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Ghosts of Horace Gray: Customary International Law as Expectation in Human Rights Litigation

Daniel Ryan Koslosky

INTRODUCTION

"The jurisprudence of Horace Gray . . ." is not an omnipotent battle cry heard amidst the tension that is a first-year law class. Justice Gray's erudition and legal prose seem to have been largely surrendered to a bygone era. Yet the overlooked legacy of this relatively understudied Justice has recently been propelled to the forefront of human rights litigation in the United States, and has been the subject of a learned and rigorous debate in political and academic communities.

In 1898, amidst the onset of the Spanish–American War, a small, unarmed Spanish fishing vessel, the Paquete Habana, was captured as a prize of war by an American gunboat two miles off the coast of Mariel, Cuba. The validity of the seizure was considered by the Supreme Court. Justice Gray, speaking for the majority, stated that:

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. For this purpose, where there is no treaty and no controlling executive or legislative

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2 See, e.g., United States v. Wong Kim Ark, 169 U.S. 649, 652, 693, 732 (1898) (holding that the Fourteenth Amendment requires that children born in the United States to domiciled, non-citizen parents automatically become citizens of the United States if the United States is not party to a treaty stating otherwise); Fong Yue Ting v. United States, 149 U.S. 698, 704, 725, 728 (1893) (upholding the Geary Act, which added multiple requirements to the Chinese Exclusion Act); Nishimura Ekiu v. United States, 142 U.S. 651, 658, 663 (1892) (upholding the refusal of entry to Chinese immigrants). Justice Gray was also instrumental in establishing the circuit courts of appeal. See Circuit Court of Appeals (Evarts) Act of 1891, ch. 517, 26 Stat. 826 (1891); 8 Owen M. Fiss, History of the Supreme Court of the United States: Troubled Beginnings of the Modern State 1888–1910, at 24 (1993) (describing the contributions of Justice Gray to the federal judiciary).

3 The Paquete Habana, 175 U.S. 677, 678–679 (1900).

4 Id. at 679.
act or judicial decision, resort must be had to the customs and usages of civilized nations . . . .

This simplistic declaration has had a rebirth of relevance in light of contemporary human rights litigation brought under the Alien Tort Statute (ATS). The contemporary academic and juridical debates have centered primarily on whether Customary International Law (CIL) is a constituent of post- *Erie* federal common law, directly applicable in federal and state courts. Moreover, questions regarding the limits of corporate liability under the ATS, as well as the limits of ATS litigation in light of the Act of State Doctrine, and Foreign Sovereign Immunity have also been repeatedly revisited by courts and legal academia.

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5 Id. at 700. Justice Gray stated five years prior to the *Paquete Habana* that private international law “is part of our law, and must be ascertained and administered by the courts of justice as often as such questions are presented in litigation between man and man, duly submitted to their determination.” Hilton v. Guyot, 159 U.S. 113, 163 (1895) (emphasis added).

6 28 U.S.C. § 1350 (2000). The statute in full provides: “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” Id. It is of note that the statute is also referred to as the “Alien Tort Claims Act,” but for clarity and consistency this Article will follow the Supreme Court’s usage of the descriptive “Alien Tort Statute.” See, e.g., Sosa v. Alvarez-Machain, 542 U.S. 692, 697 (2004) (stating that the question presented was whether plaintiffs could “recover under the Alien Tort Statute (ATS)”).

7 *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).


However, the vast majority of studies on applying CIL in domestic courts take CIL for granted: CIL is seemingly viewed as some objective "thing" that somehow exists, yet is not fully conceptualized. That is not to say that brilliant legal scholars, practitioners, and judges have not gone to great lengths to deduce the implications and constitutionality of applying CIL directly in American courts. Yet, a complete analysis of CIL as domestic law must account for the nature of the doctrine, prior to deciding whether its application in domestic courts is warranted.

Litigating the law of nations in a U.S. district court is an ominous undertaking. There is a certain skepticism and disinclination to rely on international law. There are strong ideological and political hostilities regarding the federal judiciary's use—even its consideration—of international law in its jurisprudence. Legal practitioners may also be reluctant to use the theories underlying international human rights because of a narrow view of their roles in global civil society. Such reluctance is evident in the relative lack of cases brought under the ATS. However,
after the Second Circuit Court of Appeals held in *Filartiga v. Peña-Irala*\(^\text{15}\) that the torture and murder of a young Paraguayan man was a tort actionable under the laws of nations, there has been renewed interest in utilizing the ATS in human rights litigation.\(^\text{16}\)

Renewed interest in the ATS also brought a wave of disapproval regarding its application. Critics often point to separation of powers and the importance of maintaining American sovereignty as rallying cries against an extensive recognition of international legal norms in American courts.\(^\text{17}\) Some of these concerns were manifested in the Supreme Court’s decision *Sosa v. Alvarez-Machain*,\(^\text{18}\) which unequivocally held the ATS to be jurisdictional in nature, and that cases filed under the ATS must meet the specificity of violations of international law recognized at the time of its inception.\(^\text{19}\) However, a definite conclusion as to the status of international law in American jurisprudence can only be ascertained by examining both domestic and international law through a jurisprudential framework that can overcome traditional rigidities in mainstream legal thinking.

The Policy Sciences is just such a legal model. It allows exploration into the fundamental dynamics of law by examining signs and signals of legal communications and helps clarify the normative and legal concept of human rights. Such a paradigm allows one to explore insights into the social processes whereby law is made. Law fundamentally arises from the interrelationships of psychosocial group development, power structures, and constitutive processes. Moreover, the Policy Sciences approach also analyzes law in its communicative context by observing the signs and symbols demarcating law’s authority and control. As such, certain expectations arise from human interaction, whether they are on the micro-social or transnational level.\(^\text{20}\)

This Article will attempt to examine the nature of CIL as well as the implications of applying it in federal courts. Part I of this Article will explore the epistemology of CIL as common law. The English conceptualization and application of the law of nations will be examined, as will the framers’ views of the nature of CIL at the time of the Constitution’s drafting. More recent trends in American law such as legal positivism and the elimination of federal general common law will be examined in their intellectual contexts. American jurisprudence regarding the status and nature of CIL

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\(^{15}\) *Filartiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980).

\(^{16}\) *Id.* at 879.

\(^{17}\) See supra note 12, infra note 256.


\(^{19}\) *Id.* at 724–25.

will also be explored up to modern federal court jurisprudence. Part II of this Article will examine the nature of CIL. A more inclusive legal theory founded upon the Policy Sciences and communications theory will be outlined. Specifically, it will be demonstrated that CIL is essentially a normative concept of law founded upon generalized expectations of state and individual conduct. Notions of sovereignty found in federal courts’ ATS jurisprudence will be evaluated against this jurisprudential model and evaluated for its analytical robustness. Part III will look at the nature of contemporary human rights. The focus will be on human rights abuses in Paraguay during the 1970s, as well as the legality of nuclear deterrence. Conclusions and implications will follow.

I. THE EPISTEMOLOGY OF THE ALIEN TORT STATUTE

Alien Tort Statute jurisprudence is conceptually unique; it incorporates treaty and customary international law into the American constitutional framework. Such an undertaking invariably raises considerations regarding separation of powers, constitutional supremacy, as well as the nature of international law itself. To fully understand the nature and operation of the ATS, its ever-evolving jurisprudence must be viewed not only in its current form, but also historically in its intellectual context. The following sections examine the epistemology of the ATS by examining the various jurisprudential approaches to the law of nations as domestic law. The common law of England and early America will be examined along with contemporary legal thinking and case law.
That the "Law of Nations" is a part of enforceable domestic law is a concept that predates the founding of the American Republic. The law of nations was held to be a part of eighteenth-century English common law. Central to that idea was the Grotian concept that the universal nature of law rendered it applicable to both states and individuals. As such, the dichotomy of international law as either public or private, and applicable to states or individuals, was lacking. Indeed, for Grotius there were two primary sources of international law: "the principles of nature" and "common consent."
Such “law of nature” could be ascertained by two different means: (1) through “the necessary agreement or disagreement of anything with a rational and social nature,”27 or, (2) by demonstrating that “among all nations, or among all those that are more advanced in civilization” a practice or custom is believed to be the law of nature.28 Yet Grotius also spoke to the universal applicability of international law. He asserted that “an association, as well as an individual, has the right to bind itself by its own act, or by the act of a majority of its members.”29 Grotius’ considerations of the universality of international law directly influenced the two elements by which modern CIL is recognized: opinio juris and general practice.30

Emmerich de Vattel held similar views on the nature of international law, stating that it “consist[s] in a just and rational application of the law of nature to the affairs and conduct of nations or sovereigns.”31 Yet de Vattel distinguished rules obtained from law of nature and rules obtained from human agreement. When the two conflicted, the rules derived from natural law controlled; no human agreement could legitimately contravene natural law.32 Thus, it was not treaties, but rather custom, that was “the older and the original source of International Law.”33

The direct application of international law in English courts was the logical extension of the universalist view of international law. Moreover, such a view did not contemplate a distinction between private and public international law. What significance would a difference in the forum among civilized nations have for a law that is universal in its application? This is the concept to which Lord Mansfield spoke in Lindo v. Rodney.34 Indeed, in Lindo no explicit distinction was made between private and public strands

27 Grotius, supra note 26, at 42.
28 Id.
29 Id. at 386.
33 I LASSA OPPENHEIM, INTERNATIONAL LAW 22 (2d ed. 1912).
of international law. Lord Mansfield was the foremost English jurist to advocate international law as part of domestic common law. He even went so far as to assert that domestic statutes need be construed harmoniously with international law.

In his Commentaries, Lord Blackstone also alluded to the status of CIL as enforceable in domestic courts. Like his intellectual predecessors, Blackstone saw CIL as “a system of rules, deducible by natural reason, and established by universal consent among the civilised inhabitants of the world,” which was founded upon an anti-positivist natural law foundation. As such, an obligation of state arose not out of a notion of sovereignty, but rather moralistic obligations to do good in peace, and mitigate the harm of war. Moreover, the nature of CIL made it applicable in domestic English

35 Id. at 385. Lord Mansfield stated:

By the law of nations, and treaties, every nation is answerable to the other for all injuries done, by sea or land, or in fresh waters, or in port. Mutual convenience, eternal principles of justice, the wisest regulations of policy, and the consent of nations, have established a system of procedure, a code of law, and a Court for trial of prize. Every country sues in these Courts of the others, which are all governed by one and the same law, equally known to each.

Id. at 388 (emphasis added).

36 See Dickinson, supra note 23, at 28. A similar conclusion was affirmed by Lord Stonewell in 1807. He noted, in the High Court of Admiralty

... is a Court of the Law of Nations, though sitting here under the authority of the King of Great Britain. It belongs to other nations as well as to our own; and what foreigners have a right to demand from it, is the administration of the law of nations, simply, and exclusively of the introduction of principles borrowed from our own municipal jurisprudence, to which, it is well known, they have at all times expressed no inconsiderable repugnance.


37 See, e.g., Barbuit’s Case, (1737) 25 Eng. Rep. 777, 778 (Ch.). This principle was also adopted by the U.S. Supreme Court in Charming Betsy. Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) (“[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.”); see DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr., 485 U.S. 568, 575 (1988) (stating that the holding of Charming Betsy is “beyond debate”); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 115 cmt. a (1987) (“It is generally assumed that Congress does not intend to repudiate an international obligation ... ”).

38 William Blackstone, 4 COMMENTARIES *66.

39 Id.

40 Id. See also De Vattel, supra note 31, at lvi (stating that “the law of Nations is originally no other than the law of Nature applied to Nations”); Triquet v. Bath, (1764) 1481, 97 Eng. Rep. 936, 938 (K.B.) (Lord Mansfield noted that “The law of nations was to be collected
courts as part of the common law.41 However, Blackstone found only four violations of the laws of nations: violations of passports, violations of the rights of ambassadors, the crime of piracy, and trading slaves.42 By the time of the American Revolution, international law was accepted as a part of the laws of England.

B. The Common Law of America

The English approach to international law was adopted by American courts both prior to and after independence.43 Indeed, in addition to Blackstone, de Vattal and Grotius significantly influenced early American conceptualizations of international law, and its status with new American common law.44 Two competing theories account for the presence of international law as domestic law in the United States. First, there is the view that the law of nations recognized by England was inherited by American jurisprudence at the time of independence.45 A clear declaration of this approach to CIL was made in the Rapid.46 At issue in the Rapid was the confiscation of English-bought goods during the War of 1812.47 When ascertaining the legality of the confiscation under international prize law, the Supreme Court stated that the governing law was “the law

from the practice of different nations and [also from] the authority of Grotius, Barbeyrac, Bynkershoek, Wiquefort [and others,] there being no English writer of eminence, upon the subject.”.

41 William Blackstone, 4 Commentaries *67. Lord Blackstone stated in full:

In arbitrary states this law, wherever it contradicts or is not provided for by the municipal law of the country, is enforced by royal power: but since in England no royal power can introduce a new law or suspend the execution of the old, therefore the law of nations (wherever any question arises which is properly the object of its jurisdiction) is here adopted in its full extent by the common law, and is held to be a part of the law of the land.

Id. (emphasis added).

42 Id. at *68-*73, *423-*425.

43 See, e.g., Talbot v. Janson, 3 U.S. (3 Dall.) 133, 159–160 (1795) (Iredell, J.) (stating “[t]hat prima facie all piracies and trespasses committed against the general law of nations, are enquirable, and maybe proceeded against, in any nation where no special exemption can be maintained, either by the general law of nations, or by some treaty which forbids or restrains it.”); Ware v. Hylton 3 U.S. (3 Dall.) 199, 228 (1796) (stating that “the law of nations is part of the municipal law of Great Britain.”).

44 See Jesse S. Reeves, The Influence of the Law of Nature upon International Law in the United States, 3 Am. J. Int'l L. 547, 549 (1909) (arguing that de Vattel was one of the influential international legal thinkers on early U.S. jurisprudence).


46 The Rapid, 12 U.S. (8 Cranch) 155, 162 (1814).

47 Id. at 159.
of England before the revolution, and therefore constitutes a part of the admiralty and maritime jurisdiction conferred on this Court in pursuance of the constitution."

The second theory regarding how CIL was incorporated into American jurisprudence posits that independence in and of itself subjects the United States to international law. This independent nation thesis finds support in many early Supreme Court opinions, as well as the writings supporting the ratification of the Constitution. *Ware v. Hylton* involved a post–Revolutionary War Virginia law inhibiting the repayment of pre–Revolutionary War debts owed to British subjects. The Justices held that a law of a state cannot contravene the Constitution of the United States. Justice Wilson, however, stated in dictum that the controlling law of nations did not apply because of its inheritance from the English common law. Rather, he stated that "[w]hen the United States declared their independence, they were bound to receive the law of nations, in its modern state of purity and refinement. By every nation, whatever is its form of government, the confiscation of debts has long been considered disreputable . . . ." That is, being an independent nation automatically makes CIL binding upon a state.

The independent nation thesis also finds support in *Chisholm v. Georgia*. *Chisholm* involved a suit against the State of Georgia for debts incurred during the Revolutionary War. The Supreme Court held that Article III permitted suits against states by a citizen of another state.

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48 Id. at 162. See also Thirty Hogshead of Sugar v. Boyle and Others, 13 U.S. (9 Cranch) 191 (1815). The Boyle Court, also considering the legality of a confiscation, stated that "[t]he United States having, at one time, formed a component part of the British empire, their prize law was our prize law. When we separated, it continued to be our prize law, so far as it was adapted to our circumstances and was not varied by the power which was capable of changing it." Id. at 198. Cf. The Nereide, Bennett, Master 13 U.S. (9 Cranch) 388, 423 (1815) (Chief Justice Marshall stating that "the court is bound by the law of nations which is part of the law of the land").

49 Henkin, *supra* note 45, at 1556; see also Phillip C. Jessup, *The Doctrine of Erie Railroad v. Tompkins Applied to International Law*, 33 Am. J. Int'l L. 740, 743 (1939) (stating that the duty to apply international law in federal courts is one imposed upon the United States as an international person).

50 *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796).


52 *Ware*, 3 U.S. (3 Dall.) at 223.

53 Id. at 281.

54 Id.

55 *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 474 (1793).


57 *Chisholm*, 2 U.S. (2 Dall.) at 479.
scholarly attention has primarily focused on the implications of Chisholm on theories of sovereign immunity, the decision is also an endorsement of the independent nation approach to CIL, and an affirmation of the supremacy of CIL relative to the states. Chief Justice Jay stated that the “United States had, by taking a place among the nations of the earth, become amenable to the laws of nations . . . .” He further stated that the law of nations was of “national character and capacity” and that the “United States were responsible to foreign nations for the conduct of each State, relative to the laws of nations, and the performance of treaties . . . .” Indeed, the Chief Justice differentiated international law derived from custom and international law derived from treaty. Both, however, rise supreme to state law, and are treated as equal to each other.

Chief Justice Jay’s theory on the status of international law in the new republic predated his tenure on the Supreme Court. For Jay, Madison, and Hamilton, the law of nations was a strictly federal concern. In Federalist No. 3, Jay espoused the belief that treaties and the law of nations should be constructed in a single sense. Because state courts adjudicating matters based on the law of nations or treaties would reach inconsistent conclusions, such adjudications should rest solely with federal courts. Madison and Hamilton also reached like conclusions. For Madison, knowledge of the law of nations was necessary for the Congress to regulate commerce.

Hamilton argued in Federalist No. 80 that:


59 Chisholm, 2 U.S. (2 Dall.) at 474.

60 Id.

61 See also Respublica v. De Longchamps, 1 U.S. (1 Dall.) 111, 116 (1784) (holding that the law of nations “in its full extent, is part of the law of [Pennsylvania], and is to be collected from the practice of different Nations, and the authority of writers”); United States v. Worrall, 28 F. Cas. 774, 778 (C.C.D. Pa. 1798) (stating that the “prosecution . . . was not expressly on the treaty, but on the law of nations, which is a part of the common law of the United States; and the power of indicting for a breach of treaty, not expressly providing the means of enforcing performance in the particular instance, is itself a common law power.”); Henfield’s Case, 1 F. Cas. 1099, 1117 (C.C.D. Pa. 1793) (Grand Jury charge of Wilson, J.) (stating that “it is demonstrated that the law of nations is part of the law of the land” and that “in numerous other instances, enumerated by Blackstone, the law of nations is enforced by the judiciary”).


63 Id. Jay also noted that “[s]o far therefore as either designed or accidental violation of treaties and of the laws of nations afford just causes of war, they are less to be apprehended under one general government, than under several lesser ones, and in that respect, the former most favors the safety of the people.” Id. at 11. See also Hines v. Davidowitz, 312 U.S. 52, 62, n.9 (1941) (noting the “importance of national power in all matters relating to foreign affairs and the inherent danger of state action in this field” (citing The Federalist Nos. 3, 4, 5, 42, and 80)).

64 The Federalist No. 53, at 263 (James Madison).
The most bigotted idolizers of state authority have not thus far shewn a disposition to deny the national judiciary the cognizance of maritime causes. These so generally depend on the laws of nations, and so commonly affect the rights of foreigners, that they fall within the considerations which are relative to the public peace. The most important part of them are by the present confederation submitted to federal jurisdiction.

He further was of the opinion that:

The common law of England which was & is in force in each of these states adopts the law of Nations, the positive equally with the natural, as a part of itself . . . . Ever since we have been an Independent nation we have appealed to and acted upon the modern law of Nations as understood in Europe . . . . The President's Proclamation of Neutrality refers expressly to the modern law of Nations . . . . "Tis indubitable that the customary law of European Nations is a part of the common law and by adoption that of the U[nited] States.

The propositions of Jay and Hamilton extend beyond a theory of federalism. They rest on the notion that CIL is enforceable in domestic courts, particularly the federal judiciary. Jay went so far as to declare in Federalist No. 64 that CIL had such status within the common law so as to enable the federal judiciary to check the treaty power of Congress.

C. The Path of the Alien Tort Statute

1. Universalist Beginnings.—The juridical basis on which CIL is incorporated into the common law of the United States is of fundamental importance to contemporary human rights litigation under the ATS. The ATS was passed as § 9(b) of the Judiciary Act of 1789. Many of the objections to the ratification of the Constitution were related to the broad powers granted to the counter-majoritarian judicial branch. The Judiciary Act of 1789 served to placate those reservations by structuring the federal judiciary and refining its jurisdiction. Among the provisions contained in the Judiciary Act of 1789 was the ATS.

65 The Federalist No. 80, at 389 (Alexander Hamilton).
67 The Federalist No. 64, at 317 (John Jay) (stating that in the instance in which the Senate ratified an obtrusive treaty, "the treaty so obtained from us would, like all other fraudulent contracts, be null and void by the laws of nations").
68 Judiciary Act of 1789, ch. 20, § 9(b), 1 Stat. 73, 77 (1789).
70 See Dickinson, supra note 23, at 46.
The specific rationale of the ATS is unclear. Although the language of the statute has been changed numerous times over the course of its history, the ATS has been used infrequently. The nineteenth century jurisprudence is devoid of a comprehensive ATS legal corpus. Yet lack of litigation did not prevent the Supreme Court from making findings with regard to the status of CIL in American common law.

In *Hilton v. Guyot*, the Supreme Court held that, as a matter of comity between nations, judgments of foreign courts are "prima facie evidence . . . of the truth of the matter adjudged" when the manner is litigated in American courts. Justice Gray, speaking for the Court, noted that a judgment rendered between two citizens of the same country "may be held conclusive as between them everywhere." Thus, although the suit is between American and foreign parties in an American court, "both may be held bound by a judgment in favor of either; and if a citizen sues a foreigner, and judgment is rendered in favor of the latter, both may be held equally bound." A qualification of the holding is a view of international law similar to the Grotian tradition of English common law. That is to say, the outcome of an adjudication is the legal relationship between the parties in light
of the substantive law of the jurisdiction in which the transaction occurs. Applicability of the outcome in multiple international fora, in light of the substantive law applied to the transaction, is an endorsement of the universality of such law. Justice Gray stated this succinctly:

International law, in its widest and most comprehensive sense,—including not only questions of right between nations, governed by what has been appropriately called the 'law of nations,' but also questions arising under what is usually called 'private international law,' or the 'conflict of laws,' and concerning the rights of persons within the territory and dominion of one nation, by reason of acts, private or public, done within the dominions of another nation,—is part of our law, and must be ascertained and administered by the courts of justice as often as such questions are presented in litigation between man and man, duly submitted to their determination.79

Not only does Justice Gray seem to adopt Grotian universalism in his approach to law, he also blurs the distinction between public and private international law. Yet, because of the universal applicability of international law, both its public and private strains are treated the same way, as part of American common law.

Justice Gray also elaborated his view of international law five years later in the Paquete Habana.80 Recall, he made the sweeping statement that "[i]nternational 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."81 As was the case in Guyot, the belief that international law simply is part of American law rests on a Grotian–universalist view of international law. That a law is applicable within a jurisdiction without an enabling of such a law by the sovereign governing that jurisdiction is a rejection of Austinian positivism.82 Moreover, the binding force of international law makes it a true form of law rather than mere "positive morality."83

2. Positivism.—There soon arose a strong transformational undercurrent whereby legal scholars sought to emulate the natural sciences by developing and utilizing methodologies in interpreting and applying international

79 Id. at 163.
80 The Paquete Habana, 175 U.S. 677, 700 (1900).
81 Id. at 700 (emphasis added).
83 See 2 John Austin, Lectures on Jurisprudence or the Philosophy of Positive Law 176–77 (R. Campbell ed., 1875).
"[T]his involved redefining the discipline in ways that appeared compatible with the scientific framework in an attempt not only to elevate their discipline, but their profession." However, the increasing focus on more concrete legal methodologies occurred simultaneously with the rise of the modern state system.

One of the chief critics of the natural law approach to interstate law was John Austin. Austin sought to separate concepts of morality and notions of natural law from international jurisprudence. The lack of a definable international sovereign was inherently fatal to the concept of international law. The analysis of a legal system began with the identification of a sovereign whose commands are obeyed. According to Austin, international law was merely "a set of objects frequently but improperly termed laws," more akin to "[t]he law of honour" or "[t]he law set by fashion." Positivism, as adhered to and refined by Austin, shaped legal thinking during the time that American jurisprudence was undergoing significant transformation.

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85 Id. at 18.
86 See Louis Henkin et al., International Law, at xxv (3d ed. 1993) (observing that, "[t]he rise of positivism in Western political and legal theory, especially from the latter part of the 18th century to the early part of the 20th century, corresponds to the steady rise of the national state and its increasingly absolute claims to legal and political supremacy.").
87 See Anghie, supra note 84, at 14 (describing Austin as "the foremost spokesman for positivism at the time").
88 Austin, supra note 24, at 9; see also id. at 101 (arguing that "[l]aws properly so called are a species of commands" and that "every law properly so called flows from a determinate source").
89 Id. at 152 ("[T]he law obtaining between nations is not positive law: for every positive law is set by a person or persons in a state of subjection to its author.").
90 Id. at 199–212.
91 Id. at 10.

No... [state] has a right to sit in judgment generally upon the actions of another; at least to the extent of compelling its adherence to all the principles of justice and humanity in its domestic concerns. It would be inconsistent with the equality and sovereignty of nations, which admit no common superior. No nation has ever yet pretended to be the custos morum of the whole world; and though abstractedly a particular regulation may violate the law of nations, it may sometimes, in the case of nations, be a wrong without a remedy.

United States v. La Juene Eugenie, 26 F. Cas. 832, 847 (C.C.D. Mass. 1822).
In addition to providing federal-court jurisdiction to federal courts to hear suits by aliens in violation of the law of nations, the Judiciary Act of 1789 also granted federal courts jurisdiction to hear disputes between parties having diversity of citizenship. But the Judiciary Act failed to specify what law applied in such cases. The only guidance was found in section 34, which stated that "the laws of the several states . . . shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply." 

The Supreme Court sought to clarify the meaning of section 34 in Swift v. Tyson. In Swift, a commercial dispute arose over the assignment of a bill of exchange assigned in New York. Justice Story rejected the contention that section 34 required the Court to apply New York state court decisions to the dispute. Rather, section 34 was "limited [in] application to state laws, strictly local, that is to say, to the positive statutes of the state, and the construction thereof adopted by the local tribunals, and to rights and titles to things having a permanent locality." Thus, in the absence of a statute, questions of a "more general nature" are governed by the "principles established in the general commercial law." 

The "general common law" approach of Swift was plagued by criticism and proved short lived. The Supreme Court expressly overruled Swift's approach in Erie v. Tompkins. Among the Court's rationales were the unfairness of forum shopping by plaintiffs and separation of power

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93 Judiciary Act of 1789, § 11 (codified at 28 U.S.C. § 1332 (2000)). Diversity of citizenship in section 11 included situations in which "an alien is a party, or the suit is between a citizen of the State where the suit is brought, and a citizen of another State." Id.


95 Judiciary Act of 1789, § 34 (codified at 28 U.S.C. § 1652). This section is commonly known as the "Rules Decision Act." See Fletcher, supra note 94, at 1516 (stating that section 34 "did not specify the cases in which the application of state law would be appropriate").


97 Id. at 2-4.

98 Id. at 18.

99 Id.


101 Erie R.R. Co. v. Tompkins, 304 U.S. 64, 80 (1938).

102 Id. at 74-75. (Diversity of citizenship jurisdiction was conferred in order to prevent apprehended discrimination in state courts against those not citizens of the state. Swift v. Tyson introduced grave discrimination by noncitizens against citizens. It made rights enjoyed under the unwritten 'general law' vary according to whether enforcement was sought in the state or in the federal court; and the privilege of selecting the court in which the right should be
concerns. The most striking feature of the opinion was that it rested on a theory of legal positivism. The basis of general common law was that it was "not attached to any particular sovereign; rather it existed by common practice and consent among a number of sovereigns." Erie effectively affixed law to a specific identifiable sovereign. It proclaimed that "[e]xcept in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state." This is an adoption of Justice Holmes' critique in Black & White Taxicab: general common law was not the product of an identifiable sovereign and thus illegitimate. An extensive discussion on the implications of Erie is beyond the scope of this Article. It is, however, prudent to note that choice of law by federal courts sitting in diversity jurisdiction among only positive acts of legislatures or the Constitution places sovereignty at an apogee within the American judicial system.

Positivism's second significant development in international law came with Banco Nacional de Cuba v. Sabbatino. In Sabbatino, the Supreme Court based its ruling on the Act of State Doctrine, which prevents domestic courts from determining the legality of "public acts a recognized foreign sovereign power committed within its own territory." A Cuban national sought to recover value of a sugar shipment expropriated by
determined was conferred upon the noncitizen.

103 Id. at 78.
104 Fletcher, supra note 94, at 1517.
105 Erie, 304 U.S. at 78.
106 See supra note 100 and accompanying text.
107 The reciprocity requirement of Hilton v. Guyot, 159 US 113 (1895), is generally not followed by most jurisdictions today. See, e.g., Phillips USA, Inc. v. Allflex USA, Inc., 77 F.3d 354, 360 n.6 (10th Cir. 1996); Choi v. Kim, 50 F.3d 244, 248 (3d Cir. 1995); Somportex Ltd. v. Philadelphia Chewing Gum Corp., 381 F. Supp 161 (E.D. Pa. 1970). The Restatement also sides against Guyot, the rationale being:

In formulating common law rules of choice of law, the courts are rarely guided by considerations of reciprocity. Private parties... should not be made to suffer for the fact that the courts of the state from which they come give insufficient consideration to the interests of the state of the forum.

Restatement (Second) of Conflict of Law § 6 cmt. k (1969). See also Restatement (Third) of the Foreign Relations Law of the United States § 481 cmt. d (1987) (stating that reciprocity "is no longer followed in the great majority of State and federal courts in the United States").


109 Id. at 401. It is to be noted the Act of State Doctrine was first articulated by the Supreme Court in Underhill v. Hernandez, 168 U.S. 250 (1897). The Supreme Court stated:
Castro’s government by asserting that the taking violated CIL. The Supreme Court held that although not a principle of international law, an American court would not review the legality of the taking by a foreign sovereign, absent a treaty or other international agreement, although it violates CIL. The nature and limits of the doctrine have been developed by the federal judiciary in an extensive post-Sabbatino corpus, as well as by congressional enactments.

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[e]very sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.

Id. at 252.


111 Id. at 428. See also *Restatement (Third) of the Foreign Relations Law of the United States* §§ 443, 444 (1987).


personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources . . . for such an act if such act or provision of material support is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency . . . .

28 U.S.C. § 1605(7) (internal citations omitted). See also Republic of Austria v. Altmann, 541 U.S. 677 (2004) (holding that the FSIA applied retroactively); Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 434 (1989) (holding that the FSIA is the "sole basis for obtaining jurisdiction over a foreign state in our courts"); Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 493 (1983) (stating that the FSIA "must be applied by the District Courts in every action against a foreign sovereign, since subject-matter jurisdiction in any such action depends on the existence of one of the specified exceptions to foreign sovereign immunity"); Liu v. Republic of China, 892 F.2d 1419, 1424, 1434 (9th Cir. 1989), cert. denied, 497 U.S. 1058 (1990) (stating that a government-sanctioned assassination of a Chinese dissident residing in the United States is sufficient conduct to waive foreign sovereign immunity). The Supreme Court noted the purpose of foreign sovereign immunity:
The modern debate in academic circles over the status of CIL within the American legal system centers on the effects of *Erie* and *Sabbatino*. Specifically, the "revisionist" post-*Erie* account of CIL views congressional authorization as a condition precedent to its application in federal courts. This is due, in part, to a view "that CIL was not federal law prior to *Erie*." Moreover, the revisionist camp relies on a strict textualist interpretation of the Constitution. That Article III, Section 2, and Article VII refer only to "treaties" serves as reason to preclude CIL from pre-*Erie* common law. Revisionists also point to Article I, Section 8, which states that it is the province of Congress "[t]o define and punish piracies and felonies committed on the high seas, and offences against the law of nations . . . ." To wit, because the Constitution ostensibly seems to adopt a positivist view of international law—treaties or congressionally defined CIL—federal courts may not apply CIL without a positive act from the legislative branch.

Revisionists also point to *Sabbatino* as a separation of powers caution against the judiciary involving itself in foreign affairs. The adjudication

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115 See Bradley, Goldsmith, & Moore, Continuing Relevance of *Erie*, supra note 8, at 886.

116 Id.

117 Article III, Section 2 provides in part that, "[t]he judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority . . . ." U.S. Const. art. III, § 2.

118 The Supremacy Clause states in part that:

This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

U.S. Const. art. VI, cl. 2.

119 Bradley, Goldsmith, & Moore, Continuing Relevance of *Erie*, supra note 8, at 886; Bradley & Goldsmith, Current Illegitimacy, supra note 8, at 320–21.

120 U.S. Const. art. I, § 8.

121 Bradley, Goldsmith, & Moore, Continuing Relevance of *Erie*, supra note 8, at 886;
of a dispute, for instance under the ATS jurisdictional grant, would place the federal judiciary in the midst of the foreign relations purview of the executive. Indeed, this entails that "application of a CIL of human rights as federal common law would be contrary to the post-Erie requirement that federal common law conform to the policies of the federal political branches."

By contrast the "modern" or, more aptly, the "traditional" position views CIL as federal common law. Because CIL was self-executing, it was therefore applicable in federal courts without a positive act of the legislature. Moreover, the traditional position maintains that the status of CIL was fundamentally unaltered by both *Erie* and *Sabbatino*. Traditionalists point to the actual holding of *Erie*: that because "Congress has no power to declare substantive rules of common law applicable in a State," there is a corresponding lack of jurisdiction on the part of the federal judiciary to fashion a federal common law of tort. However, the Constitution vests Congress with the affirmative power to "define and punish . . . offenses against the law of nations." Thus, because Congress is vested with the power to declare substantive rules relating to CIL, federal courts have jurisdiction to adjudicate disputes arising under CIL.

Moreover, traditionalists point to the federal nature of CIL. In *Hanna v. Plumer* the Supreme Court considered whether service of process in a diversity suit was governed by state law or by the Federal Rules of Civil Procedure. The Court had no problem finding that federal procedural law was compatible with the *Erie* Doctrine. *Erie*, the Court noted, had never been invoked to invalidate a federal rule. "The federal courts cannot make substantive law without a grant of federal authority." Thus, because

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122 Bradley, Goldsmith, & Moore, *Continuing Relevance of Erie*, supra note 8, at 886.
123 *Id.*
125 *Erie* R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).
126 *Id. See also* Koh, *Is International Law Really State Law?*, supra note 8, at 1831.
128 Beth Stephens, *The Law of Our Land: Customary International Law as Federal Law After Erie*, 66 FORDHAM L. REV. 393, 397 (1997) ("While *Erie* rejected the general common law, it upheld the federal courts' power to develop common law in areas properly governed by federal law, including international law.").
130 *Id. at* 461.
131 *Id. at* 465–466 (stating that "the broad command of *Erie* was therefore identical to that of the Enabling Act: federal courts are to apply state substantive law and federal procedural law.").
132 *Id. at* 470.
133 *Id. at* 471–72. Chief Justice Warren stated:
rules of CIL are of federal concern and subject to federal authority under the Constitution, state legislative or judicial functions are precluded. As such, the historical status of CIL as federal common law went unaffected by *Erie*.134

Traditionalists also posit that the status of CIL was not affected by *Sabbatino*. Rather, the majority's opinion rested on the fact that the Court interpreted CIL to conclude that the act of state doctrine was not a requirement of CIL.135 Moreover, *Sabbatino* saw issues that concerned "our relationships with other members of the international community" as "exclusively an aspect of federal law."136 The federal nature of international law is equally applicable to decisions of the executive, as well as the judiciary.137 Thus, the traditional approach views CIL as a legitimate legal basis for human rights claims brought under the ATS.

3. *What Law of Nations?*—The traditional position, however, remains vulnerable to attack from the position that, although CIL is federal in nature, it extends only to the CIL inherited from the common law of England at the time of independence. According to Blackstone, these were the prohibitions against violations of passports, violations of the rights of ambassadors, the crime of piracy, and trading slaves.138 Indeed, the Supreme Court seemed to endorse this approach in the *Rapid* by declaring that the CIL of prize law was a part of applicable common law because "it was the law of England before the revolution."139 Furthermore, the Supreme Court stated in *Thirty Hogsheads of Sugar v. Boyle* that the prize law of England was the prize law of the United States.140

To mean anything for modern human rights litigation, the CIL applicable in federal courts has to be the modern law of nations. The independent nation thesis supports the principle that it is the modern law of nations that

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We are reminded by the *Erie* opinion that neither Congress nor the federal courts can, under the guise of formulating rules of decision for federal courts, fashion rules which are not supported by a grant of federal authority contained in Article I or some other section of the Constitution; in such areas state law must govern because there can be no other law.

*Id.* at 471–72. Justice Harlan also noted that *Erie* "recognized that the scheme of our Constitution envisions an allocation of law-making functions between state and federal legislative processes which is undercut if the federal judiciary can make substantive law affecting state affairs beyond the bounds of congressional legislative powers in this regard." *Id.* at 474–75. (Harlan J., concurring).

134 See supra Section I. B.
137 *Id.*
138 WILLIAM BLACKSTONE, 4 COMMENTARIES *68–*73.
139 The *Rapid*, 12 U.S. (8 Cranch) 155, 162 (1814).
is federal common law by virtue of the United States being an independent nation. The Supreme Court in *Ware v. Hylton* spoke of the "modern law of nations," as did the Court in *Brown v. United States*. Yet the Supreme Court's application of the modern law of nations is largely restricted to a few instances in the nineteenth century. Moreover, the ATS speaks of the law of nations rather than the modern law of nations. This raises the obvious question of whether it is the modern law of nations which is a part of federal common law and actionable under the ATS. Put alternatively, is contemporary ATS litigation valid if the law of nations that is actionable includes only those norms which were present at the time the Judiciary Act of 1789 was enacted?

The answer to this question seems to be an intuitive yes. Yet the scholarly debate has been preoccupied with the status of CIL in the American legal system as opposed to the nature of CIL in the American system. There is overwhelming support for the conclusion that CIL is a part of the federal common law, and is of exclusively federal concern. However, the modern red herring of *Erie* has led scholars, both revisionist and traditional, to see CIL as some finite and defined "thing." The only remaining concern is where it fits.

There are two questions that need be ascertained to adjudge the validity of ATS litigation. The first is how has CIL been incorporated into common law. If substantive CIL was inherited from England at the time of independence, then the inquiry stops; human rights' violations such as torture or genocide cannot be actionable if the ATS only contemplates the CIL of 1789. If, however, it is found that CIL is a part of the common law by virtue of the United States's existence as an independent nation, the second question becomes whether it is the modern law of nations which is applicable under the ATS.

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141 *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 223–224, 229 (1796). The Supreme Court also stated that the CIL inherited from England was "the law of nations, in its modern state of purity and refinement." *Id.* at 281.

142 *Brown v. United States*, 12 U.S. (8 Cranch) 110, 112 (1814). See *also* *United States v. Arjona*, 120 U.S. 479 (1887) (holding that counterfeiting foreign securities was a violation of the law of nations).

143 See, e.g., *Dow v. Johnson*, 100 U.S. 158, 184 (1879) ("private property, which, though it may be subjected to confiscation by legislative authority, is, according to the modern law of nations, exempt from capture as booty of war"); *Lamar v. Browne*, 92 U.S. 187, 194 (1875) (holding that "the humane maxims of the modern law of nations, which exempt private property of non-combatant enemies from capture as booty of war") (quoting *United States v. Klein*, 80 U.S. (13 Wall) 128, 137 (1871)); *Haycraft v. United States*, 89 U.S. (22 Wall) 81, 94–95 (1874) (exempting the private property of non-combatants from capture in a time of war).


145 See *supra* Section I. A; *supra* notes 49–57, 75–83 and accompanying text.

4. The Magisterial Filartiga.—The 1970s were not great for Paraguay as far as respect for human rights and dignity was concerned. The oppressive regime of Alfredo Stroessner resorted to torture and extra-judicial killings as a matter of course. In 1976 Inspector General Pena-Irala of the Asuncion Police kidnapped, tortured, and murdered a 17-year-old boy, Joelito Filartiga, because of his father’s opposition to the Paraguayan government. With recourse to Paraguayan courts difficult, the sister of the deceased, Dolly Filartiga, relocated to the United States seeking asylum in the United States. Inspector General Pena-Irala had also absconded to the United States. Upon discovering his location, Dolly Filartiga informed the Immigration and Naturalization Service, which ordered his deportation back to Paraguay.

While at the Brooklyn Navy Yard awaiting deportation, Pena-Irala, likely to his surprise, was served with process. The complaint alleged, inter alia, that Pena-Irala wrongfully caused the death of Joelito Filartiga and demanded punitive damages of $10,000,000. The cause of action was based on the Alien Tort Statute; the relevant CIL being “wrongful death statutes; the U.N. Charter; the Universal Declaration on Human Rights; the U.N. Declaration Against Torture; the American Declaration of the Rights and Duties of Man; and other pertinent declarations, documents and practices constituting the customary international law of human rights and the law of nations.”

Judge Irving Kaufman, speaking for the Second Circuit Court of Appeals, held in Filartiga v. Pena-Irala that the torture and murder of Joelito Filartiga was a tort actionable in federal courts under the ATS. Considered by some commentators to be the Brown v. Board of Education of transnational human rights litigation, the Filartiga court had little problem holding

148 Filartiga v. Pena-Irala, 630 F.2d 876, 878 (2d Cir. 1980).
149 Id. (noting that subsequent to the death of his son “Dr. Filartiga commenced a criminal action in the Paraguayan courts against Pena and the police . . . . As a result, Dr. Filartiga’s attorney was arrested and brought to police headquarters where, shackled to a wall, Pena threatened him with death. This attorney, it is alleged, has since been disbarred without just cause.”).
150 Id.
151 Id. at 878–79.
152 Id. at 879.
153 Id.
154 Id.
155 Id. at 890.
157 Harold Hongju Koh, Transnational Public Law Litigation, 100 Yale L.J. 2347, 2366
the modern law of nations as federal common law. The opinion begins by predicking the discussion of CIL on the independent nation thesis of how CIL became a part of federal common law.\textsuperscript{158} The court then noted that the law of nations was "preeminently a federal concern."\textsuperscript{159} Indeed, the court seemed to skirt any potential revisionist--\textit{Erie} objections by stating that the ATS was a congressional implementation of a constitutional mandate of vesting the foreign relations power with the federal government.\textsuperscript{160}

\textit{Filartiga} also echoed Justice Gray’s Grotian–universalist understanding of international law.\textsuperscript{161} The court observed that the U.N. Charter made clear that the treatment of its own citizens is of "international concern."\textsuperscript{162} After noting the appropriate sources of international law,\textsuperscript{163} the court looked to numerous international agreements to conclude that there was a universal consensus that torture was a violation of CIL.\textsuperscript{164} That the international

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\textsuperscript{158} \textit{Filartiga} v. Pena-Irala, 630 F.2d 876, 877 (2d Cir. 1980). The court stated that: "Upon ratification of the Constitution, the thirteen former colonies were fused into a single nation, one which, in its relations with foreign states, is bound both to observe and construe the accepted norms of international law, formerly known as the law of nations." \textit{Id.}

\textsuperscript{159} \textit{Id.} at 878.

\textsuperscript{160} \textit{Id.}

\textsuperscript{161} \textit{See supra} Section I. C. 1.

\textsuperscript{162} \textit{Filartiga}, 630 F.2d at 881. The court looked to Articles 55 and 56 of the Charter. Article 55 provides:

With a view to the creation of conditions of stability and well–being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self–determination of peoples, the United Nations shall promote: a. higher standards of living, full employment, and conditions of economic and social progress and development; b. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

U.N. Charter art. 55. Article 56 provides that "[a]ll members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55." U.N. Charter art. 56.

\textsuperscript{163} \textit{Filartiga}, 630 F.2d at 880 (observing that international law "may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law" (quoting United States v. Smith, 18 U.S. (5 Wheat.) 153, 160–61 (1820)).

community in the post–World War II era "has come to recognize the common danger posed by the flagrant disregard of basic human rights" is conducive to the recognition that torture is a violation of CIL. Further, the international community, through the UN system, has prescribed certain norms of behavior that are universal in application. Thus, "for purposes of civil liability, the torturer has become like the pirate and slave trader before him hostis humani generis, an enemy of all mankind."  

5. Filartiga's Progeny.—Of course, not all courts considered the laws of nations actionable substantive law as strongly as did Judge Kaufman. On March 11, 1978, members of the Palestine Liberation Organization (PLO) attacked two buses and other civilian targets outside Haifa, Israel, killing or wounding 121 people. The survivors of the attack and representatives of the deceased brought an action under the ATS against Libya and the PLO for violating CIL. The complaint alleged, inter alia, that the PLO combatants trained in Libya, and that Libya assisted in the planning of the attack and provided other support in its furtherance.

165 Filartiga, 630 F.2d at 890.
166 Id.
167 Id. (emphasis added).
168 Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 776 (D.C. Cir. 1984) (Edwards, J., concurring). It is also of note that the Palestine Information Office (PIO), the National Association of Arab Americans (NAAA), and that Palestine Congress of North America (PCNA) were also named as original defendants in the litigation. See Tel-Oren v. Libyan Arab Republic, 517 F. Supp. 542, 544–545 (D.D.C. 1981). The district court dismissed the allegations against the PIO, the NAAA, and the PCNA as insufficient to support a tort action for a violation of the laws of nations. Id. at 549.
170 Tel-Oren, 726 F.2d at 799 (Bork, J., concurring).
The per curiam opinion affirmed the district court’s dismissal for lack of subject matter jurisdiction.\(^{171}\) However, each judge on the Court of Appeals for the District of Columbia wrote a separate concurrence and rationale for their decision. Judge Bork’s affirmation of the district courts’ dismissal of the case was grounded in his belief that the ATS did not provide an independent cause of action.\(^{172}\) His caution against interpreting the ATS broadly was in large part grounded on separation of powers arguments,\(^{173}\) legal positivism,\(^{174}\) and a highly pragmatic view of the likely repercussions of an alternative outcome.\(^{175}\)

More interesting, however, is Judge Bork’s epistemology of the ATS and of CIL. Ironically, Judge Bork repeatedly looked to Hamilton’s *Federalist No. 80* for the proposition that the ATS was designed only to allow aliens to avail themselves of the federal courts to avoid provoking conflicts with other nations.\(^{176}\) Moreover, he used a textually based argument that the Constitution’s specific grant of jurisdiction over piracy and ambassadors\(^{177}\) is evidence that the United States inherited the law of nations from England at the time of independence.\(^{178}\) He thus rejected the proposition that the law of nations actionable under the ATS incorporates modern rules of

\(^{171}\) *Id.* at 775 (per curiam); see also *Tel-Oren*, 517 F. Supp. at 549 (stating that the ATS did not provide a cause of action and that the Israeli plaintiffs did not plead a “cause of action that, if proved, would permit the Court to grant relief”).

\(^{172}\) *Tel-Oren*, 726 F.2d at 799, 810 (Bork, J., concurring). Judge Bork stated that the ATS is “merely a jurisdiction-granting statute and not the implementing legislation required by non-self-executing treaties to enable individuals to enforce their provisions.” *Id.* at 810.

\(^{173}\) *Id.* at 803 (stating that “[q]uestions touching on the foreign relations of the United States make up what is likely the largest class of questions to which the political question doctrine has been applied.”); *id.* at 802 (arguing that “[t]he major underpinning of the act of state doctrine is the policy of foreclosing court adjudications involving the legality of acts of foreign states on their own soil that might embarrass the Executive Branch of our Government in the conduct of our foreign relations” (quoting Alfred Dunhill of London, Inc. v. Cuba, 425 U.S. 682, 697 (1976))).

\(^{174}\) *Id.* at 807-08. Judge Bork stated that without an express grant of authority—a positive act from the legislative branch—federal court adjudication of the claim was inappropriate. *Id.* He noted that treaties to which the United States is a party do not create a private right of action except when the treaty provides that such a cause of action exists. *Id.* at 808. That is to say, treaties are not self executing, including those on which the plaintiffs base their cause of action. *Id.* at 808, 810. He further stated that the “law of nations is based on the common consent of individual States . . . the law of nations is primarily a law for the international conduct of States, and not of their citizens.” *Id.* at 817.

\(^{175}\) *Id.* at 810 (noting the possible flood of litigation if certain treaties were construed as providing a private right of action).

\(^{176}\) *Id.* at 812, 816, 821.

\(^{177}\) Article I, Section 8, vests the Congress with the authority “to define and punish Piracies and Felonies committed on the High Seas, and Offenses against the Law of Nations.” U.S. CONST. art. I, § 8, cl. 10. Article III grants the Supreme Court with original jurisdiction over “all Cases affecting Ambassadors.” U.S. CONST. art. III, § 2, cl. 2.

\(^{178}\) *Tel-Oren*, 726 F.2d at 814 n.22 (Bork, J., concurring).
Thus, the ATS could only be understood in the context of 1789, and appellate courts ought to exercise caution in inquiring into its meaning. Furthermore, Judge Bork thought that further analysis was necessary to determine whether CIL norms prohibited the kidnapping and murder of civilians, even though some of the international legal instruments cited were intended to protect individual liberty.

Judge Bork, however, neglected to reconcile the strong historical and juridical foundation for the independent nation thesis. Chief Justice Jay’s strong belief that the law of nations was part of the common law of the United States, which he developed in Federalist No. 3 and Federalist No. 64, was not considered. Alexander Hamilton’s own views of the nature and status of the law of nations contained in Federalist No. 80 were overlooked. Furthermore, the dictates of Ware v. Hylton were absent from Judge Bork’s analysis.

Judge Edwards, in a separate concurrence, did take notice of the American common law tradition and its relationship to the law of nations. Judge Edwards, like the Second Circuit in Filartiga and Justice Gray in the Paquete Habana, adopted a Grotian view of CIL. He noted that the law of nations was not a stagnant juridical concept, but rather exists in the context of modern norms and expectations of conduct. Thus, the four violations of the law of nations that existed at the time of Blackstone were not the only torts actionable under the ATS. Rather, customs and usages of international law which had evolved over time and through state practice can be actionable under the ATS as “a settled rule of international law” by ‘the general assent of civilized nations.”

179 Id. at 812.
180 Id. at 815. Judge Bork stated that

Congress’ understanding of the “law of nations” in 1789 is relevant to a consideration of whether Congress, by enacting section 1350, intended to open the federal courts to the vindication of the violation of any right recognized by international law. Examining the meaning of the “law of nations” at the time does not . . . “avoid the dictates of The Paquete Habana” and “limit the ‘law of nations’ to its 18th Century definition.”

181 Id. at 816 (internal citations omitted).
182 See supra notes 62 and 67 and accompanying text.
183 See supra notes 65–66 and accompanying text.
184 See supra notes 49–61 and accompanying text.
185 Tel-Oren, 726 F.2d at 777, 789 (Edwards, J., concurring) (citing Filartiga v. Pena–Irala, 630 F.2d 876 (2d Cir. 1980)); the Paquete Habana, 175 U.S. 677 (1900); Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796)).
186 Id.
187 Id. (quoting Paquete Habana, 175 U.S. at 694).
Judge Edwards' perspective of the ATS was grounded on a Grotian construction of CIL. Like Justice Gray, Judge Edwards acknowledged the universalism of certain norms of CIL which transcend international borders. He noted that like the eighteenth-century slave trader and pirate, violators of certain modern norms of international law are in essence "enemies of all mankind . . . susceptible to prosecution by any nation capturing them." Thus, certain norms of CIL transcend state boundaries; they are universal in nature and applicable to individuals without a positive legal acknowledgment by national governments. As such, Judge Edwards concluded that the ATS conferred federal district courts with jurisdiction and aggrieved foreign nationals with a cause of action. However, the failure of the plaintiffs' claim was that the PLO did not constitute a state for purposes of the ATS, a requirement embedded within many international definitions of torture. Since the actions of the PLO could not be considered torture, the plaintiffs failed to state a cause of action under the ATS.

Most federal courts have found Filartiga persuasive and held that the ATS creates a cause of action as well as granting jurisdiction.

188 Id. at 781.
189 Id. Judge Edwards went onto explain that under international law a pirate was termed a "hostis humani generis," and "[a]ccording to the Law of Nations the act of piracy makes the pirate lose the protection of his home State, and thereby his national character . . . Piracy is a so-called 'international crime'; the pirate is considered the enemy of every State, and can be brought to justice anywhere." Id. (quoting 1 LASSA OPPENHEIM, INTERNATIONAL LAW: A TREATISE § 272, at 609 (H. Lauterpacht 8th ed. 1955). Judge Edwards went onto say that the "inference is that persons may be susceptible to civil liability if they commit either a crime traditionally warranting universal jurisdiction or an offense that comparably violates current norms of international law." Id. See also RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 3 cmt. h (1965) (stating that a state's domestic law may provide remedies for individuals asserting a violation of international law).

190 Tel-Oren, 726 F.2d at 780 (Edwards, J., concurring).
191 Id. at 776.
Circuit concluded as much in *In re Estate of Ferdinand E. Marcos Human Rights Litigation (Marcos)*. In 1977 Archimedes Trajano was a student at the Mapua Institute of Technology in the Philippines. At a political forum he questioned then National Chairman of the Kabataang Baranggay, Imee Marcos-Manotoc, about the propriety of her appointment. He was kidnapped and tortured to death with Marcos-Manotoc's knowledge and under her direction. In 1986 Marcos-Manotoc and her father, President Ferdinand Marcos, fled to Hawaii where they were served with process by the mother of Trajano for, inter alia, false imprisonment, kidnapping, and wrongful death in violation of the law of nations.

The Ninth Circuit followed the approach of Judge Kaufman in *Filartiga* in constructing the ATS in light of sovereign immunity and CIL. The court in Marcos first noted that neither President Marcos nor Marcos-Manotoc was entitled to the protection of the Foreign Sovereign Immunities Act (FSIA). Because an act of politically motivated torture and subsequent killing fell outside the capacity of the state, the FSIA was inapplicable to those who perpetrated the tort regardless of their status as public officials. In making this finding, the Ninth Circuit, like its predecessor in *Filartiga*, looked to numerous international legal documents and found that torture rose to the level of a *jus cogens* norm. Such a preemptory

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193 *In re Estate of Ferdinand E. Marcos Human Rights Litigation (Marcos)*, 978 F.2d 493 (9th Cir. 1992).

194 *Marcos*, 978 F.2d at 495.

195 *Id.* at 495-96. In her capacity as National Chairman, Marcos-Manotoc controlled the police and military intelligence and acted in that capacity pursuant to the authority granted by President Ferdinand Marcos' declaration of martial law. *Id.* at 496.

196 *Id.*

197 *Id.* at 497. The court noted that the FSIA was to be interpreted consistently with international law and that "a state loses its sovereign immunity for tortuous acts only where they occur in the territory of the forum state." *Id.* at 497-98 (quoting McKeel v. Islamic Republic of Iran, 722 F.2d 582, 588 (9th Cir. 1983)).

198 *Id.* at 497. *See also* Chuidian v. Philippine Nat'l Bank, 912 F.2d 1095, 1106 (9th Cir. 1990). The Ninth Circuit also noted that passage of the FSIA did not affect the jurisdiction of the ATS for purposes of foreign defendants. *Marcos*, 978 F.2d. at 497 n.8; Argentine Republic v. Amerada Hess, 488 U.S. 428, 438 (1989); 28 U.S.C. § 1605(a)(5) (2008); *supra* note 113 and accompanying text.

199 *Marcos*, 978 F.2d. at 499 n.14. *See* Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331 (defining a *jus cogens* principle as "accepted and recognized by the international community of States as a whole as ... norm[s] from which no derogation is permitted and which can be modified only by ... subsequent norm[s] of general international law having the same character"). The *Restatement* provides that a State violates *jus cogens* when:

| It practices, encourages, or condones (a) genocide (b) slavery or slave trade, (c) the murder or causing the disappearance of individuals, (d) |
norm of international law prohibiting torture was sufficient to find that the
torture and killing of Mr. Trajano was actionable under the ATS and not
precluded by sovereign immunity. Both the Eleventh and Fifth Circuits
have followed suit and held that the ATS provides both a cause of action
and jurisdiction.

D. Enter Sosa v. Alvarez–Machain

Post-_Filartiga_ jurisprudence among the district and circuit courts
resulted in two competing theories. The majority of jurisdictions held that
the modern law of nations was applicable in federal courts and that the ATS
provided a cause of action and a jurisdictional grant. However, a minority


torture or other cruel, inhuman, or degrading treatment or punishment,
(e) prolonged arbitrary detention, (f) systematic racial discrimination, or
(g) a consistent pattern of gross violations of internationally recognized
human rights.

The Ninth Circuit in _Marcos_ looked to the Universal Declaration of Human Rights, G.A.
American Convention on Human Rights, Art. 5, OAS Treaty Series No. 36 at 1, OAS Off.
Rec. OEA/Ser 4 v/II 23, doc. 21, rev. 2 (English ed., 1975); the Declaration on the Protection
of All Persons from Being Subjected to Torture, G.A. Res. 3452, at 91, U.N. GAOR, 30 U.N.
Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46,

200 _Marcos_, 978 F.2d at 500; see also _Siderman de Blake v. Republic of Argentina_, 965 F.2d
699, 717 (9th Cir. 1992) (noting the effect of a _jus cogens_ norm in international law); Comm. of
U.S. Citizens Living in Nicaragua v. Reagan, 859 F.2d 929, 940 (D.C. Cir. 1989) (noting that a
_jus cogens_ norm "enjoy[s] the highest status in international law").

201 See _Abebe-Jira v. Negewo_, 72 F.3d 844, 848 (11th Cir. 1996) (holding that the ATS
"establishes a federal forum where courts may fashion domestic common law remedies to
give effect to violations of customary international law"); _Beanal v. Freeport-McMoran_, 197
F.3d 161, 165-66 (5th Cir. 1999) (holding that the ATS provides a cause of action). It is of note
that the D.C. Circuit was unable to come up with a definite precedent on whether the ATS
provided a cause of action. _AI-Odah v. United States_, 321 F.3d 1134, 1145-50 (D.C. Cir.
2003) (Randolph, J., concurring) _reversed and remanded on other grounds by Rasul v. Bush_, 540

202 See, e.g., _Kadic v. Karadzic_, 70 F.3d 232 (2d Cir. 1995); _Prince v. Fed. Republic of
Germany_, 26 F.3d 1166 (D.C. Cir. 1994); _Trajano v. E. Marcos (In re Estate of Ferdinand E.
Marcos Human Rights Litigation)_, 978 F.2d 493, 502 (9th Cir. 1992); _Trajano v. Marcos_, 878
F.2d 1439 (9th Cir. 1989). Indeed the view that the ATS provided both a cause of action and
a jurisdictional grant as a matter of policy can be traced to 1907. The Attorney General was
of the opinion that:

As to indemnity for injuries which may have been caused to [foreign] citizens . . . I am of opinion that existing statutes _provide a right of action and a forum_. Section 563, Revised Statutes, clause 16, gives to district
courts of the United States jurisdiction "of all suits brought by any alien
of courts, most notably the D.C. Circuit, held that actionable violations were confined to those present in 1789 and that the ATS conferred only jurisdiction and not a cause of action.\textsuperscript{203} The competing theories among the circuit courts would be settled by the Supreme Court.

In 1985, Drug Enforcement Agent Enrique Camarena-Salazar was kidnapped while on assignment, taken to a house in Guadalajara, Mexico, tortured for two days, then killed.\textsuperscript{204} Dr. Humberto Alvarez-Machain was allegedly present at the interrogation to supply medical care to prolong the torture.\textsuperscript{205} The Drug Enforcement Agency (DEA) responded by requesting the extradition of Dr. Alvarez. When such requests were met with stalemate, the DEA hired a private Mexican team, including Francisco Sosa, to abduct Alvarez and bring him to Texas.\textsuperscript{206} Dr. Alvarez was acquitted of the charges in federal district court and subsequently brought a civil action for his kidnapping under the ATS.\textsuperscript{207}

Justice Souter, speaking for the majority, rejected Dr. Alvarez's claim. The Court held that there had been "no development in the two centuries from the enactment of [the ATS] to the birth of the modern line of cases... [that] has categorically precluded federal courts from recognizing a claim under the law of nations as an element of common law..."\textsuperscript{208} The Court noted that:

\textit{Erie} did not in terms bar any judicial recognition of new substantive rules, no matter what the circumstances, and post-\textit{Erie} understanding has identified limited enclaves in which federal courts may derive some substantive law in a common law way. For two centuries we have affirmed that the domestic law of the United States recognizes the law of nations.\textsuperscript{209}

The Court held that the ATS was a "jurisdictional statute creating no new causes of action."\textsuperscript{210} Justice Souter further elaborated that "[t]he jurisdictional grant is best read as having been enacted on the understanding

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205 Id. at 697.
206 Id.
207 See id. at 734-35. Dr. Alvarez looked to the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights for the proposition that "arbitrary arrest" was a sufficiently defined wrong under CIL. Id.
208 Id. at 724-25.
209 Id. at 729.
210 Sosa, 542 U.S. at 724.
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."\textsuperscript{211} The Court also stated that the modern law of nations was applicable under the ATS:

The First Congress, which reflected the understanding of the framing generation and included some of the Framers, assumed that federal courts could properly identify some international norms as enforceable in the exercise of \$ 1350 jurisdiction. We think it would be unreasonable to assume that the First Congress would have expected federal courts to lose all capacity to recognize enforceable international norms simply because the common law might lose some metaphysical cachet on the road to modern realism.\textsuperscript{212}

However, the Court stopped short of recognizing the wholesale incorporation of the modern law of nations into common law. Its concerns over "collateral consequences of making international rules privately actionable argue[d] for judicial caution."\textsuperscript{213} Among these collateral consequences were interference with the foreign relations powers of the executive and the lack of a congressional mandate to declare new violations of CIL.\textsuperscript{214} Although nothing categorically precluded the recognition of a violation of modern CIL, the Court added a requirement that any claim based on the present-day law of nations "rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized."\textsuperscript{215}

The Court found several reasons for exercising judicial caution in recognizing new law of nations. First was the effect of \textit{Erie}. Justice Souter noted that the ATS was passed in the era of general common law, which had come to an end in 1938 with the Court's decision in \textit{Erie}. Thus, the changed nature of the common law required caution in exercising judicial discretion.\textsuperscript{216} Although the majority seemed to characterize CIL as general common law, the Court then stated that it had previously found it was appropriate for federal courts to fashion federal common law in "interstitial areas of particular federal interest."\textsuperscript{217} The Court seemed to state that legislative guidance should inform federal CIL jurisprudence, but did not elaborate a bright-line rule.\textsuperscript{218} The majority also noted that private causes of action are best left to the legislature, and that there are a plethora of

\textsuperscript{211} \textit{Id.}
\textsuperscript{212} \textit{Id.} at 730.
\textsuperscript{213} \textit{Id.} at 727.
\textsuperscript{214} \textit{Id.} at 727–28.
\textsuperscript{215} \textit{Id.} at 725.
\textsuperscript{216} \textit{Id.} at 725–26.
\textsuperscript{217} \textit{Id.} at 726.
\textsuperscript{218} \textit{Id.}
“collateral consequences” to recognizing a new violation of international law. Lastly, the Court observed that there was no congressional mandate “to seek out and define new and debatable violations of the law of nations.”

The Sosa Court walked the line between the revisionist and traditional camps. It rejected the argument that by gutting general common law, Erie required positive law from Congress. However, it did not adopt Filartiga's wholesale incorporation thesis. The eighteenth-century paradigm approach is the reconciliation of Erie's positivism with the incorporation of an essentially anti-positivist legal conception.

II. RECONSTRUCTING CUSTOMARY INTERNATIONAL LAW

As I have argued elsewhere, the Policy Sciences approach seeks to rectify rigidities found in other legal approaches that focus on formal conceptualizations of the law, absent substantive moral and contextual considerations, such as legal positivism. Indeed, it is only when global social processes are considered and incorporated into legal analysis that a more comprehensive model of a world order emerges. This jurisprudential framework takes a policy-oriented focus on authoritative decision-making, and utilizes communications theory to dissect the interplay and dynamics within human interrelations, society, states, and the global community.

A. Social Processes and Communications Theory

The Policy Sciences approach begins with the notion that social and power relationships produce constitutional expectations. The policy-oriented focus allows one to distill a contextual map to clarify the operation

220 Sosa, 542 U.S. at 728.
of various processes present in international and domestic governance systems. The Policy Sciences identifies three fundamental processes as operating simultaneously and interdependently: the social, power, and constitutive processes.\(^{223}\)

The broadest pattern of social interaction—the social process—is the system of interactions in which people act through institutions to promote values.\(^{224}\) Interactions exist in that one person takes another subjectively into account when making choices, thus tying themselves together within the process.\(^{225}\) Individuals must take into account the demands of others within the social process, who in turn reshape their own demands, pursuits, and values.\(^{226}\) The specialized interactions of individuals pursuing and maximizing their subjective ends operate through specialized institutions based on the group’s common value goals.\(^{227}\) Indeed, these interactions extend beyond the confines of national borders and give rise to transnational expectations about what is or is not an appropriate interaction.\(^{228}\)


\(^{226}\) McDougal, Reisman, & Willard, *World Community*, *supra* note 222, at 809.

\(^{227}\) McDougal & Lasswell, *supra* note 225, at 7. The eight primary ends or values pursued are: well-being, affection, respect, skill, enlightenment, rectitude, wealth, and most importantly, power. See MYRES S. McDOUGAL, HAROLD D. LASSWELL, & LUNG-CHU CHEN, *HUMAN RIGHTS AND WORLD PUBLIC ORDER: THE BASIC POLICIES OF AN INTERNATIONAL LAW OF HUMAN DIGNITY* 3–13 (1980) (outlining the various demands relating to fundamental values); McDougal, Reisman, & Willard, *World Community*, *supra* note 222, at 895–957 (describing the various value outcomes of the world social process).

\(^{228}\) Myres S. McDougal, Harold D. Lasswell, & W. Michael Reisman, *The World Constitutive Process of Authoritative Decision*, 19 J. Legal Educ. 253, 256 (1967). It is the pursuit of like subjectivities by actors in multiple territorial units—i.e. interdependence—which gives rise to transnational organizations created for a functional purpose. McDougal, Reisman, & Willard, *World Community*, *supra* note 222, at 822–23. Indeed, the organization need not be made up of sovereign territorial units. Numerous transnational political parties or alliances, transnational “pressure groups,” and transnational private associations have all formed during the twentieth century based on the pursuit of like subjectivities of their membership. *Id.* at 823–28. For example, during the Cold War, a complex interaction of political and private entities operated transnationally based on political ideology. See generally STEVE COLL, *GHOST WARS: THE SECRET HISTORY OF THE CIA, AFGHANISTAN, AND BIN LADEN, FROM THE SOVIET INVASION TO SEPTEMBER 10*, at 2001 (2004) (outlining the history of American intervention in Afghanistan); CHESTER A. CROCKER, *HIGH NOON IN SOUTHERN AFRICA: MAKING PEACE IN A ROUGH NEIGHBORHOOD* (1992) (discussing American funding to paramilitary groups in Angola and Southern Africa); EL SALVADOR: CENTRAL AMERICA IN THE NEW COLD WAR (Marvin E. Gettleman et al. eds., 1981) (detailing American foreign policy in central America during the Cold War); MARIE LAVIGNE, *THE ECONOMICS OF TRANSITION: FROM SOCIALIST ECONOMY TO MARKET ECONOMY* (2d ed. 1999).
A more specific aspect of the greater social process is the power process. Individuals seek power in various "arenas," spaces in which power outcomes are formed and manipulated by individuals with shared perspectives.\(^{229}\) The individual's perspectives of value demands, group identification, and expectations, in turn, shape what arenas, if any, are utilized.\(^{230}\) That is, individuals utilizing a given arena have shared "structure[s] of expectation," which shape strategies of coercion used by individuals within any given arena.\(^{231}\) Arenas may be organized as territorial units (i.e., the government of a nation–state), international governmental organizations, political parties, pressure groups, or private associations.\(^{232}\) The state, however, remains the dominant actor within the global power process.\(^{233}\)

Lastly, an aspect of the power process is the constitutive process: the process whereby institutions are developed for the allocation and management of power.\(^{234}\) Institutions are created based on community (describing Soviet economic assistance to Soviet–aligned countries through the Council for Mutual Economic Assistance). Moreover, private transnational groups such as Al-Qaeda have emerged based on a radical form religious ideology. See, e.g., Richard A. Clarke, Against All Enemies: Inside America's War on Terror 35–37 (2004).

229 McDougal & Lasswell, Identification and Appraisal, supra note 225, at 8. Such "arenas" are "social situation[s] relatively specialized to the shaping and sharing of power outcomes." \(\text{ld. at 8.} \) Each "pattern of subjectivities" becomes "specialized to the sharing of value we identify as an 'institution.'" \(\text{ld. at 7.} \) For example, professors McDougal and Lasswell cite institutions of government which specialize in "the shaping and sharing of power," and economic institutions that specialize in "the production, distribution and consumption of wealth." \(\text{ld. at 7.} \) Institutions thus form all of the base values, which groups with like subjectivities operate within. See \(\text{id.}\).

230 McDougal & Lasswell, supra note 225, at 8.

231 \(\text{id.}\).

232 See McDougal, Lasswell & Reisman, supra note 228, at 263–69. Arenas can be defined by their institutional structures, geographical reach, duration, or crisis. \(\text{ld. at 281–84.} \) For instance, an adjudicative arena is characterized by vesting decision–making with a third party with entrenched expectations regarding its internal procedures. \(\text{ld. at 282.} \) Geographically defined arenas can be regional in their organization and competence, bilateral, or generally be open to numerous members. \(\text{ld. at 283.} \) When there is an expectation of violent action among entities within the community, a "military arena" exists. \(\text{ld. at 284.} \) There is, however, a dual expectation on the part of participants within the military arena. First, there are customary \(\text{jus ad bellum} \) expectations—expectations relating to when recourse to armed conflict is permissible. See Ingrid Detter, The Law of War 156–57 (2nd ed. 2000). Second, there are expectations within the global community and among the combatants themselves relating to the conduct during a war—\(\text{jus in bellum} \) expectations. \(\text{ld. at 158.} \)

233 McDougal, Reisman & Willard, World Community, supra note 222, at 900. The U.N. Charter, for example, restricts membership to states and vests decision–making competency within the U.N. system to states. See U.N. Charter art. 3, art. 2 para. 4, and art. 4 para. 1); infra notes 266–74 and accompanying text.

234 Harold D. Lasswell & Myres S. McDougal, Criteria for a Theory About Law, 44 S. Cal. L. Rev. 362, 386 (1971). Professors Lasswell and McDougal define the "constitutive process" as:

The decisions which identify and characterize the different authoritative
expectations about decision-making authority. Such authority extends to those vested with the authority to create policy, the procedures for creating such policy, as well as the means and procedures for distributing sanctions. Although the constitutive process may appear to codify the rules of decision-making, it is not a finite process; it develops over time as power constellations change.

In contrast to the power process, however, authority structures resulting from the constitutive process contain a normative component. Decision-making combines the elements of authority and control. Authority connotes participation in decision-making based on community perspectives of how decisions are reached. That is to say, authority is the common expectation concerning who has the authority to make the decision, what qualifies them to do so, and by what procedures and criteria they are chosen by the community to make such decisions. The control element looks at the effectiveness of the enforcement of the decision and its corresponding outcome. To maintain the expectation of the community for future decisions, there must be a degree of effectiveness of a particular decision that corresponds with community expectations of authority. Authoritative decision-making is based on community perspectives on how outcomes are reached and enforced. When these expectations are codified within a governance arena, a system of constitutional law emerges.

The Policy Sciences approach also demarcates how power operates in society and within nations. The Policy Sciences view the state as a continuum in which individual and political entities are interconnected through communication. It looks to signs and symbols to demarcate decision-makers, specify and clarify basic community policies, establish appropriate structures of authority, allocate bases of power for sanctioning purposes, authorize procedures for making the different kinds of decisions, and secure the continuous performance of all the different kinds of decision functions (intelligence, promotion prescription, etc.) necessary to making and administering general community policy.

_Id._ This was also termed “lebendes Recht” (living law) to describe law as a form of social conduct or custom, rather than a proclamation promulgated by a sovereign. See Eugen Ehrlich, _Fundamental Principles of the Sociology of Law_ 497 (1936).

236 McDougal & Lasswell, _supra note_ 225, at 9.
237 _Id._; McDougal, _supra note_ 223, at 34.
238 McDougal & Lasswell, _supra note_ 225, at 9.
239 McDougal, Lasswell & Reisman, _World Constitutive Process, supra note_ 228, at 256.
240 _Id._ at 256–257.
241 See McDougal & Lasswell, _supra note_ 225, _passim_ (discussing the relationship between law and power).
242 See Harold D. Lasswell, _Psychopathology and Politics_ 240–67 (1930) (describing
the meaning of interaction between persons.\textsuperscript{243} The Policy Sciences approach also sheds light on the participants and mechanisms of law as communication.\textsuperscript{244} Analyzing the structure of legal communication allows us to model the dynamics of contemporary human rights generally, and the ATS specifically, in a social context. The initiator of the communication and the content of the communication do not require extensive elaboration. More interesting is the question of the channel of the communication and social context in which the communication takes place. The channel of the communication examines how the targets of the communication (the public and service members) understand its intended effect.\textsuperscript{245} The question of the subject of the communication looks at the prescriptive content of a law in its broader context.\textsuperscript{246}

However, a comprehensive legal analysis cannot stop at the pattern and context of the communication; it must also account for its content. Contained within the communication that is law are three components: a policy content, an authority signal, and a control intention.\textsuperscript{247} The policy content is the prescription, the intent of the law. The authority signal is the basis of legitimacy from which the law originates, such as the federal government or sovereign. Lastly, the control intention describes the enforcement power behind the law.\textsuperscript{248} To be considered legitimate, the policy content of the law must originate from a legitimate basis and be accompanied by symbols or markers indicating general community acceptance.\textsuperscript{249}

\textsuperscript{243} See Myres S. McDougal, Harold D. Lasswell, & James C. Miller, The Interpretation of Agreements and World Public Order, at xii (1967) (stating that "[s]igns are materials or energies that are specialized to the task of mediating between the subjective events of two or more persons"). In his study of World War I, Lasswell observed that certain signs and symbols were observed after certain events. These events communicated various messages to the public thereby maintaining the war effort. The signs and symbols Lasswell observed were especially powerful in mass advertising, significantly influencing public attitudes toward the war. See Harold Lasswell, Propaganda Technique in the World War 185-213 (1927).


\textsuperscript{245} Id.

\textsuperscript{246} Id.


\textsuperscript{248} Reisman, International Lawmaking, supra note 247, at 108–10.

\textsuperscript{249} Id.
B. Sovereignty Reconsidered

The debate over the relationship of CIL as federal common law has largely concerned the legitimate basis on which international human rights law can exist; an attempt to reconcile notions of state sovereignty with an essentially international anti–positivist legal conceptualization. However, the notion of sovereignty has not been a constant since the inception of the Westphalian system in 1648. The concept of sovereignty has ranged from a “rule of recognition,” to state independence, to the control of power. In more recent times, the absolutism of state sovereignty has yielded to concerns over national security, rogue states, and international criminal jurisdiction. Indeed, this is a reflection of the rise of positivism during a critical time of America constitutional development. Adherents to legal

250 See supra notes 24, 82–92 and accompanying text.

251 See H.L.A. Hart, The Concept of Law 97–115 (1961) (noting that the “rule of recognition” establishes certain entities as a rulemaking institution). Indeed, the foundation of German constitutional law is the Grundgesetz (Basic Law) setting forth a framework of values and norms requiring adherence. The Grundnorm (Basic Norm) validates and legitimates the German legal order. A violation of either Grundgesetz or Grundnorm is accordingly inconsistent with the German constitutional order and is invalid. See Hans Kelsen, General Theory of Law and State 115 (Anders Wedberg trans., 1961). Similarly in Cuba, after the 26th of July Movement solidified power, leaders of the group promulgated its Fundamental Law. The Fundamental Law, inter alia, set forth the binding norms and values that were to become the basis of the Communist constitutional order. See Ley Fundamental de la República, published in Gaceta Oficial, Feb. 7, 1959 (Cuba); Kern Alexander & Jon L. Mills, Resolving Property Claims in Post Socialist Cuba, 27 LAW & POL’Y INT’L BUS. 137, 142 (1996) (describing the relationship between the Cuban Constitution of 1940 and the fundamental law).

252 See Claudio Grossman & Daniel D. Bradlow, Are We Being Propelled Towards a People–Centered Transnational Legal Order?, 9 AM. U. J. INT’L L. & POL’Y 1, 1 (1993); U.N. Charter art. 2, para. 7 (stating that “[n]othing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter . . . ”). Independence as a source of sovereignty also relates to the recognition of such independence. To wit, sovereignty can be conceptualized as a function of international recognition. See Hersh Lauterpacht, Recognition in International Law 4–6 (1947) (discussing various contending views on the recognition of statehood under international law).


255 See supra notes 84–92 and accompanying text.
positivism in American constitutional order have also long been skeptical about the applicability—and even the existence—of international law.256

Sovereignty is essentially the claim to decision-making authority and control within a system of governance.257 On the national or state level, sovereignty is an institutional claim to authority. Authority in this respect is "the structure of expectation" concerning competency to make decisions.258 Control is the effective operation of the decision.259 What we think of as "law" is in essence "the conjunction of common expectations concerning authority with a high degree of corroboration in actual operation."260 Of course the policy content of law must also originate from a legitimate basis and be accompanied by the markers of general community acceptance.

The legal framework of an institution of governance—"constitutional law"—is thus essentially a framework for "institutionalizing expectations relating to the management of power."261 This institutionalization creates corresponding expectations of the use of power, as well as what constitutes a misuse of that power. *Erie* thus stands for the proposition that the federal judiciary, sitting in diversity jurisdiction, can only make authoritative decisions on matters pursuant to positive law from a state or Congress, or under the authority of the Constitution, or matters of federal concern.262

H.L.A. Hart made a similar conceptualization of the law. For Hart, law could only be understood as a constellation of social rules, presupposing

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256 See Thomas Erskine Holland, *The Elements of Jurisprudence* 392 (13th ed. 1924) ("[International law is] the vanishing point of Jurisprudence."); George Kennan, *American Diplomacy* 95 (1984) (criticizing international law as being insufficiently grounded in reality because of its "legalistic-moralistic approach" to international disputes); Robert Bork, *The Limits of "International Law,"* *The Nat'l Int.* (Winter 1989–1990), at 3, 4 (criticizing the international community's general lack of response to violations of international law); Michael Glennon, *The New Interventionism: The Search for a Just International Law,* *Foreign Aff.*, May–June 1999, at 2, 4 (remarking on perceived failures of the U.N. Charter with regard to existing measures designed to counter international genocide); Hersch Lauterpacht, *The Problem of the Revision of the Law of War,* *Brit. Y.B. Int'l L.* 382 ("international law is, in some ways, at the vanishing point of law"); Hans J. Morgenthau, *Politics Among Nations: The Struggle For Power And Peace* 10, 312 (6th ed. 1985) (critiquing international organizations, such as the United Nations, as ineffective mechanisms which seek to displace continuing efforts by various nations to amass power and stating that "there can be no more primitive and no weaker system of law enforcement than [international law]").


259 Id.

260 Id.

261 See Nagan & Hammer, *supra* note 223, at 152.

context as law is communicated. He differentiated obligations from raw power. Raw power is a function of the threat of force; obligation arises out of an accepted legal legitimacy. Positivism by its nature “weakens the normative component of general international law as a critical world order variable.”

Law, as a system of expectation, can be equally applied to interstate rather than intrastate expectations about the management of power. Thus, international law is a transnational expectation about the management of power among entities, in international law, or states. These entities, like Congress or state legislatures, are vested with a degree of sovereignty, or authority of decision-making. Indeed, this notion is inherent in the *opinio juris* requirement of CIL; in fact, that CIL can be ascertained from a sense of legal obligation in addition to state practice. However, the nature of this sovereignty changed drastically since the creation of the United Nations. The Preamble of the U.N. Charter begins “We the Peoples of the United Nations determined ....” Although the Article II, section 1 of the Charter recognizes the “sovereign equality of all its Members,” that the authority is vested in the “people” of the United Nations seems to place a constraint on state discretion.

Indeed, the dictates of international law prior to the enactment of the U.N. Charter provided that limitations on national sovereignty could not be presumed. Yet the Charter enumerates certain goals with respect to the individual and society to which the organization aspires, without regard to the state. Still, membership in the organization is limited to states. Moreover, the Charter vests states with exclusive authority over “matters

263 Hart, *supra* note 251, at 80.
264 Id. at 79–88.

267 See *supra* note 21 and accompanying text.
268 U.N. Charter pmbl.
269 Id. at art. 2, para. 1.
272 See U.N. Charter pmbl. The preamble of the Charter pledges to respect the “equal rights of men and women and of nations large and small,” to “promote social progress,” to have “faith in fundamental human rights [and] the dignity and worth of the human person,” and “to maintain international peace and security.” Id.
273 Id. at arts. 3, 4(1).
which are essentially within the domestic jurisdiction of any state." Yet Chapter VII of the Charter vests the Security Council with authority to use force upon a state when it has determined the existence of a "threat to the peace, breach of the peace, or act of aggression." Thus, there is an inherent tension within the international legal order over where the bounds of sovereignty reside.

Yet the international legal order has recognized certain inviolable norms that transcend sovereignty and national borders, and scholars have recognized international law as a legitimate component of inter-state relations. In these jus cogens norms, the expectations of the international community overcome concerns for state sovereignty. The Ninth Circuit in *Marcos*, for instance, refused to apply the principles of sovereign immunity to the politically motivated torture and murder of an outspoken college student. The FSIA, likewise, specifically exempts, among other things, acts of torture, aircraft sabotage, and hostage taking from foreign state immunity. Indeed, politically motivated murder is within the capacity of the state—there is no shortage of politically motivated state-sanctioned killings. Yet certain transnational expectations of conduct of state actors have emerged which preclude the murderer, torturer, or Génochidaire from escaping liability because they acted under the auspices of state authority.

274 Id. at art. 2(7).

275 Id. at art. 39. Article 39 provides in full: "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security." Id. Article 42 authorizes the Security Council to "take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations." Id. at art. 42.


C. Expectation, CIL, and Human Rights

What emerges from the three social processes are transnational expectations on state conduct based on the limits of state authority and sovereignty. Thus, is Sosa's requirement that CIL be constructed with the specificity of eighteenth-century paradigms viable? Expectations of international conduct have changed so significantly since the end of World War II that constructing CIL in light of how expectations functioned in 1789 is an untenable position.

Modern expectations among the international community could not be fathomed by those who enacted the ATS in 1789. Genocide, weapons of mass destruction, the machine gun, and the tank did not yet exist. Yet today the community of nations prescribes when, if ever, and under what circumstances, they can be used. Moreover, human rights violations recognized by the international community today—such as torture, extra-judicial killing, and forced impregnation—were not recognized by Blackstone as violations of the law of nations.280

More fundamental, however, is that to ignore modern transnational expectations on state and individual conduct is to ignore the nature of the legal process and the nature of CIL. Systems of law are based on shared expectations regarding values, the allocation of power within the community, and decision-making authority.281 It is immaterial whether the institution or arena of governance is based at the national or international level. The Constitution of the United States, like the U.N. Charter, is a codification of expectations regarding who is vested with decision-making competence and power. Within the United States, after Congress acts, a strong control element vested in the executive and judiciary branches of government seeks to align the effectiveness of the legislation with the legislative authority under which it was enacted.

There is an ever-growing body of international treaties, resolutions, and declarations which have codified and enhanced international expectations regarding state and individual conduct.282 These transnational expectations...

280 See supra note 42 and accompanying text.
281 See supra sections II. A., II. B.
form the basis of what we conceptualize as international law. However, the U.N. system does not, at present, have a control mechanism as strong as the Constitution, making transnational expectations of state behavior weaker than domestic law. Yet, where the international control mechanism has evolved to match international community expectations of conduct, a preemptory norm is recognized—a *jus cogens* norm.\(^{283}\) Such norms thus transcend national boundaries and apply directly to national governments and individuals. Indeed, individuals who are confronted with a deprivation of values—i.e., a human rights deprivation—commonly appeal to authority transcending the state to restrain such deprivation.\(^{284}\) However, this is not to say that international norms which have not been as universally accepted are of a different character entirely. On the contrary, all norms of CIL are of a Grotian—universalist nature, the issue being the difference between community expectations of authority and effectiveness.

Justice Gray's conceptualization of CIL indeed foreshadowed the future. His comment that international law is something that "must be ascertained" and the "customs and usages of civilized nations" applied in federal courts, not only bespeaks a Grotian concept of the universal nature of international law, but alludes to the actual nature of CIL.\(^{285}\) That CIL is at its core an expectation about state and non-state conduct allowed Justice Gray to avoid a distinction between private and public international law for purposes of its substantive content and its applicability in U.S. courts.\(^{286}\) Not only did Justice Gray rest his decisions on the same foundation of international law as did de Vattel, Mansfield, and Blackstone, he also set a precedent which would enable future courts to apply modern CIL to situations unthinkable to those who preceded them.\(^{287}\)

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\(^{283}\) See *supra* note 199 and accompanying text.

\(^{284}\) McDougal, *supra* note 223, at 34.

\(^{285}\) See the Paquete Habana, 175 U.S. 677, 700 (1900); Hilton v. Guyot, 159 U.S. 113, 163 (1895).

\(^{286}\) See *supra* notes 5, 77, 79–80 and accompanying text.

\(^{287}\) See R.J. RUMMEL, *DEATH BY GOVERNMENT* 9 (1994) (estimating that approximately 170,000,000 noncombatants have been killed by governments between 1900–1958 by various methods).
III. Hostis Humani Generis, Context, and Expectations

To illuminate the CIL as expectations approach, a brief discussion of modern human rights issues and their context may be of value. Power politics were the name of the game during the Cold War. The United States and the Soviet Union were engaged in an endless game of nuclear deterrence, as well as a proxy fight over interests throughout the world. The Soviets had established a “security zone” in Eastern Europe following World War II, and the United States gave Vietnam “military assistance” in the face of a communist incursion. Moreover, the United States and Soviet Union actively engaged in supporting ideologically aligned opposition movements against governments supported by the opposing superpower. Much of the concern of United States foreign policy was the maintenance of stability in Latin America. That is, a chief component of American regional policy was to ensure that Latin America remained ideologically aligned with the United States. One country that was particularly aligned with the United States was Paraguay.

Because of the geopolitical dynamics of the Cold War, the United States provided support for the “democratic façade” of the regime of General Alfredo Stroessner. Stroessner was “re-elected” in successive fraudulent elections while international publicity on the country’s human rights abuses was muted. The regime, especially during the 1970s, resorted to state sanctioned terror as a matter of policy. Many of the human rights violations were documented and stored in the so-called Archivo del Terror, discovered after Stroessner was deposed.

The archives, totaling over 700,000 pages, tell of political opponents routinely monitored, incarcerated, and tortured in Paraguayan jails.


289 See Frank O. Mora, The Forgotten Relationship: United States-Paraguay Relations, 1937-89, 33 J. Contemp. Hist. 451, 458 (1998) (stating that American foreign policy toward Latin America “was dominated by the obsessive concern to maintain ‘hemispheric security in the face of a global communist threat’”).

290 Id. at 461. Paraguay achieved independence after Napoleon’s invasion of Spain and Portugal splintered the Spanish empire. The country was geographically and politically isolated and foreign affairs deemed unimportant. Political give and take oscillated between the two political parties, the Liberals and the Colorados, through the late nineteenth and early twentieth centuries. The Colorados maintained effective one-party rule from 1947 onward, and the strong personality of the forty-two-year-old commander-in-chief of the armed forces, General Alfredo Stroessner, emerged to lead the country from 1954 onward. Riordan Roett, Paraguay After Stroessner, 68 Foreign Aff. 124, 125-28 (1989); Mora, supra note 289, at 457.

291 Mora, supra note 289, at 461.

292 Nickson, supra note 147, at 127-28. Amnesty International estimated that there were approximately 1000 political opponents incarcerated in 1976. Ellen L. Lutz & Kathryn
Furthermore, political opponents in exile were kidnapped with the assistance from neighboring security forces.\textsuperscript{293} This was done through the 1970s and 1980s under the rubric of "Operation Condor," a mutual-assistance network of the military regimes of Argentina, Brazil, Uruguay, Chile, and Paraguay. The archives also document that those prisoners who "disappeared" were in actuality murdered by the regime. They were even given a special classification within the archives: "empaquetados" (packaged).\textsuperscript{294} There is no precise number of victims of the Stroessner regime. However, it is known that seventeen-year-old Joélito Filartiga was one of them.\textsuperscript{295}

Paraguay had not ratified any of the human rights treaties or conventions prohibiting torture, nor did it accept the jurisdiction of the Inter-American Court of Human Rights.\textsuperscript{296} The family of Joélito Filartiga thus had few options of legal recourse. Yet, although the positive law was not implemented in Paraguay, international expectations of human dignity did seem to have a chilling effect on state terror. The former American ambassador to Paraguay recalled:

After the case was decided in favor of Dr. Filártiga one of the people closest to General Stroessner told me that I just had to do everything possible to get this decision reversed. They don't really understand the independence of our court system here. And he stressed to me that no Paraguayan government figure would feel free to travel to the United States if this judgment was upheld because, you know, they would feel that they would be liable to arrest just being in any state in the United States.\textsuperscript{297}

Thus, even in the absence of positive implementation (a precondition of sovereignty), modern international expectations (i.e., CIL) did have an effect on state conduct, albeit a limited one. It can be said, however, that there would likely have been no effect if the law of nations was constructed to be slave trading, piracy, and violations of ambassadors and passports. The human rights abuses in Paraguay, such as Joélito Filartiga's torture and murder, were only repugnant to CIL because modern (transnational) expectations about individual and state behavior proscribed them.

\begin{footnotesize}
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\item \textsuperscript{293} Nickson, \textit{supra} note 147, at 128–29.
\item \textsuperscript{294} \textit{Id.} at 129.
\item \textsuperscript{295} \textit{See generally} Miranda, \textit{supra} note 147, at 92-94.
\item \textsuperscript{296} \textit{See} Lutz & Sikkink, \textit{supra} note 292, at 644–45.
\item \textsuperscript{297} \textit{Id.} at 646 (internal citations omitted).
\end{itemize}
\end{footnotesize}
As a postscript, Stroessner was overthrown in 1989. Paraguay subsequently ratified the Covenant on Civil and Political Rights, the American Convention on Human Rights, the U.N. Convention Against Torture, and the Inter-American Convention Against Torture. Furthermore, Paraguay enumerated a series of human rights in a 1992 constitutional revision. The 1992 Constitution largely conforms to international human rights documents and international expectations with regard to human rights and human dignity.

Another instance in which a Cold War military paradigm collided against the principles of human rights was nuclear weapons. Nuclear balance was ominously branded as Mutually Assured Destruction (MAD). Yet as the Cold War progressed, a lex specialis developed which began to regulate and proscribe when and how those states possessing nuclear weapons could use and test them, and prevent other states from acquiring them. Indeed, these treaties in aggregate contain a strong policy content indicating that

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303 Lutz & Sikkink, supra note 292, at 647.

304 Id.


the signatory nations desire to eradicate or otherwise curtail the presence of nuclear weapons in the international system.\textsuperscript{308}

Indeed, the World Health Organization (WHO) sought an advisory opinion from the International Court of Justice (ICJ) whether using a nuclear weapon during an armed conflict would violate international law in light of its health and environmental effects.\textsuperscript{309} The ICJ considered the legality of the use of nuclear weapons in light of existing international humanitarian and environmental law as well as state obligations under the U.N. Charter.\textsuperscript{310}

The court made several important substantive holdings. First, there was no "specific authorization" for the use of nuclear weapons in international law.\textsuperscript{311} The ICJ also held that nuclear weapons were subject to the commands of Articles 2(4) and 51 of the U.N. Charter.\textsuperscript{312} Article 2(4) stipulates that all nations "shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."\textsuperscript{313} Article 51 authorizes states to engage in self-defense in the event of an armed attack.\textsuperscript{314} In light of these considerations, the ICJ

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\textsuperscript{308} Nagan, Nuclear arsenals, International Lawyers, and the Challenge of the Millennium, supra note 13, at 506.


\textsuperscript{310} See Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 226–228 (July 8).

\textsuperscript{311} Id. at 247.

\textsuperscript{312} Id. at 266.

\textsuperscript{313} U.N. Charter art. 2, para. 4.

\textsuperscript{314} U.N. Charter art. 51. Article 51 provides in full that:

\begin{quote}
Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.
\end{quote}

\textit{Id.} For a learned analysis of Article 51 and the U.N. Charter in relation to issues of individual state sovereignty see Nagan & Hammer, supra note 223, at 154–59.
could not, over an eloquent dissent,\(^\text{315}\) "conclude definitively whether the threat of use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self defence, in which the very survival of a State would be at stake."\(^\text{316}\)

Although the ICJ did not universally prohibit recourse to nuclear weapons, it certainly did acknowledge the policy content with regard to international legal instruments. The opinion, as well as the existing corpus of treaty–based legal instruments, indicates that individual nations can possess nuclear weapons not pursuant to their own sovereignty, but rather under the "authority of the international community."\(^\text{317}\) Indeed, the international community may thus exercise competence in determining how nuclear weapons are maintained by individual nations.\(^\text{318}\) That is to say, there is a transnational structure of expectation that has developed concerning the use and maintenance of nuclear weapons. It is unlikely that there will be a claim brought under the ATS based on the CIL applicable to nuclear arsenals. However, the example shows that these expectations have accordingly been constituted as a transnational legal framework whereby competency is vested transnationally as opposed to power vested in an individual state.

**CONCLUSIONS AND IMPLICATIONS**

This Article has attempted to demonstrate that the contemporary academic debate, learned as it may be, needs to account for the nature of CIL to ascertain its validity in American courts. The *Erie*–centric debate over the current legitimacy of human rights litigation has, unfortunately, followed the proverbial red herring into an analytical void. Courts, practitioners, and academics alike should consider the nature of CIL—

\(^{315}\) Judge Weeramantry in dissent was of the belief that the use or threat of use of nuclear weapons is illegal *in any circumstances whatsoever*. It violates the fundamental principles of international law, and represents the very negation of the humanitarian concerns which underlie the structure of humanitarian law. It offends conventional law and, in particular, the Geneva Gas Protocol of 1925, and Article 23(a) of the Hague Regulations of 1907. It contradicts the fundamental principal of the dignity and worth of the human person on which all law depends. It endangers the human environment in a manner which threatens the entirety of life on the planet.


\(^{316}\) *Id.* at 266.

\(^{317}\) W. Michael Reisman, *The Political Consequences of the General Assembly Advisory Opinion, in International Law, the World Court, and Nuclear Weapons* 482 (Lawrence Boisson de Chazournes & Philippe Sands eds., 1999).

\(^{318}\) *Id.*
the law of nations to which centuries of commentators have spoken—to ascertain the validity and prospects for modern human rights litigation under the ATS.

There may be no legal question as fundamental as “to what amount of dignity is a human being entitled?” Centuries of experience have led to present expectations of how we should treat our fellow human being, whether acting through a state or in our individual capacities. The nature of CIL in modern human rights litigation cannot and should not be ignored, in theory or in practice. Rather, embracing our collective experiences, as well as our conceptions about what is or is not a valid exercise of power, may in fact help re-legitimize private human rights enforcement, as well as open potential avenues for ATS litigation.