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A Door Ajar or a Floodgate?: Corporate Liability After Sosa v. Alvarez-Machain

Tim Kline

In 1980, the little known “Alien Tort Statute” (ATS) caught the attention of human rights activists, governments, and corporations throughout the world. Since then, numerous lawsuits have arisen under this statute, but only recently has the Supreme Court weighed in on the provision, in Sosa v. Alvarez-Machain. After Sosa, few questions were answered, but many more have been created. This note addresses these issues, and is divided into five sections. First, it gives a brief history of the ATS and its use, including the 1980 Filartiga v. Pena-Irala case, which brought the ATS to the attention of human rights advocates. Second, it reviews the ruling of the Supreme Court in Sosa to determine what rules the Court promulgated in determining when the statute applies. Third, it addresses the issue of corporate liability under the ATS to determine if it can be used to hold corporations liable for violations of international law. Fourth, the note surveys several post-Sosa cases currently pending in the court system to determine how Sosa has been applied in the lower federal courts. Finally, it predicts how the ATS will be used against corporations in the future. For now, it suffices to say that Sosa offers little to no protection for corporations that may be accused of various customary international law or treaty violations, due to the non-existent standard imposed by the Court in Sosa. This note will demonstrate that Sosa is a paper-tiger ruling due to the increasing use of the international law in non-ATS related cases and the evolving nature of international law. Thus, corporations will likely be exposed to liability for almost any imaginable tort in the future.

1 J.D. expected 2007, University of Kentucky College of Law. I wish to thank my wife, Elizabeth, and my parents, Ken and Vicki Kline, for their continued support and love.

2 28 U.S.C. § 1350 (2000). The statute reads: “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.” Because “Alien Tort Statute” is how the Supreme Court refers to this statute in Sosa, this note will use the same terminology.


4 Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980).
I. HISTORY AND EARLY USE OF THE ALIEN TORT STATUTE

Judge Friendly once stated that the Alien Tort Statute is a "legal Lohengrin; although it has been with us since the first Judiciary Act... no one seems to know whence it came." The statute, drafted by Oliver Ellsworth, was passed in the original Judiciary Act of 1789, but the lack of legislative history makes it difficult to precisely define Congress' intent with its passage. Furthermore, the statute was seldom used before the Filartiga case, leaving it shrouded in mystery until only the last twenty-five years. Indeed, the statute provided jurisdiction in only one case during the first 170 years of its existence. Until only recently, the main question regarding the ATS had not been answered: does it serve simply as a jurisdictional grant or, does it provide "authority for the creation of a new cause of action for torts in violation of international law"? To answer this question, it is helpful to review the ATS' history.

Two types of "laws of nations" existed at the time that the ATS was originally written. The first involved general norms that governed the interaction of states. This aspect of international law was governed solely by the executive and legislative branches. However, the second aspect of the law of nations did involve the judicial branch. In volume four of his Commentaries, Blackstone describes "Offences against the Law of Nations" in some detail. Blackstone argued that this aspect of the law of nations rested on natural law, based on a "system of rules, deducible by natural reason and established by universal consent among the civilized inhabitants of the world." At the time, Blackstone cited three types of principal offences against the law of nations: violation of safe-conducts, infringement of ambassadors' rights, and piracy. Each of these offenses against the law of nations could be and typically were violated by individuals. Blackstone

5 IIT v. Vencap, Ltd., 519 F.2d 1001, 1015 (2d Cir. 1975).
6 William S. Dodge, The Historical Origins of the Alien Tort Statute: A Response to the "Originalists," 19 HASTINGS INT'L & COMP. L. REV. 221, 222-23 (1996). The original wording of the text stated: "That the district courts shall also have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States." Id. at 225.
8 Sosa, 542 U.S. at 712.
9 Id.
10 Id. at 714.
11 Id.
12 Dodge, supra note 6, at 225.
13 Id. at 225-26 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES 66 (1775)).
14 Dodge, supra note 6, at 226.
15 Id.
believed that such acts would more effectively be handled in the judicial arena.\textsuperscript{16} Thus, Blackstone believed the government had both an interest and duty in addressing these types of behaviors.\textsuperscript{17} As the \textit{Sosa} Court put it, "[i]t was this narrow set of violations of the law of nations, admitting of a judicial remedy and at the same time threatening serious consequences in international affairs, that was probably on minds of the men who drafted the ATS with its reference to tort."\textsuperscript{18} In other words, the Founders likely recognized that there were certain torts that affected not only the victims, but rather, had far-reaching effects into the international political arena.\textsuperscript{19} Such actions would have to be redressed for the early republic to be recognized by its peers in the international system.

The Continental Congress recognized the importance of addressing this issue as early as 1781.\textsuperscript{20} Unfortunately, they had little power to handle the issue themselves, and called on the States to "vindicate rights" under the law of nations.\textsuperscript{21} Only Connecticut's legislature—including Oliver Ellsworth, who would later draft the ATS—enacted such a statute, and the Continental Congress maintained its impotence on the subject.\textsuperscript{22} During the Constitutional Convention, the Founders made inroads by giving the Supreme Court original jurisdiction over "all Cases affecting Ambassadors, other public ministers and Consuls," which addressed only one of the three infractions described by Blackstone.\textsuperscript{23} The First Congress subsequently added to the jurisdiction of federal courts over such matters as part of the Judiciary Act of 1789, including Section 9, which was the first version of the ATS.\textsuperscript{24} This Judiciary Act provided the federal courts with jurisdiction over common-law crimes, which included crimes violating the laws of nations.\textsuperscript{25} Did the ATS just provide jurisdiction to the courts, as the rest of the Judiciary Act did, or, did it open up causes of action to wronged aliens? In \textit{Filartiga}, the Second Circuit became the first court to attempt to answer that question.

After lying dormant for almost 200 years, the ATS was awoken by Dolly Filartiga who filed a lawsuit under the ATS.\textsuperscript{26} She claimed that the defendant, Americo Pena-Irala, tortured and killed her brother, Joelito, in Para-

\textsuperscript{16} Id.
\textsuperscript{17} Id.
\textsuperscript{18} \textit{Sosa}, 542 U.S. at 715.
\textsuperscript{19} Id.
\textsuperscript{20} Dodge, \textit{supra} note 6, at 226.
\textsuperscript{21} \textit{Sosa}, 542 U.S. at 716.
\textsuperscript{22} Id.
\textsuperscript{23} Id. at 717.
\textsuperscript{24} Id. For a more thorough review of the history of the ATS, see Dodge, \textit{supra} note 6, at 222–23.
\textsuperscript{25} Dodge, \textit{supra} note 6, at 231.
\textsuperscript{26} \textit{Filartiga v. Pena-Irala}, 630 F.2d 876, 876 (2d Cir. 1980).
guay in retaliation for his father's political activities and beliefs.\textsuperscript{27} Claiming jurisdiction under the ATS and citing the United Nations (U.N.) Charter, the Universal Declaration on Human Rights, The American Declaration of the Rights and Duties of Man, and other international documents, Filartiga attempted to establish that Joelito's death violated customary international law.\textsuperscript{28} Because the claim did not arise directly under a treaty, the court grappled with the issue of whether this conduct violated the law of nations.\textsuperscript{29} Claiming that torture is universally condemned in numerous international agreements, and that almost all nations had renounced torture as an official policy, the court held that "an act of torture committed by a state official against one held in detention violates established norms of the international law of human rights, and hence the law of nations," and therefore the plaintiffs had a cause of action under the ATS.\textsuperscript{30}

As alluded to in the previous statement, the Court looked to numerous instruments in determining what violates the law of nations. Citing the Supreme Court, the Second Circuit stated: "the law of nations '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.'"\textsuperscript{31} Furthermore, the court concluded that the law of nations was not static by specifying that "courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today."\textsuperscript{32} The court did attempt to limit itself in its interpretation of the ATS, however. While Filartiga urged the court to treat the ATS as an exercise of Congress' power to define offenses against the law of nations, the court held that the ATS did not grant new rights to aliens, but rather, opened the federal courts for adjudication of already recognized international law.\textsuperscript{33} Thus, the Filartiga court stated that if the defendant's alleged conduct violated "well-established, universally

\textsuperscript{27} Id. at 878.

\textsuperscript{28} Id. at 879. For the purposes of this note, "customary international law" is defined in terms used by the Sosa court: any international law "test[ing] 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." Sosa, 542 U.S. at 725.

\textsuperscript{29} See Filartiga, 630 F.2d at 880–81.

\textsuperscript{30} Id. at 880.

\textsuperscript{31} Id. (quoting United States v. Smith, 18 U.S. 153, 160–61 (1820)).

\textsuperscript{32} Id. at 881. The court specifically referenced The Paquete Habana, 175 U.S. 677, 694 (1900), in coming to this conclusion. In that case, the Supreme Court determined that the "traditional prohibition against seizure of an enemy's coastal fishing vessels during wartime, a standard that began as one of comity only, had ripened over the preceding century into 'a settled rule of international law' by 'the general assent of civilized nations.'"

\textsuperscript{33} See Filartiga, 630 F.2d at 887.
recognized norms of international law" rather than "idiosyncratic legal rules," federal jurisdiction was present under the ATS.

This first trickle opened the floodgates of ATS-related suits. In *Tel-Oren v. Libyan Arab Republic*, representatives of individuals killed in a bus attack in Israel sued Libya, the Palestinian Liberation Organization, and other defendants. The D.C. Circuit Court of Appeals proved more restrained, however, agreeing unanimously that it had no jurisdiction over the claims, although each judge wrote a separate concurring opinion. The reasons can be summed up as follows: (1) only a handful of heinous actions which violate definable universal and obligatory norms should fall under the ATS; (2) exercising jurisdiction improperly places the judiciary in a realm reserved for the executive and legislative branches; and (3) the ATS merely provided jurisdiction and did not provide for private causes of action for international law violations.

The Second Circuit proved friendlier to the ATS cases however, following their own lead in *Filartiga*. The atrocities visited upon Croat and Muslim citizens in Bosnia-Herzegovina led to a significant expansion in how the court viewed ATS jurisdiction. In *Kadic v. Karadzic*, the plaintiff alleged that Serb General Radovan Karadzic "personally planned and ordered a campaign of murder, rape, forced impregnation, and other forms of torture designed to destroy the religious and ethnic groups of Bosnian Muslims and Bosnian Croats." Citing genocide, war crimes, and crimes against humanity as meeting the requirement for jurisdiction under the ATS, the court held that Karadzic could be held liable in his private capacity, thereby broadening the reach of the ATS from state to private actors. Several other cases followed in this fashion, both within the Second Circuit and its sister circuits.

34 Id. at 888.
35 Id. at 881.
36 Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984) (per curiam).
37 Id. at 775.
39 Id. at 113–14.
41 Id. at 242.
42 Id. at 236.
43 See, e.g., Abebe-Jira v. Negewo, 72 F.3d 844, 848 (11th Cir. 1996) (ATS "establishes a federal forum where courts may fashion domestic common law remedies to give effect to violations of customary international law"); Hilao v. Estate of Marcos, 103 F.3d 767 (9th Cir. 1996) (reestablishing the rule that violations of international law under the ATS are actionable if they are derived from specific, universal and obligatory norms); Doe I v. Unocal Corp., 963 F. Supp. 880 (C.D. Cal. 1997), *aff'd in part & rev'd in part*, 395 F.3d 932 (9th Cir. 2002) (maintaining jurisdiction under the ATS regarding American oil company's involvement with Burmese
These suits paved the way for an onslaught of suits against multinational corporations, most of which failed. In 1997, *Doe I v. Unocal Corp* changed this trend. A federal district court in California found subject matter jurisdiction under the ATS "based on allegations that an American oil company, acting allegedly in concert with the Myanmar/Burmese government, committed various civil and human rights abuses." In a subsequent appeal, the Ninth Circuit held that plaintiff's allegations could be substantiated by the evidence—one could reasonably find that Unocal aided and abetted in forced labor, rape, murder, and torture by the Burmese government. At trial, the court broadly viewed international law, citing several conventions and other international instruments to which the United States is not a party. Furthermore, it appears that the court held international law in higher esteem than American state or federal law, thus creating a broad reach for the ATS. The most sweeping result of this case, therefore, was that corporations may be held liable for human rights violations under customary international law.

Subsequent cases have been brought against numerous corporations, including Chevron, Coca-Cola, ExxonMobil, and The Gap, among others. These cases involved vicarious liability, direct liability, and aiding and abetting, and are attractive to plaintiffs because of deep corporate pockets. However, none of these cases reached the Supreme Court.

II. *Sosa v. Alvarez-Machain*: The Supreme Court Weighs In

As mentioned, all of the above cases were pre-*Sosa*, and the United States Supreme Court had yet not weighed in on the ATS. The following is a review of the facts and law from *Sosa*, which will be useful in the later discussion on corporate liability after *Sosa*.

In 1985, a Drug Enforcement Administration (DEA) agent was captured while in Mexico, taken to a house in Guadalajara, tortured for two days, and subsequently murdered. After interviewing eyewitnesses, the

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47 *Id.* (citing *Doe I*, 395 F.3d at 954-55).
48 *Id.*
49 *Id.*
50 *Id.* at 117.
51 *Id.*
52 *Id.*
DEA concluded that Humberto Alvarez-Machain (Alvarez), a Mexican doctor, was present for the agent's torture and murder and in fact helped draw out the agent's life to extend the torture and interrogation. For his role in the torture and murder of the DEA agent, a grand jury indicted Alvarez, and the District Court for the Central District of California issued an arrest warrant. After the Mexican government refused to extradite Alvarez to the United States, the DEA hired Mexican nationals to capture Alvarez and bring him into the United States to stand trial. The hired group of Mexicans, including Sosa, kidnapped Alvarez, held him in a motel overnight, and then flew him by private plane to the El Paso, Texas, where he was arrested on arrival. Claiming that his seizure was "outrageous governmental conduct" and that it violated the extradition treaty between Mexico and the United States, Alvarez moved for dismissal of his indictment. While the District Court and Ninth Circuit agreed with Alvarez, the United States Supreme Court held that the method used to bring Alvarez within the court's jurisdiction had no effect on federal court's jurisdiction over the matter. Alvarez was later acquitted after the presentation of the Government's case.

After returning to Mexico in 1993, Alvarez filed a civil suit against numerous parties who participated in his abduction, including Sosa, a DEA operative, five Mexican civilians, the United States, and five DEA agents. Alvarez based his damage claim against the United States on the Federal Tort Claims Act (FTCA) and against Sosa based on the ATS, claiming Sosa violated the law of nations in kidnapping him. The District Court dismissed the FTCA claim but awarded summary judgment and monetary damages to Alvarez on his ATS claim, which the Ninth Circuit affirmed. The Ninth Circuit then heard the case en banc, affirming the panel's ruling, stating that the ATS "not only provides federal courts with subject matter jurisdiction, but also creates a cause of action for an alleged violation of the law of nations." Referring to the "clear and universally recognized norm prohibiting arbitrary arrest and detention," the Court said that Alvarez's ar-

54 Id.
55 Id. at 697–98.
56 Id. at 698.
57 Id.
58 Id.
59 Id.
60 Id.
61 Id.
63 Sosa, 542 U.S. at 698.
64 Id. at 699.
65 Id. (quoting Alvarez-Machain v. United States, 331 F.3d 604, 641 (9th Cir. 2003)).
rest was in fact a tort in violation of the law of nations. Sosa then appealed to the Supreme Court.

Sosa argued that the ATS provided no relief because the statute merely gave federal courts jurisdiction and did not authorize the courts to recognize any cause of action without congressional action to the contrary. The Court ruled differently, stating that although the statute was jurisdictional in nature, at the time it was enacted, the ATS provided the newly created federal courts the power to hear a limited category of claims “defined by the law of nations and recognized at common law.” It did not believe, however, that the “limited, implicit sanction to entertain the handful of international law [with] common law claims understood in 1789 should be taken as authority to recognize the right of action asserted by Alvarez here.”

The Court provided many reasons for its ruling. First, because the ATS was placed in the Judiciary Act, which otherwise dealt only with federal-court jurisdiction, it was also jurisdictional in nature. This holding raised the question of whether the ATS was stillborn at the time of its passage. Citing “amici professo r,” the court stated that “federal courts could entertain claims once the jurisdictional grant was on the books, because torts in violation of the law of nations would have been recognized within the common law of the time.” They then expounded upon the history of the ATS, asserting that the Founders must have intended that the statute have some bite, otherwise, the issue of an individual’s violation of the law of nations could not be addressed. Thus, the Court held:

[T]he First Congress did not pass the ATS as a jurisdictional convenience to be placed on the shelf for use by a future Congress or state legislature that might, some day, authorize the creation of causes of action or itself decide to make some element of the law of nations actionable for the benefit of foreigners.

Furthermore, the First Congress intended that the ATS provide jurisdiction for the short list of actions involving individual violations of the law of nations. At the time the ATS was enacted, the common law recognized only three such violations, i.e. piracy, violations of safe conduct, and offens-

66 Id.
67 Id. at 712.
68 Id.
69 Id.
70 Id. at 713.
71 Id. at 714.
72 Id. at 724.
73 Id. at 719.
74 Id. at 720.
es against ambassadors, which are described above.\textsuperscript{75} Summing up their historical review of the ATS, the Court stated:


\[\text{Although the ATS is a jurisdictional statute creating no new causes of action, the reasonable inference from the historical materials is that the statute was intended to have practical effect the moment it became law. The jurisdictional grant is best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time.}\textsuperscript{76}

The Court then turned to how the ATS should be applied today. First, it assumed that Congress had taken no action after the ATS' enactment to preclude federal courts from recognizing a claim under the law of nations as a common law element.\textsuperscript{77} Neither had Congress amended the ATS or limited the civil common law by some other statute.\textsuperscript{78} The Court did see a need for judicial caution when determining what types of claims might fall under the ATS.\textsuperscript{79} Building upon these premises, the Court concluded that a claim today must "rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized."\textsuperscript{80}

Realizing that this holding was not the type of black-letter law upon which a district court could confidently depend, the court specified several reasons for judicial caution when considering claims that might fall under the ATS. First, the notion of what is part of the common law has changed dramatically since the ATS was created in 1789.\textsuperscript{81} Second, the role of federal courts in creating common law has changed. Rather than developing common law based on their own authority, courts must now look to legislative guidance before exercising judicial authority over substantive law.\textsuperscript{82} Third, the Court believed that the creation of private rights of action is better left to the legislative branch in most cases.\textsuperscript{83} Fourth, courts must be wary of the implications for U.S. foreign relations in recognizing new causes of action.\textsuperscript{84}

\begin{itemize}
\item \textsuperscript{75} \textit{Id.}
\item \textsuperscript{76} \textit{Id. at 724.}
\item \textsuperscript{77} \textit{Id. at 724-25.}
\item \textsuperscript{78} \textit{Id. at 725.}
\item \textsuperscript{79} \textit{Id.}
\item \textsuperscript{80} \textit{Id.}
\item \textsuperscript{81} \textit{Id.}
\item \textsuperscript{82} \textit{Id. at 726.}
\item \textsuperscript{83} \textit{Id. at 727.}
\item \textsuperscript{84} \textit{Id. at 727-28.} ("Since many attempts by federal courts to craft remedies for the violation of new norms of international law would raise risks of adverse foreign policy consequences, they should be undertaken, if at all, with great caution.") (citing \textit{Tel-Oren v. Libyan Arab Republic}, 726 F.2d 774, 813 (1984) (Bork, J. concurring)).
\end{itemize}
Fifth, courts have "no congressional mandate to seek out and define new and debatable violations of the law of nations." 85

With these cautions and the underlying belief that the statute is jurisdictional, the Court turned to deriving a set of standards for reviewing Alvarez's claim. First, "federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when [the ATS] was enacted." 86 In making this determination, courts must exercise judgment regarding "the practical consequences of making that cause available to litigants in the federal courts." 87 One practical consequence is how the action might affect the political branches, which will vary with the facts of each case. 88 Additionally, a claim "must be gauged against the current state of international law, looking to those sources [that the Court has] long, albeit cautiously, recognized." 89 Applying these principles to Alvarez's circumstances, the court held that he did not have a valid ATS claim. 90 Alvarez's theory, they stated, was too broad, and its "aspiration ... exceed[ed] any binding customary rule having the specificity [the Court] require[d]" since following Alvarez's desire to create such a private cause of action would surpass any post- Erie common law discretion that the federal courts retain. 91 In summary, the court said it was sufficient to hold that a "single illegal detention of less than a day, followed by the transfer of custody to lawful authorities and a prompt arraignment, violates no norm of customary international law so well defined as to support the creation of a federal remedy." 92

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85 Id. at 728.
86 Id. at 732 (citing United States v. Smith, 18 U.S. 153 (1820)).
87 Id. at 732–33.
88 Id. at 733. (In cases with political implications, "there is a strong argument that federal courts should give serious weight to the Executive Branch's view of the case's impact on foreign policy.").
89 Id. In elaborating on the sources upon which courts should rely upon when determining the current state of international law, the Court stated:

[Where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.

Id. at 734 (quoting The Paquete Habana, 175 U.S. 677, 700 (1900)).
90 Id. at 738.
91 Id.
92 Id. at 729–30, 738.
93 Id. at 738.
This formulation of how to apply the ATS is rife with confusion. On one hand, the Court held that the statute was jurisdictional only, but within the same paragraph, they held that there are common law causes of action within the statute. Cautionary discretion is advised of the district courts who will apply the holding, but the limitation is open-ended given that each claim is measured against the current state of international law, which may change over time. This confusion was captured in a Wall Street Journal article written at the time of Sosa’s opinion. Outside Counsel for Unocal said that the decision represented a “sound rejection” of the way that human-rights groups were using the ATS. On the other hand, a representative of the Center for Constitutional Rights in New York thought “that business’ and government’s effort to eliminate the statute as a basis for relief was defeated.” What is clear, however, is that any determination is inherently fact-intensive, which undoubtedly presents difficulties for courts attempting to apply it.

III. CORPORATE LIABILITY POST-SOSA

As already discussed, the ATS was used multiple times in an attempt to hold corporations liable for actions in foreign countries prior to Sosa. Will Sosa end these attempts? Before discussing what may be viewed as a binding customary rule, the question of whether corporations can be held liable under the ATS must be answered. This question is important because the prospect of large judgments or settlements can drive litigation, and plaintiffs’ attorneys will rush to use this statute to reach the pockets of corporations. Already, evidence exists that some corporations have settled cases due to the unpredictability of this new theory of action under the ATS.

94 Id. at 712.
95 Id. at 725.
96 Id. at 734.
98 Id.
99 Id.
100 For example, the Court held that Alvarez’s detention did not reach the type of arbitrary detention which falls under the ATS because it was only one day. Sosa v. Alvarez-Machain, 542 U.S. 692, 738 (2004). Using the Court’s determination as a guide for other cases, it is reasonable to conclude that this lack of a bright-line test will give federal judges broad discretion in determining when the line is crossed. This query is likely to be heavily fact-intensive, having little basis in any legal foundation.
101 Kochan, supra note 38, at 116.
102 Id. at 117.
103 Id. at 117-18.
To answer this question, *Sosa* must be considered, but unfortunately, it says very little. In fact, only one footnote directly addresses the subject:

A related consideration is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual. Compare *Tel-Oren* ... (insufficient consensus in 1984 that torture by private actors violates international law) with *Kadic* ... (sufficient consensus in 1995 that genocide by private actors violates international law.)

The Court may have raised the issue for the benefit of the lower courts as a consideration they will have to make in adjudicating such cases. However, for the present, circuit court rulings are most relevant, particularly because the Court explicitly referred to them in *Sosa*. Therefore, further discussion is limited to cases that are within the D.C. and Second Circuits (since these circuits were specially mentioned by the *Sosa* Court) and to cases that have either been decided since *Sosa* or are currently before courts.

The D.C. Circuit has strictly construed the ATS, holding that the law of nations does not apply to private actors. *Ibrahim* involved seven Iraqi nationals who sued Titan Corporation (Titan), a private government contractor, among others, for its role in the activities at Abu Ghrab prison in Iraq. The plaintiffs alleged serious violations, namely that the defendant tortured one or more through various means, including beating them, subjecting them to loud, excessive noise for long periods of time, threatening dog attacks, urinating on them, and forcing them to witness abuse of other prisoners.

In accordance with *Sosa*, the court recognized that claims cognizable under the jurisdictional grant of the ATS are not limited to those that violated the law of nations at the time of its enactment. New claims based on “common law principles ... [that] ‘rest[ed] 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,’” could be recognized under the jurisdiction of the ATS. However, while the court did find that the allegations were against the law of nations, it also found that the law of nations did not apply to private actors, such as Titan.

104 *Sosa*, U.S. at 733 n.20.
105 See infra notes 106–22.
107 *Id.* at 12.
108 *Id.*
109 *Id.* at 13 (quoting *Sosa*, 542 U.S. at 725).
110 *Id.* at 14. The court acknowledged that the Supreme Court has not addressed the issue of whether the law of nations could be applied against private actors.
Citing Tel-Oren, the court recounted the three separate opinions of the judges on the panel.111 Looking to Judge Edwards, who read the ATS the most broadly among the three judges, the court found “no consensus that private actors are bound by the law of nations.”112

The court also looked to the D.C. Circuit case of Sanchez-Espinoza v. Reagan,113 which involved allegations of “execution, murder, abduction, torture, rape, wounding, and the destruction of private property and public facilities” by the Contras in Nicaragua.114 Quoting Judge Edwards in Tel-Oren, the Sanchez Court held that “the law of nations ‘does not reach private, non-state conduct of this sort.’”115 Thus, the D.C. Circuit concluded that for the ATS to apply to a private actor, the plaintiff’s allegations must be a violation of international law and the law of nations must at some point recognize private actor liability.116

In Kadic, the Second Circuit held that private actors may be liable for violations of the law of nations.117 In re “Agent Orange” Product Liability Lit-
reinforced this notion by referring to a litany of cases in the Second Circuit which allowed invocation of the ATS against private actors. Additionally, the court looked back to one of the earliest commentaries on the ATS, made by Attorney General Bradford, to show that liability of private actors for violations of international law was understood at the enactment of the ATS. When asked to determine what might be done to punish Americans involved in the French plunder of Sierra Leone, Bradford stated that those injured could file a civil suit in federal court, "jurisdiction being expressly given to these courts in all cases where an alien sues for a tort only, in violation of the laws of nations, or a treaty of the United States." Thus, according to Bradford, individuals would be liable under the ATS for "committing, aiding, or abetting" violations of the laws of war. Thus, at least in the Second Circuit, private actors may be held liable for violations of the law of nations.

Whether the ATS allows plaintiffs to sue private actors could very well be the next major ATS issue for the Supreme Court to address. With a split in the circuits, a plaintiff can simply shop around for a court that will allow a claim under the ATS to proceed against a private entity. Because these cases deal mostly with large, profitable multinational corporations, establishing sufficient minimum contacts for personal jurisdiction is unlikely to be an issue. On the other hand, the fact that the Sosa Court left the door open as to what is encompassed by the law of nations will probably mean that as more corporations are sued for international law violations, the practice of holding them liable may reach the normalcy, definitiveness, and acceptance required to make private actor liability part of the law of nations. The next section examines what issues are making their way through the lower federal courts.

119 Id. at 52-53.
120 Id.
121 Dodge, supra note 6, at 253 (quoting Breach of Neutrality, 1 Op. Att'y Gen., 57, 59 (1795)).
122 "Agent Orange," 373 F. Supp. 2d at 54.
125 This inference is drawn based on the trend already demonstrated. When the ATS was created in 1789, it entailed merely three torts. Today, many more torts are widely accepted as falling under the purview of the ATS. Given the open door maintained by the high court in Sosa, it is probable that the definition of the law of nations will expand.
IV. ATS's Gatekeepers: A Survey of Post-Sosa Cases in the Federal District Courts

Since Sosa, the federal district and appellate courts have had the opportunity to review cases involving these issues. In order to determine how the law in this area is progressing, this section presents a brief survey of some of the major cases percolating in the Circuits.

A. Second Circuit

In Presbyterian Church of Sudan v. Talisman Energy, Inc., the plaintiffs were a church and group of citizens who resided in the southern Sudan near several oilfields developed by the defendant oil company, Talisman. The plaintiffs alleged that their churches were destroyed and that church leaders and members were killed, raped, enslaved, tortured, and displaced by the Sudanese military because of their ethnicity and proximity to the oilfields. They argued that Talisman was involved in these actions because of its relationship with the Sudanese government, whereby Sudan received 39% of all oil revenues from Talisman’s operations in southern Sudan.

In 1989, a military coup ousted the Khartoum government paving the way for an Islamo-fascist group, the National Islamic Front, to take control. Since then, the Sudanese government has “intensified the religious and ethnic persecution” against non-Muslims in southern and western Sudan. This conflict escalated to an “oil war” for control of Sudan’s oil supply. The plaintiffs claimed that a “symbiotic partnership” formed between foreign oil companies, such as Talisman, and the Government:

[T]he Government could only receive capital from the development of its oil reserves to expand its war against the southern population by turning to foreign oil companies with the technology to develop the reserves successfully, while foreign oil companies could only develop the oil reserves successfully under secure conditions generated by assisting the Government in waging war against its southern population.

127 Id. at 457–58.
128 Id. at 458.
129 Id. at 461.
130 Id.
131 Id.
132 Id. at 462.
133 Id.
Plaintiffs argued that Talisman knew of the link between its predecessor company in Sudan and the Government and that the predecessor employed private and government forces to protect its operations. The plaintiffs further alleged that Talisman itself maintained the Government’s military vehicles and even supplied the military bases in exchange for protection. Finally, plaintiffs claimed that Talisman worked with the Sudanese government to “dispose of” civilians living in areas that Talisman wished to explore, and that these actions, including murder, rape, and torture of ethnic and religious minorities, amounted to genocide and war crimes against the local population. While the court ultimately declined to certify the class of plaintiffs in the case, it accepted that genocide, war crimes, and crimes against humanity all fall under the ATS.

As already mentioned, the ATS encompasses corporate liability in the Second Circuit, but the Talisman litigation provides more insight into the issue. First, the court stated that the Supreme Court, though given ample opportunity to disallow ATS cases with corporate defendants, has failed to do so. Additionally, while governments have objected to their corporations being subject to litigation under the ATS, the objections are not because of a belief that there is no violation of international law when a corporation commits (or aids in committing) genocide or other similar crimes. Talisman provides good insight into direct and indirect liability for corporate defendants under the ATS.

In Weiss v. American Jewish Committee, the plaintiffs, descendants of Jews killed at the Belzec concentration camp in Poland, sued under the ATS to stop the defendant Jewish organization from continuing to fund the construction of a trench at the site, which was part of a larger Holocaust memorial. Weiss contended that digging at the site would constitute a violation of Jewish ceremonial law concerning human remains, and sued to enjoin further digging. Plaintiffs sought to meet the ATS’ requirements by alleging that further digging violated the law of nations as expounded by the “Protocol Additional to the Geneva Conventions of 12 August 1949”

134 Id. at 463.
135 Id. at 464.
136 Id.
137 Id. at 485. The court denied certification because “the core question ... is whether the suffering endured by each putative class member can be attributed to the defendant [and] [t]hat is fundamentally an individual question.” Id.
139 Id. at *11.
141 Id. at 470.
142 Id. at 470, 473.
(Protocol), the "Protection of Victims of International Armed Conflicts," and the "International Covenant on Civil and Political Rights" (ICCPR). 143

The Court analyzed these documents and concluded that while they were evidence of customary international law in that they create legal obligations among signatories, the plaintiff failed to show that an "overwhelming majority of States have ratified [them and that] those States uniformly and consistently act in accordance with [their] principles." 144 Additionally, while the Protocol states that the remains of those who died as a result of hostilities should be respected, the court did not find this principle to be uniformly observed so as to recognize a binding customary law obligation. 145 Finally, as to the ICCPR, the court said that nothing in it regarding arbitrary or unlawful interference with an individual's privacy or family was sufficient to give rise to a rule of customary international law. 146

These cases shed light on the Second Circuit's interpretation of the ATS, post-Sosa. While denying customary international law status to possible grave desecration, the Second Circuit has determined that genocide, war crimes, and crimes against humanity do fit the requirements for Sosa liability. Additionally, the Second Circuit has reaffirmed its belief that corporations may be called to task under the ATS for customary international law violations.

B. Third Circuit

Jama v. United States Immigration and Naturalization Service 147 involves Jama and several other plaintiffs who were foreign nationals and refugees seeking political asylum in the United States. 148 After being taken into custody by the INS for being illegal aliens, the plaintiffs were transported to a holding facility in Elizabeth, New Jersey. 149 Esmor, a corporate defendant, managed and operated the for-profit facility for federal, state and local agencies. 150 In 1995, the detainees rioted, causing the facility to close, and the detainees were deported or transferred elsewhere. 151 Plaintiffs claimed that while they were held at the Elizabeth facility, they were tortured, beaten,

143 Id. at 476.
144 Id. (citing Flores v. S. Peru Copper Corp., 343 F.3d 140, 153 (2d Cir. 2003) (The law of nations "is composed only of those rules that States universally abide by, or accede to, out of a sense of legal obligation and mutual concern)).
145 Id.
146 Id.
148 Id. at 345.
149 Id. at 345-46.
150 Id. at 346.
151 Id.
harassed, mistreated by the Esmor guards and subjected to horrid living conditions, including poor sanitation and insufficient medical treatment.\textsuperscript{152}

Plaintiffs brought suit in federal district court under the ATS and other laws. To establish that customary international norms had been violated, the plaintiffs based their claims on nineteen international agreements, including treaties, human rights charters, and other conventions dealing with refugees' rights, to establish that customary international norms applied.\textsuperscript{153} After \textit{Sosa}, the court had to readdress each of these issues.\textsuperscript{154} First, the court determined that the claims against Esmor's guards did not meet the "rigorous \textit{Sosa} requirements" because they did not rise to the level of torture and murder which was the subject of \textit{Filartiga}.\textsuperscript{155} For example, the court cited that sexual harassment and assault did not rise to the level of a violation of the law of nations.\textsuperscript{156} However, the court did determine that Esmor could be liable for the alleged actions of the guards because \textit{respondeat superior} was applicable.\textsuperscript{157} Furthermore, the court concluded that Esmor's "inhumane treatment of a huge number of persons accused of no crime and held in confinement is a violation of the law of nations."\textsuperscript{158} In other words, while none of the defendants' individual actions violated the ATS, the totality of such actions could violate the ATS.\textsuperscript{159}

This case is interesting in that the court did not hinge liability on a single event, but on the totality of Esmor's actions against a large number of non-criminal detainees.\textsuperscript{160} Additionally, it is a prime example of the District Court's role as the gatekeeper post-\textit{Sosa}, reflecting the court's interpretation of \textit{Sosa}.

\textbf{C. Ninth Circuit}

\textit{Mujica v. Occidental Petroleum Corp.},\textsuperscript{161} involved an American company, Occidental Petroleum Corporation, which operated a pipeline in Santo Domingo, Colombia.\textsuperscript{162} AirScan, another defendant in the case, provided security for Occidental's pipeline from insurgents, who regularly attacked Occiden-

\textsuperscript{152} Id.
\textsuperscript{153} Id. at 358.
\textsuperscript{154} Id. at 357. Because the \textit{Sosa} opinion was issued in June 2004, the \textit{Jama} court determined that the rulings in its 1998 Opinion concerning the ATS were outdated. \textit{See id.} at 357–66.
\textsuperscript{155} Id. at 360–61.
\textsuperscript{156} Id. at 383.
\textsuperscript{157} Id. at 361.
\textsuperscript{158} Id.
\textsuperscript{159} Id
\textsuperscript{160} Id. at 360.
\textsuperscript{162} Id. at 1168.
tal's commercial interests. To protect its interests, Occidental also provided financial and other assistance to the Colombian military, including allowing them to plan missions in Occidental facilities. At Occidental's behest, AirScan, along with Colombian military liaisons, used aircraft to provide surveillance for the Colombian Air Force (CAF), which was then used by the CAF to find targets and deploy troops in their ongoing struggle against the insurgents.

On December 13, 1998, CAF helicopters dropped cluster bombs on the town of Santo Domingo with the purpose of protecting Occidental's pipeline from attack by insurgents. The bombs destroyed several homes and killed seventeen civilians, including six children, while wounding twenty-five others. According to the plaintiffs, no insurgents were killed in the attack. The plaintiffs alleged that Occidental and the other defendants knew that there were no insurgents in the area, yet persisted in the attack. The plaintiffs filed suit and based part of their claims on the ATS alleging "extra-judicial killing, torture, crimes against humanity, cruel, inhuman and degrading treatment, and war crimes."

It is important to recognize that because the court did not dismiss the case at the outset, the clear inference is that the court believes that corporations may be sued under the ATS. As to extra-judicial killing, the court held that binding customary international law norms exist, and were not supplanted by the Torture Victim Protection Act (TVPA), which also includes a right of action against such behavior. Citing several previous cases, the court suggested that murder is a jus cogens violation, and as such, is a violation of the laws of nations.

Relying on the fact that Congress had passed the TVPA, the court found this to be "strong evidence that the prohibition against torture is a bind-

163 Id.
164 Id.
165 Id.
166 Id.
167 Id.
168 Id.
169 Id. at 1168–69.
170 Id. at 1176.
171 Id. This assumption is made based on the fact that while the court ultimately dismissed the ATS claim on other grounds, it did not even address the issue of corporate liability under the ATS.
173 "The Court does not believe that the TVPA precludes claims of torture and extra-judicial killing under the ATS." Id. at 1179 n.13.
174 Id. (citing Doe I v. Unocal Corp., 395 F.3d 932, 945 (9th Cir. 2002), vacated and rev'd en banc, 395 F.3d 978 (2003)).
ing customary international law norm." Probably most interestingly, the court relied on the Nuremberg Charter and its prohibitions against crimes against humanity to determine that crimes against humanity are prohibited by the law of nations. The intriguing part of this determination lies in how the court arrived at this conclusion. Citing Sosa, the court stated that it could consider opinions of experts in the field to determine what is an international law norm. The plaintiffs provided a declaration from a professor of international human rights and international environmental law, and apparently, the court found this to be compelling. Relying on the fact that the Nuremburg trials and subsequent international criminal tribunals have prosecuted and enforced norms for crimes against humanity, the court determined that war crimes and crimes against humanity were binding international law norms.

As to cruel, inhuman and degrading treatment, the court looked to international criminal tribunals again, this time in Yugoslavia and Rwanda, as well as some previous court cases. Finally, the Geneva Conventions, ratified by over 180 countries, and the War Crimes Act of 1996 provided the court with enough evidence to decide that war crimes are prohibited by the law of nations. Thus, the court found every claim under the ATS to meet the test of Sosa, although it later ruled that the claims for cruel, inhuman and degrading treatment to be unnecessarily duplicative, given the plaintiffs' abilities to sue for intentional infliction of emotional distress. While each of these claims did fall under the ATS, the court ultimately dismissed because of the political question doctrine.

Even though ultimately dismissed, the Ninth Circuit, via Occidental, clearly applies a liberal interpretation to the ATS and Sosa's rubric for its application.

D. Eleventh Circuit

In Aldana v. Del Monte Fresh Produce, N.A., Guatemalan plaintiffs, members of a trade union, alleged that while they were trying to negotiate a new collective bargaining agreement with a Del Monte subsidiary, the subsidiary hired a private, armed security force which was used to intimidate

175 Id.
176 Id.
177 Id. at n.14.
178 Id.
179 Id. at 1180.
180 Id. at 1181.
181 Id.
182 Id. at 1182.
183 Id. at 1195.
184 Aldana v. Del Monte Fresh Produce, N.A., 416 F.3d 1242 (11th Cir. 2005).
and threaten the trade union.\textsuperscript{185} According to plaintiffs, the security force threatened violence if the plaintiffs did not give in to the Del Monte subsidiary’s position to denounce the trade union involved in negotiations.\textsuperscript{186} Additionally, defendants threatened to kill the plaintiffs if they did not leave Guatemala.\textsuperscript{187} Plaintiffs filed suit alleging several claims under the ATS.

Based on its interpretation of \textit{Sosa}, the Court of Appeals saw no basis for recognizing plaintiffs’ claims for cruel, inhuman, degrading treatment or punishment.\textsuperscript{188} While district courts in the Eleventh Circuit had recognized such a cause of action under the ATS, the appellate court stated that such claims arose under the ICCPR, and that this covenant does not create obligations which a federal court can enforce.\textsuperscript{189} The court similarly disposed of plaintiffs’ arbitrary detention claim because the plaintiffs were detained for a short period of time.\textsuperscript{190} Furthermore, the Court affirmed dismissal of plaintiffs’ crimes against humanity claim.\textsuperscript{191} Although the court recognized such crimes as violations of international law, the court found that the plaintiffs failed to plead the necessary element that the crimes “occur as a result of ‘widespread or systematic attack’ against civilian populations.”\textsuperscript{192} Thus, while this claim was dismissed, the court clearly viewed it as falling under the purview of the ATS.

Plaintiffs also brought torture claims against Del Monte.\textsuperscript{193} Most relevant from this portion of the court’s ruling is that a claim for state-sponsored torture can be based on both direct and indirect liability under the ATS.\textsuperscript{194} The court concluded that plaintiffs alleged sufficient facts to show torture causing mental distress under the ATS.\textsuperscript{195} Looking to the “Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,” the court found that the claims alleged by the plaintiffs could constitute torture—based on intentionally inflicted emotional pain and suffering,\textsuperscript{196} but plaintiffs’ claims of internationally inflicted physical pain and suffering the situation did not rise to torture.\textsuperscript{197}

\textsuperscript{185} Id. at 1245.
\textsuperscript{186} Id.
\textsuperscript{187} Id.
\textsuperscript{188} Id. at 1247.
\textsuperscript{189} Id.
\textsuperscript{190} Id.
\textsuperscript{191} Id.
\textsuperscript{192} Id. (quoting Cabello v. Fernandez-Larious, 402 F.3d 1148, 1161 (11th Cir. 2005).
\textsuperscript{193} Id. at 1247-48.
\textsuperscript{194} Id. at 1248 (“The Alien Tort Act ‘reaches conspiracies and accomplice liability….’”) (quoting \textit{Cabello}, 402 F.3d at 1157).
\textsuperscript{195} Id. at 1251.
\textsuperscript{196} Id. at 1252-53.
\textsuperscript{197} Id. at 1253.
Thus, it appears that the *Aldana* court widened the notion of torture to encompass not only physical, but also mental distress, the opposite of the ruling reached in *Mujica*. With this background, we now discuss the implications of *Sosa* and the future of litigation under the ATS.\(^{198}\)

V. THE FUTURE OF CORPORATE LIABILITY UNDER THE ATS

Now that the ATS, *Sosa*, and several post-*Sosa* cases have been discussed, the question becomes: now what? This section will address several of the author’s observations with regard to the way the law may evolve.

First, as the *Sosa* court was ambiguous on whether corporations or other third parties may be held liable under the ATS, the issue has yet to be fully decided.\(^{199}\) Courts within the D.C. Circuit say no,\(^{200}\) but courts within other circuits disagree.\(^{201}\) One might have expected this issue to have already reached the Supreme Court, given the number of ATS-related suits against corporations since 1980, but the issue has yet to be addressed. However, while the Circuits are divided, plaintiffs will be able to shop for a forum that will hold their prospective defendant to be a proper party to such a suit. At some point, the high court will need to step in to ensure that the ATS is applied consistently throughout the Circuits.

Second, as described in detail above, cases brought against corporations under the ATS have been allowed for extra-judicial killing, mental and physical torture, crimes against humanity, war crimes, inhuman, cruel and degrading treatment, and confinement of large groups under generally horrendous conditions. Courts have not found ATS jurisdiction for non-widespread sexual harassment, simple assault, disruption of gravesites, business relations with apartheid-style regimes, and medical testing without consent.\(^{202}\)

There is good reason to believe that the list of offenses for which jurisdiction may be found under the ATS will grow. The *Sosa* court stated the requirements for determining what offenses may be found in the ATS: “federal courts should not recognize private claims under federal common


199 *Sosa*, 542 U.S. at 731.


202 See supra note 198 and accompanying text.
law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when [the ATS] was enacted."\(^{203}\) Courts must use their judgment regarding the "practical consequences of making that cause available to litigants in the federal courts."\(^{204}\) Finally, a claim "must be gauged against the current state of international law, looking to those sources [the court has] long, albeit cautiously, recognized."\(^{205}\)

While this appears to be a black-letter, bright-line test, it is clearly more than a "door ajar." Internationally-agreed-upon norms change with time. The most obvious example is slavery, which was a widely practiced institution for centuries but is no longer recognized in most nations.\(^{206}\) Thus, as these norms change, district courts will be forced to rely upon what the world agrees to be right or wrong, and such discretion is broad, rather than a narrow "gate-keeping" power. In practical terms, this means that within the near future, corporations may be sued under the ATS for any or all of the offenses listed above that currently are not found to provide jurisdiction under the ATS. In addition, environmental groups will surely use the evolving importance of agreements such as the Kyoto Protocols to push their policies in American courts, even though the Protocols have not been ratified by the United States Senate.

This proposition is related to activities that have already infiltrated the Supreme Court. Currently, an ongoing debate exists regarding the use of international law as a basis for making decisions respecting domestic law questions in United States courts.\(^{207}\) Three main cases have demonstrated this trend:\(^{208}\) *Atkins v. Virginia*,\(^{209}\) *Lawrence v. Texas*,\(^{210}\) and *Roper v. Simmons*.\(^{211}\) In *Atkins*, the Court struck down laws allowing for the death penalty for the mentally retarded.\(^{212}\) Relying in part on the European Union's amicus brief, the court stated that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved."\(^{213}\) The *Lawrence* Court overturned a Texas law

\(^{203}\) *Sosa*, 542 U.S. at 732.
\(^{204}\) Id. at 732-33.
\(^{205}\) Id. at 733.
\(^{207}\) Kochan, *supra* note 38, at 126.
\(^{208}\) See *id*.
\(^{212}\) *Atkins*, 536 U.S. at 321.
\(^{213}\) Id. at 316.
prohibiting homosexual sodomy. Justice Kennedy, writing the majority opinion, referring to an earlier case on sodomy in which a similar prohibition was upheld, stated that the Court's reasoning and holding have been rejected by the European Court of Human Rights and that "other nations have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct." Finally, in *Roper,* the Court struck down the juvenile death penalty, again relying on international consensus rather than established American history and precedent.

In light of these trends, it is clear that the gatekeeper function of the district courts carries much responsibility and broad latitude. Arguing from the lesser to the greater, one might reasonably expect that if the Supreme Court is willing to apply foreign law to domestic law cases, then it will be even more likely that the Court will allow foreign law to be integral to cases brought under the ATS, even if such foreign law disagrees with historically recognized American law. For these reasons, the Supreme Court's ruling in *Sosa* is not as narrow as it appears, and corporations can expect the ATS to be a thorn in their corporate sides for many years to come.

214 *Lawrence,* 539 U.S. at 578-79.
216 *Lawrence,* 539 U.S. at 576.
217 *Roper,* 543 U.S. at 575:

Our determination that the death penalty is disproportionate punishment for offenders under 18 finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty. This reality does not become controlling, for the task of interpreting the Eighth Amendment remains our responsibility. Yet at least from the time of the Court's decision in *Trop,* the Court has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of "cruel and unusual punishments."

(citing *Trop v. Dulles,* 356 U.S. 86, 102-03 (1958) (plurality opinion)).