

## RAPE UNDER THE ALIEN TORT STATUTE IN THE POST-*SOSA V. ALVAREZ-MACHAIN* ERA

### INTRODUCTION

A woman is raped in her hometown in Africa. She suffers severe physical, emotional, and mental harm from the rape. Later, she is temporarily in the United States, as is her rapist. She learns of a federal statute, the Alien Tort Statute,<sup>1</sup> which may provide a means for her to pursue her rapist in U.S. federal courts. She discovers that other aliens have used the same statute to pursue individuals who have perpetrated international crimes against them. Can she seek civil redress for the rape committed against her under this statute?

Since the early 1980s, aliens have used the Alien Tort Statute (“ATS”) to pursue litigation in U.S. federal courts against individuals who committed human rights atrocities against them.<sup>2</sup> The ATS allows aliens to bring a claim for a tort committed in violation of the law of nations or a U.S. treaty before a federal district court.<sup>3</sup> Judges, practitioners, and academics have long debated the scope and intent of the statute: what causes of action could be brought under the ATS? Were these human rights claims proper under the statute?

In June 2004, the Supreme Court finally addressed the ATS in *Sosa v. Alvarez-Machain*.<sup>4</sup> In *Sosa*, the Court held that the ATS is a jurisdictional statute creating no new causes of action.<sup>5</sup> Instead, the ATS permits district courts to recognize a small number of existing international norms as within federal common law without further statutory authority.<sup>6</sup>

The Court stated that this “jurisdictional grant is best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time [the statute was originally enacted].”<sup>7</sup> The Court failed to define explicitly what criteria courts should

<sup>1</sup> 28 U.S.C. § 1350 (2000).

<sup>2</sup> See discussion *infra* Part I.B.

<sup>3</sup> 28 U.S.C. § 1350.

<sup>4</sup> 542 U.S. 692 (2004).

<sup>5</sup> *Id.* at 723-24. The jurisdictional grant is similar to that of 28 U.S.C. § 1332(a), which provides that district courts shall have original jurisdiction for matters of controversy exceeding a certain dollar amount and between citizens of different states. 28 U.S.C. § 1332(a) (2000). Section 1332 opens the court house door to these parties, but does not proscribe the causes of action that can be brought before a court. *Id.*

<sup>6</sup> *Sosa*, 542 U.S. at 729.

<sup>7</sup> *Id.* at 724. The First Congress enacted the ATS in 1789. *Id.* at 712.

use to determine whether a cause of action is subject to jurisdiction under the ATS. Instead, the Court concluded that “federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance” than the three common law offenses associated with the ATS in the 1800s.<sup>8</sup>

The Court then cited a number of its past cases and previous federal cases dealing specifically with the ATS to provide some guidance as to what type of claim would survive its ruling in *Sosa*. For example, the Court revisited federal court findings regarding the ATS which suggested that: (1) the ATS is limited to a handful of heinous acts; (2) the perpetrators of actionable claims are considered *hostis humani generis*, an enemy of all mankind; and (3) actionable violations must be of specific, universal, and obligatory norms.<sup>9</sup> Although according to *Sosa* the ATS lives, it is unclear what viable causes of action, if any, an alien may bring before a federal court under the jurisdiction conferred by the ATS.

Leading up to *Sosa*, women’s rights organizations were concerned that if the Court found the ATS purely jurisdictional, then those who perpetrate international crimes against women would go free.<sup>10</sup> In light of the Court’s conclusion that the ATS *is* in fact purely jurisdictional, does the holding prevent victims of rape and sexual violence from seeking redress before federal courts under the ATS?

Though rape may be a domestic crime in most countries, the act of rape alone is not considered an international crime and therefore does not violate international law. Were the women’s rights organizations justified in their concern regarding *Sosa*? May a victim of rape or sexual violence pursue her rapist through a civil suit under the ATS?

This Note examines whether certain acts of rape against women rise to the threshold of a violation of international law such that federal courts may exert jurisdiction over these claims under the ATS. Part I.A provides a background of the ATS. Part I.B addresses the application of the law of nations to ATS actions pre-*Sosa*. Part I.C reviews the *Sosa* case and the ATS. Part I.D examines when rape is a violation of international law. Part II.A analyzes whether, under the *Sosa* framework, rape within the context

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<sup>8</sup> *Id.* at 731-32. See *infra* text accompanying notes 16-17, for a discussion of Blackstone and the three common law violations of the law of nations he set forth. The Court stated:

Whatever the ultimate criteria for accepting a cause of action subject to jurisdiction under § 1350, we are persuaded that federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted.

*Sosa*, 542 U.S. at 732.

<sup>9</sup> See *id.* at 730-34.

<sup>10</sup> See, e.g., Brief as Amici Curiae of Women’s Human Rights Organization in Support of Respondent at \*3, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (No. 03-339) 2004 WL 419423.

of certain crimes constitutes a viable cause of action under the ATS. Part II.B addresses potential counter-arguments and concerns regarding whether *any* causes of action can be recognized under the ATS. This Note concludes that, under the current state of international law, an act of rape can constitute a violation of international law *when it occurs as part of another crime* (e.g., torture, genocide, or war crimes). Thus, under the ATS, the doors to a federal court are open only to those alien rape victims who can demonstrate that their rape constitutes a violation of international law because of the circumstances in which it took place.

## I. BACKGROUND LAW

### A. *The Alien Tort Statute*

The First Congress enacted the Alien Tort Statute as Section 9 of the Judiciary Act of 1789.<sup>11</sup> The current version of the ATS has changed very little from the original and reads: “the district courts shall have original jurisdiction of any civil action for a tort only, committed in violation of the law of nations or a treaty of the United States.”<sup>12</sup> Much debate surrounds the intent of the First Congress with respect to the statute’s scope. Very little legislative history concerning the ATS exists making it difficult to determine Congress’ intent.<sup>13</sup>

The Constitution only mentions the law of nations once: in Article I, Section 8, Clause 10, which provides Congress with the power to “define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations.”<sup>14</sup> In 1769, the legal scholar William Blackstone stated that the law of nations is a “system of rules, deducible by natural reason, and established by universal consent among the civilized inhabitants of the world.”<sup>15</sup> Blackstone listed only three principal offenses against the law of nations existing at that time: violation of safe conduct; infringement of the rights of ambassadors; and piracy.<sup>16</sup> Concerning piracy, Black-

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<sup>11</sup> William R. Casto, *The Federal Courts’ Protective Jurisdiction over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467 (1986).

<sup>12</sup> 28 U.S.C. § 1350 (2000).

<sup>13</sup> See *Sosa*, 542 U.S. at 718.

<sup>14</sup> U.S. CONST. art. I, § 8, cl. 10.

<sup>15</sup> WILLIAM BLACKSTONE, 4 COMMENTARIES \*66. Blackstone noted that the law of nations was adopted in its entirety by English common law and was part of the law of the land. Moreover, he noted that the law of nations originated from history and usage. *Id.* at \*67.

<sup>16</sup> *Id.* at \*68.

stone noted the offense went against the universal law of society and that a pirate was *hostis humani generis*, or enemy of the human race.<sup>17</sup>

B. *Federal Courts and Their Application of the Law of Nations Pre-Sosa*

For almost 200 years, the ATS lay relatively untouched with only twenty-one cases invoking ATS jurisdiction before 1980; of those twenty-one, only two cases sustained jurisdiction under the ATS.<sup>18</sup> In 1980, *Filar-tiga v. Peña-Irala*<sup>19</sup> revived the ATS. Dr. Joel Filartiga, a Paraguayan citizen, successfully used the ATS to pursue the police official allegedly responsible for torturing and killing his son.<sup>20</sup> The district court dismissed the complaint for lack of subject matter jurisdiction. Though the district court recognized the strength of the argument that official torture violates customary international law, it narrowly construed the “law of nations” as excluding law that governs a *state’s* treatment of its own citizens.<sup>21</sup> The U.S. Court of Appeals for the Second Circuit reversed, finding that “an act of torture committed by a state official against [an individual] held in detention violates established norms of the international law of human rights, and hence the law of nations.”<sup>22</sup>

Cases following *Filartiga* focused on several fundamental findings proposed by the *Filartiga* court. For example, the *Filartiga* court discussed the appropriate sources of international law that courts should use in determining whether an act violates international law.<sup>23</sup> The *Filartiga* court looked to two earlier Supreme Court cases for guidance: *United States v. Smith*<sup>24</sup> and *The Paquete Habana*.<sup>25</sup> In those cases, the Supreme Court determined that the law of nations may be ascertained by examining the customs and usages of civilized nations, the work of expert jurists and scholars, and judicial decisions recognizing and enforcing international law.<sup>26</sup>

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<sup>17</sup> *Id.* at \*71. Blackstone further commented that because a pirate effectively declares “war” on mankind, mankind must declare “war” against him. *Id.*

<sup>18</sup> John Haberstroh, Comment, *The Alien Tort Claims Act & Doe v. Unocal: A Paquete Habana Approach to the Rescue*, 32 DENV. J. INT’L L. & POL’Y 231, 236 (2004) (citing Kenneth C. Randall, *Federal Jurisdiction Over International Law Claims: Inquiries into the Alien Tort Statute*, 18 N.Y.U. J. INT’L L. & POL. 1, 5 (1985)).

<sup>19</sup> 630 F.2d 876 (2d Cir. 1980).

<sup>20</sup> *Id.* at 878-79.

<sup>21</sup> *Id.* at 880.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> 18 U.S. (5 Wheat.) 153 (1820).

<sup>25</sup> 175 U.S. 677 (1900).

<sup>26</sup> *See Smith*, 18 U.S. (5 Wheat.) at 160-61; *The Paquete Habana*, 175 U.S. at 700.

The *Filartiga* court also looked to Article 38 of the Statute of the International Court of Justice which lists the sources of international law as: (1) “international conventions;” (2) “international custom, as evidence of general practice accepted as law;” (3) “general principles of law recognized by civilized nations;” and (4) “judicial decisions and teachings of the most highly qualified publicists of various nations as a subsidiary means for determining the rules of law.”<sup>27</sup>

Because the customs and usages of states can attain the status of customary international law,<sup>28</sup> which is considered binding on all states, the *Filartiga* court found that customary international law must command the general assent of civilized nations before a court should recognize it as such.<sup>29</sup> Otherwise, the courts of one nation might try to impose idiosyncratic legal rules upon others in the name of applying international law.<sup>30</sup> The *Filartiga* court then concluded that courts must interpret international law not as it existed in 1789 when Congress enacted the ATS, but as it exists now.<sup>31</sup>

In reaching its specific conclusion concerning the status of torture as a crime violating customary international law, the *Filartiga* court looked to the United Nations (“UN”) Charter, two UN General Assembly Resolutions, the Universal Declaration of Human Rights, the Declaration on the Protection of All Persons from Being Subjected to Torture, several international conventions, the constitutions of over fifty-five nations, and reports produced by the U.S. Department of State.<sup>32</sup> In sum, upon examining the customs and usages of nations, judicial opinions, and the works of jurists,

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<sup>27</sup> Statute of the International Court of Justice, June 26, 1945, art. 38, 59 Stat. 1055, 1060, 3 Bevans 1153, 1187, available at [http://www.icj-cij.org/icjwww/basicdocuments/basictext/basicstatute.htm#Article\\_38](http://www.icj-cij.org/icjwww/basicdocuments/basictext/basicstatute.htm#Article_38).

<sup>28</sup> Customary international law norms arise from the “general and consistent practice of states followed by them from a sense of legal obligation.” RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102 (1987) [hereinafter RESTATEMENT]. Customary international norms are considered binding on all states, unless a state has actively dissented from that practice as the practice developed (i.e., states that come into being after a rule matures into customary international law are bound by that rule). See International Law Association, *Statement of Principles Applicable to the Formation of General Customary International Law* (2000), reprinted in BARRY E. CARTER ET AL., INTERNATIONAL LAW 123-24 (4th ed. 2003).

<sup>29</sup> *Filartiga v. Peña-Irala*, 630 F.2d 876, 881 (2d Cir. 1980). “It is only where the nations of the world have demonstrated that the wrong is of mutual, and not merely several, concern, by means of express international accords, that a wrong generally recognized becomes an international law violation within the meaning of the [ATS].” *Id.* at 888.

<sup>30</sup> *Id.* at 881.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 881-84. International conventions prohibiting torture include: American Convention on Human Rights; International Covenant on Civil and Political Rights; and European Convention for the Protection of Human Rights and Fundamental Freedoms. *Id.* at 883-84 (citations omitted).

the *Filartiga* court concluded that the law of nations prohibits official torture.<sup>33</sup>

The *Filartiga* court also determined that an Article III constitutional basis for federal jurisdiction existed: the law of nations, which has always been a part of federal common law.<sup>34</sup> The court construed the ATS not as granting new rights to aliens, but rather as opening the federal courts to rights already recognized by international law.<sup>35</sup> Finally, the court found that the torturer was, like the pirate and slave trader of earlier times, *hostis humani generis*.<sup>36</sup>

Since *Filartiga*, numerous suits have been brought under the ATS.<sup>37</sup> Federal courts' responses to these suits have been far from consistent. Most courts have continued to follow the *Filartiga* methodology.<sup>38</sup> Others, by contrast, have sought more restrictive standards by which to measure ATS claims. For example, several courts have found that the ATS specifically requires a *jus cogens*<sup>39</sup> violation of international law—*jus cogens* are international norms from which no state can derogate.<sup>40</sup>

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<sup>33</sup> *Id.* at 884.

<sup>34</sup> *Id.* at 885.

<sup>35</sup> *Id.* at 887.

<sup>36</sup> *Id.* at 890.

<sup>37</sup> One author notes that approximately 100 cases have raised ATS claims since *Filartiga*. See Beth Stephens, *Upsetting Checks and Balances: The Bush Administration's Efforts to Limit Human Rights Litigation*, 17 HARV. HUM. RTS. J. 169, 177 (2004).

<sup>38</sup> See, e.g., *Flores v. S. Peru Copper Corp.*, 253 F. Supp. 2d 510, 513-14 (S.D.N.Y. 2002); see also Joshua Ratner, Comment, *Back to the Future: Why a Return to the Approach of the Filartiga Court is Essential to Preserve the Legitimacy and Potential of the Alien Tort Claims Act*, 35 COLUM. J.L. & SOC. PROBS. 83, 97 nn.68-69 (2002).

<sup>39</sup> *Jus cogens* norms are considered binding on states, whether they agree to them or not. CARTER ET AL., *supra* note 28, at 107-08 (citations omitted). *Jus cogens* norms differ from customary international law in that a state need not follow customary international law if it actively resisted the practice as it developed. *Id.* at 124 (citations omitted). *Jus cogens* norms, on the other hand, do not permit any derogation by any state. *Id.* at 107-08 (citations omitted). The RESTATEMENT considers the following to be *jus cogens* violations of international law: (1) genocide; (2) slavery or slave trade; (3) murder or causing the disappearance of individuals; (4) torture or other cruel, inhuman treatment or punishment; (5) prolonged arbitrary detention; and (6) systematic racial discrimination. See RESTATEMENT, *supra* note 28, § 702 cmt. n. One author notes that no other codifier of international law has come close to the expansive approach set forth in the RESTATEMENT. See Ratner, *supra* note 38, at 108. It is important to note, however, that though the concept of *jus cogens* may be accepted, there is little agreement regarding its content. See RESTATEMENT, *supra* note 28, § 102 rep.'s n.6 (noting that although the concept of *jus cogens* is now accepted, its content is not agreed; there does appear to be general agreement that the principles of the UN Charter prohibiting the use of force are *jus cogens*). Ratner notes that international law scholars have "nearly unanimously professed their inability to define *jus cogens* norms beyond the general prohibition of the use of force." Ratner, *supra* note 38, at 106. Moreover, the first decision in which a U.S. court identified and defined the concept of *jus cogens* did not occur until 1988. *Id.* at 107

### C. *Sosa v. Alvarez-Machain and the Alien Tort Statute*

*Sosa v. Alvarez-Machain*<sup>41</sup> is the first case in which the Supreme Court specifically addressed the ATS. In *Sosa*, the Court held that the ATS is strictly jurisdictional such that it gives federal courts the power to entertain cases concerned only with certain subjects.<sup>42</sup> The Court concluded that when Congress passed the statute, the ATS enabled federal courts to hear claims in a very limited category defined by the law of nations and recognized at common law (and in violation of a treaty to which the United States is a party).<sup>43</sup>

#### 1. Factual and Procedural Background

Following the 1985 murder and torture of a Drug Enforcement Administration (“DEA”) agent in Mexico, the DEA arranged for Mexican nationals to seize Humberto Alvarez-Machain (“Alvarez”), a Mexican physician who the DEA believed prolonged the agent’s life to extend the torture, and bring him to the United States for trial.<sup>44</sup> Upon his acquittal and return to Mexico, Alvarez initiated a civil suit under the ATS asserting a violation of the law of nations by Jose Francisco Sosa (“Sosa”), a Mexican citizen who participated in the abduction of Alvarez, other Mexican citizens connected to the abduction, and several DEA agents.<sup>45</sup> This Note concerns only the portion of the suit in which Alvarez sought damages from Sosa under the ATS. The U.S. Court of Appeals for the Ninth Circuit, sitting en banc, held that Alvarez did establish the existence of a violation of the law of nations—arbitrary arrest and detention—and that Alvarez therefore had an actionable claim under the ATS against Sosa.<sup>46</sup>

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(referencing *Comm. of United States Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929 (D.C. Cir. 1988)).

<sup>40</sup> See Ratner, *supra* note 38, at 98-99 (citing *Xuncax v. Gramajo*, 886 F. Supp. 162, 184 (D. Mass. 1995), *Beanal v. Freeport-McMoRan, Inc.*, 969 F. Supp. 362, 370 (E.D. La. 1997), *aff’d*, 197 F.3d 161 (5th Cir. 1999)).

<sup>41</sup> 542 U.S. 692 (2004).

<sup>42</sup> *Id.* at 713-14.

<sup>43</sup> *Id.* at 712.

<sup>44</sup> *Id.* at 697-98.

<sup>45</sup> *Id.* at 698.

<sup>46</sup> See *Alvarez-Machain v. United States*, 331 F.3d 604, 631 (9th Cir. 2003), *rev’d sub nom. Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

## 2. Supreme Court Proceedings

On appeal before the Supreme Court, Alvarez asserted that the ATS creates not only jurisdiction, but also permits the creation of a new cause of action for torts in violation of international law.<sup>47</sup> The Court dismissed this argument, instead noting that the ATS gives federal courts “cognizance” of certain causes of action—not the ability to make new ones.<sup>48</sup> *Sosa*, on the other hand, contended that no claims could be brought under the ATS without Congress expressly authorizing the claims through another statute or by amending the ATS.<sup>49</sup> The Court dismissed this argument as well.<sup>50</sup> Rather, the Court seemed to split the difference between the two positions, finding that, “although the ATS is a jurisdictional statute creating no new causes of action, the reasonable inference from the historical materials is that the statute was intended to have practical effect the moment it became law.”<sup>51</sup> Moreover, the Court declared, “[t]he jurisdictional grant is best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time.”<sup>52</sup>

The Court looked to the history of the ATS to determine what Congress intended when it created the ATS.<sup>53</sup> No record exists of congressional discussion concerning the need to draft legislation authorizing private remedies nor is there record of any discussion concerning what private actions might be actionable under the ATS.<sup>54</sup>

The Court noted that while there was no basis to suspect the First Congress had any examples of private actions in mind beyond the three offenses put forth by Blackstone (violation of safe conduct, infringement of the rights of ambassadors, and piracy), no development seemed to preclude federal courts from recognizing a claim under the law of nations.<sup>55</sup> In fact, the Court specifically stated that “no development in the two centuries from the enactment of § 1350 . . . has categorically precluded federal courts from

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<sup>47</sup> *Sosa*, 542 U.S. at 713. Several circuits and many academics advocated this position. See generally Jordan J. Paust, *The History, Nature, and Reach of the Alien Tort Claims Act*, 16 FLA. J. INT'L L. 249 (2004) (citations omitted).

<sup>48</sup> *Sosa*, 542 U.S. at 713.

<sup>49</sup> *Id.* at 714.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 724.

<sup>52</sup> *Id.* “International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination.” *Id.* at 730 (citing *The Paquete Habana*, 175 U.S. 677 (1900)).

<sup>53</sup> *Id.* at 718.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 724.

recognizing a claim under the law of nations as an element of common law.”<sup>56</sup> The Court, however, cautioned against judicial activism under the ATS in light of several factors: (1) the common law is now understood to be made by judges, not discovered from natural law; (2) judicial recognition of the limitations on federal judicial power to create federal common law; (3) the past practice of seeking legislative guidance before exercising innovative authority over substantive law; (4) the creation of a private right of action is better left to the legislature in most cases; (5) the potential impact that recognizing ATS claims could have on foreign relations—areas best managed by the Executive and Legislative branches; and finally (6) federal courts have no congressional mandate to seek out and define “new and debatable” violations of the law of nations.<sup>57</sup> The Court concluded that the door to ATS claims is “still ajar,” though “subject to vigilant door keeping,” for a narrow class of international norms.<sup>58</sup>

### 3. Supreme Court’s Criteria for Establishing a Cause of Action Under the ATS

The *Sosa* Court determined that

courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms [the Court has] recognized [(i.e., violation of safe conduct, infringement of the rights of ambassadors, and piracy)].<sup>59</sup>

The Court concluded that the First Congress assumed federal courts could properly identify some international norms enforceable under the jurisdiction provided by the ATS.<sup>60</sup>

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<sup>56</sup> *Id.* There has been great debate as to whether customary international law is part of federal common law in general and especially in light of *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 79 (1938), which held that federal courts have no authority to create general common law. For more material concerning the debate, see generally Jeffrey M. Blum & Ralph G. Steinhardt, *Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act after Filartiga v. Peña-Irala*, 22 HARV. INT’L L.J. 53 (1981); T. Alexander Aleinikoff, *International Law, Sovereignty, and American Constitutionalism: Reflections on the Customary International Law Debate*, 98 AM. J. INT’L L. 91 (2004); Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997). See also RESTATEMENT, *supra* note 28, § 111, rep.’s n.3 (“[T]he modern view is that customary international law in the United States is federal law and its determination by the federal courts is binding on the State courts.”).

<sup>57</sup> *Sosa*, 542 U.S. at 725-28.

<sup>58</sup> *Id.* at 729.

<sup>59</sup> *Id.* at 725.

<sup>60</sup> *Id.* at 730.

Beyond the requirement that federal courts not recognize claims for violations of international law unless they meet the historical paradigms existing at the time the ATS was created, the Court did not articulate specific criteria or standards by which courts should evaluate claims under the ATS.<sup>61</sup> Nor did it attempt to create a running list of international norms which satisfy the ATS. Rather, the Court reviewed a past Supreme Court case and several federal cases to provide some factors that courts should consider in determining whether the international norm at issue has gained worldwide acceptance and is sufficiently specific and definite in its content to sustain ATS jurisdiction.<sup>62</sup>

The Court first cited *United States v. Smith*<sup>63</sup> as illustrative of the specificity with which the international community defined a particular violation of the law of nations, the crime of piracy. The *Smith* Court concluded that the definition for piracy was “certain, consistent, and unanimous.”<sup>64</sup> Moreover, the *Smith* Court found the law of nations defined both the offense of piracy *and* its punishment because: (1) there was a settled and specified definition of the crime; (2) the offense was seen as universal in application and hence, any tribunal could try an offender; and (3) there was consensus as to the method of punishment.<sup>65</sup>

The Court also turned to findings by other federal courts regarding the ATS, specifically *Filartiga, Tel-Oren v. Libyan Arab Republic*,<sup>66</sup> and *In re Estate of Marcos Human Rights Litigation*.<sup>67</sup> Regarding *Filartiga*, the Court noted that the Second Circuit likened the torturer to the pirate and slave trader, or *hostis humani generis*.<sup>68</sup> The Court cited Judge Edwards’ concurring opinion in *Tel-Oren*, in which he found that the ATS can reach only a “handful of heinous actions—each of which violates definable, universal, and obligatory norms.”<sup>69</sup> The Court also noted the standard set forth in *In re*

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<sup>61</sup> *Id.* at 732

Whatever the ultimate criteria for accepting a cause of action subject to jurisdiction under [the ATS], we are persuaded that federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when [the ATS] was enacted.

*Id.*

<sup>62</sup> *See id.* at 732-33.

<sup>63</sup> 18 U.S. 153, 160-62 (1820).

<sup>64</sup> *Id.* at 156. The Court provided an exhaustive list of jurists, cases, and statements from which it determined what constitutes piracy under the law of nations. *Id.* at 163.

<sup>65</sup> *Id.* at 156-62.

<sup>66</sup> 726 F.2d 774 (D.C. Cir. 1984).

<sup>67</sup> 25 F.3d 1467 (9th Cir. 1994).

<sup>68</sup> *Sosa*, 542 U.S. at 732.

<sup>69</sup> *Id.* (citing *Tel-Oren*, 726 F.2d at 781 (Edwards, J., concurring)).

*Estate of Marcos* by the Ninth Circuit: “actionable violations of international law must be of a norm that is specific, universal, and obligatory.”<sup>70</sup>

The Court cautioned that the inquiry does not stop with whether the norm is sufficiently definite in both its content and acceptance to support a cause of action under the ATS. Judges must also consider the practical consequences of making a particular cause of action available to litigants in federal court.<sup>71</sup> For example, if international law requires a litigant to exhaust all legal remedies available to him in his domestic legal system before pursuing alternatives and he fails to do so, then his failure may provide a reason to deny the claim under the ATS even if the norm at issue has a specific definition.<sup>72</sup>

The Court then examined Alvarez’s detention claim in light of the foregoing considerations. Alvarez argued that prohibition of arbitrary arrest<sup>73</sup> had attained the status of binding customary international law. The Court, however, concluded that Alvarez provided little authority that *his* reading of arbitrary arrest had in fact reached the status of binding customary international law.<sup>74</sup> Beyond the definition Alvarez proposed, the Court considered what fallout a ruling supporting Alvarez would have:

[it] would support a cause of action in federal court for any arrest, anywhere in the world, unauthorized by the law of the jurisdiction in which it took place, and would create a cause of action for any seizure of an alien in violation of the Fourth Amendment, supplanting [a federal statute and Supreme Court precedent].<sup>75</sup>

Therefore, beyond failing to have a definite and specific definition of the crime accepted worldwide, recognizing Alvarez’s claim could cause significant practical problems. The Court therefore concluded that Alvarez’s claim did not fall within the jurisdiction of the ATS.

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<sup>70</sup> *Id.* (citing *In re Estate of Marcos*, 25 F.3d at 1475).

<sup>71</sup> *Id.* at 732-33.

<sup>72</sup> *See id.* at 733 n.21. The Court also noted that another possible limitation to permitting an ATS claim is case-specific deference to the political branches. *Id.*

<sup>73</sup> *Id.* at 735. Alvarez defined arbitrary detention as “officially sanctioned action exceeding positive authorization to detain under the domestic law of some government, regardless of the circumstances.” *Id.* at 736.

<sup>74</sup> *Id.* at 733 n.21.

<sup>75</sup> *Id.* at 736-37 (finding that recognizing Alvarez’s claim here would supplant 42 U.S.C. § 1983 and *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971)).

4. Concurring Opinion by Justice Scalia, Joined by Chief Justice Rehnquist and Justice Thomas

All Justices agreed that the ATS is jurisdictional only. Moreover, they appeared to agree that when the ATS was enacted, federal courts could enforce a small number of international norms at common law without further statutory authority.<sup>76</sup> The understanding of two developments that occurred after the ATS came into being distinguished the majority from the concurring Justices led by Justice Scalia: (1) the recognition that common law is made by judges, not discovered, and (2) under *Erie Railroad Co. v. Tompkins*,<sup>77</sup> federal courts have no authority to create general common law.<sup>78</sup> While the majority found these two developments *limit* federal courts' ability to recognize judicially enforceable international norms,<sup>79</sup> Justice Scalia wrote that these developments *preclude* federal courts from recognizing judicially enforceable international norms unless Congress authorizes them to do so.<sup>80</sup> He concluded that the federal judiciary retains no discretionary power to create causes of action for the enforcement of international law-based norms.<sup>81</sup> Rather, Justice Scalia found that "[b]ecause post-*Erie* federal common law is made, not discovered, federal courts must possess some federal-common-law-making authority before undertaking to craft it."<sup>82</sup> He argued that courts do not possess "federal-common-law-making powers with regard to the creation of private federal causes of action for violations of customary international law."<sup>83</sup>

Justice Scalia also noted that the very standard the Ninth Circuit applied to Alvarez's claim (by which it found that Alvarez asserted an actionable claim under the ATS) was the same standard the Court endorsed here: the Ninth Circuit held that the norm against arbitrary arrest and detention asserted by Alvarez was "specific, universal, and obligatory."<sup>84</sup> Justice Scalia opined that endorsing the standard, which brought the Court the very case at issue, did not seem to be a wise recipe for judicial restraint.<sup>85</sup>

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<sup>76</sup> *Id.* at 729.

<sup>77</sup> 304 U.S. 64 (1938).

<sup>78</sup> *Sosa*, 542 U.S. at 729.

<sup>79</sup> *Id.* at 729-30.

<sup>80</sup> *Id.* at 747-48 (Scalia, J., concurring).

<sup>81</sup> *Id.* at 747.

<sup>82</sup> *Id.* at 741.

<sup>83</sup> *Id.* at 747.

<sup>84</sup> *Id.* at 747-48 (Scalia, J., concurring) (citing *In re Estate of Marcos*, 25 F.3d at 1475).

<sup>85</sup> *Id.* at 748.

### 5. Concurring Opinion by Justice Breyer

Justice Breyer agreed with the majority's position regarding the general framework it set forth.<sup>86</sup> Justice Breyer, however, would add one additional consideration: "whether the exercise of jurisdiction under the ATS is consistent with those notions of comity<sup>87</sup> that lead each nation to respect the sovereign rights of other nations by limiting the reach of its laws and their enforcement."<sup>88</sup> Comity concerns may arise when foreign persons injured abroad bring ATS claims, thereby asking U.S. federal courts to recognize a claim alleging that some form of foreign conduct violates international law.<sup>89</sup>

Justice Breyer further noted that in the 18th century, nations agreed not only on the substantive content of the crime of piracy but also to procedure—any nation that found a pirate could prosecute him.<sup>90</sup> He observed that international law today sometimes "reflect[s] not only substantive agreement as to certain universally condemned behavior but also procedural agreement that universal jurisdiction exists to prosecute a subset of that behavior."<sup>91</sup> Justice Breyer wrote that crimes such as genocide, war crimes and crimes against humanity fall within the category of universally condemned behavior for which there is substantive and procedural agreement.<sup>92</sup> While a petitioner bringing a genocide claim, for instance, would not violate principles of comity, Justice Breyer could find no similar procedural consensus concerning Alvarez's claim and asserted that this lack of consensus provided additional support for the Court's conclusion that the ATS did not recognize his claim.<sup>93</sup>

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<sup>86</sup> *Id.* at 760-61 (Breyer, J., concurring).

<sup>87</sup> In *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895), the Court defined the term: "Comity," in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.

*Id.*

<sup>88</sup> *Sosa*, 542 U.S. at 760 (Breyer, J., concurring).

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 762. Universal jurisdiction provides that any nation may try a person for a few selected crimes no matter the nationality of the perpetrator or where the crime occurred. RESTATEMENT, *supra* note 28, § 404. In short, the state trying the claim need not have any connection to the location of the crime, the victim or the perpetrator. *Id.* cmt. a.

<sup>92</sup> *Sosa*, 542 U.S. at 762 (Breyer, J., concurring) (citing RESTATEMENT, *supra* note 28, § 404).

<sup>93</sup> *Id.* at 763.

#### D. *Laws Concerning Sexual Violence Against Women*<sup>94</sup>

“Rape is not primarily a sexual act . . . . Rape is primarily an act of violence with sex as the weapon.”<sup>95</sup>

Though at least one author argues that rape has reached the level of a *jus cogens* norm,<sup>96</sup> rape does not appear to violate international law standing on its own. Rather, successful claims for rape, both in pre-*Sosa* ATS litigation and before other international criminal tribunals, have occurred when rape was committed as part of another violation of international law, such as genocide or torture. In those cases, the cause of action alleged was not rape, but rather genocide or torture.<sup>97</sup>

Rape, as defined by almost every U.S. jurisdiction, is forcible and nonconsensual sex.<sup>98</sup> However, no explicit definition of rape exists within international law.<sup>99</sup> Below, this Note examines whether rape forms part of

<sup>94</sup> Though rape and sexual violence are certainly not limited to female victims, this Note focuses on the rape of women. Both men and women are victims of rape, though women are at greater risk for rape or other violent crimes. See *Contemporary Forms of Slavery: Systematic Rape, Sexual Slavery and Slavery-like Practices During Armed Conflict, Final Report Submitted by Ms. Gay J. McDougall, Special Rapporteur*, U.N. ESCOR, Comm'n on Human Rights, 50th Sess., Provisional Agenda Item 6, ¶ 23, U.N. Doc. E/CN.4/Sub.2/1998/13 (1998) [hereinafter Commission Report].

<sup>95</sup> Evelyn Mary Aswad, Note, *Torture by Means of Rape*, 84 GEO. L.J. 1913, 1920 (1996) (citation omitted).

<sup>96</sup> Kelly D. Askin, *Prosecuting Wartime Rape and Other Gender-Related Crimes Under International Law: Extraordinary Advances, Enduring Obstacles*, 21 BERKELEY J. INT'L L. 288, 346-49 (2003).

<sup>97</sup> See discussion *infra* Parts I.D.1 and 2.

<sup>98</sup> Aswad, *supra* note 95, at 1915, n.9 (citing Donald Dripps, *Beyond Rape: An Essay on the Difference Between the Presence of Force and the Absence of Consent*, 92 COLUM. L. REV. 1780, 1784 (1992)).

<sup>99</sup> Although no explicit definition of rape exists, it is thought to include “the insertion, under conditions of force, coercion or duress, of any object, including but not limited to a penis, into a victim’s vagina or anus; or the insertion, under conditions of force, coercion or duress, of a penis into the mouth of the victim.” Commission Report, *supra* note 94, ¶ 24. The Rwanda Tribunal defined rape as “a physical invasion of a sexual nature, committed on a person under circumstances which are coercive.” Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgment, ¶ 598 (Sept. 2, 1998), available at <http://65.18.216.88/ENGLISH/cases/Akayesu/judgement/akay001.htm>. Because the Rwanda Tribunal found no definition of the elements of rape in conventional or customary international law, it looked to the principles of criminal law common to the major legal systems for the elements of the crime of rape. *Id.* ¶ 596. The Yugoslav Tribunal defined rape in international law as

the sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; where such sexual penetration occurs without the consent of the victim. Consent for this purpose must be consent given voluntarily, as a result of the victim’s free will, assessed in the context of the surrounding circumstances. The mens rea is the intention to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim.

other violations of international law, such as torture, genocide, war crimes, and crimes against humanity.

### 1. Customary International Human Rights Law

A state violates the customary international law of human rights if, as a matter of state policy, it encourages, practices or condones genocide or torture or other cruel, inhuman, or degrading treatment or punishment, among other offenses.<sup>100</sup>

#### a. *Rape as Torture*

In certain circumstances, the international provisions governing torture prohibit rape and sexual violence.<sup>101</sup> Prohibitions against torture are *jus cogens* norms from which no derogation is permitted.<sup>102</sup> Under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“Torture Convention”),<sup>103</sup> torture occurs when (1) a public official or other person acting in an official capacity (2) intentionally inflicts severe mental or physical pain or suffering<sup>104</sup> (3) to punish, obtain

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Prosecutor v. Kunarac, Case No. IT-96-23-T & IT-96-23/1-T, Judgment, ¶ 460 (Feb. 22, 2001), available at <http://www.un.org/icty/foca/trialc2/judgement/>.

<sup>100</sup> RESTATEMENT, *supra* note 28, § 702. The Restatement sets forth the following offenses as violative of customary international law: (1) genocide; (2) slavery or slave trade; (3) the murder or causing the disappearance of individuals; (4) torture or other cruel, inhuman, or degrading treatment or punishment; (5) prolonged arbitrary detention; (6) systematic racial discrimination; or (7) a consistent pattern of gross violations of internationally recognized human rights. *Id.* The difference between torture and cruel, inhuman treatment is the intensity of the suffering inflicted; the pain or suffering inflicted by torture is more severe. *Id.* § 702 n.5.

<sup>101</sup> Beth Stephens, *The Civil Lawsuit as a Remedy for International Human Rights Violations Against Women*, 5 HASTINGS WOMEN’S L.J. 143, 156 (1994).

<sup>102</sup> Commission Report, *supra* note 94, ¶ 53.

<sup>103</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, 39 U.N. GAOR, Supp. No. 51, U.N. Doc. A/39/51 (Dec. 10, 1984), 1465 U.N.T.S. 85 [hereinafter Torture Convention], available at <http://www.un.org/documents/ga/res/39/a39r046.htm>. The United States is a party to the Torture Convention. U.S. Dep’t of State, *Treaties in Force: A List of Treaties and Other International Agreements of the United States in Force on January 1, 2005*, at 513 (2005) [hereinafter *Treaties in Force*], available at <http://www.state.gov/documents/organization/53678.pdf>.

<sup>104</sup> See Memorandum for James B. Comey, Deputy Attorney General, from Daniel Levin, Acting Assistant Attorney General, U.S. Dep’t of Justice, Office of Legal Counsel (Dec. 30, 2004), available at <http://www.usdoj.gov/olc/dagmemo.pdf> (discussing how the United States Department of Justice interprets domestic legislation implementing the Torture Convention, *supra* note 103). Specifically the

information, coerce, intimidate, or for any purpose based on discrimination of any kind.<sup>105</sup> In short, torture is the infliction of severe mental or physical suffering for a designated purpose (e.g., to punish, intimidate, coerce, obtain information) by government officials. Therefore, if a victim suffers severe mental or physical pain because a government official raped her to obtain information or intimidate her then his act of rape is torture.<sup>106</sup>

The European Court of Human Rights, the Inter-American Commission on Human Rights and numerous domestic courts have found acts of rape meeting the above definition to constitute torture.<sup>107</sup> The U.S. Courts of Appeal for the Third and Ninth Circuits have asserted that rape can be a form of torture.<sup>108</sup> Likewise, in *Kadic v. Karadzic*,<sup>109</sup> which involved ATS claims, the Second Circuit described the appellants' allegations of torture as including rape, among other offenses.

In sum, rape can constitute torture when a government official, or one acting under the color of authority, inflicts severe mental or physical suffering for a designated purpose.

#### b. *Rape as Genocide*

Like the prohibitions against torture, prohibitions against genocide are also *jus cogens* norms.<sup>110</sup> Rape can be termed an act of genocide. The 1948 Convention on the Prevention and Punishment of the Crime of Genocide<sup>111</sup> (“Genocide Convention”) establishes that certain acts “committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group” constitute genocide.<sup>112</sup> These acts include: (1) killing members of

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memorandum examines the meaning of “severe,” “physical pain and suffering,” “severe mental pain or suffering,” and “specifically intended” as within the U.S. statutes concerning torture. *Id.*

<sup>105</sup> See Torture Convention, *supra* note 103, art. 1, para. 1. The Torture Convention does not explicitly define rape as a form of torture when it meets these requirements. *See id.*

<sup>106</sup> To rise to the level of torture, the pain suffered by the victim must be severe. Aswad, *supra* note 95, at 1930. Studies on the aftermath of rape have shown that the suffering of rape survivors is strikingly similar in duration and intensity to the suffering endured by torture victims. *Id.* Like torture victims, many rape victims suffer from Post Traumatic Stress Disorder. *Id.*

<sup>107</sup> Commission Report, *supra* note 94, ¶ 53.

<sup>108</sup> See *Zubeda v. Ashcroft*, 333 F.3d 463, 472-73 (3rd Cir. 2003), *Al-Saher v. INS*, 268 F.3d 1143, 1147 (9th Cir. 2001).

<sup>109</sup> 70 F.3d 232, 236 (2d Cir. 1995).

<sup>110</sup> Commission Report, *supra* note 94, ¶ 48.

<sup>111</sup> Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention], available at [http://www.unhcr.ch/html/menu3/b/p\\_genoci.htm](http://www.unhcr.ch/html/menu3/b/p_genoci.htm). The United States is a party to the Genocide Convention. *See Treaties in Force*, *supra* note 103, at 423.

<sup>112</sup> Genocide Convention, *supra* note 111, art. 2.

the group; (2) causing serious bodily or mental harm to members of the group; (3) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; or (4) imposing measures intended to prevent births within the group.<sup>113</sup> The Genocide Convention declares that genocide, whether committed during times of peace or war, is a crime under international law that Contracting Parties agree to prevent or punish.<sup>114</sup> To that end, Article 5 of the Genocide Convention requires that Contracting Parties “undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention, and, in particular, to provide effective penalties for persons guilty of genocide.”<sup>115</sup> Under the Genocide Convention, claims of genocide may be brought against public officials or private individuals.<sup>116</sup> Critically, it appears that obligations concerning genocide are part of customary international law and thus binding regardless of whether a state is party to the Genocide Convention.<sup>117</sup>

In 1998, the Rwanda Tribunal<sup>118</sup> (“ICTR”) became the first international criminal tribunal to define rape as an act of genocide.<sup>119</sup> In *Prosecutor v. Jean-Paul Akayesu*,<sup>120</sup> the ICTR found Akayesu guilty of genocide on the basis of acts of rape and sexual violence, among others.<sup>121</sup> During the Rwanda genocide, the Hutu used rape as a tool to spread AIDS and HIV among the Tutsi population.<sup>122</sup> The Hutu directed rape at Tutsi women or Hutu women married to Tutsi men to kill these women.<sup>123</sup> In this context, the Hutu used rape as a tool to cause serious bodily or mental harm to the Tutsis and deliberately inflicted on the Tutsis conditions of life calculated

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<sup>113</sup> *Id.*

<sup>114</sup> *Id.* art. 1.

<sup>115</sup> *Id.* art. 5.

<sup>116</sup> *Id.* art. 4.

<sup>117</sup> STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW 41 (2d ed. 2001).

<sup>118</sup> The full name of the tribunal is the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighbouring states, between 1 January 1994 and 31 December 1994. The United Nations Security Council authorized the creation of the ICTR to prosecute persons responsible for genocide and other serious violations of international humanitarian law in Rwanda. S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994), available at <http://www.un.org/docs/scres/1994/scres94.htm> (follow link to “Security Council resolution 955”).

<sup>119</sup> Sherrie L. Russell-Brown, *Rape as an Act of Genocide*, 21 BERKELEY J. INT’L L. 350, 351 (2003) (citing *Prosecutor v. Akayesu*, Case No. ICTR 96-4-T, Judgment, ¶ 496 (Sept. 2, 1998)).

<sup>120</sup> *Akayesu*, Case No. ICTR 96-4-T, Judgment, ¶ 598.

<sup>121</sup> Russell-Brown, *supra* note 119, at 351.

<sup>122</sup> *Id.* at 354.

<sup>123</sup> *Id.* at 351, 356.

to bring about their physical destruction—all with the objective of destroying an ethnic group. The ICTR acknowledged genocidal rape “as possibly the most effective and serious way of inflicting injury and harm on individual Tutsi women, thus advancing the destruction of the entire Tutsi group.”<sup>124</sup>

Moreover, in *Kadic*, the plaintiffs alleged that they suffered acts of rape, among other brutal offenses, at the hands of Bosnian-Serb forces as part of a genocidal campaign conducted in the course of the Bosnian civil war.<sup>125</sup> The Second Circuit found that the plaintiffs’ allegations concerning the defendant’s campaign of murder, rape, forced impregnation, and other forms of torture designed to destroy ethnic groups clearly stated a violation of the international law proscribing genocide.<sup>126</sup> Here, rape was used as a tool of the genocide.

In sum, rape, committed with the intent to destroy, in whole or in part, a national, ethnic or religious group, is genocide.

## 2. Customary International Humanitarian Law

International humanitarian law is the law of armed conflict. Its fundamental purpose is to place restraints on the conduct of warfare to lessen the effects of hostilities.<sup>127</sup> The laws of war provide a framework in which parties are to comport their behavior to minimize the horrors of war for all involved, whether soldier or civilian.<sup>128</sup>

### a. Rape as a War Crime

War crimes are crimes against the customary or conventional laws of war that are committed by persons “belonging” to one side of the conflict

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<sup>124</sup> *Id.* at 352.

<sup>125</sup> *Kadic v. Karadzic*, 70 F.3d 232, 236-37 (2d Cir. 1995).

<sup>126</sup> *Id.* at 242.

<sup>127</sup> Robert K. Goldman & Brian D. Tittmore, *Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law* (Dec. 2002) (unpublished manuscript), reprinted in CARTER ET AL., *supra* note 28, at 1116, available at <http://www.asil.org/taskforce/goldman.pdf>.

<sup>128</sup> One website noted that:

In the sixth century BCE, Chinese warrior Sun Tzu suggested putting limits on the way that wars were conducted. Around 200 BCE, the notion of war crimes as such appeared in the Hindu code of Manu. In 1305, the Scottish national hero Sir William Wallace was tried for the wartime murder of civilians. Hugo Grotius wrote “On the Law of War and Peace” in 1625, focusing on the humanitarian treatment of civilians.

Society of Professional Journalists, *A Brief History of the Laws of War*, <http://www.globalissuesgroup.com/geneva/history.html> (last visited Jan. 29, 2006).

against persons or property of the other side.<sup>129</sup> The perpetrator of the crimes does not have to be a soldier.<sup>130</sup> Customs and laws guiding the conduct of states during armed conflict have existed for centuries.

The Geneva Conventions regulate the conduct of war by protecting certain categories of persons: wounded and sick members of armed forces in the field (“Convention I”);<sup>131</sup> wounded, sick and shipwrecked members of armed forces at sea (“Convention II”);<sup>132</sup> prisoners of war (“Convention III”);<sup>133</sup> and civilians in time of war (“Convention IV”).<sup>134</sup> Within the Geneva Conventions, war crimes, or the violations of the laws of armed conflict, fall into two categories: (1) violations of the laws of war and (2) “grave breaches” of the laws of war.<sup>135</sup> Grave breaches of the laws of war trigger a stronger set of prohibitions and governmental obligations.<sup>136</sup> In fact, under the Geneva Conventions, Contracting Parties must “undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention.”<sup>137</sup> Grave breaches include willful killing, torture or inhuman treatment, and willfully causing great suffering or serious injury to body or health, among others.<sup>138</sup> Customary international law appears to criminalize grave breaches of the Geneva Conventions whether states are party to the Geneva Conventions or not.<sup>139</sup>

Moreover, the four Geneva Conventions contain an identical Article 3 (“Common Article 3”), which applies to non-international armed conflict.

<sup>129</sup> THEODOR MERON, *Rape as a Crime Under International Humanitarian Law*, in WAR CRIMES LAW COMES OF AGE 204, 207 & n.19 (1998).

<sup>130</sup> *Id.*

<sup>131</sup> Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva Convention I], available at [http://www.unhcr.ch/html/menu3/b/q\\_genev1.htm](http://www.unhcr.ch/html/menu3/b/q_genev1.htm).

<sup>132</sup> Geneva Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva Convention II], available at [http://www.unhcr.ch/html/menu3/b/q\\_genev2.htm](http://www.unhcr.ch/html/menu3/b/q_genev2.htm).

<sup>133</sup> Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III], available at <http://www.unhcr.ch/html/menu3/b/91.htm>.

<sup>134</sup> Geneva Convention Relative to the Treatment of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV], available at <http://www.unhcr.ch/html/menu3/b/92.htm>.

<sup>135</sup> See Stephens, *supra* note 101, at 161 n.74.

<sup>136</sup> *Id.*

<sup>137</sup> Geneva Convention I, *supra* note 131, arts. 49-50; Geneva Convention II, *supra* note 132, arts. 50-51; Geneva Convention III, *supra* note 133, arts. 129-30; Geneva Convention IV, *supra* note 134, arts. 146-47.

<sup>138</sup> See Geneva Convention I, *supra* note 131, art. 50; Geneva Convention II, *supra* note 132, art. 50; Geneva Convention III, *supra* note 133, art. 130; Geneva Convention IV, *supra* note 134, art. 147.

<sup>139</sup> See RATNER, *supra* note 117, at 90.

Common Article 3 provides that civilians shall be treated humanely and that

the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons: (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture . . . [and] (c) outrages upon personal dignity, in particular humiliating and degrading treatment.<sup>140</sup>

The International Criminal Tribunal for Yugoslavia<sup>141</sup> (“ICTY”) asserted that Common Article 3 has also attained the status of customary international law.<sup>142</sup> The Geneva Conventions carry almost universal ratification with 192 nations party to them at the end of 2005.<sup>143</sup>

For centuries, the laws of war have prohibited rape by soldiers, and violators have been subject to capital punishment under national military codes.<sup>144</sup> Indeed, in 1758, prior to the enactment of the ATS, at least one scholar wrote of the norms governing the conduct of nations at war, including the treatment of women during those times.<sup>145</sup> In virtually all wars, however, women have been raped as a tactic of war.<sup>146</sup>

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<sup>140</sup> Geneva Convention I, *supra* note 131, art. 3; Geneva Convention II, *supra* note 132, art. 3; Geneva Convention III, *supra* note 133, art. 3; Geneva Convention IV, *supra* note 134, art. 3.

<sup>141</sup> The complete name of the tribunal is International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991. In Resolution 827, the United Nations Security Council authorized the creation of the ICTY “for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the area of the former Yugoslavia.” S.C. Res. 827, U.N. Doc. S/RES/827 (May 23, 1993), *available at* <http://www.un.org/Docs/scres/1993/scres93.htm> (follow link to “Resolution 827”).

<sup>142</sup> Prosecutor v. Kunarac, Case No. IT-96-23-T & IT-96-23/1-T, Judgment, ¶ 406 (Feb. 22, 2001).

<sup>143</sup> International Committee of the Red Cross, *States Party to the Geneva Conventions and Their Additional Protocols*, [http://www.icrc.org/Web/eng/siteeng0.nsf/html/party\\_gc](http://www.icrc.org/Web/eng/siteeng0.nsf/html/party_gc) (follow link to “States party to the Geneva Conventions and their Additional Protocols”) (last visited Jan. 29, 2006); *see also* International Committee of the Red Cross, *International Humanitarian Law: Answers to Your Questions*, <http://www.icrc.org/> (search “international humanitarian law answers to your questions”; then follow link “International humanitarian law: answers to your questions”; then follow link “PDF format.”) (last visited Jan. 29, 2006) [hereinafter ICRC Answers]. The United States is a party to all four Geneva Conventions. *See Treaties in Force*, *supra* note 103.

<sup>144</sup> MERON, *supra* note 129, at 205-06.

<sup>145</sup> *See* EMMERICH DE Vattel, THE LAW OF NATIONS OR PRINCIPLES OF THE LAW OF NATURE APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS 351 (Joseph Chitty ed., T. & J.W. Johnson & Co., Law Booksellers 1863) (recognizing that being at war with another nation does not sanction the “maltreat[ment] of [women in] their persons,” the “use [of] any violence against [women],” or the use of “brutality so far as to violate female chastity” and that a “prudent and humane general even punishes [such acts] whenever he can”), *available at* <http://www.constitution.org/vattel/vattel.htm>.

<sup>146</sup> Stephens, *supra* note 101, at 146.

Following World War II, the Allied powers initiated the first military tribunals, one in Nuremberg<sup>147</sup> (“Nuremberg Tribunal”) and the other in Tokyo<sup>148</sup> (“Tokyo Tribunal”), to prosecute those guilty of war crimes, among other offenses. The Charter of the Nuremberg Tribunal did not mention rape nor was it prosecuted as a war crime under customary international law.<sup>149</sup> The Tokyo Tribunal, however, prosecuted rape as a war crime.<sup>150</sup>

To date, no international convention specifically criminalizes rape itself as a grave breach of the laws of war. Article 27 of Geneva Convention IV explicitly prohibits rape during armed conflict, but does not enumerate rape as a grave breach of the laws of war.<sup>151</sup> Nevertheless, rape has been interpreted as a grave breach of the laws of war. For example, the U.S. Department of State considers rape a grave breach under customary international law and the Geneva Conventions.<sup>152</sup> Many legal scholars would include rape within the provisions describing grave breaches of the laws of war as “willfully causing great suffering or serious injury to body or health” or as torture.<sup>153</sup>

The 1977 Protocols I<sup>154</sup> and II<sup>155</sup> supplement the Geneva Conventions, but pertain to the protection of victims of international and non-international armed conflict, respectively. Article 76 of Protocol I declares that “[w]omen shall be the object of special respect and shall be protected

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<sup>147</sup> Charter of the International Military Tribunal, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279 [hereinafter Nuremberg Charter], available at <http://www.yale.edu/lawweb/avalon/imt/proc/imtconst.htm>.

<sup>148</sup> Charter of the International Military Tribunal for the Far East, Jan. 19, 1946, 4 Bevans 20, TIAS No. 1589 [hereinafter Tokyo Charter], available at <http://www.yale.edu/lawweb/avalon/imtfech.htm>.

<sup>149</sup> MERON, *supra* note 129, at 206.

<sup>150</sup> *Id.*

<sup>151</sup> Geneva Convention IV, *supra* note 134, art. 27.

<sup>152</sup> MERON, *supra* note 129, at 207-08 n.22 (1998) (citing to a letter from Robert A. Bradtke, Acting Assistant Secretary for Legislative Affairs to Senator Arlen Specter (Jan. 27, 1993) (discussing the potential amendment of the Geneva Conventions to include rape as a war crime)). The State Department noted that the Department of the Army’s Law of War Manual considers any violation of the Geneva Conventions a war crime. *Id.* Further, the State Department noted that the United States, in its reports to the United Nations concerning human rights violations in the former Yugoslavia, reported sexual assaults as grave breaches of the laws of war. *Id.*

<sup>153</sup> See Dr. Francis T. Pilch, *Rape as Genocide: The Legal Response to Sexual Violence* 8, available at <http://www.ciaonet.org/wps/pif01/pif01.pdf> (last visited Jan. 29, 2006).

<sup>154</sup> Protocol Additional to the Geneva Conventions of 1949, and Relating to the Protection of Victims of International Armed Conflicts, entered into force Dec. 9, 1979, 1125 U.N.T.S. 3 [hereinafter Protocol I], available at <http://www.unhcr.ch/html/menu3/b/93.htm>.

<sup>155</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, entered into force Dec. 7, 1978, 1125 U.N.T.S. 609 [hereinafter Protocol II], available at <http://www.unhcr.ch/html/menu3/b/94.htm>.

in particular against rape, forced prostitution and any other form of indecent assault.”<sup>156</sup> In Article 4, Protocol II provides freedom from rape as a fundamental guarantee to all persons.<sup>157</sup> As of the end of 2005, 163 states were party to Protocol I and 159 states to Protocol II.<sup>158</sup>

In *Prosecutor v. Furundzija*<sup>159</sup> and *Prosecutor v. Kunarac*,<sup>160</sup> the ICTY confirmed the status of rape as a war crime for which the perpetrator is criminally liable even though it is not named as a grave breach of the laws of war. Furundzija allegedly violated Article 4 of Protocol II to the Geneva Conventions, which prohibits rape.<sup>161</sup> The prosecutor argued that “substantive offences prohibited by article 4 of . . . Protocol II are part of customary law and that they enhance the protection afforded by [Common Article 3 of the Geneva Conventions].”<sup>162</sup> Though the ICTY Statute does not explicitly name rape as a war crime, the ICTY nevertheless found jurisdiction over rape as a war crime under Article 3 of its Statute, namely violations of the laws or customs of war.<sup>163</sup> In *Furundzija*, the Trial Chamber noted that the ICTY has jurisdiction over “all serious violations of international humanitarian law in accordance with its Statute” and that “the [rape] charged in the Indictment can indeed be prosecuted under Article 3 [of the ICTY Statute].”<sup>164</sup> The court ultimately found Furundzija guilty of aiding and abetting a war crime: the rape of a Bosnian Muslim woman.<sup>165</sup>

Likewise, in the *Kunarac* case, the defendants were charged with rape under Article 3 of the ICTY Statute (violations of the laws and customs of war) based upon Common Article 3 and customary international law.<sup>166</sup> The ICTY convicted the defendants of rape as a war crime.<sup>167</sup>

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<sup>156</sup> Protocol I, *supra* note 154, art. 76.

<sup>157</sup> Protocol II, *supra* note 155, art. 4.

<sup>158</sup> ICRC Answers, *supra* note 143, at 12. The United States has not ratified Protocol I or II. See Human Rights Watch, *Background Paper on Geneva Conventions and Persons Held by U.S. Forces*, <http://www.hrw.org/background/usa/pow-bck.htm> (Jan. 29, 2002).

<sup>159</sup> *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, Judgment, ¶¶ 165-89 (Dec. 10, 1998), available at <http://www.un.org/icty/furundzija/trialc2/judgement/>.

<sup>160</sup> *Prosecutor v. Kunarac*, Case No. IT-96-23-T & IT-96-23/1-T, Judgment (Feb. 22, 2001).

<sup>161</sup> *Furundzija*, Case No. IT-95-17/1-T, Judgment, ¶ 44.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* ¶ 163.

<sup>164</sup> *Id.* ¶ 14.

<sup>165</sup> Shan Herald Agency for News, *Sexual Violence as a War Crime: Grave Breaches of the 1949 Geneva Convention, and Violations of the Laws and Customs of War*, [http://www.shanland.org/resources/bookspub/humanrights/LtoR/sexual\\_violence\\_as\\_a\\_war\\_crime.htm](http://www.shanland.org/resources/bookspub/humanrights/LtoR/sexual_violence_as_a_war_crime.htm) (last visited Jan. 29, 2006) [hereinafter Shan article].

<sup>166</sup> *Kunarac*, Case No. IT-96-23-T & IT-96-23/1-T, Judgment, ¶ 400.

<sup>167</sup> Shan article, *supra* note 165.

Building upon the lessons of the ICTY, both the Statutes of the ICTR and Special Court for Sierra Leone<sup>168</sup> provide for jurisdiction over violations of Common Article 3 to the Geneva Conventions and Article 4 of Protocol II, thereby specifically naming rape as a war crime.<sup>169</sup> Finally, the Rome Statute of the International Criminal Court<sup>170</sup> (“ICC”) specifically enumerates rape as a war crime for which it has jurisdiction.<sup>171</sup>

In addition to allegations of genocide, the *Kadic* plaintiffs also alleged that rape committed in the course of armed conflict constituted a war crime.<sup>172</sup> The U.S. Court of Appeals for the Second Circuit concluded that the offenses alleged by the appellants would violate the most fundamental norms of the laws of war embodied in Common Article 3.<sup>173</sup>

Thus, even though rape is not technically listed as a grave breach of the laws of war in the Geneva Conventions, several individuals have been charged and convicted of rape as a war crime. Moreover, legal scholars and the U.S. government consider rape to be a grave breach of the laws of war prohibited by the Geneva Conventions.

#### b. *Crimes Against Humanity*

The international community has developed a body of law outside of conventional law to address a broad range of systematic atrocities.<sup>174</sup> This body of law, known as crimes against humanity, is primarily a product of

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<sup>168</sup> “The Special Court for Sierra Leone was set up jointly by the Government of Sierra Leone and the United Nations.” Special Court for Sierra Leone, <http://www.sc-sl.org/about.html>. (last visited Jan. 29, 2006). The Special Court shall “try those who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996.” *Id.*

<sup>169</sup> Statute of the Special Court for Sierra Leone, art. 3, Aug. 14, 2000, <http://www.sc-sl.org/scsl-statute.html> [hereinafter Sierra Leone Statute]; Statute of the International Tribunal for Rwanda, S.C. Res. 955, U.N. SCOR, 49th Sess., art. 4, U.N. Doc. S/Res/955 (1994) [hereinafter ICTR Statute], *available at* <http://www.un.org/ict/statute.html>.

<sup>170</sup> Rome Statute of the International Criminal Court, July 17, 1998, 37 I.L.M. 999, 2187 U.N.T.S. 3 [hereinafter ICC Statute], *available at* <http://www.un.org/law/icc/statute/romefra.htm>. Though instrumental in drafting the Statute creating the ICC and a signatory to the treaty creating the ICC, the United States has since made clear that it will not ratify the treaty and does not consider itself bound by the treaty. Curtis Bradley, *U.S. Announces Intent Not to Ratify International Criminal Court Treaty* (May 2002), <http://www.asil.org/insights/insigh87.htm>.

<sup>171</sup> ICC Statute, *supra* note 170, art. 8.

<sup>172</sup> *Kadic v. Karadzic*, 70 F.3d 232, 242 (2d Cir. 1995); *see also supra* text accompanying notes 125-26.

<sup>173</sup> *Id.* at 243.

<sup>174</sup> RATNER, *supra* note 117, at 46.

customary international law.<sup>175</sup> The concept of fundamental notions of humanity have long guided and governed states' conduct.<sup>176</sup> However, the Nuremberg Tribunal "marked the birth of the modern notion of crimes against humanity."<sup>177</sup>

The Nuremberg Tribunal defined crimes against humanity as "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds."<sup>178</sup> Originally, the Nuremberg Charter required a nexus between crimes against humanity and armed conflict.<sup>179</sup> Over time though, international law severed this nexus with armed conflict. Today, crimes against humanity may occur in times of war or peace.<sup>180</sup> The list of acts that fall within crimes against humanity has also evolved since the Nuremberg Tribunal.<sup>181</sup> In addition to the crimes articulated at Nuremberg, crimes against humanity now include imprisonment, torture, rape, and other inhumane acts committed against civilian populations.<sup>182</sup>

In sum, today's overall definition of crimes against humanity reads, more or less, as crimes committed in the context of a widespread<sup>183</sup> or systematic attack<sup>184</sup> against a certain population—including widespread persecution based on racial, ethnic, religious, political or other grounds—in times of war or peace.<sup>185</sup>

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* at 47.

<sup>178</sup> Nuremberg Charter, *supra* note 147, art. 6(c).

<sup>179</sup> RATNER, *supra* note 117, at 49.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> See Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 5, May 25, 1993, 32 I.L.M. 1173-74, [hereinafter ICTY Statute], available at <http://www.un.org/icty/legaldoc-e/basic/statut/statuteindex.htm>; ICTR Statute, *supra* note 169, art. 3; Nuremberg Charter, *supra* note 147. In 1945, the Charter of the Nuremberg Tribunal first defined crimes against humanity as:

[M]urder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

Nuremberg Charter, *supra* note 147, art. 6, para. (c). The ICC Statute includes these specific crimes, as well as enforced disappearance of persons and apartheid. See ICC Statute, *supra* note 170, art. 7.

<sup>183</sup> RATNER, *supra* note 117, at 57 (term focuses on the number of victims).

<sup>184</sup> *Id.* (term focuses on method of crimes and that they are directed against a specific population—not random individuals).

<sup>185</sup> Cherif Bassiouni, *Crimes Against Humanity*, <http://www.crimesofwar.org/thebook/crimes-against-humanity.html>. (last visited Jan. 29, 2006) [hereinafter Bassiouni article]; See Commission Report, *supra* note 94, ¶¶ 38-45; See also RATNER, *supra* note 117, at 59 (noting that crimes against

It appears that atrocities committed either on a large scale or by a systematic policy (or perhaps both) are necessary for acts to be crimes against humanity.<sup>186</sup> An isolated instance is not enough. The question of motive is linked to systematic or mass action: must the perpetrator of the crime have acted based upon some trait of the victim?<sup>187</sup> In other words, did some special characteristic of the victim motivate the perpetrator to act against this person? There are two camps regarding the violator's motive. On one hand, the Nuremberg Charter, ICTY, and ICTR support the view that certain grave acts, such as murder or torture, are so heinous that motive is irrelevant and thus are *per se* crimes.<sup>188</sup> On the other hand, the domestic laws of some nations support the position that there must be some underlying motive that identifies the victim with a particular racial, religious, political, cultural, or social attribute for an act to be a crime against humanity.<sup>189</sup>

Until recently, crimes against humanity required an element of state action.<sup>190</sup> However, such a view ignores the fact that entities not officially recognized as state actors commit such atrocities (e.g., entities in Yugoslavia, Rwanda, and the Sudan). It appears at this time that there must be some sort of "official action," even though the recognized state actors need not have authorized it.<sup>191</sup>

States have sought to limit the scope of crimes against humanity by determining that such acts, like rape or murder, do not represent crimes against humanity unless they are accompanied by the elements that define the category: (1) large scale or systematic nature, (2) requisite motive, and (3) connection with official action.<sup>192</sup> Because it is difficult to produce evidence establishing the policy planning, mass character and command responsibility of crimes against humanity, it is difficult to adjudicate such claims.<sup>193</sup>

While no international convention exists concerning crimes against humanity, the category has been included in the Statutes of the ICTY, the ICTR, and the ICC.<sup>194</sup> There are eleven international texts defining crimes against humanity, though they all differ slightly in their definition of the

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humanity must entail more than isolated instances; rather, "either atrocities on a large scale or a systematic policy, or both, is necessary").

<sup>186</sup> RATNER, *supra* note 117, at 59.

<sup>187</sup> *Id.* at 60.

<sup>188</sup> *Id.* at 64.

<sup>189</sup> *Id.* 63-64. France, Australia, and China appear to fall into group two. *Id.*

<sup>190</sup> *Id.* at 67.

<sup>191</sup> *Id.* at 67-68 (noting that prosecutions in the ICTY and ICTR suggest that those committing the offenses must be part of an organization seeking political control of a territory).

<sup>192</sup> *Id.* at 77-78.

<sup>193</sup> See MERON, *supra* note 129, at 209.

<sup>194</sup> Bassiouni article, *supra* note 185.

crime and its legal elements.<sup>195</sup> No accepted definition of crimes against humanity exists, as a matter of treaty or customary international law.<sup>196</sup>

In 1945, when the Charter for the Nuremberg Tribunal first codified a definition of crimes against humanity, it did not include rape.<sup>197</sup> Shortly thereafter, the four occupying powers adopted Control Council Law No. 10 as a charter for war crimes trials by their own courts in Germany.<sup>198</sup> Control Council Law No. 10 expanded the list comprising crimes against humanity to include rape.<sup>199</sup>

The Statutes of the ICTY, ICTR, ICC, and Special Court for Sierra Leone list rape as a crime against humanity.<sup>200</sup> In *Akayesu*, the ICTR found the defendant guilty of crimes against humanity, under Article 3(g) of the ICTR Statute, based on evidence that he witnessed and encouraged rape of Tutsi women while he was a communal leader.<sup>201</sup> The tribunal found that the rapes were systematic and carried out on a massive scale against a civilian ethnic population.<sup>202</sup> Witnesses testified that Akayesu publicly incited the perpetrators.<sup>203</sup> Thus, the Tribunal concluded that the defendant's "words of encouragement . . . by virtue of his authority, sent a clear signal of official tolerance for sexual violence, without which these acts would not have taken place."<sup>204</sup> Likewise, in *Kunarac*, the ICTY convicted the defendants for rape as a crime against humanity.<sup>205</sup>

In sum, after the Nuremberg Tribunal, the international community has considered rape a crime against humanity. Even though a number of individuals have been convicted of crimes against humanity, there does not

<sup>195</sup> *Id.* Bassiouni notes

[W]hat [the 11] definitions have in common is: (1) they refer to specific acts of violence against persons irrespective of whether the person is a national or nonnational and irrespective of whether these acts are committed in time of war or time of peace, and (2) these acts must be the product of persecution against an identifiable group of persons irrespective of the make-up of that group or the purpose of the persecution.

*Id.*

<sup>196</sup> LEILA NADYA SADAT, *THE INTERNATIONAL CRIMINAL COURT AND THE TRANSFORMATION OF INTERNATIONAL LAW* 148-69 (2002) reprinted in CARTER ET AL., *supra* note 28, at 1098.

<sup>197</sup> See Bassiouni article, *supra* note 185.

<sup>198</sup> MERON, *supra* note 129, at 206 (citation omitted).

<sup>199</sup> *Id.* at 206.

<sup>200</sup> See ICTY Statute, *supra* note 182, art. 5; ICTR Statute, *supra* note 169, art. 3; ICC Statute, *supra* note 170, art. 7; Sierra Leone Statute, *supra* note 169, art. 2.

<sup>201</sup> Prosecutor v. Akayesu, Judgment, ICTR-96-4-T, ¶¶689-95 (Sept. 2, 1998). Article 3(g) of the ICTR Statute cites rape as a crime against humanity. ICTR Statute, *supra* note 169, art. 3(g).

<sup>202</sup> See *Akayesu*, Judgment, ICTR-96-4-T, ¶ 695.

<sup>203</sup> *Id.* ¶ 706.

<sup>204</sup> *Id.* ¶ 694.

<sup>205</sup> Prosecutor v. Kunarac, Case No. IT-96-23-T & IT-96-23/1-T, Judgment, ¶¶ 4-6, 8-11, 687, 704, 745, 782, 822 (Feb. 22, 2001).

appear to be universal agreement as to the definition and elements of this violation of international law.

## II. ANALYSIS

In the following sections, this Note analyzes whether torture, genocide, war crimes, and crimes against humanity satisfy the benchmark set forth by the Supreme Court in *Sosa*: whether, under international law, the norm is sufficiently definite both in its content and universal acceptance to support a cause of action under the ATS.

### A. *Applying Sosa Criteria to Rape as a Viable Cause of Action Under the ATS*

While the *Sosa* Court set parameters for federal courts in their examination of any ATS claim, it did not set forth specific criteria for courts to consider.<sup>206</sup> Rather, the Court concluded that any actionable claims under the ATS must “rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms.”<sup>207</sup> The Court also provided other factors to aid courts in determining whether an international norm satisfies *Sosa*. The Court cited the specific definition of piracy in *Smith*, the parallel drawn by the *Filartiga* court between torturer and pirate as *hostis humani generis*, and the “specific, universal, and obligatory” standards set forth by the Ninth Circuit as guidance to federal courts in assessing an ATS claim.<sup>208</sup> Finally, the Court cautioned that district courts must consider the practical effects of recognizing a particular norm under the ATS.

In sum, a plaintiff must establish that the international norm, under which she asserts her ATS claim, is widely accepted by the international community and sufficiently definite and specific under international law. Moreover, if the plaintiff can demonstrate that the international community considers a violator of this norm as *hostis humani generis* and that punishment for the violation of the norm is universal, then the plaintiff can likely demonstrate that the international norm under which she asserts her cause of action is sufficiently definite and specific to satisfy *Sosa*. Even with a specific and universal definition, a court must still consider the practical

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<sup>206</sup> See discussion *supra* Part I.C.3.

<sup>207</sup> *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004); see also *supra* note 8 and accompanying text.

<sup>208</sup> See discussion *supra* Part I.C.3.

effects of recognizing this violation of international law as an actionable claim under the ATS.

As the Court stated in *Sosa*, the ATS has had force from the minute the First Congress passed it; it has not been sitting on a shelf waiting for the day a future Congress would legislate the appropriate causes of actions a plaintiff may assert under the statute.<sup>209</sup> Courts can look to international law, as embodied in federal common law, to provide a cause of action under the ATS. So, the question becomes: which of today's international norms will federal courts recognize as actionable claims under the ATS? Specifically, when may rape be recognized as an actionable ATS claim?

### 1. Torture and the ATS

In 1991, Congress passed the Torture Victim Protection Act<sup>210</sup> ("TVPA"), thereby codifying the Second Circuit's finding in *Filartiga* that the law of nations prohibits official torture. The TVPA establishes "an unambiguous and modern basis for a cause of action" under the ATS.<sup>211</sup> The purpose of the TVPA "is to provide a Federal cause of action 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>212</sup> The TVPA's definition of torture mirrors the definition set forth in the Torture Convention.<sup>213</sup>

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<sup>209</sup> See *Sosa*, 542 U.S. at 724.

<sup>210</sup> 28 U.S.C. § 1350 note (2000).

<sup>211</sup> H.R. REP. NO. 102-367 (I), at 3 (1991) reprinted in 1992 U.S.C.C.A.N. 84, 86.

<sup>212</sup> *Id.* at 2, 84.

<sup>213</sup> Torture Victim Protection Act of 1991, 28 U.S.C. § 1350 note (2000). The statute defines torture as:

- (1) . . . any act, directed against an individual in the offender's custody or physical control, by which severe pain or suffering (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind; and
- (2) mental pain or suffering refers to prolonged mental harm caused by or resulting from—
  - (A) the intentional infliction or threatened infliction of severe physical pain or suffering;
  - (B) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality;
  - (C) the threat of imminent death; or
  - (D) the threat that another individual will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.

*Id.*

Under the TVPA, subject to certain requirements, an alien can bring a claim for torture under the ATS. Rape can constitute torture.<sup>214</sup> Therefore, under the ATS an alien may seek redress for rape if it fits the definition of torture set forth in the TVPA. Federal courts do not need to examine such a claim under *Sosa* criteria because Congress has specifically named torture as a permitted cause of action under the ATS.

## 2. Genocide Satisfies *Sosa* and Constitutes a Viable Cause of Action Under the ATS

The norm prohibiting genocide is widely accepted in the international community. Moreover, it is sufficiently specific and definite to meet the *Sosa* framework. More than 130 of the 191 members of the United Nations have ratified the Genocide Convention, which defines both the crime of genocide and acts punishable as genocide.<sup>215</sup> The ICTY, ICTR, and ICC contain the same definition of the elements of genocide and acts punishable as genocide as found in the Genocide Convention.<sup>216</sup> The Restatement (Third) of Foreign Relations Law (“Restatement”) refers to genocide as a violation of customary international law and cites to the definition of genocide set forth in the Genocide Convention.<sup>217</sup> Finally, the definition of genocide set forth by Congress in the Genocide Convention Implementation Act of 1987<sup>218</sup> is almost identical to that of the Genocide Convention.

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<sup>214</sup> See *supra* Part I.D.1.a.

<sup>215</sup> Alfred de Zayas, *Memorandum on The Genocide against the Armenians 1915-1923 and the Application of the 1948 Genocide Convention*, available at <http://groong.usc.edu/dezayas-memorandum.html> (last visited Jan. 29, 2006).

<sup>216</sup> See ICTY Statute, *supra* note 182, art. 4; ICTR Statute, *supra* note 169, art. 2; ICC Statute, *supra* note 170, art. 6.

<sup>217</sup> RESTATEMENT, *supra* note 28, § 702 cmt. d.

<sup>218</sup> 18 U.S.C. § 1091 (2000) (amended 2002). Article A describes the offense:

Whoever, whether in time of peace or in time of war, in a circumstance described in subsection (d) and with the specific intent to destroy, in whole or in substantial part, a national, ethnic, racial, or religious group as such—

- (1) kills members of that group;
- (2) causes serious bodily injury to members of that group;
- (3) causes the permanent impairment of the mental faculties of members of the group through drugs, torture, or similar techniques;
- (4) subjects the group to conditions of life that are intended to cause the physical destruction of the group in whole or in part;
- (5) imposes measures intended to prevent births within the group; or
- (6) transfers by force children of the group to another group; or attempts to do so, shall be punished as provided in subsection (b).

Section 1092 provides that “[n]othing in this chapter shall be construed as precluding the application of State or local laws to the conduct proscribed by this chapter, nor shall anything in this chapter be construed as creating any substantive or procedural right enforceable by law by any party in any proceeding.” 18 U.S.C. § 1092 (2000) (amended 2002). Though this legislation existed at the time of the *Kadic*

By all accounts, the definition of genocide is sufficiently definite and specific under international law.

Moreover, there is universal acceptance of the norm prohibiting genocide. For example, the preamble of the Genocide Convention declares “genocide is a crime under international law, contrary to the spirit and aims of the United Nations and condemned by the civilized world.”<sup>219</sup> The Restatement explains that “[a] state violates [customary] international law if . . . it practices, encourages, or condones . . . genocide.”<sup>220</sup> The prohibition on genocide is a *jus cogens* norm, from which no state may deviate.<sup>221</sup> Given the settled definition of genocide, its use in a number of international criminal tribunals, and its status as a *jus cogens* violation of international law, the international community has accepted an international norm prohibiting genocide.

Further, genocide, along with piracy, is a crime of universal concern.<sup>222</sup> Thus, the perpetrator of genocide could, like the pirate and torturer, be considered an enemy of all mankind.

That genocide is punished universally provides even greater support for the position that the international norm prohibiting genocide satisfies *Sosa*. States party to the Genocide Convention confirm that “genocide . . . is a crime under international law which they undertake to prevent and to punish.”<sup>223</sup> Article 4 of the Genocide Convention declares that persons committing genocide (whether state actors or private individuals) shall be punished.<sup>224</sup> Moreover, the Genocide Convention also calls upon Contract-

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case (which included a claim for genocide under the ATS), the Second Circuit concluded that “the legislative decision not to create a new private remedy does not imply that a private remedy is not already available under the [ATS] . . . . Nothing in the Genocide Convention Implementation Act or its legislative history reveals an intent by Congress to repeal the [ATS] insofar as it applies to genocide.” *Kadic v. Karadzic*, 70 F.3d 232, 242 (2d Cir. 1995). The Second Circuit held that “[u]nder these circumstances, it would be improper to construe the Genocide Convention Implementation Act as repealing the [ATS] by implication.” *Id.* (citing *Rodriguez v. United States*, 480 U.S. 522, 524 (1987) (noting that repeals by implication are disfavored)). In his concurring opinion in *Sosa*, Justice Scalia raised the Second Circuit’s decision in *Kadic* as evidence that the majority’s position would lead federal courts into confrontation with the political branches. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 748 (2004) (Scalia J., concurring). Justice Scalia noted that Congress and the Executive Branch explicitly state that the Genocide Convention Implementation Act does not provide a private cause of action, yet the Second Circuit reasoned that the legislation did not prevent the cause of action from being recognized under other existing legislation, such as the ATS. *Id.* The majority did not respond to Justice Scalia’s concern. *See id.* at 697-738 (majority opinion).

<sup>219</sup> Genocide Convention, *supra* note 111, pmbl.

<sup>220</sup> RESTATEMENT, *supra* note 28, § 702.

<sup>221</sup> *Id.* § 702 n.11.

<sup>222</sup> *Id.* § 404.

<sup>223</sup> Genocide Convention, *supra* note 111, art. 1.

<sup>224</sup> *See id.* art. 4.

ing Parties to “undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention, and, in particular, to provide effective penalties for persons guilty of genocide.”<sup>225</sup> Obligations concerning genocide are considered customary international law and thus binding on all states.<sup>226</sup>

Looking to the consequences of recognizing a genocide claim under the ATS, it is unlikely that permitting such a claim will have harmful practical effects. Contrary to Alvarez’s claim in *Sosa*, recognizing a claim for genocide under the ATS will normally not conflict with existing case law, statutes, policy, or foreign relations considerations.<sup>227</sup>

The crime of genocide satisfies *Sosa* and falls within the Court’s mandate that the norm must parallel the 18th-century paradigms existing at common law at the time the First Congress enacted the ATS. Moreover, as discussed above, rape constitutes a form of genocide.<sup>228</sup> Thus, a claim of rape, which falls within the definition of genocide, can be an actionable claim under the ATS in the post-*Sosa* era.

### 3. War Crimes Satisfy *Sosa* and Constitute a Viable Cause of Action Under the ATS

War crimes constitute violations of the laws and customs of war. The exact content and definition of war crimes is not as certain as that of genocide and continues to change. This portion will examine the two categories of war crimes that are sufficiently definite and specific under international law to satisfy *Sosa*.

The first category of war crimes that likely meets the *Sosa* benchmark is grave breaches of the laws of war. The Geneva Conventions, ratified by approximately 192 nations, list “torture or inhuman treatment” and “wilfully causing great suffering or serious injury to body or health” among the grave breaches of the laws of war.<sup>229</sup> Customary international law appears to criminalize grave breaches of the Geneva Conventions whether states are party to the Geneva Conventions or not.<sup>230</sup> Moreover, the Statutes of the

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<sup>225</sup> *Id.* art. 5.

<sup>226</sup> RATNER, *supra* note 117, at 401.

<sup>227</sup> See *supra* notes 73-75 and accompanying text, concerning the practical consequences of recognizing Alvarez’s claim under the ATS.

<sup>228</sup> See *supra* Part I.D.1.b.

<sup>229</sup> Geneva Convention IV, *supra* note 134, art. 146.

<sup>230</sup> RATNER, *supra* note 117, at 90.

ICTY and the ICC list the same grave breaches of the laws of war as those provided in the Geneva Conventions.<sup>231</sup>

The second category of war crimes that likely satisfies *Sosa* are those acts prohibited by Common Article 3 (regarding non-international armed conflicts): “violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture . . . [and] outrages upon personal dignity, in particular humiliating and degrading treatment.”<sup>232</sup> Common Article 3 has also reached the status of customary international law.<sup>233</sup> Further, the ICTR and the Special Court for Sierra Leone have jurisdiction over violations of Common Article 3.<sup>234</sup>

Like genocide and piracy, universal jurisdiction exists for the prosecution of war crimes.<sup>235</sup> Therefore, war crimes are also offenses of universal concern and universal condemnation.<sup>236</sup> Individuals have been tried for war crimes in the Nuremberg and Tokyo Tribunals, the ICTY and the ICTR.<sup>237</sup> The ICC has jurisdiction over an expansive list of war crimes.<sup>238</sup>

The Geneva Conventions carry almost universal ratification. Thus, there is almost universal acceptance of the norm prohibiting war crimes. It appears that like the perpetrator of genocide or the pirate, the international community also considers the war criminal an enemy of all mankind.

Moreover, the punishment of war crimes appears universal. Regarding grave breaches of the Geneva Conventions, states party to the Geneva Conventions “undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention.”<sup>239</sup> In addition, a state party to the Geneva Conventions:

shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provi-

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<sup>231</sup> See ICTY Statute, *supra* note 182, art. 3. Article 3 includes “wilfully causing great suffering or serious injury to body or health” and “[t]orture or inhuman treatment” within its definition of war crimes. *Id.* Accord ICC Statute, *supra* note 170, art. 8.

<sup>232</sup> Geneva Convention I, *supra* note 131, art. 3; Geneva Convention II, *supra* note 132, art. 3; Geneva Convention III, *supra* note 133, art. 3; Geneva Convention IV, *supra* note 134, art. 3.

<sup>233</sup> See *supra* notes 142-143 and accompanying text.

<sup>234</sup> ICTR Statute, *supra* note 169, art. 4; Sierra Leone Statute, *supra* note 169, art. 3.

<sup>235</sup> RESTATEMENT, *supra* note 28, § 404.

<sup>236</sup> See *id.*

<sup>237</sup> See *supra* Part I.D.2.a.

<sup>238</sup> ICC Statute, *supra* note 170, art. 8.

<sup>239</sup> Geneva Convention IV, *supra* note 134, art. 146.

sions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case.<sup>240</sup>

From the Nuremberg Tribunal to the ICC, the international community has created tribunals to prosecute war crimes. Additionally, war crimes are offenses of such universal condemnation that any state can prosecute persons alleged to have committed them.<sup>241</sup>

Those crimes constituting grave breaches of the laws of war and violating Common Article 3 are sufficiently defined under international law to satisfy *Sosa*. Though rape is not expressly named a grave breach of the Geneva Conventions, state practice and custom demonstrate otherwise. The U.S. Department of State, legal scholars, and international organizations have interpreted rape as a grave breach of the Geneva Conventions.<sup>242</sup> Further, the ICTY and the Second Circuit have found rape to be a violation of Common Article 3.<sup>243</sup>

In sum, not all claims of war crimes are actionable under the ATS. The list of war crimes continues to expand, and it may be some time before a particular act is considered sufficiently definite and certain under international law. It appears that grave breaches of the laws of war and violations of Common Article 3 meet *Sosa* and thus comply with the Supreme Court's mandate that an actionable claim should parallel the 18th-century paradigms, such as piracy.

With respect to the practical effects of recognizing a war crimes claim under the ATS, a court is less likely to run into problems if it deals with grave breaches of the Geneva Conventions or violations of Common Article 3. There is sufficiently definite content and acceptance of these types of crimes within the international community that recognizing such a claim will not likely create problems, either legally or politically. Accordingly, when rape is committed as a grave breach of the Geneva Conventions or in violation of Common Article 3, it is most likely an actionable claim under the ATS.

#### 4. Crimes Against Humanity Do Not Satisfy *Sosa* and Therefore Do Not Constitute a Viable Cause of Action Under the ATS

There appears to be worldwide acceptance of the norm prohibiting crimes against humanity. The Statutes of the ICTY, ICTR, and ICC pro-

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<sup>240</sup> *Id.*

<sup>241</sup> RESTATEMENT, *supra* note 28, § 404.

<sup>242</sup> *See supra* notes 152-53 and accompanying text.

<sup>243</sup> *See supra* notes 159-73 and accompanying text.

claim jurisdiction over acts considered crimes against humanity. In fact, the ICTY and ICTR have convicted persons of these crimes.<sup>244</sup> As the acts which generally constitute crimes against humanity are often egregious, one would presume that the international community would perceive a perpetrator of these crimes as an enemy of all mankind—much like the pirate, torturer, and war criminal.

Nevertheless, in contrast to genocide and war crimes, no convention defines crimes against humanity. Rather, they are based solely on customary international law. Though a norm of customary international law could certainly be sufficiently definite and specific to satisfy *Sosa*, crimes against humanity do not fall into that category. Despite being based on the same concepts, eleven different international texts provide eleven slightly different versions of what elements and acts constitute crimes against humanity. Thus, it does not appear that crimes against humanity are sufficiently definite and specific to satisfy *Sosa*.

Beyond the jurisdiction of the international criminal tribunals, there does not appear to be much support for universal punishment of crimes against humanity. There is little evidence that the international community considers crimes against humanity as offenses of such universal condemnation that any state can prosecute any person alleged to have committed such crimes. No convention provides for the punishment of crimes against humanity, though all of the criminal tribunals beginning with Nuremberg and Tokyo have had jurisdiction to punish crimes against humanity. Crimes against humanity are not considered to have universal jurisdiction.<sup>245</sup> Crimes against humanity are not considered *jus cogens* norms.<sup>246</sup>

In contrast to torture, genocide, and war crimes, rape is expressly named a crime against humanity in several international texts.<sup>247</sup>

Nevertheless, crimes against humanity do not appear to have the specific content and worldwide acceptance necessary for a court to find them to be actionable under the ATS. Because crimes against humanity do not satisfy *Sosa*, there is no need to consider the practical effects of recognizing this claim under the ATS.

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<sup>244</sup> See *supra* notes 201-05 and accompanying text.

<sup>245</sup> See RESTATEMENT, *supra* note 28, § 404.

<sup>246</sup> See *id.* § 702 cmt. n.

<sup>247</sup> See ICTY Statute, *supra* note 182, art. 5; ICTR Statute, *supra* note 169, art. 3; ICC Statute, *supra* note 170, art. 7; Sierra Leone Statute, *supra* note 169, art. 2.

## B. *Countervailing Arguments and Concerns*

### 1. Policy Concerns: Interference with the Executive and Congressional Domains, Especially Foreign Affairs

In *Sosa*, the Court declared that its holding regarding the ATS keeps the door ajar for a narrow class of international norms the violation of which may be alleged under the ATS.<sup>248</sup> Just how wide is the opening? What are some of the countervailing concerns that arise from the Court's decision in *Sosa*? The portions below examine some of the concerns and countervailing arguments that have been made against permitting any cause of action under the ATS.

One author, Captain Mark Rosen, notes that in the post-9/11 world, the United States relies heavily upon, and even requires, foreign cooperation to meet its national security and political goals. Given this need for cooperation, he asks “[w]ill the new risks of ATS litigation make it more difficult for the [United States] to get help from foreign officials if there is concern that the individuals, or perhaps their government, will become defendants in ATS litigation in [U.S.] courts?”<sup>249</sup> Rosen cites several ATS litigation scenarios that he believes undermine U.S. security policies.<sup>250</sup> These include: (1) civil suits against weapons manufacturers for tortious deaths or injuries of foreign persons associated with overseas U.S. military operations; (2) civil suits against manufacturers or foreign officials that use a weapon considered illegal by customary international law (e.g., landmines); and (3) civil suits concerning human rights abuses of foreigners overseas in connection with police action.<sup>251</sup> Rosen notes that, although the U.S. government cannot be sued directly under the ATS, federal officials or contractors could be held liable under the ATS for actions that kill or harm foreigners.<sup>252</sup>

Although his article pre-dates *Sosa*, Rosen raises several legitimate concerns that are particularly relevant given the majority's mandate that courts consider the practical consequences or effects of recognizing a claim under the ATS. In *Sosa*, the Court set a high standard for establishing an actionable claim under the ATS. Further, it cautioned federal courts about accepting claims in light of Executive or Legislative concerns. In fact, one

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<sup>248</sup> *Sosa v. Alvarez-Machain*, 542 U.S. 692, 729 (2004).

<sup>249</sup> Mark E. Rosen, *The Alien Tort Statute: An Emerging Threat to National Security*, NAT'L FOREIGN TRADE COUNCIL 14 (2003), available at <http://www.nftc.org/default/usa%20engage/ATS%20-%20An%20Emerging%20Threat%20to%20National%20Security.pdf> at 14.

<sup>250</sup> *Id.* at 14-18.

<sup>251</sup> *Id.*

<sup>252</sup> *Id.* at 20.

of the reasons the Court denied Alvarez's claim was because of the adverse and breathtakingly broad impact such a ruling would have on arrests worldwide.<sup>253</sup> Moreover, the Court expressly noted that the "potential implications for the foreign relations of the United States of recognizing [causes of action under the ATS] should make courts *particularly wary* of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs."<sup>254</sup> The Court continued, noting that "since many attempts by federal courts to craft remedies for the violation of new norms of international law would raise risks of adverse foreign policy consequences, they should be undertaken, *if at all*, with great caution."<sup>255</sup>

The Court seems to have answered most of the concerns raised by Rosen by its requirement that any actionable ATS claims must meet the standards of the 18th-century law of nations crimes coupled with its cautions to federal courts to tread carefully in this area.

Even if a norm was sufficiently specific to satisfy *Sosa* (e.g., the example Rosen gives concerning human rights abuses), courts must still consider the practical consequences of recognizing such a claim. If, for instance, the recognition of a claim jeopardizes some area of foreign relations that is particularly important to the Executive, it is likely, though by no means guaranteed, that a court would not exercise jurisdiction over that claim. Problems could arise, though, if the circuits reach conflicting positions. What if the Fourth Circuit refuses to recognize a human rights violation because of Executive or Legislative concerns and the Ninth Circuit exercises jurisdiction over a similar claim? Foreign relations or national security concerns could be jeopardized. How could the Supreme Court reconcile these positions? This seems to have been Justice Scalia's concern in *Sosa* when he criticized the majority for condoning the same standard that brought them *Sosa* as at least part of the inquiry a court should undertake when reviewing whether a norm is actionable under the ATS. In fact, Justice Scalia questioned how the majority's holding actually provides any guidance to courts facing an ATS claim.<sup>256</sup> Justice Scalia concluded that perhaps there are just some areas where the courts should not be involved.<sup>257</sup>

As the Court noted, the door is ajar to ATS claims, subject to vigilant door keeping, and thus open to a small class of international norms.<sup>258</sup> Though the opening may be narrow today, conflicting circuit decisions

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<sup>253</sup> *Sosa*, 542 U.S. at 736-37.

<sup>254</sup> *Id.* at 734 (emphasis added).

<sup>255</sup> *Id.* (emphasis added).

<sup>256</sup> *Id.* at 748 (Scalia, J. concurring).

<sup>257</sup> *Id.* at 749.

<sup>258</sup> *Id.* at 729.

could open the door to areas infringing upon matters traditionally controlled by the Executive or Legislative branches.

## 2. Are any Claims Truly Actionable Under the ATS?

Perhaps only torture (as Congress singled it out as a private cause of action under the ATS) and the other violations of the law of nations constituting the 18th-century paradigms actually satisfy *Sosa*. Justice Breyer in his concurring opinion in *Sosa* hones in on piracy as the standard that current international norms must meet. Professor Eugene Kontorovich argues that piracy had six characteristics and that today's international norms do not have those same characteristics.<sup>259</sup> These characteristics are: (1) universal condemnation of the crime;<sup>260</sup> (2) a "narrowly defined offense;"<sup>261</sup> (3) internationally uniform punishment of death;<sup>262</sup> (4) pirates were private actors (no government action);<sup>263</sup> (5) difficulty enforcing the crime of piracy because of the location of the crime on the high seas (such that universal jurisdiction provided the best means to enforce the laws against piracy);<sup>264</sup> and (6) it directly threatened or harmed many nations, thus making a pirate an enemy of all mankind.<sup>265</sup>

Crimes such as genocide, war crimes, and crimes against humanity do not reflect the exact characteristics of piracy. Perhaps war crimes and crimes against humanity may not be considered "narrowly defined." For genocide and war crimes, there are obligations and mechanisms to punish perpetrators, but that does not mean that the punishment itself will be the same every time (e.g., there is no agreement that a convicted war criminal will receive the death penalty). Further, some of these offenses include state actors. For example, generally crimes against humanity require some sort of "official action."<sup>266</sup> Torture, likewise, requires a state actor or individual acting in an official capacity.<sup>267</sup> Genocide by its very definition is directed towards one group—not all people. Yet, arguably, the international community conceives the perpetrator of genocide to be an enemy of all man-

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<sup>259</sup> Eugene Kontorovich, *Implementing Sosa v. Alvarez-Machain: What Piracy Reveals about the Limits of the Alien Tort Statute*, 80 NOTRE DAME L. REV 111, 153-57 (2004).

<sup>260</sup> *Id.* at 139.

<sup>261</sup> *Id.* at 139-42.

<sup>262</sup> *Id.* at 142-45.

<sup>263</sup> *Id.* at 145-51.

<sup>264</sup> *Id.* at 151-52.

<sup>265</sup> *Id.* at 152-53.

<sup>266</sup> See *supra* notes 178-93 and accompanying text concerning the elements of crimes against humanity.

<sup>267</sup> See *supra* notes 104-06 and accompanying text concerning the elements of torture.

kind. North American Treaty Organization members cited the genocide and ethnic cleansing in Kosovo as part of its rationale for its humanitarian intervention into the region in the late 1990s.<sup>268</sup> More recently, the George W. Bush Administration cited human rights atrocities as part of its justification for entering Iraq.<sup>269</sup> Notwithstanding Kontorovich's concerns, it appears that the international community does perceive some crimes to be as egregious as piracy and is therefore willing to invest significant time, resources, money, and personnel in routing out such acts.

Despite these concerns and those raised by the concurring justices in *Sosa*, the ATS has life yet. A narrow class of international norms may be presented under the ATS. Norms of international law change and grow over time and through the guidance of the international community. The Court did not want to shut the door to all claims alleging violations of international law. Certain egregious, universally condemned crimes with definite and specific content under international law, examined in light of Executive or Congressional concerns, will survive *Sosa*.

#### CONCLUSION

The Supreme Court concluded that the ATS was jurisdictional in nature, providing no new causes of action for aliens. However, it found that a modest number of claims may be brought under the ATS because they constitute violations of existing norms of international law. Not just any claim will be considered. Rather, federal courts must analyze the claim and determine if it parallels the 18th-century paradigms existing when the ATS came into being. Even if the norm is widely accepted by the international community and sufficiently definite in its content, courts must still consider the practical consequences of recognizing a particular claim under the ATS.

Rape is not a *per se* violation of international law. An act of rape can nevertheless be committed as part of another violation of international law. Rape resulting in severe mental or physical suffering and inflicted for a designated purpose (e.g., to punish, intimidate, coerce, or obtain information) by government officials, or under the color of authority, constitutes torture. Rape, when used as a tool to destroy, in whole or in part, a national, ethnic or religious group, constitutes genocide. Rape in armed conflict violates the laws of war and thus is a war crime for which perpetrators have

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<sup>268</sup> See Mary Ellen O'Connell, *The UN, NATO, and International Law after Kosovo*, 22 HUM. RTS. Q. 57, 73-82 (2000), reprinted in CARTER ET AL., *supra* note 28, at 1078-81.

<sup>269</sup> Kenneth Roth, *Setting the Standard: Justifying Humanitarian Intervention*, 26 HARV. INT'L REV. 58 (2004), available at <http://hir.harvard.edu/articles/?id=1218>.

been found criminally liable. Finally, rape has been expressly named a crime against humanity.

Certain existing norms of international law (e.g., genocide and war crimes), satisfy the *Sosa* benchmark such that federal courts will likely recognize a cause of action alleging the violation of those norms under the ATS. The TVPA specifically provides that torture can be a private cause of action under the ATS. Additionally, genocide meets the 18th-century paradigms associated with the ATS. Though not quite as specifically defined, war crimes arguably meet the 18th-century paradigms of the ATS. Finally, crimes against humanity do not appear to satisfy the 18th-century paradigms at this time because the content and elements of those crimes are not yet sufficiently specific or widely accepted. Moreover, there do not appear to be any mechanisms or obligations for universal punishment for crimes against humanity.

Thus, the woman raped in her hometown in Africa *may* be able to bring a claim against her rapist under the ATS in a U.S. federal court. In light of *Sosa*, it appears that she may seek redress for the rape only if it occurred pursuant to the commission of another crime: torture, genocide, or war crimes. Even if the rape constituted an act of torture or was used as a tool to perpetrate genocide, the court may still dismiss the claim for lack of jurisdiction if the practical consequences of recognizing the claim weigh against it. Though the Court considers the ATS to be jurisdictional in nature, civil redress for rape still exists, albeit in limited conditions. Therefore, *Sosa* does not close the door to all rape claims under the ATS.

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