in part, these economic concerns. See *infra* notes 234–40 and accompanying text. A divided panel of the Second Circuit recently held that the ATS does not provide jurisdiction for lawsuits against corporations, stopping the South Africa litigation and perhaps signaling the future demise of all ATS lawsuits against corporations. See *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 145 (2d Cir. 2010).

12. See Abebe, *supra* note 4, at 32–35.

13. See *id.* at 14–15; Bradley, *Costs*, *supra* note 2, at 464–69; John O. McGinnis & Ilya Somin, *Should International Law Be Part of Our Law?*, 59 *STAN. L. REV.* 1175, 1177 (2007) (describing international law not endorsed by the domestic political process as “raw international law”).

14. See, e.g., Cleveland, *supra* note 6, at 984–85; Harold Hongju Koh, *Transnational Legal Process*, 75 *NEB. L. REV.* 181, 199 (1996) [hereinafter Koh, *Transnational Process*]; Christiana Ochoa, *Towards a Cosmopolitan Vision of International Law: Identifying and Defining CIL Post Sosa v. Alvarez-Machain*, 74 *U. CIN. L. REV.* 105, 108–09 (2005).

assumptions partake of alternatives to realism in IR theory, including liberalism and constructivism.<sup>15</sup> For its defenders, ATS litigation contributes to a global human rights regime that can substantially influence nations' behaviors.<sup>16</sup> The South African apartheid litigation, for example, is said to demonstrate to the world that no one can escape justice for human rights violations.<sup>17</sup> ATS litigation is, for its defenders, one way that international society can strengthen the rule of law and improve governments' human rights practices.<sup>18</sup>

With critics and defenders largely talking past one another, it has seemed that views of international relations dictate one's views of the ATS. But this need not be true. Realist assumptions need not lead one to reject ATS litigation. This Article separates assumptions from their conventional conclusions and offers a defense of ATS litigation from a realist perspective. In doing so, it supplies missing common ground for further empirical studies about the costs and benefits of ATS litigation. The project that this Article begins is especially important because historical materials on the ATS are quite thin, and the relationship between CIL and federal common law is especially murky.<sup>19</sup> Because the debate about doctrine and history remains stalemated, cost-benefit analysis takes on greater significance.<sup>20</sup>

An evaluation of the realist, cost-benefit ATS critique on its own terms reveals three major flaws. First, it is internally inconsistent. Realism holds that nations are unitary, rational actors pursuing their interests.<sup>21</sup> But critics posit that U.S. courts' enforcement of the ATS harms U.S. interests. In doing so, critics prematurely disregard the possibility that the U.S. government *as a whole* acts rationally to pursue its interests through ATS

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15. See Abebe, *supra* note 4, at 7. For a discussion of constructivism and liberalism, see *infra* notes 122–27 and accompanying text.

16. See Cleveland, *supra* note 6, at 985.

17. See, e.g., Jeremy Sarkin, *Reparations for Past Wrongs: Using Domestic Courts Around the World, Especially the United States, to Pursue African Human Rights Claims*, 32 INT'L J. LEGAL INFO. 426, 429–30 (2004) (concluding that the “[t]he issue of compensation” for human rights abuses through litigation “has become so important” in part to “deter future perpetrators from committing similar violations in the future”).

18. See Cleveland, *supra* note 6, at 985.

19. See *infra* notes 41–78 and accompanying text.

20. See Knowles, *supra* note 10, at 94–111 (discussing the importance of cost-benefit analysis for debates on the constitutional law of foreign affairs, given the relative paucity of textual and historical evidence).

21. For a discussion of realism's similarities to, and differences from, other rational-choice approaches to international relations, see Oona A. Hathaway & Ariel N. Lavinbuk, *Rationalism and Revisionism in International Law*, 119 HARV. L. REV. 1404, 1422–26 (2006). See also *infra* notes 99–127 and accompanying text.

litigation. Critics fail to consider the positive instrumental role that U.S. courts can play in foreign policy, particularly when the United States is a global provider of public goods seeking cooperation from other nations.<sup>22</sup>

Second, the ATS critique relies on speculation, not actual experience. ATS litigation has resulted in just a handful of collectable judgments<sup>23</sup> and has not provoked an economic or diplomatic crisis for the United States. So, the most trenchant criticism must be based on future, rather than past or present, costs. Yet critics' sometimes-catastrophic predictions—including a 2003 “nightmare” scenario of a \$26 billion class action by 100,000 Chinese plaintiffs within the decade—seem far from coming true.<sup>24</sup> Five ATS lawsuits against Chinese government officials, which are a critical case study of ATS litigation's effects, have not caused any visible rupture in the U.S.-China relationship.<sup>25</sup> Moreover, in 2004's *Sosa v. Alvarez-Machain*, the Supreme Court, addressing the ATS for the first time, limited actionable claims to certain core “specific, universal, and obligatory” human rights norms.<sup>26</sup> These constraints, as well as various jurisdictional and prudential tools available for courts to keep litigation in check and the actual history of ATS litigation, all suggest that it is unlikely to create the foreign policy problems its critics predict.<sup>27</sup>

Moreover, concerns about sovereignty costs are unfounded. Critics fail to distinguish between the wholesale incorporation of customary international law into U.S. domestic law and the very limited application of a few universal, specific, and obligatory norms in *Sosa*-constrained ATS litigation.<sup>28</sup> Critics also confuse the doctrinal act of applying an international law norm in ATS litigation with its actual effect on the body of U.S. domestic law, which is negligible. Federal courts have not

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22. See *infra* notes 305–17 and accompanying text.

23. AKOH, *supra* note 6, at 57 (noting that approximately \$300 had been collected from one of the African defendants); HENRY J. STEINER, PHILIP ALSTON, & RYAN GOODMAN, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS (2007) (concluding that approximately \$1.27 million has been collected from three defendants).

24. HUFBAUER & MITROKOSTAS, *supra* note 4, at 122.

25. See, e.g., *Doe v. Qi*, 349 F. Supp. 2d 1258, 1266 (N.D. Cal. 2004) (entering a default declaratory judgment against the mayor of Beijing on claims by Falun Gong adherents for torture, arbitrary detention, and cruel, inhuman, or degrading treatment following the 1999 crackdown). All other lawsuits against Chinese officials were dismissed on jurisdictional grounds. See *infra* notes 214–33 and accompanying text.

26. 542 U.S. 692, 749 (2004) (quoting *Alvarez-Machain v. United States*, 331 F.3d 604 (2003)) (internal quotation marks omitted); see *infra* notes 75–91 and accompanying text.

27. See *infra* Part II.C.2.

28. See *infra* Part II.C.1.

recognized ATS-actionable norms that do not already have counterparts in U.S. law, and they are unlikely to do so.<sup>29</sup>

Finally, critics ignore the strategic benefits of ATS litigation, assuming that its success should be measured solely by its ability to improve human rights conditions worldwide and “judicialize” international relations.<sup>30</sup> By describing its goals in these grand terms, ATS critics set it up for failure. And while the advancement of human rights is a U.S. foreign policy objective, realist critics can reasonably insist that it must yield to more “fundamental” security and economic interests.<sup>31</sup>

ATS litigation may advance not just human rights, but U.S. security and economic interests as well. By accounting for these effects, this Article offers the first comprehensive explanation of the benefits of ATS litigation.<sup>32</sup> As the world’s leading power, the United States provides a number of global public goods—such as support for global trade and security guarantees—from which it also benefits.<sup>33</sup> It has the incentive to signal cooperativeness so that it can provide those public goods more easily, not because it is the most powerful state, but because it pays the highest costs when it engages in self-restraint. In its present form, ATS litigation represents a way for the United States to signal restraint more cheaply than by simply complying with international human rights norms. The United States signals cooperativeness in ATS litigation through respect for human rights law while shaping that law in a way that suits its interests and paying few, if any, sovereignty costs.

This Article proceeds in four parts. Part I describes both the doctrinal and cost-benefit aspects of the debate about the ATS and the distinct, underlying assumptions about international relations held by critics and defenders. Part II responds to the functional critique of ATS litigation, explaining why it is self-contradictory and why its claims about the strategic effects of ATS litigation are unfounded. In Part III, I offer the

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29. See *infra* notes 188–99 and accompanying text.

30. See *infra* Part II.C.3.

31. See Abebe, *supra* note 4, at 33; *infra* notes 253–60 and accompanying text.

32. Former U.S. diplomats, in arguing for some exceptions to sovereign immunity under the ATS, noted some of the strategic benefits of ATS litigation. See Brief for Former United States Diplomats as Amicus Curiae Supporting Respondents at 16, *Samantar v. Yousef*, 130 S. Ct. 2278 (2010), available at [http://www.abanet.org/publiced/preview/briefs/pdfs/09-10/08-1555\\_RespondentAmCu26FmrUSDiplomats.pdf](http://www.abanet.org/publiced/preview/briefs/pdfs/09-10/08-1555_RespondentAmCu26FmrUSDiplomats.pdf) (observing that human rights violations create economic and political instability and that advancing human rights aids the U.S. in its battle for “hearts and minds” around the world).

33. See, e.g., MICHAEL MANDELBAUM, *THE CASE FOR GOLIATH: HOW AMERICA ACTS AS THE WORLD’S GOVERNMENT IN THE TWENTY-FIRST CENTURY* 7–9, 31–139 (2005) (describing numerous international public goods provided exclusively or primarily by the United States).



first account of ATS litigation's strategic benefits from a realist perspective. In doing so, it must be noted, I move slightly—but not too far—away from realism. Although a pure realist rejects *any* purpose for international law, if one leaves realist premises mostly intact but assumes that states will sometimes comply with human rights law to signal cooperativeness, a strategic purpose and benefit for the ATS emerges.<sup>34</sup> Part IV weighs the costs and benefits of ATS litigation and concludes that the benefits outweigh the costs. While the costs are often overstated, its benefits for advancing both human rights and the strategic interests of the United States justify and explain its continued existence.

#### I. THE ATS, REALISM, AND REVISIONISM

This section reviews the doctrinal and functional debate about ATS litigation against the backdrop of the broader debate about the formal status and purpose of international law. The critique of ATS litigation is part of a broader “revisionist” view that the incorporation of CIL into U.S. law unwisely transfers power from the political branches and state governments to international institutions and unelected federal judges.<sup>35</sup> Although there are variations of revisionism and scholars who have carved out middle paths between revisionism and what is known as the “modern position,”<sup>36</sup> I use the term revisionism here in a comprehensive sense: revisionists view modern international human rights litigation in U.S. federal courts—primarily through the ATS—as both pragmatically unwise and unsupported in text, history, or doctrine.<sup>37</sup>

The revisionist view has both formal and functional aspects. Formalism concerns the ways courts should be constrained by doctrine and the best

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34. Even ATS critics seem to agree that realism, while the most useful perspective, does not account for every interaction among nations. *See infra* notes 318–21 and accompanying text.

35. Hathaway & Lavinbuk, *supra* note 21, at 1406–07. Revisionism can also be seen as a branch of the conservative critique of judicial “activism,” although revisionism is not necessarily tied to conservative politics. *See* G. Edward White, *Unpacking the Idea of the Judicial Center*, 83 N.C. L. REV. 1089, 1180–82 (2005) (discussing the relationship between revisionism on the Supreme Court, judicial restraint, and conservative politics).

36. The modern position generally refers to the view that CIL is, in some sense, part of U.S. federal common law cognizable by federal courts. *See infra* notes 60–78 and accompanying text.

37. It should be noted that some critics raise functional concerns about international human rights litigation without expressing agreement with the formal—i.e., doctrinal, historical, and textual—critique of ATS litigation. *See, e.g.,* Abebe, *supra* note 4. Although I refer to all critics as “revisionists,” and there is a connection between the formal and functional aspects of the critique, not all critics are “revisionists” in the way the term was originally used by Professors Bradley and Goldsmith. *See infra* notes 60–78 and accompanying text.

interpretation of text, structure, and history.<sup>38</sup> Functionalism, by contrast, weighs the costs, benefits, and efficiency of laws or procedures.<sup>39</sup> Until now, the formalist side of the debate over ATS litigation has been much more prominent, but this is changing. The post-9/11 transformation of foreign affairs law has magnified the importance of functional arguments for expanded executive power and limited judicial power.<sup>40</sup> This trend toward functionalism will likely exert more influence on the ATS debate in the future.

### A. *The Alien Tort Statute*

The long-obscure provision of the 1789 Judiciary Act now known as the Alien Tort Statute—alternatively called the Alien Tort Claims Act<sup>41</sup>—was famously described by Judge Henry Friendly as a “legal Lohengrin” because “no one seems to know whence it came.”<sup>42</sup> The lack of legislative

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38. See Cass R. Sunstein, *Must Formalism Be Defended Empirically?*, 66 U. CHI. L. REV. 636, 638 (1999) (“[F]ormalist strategies . . . entail three commitments: to promot[e] compliance with all applicable legal formalities (whether . . . they make sense in the individual case), to ensur[e] rule-bound law . . . and to constrain[] the discretion of judges . . .”). There is, of course, no consensus on the precise boundaries between formalism and functionalism. See William N. Eskridge, Jr., *Relationships Between Formalism and Functionalism in Separation of Powers Cases*, 22 HARV. J.L. & PUB. POL’Y 21, 21–22 (1998) (contrasting constitutional formalism with constitutional functionalism and each theory’s respective role in American legal history); Deborah N. Pearlstein, *Form and Function in the National Security Constitution*, 41 CONN. L. REV. 1549, 1555–56 (2009) (observing that the boundaries between functionalism and formalism are blurry).

39. *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919, 944 (1983) (describing functionalism as an inquiry into whether “a given law or procedure is efficient, convenient, and useful in facilitating functions of government,” and concluding that “[c]onvenience and efficiency are not the primary objectives—or the hallmarks—of democratic government”); Pearlstein, *supra* note 38, at 1556–58.

40. In general, the post-9/11 literature on the foreign affairs constitution has been influenced by the notion that terrorism and weapons of mass destruction are new threats that formalist understandings of the Constitution are inadequate to address. See Knowles, *supra* note 10, at 97–99; Pearlstein, *supra* note 38, at 1551–52.

41. 28 U.S.C. 1350 (2006). Those who interpret the provision as providing a cause of action prefer the label “Alien Tort Claims Act,” while those who contend it is merely jurisdictional prefer “Alien Tort Statute.” Compare Beth Stephens, *Upsetting Checks and Balances: The Bush Administration’s Efforts to Limit Human Rights Litigation*, 17 HARV. HUM. RTS. J. 169 (2004), with Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT’L L. 587 (2002). I use “Alien Tort Statute” here because that is the label given to it by the Supreme Court. See, e.g., *Sosa v. Alvarez-Machain*, 542 U.S. 692, 697 (2004); *Argentine Republic v. Amerasia Shipping Corp.*, 488 U.S. 428, 436 (1989).

42. *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975). The Lohengrin of German legend is a knight who appears from nowhere to rescue a maiden, but disappears mysteriously when asked to reveal his origins. See ROBERT JAFFRAY, *THE TWO KNIGHTS OF THE SWAN: LOHENGRIN AND HELYAS* 11 (1910). For a more detailed comparison of the ATS with Lohengrin, see Andrea Bianchi, *International Law and US Courts: The Myth of Lohengrin Revisited*, 15 EUR. J. INT’L L. 751, 754

history has bedeviled interpreters for decades.<sup>43</sup> In the first 200 years after its enactment, the ATS was recognized only twice as a source of jurisdiction.<sup>44</sup>

The Second Circuit launched the modern ATS litigation revolution in 1980 with *Filartiga v. Pena-Irala*.<sup>45</sup> Two Paraguayan nationals, Dr. Joel Filartiga and his daughter, filed suit in a U.S. district court in New York against a Paraguayan police official, who was then living in New York, for the torture and death of Filartiga's son in Paraguay.<sup>46</sup> The Second Circuit upheld the jurisdiction of the district court under the ATS, reasoning that the Filartigas' claims arose under federal law because the "constitutional basis for the Alien Tort Statute is the law of nations, which has always been part of the federal common law."<sup>47</sup> The Second Circuit equated the law of nations with contemporary CIL and examined several sources of evidence—mainly, human rights treaties and U.N. declarations—in reaching its conclusion that there "exists an international consensus that recognizes basic human rights and obligations owed by all governments to their citizens," including the prohibition on official torture.<sup>48</sup> For the first time, foreign nationals could sue one another in U.S. courts, even for CIL violations occurring in their home countries.<sup>49</sup>

After *Filartiga*, many courts interpreted the ATS as providing a cause of action for violations of CIL.<sup>50</sup> Still, ATS litigation developed rather

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(2004), and Thomas H. Lee, *The Safe-Conduct Theory of the Alien Tort Statute*, 106 COLUM. L. REV. 830, 907 (2006).

43. For a recent attempt to unlock the original purpose of the ATS through examining the historical materials and structure of the 1789 Judiciary Act, see, for example, Lee, *supra* note 42, at 906–07 (concluding that Congress intended the ATS to redress only violations of safe conduct, and suggesting that this original purpose should be translated to limit contemporary application of the ATS to violations with a sovereign U.S. nexus).

44. See *Adra v. Clift*, 195 F. Supp. 857, 864–65 (D. Md. 1961) (holding that concealing the foreign nationality of a child to bring her into the United States is a tort in violation of the law of nations); *Bolchos v. Darrel*, 3 F. Cas. 810, 810–11 (D.S.C. 1795) (No. 1607) (finding jurisdiction to adjudicate the legality of the seizure of property of neutral aliens seized as prize cargo by a French privateer under the ATS); cf. *Nguyen Da Yen v. Kissinger*, 528 F.2d 1194, 1201 n.13 (1975) (noting that ATS jurisdiction "may be available"). Plaintiffs invoked the ATS in only about a dozen cases. See Lee, *supra* note 42, at 832 & n.6 (listing cases).

45. 630 F.2d 876 (2d Cir. 1980).

46. *Id.* at 877–78.

47. *Id.* at 878, 885.

48. *Id.* at 884 (quoting JOINT COMM., H.R. COMM. ON FOREIGN AFFAIRS & S. COMM. ON FOREIGN RELATIONS, 96TH CONG., COUNTRY REPORTS ON HUMAN RIGHTS FOR 1979, at 1 (Comm. Print 1980)).

49. *Id.* at 878 ("[D]eliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human rights, regardless of the nationality of the parties. Thus, whenever an alleged torturer is found and served with process by an alien within our borders, § 1350 provides federal jurisdiction.").

50. *Filartiga* itself did not hold this, although it has been often interpreted as having done so.

slowly. At first, plaintiffs targeted government officials or those acting under color of state authority.<sup>51</sup> Congress seemed to approve of international human rights litigation by enacting the Torture Victims Protection Act (TVPA) in 1992.<sup>52</sup> The TVPA provides a federal cause of action for damages against any “individual who, under actual or apparent authority, or color of law, of any foreign nation . . . subjects an individual to torture . . . or . . . extrajudicial killing.”<sup>53</sup> The TVPA has a narrower scope than the ATS in several ways—it imposes a ten-year statute of limitations, requires plaintiffs to exhaust local remedies, and provides relief only for a narrow set of claims.<sup>54</sup> But unlike the ATS, which is limited to aliens, the TVPA permits U.S. citizens to obtain relief.<sup>55</sup> Most courts interpret the TVPA as serving to complement, rather than replace, the ATS.<sup>56</sup>

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*See, e.g., Hilao v. Estate of Marcos (In re Estate of Ferdinand Marcos, Human Rights Litig.)*, 25 F.3d 1467, 1475 (9th Cir. 1994) (“We thus join the Second Circuit [in *Filartiga*] in concluding that the [ATS] . . . creates a cause of action . . . .”); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 320 (S.D.N.Y. 2003) (“The ATCA provides a cause of action in tort for breaches of international law.” (citing *Filartiga*, 630 F.2d at 889)); *see also Bradley, supra* note 41, at 592 n.21.

51. *See, e.g., Abebe-Jira v. Negewo*, 72 F.3d 844, 848 (11th Cir. 1996) (affirming judgment under the ATS against former Ethiopian official for torture and cruel, inhuman, and degrading treatment); *Kadic v. Karadzic*, 70 F.3d 232, 244 (2d Cir. 1995) (holding that a Bosnian Serb leader’s alleged genocide, torture, and other atrocities were actionable under the ATS); *Hilao*, 25 F.3d at 1474–75 (holding that the ATS not only provides federal courts with subject matter jurisdiction, but also creates a cause of action for an alleged violation of the law of nations); *Trajano v. Marcos (In re Estate of Ferdinand E. Marcos Human Rights Litig.)*, 978 F.2d 493, 503 (9th Cir. 1992) (holding that alleged torture by the Philippine President violated customary international law and gave rise to subject matter jurisdiction of the federal courts under ATS); *Xuncax v. Gramajo*, 886 F. Supp. 162, 187–89 (D. Mass. 1995) (concluding that the Guatemalan military’s tactics of torture, summary execution, “disappearance,” and arbitrary detention were actionable under ATS).

52. Torture Victim Protection Act, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified as amended at 28 U.S.C. § 1350 (2006)). The TVPA implemented legislation for the Convention Against Torture. *See* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 65.

53. Pub. L. No. 102-256, 106 Stat. 73.

54. *See id.* § 2(b) (establishing an exhaustion of remedies requirement); *id.* § 2(c) (establishing a statute of limitations); *id.* § 3 (providing detailed definitions of torture and extrajudicial killing).

55. *See* Pamela J. Stephens, *Spinning Sosa: Federal Common Law, The Alien Tort Statute, and Judicial Restraint*, 25 B.U. INT’L L.J. 1, 6–7 (2007).

56. *See Flores v. S. Peru Copper Corp.*, 343 F.3d 140, 153 (2d Cir. 2003) (recognizing that “the TVPA reaches conduct that may also be covered by the ATCA”); *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161, 168–69 (5th Cir. 1999) (considering separately claims under the ATCA and TVPA that are “essentially predicated on the same claims of individual human rights abuses”); *Abebe-Jira*, 72 F.3d at 848 (citing the TVPA as confirmation that the ATCA itself confers a private right of action); *Kadic*, 70 F.3d at 241 (“The scope of the Alien Tort Act remains undiminished by enactment of the Torture Victim Act.”); *Hilao*, 103 F.3d at 778–79 (9th Cir. 1994) (noting that the TVPA codifies the cause of action recognized to exist in the ATCA); *Wiwa v. Royal Dutch Petroleum Co.*, No. 96 CIV 8386, 2002 WL 319887, at \*4 (S.D.N.Y. Feb. 28, 2002) (“[P]laintiffs’ claims under ATCA are not preempted by the TVPA. . . . [T]he TVPA simply provides an additional basis for assertion of claims for torture and extrajudicial killing.”); *Doe v. Islamic Salvation Front*, 993 F. Supp. 3, 7–9 (D.D.C.

The ATS litigation against government officials was relatively unsuccessful in obtaining collectable judgments, and it was often thwarted by sovereign immunity and lack of personal jurisdiction.<sup>57</sup> Plaintiffs began to search elsewhere for sources of recovery. In 1996, Burmese citizens and human rights groups sued the U.S. oil company Unocal in federal court in California for alleged complicity in human rights violations by the government of Myanmar (Burma) during the construction of an oil pipeline.<sup>58</sup> The Unocal case marked the beginning of the next wave of ATS litigation aimed at holding multinational corporations (MNCs) liable for aiding and abetting human rights violations.<sup>59</sup>

### B. Revisionism

Meanwhile, revisionism was born. It began as a formalist, doctrinal critique of conventional academic wisdom about the status of CIL as federal common law. In 1997, Jack Goldsmith and Curtis Bradley “shook the international law academy” by criticizing what they termed “the modern position.”<sup>60</sup> Adopted by the Restatement and many scholars, the modern position holds that CIL should be recognized by courts as federal common law that preempts state law—even CIL that has not been incorporated by the political branches through the constitutional lawmaking process.<sup>61</sup>

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1998) (recognizing simultaneous claims under the ATCA and the TVPA). *But see* Enahoro v. Abubakar, 408 F.3d 877, 884–85 (7th Cir. 2005) (holding that plaintiffs could not assert claims of torture and extrajudicial killing as common law violations under the ATS generally and were instead required to assert such claims under the TVPA, which has superseded the ATS with respect to these specific claims).

57. Michael D. Ramsey, *International Law Limits on Investor Liability in Human Rights Litigation*, 50 HARV. INT’L L.J. 271, 276, 279 (2009).

58. *Doe I v. Unocal Corp.*, 963 F. Supp 880, 883–84 (C.D. Cal. 1997).

59. *See, e.g.*, *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163, 177 (2d Cir. 2009) (holding that case against Pfizer alleging nonconsensual medical experimentation on children in Nigeria could proceed under the ATS); *Sarei v. Rio Tinto, PLC*, 487 F.3d 1193, 1197–98 (9th Cir. 2007), *reh’g granted en banc*, 499 F.3d 923 (9th Cir. 2007) (suit by residents of Bougainville Island, in Papua New Guinea, for injuries relating to the mining activities of Rio Tinto, PLC, a British multinational corporation); *Doe I v. Exxon Mobil Corp.*, 393 F. Supp. 2d 20, 22–23 (D.D.C. 2005), *appeal dismissed*, 473 F.3d 345 (D.C. Cir. 2007) (suit by citizens of Indonesia against U.S. oil giant Exxon Mobil for complicity in atrocities committed by the Indonesian government in the rebellious province of Aceh). However, a divided panel of the Second Circuit has recently held that the ATS does not extend liability to corporations. *See* *Kiobel v. Royal Dutch Petroleum*, 621 F.3d 111 (2d Cir. 2010); *see also infra* note 249.

60. *See* William S. Dodge, *Customary International Law and the Question of Legitimacy*, 120 HARV. L. REV. F. 19, 19 (2007) (observing that Bradley and Goldsmith’s original argument about the status of CIL after *Erie* “shook the international law academy”). *See generally* Bradley & Goldsmith, *Modern Position*, *supra* note 3.

61. *See* Bradley & Goldsmith, *Modern Position*, *supra* note 3, at 819–20.

This revisionist critique differs with the modern position on the proper interpretation of *Erie Railroad Co. v. Tompkins*, which ended federal court creation of general common law and held that state common law should be applied “[e]xcept in matters governed by the Federal Constitution or by Acts of Congress.”<sup>62</sup> Customary international law—or “the law of nations,” as it was then known—was originally considered part of the general common law, which both federal and state courts discerned.<sup>63</sup> But *Erie* transformed our understanding of the common law: judges no longer discovered it, they made it. Declaring that “there is no federal general common law,” *Erie* effectively left general common lawmaking to state courts and shrank federal courts’ power.<sup>64</sup> Because modern federal common lawmaking must be authorized by legislation, revisionists contend, there is no room for the independent judicial incorporation of CIL.<sup>65</sup>

Focusing specifically on the ATS, revisionists argue that *Erie*’s repudiation of the general common law background against which the ATS was enacted rendered it a dead letter. It is merely a jurisdictional statute that provides no substantive causes of action.<sup>66</sup> This interpretation was adopted by conservative jurists—first by Judge Bork, and later by three Supreme Court Justices in *Sosa*.<sup>67</sup>

Moreover, revisionists argue, CIL had evolved since 1789 in ways that made it particularly unsuited for incorporation into federal common law. Once devoted almost exclusively to nations’ relations with one another, CIL now also addresses the way nations treat their own citizens.<sup>68</sup> Although the First U.S. Congress contemplated that some traditional CIL claims would be heard by federal courts under the ATS, revisionists argue, they would not have imagined that it would provide “civil remedies in its courts for human rights violations committed abroad by foreign

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62. 304 U.S. 64, 78 (1938).

63. Ernest A. Young, *Sorting Out the Debate Over Customary International Law*, 42 VA. J. INT’L L. 365, 393 (2002).

64. *Erie*, 304 U.S. at 78; see Bradley & Goldsmith, *Modern Position*, *supra* note 3, at 852–54.

65. Bradley & Goldsmith, *Modern Position*, *supra* note 3, at 852–54.

66. See Curtis A. Bradley & Jack L. Goldsmith III, *The Current Illegitimacy of International Human Rights Litigation*, 66 FORDHAM L. REV. 319, 358 (1999) [hereinafter Bradley & Goldsmith, *Current Illegitimacy*]; A.M. Weisburd, *State Courts, Federal Courts, and International Cases*, 20 YALE J. INT’L L. 1 (1995).

67. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 739 (2004) (Scalia, J., joined by Thomas, J., and the Chief Justice, concurring in part and concurring in the judgment); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 801 (D.C. Cir. 1984) (Bork, J., concurring) (“[I]t is essential that [the allegedly violated law creates] an explicit grant of a cause of action before a private plaintiff be allowed to enforce principles of international law in a federal tribunal.”).

68. Bradley & Goldsmith, *Current Illegitimacy*, *supra* note 66, at 327.

government officials against aliens.”<sup>69</sup> In addition, modern CIL is especially unsuitable for incorporation, revisionists contend, because many modern CIL norms are embedded in human rights treaties and U.N. resolutions that the United States has refused to ratify or has ratified only with reservations.<sup>70</sup> Incorporation of these norms through the ATS would “permit[] federal courts to accomplish through the back door of CIL what the political branches have prohibited through the front door of treaties.”<sup>71</sup>

In response, defenders of the modern position argue that the revisionists read too much into *Erie*, which held only that federal courts could not make a general common law of tort applicable in a state because Congress lacked the power to legislate such rules and the courts would be upsetting the federal-state allocation of authority in this area.<sup>72</sup> *Erie* said nothing about the quite distinct issue of CIL’s status as federal common law. Unlike the general common law, CIL norms can be incorporated by Congress into U.S. law through its enumerated constitutional power to define and punish offenses against the law of nations.<sup>73</sup> This connection to explicit federal lawmaking authority ties CIL to modern federal common law, rather than the general common law. And because states have always lacked authority over foreign affairs matters, when federal courts recognize CIL norms, they do not infringe on areas of core state concern.<sup>74</sup>

As for the ATS, defenders observed that the Court had recognized, from the founding era to the twentieth century, claims for violations of the law of nations.<sup>75</sup> In *The Paquete Habana*, the Court famously declared that CIL “is part of our law,” although its application by federal courts would be subject to executive or congressional override.<sup>76</sup> Defenders interpret the

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69. *Id.* at 360.

70. See Peter J. Spiro, *The States and International Human Rights*, 66 *FORDHAM L. REV.* 567, 567–68 (1997).

71. Bradley & Goldsmith, *Current Illegitimacy*, *supra* note 66, at 330–31.

72. See, e.g., Ryan Goodman & Derek P. Jinks, *Filartiga’s Firm Footing: International Human Rights and Federal Common Law*, 66 *FORDHAM L. REV.* 463, 468 (1997); Harold Hongju Koh, *Is International Law Really State Law?*, 111 *HARV. L. REV.* 1824, 1831 (1998) [hereinafter Koh, *State Law*]; Beth Stephens, *The Law of Our Land: Customary International Law as Federal Law After Erie*, 66 *FORDHAM L. REV.* 393 (1997).

73. See Koh, *State Law*, *supra* note 72, at 1835. John Yoo and Julian Ku argue that state courts, rather than federal courts, are best suited to exercise the authority to recognize customary international law norms, subject to federal executive branch override. See Ku & Yoo, *Beyond Formalism*, *supra* note 4, at 215–16.

74. Koh, *State Law*, *supra* note 77, at 1831–32.

75. See *id.* at 1825.

76. *The Paquete Habana*, 175 U.S. 677, 700 (1900).

Court's use of "our law" to mean federal common law, while revisionists interpret it to mean the general common law.<sup>77</sup>

With the notable exception of Judge Bork's *Tel-Oren* concurrence, the courts generally adopted the modern position.<sup>78</sup> ATS litigation continued for fourteen years before the Supreme Court finally weighed in.

### C. *Sosa* and Functional Approaches

As the debate between revisionists and defenders of the modern position grew more heated in the late 1990s and early 2000s, many hoped the Supreme Court would definitively resolve the question, but to no avail. The Court waited until 2004 to interpret the ATS for the first time, in *Sosa v. Alvarez-Machain*.<sup>79</sup> In *Sosa*, the United States Drug Enforcement Administration (DEA) had hired Mexican nationals to abduct the plaintiff, Humberto Alvarez-Machain, from his home and bring him to the United States for trial. Alvarez sued his captors under the ATS and the U.S. government under the Federal Tort Claims Act (FTCA) for arbitrary arrest and detention.<sup>80</sup> Reversing the Ninth Circuit, the Supreme Court rejected Alvarez's claims, holding that his brief detention and transfer to the custody of U.S. authorities did not violate a norm of international law "so well defined as to support the creation of a federal remedy" under the ATS.<sup>81</sup>

Justice Souter's majority opinion reflects an apparent decision by the Court to keep ATS litigation alive but constrained. The Court gave both revisionists and defenders something to cheer for, but in doing so left the status of CIL in U.S. law unclear.<sup>82</sup> The Court held that, although the ATS

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77. See Bradley, Goldsmith, & Moore, *supra* note 3, at 883 (discussing the academic debate on how to interpret *Erie*'s effect on CIL). Compare Koh, *State Law*, *supra* note 72, at 1841, 1846 (arguing that CIL's status as federal law preempting state law has been established since "the beginning of the Republic" and reflects "a long-accepted, traditional reading of the federal courts' function."), with Bradley & Goldsmith, *Modern Position*, *supra* note 3, at 822–26 (arguing that "our law" referred to the general common law).

78. See, e.g., Hilao v. Estate of Marcos (*In re Estate of Ferdinand Marcos, Human Rights Litig.*), 25 F.3d 1467, 1475 (9th Cir. 1994) ("We thus join the Second Circuit [in *Filartiga*] in concluding that the [ATS] creates a cause of action . . ."); Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289, 320 (S.D.N.Y. 2003).

79. 542 U.S. 692, 712 (2004).

80. *Id.* at 697–98.

81. *Id.* at 738. Alvarez's FTCA claims were rejected on the ground that his abduction took place outside the United States. See *id.* at 642.

82. Julian Ku, *A No Decision Decision: Sosa v. Alvarez-Machain and the Debate Over the Domestic Status of Customary International Law*, 101 AM. SOC'Y INT'L L. PROC. 267, 267 (2007) (concluding that *Sosa* supports neither the revisionist nor modern position but is "a pragmatic but somewhat incoherent ratification of existing caselaw under the [ATS] based on no particular theory of



is a jurisdictional statute that does not create a cause of action, the common law gives rise to certain causes of action via the incorporation of a “modest number” of international legal norms with “a potential for personal liability.”<sup>83</sup> *Sosa* held that courts should recognize only CIL-based claims resting on norms “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.”<sup>84</sup> The Court then cited, approvingly, language from several post-*Filartiga* cases limiting ATS liability to acts that violate “specific, universal, and obligatory” norms.<sup>85</sup>

Furthermore, the Court indicated that it was aware of the impact ATS litigation could have on U.S. interests abroad.<sup>86</sup> In determining whether a norm is sufficiently defined to support a private right of action, *Sosa* held that courts must also consider “risks of adverse foreign policy consequences” from crafting “remedies for the violation of new norms of international law.”<sup>87</sup> The Court also observed that it would be appropriate for federal courts to give “case-specific deference to the political branches” and require the “exhaust[ion of] any remedies available in the domestic legal system.”<sup>88</sup>

The debate about history and doctrine, which *Sosa* failed to definitively resolve, has reached a “stalemate.”<sup>89</sup> In the meantime, functional arguments about the costs and benefits of ATS litigation have been engaged only sporadically.<sup>90</sup> The revisionist critique always contained a functionalist aspect: in the background was the concern that, because federal courts are both politically unaccountable and incompetent in

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incorporation”). *But see* Bradley, Goldsmith & Moore, *supra* note 3 (arguing that *Sosa* supports the revisionist position); Stephens, *supra* note 51 (arguing that *Sosa* endorsed the modern position); *see also* Eugene Kontorovich, *Implementing Sosa v. Alvarez-Machain: What Piracy Reveals About the Limits of the Alien Tort Statute*, 80 NOTRE DAME L. REV. 111 (2004) (concluding that, because modern CIL human rights norms do not fit the criteria for universal jurisdiction in 1789, the set of post-*Sosa* ATS-actionable norms is an empty one).

83. *Sosa*, 542 U.S. at 724.

84. *Id.* at 725. The Court, here, refers to three specific offenses against the law of nations addressed by the criminal law of England and mentioned by Blackstone in his commentaries: violation of safe conduct, infringement of the rights of ambassadors, and piracy. *See id.* at 715 (citing 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 68 (1769)).

85. *Id.* at 732 (quoting *Hilao v. Estate of Marcos (In re Estate of Ferdinand Marcos, Human Rights Litig.)*, 25 F.3d 1467, 1475 (9th Cir. 1994)).

86. *Id.* at 727–28; *see also* Stephens, *supra* note 55, at 27 (observing that the Court addressed critics’ functional concerns).

87. *Sosa*, 542 U.S. at 727–28.

88. *Id.* at 733 n.21.

89. Anthony J. Bellia Jr. & Bradford R. Clark, *The Federal Common Law of Nations*, 109 COLUM. L. REV. 1, 5 (2009).

90. *See* Bradley, *Costs*, *supra* note 2, at 459; Cleveland, *supra* note 6, at 986.

foreign affairs matters, they should not be given the authority to import external norms. After *Sosa*, Julian Ku and John Yoo observed that, in the “sharp[]” and “bitter” debate about whether the ATS creates a cause of action, “neither side has convinced the other” using formalist and originalist methods.<sup>91</sup> Professors Ku and Yoo took “a different approach,” conducting a functionalist, “comparative institutional analysis of the role of the courts in foreign affairs.”<sup>92</sup> Their conclusion was that the costs of ATS litigation outweighed its benefits because the courts were incompetent to weigh the foreign policy implications of their judgments.<sup>93</sup> Other critics have focused on the security, economic, and human rights costs, making stark predictions that ATS litigation will run amuck.<sup>94</sup> This functional critique was shared, at least in part, by the Bush administration, which, with the support of corporations fearful of lawsuits, reversed prior executive branch policy and began to intervene in favor of defendants in ATS cases.<sup>95</sup>

Defenders of the ATS have answered the functional critique by emphasizing the value of ATS litigation for advancing human rights and downplaying its foreign affairs side effects.<sup>96</sup> They have argued that ATS litigation enhances the legitimacy and authority of international law.<sup>97</sup> Defenders have also noted the difficulty of demonstrating actionable violations of CIL and the jurisdictional and prudential tools available to courts for restricting ATS litigation.<sup>98</sup> Finally, they have observed that the protection of human rights is an official foreign policy goal of the United States and that the promotion of human rights enhances America’s prestige.<sup>99</sup> But defenders have not articulated a functional justification for ATS litigation that accounts for U.S. security and economic interests.

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91. Ku & Yoo, *Beyond Formalism*, *supra* note 4, at 154.

92. *Id.*

93. *Id.* at 183.

94. See HUFBAUER & MITROKOSTAS, *supra* note 4, at 56; Abebe, *supra* note 4, at 21; Bradley, *Costs*, *supra* note 2, at 460; Rosen, *supra* note 4.

95. See Derek Baxter, *Protecting the Power of the Judiciary: Why the Use of State Department ‘Statements of Interest’ in Alien Tort Statute Litigation Runs Afoul of Separation of Powers Concerns*, 37 RUTGERS L.J. 807 (2006); Jide Nzelibe, *Desperately Seeking Political Cover: The Partisan Logic of Alien Tort Statute Litigation* (April 29–30, 2010) [hereinafter Nzelibe, *Partisan Logic*] (transcript available at [www.law.northwestern.edu/searlecenter/papers/Nzelibe\\_Alien\\_Tort\\_Statute.pdf](http://www.law.northwestern.edu/searlecenter/papers/Nzelibe_Alien_Tort_Statute.pdf)).

96. See, e.g., Cleveland, *supra* note 6, at 976; Stephens, *supra* note 41, at 196–202.

97. See Cleveland, *supra* note 6, at 971.

98. See *id.* at 981; Stephens, *supra* note 41, at 196.

99. See AKOH, *supra* note 6, at 27.

#### D. Revisionism and International Relations Theory

This debate about the purpose, scope, and proper operation of the ATS, and the status of CIL as common law more generally, has evolved against the backdrop of a broader discussion about the nature of international law. Most revisionists reject the concept—long a staple of international law scholarship—that international law exerts an independent “compliance pull” on states.<sup>100</sup> Therefore, revisionists tend to agree that “much of customary international law is simply [a] coincidence of interest.”<sup>101</sup> Nations bow to international institutions of law, but should only do so when it serves their interests.<sup>102</sup>

This skepticism about international law reflects the influence of international relations realism.<sup>103</sup> One of the most prominent IR paradigms, realism, rests on three fundamental premises.<sup>104</sup> First, it holds that nation states—rather than individuals or institutions—are the basic units of action in world affairs.<sup>105</sup> The nation state is sovereign in that it “decides for itself how it will cope with its internal and external problems.”<sup>106</sup> Each nation is “opaque”: it has a unified relationship with the rest of the world.<sup>107</sup> Second, states are undifferentiated rational actors driven by security interests, rather than regime type, norms, or institutions.<sup>108</sup> And finally, the international system is characterized by anarchy because it lacks a central enforcement mechanism. Although there

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100. See JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 3 (2005); Abebe, *supra* note 4, at 22.

101. GOLDSMITH & POSNER, *supra* note 100, at 225; see also Abebe, *supra* note 4, at 23.

102. GOLDSMITH & POSNER, *supra* note 100, at 234; Curtis A. Bradley, *International Delegations, the Structural Constitution, and Non-Self-Execution*, 55 STAN. L. REV. 1557 (2003); Julian G. Ku, *The Delegation of Federal Power to International Organizations: New Problems with Old Solutions*, 85 MINN. L. REV. 71 (2000).

103. HANS J. MORGENTHAU, *POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE* 271–72 (5th ed. 1973) (1948) (contending that “considerations of power rather than law” determine compliance with, and enforcement of, international law); Hathaway & Lavinbuk, *supra* note 21, at 1408.

104. See Anne-Marie Slaughter Burley, *Are Foreign Affairs Different?*, 106 HARV. L. REV. 1980, 2000 (1993) (reviewing THOMAS M. FRANCK, *POLITICAL QUESTIONS/JUDICIAL ANSWERS: DOES THE RULE OF LAW APPLY TO FOREIGN AFFAIRS?* (1992)); Keohane, *supra* note 8, at 158; Jeffrey W. Legro & Andrew Moravcsik, *Is Anybody Still a Realist?*, 24 INT’L SEC. 5, 5, 8 (1999) (discussing the “degeneration” of realist theory after the end of the Cold War but observing that it “remains the primary or alternative theory in virtually every major book and article addressing general theories of world politics, particularly in security affairs”).

105. KENNETH N. WALTZ, *THEORY OF INTERNATIONAL POLITICS* 113 (1979).

106. *Id.*

107. Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 EUR. J. INT’L L. 503, 507 (1995) [hereinafter Slaughter, *International Law*].

108. See *id.*

are international laws and institutions, there is no world government with the power to enforce laws.<sup>109</sup> The United Nations and the World Bank have no army or navy. Without such governing authority, nations can never be sure if others will abide by agreements, and they have no means of enforcing those agreements. They must engage in “self-help.”<sup>110</sup> In this anarchic environment, each state seeks to maximize its own economic and military capacity relative to the others.<sup>111</sup> This instability in the system, realists contend, means that states have high discount rates. They seek short-term gains rather than exercising self-restraint in favor of longer-term gains.

For realists, efforts to construct a framework of binding international legal norms are misguided and driven by naïve cosmopolitanism.<sup>112</sup> Realists view CIL as largely reflecting the interests of the great powers that dominate the international system.<sup>113</sup> As a great power, the United States can shape international law norms and depart from them when it suits its purposes.<sup>114</sup> Because it can ignore international law, the United States suffers the greatest sovereignty costs from complying with international law norms that do not coincide with its interests.<sup>115</sup>

A *pure* realist approach, then, has no use for international law because it serves no purpose. The difficulty with this approach, however, is that it fails to explain why nations expend vast resources on developing international law, including complex treaty regimes with dispute resolution mechanisms such as the WTO.<sup>116</sup> And even the United States feels the need to argue that it complies with customary international human rights norms.<sup>117</sup> Revisionists have acknowledged, therefore, that realism does not completely describe the way that nations interact.<sup>118</sup>

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109. See JOHN J. MEARSHEIMER, *THE TRAGEDY OF GREAT POWER POLITICS* 30, 51 (2001).

110. *Id.* at 33; WALTZ, *supra* note 105, at 100.

111. See MEARSHEIMER, *supra* note 109, at 33–34.

112. See, e.g., John R. Bolton, *Is There Really “Law” in International Affairs?*, 10 *TRANSNAT’L L. & CONTEMP. PROBS.* 1, 37 (2000); Stephen D. Krasner, *Realist Views of International Law*, 96 *AM. SOC’Y INT’L L. PROC.* 265, 268 (2002) (“It is naïve to expect that a stable international order can be erected on normative principles embodied in international law.”).

113. Abebe, *supra* note 4, at 21.

114. *Id.* at 25.

115. *Id.*

116. Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 *CALIF. L. REV.* 1823, 1837–38 (2002) [hereinafter Guzman, *Compliance Theory*].

117. See *id.*

118. See Abebe, *supra* note 4, at 41 n.150; Jack Goldsmith & Eric A. Posner, *The New International Law Scholarship*, 34 *GA. J. INT’L & COMP. L.* 463, 468 (rejecting the view, attributed to some “realists,” that “international law does nothing at all”).

In contrast, defenders of ATS litigation tend to be influenced by the other, nonrealist end of the IR spectrum. They argue that ATS litigation enhances “the efforts of global civil society in developing the human rights regime.”<sup>119</sup> Defenders place importance on the role played in ATS litigation by subnational and transnational units, such as domestic constituencies, NGOs, and international institutions.<sup>120</sup> These units can act as “norm entrepreneurs” that develop human rights principles with the power to influence cultures and governments, in part through litigation.<sup>121</sup>

These views of ATS litigation and international law reflect the influence of liberalism and constructivism.<sup>122</sup> In contrast to the realist premise that states are undifferentiated opaque units, liberalism emphasizes the ways that regime type, domestic interest groups, and international institutions affect state interactions. Liberal, democratic states tend to have less conflict with one another and enter into and comply with legal agreements more often.<sup>123</sup> Governments comply with international law in part because domestic interest groups exert pressure.<sup>124</sup> ATS litigation succeeds because domestic constituencies shape nations’ preferences for human rights. Constructivism emphasizes the role of perceptions and beliefs in shaping state behavior.<sup>125</sup> For constructivists, similarly situated states may act differently because they have divergent understandings of the strategic environment and other states’ intentions.<sup>126</sup> These perceptions and beliefs can be shaped by exogenous forces, such as ATS litigation, that encourage states to internalize human rights norms.<sup>127</sup>

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119. Cleveland, *supra* note 6, at 975–76.

120. See Cheryl Holzmeier, *Human Rights in an Era of Neoliberal Globalization: The Alien Tort Claims Act and Grassroots Mobilization in Doe v. Unocal*, 43 LAW & SOC’Y REV. 271, 272 (describing how human rights activists in the United States and Burma mobilized in support of the ATS claims against Unocal and emphasizing the impact of “a transnationally attuned legal mobilization framework”).

121. See Harold Hongju Koh, *The 1998 Frankel Lecture: Bringing International Law Home*, 35 HOUS. L. REV. 623, 647 (1998) [hereinafter Koh, *International Law*].

122. See Abebe, *supra* note 4, at 11–12.

123. See Hathaway & Lavinbuk, *supra* note 21, at 1432–33; Andrew Moravcsik, *Taking Preference Seriously: A Liberal Theory of International Politics*, 51 INT’L ORG. 513, 513 (1997); Slaughter, *International Law*, *supra* note 107.

124. See Moravcsik, *supra* note 123, at 513.

125. See Hathaway & Lavinbuk, *supra* note 21, at 1435–36. See generally ALEXANDER WENDT, *SOCIAL THEORY OF INTERNATIONAL POLITICS* (1999).

126. Robert Jervis, *Realism, Game Theory, and Cooperation*, 40 WORLD POL. 317, 337 (1988).

127. Cleveland, *supra* note 6, at 976–79; Ochoa, *supra* note 14, at 108–09. Peter Spiro has recently used liberalist and constructivist approaches to predict that subnational institutions, including “disaggregated governmental components beyond the traditional foreign policy apparatus,” may be developing an institutional interest in the incorporation of international law into domestic law. Peter S.

*Institutionalism* is another major paradigm of international relations theory that shares many assumptions with realism. It also holds that states are unitary, rational agents pursuing their interests in an anarchic world.<sup>128</sup> However, institutionalists conclude that nations cooperate to maximize absolute gains and that international institutions—including international law—can facilitate cooperation.<sup>129</sup> It is important to note that an institutionalist need not ascribe to the view that states have an innate interest in complying with international law or sense of obligation to do so.<sup>130</sup> And institutionalist views can lead one to conclude that ATS litigation is either wise or unwise, depending on its potential for maximizing payoffs.

With revisionists influenced by realism and defenders influenced by its alternatives, little common ground currently exists from which to evaluate the costs and benefits of ATS litigation. Neither side has effectively engaged with the other. Yet one's theoretical approach to international relations need not dictate a particular view of ATS litigation. Realism may be entirely consistent with the conclusion that ATS litigation is strategically beneficial for the United States.<sup>131</sup>

## II. THE REALIST CRITIQUE OF ATS LITIGATION

This Section describes the realist, functional ATS critique and explains why it is problematic. The revisionists argue that the domestic incorporation of CIL should only be effectuated through the political branches in the form of legislation, executive-branch action, or, if the courts are to be involved at all, very strong deference to executive-branch interpretation.<sup>132</sup> The revisionist critique consists of three primary arguments. First, revisionists contend that ATS litigation imposes significant sovereignty costs on the United States by importing exogenous legal norms that lack democratic pedigree. In an anarchic world with shifting power balances, it is unwise for the United States to commit itself

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Spiro, *Disaggregating U.S. Interests in International Law*, 67 LAW & CONTEMP. PROBS. 195, 196 (2004).

128. See ANDREW T. GUZMAN, HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY 17–21 (2008).

129. See ROBERT O. KEOHANE, AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY (1984); Hathaway & Lavinbuk, *supra* note 21, at 1430.

130. See Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935, 1950–51 (2002).

131. See *infra* Part IV.

132. See Abebe, *supra* note 4, at 19.

to particular international law norms.<sup>133</sup> Second, revisionists argue that ATS litigation harms U.S. security and economic interests by causing friction with allies and potential rivals. Finally, revisionists contend that, to the extent the United States has a national interest in improving human rights worldwide, ATS litigation fails to further this interest and in fact may thwart it.

Below, I begin with general difficulties that the revisionist approach fails to overcome: it relies on institutional competence arguments that are questionable, and it draws on insights from realism without fully accepting the implications of applying realism to evaluate the role of courts in foreign affairs. I then explain why the specific functional arguments against ATS litigation lack support and do not properly weigh countervailing evidence.

#### A. Courts' Competence in Foreign Affairs

The arguments advanced by the ATS's critics are often intertwined with a set of assumptions about the comparative institutional competence of courts and the executive branch in foreign affairs. Many, but not all, revisionists rely on these assumptions to argue for strong deference by the courts to the executive branch in other contexts.<sup>134</sup>

These institutional competence claims are rooted in an outdated version of IR realism.<sup>135</sup> The realist justification for executive hypercompetence and judicial incompetence in foreign affairs proceeds along the following lines: due to the anarchic and fluid nature of the international realm, executive primacy is justified by the executive's superior expertise, information gathering, and political savvy in foreign affairs. Foreign affairs matters are particularly complicated, and the meaning of international law changes with geopolitical shifts; courts are ill suited to address foreign affairs because they lack special expertise, are relatively inflexible, and hear only the issues selected by litigants.<sup>136</sup> Because nations are unitary actors on the world stage, the United States must "speak with

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133. Abebe, *supra* note 4, at 8–9; McGinnis & Somin, *Political Economy*, *supra* note 4, at 1.

134. See, e.g., Julian Ku & John Yoo, *Hamdan v. Rumsfeld: The Functional Case for Foreign Affairs Deference to the Executive Branch*, 23 CONST. COMMENT. 179, 200–01 (2006) [hereinafter Ku & Yoo, *Hamdan*]; Eric A. Posner & Cass R. Sunstein, *Chevronizing Foreign Relations Law*, 116 YALE L.J. 1170, 1202 (2007); John C. Yoo, *Treaty Interpretation and the False Sirens of Delegation*, 90 CALIF. L. REV. 1305, 1305 (2002) (arguing for total deference to executive interpretations of treaties, based in part on the anarchic nature of the international realm).

135. See Knowles, *supra* note 10, at 127–38.

136. See Ku & Yoo, *Hamdan*, *supra* note 134, at 200–01; Posner & Sunstein, *supra* note 134, at 1204–05.

one voice” in foreign relations through the executive branch, without the courts second guessing its decisions, or risk creating confusion and suffering embarrassment and weakness.<sup>137</sup> The executive branch can better respond to changes in an unstable world because it can move with unity and speed, while federal courts are decentralized, rarely able to make uniform or quick decisions, and change course very slowly.<sup>138</sup> Finally, as the least politically accountable branch, the judicial system least reflects the national interest and is least likely to be responsive to national security needs.<sup>139</sup>

These realism-based institutional competence assumptions are intuitively very persuasive. That is why they are often simply stated as “traditional . . . understandings” and persist in court decisions.<sup>140</sup> But they are surprisingly brittle. This classic realist model of institutional competence proves unhelpful for three reasons. First, as a descriptive matter, it does not accurately depict the actual functioning of the branches in foreign affairs. The executive does not in fact always dominate. For example, although foreign relations is said to require that the United States “speak with one voice,” Congress and the President often conflict on foreign policy.<sup>141</sup> Second, maintaining a distinct model of foreign affairs institutional competence becomes increasingly problematic as globalization continues to blur the distinction between domestic and foreign affairs issues.<sup>142</sup> Federal courts are increasingly required to handle cases involving foreign parties and foreign activities. And finally, the realist model proves too much because, if actually adopted, it would

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137. *Munaf v. Geren*, 553 U.S. 674, 702 (2008) (“The Judiciary is not suited to second-guess . . . determinations that would require federal courts to . . . undermine the Government’s ability to speak with one voice in this area.”); *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319 (1936) (“[T]he President alone has the power to speak or listen as a representative of the nation.”).

138. See, e.g., *Ku & Yoo, Hamdan*, *supra* note 134, at 200 (arguing that the institutional structure of the federal judiciary—ninety-four district courts and thirteen appellate courts—inherently makes the judicial process slow); Jide Nzelibe, *The Uniqueness of Foreign Affairs*, 89 IOWA L. REV. 941, 980 (2004) (“In the context of foreign affairs . . . an authoritative settlement of the law across time and institutions . . . potentially results in the creation of a constitutional straight-jacket binding the decision-making freedom of the political branches in the international arena.”).

139. Posner & Sunstein, *supra* note 134, at 1213.

140. See, e.g., *id.* at 1202 (describing the justifications for special deference in foreign relations as “often less textual than functional, based on traditional practices and understandings”). For a fuller discussion of realism’s influence on the development of foreign affairs law, see Knowles, *supra* note 10, at 111–26.

141. See Nzelibe, *supra* note 138, at 965–66 (discussing examples); Martin H. Redish, *Judicial Review and the ‘Political Question,’* 79 NW. U. L. REV. 1031, 1052 (1985) (observing that the nation has survived despite interbranch disagreement in foreign affairs).

142. See Derek Jinks & Neal Kumar Katyal, *Disregarding Foreign Relations Law*, 116 YALE L.J. 1230, 1231–35 (2007).



require total deference by the courts to the executive, and it tells us very little about how best to balance foreign policy effectiveness against other constitutional values.<sup>143</sup>

In the end, the traditional competency-based arguments against courts' involvement in foreign affairs paint with too broad a brush. They offer little utility for determining whether ATS litigation harms or benefits the United States. These arguments do not take account of the possibility that the courts and the executive branch can work in complementary fashion in foreign affairs, just as they do in domestic affairs.<sup>144</sup> As foreign policy instruments, courts may be useful in some respects and less so in others.

### *B. Contradictions in the Realist Critique*

While the classic realist competence model proves problematic for evaluating the role of courts in foreign affairs generally, the use of realism also poses unique problems for the critics of ATS litigation. Realism's great strength is in its parsimony.<sup>145</sup> It treats nations as single units with one overriding interest: their security.<sup>146</sup> But this parsimony creates problems for the critique of ATS litigation. The ATS critique treats other nations as single units, but does not treat the United States as a unitary actor because it makes claims about the comparative effectiveness of U.S. institutions.<sup>147</sup> Drawing on the anarchic nature of world politics to critique the role of the courts in domestic governance, the ATS critique pierces the veil of the unitary state. Under *Sosa*, the ATS embodies Congress's instruction that courts entertain suits alleging a limited set of CIL claims.<sup>148</sup> Yet the core of the revisionist critique is that this instruction is not rational because it is welfare-negative for the United States. Revisionists must somewhat dissociate the courts from the pursuit of the national interest.

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143. See Knowles, *supra* note 10, at 130–34.

144. See *id.*

145. See FAREED ZAKARIA, FROM WEALTH TO POWER: THE UNUSUAL ORIGINS OF AMERICA'S WORLD ROLE 35 (1998) [hereinafter ZAKARIA, WEALTH]. Zakaria observes that classical realism's "extreme parsimony" is its "great strength" because this can be a basis for elegant, easily falsifiable propositions that enable it to be "powerfully predictive." *Id.*

146. WALTZ, *supra* note 105, at 79–98. Waltz and other realists acknowledge that the actual interactions of nations will often depart significantly from these assumptions, but observe that the value of descriptive accuracy must be weighed against the greater predictive power of a parsimonious theory. Kenneth N. Waltz, *Laws and Theories*, in *NEOREALISM AND ITS CRITICS* 27, 34 (Robert O. Keohane ed., 1986).

147. See, e.g., Ku & Yoo, *Beyond Formalism*, *supra* note 4, at 189.

148. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 712 (2004) (interpreting the ATS as a jurisdictional statute that nonetheless makes actionable violations of a limited set of CIL norms).

To some degree, this reflects a problem with realism itself. The classical version did not merely predict, but purported to advise the statesman on how best to manage foreign policy and international affairs in an unstable world. A rough-and-ready version of classical realism is the unacknowledged foundation for much of courts' and scholars' justifications for executive primacy in foreign affairs.<sup>149</sup> The revisionist critique is very much in this tradition. By contrast, however, the more contemporary incarnation of IR realism, called neorealism, has been devoted, with some exceptions, to analyzing and predicting states' behavior as dictated by the structure of the international system.<sup>150</sup> There is far less room for normative arguments about statecraft. In this way, the revisionist critique sits quite uneasily with neorealism.

Revisionists must reach beyond realism because it does not provide much space for criticizing international human rights litigation in U.S. courts. Assuming first, as the pure realist must, that the United States is, *as a whole*, a rational actor, how can we descriptively account for the persistence of welfare-negative ATS litigation?<sup>151</sup> Congress has not reigned in the ATS since *Filartiga*, and in fact has expanded the federal courts' role in international human rights litigation through the ATS's sibling, the TVPA.<sup>152</sup> Does the proliferation of ATS litigation then call into question the predictive accuracy of the realist insights animating the revisionist critique?

This difficulty is not insurmountable for the ATS critic drawing on realism. ATS litigation may persist as a strategic mistake that must be corrected.<sup>153</sup> Yet it is significant that the revisionist critique proceeds from a worldview that imagines other nations as acting strategically in response to ATS litigation without considering that ATS litigation itself may have strategic value for the United States. Instead, critics have reasoned that ATS litigation must be driven by nonrealist paradigms of international relations. A more holistic realist approach to the ATS's costs and benefits

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149. See Knowles, *supra* note 10, at 111–16.

150. See Keohane, *supra* note 8, at 25–27.

151. Cf. Hathaway and Lavinbuk, *supra* note 21, at 1434 (critiquing Goldsmith & Posner's use of state's internal political economies as determining state preferences on the ground that it creates ambiguity about state's interests, and observing that "the possibility that the desires of powerful substate actors may be welfare-negative for the states as whole units" is "decidedly inconsistent with [the] general assumption that states can be treated as rational unitary actors").

152. See *supra* notes 47–52 and accompanying text.

153. See John J. Mearsheimer, *Structural Realism*, in INTERNATIONAL RELATIONS THEORIES: DISCIPLINE AND DIVERSITY 71, 74 (Tim Dunne, Milja Kurki & Steve Smith eds., 2006) (observing that, although states are rational actors, they "operate with imperfect information in a complicated world" and "sometimes make serious mistakes.").

considers the ways in which the branches provide diverse means of achieving foreign policy goals. In Part III, I offer such an approach.

### *C. The Problematic Functional Arguments Against ATS Litigation*

Below, I explain why each aspect of the revisionist critique is problematic. In general, the critique overvalues the security and economic costs of ATS litigation and undervalues the human rights benefits. But more importantly, the revisionist critique relies largely on speculation about future harms from ATS litigation that are very unlikely to occur. Revisionists also ascribe ambitious objectives to ATS litigation that it cannot possibly meet, making it easier to portray ATS litigation as ineffectual. These errors lead to a skewed assessment of costs and benefits.

#### *1. Sovereignty Costs*

A pillar of the realist ATS critique involves the sovereignty costs from the importation of international human rights norms into the U.S. legal system.<sup>154</sup> Under a realist paradigm of international relations, state sovereignty is the core building block of the global system.<sup>155</sup> Because the United States has ratified so few treaties governing human rights, CIL is the basis for most claims under the ATS.<sup>156</sup> Revisionists argue that CIL, in its current form, is so likely to be different from U.S. law that its use by U.S. courts imposes serious sovereignty costs.<sup>157</sup> There are two major problems with this argument. First, revisionists tend to lump together ATS litigation, which involves only a modest set of core CIL claims, with the wholesale incorporation of CIL into domestic law.<sup>158</sup> Second, the revisionist argument confuses the doctrinal act of applying a CIL norm in ATS litigation with its actual effect on the body of U.S. domestic law.<sup>159</sup>

The revisionists' sovereignty concern stems from both the substance of international human rights law and the processes of its development. With some limited exceptions, CIL traditionally governed relationships among states and could be determined by examining state behavior and *opinio juris*, the belief on the part of states that they have a legal obligation to

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154. See, e.g., Abebe, *supra* note 4, at 3–5; Bradley, *Costs*, *supra* note 2, at 465–66.

155. See WALTZ, *supra* note 105, at 47.

156. See *supra* note 52 and accompanying text.

157. See Abebe, *supra* note 4, at 22–23.

158. See, e.g., Bradley, *Costs*, *supra* note 2, at 464 (describing costs to U.S. democracy from international human rights litigation because of “the type of law typically applied in these cases”).

159. See *infra* notes 184–90 and accompanying text.

obey norms established by state behavior.<sup>160</sup> Of course, defining “state behavior” has always been a serious challenge. What sources should be consulted? Most states do not declare their own practices, and there is no consensus about the appropriate interpretive method to determine whether practices are widespread or consistent. And how does one discern what states actually believe about their own obligations?<sup>161</sup>

Much of recent human rights law adds an additional layer of difficulty because it develops quickly from diffuse sources and purports to regulate the relationship between states and their own citizens.<sup>162</sup> International human rights norms increasingly derive, not from state practice, but from an ever-proliferating constellation of nonratified multilateral treaties, as well as from national constitutions, unanimous and near-unanimous declarations of the U.N. General Assembly, and other international fora such as the International Court of Justice (ICJ).<sup>163</sup> These agreements cover an increasingly broad array of issues traditionally thought to be of purely domestic concern, in areas such as labor, family, and environmental law. The development of these human rights norms is shaped by academics—“the professors, the writers of textbooks and casebooks, and the authors of articles in leading international law journals”—as well as transgovernmental human rights advocacy organizations.<sup>164</sup>

According to the revisionists, incorporation of the “new” CIL into U.S. domestic law imposes sovereignty costs on the United States.<sup>165</sup> Under a realist view of international law, the “traditional” CIL merely reflects the interests of the great powers. As the sole superpower or hegemon, the United States is in a favorable position to dictate the framework of traditional CIL.<sup>166</sup> But the United States has less ability to influence a rapidly developing body of indeterminate law shaped by international elites. This is evidenced by the fact that the United States often fails to ratify, or attaches reservations or modifications to, the international conventions and treaties supporting many new CIL norms. Moreover, the United States and Europe have diverged in their understandings of important CIL norms, including those that govern the use of the death penalty and preventive war.<sup>167</sup> Because the new human rights CIL norms

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160. Abebe, *supra* note 4, at 22–23.

161. McGinnis & Somin, *supra* note 13, at 1207–08.

162. Bradley, *Costs*, *supra* note 2, at 462.

163. *See id.*

164. Louis B. Sohn, *Sources of International Law*, 25 GA. J. INT'L & COMP. L. 399, 399 (1996).

165. *See* McGinnis & Somin, *supra* note 13, at 1177–78.

166. Abebe, *supra* note 4, at 25.

167. *See* Warren Allmand et al., *Human Rights and Human Wrongs: Is the United States Death*

do not reflect the outcome of the democratic process in the United States (unless they have been duly ratified by domestic political decision making), they are less likely to reflect U.S. interests.<sup>168</sup>

Sovereignty is the ability of a state to exclude “external actors from domestic authority structures.”<sup>169</sup> Because the United States dominates international politics, it can afford to ignore international law harmful to its interests. Therefore, the revisionist argument goes, the United States suffers the largest sovereignty costs of any nation from incorporating CIL norms into its domestic legal framework.<sup>170</sup>

However, it is not at all apparent that ATS litigation constrained by *Sosa*'s limitations actually imposes significant sovereignty costs. U.S. courts are not “outside actors,” but internal actors. Again, in order to accept the revisionist argument, one must first assume that the federal courts—as institutions of the U.S. government—are capable of acting in a manner antithetical to U.S. interests. This contradicts the realist descriptive insight—relied on by revisionists—that a state complies with international law only when it is in its interest.<sup>171</sup> Under a *pure* realist approach assuming a unitary United States government, if a court applies a CIL norm, it must be doing so to further U.S. interests. The sovereignty cost would then be zero because the U.S. has not ceded any power to external actors merely by using international law as the rationale for doing what it sought to do anyway.<sup>172</sup> To posit sovereignty costs from ATS litigation, revisionists must depart from realism by disaggregating the unitary state and associating state interests with the policies of one or both of the political branches rather than the less-accountable courts. When the courts apply a CIL norm over the objection of the political branches, they allegedly cause an inefficient result.

But even identifying state interests with the political branches does not necessarily lead to the conclusion that ATS litigation imposes sovereignty costs. ATS litigation does not result from a clash between the political branches and the courts. Congress enacted the ATS, and the President

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*Penalty System Inconsistent with International Human Rights Law?*, 67 *FORDHAM L. REV.* 2793 (1999); McGinnis & Somin, *supra* note 13, at 1179.

168. See McGinnis & Somin, *supra* note 13, at 1178–79.

169. STEPHEN D. KRASNER, *SOVEREIGNTY: ORGANIZED HYPOCRISY* 20 (1999).

170. Abebe, *supra* note 4, at 26.

171. See *supra* notes 112–18 and accompanying text.

172. Barry Friedman has recently offered an account of Supreme Court history, concluding that it never strays very far from popular opinion. See BARRY FRIEDMAN, *THE WILL OF THE PEOPLE* (2009). To the extent this account is accurate, it casts doubt on the usefulness of associating state interests merely with the current position of the executive branch.

signed it into law. Some administrations have been more supportive of ATS litigation than others.<sup>173</sup> Assuming that the *Sosa* interpretation is correct, Congress and the President empowered the courts to hear certain CIL-based claims, contemplating that CIL norms could be “locked in” absent a legislative override.<sup>174</sup> Think of the executive branch as divisible into “time zero” (executive policy at the time of enactment) and “time one” (executive policy in the present). If the “time one” executive branch objects to the incorporation of CIL norms, but Congress does not object, Congress and the “time zero” executive disagree with the “time one” executive. The revisionist critique, therefore, must ultimately rest on one of two premises: either the “time one” executive *alone* most accurately represents the national interest, or the courts exceed their congressional mandate by incorporating CIL norms.

Equating U.S. interests with the current policies of the executive branch is a simple solution harmonious with IR realism. Indeed, “time one” executive primacy in foreign affairs, as articulated by scholars and courts, owes a great deal to the persuasiveness of realism.<sup>175</sup> The President alone is elected by the entire nation and can best be said to represent its overall interests.<sup>176</sup> But if we are to accept the “time one” executive definition of the national interest, we must also accept that the separation of powers in itself has always imposed massive inefficiency upon the pursuit of those interests abroad. The United States has never strictly spoken “with one voice” in foreign affairs.<sup>177</sup> The Constitution’s text allocates foreign affairs powers to both the Congress and the President.<sup>178</sup> In practice, Congress has disagreed with the President, even regarding highly sensitive national security matters.<sup>179</sup> Congress and the “time zero” executive can bind the “time one” executive through legislation that provides courts with a role, such as the Foreign Sovereign Immunities Act (FSIA).<sup>180</sup> And the courts have, from the very beginning, rejected

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173. See Nzelibe, *Partisan Logic*, *supra* note 95, at 3.

174. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 694, 714 (2004) (concluding that Congress would not have intended for the ATS to be “stillborn,” providing jurisdiction but no causes of action); Nzelibe, *Partisan Logic*, *supra* note 95, at 3 (exploring ATS litigation through the lens of distributive domestic politics and observing that Democratic administrations are more likely than Republican administrations to use “expansive judicial interpretation in human rights controversies as an effective partisan entrenchment strategy to lock in their preferred ideological objectives”).

175. See Knowles, *supra* note 10, at 125.

176. See Ku & Yoo, *Hamdan*, *supra* note 134.

177. See, e.g., Sarah H. Cleveland, *Crosby and the ‘One Voice’ Myth in U.S. Foreign Relations*, 46 VILL. L. REV. 975, 975–76 (2001).

178. See Knowles, *supra* note 10, at 92.

179. Nzelibe, *supra* note 138, at 965–66 (discussing examples).

180. 28 U.S.C. §§ 1602–1611 (2006) (transferring the determination of sovereign immunity from

executive branch interpretations of treaties.<sup>181</sup> Although the separation of powers has been criticized as interfering with the ability of the United States to form a unified foreign policy, this is the government that the Constitution created.<sup>182</sup> If *any* limit on “time one” executive power in foreign affairs imposes sovereignty costs, ATS litigation represents a very minor problem.

This is probably why the revisionist critique largely ignores Congress and focuses on the perils of rogue courts, invoking their institutional deficiencies: decentralized and slow decision making, lack of flexibility, lack of democratic accountability, and lack of expertise.<sup>183</sup> This alleged judicial incompetence in foreign affairs—perhaps combined with a desire to further the internationalist project of a global rule of law—will, according to revisionist predictions, lead courts to exceed their ATS mandate and incorporate exogenous norms.

But there is no evidence that this has happened. As *Sosa* makes clear, ATS litigation does not operate as a wholesale incorporation of CIL into the domestic legal framework.<sup>184</sup> ATS litigation is an evolving hybrid: international law supplies the norm that the defendant is alleged to have violated, but other rules of decision are more likely to come from domestic law.<sup>185</sup> Because U.S. law tends to take a more expansive view of tort liability and jurisdiction than international law, the application of U.S., rather than international, rules of decision will likely lead to a broader scope for ATS litigation, rather than the other way around.<sup>186</sup> For example, some courts interpreting the ATS have recognized indirect investor liability, which is largely unrecognized outside the United States.<sup>187</sup>

More importantly, *Sosa* limits the scope of ATS litigation to specific, universal, and obligatory claims: for violations of norms “accepted by the civilized world and defined with a specificity comparable to the features of

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the executive branch via the State Department to the judiciary).

181. See David Sloss, *Judicial Deference to Executive Branch Treaty Interpretations: A Historical Perspective*, 62 N.Y.U. ANN. SURV. AM. L. 497, 506–08 (2007) (discussing cases).

182. See, e.g., Lloyd N. Cutler, *To Form a Government*, 59 FOREIGN AFF. 126, 128 (1980) (noting that a shortcoming of the constitutional structure of the United States is the “inability to ‘form a government’”).

183. See Abebe, *supra* note 4, at 26; Ku & Yoo, *Beyond Formalism*, *supra* note 4, at 217.

184. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 700–01 (2004) (interpreting the ATS as a jurisdictional statute that nonetheless makes actionable violations of a limited set of CIL norms).

185. William R. Casto, *The New Federal Common Law of Tort Remedies for Violations of International Law*, 37 RUTGERS L.J. 635, 639 (2006); see also Lee, *supra* note 42, at 882 (concluding that the “common law . . . supplied the right to sue and defined the elements of the cause of action; the international law reference was necessary only to identify when aliens were entitled to sue”).

186. Ramsey, *supra* note 57, at 321.

187. See *id.*

the 18th-century paradigms,” such as violations of safe conduct, infringements of the rights of ambassadors, and piracy.<sup>188</sup> Lower courts have recognized contemporary analogues as including prohibitions on genocide, war crimes, crimes against humanity, torture, summary execution, disappearance, and forced labor.<sup>189</sup> There is very little question that these norms are identical to norms that are already part of U.S. domestic law.<sup>190</sup>

ATS litigation can only be said to impose sovereignty costs if it requires a change in the domestic authority structure because of the influence of some outside actor, such as another nation or an international elite. If courts are applying norms in ATS litigation that are simultaneously international and domestic, no change is required and there is no sovereignty cost.

In the future, courts could recognize norms under the ATS that are truly exogenous in that their separate existence as part of domestic U.S. law is in serious dispute. But such instances are likely to be very rare. Although U.S. power may decline relative to that of other nations, the U.S. will, for the foreseeable future, still exercise considerable influence over the development of CIL, despite divergence from Europe, the rise of powers in Asia, and the increased role of international elites.<sup>191</sup> It is hard to imagine a U.S. court recognizing a universal, specific, and obligatory CIL norm that does not also find parallel support in U.S. domestic law. Even when judges disagree among themselves about whether a particular norm meets the universal, specific, and obligatory ATS threshold, this does not mean that the norm at issue does not have a long-established analogue in U.S. domestic law. For example, in a Second Circuit ATS case involving

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188. *Sosa*, 542 U.S. at 724–25.

189. *See id.* at 762 (Breyer, J., concurring in part) (crimes against humanity); *Doe v. Unocal Corp.*, 395 F.3d 932, 936–37 (9th Cir. 2002) (forced labor); *Abebe-Jira v. Negewo*, 72 F.3d 844, 847 (11th Cir. 1996) (torture); *Kadic v. Karadic*, 70 F.3d 232, 240 (2d Cir. 1995) (genocide and war crimes); *Hilao v. Estate of Marcos (In re Estate of Ferdinand Marcos, Human Rights Litig.)*, 25 F.3d 1467, 1472 (9th Cir. 1994) (summary execution); *Xuncax v. Gramajo*, 886 F. Supp. 162, 179 (D. Mass. 1995) (summary execution and cruel, inhuman, or degrading treatment); *Forti v. Suarez-Mason*, 694 F. Supp. 707, 709 (N.D. Cal. 1988) (disappearance).

190. *See, e.g.*, 18 U.S.C. § 1091 (2006) (prohibiting genocide); 18 U.S.C. § 1584 (2006) (prohibiting sale into involuntary servitude); 18 U.S.C. § 1589 (2006) (prohibiting forced labor); 18 U.S.C. § 2340 (2006) (prohibiting torture).

191. *See* Anupam Chander, *Globalization and Distrust*, 114 YALE L.J. 1193, 1210, 1227–29 (2005) (noting that “the United States has historically been a major proponent and progenitor of international law norms” and discussing U.S. influence over international economic law); Sarah Cleveland, *Our International Constitution*, 31 YALE J. INT’L L. 1, 102 (2006) (“The United States was the primary instigator behind the establishment of the UN system and the creation of modern international treaties ranging from human rights and humanitarian law to international intellectual property and international trade.”).



allegations that Pfizer conducted experimental drug trials on Nigerians without their consent, the majority concluded that a norm against nonconsensual human medical experimentation met the *Sosa* threshold, while the dissent vigorously disagreed.<sup>192</sup> Nonetheless, the norm prohibiting nonconsensual experimentation has long been a part of U.S. law.<sup>193</sup>

In addition, as U.S. power declines, any sovereignty costs from complying with *Sosa*-threshold CIL would also decline.<sup>194</sup> This means that the more likely the U.S. courts are to incorporate exogenous norms by adhering to *Sosa*, the less likely that incorporation is to impose significant sovereignty costs. And a safety valve exists because the political branches possess the power to override judicial overreaching through legislation. This solution imposes its own efficiency costs, but reduces the risk that exogenous CIL norms could be locked in domestically.<sup>195</sup>

Finally, the indeterminate nature of much of contemporary CIL—decried by revisionists—actually reduces the risk of sovereignty costs.<sup>196</sup> Indeterminacy in CIL empowers the U.S. judges interpreting that law, not the foreign actors and international elites making the law. The more indeterminate the law, the less norms can truly be called exogenous. Much of the concern about sovereignty costs is actually misplaced concern about judicial lawmaking.

## 2. Foreign Policy Costs

Revisionists also contend that ATS litigation imposes serious costs on the pursuit of U.S. economic and security interests abroad.<sup>197</sup> For the most part, criticism has consisted of speculation about future consequences, rather than past or present effects, of ATS litigation. But the concern is that human rights advocates driving ATS litigation may pursue goals at

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192. Compare *Abdullahi v. Pfizer*, 562 F.3d 163, 177–87 (2d Cir. 2009) (majority holding that the norm against nonconsensual medical experimentation was universal, specific, and obligatory), with *id.* at 194–95 (Wesley, J., dissenting) (contending that the norm was not enforceable against private actors under customary international law).

193. See *id.* at 182 (majority opinion) (noting that the norm has been embedded in U.S. law for forty-five years, and citing 21 U.S.C. § 355(i)).

194. See Abebe, *supra* note 4, at 26 (concluding that the U.S. faces the highest sovereignty costs from complying with CIL because of its predominant geopolitical position).

195. Cf. McGinnis & Somin, *supra* note 13, at 1226 (noting the difficulty of political branch override given the numerous veto points in enacting legislation).

196. See Abebe, *supra* note 4, at 27; Bradley, *Costs*, *supra* note 2, at 466–68.

197. See Abebe, *supra* note 4, at 36–39; Bradley, *Costs*, *supra* note 2, at 472–73; McGinnis & Somin, *Political Economy*, *supra* note 4, at 1.

odds with U.S. strategic interests.<sup>198</sup> Revisionists point out that crucial U.S. allies, such as Jordan, Egypt, Saudi Arabia, Indonesia, and Pakistan, often have troubling human rights records.<sup>199</sup> ATS lawsuits against government officials or citizens of these allies, or potential rivals like China, could produce resentment against perceived meddling in their internal affairs.<sup>200</sup> This resentment could in turn impose additional costs on the pursuit of U.S. strategic goals. Curtis Bradley argues that ATS litigation has an incremental effect, creating “[s]trains in international relationships” that “may undermine a variety of cooperative ventures, ranging from trade, to environmental protection, to the war on drugs, to arms control, to combating terrorism.”<sup>201</sup>

In addition, critics argue that ATS litigation imposes, or will impose, significant economic costs on the United States.<sup>202</sup> In the event of judgments against foreign governments, private U.S.-based lenders and insurers of those countries’ debts face exposure. Judgments against corporations with U.S. ties doing business in other countries will prompt disinvestment, dampening commerce. Other companies not reachable through ATS litigation will fill the gap, leaving U.S. companies at a disadvantage and harming U.S. competitiveness.<sup>203</sup>

These predictions could turn out to be true, but there is little evidence that ATS litigation has *thus far* produced significant economic and security costs. Until the Bush administration, the executive branch generally supported, or was indifferent to, ATS litigation.<sup>204</sup> In 1997, a California district court asked the Clinton administration about the foreign

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198. Abebe, *supra* note 4, at 29; Bradley, *Costs*, *supra* note 2, at 467; McGinnis & Somin, *Political Economy*, *supra* note 4, at 1.

199. Abebe, *supra* note 4, at 30–31.

200. *Id.* at 33–34.

201. Bradley, *Costs*, *supra* note 2, at 460.

202. HUFBAUER & MITROKOSTAS, *supra* note 4, at 1–2.

203. *Id.* at 13–17; *see, e.g.*, Press Release, U.S. Council for Int’l Bus., Business Groups Urge Supreme Court to Curtail Abuse of Alien Tort Statute (Jan. 23, 2004), *available at* <http://www.uscib.org/index.asp?documentID=2815> (quoting Thomas Niles, president of the United States Council for International Business: “Misuse of the Alien Tort Statute has begun to spin out of control in the federal courts. Not only does this clog up our judicial system, it threatens to make it virtually impossible for companies, foreign or American, to invest anywhere in the world for fear that they will be subjected to frivolous lawsuits in U.S. courts”).

204. In *Filartiga*, the Carter administration, in amicus, supported the litigation as consistent with America’s responsibility to promote human rights internationally. *See* Memorandum for the United States as Amicus Curiae at 22, *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980) (No. 79-6090) (“Like many other areas affecting international relations, the protection of fundamental human rights is not committed exclusively to the political branches of government.”). *See generally* Beth Stephens, *Upsetting Checks and Balances: The Bush Administration’s Efforts to Limit Human Rights Litigation*, 17 HARV. HUM. RTS. J. 169 (2004).

affairs implications of the *Unocal* case, and the administration indicated that “adjudication of the claims based on allegations of torture and slavery would not prejudice or impede the conduct of U.S. foreign relations with the current government of Burma.”<sup>205</sup> In 2001, however, the Bush administration changed course, filing a new statement of interest in *Unocal* objecting to the lawsuit, the start of a generally disapproving approach toward ATS litigation.<sup>206</sup> This approach may have been driven in part by ideology and strong views of executive branch primacy.<sup>207</sup> But there are functionalist justifications for the change in attitude toward ATS lawsuits, which in the 1980s and most of the 1990s “involved abuses committed under regimes that were defunct and repudiated by their successors, nearly universally shunned by other governments, possessed of, at best, uncertain claims to statehood or legitimate state power, lacking in geopolitical significance, politically unimportant to Washington, or clearly condemned by the United States.”<sup>208</sup> The first decade of the twenty-first century, by contrast, has seen a wave of ATS lawsuits against corporations and existing regimes that have prompted complaints from some foreign governments, including U.S. allies.<sup>209</sup>

The actual effect of ATS litigation on U.S. strategic interests is a very complex empirical question that deserves comprehensive attention, but is a project well beyond the scope of this Article. However, it is worth looking at two examples of recent ATS litigation with the greatest potential to affect U.S. interests abroad.

The first example involves lawsuits against Chinese officials for human rights abuses, which present a critical case study for determining the foreign policy costs of ATS litigation.<sup>210</sup> China has the most important and

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205. *Nat'l Coal. Gov't of the Union of Burma v. Unocal, Inc.*, 176 F.R.D. 329, 335 (C.D. Cal. 1997) (internal quotation marks omitted).

206. See Supplemental Brief for the United States of America as Amicus Curiae at 11–15, *Doe I v. Unocal*, 395 F.3d 932 (9th Cir. 2002) (Nos. 00-56603, 00-56628).

207. See DAVIS, *supra* note 1, at 124–44.

208. Jacques deLisle, *Human Rights, Civil Wrongs and Foreign Relations: A “Sinical” Look at the Use of U.S. Litigation to Address Human Rights Abuses Abroad*, 52 DEPAUL L. REV. 473, 477–78 (2002).

209. See John B. Bellinger III, *Enforcing Human Rights in U.S. Courts and Abroad: The Alien Tort Statute And Other Approaches*, 42 VAND. J. TRANSNAT'L L. 1, 8 (2007) (former counsel to Secretary of State, explaining that other countries see the U.S. “as something of a rogue actor” because of ATS litigation); see, e.g., *Bowoto v. Chevron Corp.*, 621 F.3d 1116 (9th Cir. 2010); *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163, 168–69 (2d Cir. 2009) (holding that a case against Pfizer alleging nonconsensual medical experimentation on children in Nigeria could go forward under the ATS); *Sarei v. Rio Tinto, PLC*, 550 F.3d 822 (9th Cir. 2008).

210. See, e.g., *Zhou v. Peng*, 286 F. Supp. 2d 255, 257 (S.D.N.Y. 2003); *Ge v. Peng*, 201 F. Supp. 2d 14, 17 (D.D.C. 2000).

perhaps the most volatile bilateral relationship with the United States.<sup>211</sup> China is a rising power and, some argue, a potential rival for geopolitical dominance.<sup>212</sup> Due to its role as a major U.S. creditor, China holds some leverage over U.S. foreign policy.<sup>213</sup> Moreover, China may be particularly sensitive to ATS litigation. The governing Communist Party of China (CPC) has proven especially skillful at invoking the long history of imperialism and abuses by Western countries to stoke the fires of nationalism and resentment against the United States.<sup>214</sup> ATS litigation is arguably more likely to impose substantial foreign policy costs in this context than in any other.

Only five ATS lawsuits have been brought concerning activities in China. Three were dismissed on jurisdictional grounds, one ended in settlement, and one resulted in a declaratory judgment with no damages awarded. One suit was brought by student leaders of the 1989 Tiananmen Square protests against Li Peng, the former Premier of China, for alleged human rights abuses.<sup>215</sup> Former prisoners also brought suit against Li Peng, various state entities, and the Adidas Corporation for human rights abuses, including forced prison labor.<sup>216</sup> Although the service of the complaint on Li Peng during a visit to the United States prompted angry denunciations from the Chinese government, both claims against government officials were dismissed on sovereign immunity grounds.<sup>217</sup> Three other cases arose from the 1999 crackdown by the Chinese government on the Falun Gong spiritual movement.<sup>218</sup> Falun Gong practitioners filed lawsuits against three Chinese government officials, including former President Jiang Zemin, the Beijing Mayor, Deputy Governor of Liaoning Province, and the Chinese Communist Party Secretary for Sichuan Province.<sup>219</sup> Two cases were dismissed on sovereign

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211. deLisle, *supra* note 208, at 492.

212. See G. John Ikenberry, *The Rise of China and the Future of the West: Can the Liberal System Survive?*, 87 FOREIGN AFF. 23 (2008) [hereinafter Ikenberry, *China*].

213. See Victor Fleischer, *A Theory of Taxing Sovereign Wealth*, 84 N.Y.U. L. REV. 440, 486 (2009). However, China's ownership of U.S. debt can also be seen as limiting China's options, because China owns far too much in U.S. currency to sell off a significant amount without reducing the value of its remaining dollar-dominated assets. See WAYNE M. MORRISON & MARC LABONTE, CONGR. RESEARCH SERV., RL34314, CHINA'S HOLDINGS OF U.S. SECURITIES: IMPLICATIONS FOR THE U.S. ECONOMY 9 (2008).

214. Abebe, *supra* note 4, at 37–38.

215. *Zhou*, 286 F. Supp. 2d at 257.

216. *Ge v. Peng*, 201 F. Supp. 2d 14, 17 (D.D.C. 2000).

217. See DAVIS, *supra* note 1, at 33–46 (discussing the ATS cases involving China).

218. See Elisabeth Rosenthal, *Beijing in Battle With Sect: 'A Giant Fighting a Ghost,'* N.Y. TIMES, Jan. 26, 2001, at A1.

219. See *Ye v. Zemin*, 383 F.3d 620 (7th Cir. 2004); *Weixum v. Xilai*, 568 F. Supp. 2d 35 (D.D.C.

immunity grounds.<sup>220</sup> In another, *Doe v. Qi*, the defendant refused to appear and the court issued a declaratory judgment in favor of the plaintiffs without awarding damages because it “pose[d] the least threat to foreign relations.”<sup>221</sup> More recently, in 2007, several Chinese dissidents sued Yahoo! under the ATS, alleging that the internet company had supplied information to the Chinese government about the dissidents, which led to their arrest, imprisonment, and torture.<sup>222</sup> No Chinese government officials were sued. Yahoo! has settled one of the suits for an undisclosed sum.<sup>223</sup>

The U.S. State Department filed statements of interest in these cases on behalf of the defendant Chinese officials, arguing that the litigation would interfere with the conduct of U.S. foreign policy.<sup>224</sup> For its part, the Chinese government complained to the court that the lawsuit would cause “immeasurable interferences”<sup>225</sup> to U.S.-China relations, denounced the lawsuits in public, and complained to executive branch officials in private meetings.<sup>226</sup> But what actual foreign policy impact did the ATS cases have? The lawsuits ended without requiring anything tangible from the Chinese defendants. On the other hand, even the filing of a lawsuit against foreign officials arguably implicates foreign policy.<sup>227</sup> The service of papers on Chinese officials while in the United States caused irritation and tirades.<sup>228</sup> The declaratory judgment in *Doe v. Qi*, and even the fact that U.S. law permits courts to entertain the ATS claims in the first place,

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2008); *Doe v. Qi*, 349 F. Supp. 2d 1258 (N.D. Cal. 2004); *Plaintiffs A, B, C, D, E, F v. Zemin*, 282 F. Supp. 2d 875 (N.D. Ill. 2003).

220. See *Ye*, 383 F.3d at 630; *Weixum*, 568 F. Supp. 2d at 35.

221. *Qi*, 349 F. Supp. 2d at 1302.

222. Second Amended Complaint for Tort Damages at 4, *Xiaoning v. Yahoo! Inc.*, No. C07-02151 (N.D. Cal. July 30, 2007), available at <http://casedocs.justia.com/california/candce/4:2007-cv02151/191339/51/0.pdf>.

223. Catherine Rampell, *Yahoo Settles with Chinese Families*, WASH. POST, Nov. 14, 2007, at D4.

224. Statement of Interest of the United States at 7, *Doe v. Qi*, 349 F. Supp. 2d 1258 (N.D. Cal. 2004) (No. C02-0672), available at [http://www.cja.org/downloads/LiuQi\\_Statement\\_of\\_Interest\\_of\\_the\\_US\\_85.pdf](http://www.cja.org/downloads/LiuQi_Statement_of_Interest_of_the_US_85.pdf); Statement of Interest of the United States at 2–3, *Zhou v. Peng*, 286 F. Supp. 2d 255 (S.D.N.Y. 2003) (No. 00 Civ. 6446), available at <http://www.state.gov/documents/organization/16671.pdf> (arguing that the Tiananmen Square litigation “severely hampers the ability of the United States to implement a robust foreign policy at a time when matters of war and peace are in the balance”).

225. *Qi*, 349 F. Supp. 2d at 1300 (quoting Statement of the Government of the People’s Republic of China on “Falun Gong” Unwarranted Lawsuits 1–2 (Sept. 2002)).

226. See DAVIS, *supra* note 1, at 207–19; *Qi*, 349 F. Supp. 2d at 1300 (quoting Statement of the Government of the People’s Republic of China on “Falun Gong” Unwarranted Lawsuits 1–2 (Sept. 2002)); *China Says Falungong Lawsuit on Beijing’s Mayor is a “Nasty Trick,”* AGENCE FR. PRESSE, Feb. 10, 2002.

227. See Abebe, *supra* note 4, at 29.

228. DAVIS, *supra* note 1, at 94–102.

could be said to cause dignitary harm and Chinese resentment of the United States.<sup>229</sup>

But in the end, there is no empirical evidence that the Chinese government altered any policy toward the United States because of the lawsuits or that ATS litigation persists as a diplomatic problem. Nor is there evidence that ATS litigation is a significant motivation for anti-American sentiment among the Chinese population.

Indeed, there could be several reasons why the ATS lawsuits involving China had little effect. A pure realist perspective offers a straightforward answer: the Chinese government is, like the United States, a rational actor pursuing material interests. If it serves China's interests for it to retaliate against the U.S. for ATS litigation, it will do so; otherwise, it won't. China may have calculated that it was not worth the cost of taking substantive action beyond diplomatic protestations and stern letters. The Sino-American relationship is dense and involves interaction on a broad range of subjects at multiple levels. Given that both governments have bigger fish to fry, it seems unlikely that these lawsuits have caused any significant friction. Moreover, Chinese government officials are savvy enough to view the ATS lawsuits through the lens of the operation of the U.S. separation of powers rather than as intrusive action by a unitary U.S. government.<sup>230</sup> In addition, the allegations against Chinese officials and the declaratory judgment in *Qi* do not depart significantly from assessments about human rights in China already made by the U.S. executive branch through the State Department's Country Reports.<sup>231</sup> U.S. courts have also made negative assessments about China's human rights record in other litigation, such as asylum cases.<sup>232</sup> If China wishes to retaliate for being accused of violating human rights norms, it already would be doing so absent ATS litigation. Finally, China actually stands to benefit in some respects from ATS litigation. Chinese citizens can sue foreign corporations or government officials for human rights violations without requiring the Chinese government to address the human rights issue.<sup>233</sup>

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229. See Abebe, *supra* note 4, at 37–38.

230. deLisle, *supra* note 208, at 546 & n.211 (listing examples of Chinese government officials discussing the U.S. separation of powers and lobbying the executive branch to overturn court decisions).

231. See *id.* at 501–02.

232. See *id.*

233. See *id.* at 495–96 (noting the favorable treatment in the Chinese press regarding an ATS lawsuit by Chinese citizens against the government of Japan for sexual abuse during World War II).

In sum, it is very difficult to conclude that ATS litigation against Chinese defendants has had any significant effect on U.S. foreign policy. This suggests that courts are capable of managing ATS litigation in a manner that avoids imposing costs on the pursuit of U.S. strategic interests abroad, at least to the extent that ATS litigation risks antagonizing rival great powers. Each bilateral relationship is unique, of course, and the value of China as a critical case study is open to debate.

What about antagonizing U.S. allies? In 2002, a group of South African citizens sued several multinational corporations under the ATS, including Ford, Daimler, IBM, Fujitsu, and two international banks that did business with the South African government during Apartheid.<sup>234</sup> The alleged harms included discriminatory employment practices, arbitrary denationalization, torture, and extrajudicial killing.<sup>235</sup> These controversial lawsuits are frequently mentioned as a prime example of ATS litigation interfering with the conduct of foreign relations and sparking resentment in target countries for meddling in their internal affairs.<sup>236</sup> The United Kingdom, Switzerland, and Australia, whose corporations were sued by the South African plaintiffs, voiced their opposition to the litigation.<sup>237</sup> The U.S. and South African governments initially argued that the cases should be dismissed, but the South African government has since switched its position to support the lawsuit, and the Obama administration's position is unclear.<sup>238</sup>

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234. The district court granted the defendants' motion to dismiss in November 2004. *See Ntsebeza v. Citigroup, Inc. (In re S. Afr. Apartheid Litig.)*, 346 F. Supp. 2d 538, 543 (S.D.N.Y. 2004), *aff'd in part, vacated in part, remanded sub nom. Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007). The Bush administration had urged that it be dismissed, citing, in part, these economic concerns. *See supra* notes 94–95 and accompanying text. After a partial reversal and remand by the Second Circuit, the Supreme Court granted certiorari but affirmed by default for lack of a quorum, due to recusal by justices. *Am. Isuzu Motors, Inc. v. Ntsebeza*, 128 S. Ct. 2424 (2008). On remand, the district court narrowed the claims but allowed the case to continue against Daimler, Ford, General Motors, IBM, and Rheinmetall Group. *See Ntsebeza v. Daimler AG (In re S. Afr. Apartheid Litig.)*, 617 F. Supp. 2d 228, 296 (S.D.N.Y. 2009).

235. *See Khulumani*, 504 F.3d at 255.

236. *See, e.g., John B. Bellinger III, The U.S. Can't Be the World's Court*, WALL ST. J., May 27, 2009, at A19.

237. Australia, Switzerland, and the U.K. objected to the Apartheid litigation in an amicus brief in *Sosa*. Brief for Governments of the Commonwealth of Australia, the Swiss Confederation, and the United Kingdom of Great Britain and Northern Ireland as Amici Curiae Supporting the Petitioner, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (No. 03-339) [hereinafter Brief of the Governments of the Commonwealth of Australia], available at <http://www.ccr-ny.org/v2/legal/docs/sva19.pdf>.

238. *See* Brief for the United States as Amicus Curiae Supporting Appellees at 1–2, *Ntsebeza v. Daimler AG (In re S. Afr. Apartheid Litig.)*, 617 F. Supp. 2d 228 (S.D.N.Y. 2009) (No. 09-2778-CV), available at [http://viewfromll2.files.wordpress.com/2009/12/soisouthafricanapartheid\\_litigation.pdf](http://viewfromll2.files.wordpress.com/2009/12/soisouthafricanapartheid_litigation.pdf) (declining to support an interlocutory appeal, under the collateral order doctrine, from the district

Yet there is no evidence that the litigation has so far resulted in disinvestment or harmed the U.S. relationship with its allies who intervened against the lawsuit. It is difficult to see how ATS litigation could disincentivize current investment in South Africa. As long as South Africa remains a democratic state that does not repress its citizens, corporations will not risk ATS liability for their present or future activities. Nor, for that matter, will disinvestment have any effect on corporations' liability for Apartheid-era activities.<sup>239</sup> It is possible, of course, that the litigation in South Africa, and other similar lawsuits, could discourage corporations from investing in other nations with poor human rights records for fear of liability.<sup>240</sup> This is an empirical question, and no study has attempted to determine the weight MNCs actually give to ATS litigation in general as a factor in making global investment decisions. And the critics' concern assumes, of course, that MNCs will do business with a regime that is currently engaged in human rights violations to the point that it could be considered aiding and abetting. It costs nothing for MNCs to claim that ATS litigation is a factor in their decisions, but money speaks louder than words and investment continues apparently unabated.

Regardless of ATS litigation's effects on human rights—which critics and defenders dispute<sup>241</sup>—disinvestment in nations with poor human rights records does not necessarily harm U.S. strategic interests. Critics of ATS litigation invoke U.S. security and economic interests, but they are not synonymous with the interests of foreign citizens who might benefit from the investment or, for that matter, from the interests of U.S.-based MNCs, who might suffer from the inability to invest in potential ATS target countries but might just as profitably invest their money elsewhere. The most compelling observation by revisionists is that MNCs lacking the contacts with the United States necessary for personal jurisdiction would be able to invest without consequences, while MNCs with U.S. ties would be disadvantaged by potential liability.<sup>242</sup> In short, ATS litigation increases the cost of doing business in the United States.

In the end, however, there is simply no significant empirical evidence that the United States has borne economic costs from ATS litigation. Gary

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court's order denying defendant's motion to dismiss, and arguing that the U.S. government had never explicitly requested dismissal).

239. See Affidavit of Joseph Stiglitz, South African Apartheid Litigation (on file with author).

240. This was the argument made by the Bush administration in its 2007 Statement of Interest. See Brief for the United States as Amicus Curiae Supporting Defendant-Appellees at 21, *Khulumani v. Barclay Nat. Bank, Ltd.*, 504 F.3d 254 (2d Cir. 2007) (No. 05-2141-CV).

241. I address the human rights costs and benefits in Part II.C.3.

242. HUFBAUER & MITROKOSTAS, *supra* note 4, at 41–42.



Clyde Hufbauer and Nicholas Mitrokostas predicted in 2003 that ATS litigation could depress worldwide U.S. trade by 10%, lead to a loss of 25% of foreign direct investment in target countries, and cost the United States hundreds of thousands of manufacturing jobs.<sup>243</sup> But these catastrophic predictions—including a “nightmare” scenario of a \$26 billion class action by 100,000 Chinese plaintiffs within the decade—have not materialized. Again, there is no evidence that companies have actually disinvested due to the ATS litigation that has occurred. Yahoo! sold its Chinese subsidiary before the lawsuits were filed but retains a 40% interest in the purchaser.<sup>244</sup> Shell and Chevron have continued to make multiyear, multibillion dollar investments in Nigeria despite defending ATS lawsuits concerning their activities in that country.<sup>245</sup> Because almost all multinational corporations operating in developing countries are subject to U.S. jurisdiction and reachable by ATS litigation, there are relatively few nonreachable companies able to step in.<sup>246</sup>

Why has the ATS failed after 30 years to cause an economic earthquake unsettling the global trading system? The gloomiest predictions assume that governments will face staggering judgments and that corporations can be held liable merely for doing business in a target country.<sup>247</sup> But these assumptions do not reflect the reality of ATS litigation as it has actually unfolded. Merely investing in a country that has an authoritarian regime has never been sufficient ground for liability under the ATS.<sup>248</sup> In fact, corporate aiding and abetting liability is becoming more difficult to prove. In 2010, the Second Circuit—which, along with

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243. *See id.* at 38–40.

244. *Yahoo Chief Apologizes to Chinese Dissidents’ Relatives*, N.Y. TIMES, Nov. 7, 2007, <http://www.nytimes.com/2007/11/07/business/worldbusiness/07iht-yahoo.1.8226586.html>.

245. *See Herz, supra* note 6, at 212. Talisman Energy, a Canadian corporation, sold its interest in the Sudan oil pipeline project in 2002, but a senior manager at the company, without reference to the ATS, attributed the decision to a public relations campaign mounted by its critics resulting in a bill introduced in Congress that would have delisted Talisman from the New York Stock Exchange. Reg Manhas, *Talisman in Sudan: Impacts of Divestment* (Mar. 16, 2007), [http://www.enebuilder.net/globalcompact/e\\_article000775162.cfm?x=b11,0,w](http://www.enebuilder.net/globalcompact/e_article000775162.cfm?x=b11,0,w).

246. *See* Michael Barsa & David Dana, *Three Obstacles to the Promotion of Corporate Social Responsibility by Means of the Alien Tort Claims Act: The Sosa Court’s Incoherent Conception of the Law of Nations, the “Purposive” Action Requirement for Aiding and Abetting, and the State Action Requirement for Primary Liability*, 21 FORDHAM ENVTL. L. REV. 79 (2010). As Barsa and Dana observe, even if companies not subject to U.S. jurisdiction step in, the threat of disinvestment by companies subject to U.S. jurisdiction is likely to give target countries an incentive to improve human rights conditions because reduced competition will lead to fewer benefits for the target country. *See id.* This would, in turn, make it more likely that companies subject to U.S. jurisdiction would maintain investment.

247. *See HUFBAUER & MITROKOSTAS, supra* note 4, at 1–2.

248. Herz, *supra* note 6, at 210.

the Ninth Circuit, is considered to be the most friendly to ATS plaintiffs—held, in a surprising decision, that jurisdiction under the ATS did not extend to lawsuits against corporations at all.<sup>249</sup>

Without a doubt, the Supreme Court's recognition in *Sosa* that crafting remedies for new CIL norms “would raise risks of adverse foreign policy consequences” has led to restraint by judges in subsequent ATS cases.<sup>250</sup> Facing a high bar for success under the ATS, plaintiffs and their attorneys are relatively more selective in filing lawsuits than they otherwise would have been.<sup>251</sup>

ATS litigation could, in the future, threaten to impose serious foreign policy costs. But one cannot presume that federal courts will ignore specific evidence of those costs presented to them, or that the political branches will be unwilling to intervene if necessary through legislative override. The courts have thus far managed litigation without imposing such costs. Why will they not continue to do so in the future? And further, should courts actually “go rogue,” there are few reasons to think that Congress and the President will reign in ATS litigation if they think it necessary for the national interest. National security concerns motivated swift passage of the Detainee Treatment Act and the Military Commissions Act in response to Supreme Court decisions in 2004 and 2006.<sup>252</sup> Multinational corporations, for good or ill, have enormous ability

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249. *Kiobel v. Royal Dutch Petroleum*, 621 F.3d 111 (2d Cir. 2010). The decision was surprising to observers because other courts had held the opposite, and the Second Circuit had decided earlier ATS cases against corporations while assuming that corporations could be liable. *See id.* at 124; *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1263 (11th Cir. 2009) (“In addition to private individual liability, we have also recognized corporate defendants are subject to liability under the ATS and may be liable for violations of the law of nations.” (citing *Romero v. Drummond Co., Inc.*, 552 F.3d 1303, 1315 (11th Cir.2008))); *Doe v. Unocal Corp.*, 395 F.3d 932, 947 (9th Cir. 2002) (holding that aiding and abetting liability against a corporation can be proven if the defendant provided “knowing practical assistance or encouragement that has a substantial effect on the perpetration of the crime”); *Al-Quraishi v. Nakhla*, 728 F. Supp. 2d 702, 753 (D. Md. 2010) (“There is no basis for differentiating between private individuals and corporations [under the ATS] . . .”).

250. *See* Stephens, *supra* note 55, at 18 (quoting *Sosa v. Alvarez-Machain*, 542 U.S. 692, 727–28 (2004)).

251. DAVIS, *supra* note 1, at 97–98.

252. The Detainee Treatment Act (DTA), Pub. L. No. 109-148, §§ 1001–1005, 119 Stat. 2680, 2739–44 (2005) (codified as amended in scattered sections of 10 U.S.C., 28 U.S.C., and 42 U.S.C. (2006)), purported to strip habeas jurisdiction for Guantánamo detainees and replace it with exclusive, but limited, review of Combatant Status Review Tribunal proceedings in the D.C. Circuit. The DTA was in part a response to *Rasul v. Bush*, 542 U.S. 466, 484 (2004), which held that alien detainees at Guantánamo had a statutory right to invoke habeas jurisdiction. *Id.* The Military Commissions Act (MCA), Pub. L. No. 109-366, 120 Stat. 2600 (codified at 10 U.S.C. §§ 948a–950w and scattered sections of 10 U.S.C., 18 U.S.C., 28 U.S.C., and 42 U.S.C. (2006)), *inter alia*, reestablished the military commissions and eliminated habeas corpus for all aliens designated as “enemy combatants” or awaiting a determination of that status. The MCA was a response to *Hamdan v. Rumsfeld*, 548 U.S. 557, 567 (2006), which declared as unlawful the military commissions established to try certain enemy

to spur the passage of legislation when their interests are seriously threatened.

### 3. *Human Rights Costs*

Revisionists acknowledge that nations like the United States will, from time to time, rationally pursue human rights as a preference.<sup>253</sup> From a realist perspective, however, human rights will (and normatively, must) ultimately take a back seat to more important material interests, primarily security.<sup>254</sup> Indeed, while the United States has long professed that the increased global observance of human rights is an important foreign policy goal, it has often allied itself with repressive regimes to advance other interests.<sup>255</sup> The revisionist critique assumes that the only instrumental use of ATS litigation is to further the U.S. interest in the establishment of a global human rights regime. Professors Ku and Yoo speculate that the purpose of the ATS is to advance the development of international human rights law.<sup>256</sup> Professor Abebe associates ATS litigation with the “normative project to judicialize international politics, integrate international law into domestic legal systems, and promote progressive change.”<sup>257</sup> Their revisionist critique focuses on the conflict between these progressive goals and the positive reality of an international system sensitive to power.

But revisionists also advance another objection: that ATS litigation fails to achieve its purpose of promoting adherence to human rights principles.<sup>258</sup> Indeed, by focusing on only the human rights benefits and the realist and security costs, revisionists can argue that ATS litigation is simultaneously ineffectual and capable of creating havoc. Revisionists point to the low number of collectable damage awards as evidence that ATS litigation fails to bring restitution to victims of human rights abuses while making international law seem empty.<sup>259</sup> Yet even judgments for the plaintiffs, revisionists argue, are not likely to result in the internalization of international human rights law in target countries. Instead, ATS litigation

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combatants for war crimes and held that the courts retained habeas jurisdiction over claims filed by Guantánamo detainees before the DTA took effect. *Id.*

253. Goldsmith & Posner, *supra* note 118, at 463.

254. See Abebe, *supra* note 4, at 29–32.

255. See *id.*

256. Ku & Yoo, *Beyond Formalism*, *supra* note 4, at 116–18; see also Abebe, *supra* note 4, at 25.

257. Abebe, *supra* note 4, at 15.

258. See McGinnis & Somin, *Political Economy*, *supra* note 4, at 38–40; see also Abebe, *supra* note 4, at 26.

259. Abebe, *supra* note 4, at 45–46.

is more likely to make international law appear as the instrument of neocolonialism by a foreign power whose government officials are shielded by sovereign immunity from similar accountability. Finally, the availability of ATS litigation will tend to discourage the development of local justice.<sup>260</sup>

These adverse human rights consequences seem entirely plausible, but they are difficult to measure, and there is plenty of countervailing evidence. Although approximately only two dozen ATS suits have survived to judgment and collectable damage awards have been few,<sup>261</sup> corporate defendants have begun to settle some high-visibility ATS suits. In 2009, “pharmaceutical manufacturer Pfizer reached a settlement with the plaintiffs in a multibillion dollar ATS suit by numerous Nigerian children and their guardians. The plaintiffs alleged that the company conducted illegal clinical trials of . . . an experimental meningitis medication[] on [the] children . . . without approval by Nigeria or the children’s parents.”<sup>262</sup> Pfizer settled after the Second Circuit held that nonconsensual experimentation was a CIL norm actionable under the ATS.<sup>263</sup> The same year, a \$15.5 million settlement was reached on the eve of trial in a long-running suit against “Royal Dutch Shell, its Nigerian subsidiary, and the former head of Shell’s Nigerian operations [for] complicit[y] in murder, torture, and other crimes in connection with Shell’s operations in the Niger Delta.”<sup>264</sup> And, as mentioned above, Yahoo! recently settled a suit brought by Chinese dissidents.<sup>265</sup> Such

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260. *See id.* Professors McGinnis and Somin add the additional argument that the prospect of losing all ill-gotten wealth through ATS litigation encourages dictators to hold onto power longer so that they can continue to enjoy sovereign immunity. *See McGinnis & Somin, Political Economy, supra* note 4, at 39–40. Former government officials are not generally protected by sovereign immunity. *See, e.g., Samantar v. Yousuf*, 130 S. Ct. 2278, 2282 (2010) (holding that the Foreign Sovereign Immunities Act did not shield a former Somali government official from ATS and TVPA lawsuits by Somali citizens alleging torture and human rights violations committed while the defendant was in government).

261. As of 2010, two judgments were awarded against a corporate defendant and twenty-two cases resulted in judgments against non-corporate defendants, thirteen of which were default judgments. *See Susan Simpson & Michael Williams, Alien Tort Statute Cases Resulting in Plaintiff Victories, THE VIEW FROM LL2* (Nov. 11, 2009), available at <http://viewfromll2.com/2009/11/11/alien-tort-statute-cases-resulting-in-plaintiff-victories/>.

262. John R. Crook, *Major Corporations Settle Alien Tort Statute Cases Following Adverse Appellate Rulings*, 103 AM. J. INT’L L. 592, 592 (2009).

263. *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163, 187 (2d Cir. 2009); Joe Stephens, *Suits Saying Pfizer Experimented on Nigerian Children Are Revived*, WASH. POST, Jan. 31, 2009, at A7.

264. Crook, *supra* note 262, at 593. The claims focused on Shell’s alleged role in Nigeria’s 1995 execution of Nigerian activist and writer Ken Saro-Wiwa and eight other Ogoni activists opposed to Shell’s environmental practices in the delta. *See* Jad Mouawad, *Shell Agrees to Settle Abuse Case for Millions*, N.Y. TIMES, June 9, 2009, at B1.

265. Rampell, *supra* note 223.

settlements may not carry the same weight as jury verdicts, but they provide some indication to the populations in target countries that MNCs can be held accountable under international law.

Indeed, there is much evidence that ATS litigation improves the reputation of the United States and temporarily fills in gaps in the justice systems of target countries.<sup>266</sup> Harry Akoh concluded from a study of the ramifications of ATS litigation in Africa against both corporations and government officials “that the ATS has enhanced the image of the United States as a purveyor of human rights” and that many Africans “have a sincere appreciation for the United States as a place where they can seek justice against those who would otherwise never be challenged in their own countries.”<sup>267</sup> Dolly Filartiga wrote that her ATS suit provided an otherwise unavailable means of accountability and brought attention to the atrocities of the Stroessner regime in Paraguay, where her brother became a martyr for human rights.<sup>268</sup>

Because of the higher bar for identifying specific, universal, and obligatory human rights norms, ATS suits are more likely to target activity in nations with repressive regimes, where justice systems are underdeveloped and accountability for human rights abuses—against both government officials and MNCs—is lacking. Lawsuits against MNCs are unlikely to provoke resentment or allegations of neocolonialism in such contexts because MNCs are themselves viewed by much of the population as foreign, and sometimes even hostile, elements, particularly if they aid and abet human rights abuses.<sup>269</sup>

It is possible that ATS litigation could tend to discourage the development of local justice and accountability for human rights violations by interfering with domestic processes already underway, opening old wounds by reviving resolved conflicts, or giving plaintiffs an alternative and more attractive means of obtaining relief.<sup>270</sup> On the other hand, it seems equally plausible that ATS litigation could spur the development of local justice by emulation.<sup>271</sup> It may do all of these things, depending on the target country. The empirical evidence is, again, indeterminate.<sup>272</sup>

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266. See, e.g., DAVIS, *supra* note 1, at 124–32.

267. AKOH, *supra* note 6, at 248.

268. Dolly Filartiga, *American Courts, Global Justice*, N.Y. TIMES, Mar. 30, 2004, at A21; see also Harold Hongju Koh, *Filartiga v. Peña-Irala: Judicial Internalization into Domestic Law of the Customary International Law Norm Against Torture*, in INTERNATIONAL LAW STORIES 45 (John E. Noyes, Laura A. Dickinson & Mark W. Janis eds., 2007).

269. See Holzmeyer, *supra* note 120, at 280.

270. See Abebe, *supra* note 4, at 35; Bradley, *Costs*, *supra* note 2, at 465.

271. See *Sarei v. Rio Tinto, PLC*, 487 F.3d 1193, 1222 (9th Cir. 2007) (“An alternative and

The conflicting incentives for target countries are evident in South Africa's complex response to the Apartheid lawsuit. Although some prominent South Africans, such as Archbishop Desmond Tutu, supported the litigation, the Mbeke administration objected, arguing to the court that it infringed on South Africa's sovereign right to resolve Apartheid-era issues through the truth and reconciliation process and would hurt foreign direct investment in South Africa.<sup>273</sup> However, in 2009, the new administration, led by President Joseph Zuma, reversed course and supported the ATS litigation.<sup>274</sup>

In the event that there is a genuine risk that ATS litigation will interfere with local remedies, the courts can adjust. Following the Supreme Court's hint in *Sosa*, the Ninth Circuit indicated that district courts should impose exhaustion requirements in ATS litigation.<sup>275</sup> This rule, if followed in other circuits, would limit interference with ongoing local litigation in most cases.

Revisionists and the U.S. government have also argued that ATS litigation against corporations harms target countries by causing disinvestment, resulting in lost opportunities for MNCs to reinforce human rights norms through constructive engagement.<sup>276</sup> This argument again assumes, without evidence, that MNCs would forsake investment opportunities were they not allowed to aid and abet violations of *Sosa*-threshold CIL norms. Moreover, as John Herz has argued, constructive engagement cannot be effective if MNCs are involved in violating the very human rights norms they seek to promote.<sup>277</sup>

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perhaps equally plausible hypothesis is that 'foreign court rulings against rights-abusing defendants have the effect of putting pressure "from above" on the state where the rights abuses occurred.'" (quoting Ellen Lutz & Kathryn Sikkink, *The Justice Cascade: The Evolution and Impact of Human Rights Trials in Latin America*, 2 CHI. J. INT'L L. 1, 4 (2001)); Herz, *supra* note 6, at 208–09.

272. Herz, *supra* note 6, at 208–09.

273. Compare Declaration from Penuell Mpapa Maduna, South African Minister of Justice, to Judge John E. Sprizzo (July 11, 2001), with Supplemental Declaration in Opposition to Defendants' Joint Motion to Dismiss by Archbishop Desmond Tutu, *In re* South Africa Apartheid Litigation, MDL 1499, 02-MD-1499, 2003 U.S. Dist. LEXIS 13797 (S.D.N.Y. May 21, 2003).

274. See Letter from Jeffrey Thamsanqa Radebe, Minister of Justice & Constitutional Dev., S. Afr., to the Honorable Shira Scheindlin, U.S. Dist. Court for the S. Dist. of N.Y., available at <http://viewfromll2.files.wordpress.com/2009/12/radebeletter.pdf>.

275. See *Sarei v. Rio Tinto, PLC*, 550 F.3d 822, 825 n.1 (9th Cir. 2008) ("As a prudential matter, in this case there is a certain logic to considering exhaustion before considering threshold grounds that may 'deny[] audience to a case on the merits.'" (quoting *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422 (2007))).

276. See generally Herz, *supra* note 6.

277. *Id.* at 21.

### III. THE STRATEGIC BENEFITS OF ATS LITIGATION

While the revisionist critique focuses on the economic and security costs of ATS litigation, its defenders have, for the most part, focused on describing its benefits for the enforcement of human rights norms and the rule of law.<sup>278</sup> These are normatively attractive objectives regardless of their benefit for the United States. And, to the extent that the United States pursues these interests for its own sake, the traditional defense of ATS litigation offers a response to the revisionist critique on its own terms.<sup>279</sup> Nonetheless, this response is radically incomplete and leaves ATS litigation quite vulnerable to realist claims that it undermines U.S. security interests. In this section, I describe the strategic benefits of ATS litigation.

#### A. *The ATS's Strategic Purpose in 1789*

The present emphasis on the ATS as a vehicle for the global judicialization of modern human rights norms obscures its likely original purpose. The ATS in fact owes its existence to U.S. geopolitical interests and realist ends. The scant evidence available suggests that the ATS was enacted to help protect U.S. neutrality in a 1789 world dominated by stronger European powers.<sup>280</sup> For the most part, early American foreign policy was isolationist, seeking to avoid entanglements with the European powers that had been warring for centuries.<sup>281</sup> The separation of powers itself was designed in part, or at least served, to institutionalize America's diplomatic isolation.<sup>282</sup> The federal courts contributed to this effort. Professor David Sloss has demonstrated, in a study of early Supreme Court cases and related materials, that the federal courts played an active role in implementing U.S. neutrality policy during the 1790s by providing

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278. *See supra* notes 115–26 and accompanying text.

279. *But cf.* Lee, *supra* note 42, at 907 (arguing that limiting ATS litigation to safe-conduct offenses would produce national security benefits and that “it is entirely consistent with the original purpose of the ATS to see it as a means to deploy the federal courts in the service of a national security policy in the best interests of the American people” (emphasis added)).

280. Anthony D’Amato, *The Alien Tort Statute and the Founding of the Constitution*, 82 AM. J. INT’L L. 62, 63 (1988); Stewart Jay, *The Status of the Law of Nations in Early American Law*, 42 VAND. L. REV. 819, 839 (1989) (“The primary consideration that forced the United States to pay respect to the law of nations was the country’s weakness in relation to the European powers.”); Lee, *supra* note 42, at 849.

281. HENRY KISSINGER, DIPLOMACY 36 (1994).

282. *See id.*; Joel R. Paul, *The Geopolitical Constitution: Executive Expediency and Executive Agreements*, 86 CALIF. L. REV. 671, 678–79 (1998).

a non-executive-branch forum for the resolution of disputes involving privateers.<sup>283</sup>

Two incidents involving assaults on foreign citizens during the 1780s in the United States likely underscored the need for an ATS. In Philadelphia, a French citizen named Chevalier De Longchamps—described by Thomas Jefferson as an “obscure and worthless character”<sup>284</sup>—had attacked the Secretary of the French Legation at the house of the French Ambassador and later assaulted the Secretary on the street.<sup>285</sup> The U.S. government lacked the authority to punish Longchamps and suffered diplomatic humiliation and some international outrage while waiting for Pennsylvania to prosecute him.<sup>286</sup> In the second incident, a police officer entered the house of the Dutch ambassador in New York and arrested him, allegedly without cause.<sup>287</sup> The ambassador complained to Secretary of State John Jay, who lamented the lack of a federal remedy.<sup>288</sup> But such risks to American neutrality were not created only by incidents in the United States. After the enactment of the ATS, Attorney General William Bradford opined that British property owners in Sierra Leone could seek damages for harm to their property inflicted during a raid by French privateers assisted by U.S. slavers.<sup>289</sup>

Of course, the fact that the ATS almost immediately fell into hibernation suggests that it was not deemed a very useful tool for serving its neutrality-preserving purpose. But its mere existence may have provided some reassurance.

Some revisionists, taking cues from ATS supporters, see the modern post-*Filartiga* purpose of the ATS as promoting the development and enforcement of international law.<sup>290</sup> They see this modern purpose as working against the ATS’s original purpose by interfering in the internal affairs of foreign nations.<sup>291</sup> But none have considered that the ATS may serve a beneficial strategic function today.

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283. See generally David Sloss, *Judicial Foreign Policy: Lessons from the 1790s*, 53 ST. LOUIS U. L.J. 145 (2008).

284. Letter from Thomas Jefferson to James Madison (May 25, 1784), reprinted in 7 THE PAPERS OF THOMAS JEFFERSON 288–89 (J. Boyd ed., 1953).

285. See *Respublica v. De Longchamps*, 1 U.S. (1 Dall.) 111 (1784); see also *Sosa v. Alvarez-Machain*, 542 U.S. 692, 617–18 (discussing the incident).

286. See William R. Casto, *The Federal Courts’ Protective Jurisdiction over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467, 489, 491–94 (1986).

287. See *id.*

288. Secretary for Foreign Aff. Rep. on the Compl. of Minister of United Netherlands (Mar. 25, 1788), reprinted in 34 JOURNALS OF THE CONTINENTAL CONGRESS 109, 111 (1788).

289. Breach of Neutrality, 1 Op. Att’y Gen. 57 (1795).

290. See Ku & Yoo, *Beyond Formalism*, *supra* note 4, at 179–80.

291. Bradley, *Costs*, *supra* note 2, at 463.



*B. The ATS's Twenty-First Century Strategic Function*

How can this strategic purpose of the ATS be made meaningful in today's world? The optimal strategies for a weak power pursuing neutrality in an eighteenth-century international system dominated by overseas powers are, of course, different from those of a lone superpower providing public goods in a twenty-first-century world transformed by globalization. However, the persistence of ATS litigation, despite this criticism, suggests not only that the interference argument is overblown, but also that ATS litigation may serve the contemporary strategic goals of the United States in slightly different, though related, ways.

A realist assessment of ATS litigation's costs and benefits must take into account the unique role of the United States in the world, which IR scholars disagree about how best to define. The United States has been variously described as the lone superpower, a hyperpower,<sup>292</sup> a hegemon,<sup>293</sup> and an empire.<sup>294</sup> These descriptions have long coexisted with predictions of more or less imminent U.S. decline.<sup>295</sup> In the first half of the 2000s, the already vast United-States-as-empire literature bloomed on both ends of the political spectrum, in part as a response to the more aggressive foreign policies of the Bush administration following 9/11.<sup>296</sup> During the second half of the decade, however, the narrative of U.S. decline, and the rise of its rivals, has gained momentum.<sup>297</sup> Many of these disagreements result from semantic differences and loose use of the term "empire."<sup>298</sup> In addition, assessments of the U.S. global position will vary, depending on

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292. See, e.g., Elliot A. Cohen, *History and the Hyperpower*, 83 FOREIGN AFF. 49 (2004).

293. See, e.g., LEA BRILMAYER, *AMERICAN HEGEMONY* (1996) (arguing that American hegemony is a form of international governance and must be evaluated by liberals in the same way they would evaluate the legitimacy of domestic political arrangements).

294. Nexon & Wright, *supra* note 9, at 253 (observing that scholars on both the left and right describe the U.S. as an empire); Joseph S. Nye, Jr., *U.S. Power and Strategy After Iraq*, 82 FOREIGN AFF. 60, 60 (2003) (same).

295. See MEARSHEIMER, *supra* note 109, at 381 (arguing that regional hegemons will arise to challenge American dominance); see also PAUL KENNEDY, *THE RISE AND FALL OF THE GREAT POWERS: ECONOMIC CHANGE AND MILITARY CONFLICT FROM 1500 TO 2000* (1987) (predicting, in the first 1987 edition, the decline of the United States).

296. See, e.g., NIALL FERGUSON, *COLOSSUS: THE RISE AND FALL OF THE AMERICAN EMPIRE* (2004); CHALMERS JOHNSON, *THE SORROWS OF EMPIRE: MILITARISM, SECRECY, AND THE END OF THE REPUBLIC* (2004).

297. See, e.g., PARAG KHANNA, *THE SECOND WORLD: EMPIRES AND INFLUENCE IN THE NEW GLOBAL ORDER* (2008); FAREED ZAKARIA, *THE POST-AMERICAN WORLD* (2008) [hereinafter ZAKARIA, *POST-AMERICAN*].

298. See, e.g., Nexon & Wright, *supra* note 9, at 253.

the importance one places, respectively, on military, economic, and soft power.<sup>299</sup>

But a few relatively noncontroversial insights from IR theory can serve as the foundation for an assessment of ATS litigation's strategic benefits. First, since the fall of the Soviet Union, the United States has lacked global balancing rivals in the traditional realist sense: it is the only nation capable of projecting military power anywhere in the world.<sup>300</sup> In this respect, the United States is the sole superpower and the global system is unipolar.

There are several reasons why this is likely to continue for some time. First, the United States is geographically isolated from other potential rivals, who are located near one another in Eurasia.<sup>301</sup> This mutes the security threat that the United States seems to pose, while increasing the threats that potential rivals seem to pose to one another.<sup>302</sup> Second, the United States far exceeds the capabilities of all other states in terms of military and, for the time being, economic power. This advantage "is larger now than any analogous gap in the history of the modern states system."<sup>303</sup> Finally, the potential rivals' possession of nuclear weapons makes the concentration of power in the United States appear less threatening. A war between great powers in today's world is very unlikely.<sup>304</sup>

The United States is also unique in that it provides a number of public goods for the world.<sup>305</sup> These include security guarantees, the protection of sea lanes, and support for open markets.<sup>306</sup> After World War II, the United States forged a system of military alliances and transnational economic and political institutions—such as the United Nations, NATO, the

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299. See JOSEPH S. NYE, JR., *SOFT POWER: THE MEANS TO SUCCESS IN WORLD POLITICS*, at x (2004) (observing that the U.S. occupies a different global position with respect to military, economic, and soft power).

300. See G. John Ikenberry, *Liberalism and Empire: Logics of Order in the American Unipolar Age*, 30 *REV. INT'L STUD.* 609, 618 (2004) [hereinafter Ikenberry, *Liberalism*].

301. Potential rivals include China, Europe, Japan, and India. See ZAKARIA, *POST-AMERICAN*, *supra* note 297, at 21.

302. Stephen G. Brooks & William Wohlforth, *International Relations Theory and the Case Against Unilateralism*, 3 *PERSP. ON POL.* 509, 511 (2005) [hereinafter Brooks & Wohlforth, *Unilateralism*].

303. *Id.*

304. Stephen G. Brooks & William C. Wohlforth, *Hard Times for Soft Balancing*, 30 *INT'L SECURITY* 72, 106 (2005).

305. Public goods are "nonrivalrous," which means capable of being simultaneously consumed by the provider and others, and "nonexcludable," which means impossible to keep others from consuming. McGinnis & Somin, *supra* note 13, at 1236.

306. MANDELBAUM, *supra* note 33, at 34–62 (describing the public goods provided by the United States for the world).

International Monetary Fund, and the World Bank—that remain in place today.<sup>307</sup> The United States exercises influence through these institutions and provides security for allies, such as Japan and Germany, by maintaining a strong military presence in Asia and Europe.<sup>308</sup> Because of its overwhelming military might, the United States possesses what amounts to a “quasi-monopoly” on the use of force.<sup>309</sup> This prevents other nations from launching wars that would tend to be truly destabilizing for the international system. Similarly, the United States provides a public good through its efforts to combat terrorism and confront rogue states.<sup>310</sup> The United States does not produce these global public goods from altruism. As the largest consumer of these goods, it benefits from them the most.

Of course, the United States supplies these public goods imperfectly. Pirates prey on shipping in some places (often with impunity), and rogue states continue to develop nuclear weapons.<sup>311</sup> Depending on whether, and how much, U.S. power declines, its ability or willingness to provide these goods could one day be in doubt.<sup>312</sup> Moreover, there are many important global public goods—such as addressing “weakest link” collective action problems like climate change—that the United States cannot provide alone.<sup>313</sup> Nonetheless, assessments of U.S. strategic interests—and the ability of ATS litigation to advance or hinder those interests—cannot rest on the assumption that the United States seeks to pursue its interests in the same way as other nations. America’s unique role demands unique strategies.

It should be clear that the “realist” defense I offer here is not purely realist.<sup>314</sup> To see how ATS litigation may be a net strategic benefit, one

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307. *See id.*

308. *Id.*

309. *See* Ikenberry, *Liberalism*, *supra* note 300, at 618 (“The United States possesses a quasi-monopoly on the international use of force while the domestic institutions and [behaviors] of states are increasingly open to global—that is, American—scrutiny.”).

310. *See, e.g.*, MANDELBAUM, *supra* note 33, at 163 (observing that forceful U.S. measures to prevent rogue states from acquiring nuclear weapons permitted Europe and China to adopt more conciliatory postures toward those regimes); *see also* TODD SANDLER, *GLOBAL COLLECTIVE ACTION* 144–61 (2004) (applying public-goods theory to the control of rogue states).

311. *See* RICHARD RHODES, *THE TWILIGHT OF THE BOMBS: RECENT CHALLENGES, NEW DANGERS, AND THE PROSPECTS FOR A WORLD WITHOUT NUCLEAR WEAPONS* (2010); Milena Sterio, *The Somali Piracy Problem: A Global Puzzle Necessitating a Global Solution*, 59 *AM. U. L. REV.* 1449, 1450 (2010).

312. *See* MANDELBAUM, *supra* note 33, at 62.

313. *See generally* Paul G. Harris, *Collective Action on Climate Change: The Logic of Regime Failure*, 47 *NAT. RESOURCES J.* 195 (2007).

314. For a discussion of international relations realism, see *supra* notes 103–16 and accompanying text.

must accept that international law is not entirely epiphenomenal—that it does serve some purpose. Again, strict adherence to international relations neorealism seems to foreclose this possibility.<sup>315</sup> However, no revisionist insists that neorealism in its pure form comprehensively describes all interactions among nations.<sup>316</sup> One can accept the premise that international law *qua* international law exerts no independent pull on nations toward compliance, yet conclude that international law, including CIL, still serves strategic purposes.

Suppose a state will, from time to time, restrain the exercise of its power in the short term in order to obtain greater long-term benefits. The larger a state's propensity to restrain short-term action in this way, the lower its "discount rate."<sup>317</sup> Because a tendency for self-restraint makes a state a better cooperative partner, low-discount-rate states will seek out other low-discount-rate states.<sup>318</sup> How can states signal that they have a low discount rate? One way is through compliance with human rights norms. Because it involves only the state's treatment of its own citizens, a state suffers fewer sanctions for failing to comply with human rights norms than for failing to repay a debt or comply with a trade agreement. Because it does not tend to get much in return, compliance with human rights law is generally believed to be costlier for a state.<sup>319</sup> For this reason, complying with human rights law can signal that the state is willing to engage in self-restraint and that it has a low discount rate.<sup>320</sup>

Another way to look at the function of complying with human rights norms is through the lens of reputation.<sup>321</sup> States are, at least to some degree, sensitive to their reputations. They may not value reputation above military or economic power, but reputation has some value, in part because it enables states to achieve other things. States can acquire reputations for a variety of things, from toughness to cooperativeness.<sup>322</sup> And a state will also develop a reputation regarding its compliance with

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315. See *supra* notes 112–15 and accompanying text.

316. See Abebe, *supra* note 4, at 39; see also GOLDSMITH & POSNER, *supra* note 100, at 14 (describing their approach to international relations as "institutionalist").

317. See David H. Moore, *A Signaling Theory of Human Rights Compliance*, 97 NW. U. L. REV. 879, 885–86 (2003).

318. GOLDSMITH & POSNER, *supra* note 100, at 172–74.

319. See Moore, *supra* note 317, at 886.

320. See Daniel A. Farber, *Rights as Signals*, 31 J. LEGAL STUD. 83, 84–93 (2002); Moore, *supra* note 317, at 886.

321. See Richard H. McAdams, *Signaling Discount Rates: Law, Norms, and Economic Methodology*, 110 YALE L.J. 625, 674–75 (2001) (book review) (describing theories of signaling as a refinement of theories of reputation).

322. See generally Rachel Brewster, *Unpacking the State's Reputation*, 50 HARV. INT'L L.J. 231 (2009).

international law.<sup>323</sup> A single state's reputation will vary a great deal, depending on the states with whom its reputation is measured and the subject matter of interactions—such as trade, human rights, and the environment.<sup>324</sup> Similarly, a state's reputation for complying with the law will vary with the type of international legal norm and nations with whom it has interacted.<sup>325</sup> For example, the United States may have a strong reputation with Canada for complying with free trade agreements, but a somewhat weaker reputation for compliance with international human rights law.

Why would states value a reputation for compliance with international human rights law? This brings us back to the signaling effect. It is generally in a state's interest, all other things being equal, to have a reputation for complying with international law because it signals it has characteristics that make it an appealing cooperative partner. A reputation for cooperativeness reduces the transaction costs for cooperation.

It is also in a state's interest to signal cooperativeness in as cheap a way as possible. One of the ways to accomplish this is to influence the way norms are defined.<sup>326</sup> “A state that controls the signals that designate low-discount types also obtains a degree of influence over the actions of other states. . . . [and] has the ability to select signals it can send more cheaply and that help it to identify countries that resemble itself.”<sup>327</sup> A nation that most influences the content of international human rights norms spends the fewest resources—and suffers the fewest sovereignty costs—in signaling cooperativeness through compliance with the human rights norms it has defined.

Whether and how to signal cooperativeness through compliance with human rights norms presents a complex problem for the United States. As the sole superpower in a unipolar world and a provider of global public goods, the United States has the strength to get its way much of the time, whether or not it sends cooperative signals.<sup>328</sup> For good or ill, no country

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323. Guzman, *Compliance Theory*, *supra* note 116, at 1837.

324. *See id.*

325. *See id.*

326. This process of “norm definition” is, for our realist purposes here, distinct from “norm entrepreneurship,” the process described by nonrealists like Harold Koh by which norms are created and internalized by both nations and institutions. *See, e.g.*, Harold Hongju Koh, *A United States Human Rights Policy for the 21st Century*, 46 ST. LOUIS U. L.J. 293, 316 (2002).

327. Moore, *supra* note 317, at 892.

328. Andrew Moravcsik, *Why Is U.S. Human Rights Policy So Unilateralist?*, in MULTILATERALISM AND US FOREIGN POLICY 345, 347–49 (Stewart Patrick & Shepard Forman eds., 2002) (citing geopolitical power as one reason for the United States' paradoxical approach toward international human rights); Johan D. van der Vyver, *American Exceptionalism: Human Rights*,

can afford not to deal with the United States. In addition, because the United States has the greatest power to ignore external constraints, it bears the highest costs from complying with international human rights norms.<sup>329</sup> This is why the United States often seeks to go its own way when it comes to human rights agreements.

On the other hand, the United States must place a premium on cooperativeness because it is the provider of public goods. If other nations are cooperative, it can provide those public goods more cheaply. For example, it is much harder for the United States to operate military bases in nations where anti-American sentiment is higher.<sup>330</sup> As the largest consumer of public goods, the United States benefits the most. Moreover, there are limits on even America's ability to disregard human rights norms without eventually acquiring a reputation for valuing short-term over long-term interests, and jeopardizing its reputation for cooperativeness. For example, the abuses at Abu Ghraib prison in Iraq and the detention policies associated with Guantánamo harmed America's "brand" and diminished support for U.S. policy abroad.<sup>331</sup>

The United States, therefore, has three oft-conflicting incentives: it wants to shape the way in which cooperativeness is signaled through compliance with international law; it wants to signal cooperativeness itself to the extent that it can; and yet it wants to avoid the sovereignty costs from having to comply with human rights norms that are not part of its domestic law.

One significant benefit of ATS litigation is that it makes it cheaper for the United States to signal that it is an appealing cooperative partner. ATS litigation helps the United States signal cooperativeness more cheaply in three ways. First, because actual litigation involving international human rights law is rare, many of the issues will be litigated for the first time

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*International Criminal Justice, and National Self-Righteousness*, 50 EMORY L.J. 775, 776–90, 831 (2001) (detailing ways in which the United States has limited the applicability of international human rights law to itself even as it uses human rights to judge other nations).

329. See Abebe, *supra* note 4, at 21 ("The United States' political, economic, and military dominance of international politics; the unipolar structure of the international system; and the United States' capacity to comply with and enforce international law consistent with its interests suggests that the sovereignty cost of incorporating international law will be higher than the cost to any other State in the international system.").

330. See Ryan M. Scoville, *A Sociological Approach to the Negotiation of Military Base Agreements*, 14 U. MIAMI INT'L & COMP. L. REV. 1, 3–4 (2006).

331. See STEPHEN HOLMES, *THE MATADOR'S CAPE: AMERICA'S RECKLESS RESPONSE TO TERROR* 152–53 (2007); *Guantánamo's Shadow*, ATLANTIC MONTHLY, Oct. 2007, ¶ 6, available at <http://www.theatlantic.com/magazine/archive/2007/10/guantanamo-apos-s-shadow/6212/> (polling a bipartisan group of leading policy experts and finding 87% believed the U.S. detention system had hurt the fight against al Qaeda).

under the ATS. This gives the United States the opportunity to act as a “norm definer” with more influence over the development of that law.<sup>332</sup> Other nations or international law scholars may disagree with U.S. courts’ interpretations of CIL norms in ATS cases, but these decisions doubtless exert some influence because they establish which international law norms can be enforced in the courts of the world’s predominant power. Costs, in terms of signaling cooperativeness, increase for other nations who violate norms recognized in ATS litigation.<sup>333</sup> Indeed, the desire to signal cooperativeness may account for other nations’ surprisingly muted reactions to ATS litigation. The more closely international law corresponds to U.S. law, the lower the costs for the United States of compliance and signaling cooperativeness.<sup>334</sup>

Second, as defenders of ATS litigation ruefully observe, sovereign immunity will protect U.S. officials from liability in most circumstances.<sup>335</sup> To the extent foreign government officials are not similarly protected, this creates an unfair double standard, but also gives the U.S. government (if not its citizens) the advantage of defining norms while maintaining the flexibility of not adhering to those norms. In any event, U.S. citizens and corporations, including the private military contractors that do a great deal of national security work, are potentially subject to ATS liability.<sup>336</sup> This imposes some compliance costs on the U.S., but also signals cooperativeness. If U.S. entities are going to be held liable for violations of CIL, it serves U.S. interests for claims to be heard in U.S. courts, with law defined by U.S. judges, rather than in alternative international fora.

Third, ATS litigation expands the range of the signaling instrument. Just as the Washington administration relied on the federal courts to

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332. See Moore, *supra* note 317, at 889–90.

333. For reasons discussed above, ATS litigation itself imposes few, if any, sovereignty costs on the United States. See *supra* Part II.B.1.

334. Cf. Abebe, *supra* note 4, at 25 (concluding that sovereignty costs from the incorporation of customary international law are high because it does not reflect state interests but is developed by elite opinion and nondemocratic processes).

335. See Karen Lin, Note, *An Unintended Double Standard of Liability: The Effect of the Westfall Act on the Alien Tort Claims Act*, 108 COLUM. L. REV. 1718, 1720 (2008). It is disputed whether the universal jurisdiction associated with *Sosa*-threshold norms abrogates sovereign immunity for U.S. government officials. See Elizabeth A. Wilson, *Is Torture All in a Day's Work? Scope of Employment, the Absolute Immunity Doctrine, and Human Rights Litigation Against U.S. Federal Officials*, 6 RUTGERS J.L. & PUB. POL'Y 175, 244–45 (2008).

336. See *In re Xe Servs. Alien Tort Litig.*, 665 F. Supp. 2d 569, 592 (E.D. Va. 2009) (granting leave to amend ATS claims by Iraqi nationals against private security firm); Jenny S. Lam, *Accountability for Private Military Contractors Under the Alien Tort Statute*, 97 CALIF. L. REV. 1459, 1462 (2009).

resolve prize disputes between rival powers so that it could maintain a neutral posture, ATS litigation, by placing some power to interpret human rights norms with the judiciary, gives the executive branch the flexibility to send a different signal.<sup>337</sup> When other nations understand the U.S. separation of powers, the executive branch can credibly distance itself from ATS litigation. The U.S. government as a whole can therefore signal both general cooperativeness through respect for, and even enforcement of, international human rights law and more specific cooperativeness via attention to the interests of the target nation. This “multi-vocal” signaling enabled by the separation of powers expands the range of strategic options for signaling cooperativeness.<sup>338</sup>

A major benefit of ATS litigation lies in its potential for addressing certain global collective action problems. The protection of human rights is not always a global public good because even massive human rights violations in one nation, such as the genocide in Rwanda, need not directly harm the citizens of other nations.<sup>339</sup> However, to the extent that human rights violations cause consequences beyond borders—such as contributing to instability, spawning failed states, and increasing the flow of refugees—the threat of liability provides a global public good from which the United States benefits as a producer and consumer of global order. And there are other human rights violations that may pass the *Sosa* threshold and can truly be called interstate. Fighting piracy was a classic public good recognized as a paradigm in *Sosa*.<sup>340</sup> While modern-day pirates are likely to have few assets, many organizations and persons who fund terrorism do have significant resources that can be reached through ATS lawsuits, complementing law enforcement and military efforts.<sup>341</sup> Terrorism is analogous to piracy in the way that it disrupts commerce, imposing costs on all nations, but especially on the United States.<sup>342</sup>

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337. See generally Sloss, *supra* note 283.

338. See Knowles, *supra* note 10, at 145–51.

339. See SAMANTHA POWER, A PROBLEM FROM HELL: AMERICA AND THE AGE OF GENOCIDE 329–90 (2002) (showing how the United States, Western European governments, and the United Nations all chose not to intervene to prevent the Rwandan genocide in large part for this reason); McGinnis & Somin, *supra* note 13, at 1240–41.

340. 542 U.S. 692, 715 (2006).

341. See JIMMY GURULE, UNFUNDING TERROR 339–44 (2008); Beth Van Schaak, *Finding the Tort of Terrorism in International Law*, 28 REV. LITIG. 381, 385 (2008) (concluding that the tort of terrorism is “precise, robust, and uncontroversial” enough to meet the *Sosa* threshold, and that recognizing the norm as ATS-actionable would “bolster the United States’ counter-terrorism regime by enabling a broader array of victims of acts of terror to pursue the assets of individuals and groups that finance or otherwise support acts of terrorism”).

342. See generally THE ECONOMIC IMPACTS OF TERRORIST ATTACKS (Harry W. Richardson, Peter Gordon & James E. Moore II eds., 2006).



The second major benefit also relates to the cheapness of signaling, but looks to a future international system in which the United States is no longer the sole superpower.<sup>343</sup> ATS jurisprudence influences the definition of CIL that will be used by global legal institutions like the International Criminal Court.<sup>344</sup> These institutions are mechanisms through which the U.S. can exert an outsized influence in the international system after its relative power has declined.<sup>345</sup> These global legal institutions may have some “stickiness” in the sense that they provide a basis upon which nations can signal self-restraint. If the norms recognized by international institutions are closely aligned with U.S. law, emerging great powers—such as China, India, and Brazil—will pay higher costs than the United States to signal cooperativeness through compliance with CIL.

#### IV. WEIGHING THE COSTS AND BENEFITS OF ATS LITIGATION

In the absence of comprehensive empirical evidence, efforts to weigh the costs and benefits of ATS litigation may seem like a quixotic task. But when mistaken revisionist assumptions are stripped away, the benefits of ATS litigation can be seen more clearly. It then becomes possible to construct a realist model under which ATS litigation is welfare-positive for the United States. Empirical studies can prove or disprove that model.

In general, realism holds that nations do not act irrationally.<sup>346</sup> Because it has persisted for decades, ATS litigation deserves the presumption of rationality. At the very least, we should begin by assuming that ATS litigation does not negatively impact U.S. interests. From that neutral standpoint, the costs and benefits can best be weighed.

The optimal strategy for the United States should be to maximize the signaling effect of ATS litigation, while minimizing the risks of retaliation, or “blowback.”<sup>347</sup> Where the target nation is another great power, the blowback for the United States is potentially at its zenith because the target nation will have the ability to retaliate. At the same time, the impact on the target nation will be small because ATS litigation is unlikely to result in disinvestment or alter human rights practices.<sup>348</sup>

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343. See *supra* note 299 and accompanying text.

344. Cleveland, *supra* note 6, at 979.

345. See Ikenberry, *China*, *supra* note 212, at 13–14.

346. See *supra* notes 99–103 and accompanying text.

347. “Blowback” originates from the intelligence context and generally refers to the unintended harmful consequences of government policies. See generally CHALMERS JOHNSON, BLOWBACK: THE COSTS AND CONSEQUENCES OF AMERICAN EMPIRE (2d ed. 2004).

348. See *supra* notes 239–42 and accompanying text.

China's market is so large that MNCs would be willing to pay some additional costs to do business there, and China, as a powerful state, faces less external pressure to comply with human rights norms.<sup>349</sup> Conversely, where the target nation is not powerful, ATS lawsuits have a greater impact on the target country but less potential to cause blowback for the United States.<sup>350</sup> ATS lawsuits are more likely to generate publicity and rally substantial support in smaller countries.<sup>351</sup> And their governments are less able to retaliate against the United States.

For the U.S. government *as a whole*, the optimal strategy is to manage ATS litigation so that it minimizes blowback while maximizing impact. Contrary to the warnings of revisionists, the history of ATS litigation thus far demonstrates that these are precisely the priorities that courts and even plaintiffs have followed, consciously or not, in ATS litigation. The lawsuits with the greatest potential for blowback involved events in China, which resulted in one declaratory judgment and a settlement by an MNC.<sup>352</sup> Yet the China litigation has had no discernible effect on Sino-American relations, nor has it caused U.S. companies to disinvest in China or discouraged Chinese companies from investing in the United States. The vast majority of ATS lawsuits have involved events and government officials in less powerful countries.<sup>353</sup> Those ending in judgments for the plaintiffs or settlements have almost all involved nations in Latin America and Africa.<sup>354</sup>

Nor is ATS litigation likely to impose significant sovereignty costs. There is very little risk that a court would enforce a norm not already part of U.S. domestic law.<sup>355</sup> The oft-cited examples of international law conflicting with U.S. law include norms prohibiting the death penalty and religious blasphemy.<sup>356</sup> But it is very hard to see how these norms could be regarded as universal, specific, and obligatory—and ATS actionable—when they are controversial in the United States.<sup>357</sup>

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349. See MICHAEL KOEBELE, CORPORATE RESPONSIBILITY UNDER THE ALIEN TORT STATUTE: ENFORCEMENT OF INTERNATIONAL LAW THROUGH US TORTS LAW 10 (2009) ("Given the degree and pace of globalization and the necessity for global players to be present in all continents, it seems unlikely that foreign direct investment will decrease as a result of . . . ATS [litigation].").

350. See *supra* notes 266–71 and accompanying text.

351. See AKOH, *supra* note 6, at 155–202 (discussing the impact of ATS litigation in African nations).

352. See *supra* notes 215–37 and accompanying text.

353. See AKOH, *supra* note 6, at 150–55.

354. See *id.*

355. See *supra* notes 193–98 and accompanying text.

356. See McGinnis & Somin, *supra* note 13, at 1240.

357. See *supra* note 196 and accompanying text.

In general, the sovereignty and foreign policy costs from ATS litigation are outweighed by its positive signaling effects. These effects can be seen, not only in the generally positive response it has received among the populations of target countries, but in the muted response by U.S. allies and other governments.<sup>358</sup> With a handful of notable exceptions, foreign governments have rarely voiced their opposition to the lawsuits in public.<sup>359</sup> In fact, the most consistent objections to ATS litigation have come from the executive branch of the U.S. government.<sup>360</sup> It is logical to assume from this that other nations have calculated that the costs of ATS litigation are outweighed by its benefits. Like the United States, other nations benefit from signaling cooperativeness through compliance with human rights norms. ATS litigation actually enables cheaper signaling for them as well because the target nations do not have to pay the often high costs of bringing human rights violators to justice. Where offenders are former government officials, prosecutions or civil liability can be very difficult for political reasons. And MNC defendants may possess a great deal of economic leverage over target countries.

Because there is a high bar for success in ATS litigation, there is little chance that it can become an all-purpose tool for addressing global problems. Although its costs are quite small in terms of diplomatic friction and blowback, its strategic benefits through signaling are also likely to remain small. Despite its popularity with international and U.S. foreign affairs law scholars, ATS litigation plays a minor role in the vast array of relationships the United States has with the rest of the world. It is but one of many signals—positive and negative—the United States sends regarding its willingness to comply with international law.

This does not mean, however, that ATS litigation is not important. While its global impact may be modest, its effect on those involved can be quite profound.<sup>361</sup> For some victims of human rights abuses, it offers the only means of redress or, at the very least, the prospect of serious publicity about the perpetrators' crimes. Were its costs and benefits evenly balanced, ATS litigation would deserve to continue for this reason alone.

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358. See Cleveland, *supra* note 6, at 982–83.

359. See *id.*

360. See *supra* notes 211–13 and accompanying text.

361. See DAVIS, *supra* note 1, at 13–14; see also *supra* notes 263–70 and accompanying text.

## CONCLUSION

Mysterious and unique, the ATS has generated a rich scholarly literature and a fierce debate—in- and outside academia—since its 1980 revival.<sup>362</sup> Where does it come from, and what was its purpose? Text, structure, and history have been deeply explored, yielding little, if any, consensus.<sup>363</sup> But lurking in the background are more important questions: what purpose should ATS litigation serve, and what effect does it have for the United States in the twenty-first century? This parallel, pragmatic debate has never been fully engaged because the ATS's critics and defenders cannot agree on the fundamentals of geopolitics.<sup>364</sup> Lacking common ground, the two sides talk past one another, their diverse assumptions apparently dictating their conclusions about the ATS's costs and benefits.

But there is a way beyond this impasse. Critics and defenders alike should consider whether their conclusions are justified, even under alternative paradigms of international relations. For example, if liberalist insights that democratic nations cooperate more easily are correct, is the ATS nonetheless a counterproductive means of achieving cooperation regarding human rights because it interferes with efforts by international legal institutions to develop human rights law? Such questions should be explored.

Likewise, the ATS's critics ought to consider whether a realist assessment of costs and benefits actually supports ATS litigation in its current form. The ATS functions as a much more precise and controllable foreign policy instrument than its critics give it credit for. ATS litigation not only furthers the stated U.S. foreign policy goal of promoting human rights worldwide, but it also advances the United States' core security and economic interests. As the leading power and global provider of public goods, the United States benefits when it cheaply signals, via the ATS, support for human rights law. At the same time, the articulation and development of certain core CIL norms by U.S. courts will give the United States a crucial advantage, even in a multipolar world.

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362. See *supra* notes 1–3 and accompanying text.

363. See *supra* note 1.

364. See *supra* Part I.