Constitutional Structure as a Limitation on the Scope of the Law of Nations in the Alien Tort Claims Act

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There is no mystic over-law to which even the United States must bow.¹

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¹ In re Western Maid, 257 U.S. 419, 432 (1922). In this case, Justice Holmes stated the following:

In deciding this question we must realize that however ancient may be the traditions of maritime law, however diverse the sources from which it has been drawn, it derives its whole and only power in this country from its having been accepted and adopted by the United States. There is no mystic over-law to which even the United States must bow. When a case is said to be governed by foreign law or by general maritime law that is only a short way of saying that for this purpose the sovereign power takes up a rule suggested from without and makes it part of its own rules.

Id.

Introduction

One cannot look lightly on the jurisdictional parameters of the courts. The Constitution grants the judiciary a specific set of enumerated cases and controversies over which it shall have cognizance.\(^2\) Outside of this set, the judiciary is at sea; it poses a threat to the separation of powers and risks becoming a dangerous and domineering branch. The constitutional separation of jurisdictional powers affects all branches of government. Under the separation of powers doctrine, the judiciary must guard its role and restrain itself from taking action outside its specified cognizance, just as the executive and legislative branches are prohibited from expanding the role of the courts, absent a constitutional amendment.\(^3\)

Jurisdictional limitations serve a particularly important function when the judiciary is dealing with issues of international law. Since much of international law concerns foreign relations, the province of the executive and, in part, the legislature, the danger that the judiciary will act in a policy-making role or will frustrate the functions of the political branches is especially great. The Framers of the Constitution were particularly concerned with constructing a document in which the government would

\(^2\) In this Note, “cognizance” means the power of a court to hear a case or to recognize a doctrine as within its jurisdiction. See William R. Casto, The Federal Courts’ Protective Jurisdiction Over Torts Committed in Violation of the Law of Nations, 18 CONN. L. REV. 467, 479 (1986) (stating “Eighteenth century lawyers understood [cognizance] as referring to a court’s power to try a case.”). Casto also states that, “lawyers in America also used ‘cognizance’ as a synonym for ‘jurisdiction,’” at least at the Founding. Id. at 479, n.61 (citing Wilson, Lectures on Law, in THE WORKS OF JAMES WILSON 457 (R. McCloskey ed., 1967); THE FEDERALIST No. 81, at 550-51 (Alexander Hamilton) (Jacob E. Cooke ed., 1961)).

\(^3\) See generally Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) (holding that even if Congress intended for the plaintiffs to have standing, it is the province of the judiciary to define “case” or “controversy” under Article III and Congress lacks the power to grant jurisdiction where the courts have determined no “case” or “controversy” exists); THE FEDERALIST No. 78 (Alexander Hamilton).
speak with one voice in its international dealings. Because the judiciary is insulated from political control, court decisions defining international law would not only be improper, but would also frustrate the intent of creating a unitary voice in foreign relations.  

These questions of proper jurisdictional limits in relation to international law are implicated in the interpretation of the Alien Tort Claims Act (ATCA). The ATCA states that the district courts will have jurisdiction to hear those cases in which an alien sues in a civil action for a tort committed in violation of the law of nations or in violation of a treaty of the United States. Thus, jurisdictional questions arise when applying this statute, particularly with reference to the meaning of the "law of nations" and the consequent limits on the judiciary's cognizance over that "law."

Jurisdictional limits are vital to the preservation of a government with limited authority, and respect for such limits by all branches of government is necessary for the preservation of individual liberty. Jurisdiction constitutes a fundamental check upon the growth of governmental power vis-à-vis individuals. Jurisdictional statutes should thus be interpreted narrowly so as to serve the ends of liberty by constraining the means for power.

This Note examines the ATCA and suggests that the application of its jurisdictional grant has been unconstitutionally expanded by the courts and currently places a responsibility and power with the judiciary that is both inconsistent with constitutional structure and dangerously unwise. Part I provides a brief history of the evolution of the "law of nations" as a controlling category of law in American courts. Next it discusses the ATCA and the precedents flowing from its application. Part I also examines the recent Second Circuit decision of Kadic v. Karadzic, along with its predecessors and progeny. Part II analyzes the constitutional structure and its relevance to defining the proper scope of the "law of nations" in American courts. After examining the constitutional history and relevant roles for the separate branches of government, Part II argues that the ATCA has been

4. See infra notes 119-23 and accompanying text.
7. Id.
8. See Richard A. Epstein, The Proper Scope of the Commerce Power, 73 VA. L. REV. 1387 (1987) (discussing jurisdictional limits on Congressional power). Epstein states: Provisions that go to the question of jurisdiction are no less important to sound governance than those that govern individual rights. . . . [Hamilton's judgment] contained a fair measure of good sense in using jurisdictional limitations as an important, indeed indispensable, limitation upon government power. Id. at 1390-91 (citing The Federalist No. 84 (Alexander Hamilton)). James Madison put it simply when he stated, "Every word of [the Constitution] decides a question between power and liberty." The Complete Madison: His Basic Writings 335 (Saul K. Padover ed., 1953) (from an essay published in The National Gazette, January 19, 1792).
applied in a manner inconsistent with this separation and the Constitution's formal requirements.

Part III presents a framework through which the ATCA can be applied in a manner consistent with the structural requirements of the Constitution. Because Article III enumerates specific categories in which the Framers understood that the “law of nations” would be implicated, this enumeration indicates that no general jurisdictional authority over the law of nations was intended to fall within judicial power. In other words, the courts may not look to international law as an independent portion of the “laws of the United States” clause. When the judiciary’s jurisdiction is predicated on that clause, Part III further contends that the judiciary may only look to those laws passed by Congress pursuant to its power to define offenses against the law of nations. Because Congress has the power to define these offenses, this Part concludes that the Constitution does not contemplate that, as a general matter, international legal principles have legally controlling authority. In other words, it would be unnecessary for Congress to define the law of nations if it were a knowable and independently controlling doctrine. This framework necessarily limits the judiciary’s role over the “law of nations” and significantly decreases the scope of the ATCA’s application. The Conclusion indicates that this jurisdictional limitation, formed from the structure of the Constitution, is the only method which can be judicially employed without acting ultra vires. The only legitimate role for the ATCA is in providing jurisdiction for torts in violation of those “international laws” properly recognized under congressional authority as ordinary laws of the United States or when it acts as a statutory grant of jurisdiction for cases arising under a jurisdictional category of Article III which specifically contemplates the usage of the “law of nations” in its exercise. Customary international law alone will not suffice.

I. Current Judicial Standards for Defining the “Law of Nations”

The phrase “law of nations” was the original means for expressing early international law. In most contemporary literature, the “law of nations” is considered coterminous with “international law.”\(^9\) This “law” is unique because it purports to create universal obligations for all sovereign nations and to police somehow the conduct of those nations. This “law” is also unique because many commentators feel that it evolves and even imposes obligations on non-state actors.\(^10\) One of the means used to enforce adherence to this international law is the Alien Tort Claims Act.

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A. The Development of Rules for Ascertaining the "Law of Nations"

The Restatement (Third) of Foreign Relations Law of the United States asserts that customary international law is part of federal common law.\(^{11}\) This assertion reflects the path U.S. courts have chosen in recent years when defining their competence to apply international legal principles to particular cases. Early cases, including *The Nereide*,\(^{12}\) *United States v. Smith*\(^{13}\) and *The Paquete Habana*,\(^{14}\) established the now "unexceptionable" proposition\(^{15}\) that the "law of nations" is included in the federal common law of the United States.\(^{16}\)

At issue in *The Nereide* was whether a Spanish shipper's goods carried aboard a British merchant vessel captured by American privateers could be condemned as prize. The shipper argued that, because Spain was a neutral party in the fighting between the United States and Great Britain and because the law of nations protected the property of neutrals, his property could not be taken as prize.\(^{17}\) Chief Justice Marshall, writing for the Supreme Court, argued that, absent Congressional legislation, "the Court is bound by the law of nations which is a part of the law of the land."\(^{18}\) Although this statement appears to conclude that international law is part of the general laws of the United States, Marshall was sitting in admiralty and thereby his statement can be read as addressing only whether international law applies in admiralty cases.\(^{19}\)

*Smith* involved a prosecution for piracy involving the "plunder and robbery" of a Spanish vessel.\(^{20}\) Thomas Smith, having participated in the piracy of the Spanish vessel, was prosecuted under an 1819 Act of Congress which stated, "That if any person or persons whatsoever, shall, on the high seas, commit the crime of piracy, as defined by the law of nations . . . every such offender or offenders shall, upon conviction thereof . . . be pun-


\(^{12}\) 13 U.S. (9 Cranch) 388 (1815).

\(^{13}\) 18 U.S. (5 Wheat.) 153 (1820).

\(^{14}\) 175 U.S. 677 (1900).

\(^{15}\) Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 810 (D.C. Cir. 1984) (Edwards, J., concurring).

\(^{16}\) The fact that Smith was a piracy case in admiralty and that *The Paquete Habana* and *The Nereide* were prize cases in admiralty are particularly important for the purposes of this Note.

\(^{17}\) *The Nereide*, 13 U.S. (9 Cranch) at 388-90.

\(^{18}\) *id.* at 423.

\(^{19}\) See infra Parts III.A, III.B (explaining that the separate jurisdictional category for admiralty cases in Article III, contemplating cognizance of some international law rules, must be considered as distinct from the "laws of the United States" category).

ished with death." The jury returned a special verdict finding that Smith was involved in the plunder and robbery, and that if these actions constituted "piracy" under the 1819 Act, a question of law, he would be in violation of the Act. Addressing the legal question, Justice Joseph Story, writing for the Supreme Court, found that Smith's acts constituted piracy "as defined by the law of nations."

Before reaching this conclusion, Story was required to consider whether the 1819 Act was constitutionally infirm, for the Constitution gives Congress the power to "define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations." Smith argued "that Congress is bound to define, in terms, the offense of piracy, and is not at liberty to leave it to be ascertained by judicial interpretation." Story, however, found the task assigned to the judiciary by Congress in the 1819 Act to be no different than finding the meaning of a word in any congressional command. He determined that ascertaining the meaning of piracy was similar to other common law means of interpreting and applying a statute and its terms.

Finding that Congress could allow the judiciary to determine the meaning of statutory terms by reference to the "law of nations," Story set forth the now oft-quoted method for ascertaining the "law of nations." Courts may ascertain the law of nations "by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognising and enforcing that law." From examining a variety of sources in each category, Story concluded that Smith's actions fell within those universally treated as piracy in violation of the law of nations.

A similar approach to ascertaining the law of nations was adopted in The Paquete Habana. The Paquete Habana was a fishing vessel sailing under the Spanish flag captured off the coast of Cuba by a U.S. gunboat.

21. Id. at 154, n. a.
22. Id. at 154-55.
23. Id. at 163.
26. Id. at 159.
27. Id. at 158-59. Although subsequent cases have relied on Justice Story's search of the common law through which he defined piracy, his holding could have been based on purely domestic and statutory law, making the determination of the law of nations merely dicta. Story argues that a 1790 act of Congress, ch. 9, sec. 8, declared "that robbery and murder committed on the high seas shall be deemed piracy." Id. at 158, 160. Relying on this statute alone, Story could have held that the jury's finding of "plunder and robbery" fit within the congressional definition of piracy. Nonetheless, because Story was following Congress's command to find the meaning of piracy "as defined by the law of nations," he may have felt obliged to look beyond the 1790 act and actually ascertain the law of nations' definition of piracy rather than rely on the previous declaration of Congress.
28. Id. at 160-61.
29. Id. at 161-63.
30. 175 U.S. 677, 700 (1900).
31. Id. at 678-79.
The vessel and her cargo were condemned as prizes of war and later sold at an auction. The owner and the master, on behalf of the other crew members who were entitled to shares of the Habana's catch, brought a suit challenging the seizure as unlawful. The Supreme Court, in order to determine whether fishing vessels were legally subject to capture during the war with Spain, looked to the law of nations and found that "coast fishing vessels ... have been recognized as exempt, with their cargoes and crews, from capture as prize of war." This case is particularly significant because the Court used international law to restrict state action by the United States. After tracing a significant amount of history on the international treatment of fishing vessels as prizes of war to support the holding, the Court set forth perhaps the most relied upon statement relating to the justiciability of the "law of nations":

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 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.

This statement presents three critical rules. First, it reaffirms the proposition that international law is part of the law of the United States, or at least its admiralty law. Second, it holds that the court may apply an international "law," as controlling authority, even when the "law" has not previously been recognized in a U.S. treaty, legislative act, executive act, or prior court decision. Finally, it ratifies the Smith Court's method of consulting the works of jurists or commentators as a means for ascertaining an international "law." The Court cautions that only those works purporting to report the law rather than advocate for the acceptance of a principle should be consulted. In support of its optimistic view that jurists can accomplish such a neutral task, the court cites Wheaton's assurance that jurists and commentators are "generally impartial in their judgment.

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32. Id. at 679.
33. Id.
34. Id. at 686.
36. The Paquete Habana, 175 U.S. at 700-01.
37. Id. (citing Wheaton's International Law § 15 (8th ed.)). Cf. C. Donald Johnson, Jr., Filartiga v. Pena-Irala: A Contribution to the Development of Customary International Law by a Domestic Court, 11 GA. J. INT'L & COMP. L. 335, 336-37 (1981) (arguing "[t]he difficulty of the task [of defining international law] is made more obvious by the wide variance among academic specialists in the field in approaching the sources of international law," and describing the "often nebulous law represented by the usage and
Finally, in analyzing international legal sources concerning the "legality" of certain war practices, The Paquete Habana Court illustrated a willingness to give international law a dynamic perspective. In other words, it indicated that the law of nations cannot be analyzed from a static perspective and that certain standards ripen over time into settled rules of international law.38 Consistent with the common law characterization of international law, the doctrine to be applied by the courts need not be set in time. Nonetheless, the decision recognizes that a rule will not become a settled portion of international law unless it commands the "general assent of civilized nations."39 This "stringent"40 rule is justified, at least in form, as a means for ensuring that one nation will not "feel free to impose idiosyncratic legal rules upon others, in the name of applying international law."41

B. The Alien Tort Claims Act and the Application of the "Law of Nations"

1. The Statute and its Origins

The Alien Tort Claims Act (ATCA), arising from a provision in the Judiciary Act of 1789, grants the federal courts subject-matter jurisdiction over cases in which an alien sues for a tort committed in violation of the law of nations.42 The ATCA provides: "The district courts shall have original practice of nations"); Mark P. Jacobsen, Comment, 28 U.S.C. 1350: A Legal Remedy for Torture in Paraguay?, 69 Geo. L.J. 833, 834 (1981) (describing the "amorphous law of nations" and arguing that the application of the ATCA is "restricted . . . by difficulty in defining when an act is governed by the law of nations").

38. The Paquete Habana, 175 U.S. at 694.
39. Id.
40. Filartiga v. Pena-Irala, 630 F.2d 876, 881 (2d Cir. 1980).
41. Id. The Filartiga court found that the situation would have been different had there not been a general assent of nations on the legal principle involved. Id. Similarly, in Banco Nacional de Cuba v. Sabbatino, the Supreme Court refused to find an international law against a government's expropriation of a foreign-owned corporation's assets, for there was no general assent on the invalidity of such action. 376 U.S. 398 (1964). See also Josef Rohlik, Filartiga v. Pena-Irala: International Justice in a Modern American Court?, 11 GA. J. INT'L & COMP. L. 325, 330 (1981). But some commentators caution that the usage of a statute such as the ATCA in any context may invite other, less friendly nations to assert similar jurisdiction over international law claims and impose obligations on foreign visitors that could lead to "chaotic or unjust results." See, e.g., Farooq Hassan, Note, A Conflict of Philosophies: The Filartiga Jurisprudence, 32 Intr'l. & Comp. L.Q. 250, 257 (1983).
42. 28 U.S.C. § 1350 (1994). The separate clause granting jurisdiction over torts committed in violation of treaties of the United States is beyond the scope of this Note. Because the provision relating to the law of nations is independent and jurisdiction may be granted on that basis alone, answers to questions of the constitutionality of the portion relating to the law of nations are not contingent upon the treaty language following the disjunctive. Nonetheless, it is important to note that even if the use of customary international law is significantly curtailed by the theory adopted in this Note, international law can still play a significant role under the ATCA through treaties. For a recent case relying exclusively on the treaty clause of the ATCA, see Brancaccio v. Reno, 964 F. Supp. 1 (D.D.C. 1997) (holding that the plaintiff had not and could not show a violation of the Convention on the Transfer of Sentenced Persons, for it does not require transfer of a prisoner upon request).
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.\footnote{28 U.S.C. § 1350 (1994). The original Act, enacted by the First Congress, read: "The district courts . . . shall 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." Judiciary Act of Sept. 24, 1789, ch. 20, sec. 9, 1 Stat. 73, 76-77.} This grant exists separately from both federal question\footnote{28 U.S.C. § 1331 (1994).} and diversity\footnote{28 U.S.C. § 1332 (1994).} jurisdiction, as well as from jurisdiction over admiralty, maritime and prize cases.\footnote{28 U.S.C. § 1333 (1994).}

Little direct evidence of Congress's intentions in enacting this provision exists to lend guidance to those searching for its meaning.\footnote{Judge Friendly has described the Act as an "old but little used section" that is "a kind of legal Lohengrin; . . . no one seems to know whence it came." IIT v. Vencap, Ltd., 519 F.2d 1001, 1015 (2d Cir. 1975) (holding fraud not a violation of international law).} The Senate debates over the Judiciary Act were not recorded and the provision is never mentioned in the debates of the House of Representatives.\footnote{See infra Part II.} Given that the ATCA's passage immediately followed the ratification of the Constitution, however, the goals of the First Congress can be inferred from those portions of ratification debates relevant to the law of nations.\footnote{See Adra v. Clift, 195 F. Supp. 857 (D. Md. 1961) (child custody dispute between two aliens; wrongful withholding of custody is a tort, and defendant's falsification of child's passport to procure custody violated the law of nations); Bolchos v. Darrel, 3 F. Cas. 810 (D.S.C. 1795) (No. 1607) (suit for restitution of three slaves who were on board a Spanish ship seized as a prize of war; treaty of France superseded the law of nations; § 1350 alternative basis of jurisdiction). Because a tort must be found to be the type which violates the law of nations before jurisdiction will be granted, some cases prior to 1980 considered application of the ATCA, but found the alleged tort did not meet the law of nations threshold. See Huynh Thi Anh v. Levi, 586 F.2d 625, 629 (6th Cir. 1978) (no generally accepted international rule granting custody of children to grandparents); Benjamins v. British European Airways, 572 F.2d 913, 916 (2d Cir. 1978) (negligence law not part of the law of nations); cert. denied, 439 U.S. 1114 (1979); Dreyfus v. Von Finck, 534 F.2d 24, 30 (2d Cir. 1976) (wrongful confiscation of property not part of the law of nations); cert. denied, 429 U.S. 833 (1976); IIT v. Vencap, Ltd., 519 F.2d. at 1015 (fraud not violative of international law); Abiodun v. Martin Oil Service, Inc. 475 F.2d 142, 145 (7th Cir. 1973) (fraud not violative of the law of nations); Khedivial Line,}
For almost 200 years, therefore, this Act remained essentially dormant. Though Smith and The Paquete Habana did not involve cases brought under the ATCA, the standards relating to the law of nations set forth in those cases are particularly relevant to the interpretation and application of the ATCA. Most ATCA cases require that courts ascertain what torts are cognizable as being "committed in violation of the law of nations."52

2. Filartiga v. Pena-Irala

In Filartiga v. Pena-Irala,53 decided in 1980, the U.S. Court of Appeals for the Second Circuit resurrected the ATCA from its fairly dormant existence.54 Dolly Filartiga, a citizen of the Republic of Paraguay, sued Americo Norberto Pena-Irala, formerly an Inspector General of Police of Paraguay, for allegedly kidnapping, torturing, and killing her brother while in office.55 The alleged actions took place in Paraguay.56 Filartiga sued, however, while both she and Pena-Irala were in the United States on visitor's visas.57 The district court dismissed the action for lack of subject matter jurisdiction.58 The Second Circuit reversed and remanded, holding that deliberate torture by state officials violates international law and that alleging such torture creates jurisdiction under the ATCA.59 This decision breathed new


52. This Note will not discuss the second clause of the ATCA involving torts "committed in violation of . . . treat[ies] of the United States." 28 U.S.C. § 1350 (1994). It should not be presumed, however, that a case will automatically become justiciable once a violation of a treaty of the United States is alleged. The treaty clause of the ATCA raises issues of its own, including whether the "treaty" is actually a treaty of the United States, whether the treaty is self-executing or non-self-executing, and whether the political question doctrine or the act of state doctrine bar justiciability. For additional discussion of the ATCA's treaty clause, see supra note 42.


54. Judge Robb of the U.S. Court of Appeals for the D.C. Circuit described the Filartiga approach as "judicially will[ing] that statute a new life." Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 827 (D.C. Cir. 1984) (Robb, J., concurring).

55. Filartiga, 630 F.2d at 878.
56. Id.
57. Id.
58. Id.
59. Id.
life into this rather ancient statute.

The *Filartiga* court held that "deliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human rights, regardless of the nationality of the parties."\(^{60}\) For the first time, the ATCA was applied in the modern human rights context. Furthermore, *Filartiga* established that "international law," used by the court as synonymous with the "law of nations," is an evolving concept to be ascertained by the courts.\(^{61}\) The Second Circuit held that courts ascertaining the law of nations "must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today."\(^{62}\)

In order to determine which principles are controlling international "law," the court accepted the methodology prescribed in *Smith* and *The Paquete Habana*. It looked to general usages and customs of nations, as evidenced by the works of jurists and commentators, as well as treaties and declarations or resolutions of multinational bodies, such as the United Nations.\(^{63}\) To that extent, the *Smith-Paquete Habana* methodology was incorporated as precedent for the interpretation and application of the ATCA.

3. Tel-Oren v. Libyan Arab Republic

Shortly after the Second Circuit's ground breaking decision in *Filartiga*, the U.S. Court of Appeals for the D.C. Circuit was faced with the similar task of applying the ATCA in *Tel-Oren v. Libyan Arab Republic*.\(^{64}\) Representatives of persons killed on a civilian bus in Israel, along with the injured survivors of the attack, sued the Libyan Arab Republic, the Palestine Liberation Organization, the Palestine Information Office, the National Association of Arab Americans, and the Palestine Congress of North America.\(^{65}\) The plaintiffs charged the defendants with multiple tortious acts in violation of international law.\(^{66}\)

The D.C. Circuit panel unanimously agreed that the court did not have jurisdiction over the plaintiffs' causes of action.\(^{67}\) Each judge, however, wrote a separate concurring opinion, each positing a different basis for denying jurisdiction. Judge Edwards, adhering to the *Filartiga* rationale, argued that violations of the law of nations is a narrow category

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60. Id.
61. Id. at 881.
62. Id.
63. Id. at 880-83.
67. *Tel-Oren*, 726 F.2d at 775.
reserved to "a handful of heinous actions — each of which violates defi-
able, universal and obligatory norms," and that the actions in this case did not trigger such jurisdiction. Edwards cautioned, however, that when a proper cause of action satisfies the requirements of the ATCA, the judiciary should exercise jurisdiction.

Judge Robb relied primarily on the political question doctrine in his concurrence, asserting that an exercise of jurisdiction would improperly involve the judiciary in foreign affairs, an area outside of its expertise and one wrought with the danger of interference with the political branches. Furthermore, Judge Robb rejected the Filartiga formulation for ascertaining international law under the ATCA and, in the process, rejected the holding of The Paquete Habana. Citing Chief Justice Fuller's dissent in The Paquete Habana, Robb stated that:

Courts ought not to serve as debating clubs for professors willing to argue over what is or what is not an accepted violation of the law of nations. Yet this appears to be the clear result if we allow plaintiffs the opportunity to proceed under § 1350. . . . The typical judge or jury would be swamped in citations to various distinguished journals of international legal studies, but would be left with little more than a numbing sense of how varied is the world of public international law.

Absent congressional guidelines to clarify the ATCA's application or purpose, Judge Robb saw no opportunity for judicial cognizance under the statute.

Judge Bork, also concurring in a separate opinion, found that the ATCA merely provides a forum and did not provide a separate and automatic private cause of action for violations of international law. Alternatively stated, even though international law may be part of the federal common law, it is not of the type, such as in torts or contracts, that allows judges to fashion a remedy. Instead it merely provides rules of decision. Furthermore, Bork found no other statute or binding international law relied upon by the plaintiffs that conferred a right to a cause of action in

68. Id. at 781 (Edwards, J., concurring).
69. Id. at 775-98. See also Beanel v. Freeport-McMoran, Inc., 969 F. Supp. 362 (E.D. La. 1997) (accepting a broader scope of the law of nations, which included action by private individuals, but dismissing for failure to state a claim under the ATCA upon which relief can be granted).
70. Tel-Oren, 726 F.2d at 789 (Edwards, J., concurring).
71. Id. at 823 (Robb, J., concurring).
72. Id. at 827 ("We ought not to cobble together for [the ATCA] a modern mission on the vague idea that international law develops over the years. Law may evolve, but statutes ought not to mutate.").
73. Id. at 827.
74. 175 U.S. 677, 720 (Fuller, J., dissenting) (stating that it was "needless to review the speculations and repetitions of writers on international law. . . . Their lucubrations may be persuasive, but are not authoritative.").
75. Tel-Oren, 726 F.2d at 827 (Robb, J., concurring).
76. Id.
77. Id. at 799 (Bork, J., concurring).
78. Id. at 811.
According to Bork, courts, in light of principles of separation of powers, should be especially adamant against finding a cause of action where none is directly conferred. Because there exists "sufficient controversy of a politically sensitive nature about the content of any relevant international legal principles" involved in the litigation, Bork felt it would be improper to adjudicate those claims. Thus, because international law is wrought with political questions, it is not the court's province to create clarity from confusion.

Finally, Judge Bork also expressed concern, in dicta, over the appropriate scope of international law in light of rules of statutory construction. He argued that "one might suppose" that the meaning of "law of nations" in the ATCA dealt with the three kinds of offenses understood to constitute the whole of international law at the Founding: violation of safe conducts, infringement of the rights of ambassadors, and piracy. Furthermore, Bork noted that this list is consistent with the specific categories enumerated in Article III.

4. Kadic v. Karadzic

Despite the brief retreat evidenced in Tel-Oren, the expansion of the judicial application of the ATCA reached new heights in 1995 with the Kadic v. Karadzic decision. The plaintiffs in Kadic were Croat and Muslim citi-

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79. Id. at 808-19.
80. Id. at 801-05.
81. Id. at 808. Judge Bork further stated, "Adjudication of those claims would require the analysis of international legal principles that are anything but clearly defined and that are the subject of controversy touching 'sharply on national nerves.'" Id. at 805 (citing Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1963)).
82. Id. at 813.
83. Id. at 813-14 (citing 4 William Blackstone, Commentaries *68, 72, quoted in 1 W.W. Crosskey, Politics and Constitution in the History of the United States 459 (1953)).
84. Id.
85. 70 F.3d 232 (2d Cir. 1995), reh'g denied, 74 F.3d 377 (2d Cir. 1996), cert. denied, 116 S. Ct. 2524 (1996). The peculiarity of this case and the ATCA was summed up in Judge Newman's introduction to the opinion when he stated, "Most Americans would probably be surprised to learn that victims of atrocities committed in Bosnia are suing the leader of the insurgent Bosnian-Serb forces in a United States District Court in Manhattan." Id. at 236. A number of case notes and articles have been published on the Kadic opinion. See, e.g., Judith Hippler Bello et al., International Decision, 90 Am. J. Int'l L. 658 (1996); David S. Bloch, Dangers of Righteousness: Unintended Consequences of Kadic v. Karadzic, 4 Tulsa J. Comp. & Int'l L. 35 (1996) (arguing that, while international law litigation in U.S. courts is generally good, Kadic itself "muddies international law, weakens American diplomacy and strengthens the very outlaws it is intended to attack"); Pamala Brondos, Note, International Law – The Use of the Torture Victim Protection Act as an Enforcement Mechanism, 32 Land & Water L. Rev. 221 (1997); Amy E. Eckert, Note, Kadic v. Karadzic: Whose International Law?, 25 Deny. J. Int'l L. & Pol'y 173 (1996) (concluding Kadic went too far); Alan Frederick Enslen, Note, Filartiga's Offspring: The Second Circuit Significantly Expands the Scope of the Alien Tort Claims Act with Its Decision in Kadic v. Karadzic, 48 Ala. L. Rev. 695 (1997); Justin Lu, Note, Jurisdiction over Non-State Activity Under the Alien Tort Claims Act, 35 Colum. J. Transnat'l L. 531 (1997).
zens of Bosnia-Herzegovina. They alleged that they were victims, and representatives of victims, of various atrocities including rape, torture, and summary executions by the Bosnian-Serb military forces. The suit was brought against Karadzic, in his capacity as the President of the Bosnian-Serb faction, and he was served while at the United Nations in New York. The district court dismissed the case for lack of subject-matter jurisdiction. The Second Circuit reversed this ruling and, as a consequence, greatly expanded the jurisdiction conferred by the ATCA — at least within the Second Circuit.

The Second Circuit held that the ATCA applies to actions by state actors or private individuals that are in violation of customary international law. According to the Kadic court, state action is not necessary for a cognizable violation of the law of nations to exist. The court accepted the principles it adopted earlier in Filartiga, noting that international law is constantly evolving and consulting a similar list of authorities to ascertain the norms of contemporary international law. As a result, the court relied upon various international conventions, declarations, and resolutions to determine that the acts alleged — including genocide, torture, and rape — constituted violations of generally accepted norms of international law.

Aside from the international law claims, the plaintiffs also sought relief under the Torture Victim Protection Act (TVPA), enacted in 1992 by the U.S. Congress. The TVPA creates a cause of action for official torture and extrajudicial killing:

An individual who, under actual or apparent authority, or color of law, of any foreign nation —
(1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or
(2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual’s legal representative, or to any person who may be a claimant in an action for wrongful death.

As the court recognized, the TVPA’s plain language extends only to official actors and not to purely private individuals. This act is not jurisdictional, but instead is an example of a cause of action arising under the

86. Kadic, 70 F.3d at 236.
87. Id. at 236-37.
88. Id. at 237.
89. Id.
90. Id. at 251.
92. Kadic, 70 F.3d at 239.
93. Id.
94. Id. at 238-39.
95. Id. at 241-44.
96. Id. at 245.
98. Kadic, 70 F.3d at 245-46.
jurisdictional grant of the ATCA. However, because the court neither considered state action a pre-condition to its creation of a remedy, nor limited its search for "law" to statutes passed by Congress, the TVPA was not essential to its decision.

5. Selected Post-Kadic Applications of the ATCA

In 1996, two circuit courts were faced with applying the ATCA. In Abebe-Jira v. Negewo, the U.S. Court of Appeals for the Eleventh Circuit affirmed a decision awarding compensatory and punitive damages for "torture and cruel, inhumane, and degrading treatment, pursuant to the Alien Tort Claims Act." Negewo served as chairman of Higher Zone 9, one of twenty-five governing units dividing Ethiopia's capital and created by the Dergue dictatorship in that country. The plaintiffs suffered various atrocities, including torture and beatings during interrogations, at the hands of Higher Zone 9 guards. The district court found that Negewo personally supervised or participated directly in at least some of the interrogations.

The Eleventh Circuit determined that the ATCA "establishes a federal forum where courts may fashion domestic common law remedies to give effect to violations of customary international law." Finding that the political question doctrine only prevents the courts from deciding issues "textually committed to the legislative or executive branches," the court determined that it could take cognizance of the tort action at bar.

The U.S. Court of Appeals for the Ninth Circuit revisited its application of the ATCA in 1996, with two separate decisions (from appeals addressing different issues) in the case of Hilao v. Estate of Ferdinand Marcos. Opponents of the Marcos regime in the Philippines sued for violations of their human rights, alleging they were victims of torture. The jury found that the plaintiffs and the victims they represented had been

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100. 72 F.3d 844, 845 (1996).
101. Id.
102. Id. at 845-46.
103. Id. at 848.
104. Id.
105. Id. (citing Linder v. Portocarrero, 963 F.2d 332, 337 (11th Cir. 1992) (holding that the "political question doctrine did not bar a tort action instituted against Nicaraguan contra leaders").
107. 103 F.3d 767 (9th Cir. 1996) [hereinafter Estate III]; 103 F.3d 789 (9th Cir. 1996) [hereinafter Estate IV]. See also John Doe I v. Unocal Corp., 963 F. Supp. 880 (C.D. Cal. 1997) (upholding subject matter jurisdiction under ATCA based on allegations that an American oil company, acting in concert with the Burmese government, committed various civil and human rights abuses).
subjected to a range of tortures under the authority of Marcos, including summary execution, arbitrary detention and other atrocities during interrogations, some of which were conducted by Marcos himself.108

Applying its earlier test that "[a]ctionable violations of international law [under the ATCA] must be of a norm that is specific, universal, and obligatory,"109 the Ninth Circuit found that the international norm against torture and arbitrary detention was sufficiently specific to be actionable under the ATCA.110 Applying the methodology endorsed in The Paquete Habana111 to determine the content of international law, the court referenced the following international documents: Universal Declaration of Human Rights; the International Covenant on Civil and Political Rights; the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the American Convention on Human Rights; the European Convention for the Protection of Human Rights and Fundamental Freedoms; and the African Charter on Human and Peoples' Rights.112

While the use of international law in judicial decision-making is not new, these cases illustrate that the law of nations is gaining an increasing presence in the jurisprudence of American courts through the ATCA. The early cases, however, can be distinguished from the ATCA cases. In other words, the ATCA is the vehicle by which the use of international law is receiving a constitutionally illegitimate mutation. Part II describes the constitutional structure from which this conclusion can be drawn.

II. The "Law of Nations" and the Constitution
A. The Framers' Understanding of the Scope of the "Law of Nations"
To understand the intended scope of jurisdictional provisions employing the "law of nations" language, such as the ATCA, it is necessary to examine both the Framers' goals as well as the meaning of "law of nations" in 1789.113 Because the "law of nations" at the Founding did not incorporate the concept of human rights, it was not Congress's intention to protect those rights with the 1789 Act.114

It is clear that Congress's understanding of the law of nations in 1789 was far different than the broad scheme of internationalism embraced by many scholars and officials today. First, in 1789 and, in essence, during the entire period prior to World War II, the law of nations did not embrace

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109. Estate IV, 103 F.3d at 794 (citing Estate II, 25 F.3d at 1475).
110. Id.
111. Id. at 794-95 (citing Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 715 (9th Cir. 1992) (quoting The Paquete Habana, 175 U.S. at 700)).
112. Id.
113. Congress's intentions, however, are somewhat irrelevant, for neither the First Congress nor any subsequent Congress retains the power to expand jurisdiction beyond the enumeration of Article III. See supra note 3 and accompanying text.
114. A.H. ROBERTSON, HUMAN RIGHTS IN THE WORLD 2 (1982) (classic international law, especially as developed during the seventeenth and eighteenth centuries, had no place for protection of human rights).
any concept of human rights. Customary international law did not even recognize private parties as legal personalities, thereby precluding them from recovering for violations of the law of nations. Given those fundamental limitations, the Framers could not have intended that the statute would extend to tortious "human rights" violations. Instead, the law of nations was quite limited in subject matter and was seen as an issue of the obligations and actions of states. Blackstone's writings further illustrate the limited conception of international law during the Founding era. He defined an exclusive list of three principle offenses against the law of nations: violation of safe conducts, infringement of the rights of ambassadors, and piracy. Each of these fits within one of the enumerated jurisdictional categories of Article III, indicating that the Framers contemplated which areas of international law would be fit for judicial resolution.

Independent of questions regarding the scope of the "law of nations," many commentators agree that one of the principle motivations behind the First Congress's creation of the ATCA was to ensure that a federal forum existed for decisions affecting international law. The Framers of the Constitution sought to give the national government the ultimate voice over foreign affairs. This argument supports the conclusion that the ATCA was intended as a means for ensuring that national courts could hear issues affecting international relations. It would have been important to create such jurisdiction because the original design of the judiciary relied on a system where most cases originated in state trial courts. The presumption was that, absent legislation to the contrary, most trials would occur in state courts. This explanation, however, provides no insight

115. Id. See also Wilner, supra note 53, at 320 ("The notion that all individuals have rights independent of what may be granted to them under national law . . . adds a dimension to international law unknown to it when the sources of the law of nations were set forth in the nineteenth and early twentieth centuries.").
116. See H. LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS 6-7 (1968); ROBERTSON, supra note 114, at 2; Wilner, supra note 53, at 320.
117. 4 WILLIAM BLACKSTONE, COMMENTARIES *68, *72.
118. Violation of safe conducts and piracy fit within admiralty and maritime jurisdiction; and the rights of ambassadors fit within jurisdiction over cases affecting ambassadors, public ministers and counsels. See U.S. CONST. art. III, § 2.
119. See, e.g., Casto, supra note 2, at 480; Harvey, supra note 64, at 343-44.
120. See Casto, supra note 2, at 480; Harvey, supra note 64, at 343-44. Some authors, such as Casto and Harvey, argue that because the Framers attributed great importance to national control over foreign affairs, those drafting the ATCA were attempting to give the national courts power to address everything international. See id. This argument, however, makes a tremendous leap. While the Framers wanted federal control over foreign affairs, they did not necessarily want federal judicial control over this area, at least not in a general sense without recognition of the powers of the federal government's political branches. See infra notes 140-47 and accompanying text.
121. See Harvey, supra note 64, at 343 ("The framers who participated in the Constitutional Convention wanted the federal courts — not the state courts — to address international law issues.") (citing Dickinson, supra note 11, at 38).
123. See Casto, supra note 2, at 508, 515-19.
into the proper scope of the judicial power over international affairs or the proper scope of judicial power under the ATCA. It only explains that where the "law of nations" is appropriate for judicial interpretation, a federal court rather than a state court will have the opportunity to fashion that construction.

Courts, as a matter of construction, should avoid broad or expansive interpretations of jurisdictional statutes. The historical background, combined with this principle of construction, reveals that courts should predicate jurisdiction on the ATCA for only a narrow class of cases.

B. The Constitutional Text and the "Law of Nations"

1. Article III: The Judiciary's Authority Extends Only to Enumerated Categories

Article III, Section 2, of the Constitution defines the parameters of the judicial branch's authority stating, "The 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 . . . ," and that it shall extend to a few additional enumerated areas of jurisdiction. The enumeration of judicial power in Article III constitutes the "entire mass" of the judicial branch's authority, and as

124. Romero v. International Terminal Operating Co., 358 U.S. 354, 379 (1959). Writing for the Court in a case not involving the ATCA, Justice Frankfurter stated: The considerations of history and policy which investigation has illuminated are powerfully reinforced by the deeply felt and traditional reluctance of this Court to expand the jurisdiction of the federal courts through a broad reading of jurisdictional statutes. A reluctance which must be even more forcefully felt when the expansion is proposed, for the first time, eighty-three years after the jurisdiction has been conferred. See also Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 813 (D.C. Cir. 1984) (Bork, J., concurring) (stating that "When courts lack such evidence [of Congressional intent], to 'construe' is to legislate, to act in the dark, and hence to do many things that, it is virtually certain, Congress did not intend. Any correspondence between the will of Congress in 1789 and the decisions of the courts in 1984 can then only be accidental.").

125. U.S. Const. art. III, § 2. This section reads: The 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; to all Cases affecting Ambassadors, other public Ministers and Consuls; to all Cases of admiralty and maritime Jurisdiction; to all Controversies between two or more States; between a State and Citizens of another State; between Citizens of different States; between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects. In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the Supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make. . . .

Id.

126. Hamilton indicated that this list of "arising under" authorities is exclusive in several instances. "[The federal judiciary] is to comprehend, 'all cases . . . . This constitutes the entire mass of the judicial authority of the union." THE FEDERALIST No. 80, at 538-39 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (emphasis added) (discussing
Hamilton stated, the courts cannot extend their authority beyond this specific grant of power:

[The judicial authority of the federal judicatures, is declared by the constitution to comprehend certain cases particularly specified. The expression of those cases marks the precise limits beyond which the federal courts cannot extend their jurisdiction; because the objects of their cognizance being enumerated, the specification would be nugatory if it did not exclude all ideas of more extensive authority.]

To that extent, authority for adjudicating the "law of nations" must be found in Article III. Under the concept that international law is part of the federal common law, many courts applying the ATCA have used the "arising under... laws of the United States" clause to justify Article III jurisdiction over human rights claims and other portions of international law not falling within a separate category of Article III jurisdiction. The legitimacy of such a construction is called into question, however, when Article III is considered in its entirety.

The law of nations plays a role in four categories of enumerated cases to which Article III of the Constitution grants jurisdictional authority to the judiciary: cases or controversies arising under treaties of the United States; cases affecting Ambassadors, other Public Ministers and Consuls; cases of admiralty and maritime jurisdiction; and controversies between a State, or the Citizens thereof, and foreign States, Citizens or Subjects. However, no general subject-matter grant over this area exists. In fact, the enumeration of particular areas in which the law of nations is involved negates a

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the classes of enumerated cases to which the judiciary’s authority extended). Hamilton also described Article III authority as involving “the particular powers of the federal judiciary...” Id. at 541 (emphasis added).

127. The Federalist No. 83, at 560 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). See also Martin v. Hunter’s Lessee, 14 U.S. (1 Wheat.) 304 (1816) (Justice Story stated “The government... can claim no powers which are not granted to it by the constitution, and the powers actually granted, must be such as are expressly given, or given by necessary implication.”)

128. See supra Part I.A.

129. This analysis was used by each of the courts in the cases discussed supra Part I.B.

130. U.S. Const. art. III, § 2. Weisburd articulated the proposition that these categories each involved the law of nations, stating:

First, without regard to article III’s grant of jurisdiction in cases arising under the laws of the United States, the federal jurisdictional power clearly extended to much of the law of nations by reason of the other portions of article III. For example, treaty questions were seen as involving the law of nations; article III gives jurisdiction over cases involving treaties. Admiralty law was an element of the law of nations; admiralty jurisdiction is expressly granted in article III. The law of nations was seen as providing special protections to ambassadors; article III expressly grants jurisdiction over cases involving ambassadors. Finally, the Framers could rely on the diversity jurisdiction to bring into the federal courts many cases involving the law of nations in its law merchant aspect because such cases were particularly likely to involve local people litigating against people from either other states or other countries.
presumption that such a general grant could exist. If the law of nations was included in the laws of the United States, the inclusion of these four additional categories of jurisdiction would be redundant.

For example, admiralty law is a category distinct from the "laws of the United States," yet one that is clearly an element of the law of nations. Prize cases involve the application of the admiralty subcategory of international law. Therefore, if a general grant over the "law of nations" is included in the "laws of the United States," then the federal courts could obtain jurisdiction over these admiralty cases without a separate enumeration of admiralty and maritime jurisdiction. If one accepts that the laws of the United States generally incorporate international law, then one must also accept that the admiralty jurisdictional clause is unnecessary and, to that extent, superfluous. Certainly that cannot be an appropriate outcome for the construction of the Constitution.

Historical records providing insight into the Framers' intentions offer further support for the proposition that only certain areas of international law were to be within the jurisdiction of the courts of the United States. In certain passages of The Federalist and other founding documents, the Framers discussed the judiciary's cognizance of the law of nations, but never in a general sense. Thus, neither The Federalist nor any passage of

Weisburd, supra note 122, at 1222.  

132. See Weisburd, supra note 122, at 1223. Weisburd argues: [C]ases involving treaties, admiralty, and ambassadors were all seen in 1789 as presenting questions arising under the law of nations. If the phrase, 'laws of the United States' had been thought to include the law of nations, the Framers would not have needed to spell out the categories of jurisdiction that they did spell out. Further, their designation of particular aspects of the law of nations as within federal jurisdiction suggests that the Framers took pains to make explicit the parts of that body of law that they particularly wished to come before the federal courts. Therefore, attaching significance to the Framer's omission of what is now called customary international law is not unreasonable.

Id.

133. The Supreme Court has stated that, "[a] case in admiralty does not, in fact, arise under the constitution or laws of the United States. These cases are as old as navigation itself; and the law admiralty and maritime, as it has existed for ages, is applied by our courts to the cases as they arise." American Insurance Co. v. Canter, 26 U.S. (1 Pet.) 511, 545-46 (1828).

134. See Dickinson, supra note 11, at 28-29; Weisburd, supra note 122, at 1222.

135. See, e.g., Bailey v. United States, 116 S.Ct. 501, 507 (1995). See also Platt v. Union Pacific R.R. Co., 99 U.S. 48, 58 (1879) ("Congress is not to be presumed to have used words for no purpose . . . [T]he admitted rules of statutory construction declare that a legislature is presumed to have used no superfluous words. Courts are to accord a meaning, if possible, to every word in a statute.").

136. See The Federalist Nos. 80, 83, at 536-38, 568 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). For example, Hamilton in Federalist No. 80 talked about the law of
the recorded debates discusses the law of nations as a portion of "the laws of the United States," unless so designated by Congress under its Article I, Section 8 power. Moreover, the law of nations was understood to play a role in only the four enumerated categories of subject-matter jurisdiction described above.\textsuperscript{137} Thus, the law of nations may be a legitimate concern for the judiciary in these certain cases, but no general grant of jurisdiction to decide cases in tort based on the law of nations exists in the Constitution. Furthermore, Congress cannot establish a general grant of jurisdiction to decide cases in international tort because it cannot extend jurisdiction to the courts beyond the bounds of the Constitution through statutes such as the ATCA.\textsuperscript{138}

Comparing the final version of Article III with its early drafts further illustrates the absence of an intent to grant the judiciary general jurisdiction over the "law of nations." On May 29, 1789, Edmund Randolph of Virginia proposed a resolution that included a grant of jurisdiction to the federal judiciary to hear and determine "questions which may involve the national peace and harmony."\textsuperscript{139} This proposal and other similar vague and general grants of jurisdictional power were duly replaced, consistent with the Framers' focus on limiting power through enumeration, by the more specific grant currently embodied in Article III.

The enumeration also makes sense in light of the Framers' understanding of the "law of nations" at the Founding. Because it touches on only three types of conduct in well-defined areas of international law with developed doctrine, there existed little danger of the judiciary legislating or interfering with foreign affairs powers by allowing the courts to interpret the "laws of nations" relevant to those areas.

\textsuperscript{137} See supra notes 83-84, 117-18, 130-32 and accompanying text.
\textsuperscript{138} See supra note 3 and accompanying text.
\textsuperscript{139} JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 32 (Bicentennial ed., Norton 1987) (reporting for May 29, 1787). This language survived a motion again on June 13. \textit{Id.} at 112, 116-17. On July 18, the jurisdiction of the national judiciary was again considered, and to satisfy criticisms about the definition, the resolution was altered. It read: "[J]urisdiction shall extend to all cases arising under the Natl. laws: And to such other questions as may involve the Natl. peace & harmony." \textit{Id.} at 319. "Under the national laws" was replaced with "under laws passed by the general legislature" and the word "may" was removed in a resolution adopted on July 21. \textit{Id.} at 383. After consideration by the Committee of Detail, the next reported version has no mention of the more vague and general grant of jurisdiction over questions relating to national peace and harmony. Instead, this version presents a much more detailed and enumerated jurisdictional grant that resembles the adopted language of Article III. Only a few alterations were made later, primarily on August 27. \textit{Id.} at 393, 482-83. But see Casto, supra note 2, at 514 (arguing that this original draft is evidence of a desire to grant the judiciary broad authority).
2. Congress’s Exclusive Authority to Define Those “Laws of Nations” That Form a Portion of the “Laws of the United States”

Article I, Section 8, clause 10 of the Constitution states that “The Congress shall have the Power . . . to define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations.” The Framers saw this as a significant improvement on the Articles of Confederation, and inserted this clause primarily to ensure that the federal government retained the power to deal with foreign nations and to prevent any one State from frustrating national policy on international relations. They recognized that effective diplomatic relations required the government to speak with one voice. Multiple voices are likely to be divergent voices, creating confusion and the possibility of embroiling the nation in international conflicts.

During the constitutional debates, it was further recognized that the law of nations is often too vague and indeterminate to act as a legal principle, and instead it must be defined by Congress before it could be considered a controlling doctrine. The Framers further understood that only portions of the law of nations might be appropriate “laws” binding the con-

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140. U.S. CONST. art. I, § 8, cl. 10. See also L. Henkin, FOREIGN AFFAIRS AND THE CONSTITUTION 72-74 (1972) (Congress has power to define offenses against the law of nations).

141. THE FEDERALIST No. 42, at 280-81 (James Madison) (Jacob E. Cooke ed., 1961). Madison states that:

The power to define and punish piracies and felonies committed on the high seas, and offences against the law of nations, belongs with equal propriety to the general government; and is still a greater improvement on the articles of confederation. These articles [of confederation] contain no provision for the case of offenses against the law of nations; and consequently leave it in the power of any indiscreet member to embroil the confederacy with foreign nations.

Id. He also provided a further example indicating the importance of domestic definitions of law, stating:

The provision of the federal articles on the subject of piracies and felonies, extends no farther than to the establishment of courts for the trial of these offences. The definition of piracies might perhaps without inconveniency, be left to the law of nations; though, a legislative definition of them, is found in most municipal codes. A definition of felonies on the high seas is evidently requisite. Felony is a term of loose signification even in the common law of England; and of various import in the statute law of that kingdom. But neither the common, nor the statute law of that or of any other nation ought to be a standard for the proceedings of this, unless previously made its own by legislative adoption.

Id. at 281 (emphasis added).

142. MADISON, supra note 139, at 637 (reporting for September 14, 1787). The following discourse on Art. I, § 8, cl. 10, during the debates is particularly relevant: [On the clause] To define & punish piracies and felonies on the high seas, and ‘punish’ offences against the law of nations.

Mr. GOVr. MORRIS moved to strike out ‘punish’ before the words ‘offences agst. the law of nations,’ so as to let these be definable as well as punishable, by virtue of the preceding member of the sentence.

Mr. WILSON hoped that the alteration would by no means be made. To pretend to define the law of nations which depended on the authority of all the civilized nations of the world, would have a look of arrogance, that would make us ridiculous.
duct of the United States. The political branches, the Executive and Congress, were given the power to determine which international laws should bind the actions of the United States. Moreover, expressing a sensitivity to the volatility of international relations, the legislature was recognized as the proper branch for making such decisions. Inherent in a political decision is also the ability to alter that decision. A judicial pronouncement that a law is binding upon all nations lacks such flexibility.

Under this construction, cases arising under the law of nations should only become cognizable by the courts under the general laws of the United States when Congress, by the power granted in Article I, section 8, clause 10, has defined and thus incorporated an international law into the laws of the United States. The Framers felt that the federal government must have supreme authority over relations with foreign nations in order to prevent individual states from thrusting the United States into international conflicts. The power to define and punish offenses against the law of nations was, therefore, placed exclusively in the hands of Congress. Any broad reading of the ATCA would allow the judiciary the same power of interference that the Constitution withheld from the individual States, by precluding them from conducting foreign affairs. As Judge Bork stated, "Those who drafted the Constitution and the Judiciary Act of 1789 wanted to open federal courts to aliens for the purpose of avoiding, not provoking, conflicts with other nations . . . A broad reading of section 1350

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143. The Federalist No. 53, at 364 (James Madison) (Jacob E. Cooke ed., 1961). Madison states:

A branch of knowledge which belongs to the acquirements of a federal representative, and which has not been mentioned, is that of foreign affairs. In regulating our own commerce he ought to be not only acquainted with the treaties between the United States and other nations, but also with the commercial policy and laws of other nations. He ought not to be altogether ignorant of the law of nations, for that as far as it is a proper object of municipal legislation is submitted to the federal government.

Id. (emphasis added).

144. James Iredell (Marcus), Answers to Mr. Mason's Objections to the New Constitution, Recommended by the Late Convention (Newbern, Hodge and Wills, 1788), reprinted in Pamphlets on the Constitution 359 (Paul Leicester Ford ed., 1888). Iredell states,

[C]ertainly the cases enumerated wherein the Congress are empowered either to define offences, or prescribe punishments, are such as are proper for the exercise of such authority in the general Legislature of the Union. They only relate to . . . 'piracies and felonies committed on the high seas, and offences against the law of nations.' . . . These are offences immediately affecting the security, the honor or the interest of the United States at large, and of course must come within the sphere of the Legislative authority which is intrusted with their protection.

Id.

145. The Federalist No. 42, supra note 141, at 280-81.

146. U.S. Const. art. I, § 8, cl. 10.
runs directly contrary to that desire." 147 Given the potency of decisions relating to the law of nations, the Framers sought to centralize the power and allow for unified policy in this area.

This reading also strengthens the presumption that the Framers intended to enumerate those areas in which the judiciary could ascertain the "law of nations" without a Congressional declaration. By doing so, they limited the amount of interference possible by the judicial branch in the normal conduct of foreign affairs, while also allowing Congress to fashion rules should it wish to limit the judiciary's role in those enumerated areas.

III. Toward a Structurally Consistent Use of International Law in the Courts under the ATCA

A. A Two-Step Jurisdictional Analysis: If Neither B Nor C, "Do Not Pass Go, Do Not Collect $200" 148

Under the structural constitutional analysis of the previous Part, jurisdiction can be granted under the "law of nations" component of the ATCA in limited circumstances. Assuming all other requirements of the ATCA are met and that the plaintiff alleges a violation of the law of nations (as opposed to a treaty), jurisdiction should be granted only if a court can answer affirmatively one of the two following questions: 1) Is the plaintiff seeking a remedy for a tort only committed in violation of the law of nations and does the case fall under a category of Article III which this Note shall call "special jurisdiction" — that is does the case sound in admiralty or maritime, or does the case involve a foreign minister, counsel, or ambassador, or is the case brought against a citizen of the United States by an alien who is a citizen of a foreign state? Or, 2) If the case does not fall within any area of special jurisdiction under Article III and the plaintiff is thus relying on the jurisdictional authority of the "laws of the United States," 149 is the plaintiff seeking a remedy for a tort only committed in violation of a law of nations as defined by Congress under its Article I, Section 8, Clause 10 authority? 150 If the answer to both questions is "no,"

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147. Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 812-13 (D.C. Cir. 1984) (Bork, J., concurring) (citing THE FEDERALIST No. 80 (Alexander Hamilton)).
148. Like the player in a game of Monopoly who is sent to Jail, the judiciary cannot move forward if a case lies outside its jurisdiction and must remain caged by the bars which form the confines of constitutional power. Just as a player cannot collect $200 precisely because he cannot pass the necessary threshold, the "Go" square, a plaintiff cannot collect if he cannot meet the jurisdictional threshold enumerated in Article III of the U.S. Constitution.
149. The Constitution itself does not proscribe any conduct as being violative of the law of nations, and treaties are separately listed in the ATCA. Therefore, if a plaintiff falls outside of the categories of special jurisdiction, then only the "laws of the United States" may be considered as the authority-granting provision in Article III.
150. For a discussion of the separation of powers and federalism implications of judicial use of customary international law, see Bradley & Goldsmith, supra note 11. Bradley and Goldsmith refer only in passing to the ATCA, but set forth a strong argument that, "in the absence of political branch authorization, [customary international law] is not a source of federal law." Id. at 870. The authors also concede, however, that the
jurisdiction under the ATCA cannot be triggered. None of the cases discussed previously in this Note recognize such a restrictive set of preliminary questions to determine jurisdiction. Yet these two questions seem to create the only legitimate threshold inquiry under the constitutional structure.

Because the ATCA must fit within the confines of Article III, this two-step analysis seeks to define the only legitimate role for the ATCA in the constitutional structure. If the ATCA is to be properly applied, the role of the judge should first be to determine whether the case at hand is one falling within a special jurisdictional category. If the case meets the requirements of one of these categories, reference to international law will be appropriate and was anticipated by the Framers in the crafting of Article III. If, however, the case or controversy does not fall within one of these categories, the judge must look to the Constitution, the laws of the United States, or a treaty of the United States. The court must restrict itself to referencing these domestic declarations of law. This means that the judge must look to "laws of the United States." Under the structural view proposed here, these laws cannot include a general international common law. The judge's duty, therefore, is to ascertain whether Congress has defined an offense against the law of nations, making it actionable under the domestic law clause. If it has not, the judge has no authority to apply international law.

Such an approach respects the constitutional construction, but, to this Author's knowledge, has never been discussed by a court interpreting judicial cognizance over the "law of nations." Several examples will illustrate the workability of this approach and its current disregard. For purposes of this analysis, it shall be presumed that problems relating generally to the justiciability of these issues in relation to the "political question" and "act of state" doctrines are not a concern and that all other preliminary ques-

151. Some may argue that the issue of the ATCA's constitutionality is moot, given that many of the cases brought under the statute may be brought into federal jurisdiction under the diversity of citizenship provision in 28 U.S.C. § 1331. Rules of statutory construction, however, require that the ATCA, codified in Section 1350, be analyzed as a separate provision with independent meaning. If it does not mean something more than a suit between an alien (presumed a citizen for purposes of § 1331 diversity jurisdiction) and a foreign state, citizen or subject, the provision is superfluous. Thus, Article III diversity jurisdiction standing alone cannot save this statute from a challenge even if, as applied, it will sometimes satisfy the diversity requirement. Furthermore, even under diversity jurisdiction, the courts cannot ignore the province of Congress to define offenses against the law of nations. The judiciary remains bound by separation of powers principles no matter how a case or controversy falls into its jurisdiction.
tions of jurisdiction other than the law of nations are met.152

B. Test One: Taking Cognizance of the "Law of Nations" Will Be Proper If Jurisdiction Obtains From One of Four Enumerated Categories of Article III

As Part II illustrates, the Framers contemplated that some areas of special jurisdiction would involve international law, either substantively or as procedural rules.153 By rejecting a general grant of authority over matters affecting national peace and harmony and enumerating a particular set of categories, the Framers indicated that international law would not be generally controlling under the Article III phrase, the "laws of the United States." From ancient times, admiralty law involved a unique set of common law concerns which developed between states as part of the law of nations.154 Courts adjudicating cases affecting foreigners necessarily needed to respect rules of diplomacy and the sovereignty of other nations. Moreover, courts needed the power to make Americans accountable for wrongs done to foreigners in order to avoid inciting a foreign nation to impute responsibility for a citizen's action upon the United States and retaliate in kind.155 These concerns, covered by enumerating the categories of special jurisdiction, were understood to be areas requiring an understanding and application of the law of nations.

Furthermore, as previously contended, this enumeration must be interpreted as the entire area in which such an application was intended to occur. If the Framers had understood the "laws of the United States" to include generally all of international law, there would be no reason to mention these special categories in Article III. Thus, in order to avoid an interpretation that these special categories are surplusage, the "laws of the United States" must be read as not including a general controlling international law.

Because the Framers contemplated that the law of nations would be cognizable when sitting in one of these special categories, it is appropriate for the judiciary to use the ATCA as an enabling statute which triggers their Article III/special category jurisdiction. Questions as to what the law of nations entails, how it is to be discerned, and whether it is stagnant or evolving will still be important, but their resolution is not necessary to this proposition. The point is that whatever the true "law of nations" is, it can only be considered when the judiciary has jurisdiction under one of these special legal categories of Article III. To that extent, from a purely struc-

152. This Author, however, finds the application of these doctrines to the ATCA to be generally persuasive and finds much merit in the concurring opinion of Judge Robb in Tel-Oren. See generally Tel-Oren, 726 F.2d at 823-27 (Robb, J., concurring).
153. Procedurally, international law is invoked in conflict of law questions.
154. See supra note 133 and accompanying text. See also Joseph Modeste Sweeney, A Tort Only in Violation of the Law of Nations, 18 Hastings Int'l & Comp. L. Rev. 445 (1995) (arguing that the ATCA was intended only to extend to the well-established torts prohibited by the law of prize).
155. The Federalist No. 80, supra note 126, at 536 ("The union will undoubtedly be answerable to foreign powers for the conduct of its members.").
cultural standpoint, one could even accept the principles for ascertaining the law of nations discussed in Part I of this Note.156

Each of those cases in the Smith-Paquete Habana line, later relied on in the ATCA cases for the proposition that the law of nations is part of the law of the United States, can be reconciled with this first test of jurisdictional authority. Because each case involved a decision of admiralty, the courts were correct to apply the law of nations.157 Within these special categories, the law of nations was, in fact, federal common law. This federal common law, however, need not reach beyond these special categories. Because the holdings in each of the ATCA cases discussed in Part I did not rely on a special jurisdictional category of Article III, the precedents establishing that the law of nations is part of our law, from the Smith-Paquete Habana line, are distinguishable and should not apply to the resolution of the jurisdictional questions in ATCA cases. Both the text of the categories and the original understanding of the purpose behind their creation supports such a conclusion.

The methods for finding and interpreting the law of nations established by the cases in Part I, though suspect,158 need not be rejected to accept this type of restriction. Whatever the law of nations may be and whatever portion is applicable to the case at hand can be researched and applied by a court sitting in a special jurisdictional category. It could be accepted that the cognizable “law of nations” in the ATCA evolves, that international law is, indeed, knowable, and that it can be ascertained, without prejudice, by reference to works of commentators and jurists in the field. Because the special categories permit application of international law, one could accept these principles of interpretation and accept the holdings and rationales in each of the cases discussed in Part I.A, while also accepting this first proposed test for jurisdiction.

156. Applying originalism as a rule of statutory interpretation, however, would require that the words be construed to mean what they meant at the time the statute was passed. This would negate an “evolving” concept of international law. See Scalia, supra note 131, at 23-25. As mentioned, however, for purposes of this Note, a resolution of what the “law of nations” truly means today is not critical. Though the meaning must be discerned when operating in one of the special jurisdictional categories, its definition is irrelevant to the proposition that such a meaning may only be employed when adjudicating a case in one of these special categories.

157. Most of these decisions (e.g., Smith, Paquete Habana, The Neirede) were pre-Erie, a period when the courts could ascertain a general “common law” as opposed to being restricted to ascertaining “federal law.” Thus, some also argue that the rules establishing the law of nations as part of our law should no longer control. Bradley & Goldsmith, supra note 11, at 827-31, 849-60 (discussing Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938)). Though much of Erie’s language gives weight to the conclusion of this Note, the following passage is of particular importance: “There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or ‘general.’ . . . And no clause in the Constitution purports to confer such power upon the federal courts.” Erie R.R. Co., 304 U.S. at 78.

158. See supra notes 72-76 and accompanying text.

As James Madison articulated, “[N]o foreign law should be a standard farther than is expressly adopted.” If a court is not sitting within a special jurisdictional category, it must rely on the “laws of the United States” as the authority for applying international law. This category is much more limited than the areas of special jurisdiction. This conclusion is premised on two points. First, the enumeration of the special categories, as discussed earlier, means that no general grant to the courts over international law exists in any circumstance. Second, because the Constitution grants to Congress and not the courts the power to define offenses against the law of nations, the courts are impotent in this area absent a congressional definition of an offense. If the law of nations exists as an overarching, independent, and controlling body of law, it would not be necessary for Congress to define which parts of international law it thinks controlling and worthy of the status of “laws of the United States.”

Little discussion of Congress’s Article I definitional power is seen in the opinions of the jurists interpreting the ATCA. In its brief in the Ninth Circuit case of Trajano v. Marcos, the Bush Department of Justice unsuccessfully advocated the position that a criminal offense against the law of nations must be defined by Congress as a prerequisite to ATCA jurisdiction. This indicated a shift in policy, probably due to the change in administrations, from the Department of Justice’s position in Filartiga, which supported the grant of jurisdiction based on sources other than


160. For a discussion of the meaning of Congress's Article I power to define offenses against the law of nations in a general context, see Charles D. Siegel, Deference and Its Dangers: Congress' Power to Define . . . Offenses Against the Law of Nations, 21 VAND. J. TRANSNAT'L L. 865 (1988) (arguing that Congress may not create offenses but may define offenses having already risen to accepted international status, but shedding little additional insight into the meaning of the clause); Comment, The Offenses Clause: Congress' International Penal Power, 8 COLUM. J. TRANSNAT'L L. 279 (1969).

161. This Note leaves open the question of whether Congress's Article I, Section 8, Clause 10 power is limited to defining only criminal offenses, and works on the presumption that civil offenses such as torts can also be defined under that clause. Even if the Article I provision was to be limited to criminal offenses, the judiciary would still have no jurisdictional authority. The fact that a general grant of jurisdiction over the law of nations cannot exist within Article III of the Constitution remains unchanged. See infra Part III.A. Moreover, because the case could only fall under the “laws of the United States” category of Article III, it is unclear that the Department of Justice was foreclosing an application of the “law of nations” to cases arising under one of the enumerated categories discussed in Part III.B of this Note. It simply would not have been relevant for the Department to discuss that issue in its brief for this case.

domestic law.\textsuperscript{163} Relying on Filartiga, the Trajano court held that the
ATCA provided jurisdiction regardless of whether Congress had acted to
define official torture claims as violations of the "law of nations."\textsuperscript{164} In
light of the previous discussion, this seems clearly erroneous.

The Department of Justice's argument on the Article I power, however,
was incomplete and may have had more impact on the court had it
employed the two-test analysis adopted in this Note. The Department did
not couple its assertion that the offense must be defined by Congress with
a supporting analysis of the enumerated special jurisdictional categories,
the existence of which negates a general authority to ascertain the "law of
nations" under the "laws of the United States." However, when these argu-
ments are viewed together, the application of the law of nations fulfills a
logical role within the constitutional structure. This role maintains mean-
ing for the Article I power that the Department was attempting to defend.

An analogy to another constitutional grant of legislative power sup-
ports the limitation that courts must reference Congress's definitions of
offenses against the law of nations. The Constitution grants Congress the
power to regulate commerce between and among the States. Thus, the
courts do not retain a power to fashion common law rules to regulate com-
merce.\textsuperscript{165} Just as the courts lack the power to define appropriate regula-
tions of commerce, they lack the authority to use the common law as a
means for defining offenses against the law of nations.\textsuperscript{166} Such a construc-
tion respects and maintains Congress's exclusive power over this activity.

These conclusions partially arise from the fact that inherent in the
power to regulate or to define is the authority to choose not to regulate or
define. In other words, power need not always be exercised, and a pre-
sumption does not exist that everything should be regulated or defined.
When a court decides to look beyond Congress for controlling regulations
or for controlling definitions, it may be usurping Congress's power to
refrain from regulating or defining.\textsuperscript{167} Stated another way, the court may

\textsuperscript{163} Trajano v. Marcos, 978 F.2d 493, 500 (9th Cir. 1992); Kim, supra note 106, at 402.
\textsuperscript{164} Trajano, 978 F.2d at 500.
\textsuperscript{165} See Weisburd, supra note 122, at 1241-42. Weisburd specifically states that,
"[f]or example, the commerce power has never been used to justify a federal common
law of interstate commerce." \textit{Id.} (citing M. Redish, \textit{Federal Jurisdiction: Tensions in
the Allocation of Judicial Power} 98-99 (1980)).
\textsuperscript{166} See id. at 1241. Weisburd states that, "[t]he Supreme Court has never held that a
grant of authority to the political branches to deal with a subject is enough to permit the
Court to frame common-law rules on that subject, even if the federal authority is exclu-
sive of the states." \textit{Id.} (citations omitted).
\textsuperscript{167} See id. at 1268; Arthur M. Weisburd, \textit{State Courts, Federal Courts, and Interna-
tional Cases}, 20 \textit{Yale J. Int'l L.} 1, 38-44 (1995). Weisburd argues:
Holding that the Executive is constrained by international law . . . would shift
power from the elected President to the unelected courts . . . [and] could leave
the United States bound by policy choices in which no element of the American
government actively participated. This result could occur because the United
States can easily be held to be bound by a rule of customary international law to
which it did not object during the process of its formation, even if it did not
actively participate in advancing the rule.
create a regulation or definition where Congress clearly wishes to refrain from regulating commerce or refrain from creating a controlling rule of law. Weisburd describes this type of outcome, discussing the effects that a judicial pronouncement on the law of nations might have upon the Executive's discretion:

A judicial effort, not grounded in the Constitution to require a particular legislative outcome amounts to depriving officials of discretion vested in them by the Constitution. The effort itself thus would be unconstitutional. Similarly, since the President acts as the primary American legislator in the field of customary international law by determining the day-to-day practice of the United States, judicial efforts to control that practice on nonconstitutional grounds amount to interference with legislative discretion vested in the President by the Constitution . . . [limiting] a discretion the Constitution has left unlimited.168

Because international law is so closely tied to (if not coterminous with) the political questions of international relations, judicial decisions entrenching principles into binding restrictions on sovereignty necessarily constrain the latitude of the political branches. In fact, the cases involving the ATCA provide empirical evidence of precisely this type of usurpation of the legislative power to define offenses against the law of nations.

For example, using Filartiga and Kadic as illustrations, each court looked to various international declarations and resolutions, including the Universal Declaration on Human Rights, to interprete the scope of the "law of nations" under the ATCA. Such references create two problems. First, many of the sources relied, or at least partially relied, upon to determine a controlling rule of international law have never been ratified by Congress. Worse yet, Congress considered these declarations and resolutions and specifically chose not to accept them as binding authority. This poses serious questions about the legitimacy of their use as sources of law. Second, these types of documents are normally drafted with an understanding that they will not act as law, thereby making their language far less precise and much broader than any signatory might normally wish to embody in a statute.

Relying on proclamations of international assemblies creates problems because the text of these documents are liberally drafted and embody general goals or aspirations as opposed to legally binding principles.169 Filartiga, Kadic, and other cases applying the ATCA, however, have

Weisburd, supra note 122, at 1268 (citing Waldock, General Course on Public International Law, 106 Recueil des Cours 1, 50 (1962)).

168. Weisburd, supra note 122, at 1255-56. See also Bradley & Goldsmith, supra note 11, at 844-47 (arguing that declarations that the law of nations is part of the laws of the United States might create executive obligations under the "Take Care" clause in Article II of the Constitution and might also raise federalism concerns through obligations placed on the states through the Supremacy Clause in Article VI of the U.S. Constitution).

169. One court in a case where plaintiffs sought jurisdiction under the ATCA, for example, granted a Fed. R. Civ. P. 12(b) (1) motion on the basis that the international principles relied upon, the Stockholm Principles on the Human Environment,
looked to such documents as supporting authority for their pronouncements on the existence of an international law.\textsuperscript{170} In \textit{Filartiga}, for example,

\begin{quote}
[The Second Circuit alluded to certain international treaties on human rights, including the American Convention on Human Rights, the International Covenant on Civil and Political Rights, and the European Convention for the Protection of Human Rights and Fundamental Freedoms. The first two of these were among the four treaties on human rights submitted by President Carter to the Senate for its advice and consent in 1978 [and the United States was not involved in the third]. Neither in the court's opinion nor in the \textit{amicus} brief filed in the \textit{Filartiga} case jointly by the Departments of Justice and State, was reference made to the reservations, declarations, understandings, and statements that President Carter recommended that the Senate include in its resolution of advice and consent. The effect of these qualifications of the two treaties would be to render them non-self-executing for the United States, requiring implementing legislation to become effective as law in the United States.\textsuperscript{171}
\end{quote}

The \textit{Filartiga} court did not even discuss or recognize either Congress's failure to ratify these documents or the affirmative and explicit concerns voiced by both Congress and the President in relation to the content of these documents. Yet it seems clear, especially in light of Congress's power to define offenses against the law of nations, that these sentiments should restrict the courts' reliance upon such documents as an authoritative statement of the law.\textsuperscript{172}

Congress's actions on the International Covenant on Civil and Polit-
itical Rights, the American Convention on Human Rights, or on the Universal Declaration of Human Rights are not isolated situations. In fact, Congress has failed to ratify the vast majority of human rights treaties sponsored by the United Nations. This record indicates a general unwillingness on the part of the United States to recognize broad principles of human rights as controlling legal authority.

For the courts to ignore this reality and insist that these documents form a foundation for ascertaining the "law of nations" component of the ATCA is to harm Congress in two ways. First, it ignores Congress's power to refrain from codifying certain principles or norms into U.S. law. Second, it restricts congressional power to legislate in a manner contrary to these principles or norms. By proclaiming that this principle or norm is universal and binding upon all states (or, in the case of Kadic, all states and some individuals), the court is stating that an obligation Congress has been specifically unwilling to accept will now bind the United States and its Congress.

Furthermore, even if one disregards Congress's refusal to accept these declarations, the parties drafting the substance of these documents did not intend for them to be construed as law. Had the drafters intended for


174. Jacobsen, supra note 37, at 847-48 ("[T]he Senate has been unwilling to extend international law to encompass the protection of human rights.").

175. See id. at 849. Jacobsen states:

The Senate has refrained thus far from ratifying... numerous... human rights treaties, thereby expressing an unwillingness to create any internationally recognized legal protections for human rights. The Senate's primary concern has been that the treaty provisions might intrude upon the sovereignty of nations and of the United States in particular.

Id. See also Bradley & Goldsmith, supra note 11, at 869 (stating that, "[f]ar from authorizing the application of the new CIL [customary international law] as domestic federal law, the political branches have made clear that they do not want the new CIL to have domestic law status.") (emphasis added).

176. For a good hypothetical analysis of the potential and diverse outcomes from the use of international resolutions or covenants as evidence of the law of nations, see Pollock, supra note 65, at 257-59. Pollock argues, however, that a construction of the ATCA which makes it applicable only to "flagrant violations" of the law of nations would prevent absurd results. Id.

177. "The simple fact is that this [Universal] Declaration [of Human Rights] was not drafted or proclaimed to serve as law." Rusk, supra note 53, at 313 (quoting Eleanor Roosevelt, Chairman of the Commission on Human Rights, who stated when presenting the Declaration to the U.N. General Assembly, that "[i]t is not and does not purport to be a statement of law or of legal obligation... [i]t is a common standard of achievement..." (XIX Bulletin, Dep't St. Bull., Dec. 19, 1948, No. 494, at 751)). Rusk further contends that this was the understanding of Congress, the Executive, and even the United States delegates to the United Nations:

As one of the authors of the instruction that Mrs. Roosevelt received from her government on this point, I can report that there was no question in Washington or in New York that the Universal Declaration was not intended to operate as law. There was no serious consultation with the appropriate committees or Congress, as would have been essential had there been any expectation that law
these documents to become legally binding in the courts, many of these documents might not have passed out of the multinational body, might not have been signed by the United States, and had they been accepted in some form, would surely exhibit a dramatically different language and scope than those promulgated with an understanding that the document was merely aspirational. As Rusk has stated, "It should be noted . . . that votes cast [on UN General Assembly Resolutions] with the knowledge that the result will not be law are very different from votes that would be cast if there were a general awareness that the result would be operationally and legally binding." In light of this reality, a court looking to these documents in an attempt to ascertain "law" is clearly acting improperly. It is like looking to the core of an orange to determine the contents of the core of an apple.

This conclusion, that universal declarations are not meant to act as controlling law, is strengthened by an examination of the bodies creating these documents. Realizing that the United Nations is to have no sovereign authority, Dean Rusk articulates the nature of its "power" as understood by member states:

The [UN] Charter . . . did not contemplate that the General Assembly would be a legislative body in the field of international law generally. . . . There is little doubt that a general legislative power vested in the General Assembly would have prompted the Senate of the United States to refuse advice and consent to the Charter. Thus, even if Congress could delegate its power to define offenses against the law of nations to this international body, it clearly did not intend to do so. Similarly, other multinational organizations to which the United States is a party lack a general legislative power. They may have the ability to draft treaties, but even these do not become binding upon the United States unless two-thirds of the Senate chooses to give its advice and consent to the ratification of that treaty. Moreover, even when Congress ratifies a treaty, it may often require additional legislation to "execute" provisions of the treaty.

Not only should Congress maintain the ability to reject, or at least refuse to accept, an international proclamation, it has already shown that it is capable of specifically adopting a principle of international law, exercising its power to define the law of nations set forth in Article I. The TVPA was coming into being. Indeed, Mrs. Roosevelt was given great leeway in her part in the drafting of the Declaration partly because it was understood that law was not being created.

Id. at 314.
178. Id. at 315.
179. Id. at 314.
181. This is the distinction between self-executing and non-self-executing treaties. Even when Congress ratifies a treaty, convention, or other international document, a non-self-executing treaty will not through ratification alone create any automatic, cognizable cause of action for a breach of the agreement. See Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 808-19 (D.C. Cir. 1984) (Bork, J., concurring).
provides evidence of the competency of Congress to define offenses against the law of nations. When the ATCA is viewed only as a jurisdictional statute which provides a forum for causes of action created when Congress acts under its power to define and punish an offense against the law of nations, it can play a useful role in the constitutional structure. The Kadic court, however, not sitting in one of the enumerated categories of special jurisdiction, refused to look exclusively at the will of Congress and instead looked beyond it, into the realm of international pronouncements on the subject of torture. Moreover, that court failed to recognize the relevance of congressional silence on the issue of non-state actors committing acts of torture. The TVPA sanctions only those acting under color of law. It would at least be reasonable for the court to exercise restraint when Congress has legislated partially in an area and chosen, although not necessarily purposefully, not to legislate in the remainder of the area. The inclusion of state actors in the TVPA indicates that Congress has considered the subject of torture and has not legislated on that subject in relation to private actors. The absence of congressional action is often purposeful. Yet when the judiciary chooses to look into the world of international principles to fashion its own decision on international law, it risks creating a cause of action Congress may specifically wish to leave unhatched.

Granting the judiciary a general power to ascertain the "law of nations" not only creates a vague standard, it allows a tremendous amount of judicial discretion to pick and choose from the multitude of international "principles" floating around in the world — regardless of whether they have been accepted or defined as law by Congress, yet effectively binding Congress all the same. A restriction on action or an obligation to act, declared by the courts as applicable to all nations, must presumably bind the United States as well. It is also a pronouncement of the U.S. position on an issue in international law, often touching on international relations. Such a pronouncement could easily trigger foreign policy problems. This was precisely the type of problem the Framers wished

182. See supra notes 97-99 and accompanying text.
184. One court has expressed this concern as follows: "Not all conduct which may be harmful to the environment, and not all violations of environmental laws, constitute violations of the law of nations. . . . Otherwise more detailed statutes and regulations would be effectively superseded, contrary to the intention of the legislatures involved." Aguinda v. Texaco, Inc., 1994 WL 142006, *7 (S.D.N.Y. 1994).
185. The court in Aguinda also recognized this concern when stating: "[W]here conduct to occur exclusively in a foreign country, caution would be necessary where [the ATCA] is invoked, in order to assure that decisionmaking by other countries is not interfered with by adjudication in the United States under necessarily highly general concepts." Id.
186. Marshall points out that Filartiga never confronts this historical evidence despite the fact that its approach "might often trigger the opposite effect of instigating such conflict." Marshall, supra note 91, at 612-13. Judge Bork also expressed that, "For a young weak nation, one anxious to avoid foreign entanglements and embroilment in Europe's disputes, to undertake casually and without debate to regulate the conduct of other nations and individuals abroad, conduct without an effect upon the interests of the United States, would be a piece of breath tak-
to avoid by leaving the mass of foreign relations to the political branches, but allowing some suits, such as those necessary so as not to invoke a foreign state's anger by denying one of its citizens or ambassadors a remedy in a U.S. court for a wrong done upon him by a U.S. citizen.\footnote{See Marshall, \textit{supra} note 91, at 612 (discussing the importance of the real purpose of the ATCA being "to allow aliens to bring suits in U.S. federal courts in order to avoid a foreign conflict with the alien's home state"). See also \textit{Tel-Oren}, 726 F.2d at 782-91 (Edwards, J., concurring) (essential use of ATCA is to quash potential foreign relations conflicts); \textit{Tel-Oren}, 726 F.2d at 812-16, 821-22 (Bork, J., concurring) (same); Jay M. Lewis Humphrey, \textit{Note, A Legal Lohengrin: Federal Jurisdiction Under the Alien Tort Claims Act of 1789}, 14 U.S.F. L. Rev. 107, 113 (arguing "it was precisely to avoid such damage to foreign relations that the ATCA was enacted"); Smith, \textit{supra} note 50, at 444 n.49 (contending "the drafters were therefore justifiably concerned that an alien's unredressed claim might develop into an international confrontation."); Harvey, \textit{supra} note 64, at 343-44 (arguing that "the framers recognized that the world community would hold the national government accountable for the actions of American citizens").}

The existence of the congressional power to define offenses against the "law of nations" therefore negates any presumption that the judiciary is given a common law power to define or expand the obligations of persons or states under the ATCA. Even if the courts could constitutionally obtain jurisdiction over the general subject of torts in violation of international law, it would be improper for the courts to do so and imprudent for Congress to grant such broad authority beyond that already existing in the special jurisdictional categories. If the judiciary looks to an "international law," not so defined by Congress, the risk exists that the judiciary will apply an international norm with which Congress disagrees, or to which it has not given priority. As stated earlier, a judicial pronouncement of an international law has the same effect as legislation, in that it is now pronounced as a law of the United States, determined by judicial research into conflicting international scholarship and documents — an endeavor ultimately requiring a subjective choice. It requires value judgments. Not only is such a pronouncement a legislative act, but because it is labeled as an obligation or prohibition binding all persons, the judiciary has the power to restrict the legal actions of Congress, once again encroaching upon its power.

The TVPA, therefore, is evidence that Congress is capable of incorporating international laws into the laws of the United States without the unsolicited assistance of the judiciary.\footnote{Statutes other than the TVPA also establish that Congress can and will legislate when it wishes. See 18 U.S.C. \textsection 1651 (1994) (Act of Apr. 30, 1790, ch. 9, \textsection 8, 1 Stat. 113, 113-14; criminalizing piracy as defined by the law of nations); \textit{Louis Henkin, Foreign Affairs and the United States Constitution} 508 n.16 (2d ed. 1996) (citing additional statutes passed pursuant to the "define and punish" clause).} Because Congress has illustrated it can and will legislate in those areas of international law which it deems important, it has also demonstrated its ability to remain silent on a number of issues it wishes not to address or which it means specifically to reject. If the judiciary uses congressional or executive silence on an issue
as a trigger for its own search of extraterritorial legal principles, it risks usurping the political branches' power to refrain purposefully from creating an international obligation or accepting an "international" rule.

Article III does not extend the judicial power to cases or controversies arising generally under the law of nations, yet the ATCA, as applied in *Kadic* and other cases, attempts to create such an authority. These cases purport to find a general recognition of the "law of nations" as part of the "laws of the United States." If this were true, however, it would make additional enumerations of jurisdiction in Article III superfluous, violating a principal canon for construing a written document. Furthermore, the precedent on ascertaining the "law of nations" is not directly applicable to cases arising under the "laws of the United States." *The Neirade, Smith,* and *The Paquete Habana,* as admiralty cases, all fall within the enumerated categories of Article III and were not decided under the "laws of the United States" clause. To that extent, the rules for construing international law developed in those cases may not apply to the various cases acquiring jurisdiction through the latter category. Because those courts were sitting in admiralty, they were required to apply international law. But, the rationale of those cases does not necessarily inform interpretations of the "laws of the United States," for a court "may label a subject 'part of our law' without intending to suggest that it falls within the 'laws of the United States.'"

Application of the two category structural framework proposed here facilitates the process of determining whether a cause of action exists in a particular case. *Filartiga* does not fall within one of the enumerated categories of Article III, and it was neither alleged nor found that Congress had defined the acts in question as an offense against the law of nations. Thus, the court should not have exercised jurisdiction in that case. *Tel-Oren v. Libyan Arab Republic* would endure a similar fate. Though the holding would be the same, the rationale could be based completely on the case's failure to meet the requirements of the enumerated categories or to fall under the laws as enacted by Congress. Similarly, the *Kadic* court could follow this method of analysis to reach a much cleaner and more legitimate

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189. For an excellent and comprehensive argument as to why the "law of nations" is not part of the "laws of the United States," see Weisburd, *supra* note 122. While his arguments are quite persuasive in support of this conclusion, Weisburd's focus is not on defending or examining the structural arguments advanced in this Note. For an excellent discussion of why modern customary international law, including "human rights norms," should not be considered part of domestic law by the courts, see Bradley & Goldsmith, *supra* note 11. As stated earlier, those authors do not discuss the structural arguments advanced in this Note nor do they present any framework for applying the ATCA.

190. *See* Weisburd, *supra* note 122, at 1237 (discussing Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938); stating that "the force of a common-law rule depends on the authority of the court that adopted it... [I]f an institution is competent to promulgate rules only in certain circumstances, then those rules necessarily apply only in those circumstances.").

191. *Id.* at 1228.

192. *Id.* at 1229.
outcome, albeit opposite to the holding the court ultimately reached. First, jurisdiction could not be obtained under the admiralty, counsels, or foreign diversity grants. Second, the only apparent Congressional declaration on the matter, the TVPA, only provides a remedy for torture and only when committed under color of law. Unless one is willing to consider Karadzic a head of state,\textsuperscript{193} the statute appears not to apply. Thus, under the structural analysis, no jurisdiction exists for the courts to hear this claim. A similar analysis can be followed in all other cases requiring an application of the ATCA.

Conclusion

In 1788, the constitutional convention in New York attempted to guard against the danger of the judiciary’s expansion of its jurisdiction by proposing an amendment stating, “that the jurisdiction of the Supreme Court of the United States, or of any other Court instituted by the Congress, ought not, in any case, to be increased, enlarged or extended, by any fiction, collusion, or mere suggestion.”\textsuperscript{194} A similar proposal was offered by delegates at the Maryland convention.\textsuperscript{195} Precisely such an extension of judicial authority, by mere suggestion of the ATCA, is currently occurring through the courts’ application of the amorphous and varied concepts of international “law.”\textsuperscript{196}

Judge Edwards of the D.C. Circuit has stated that the ATCA, “cries out for clarification by the Supreme Court.”\textsuperscript{197} A clarification of the legitimate.

\textsuperscript{193} Kadic v. Karadzic, 70 F.3d 232, 244-45 (2d. Cir. 1995) (leaving open the question whether Karadzic was a head of state).

\textsuperscript{194} 2 Elliot’s Debates on the Federal Constitution 409 (1859).

\textsuperscript{195} Id. at 550.

\textsuperscript{196} The varied nature of international principles from which a judge might find “law” raises another concern not covered in this Note — the ability of a judge to reach any outcome due to the plethora of sources with varying degrees of legitimacy (or, perhaps more properly, illegitimacy) that might justify the result he wishes to obtain. The risk that a judge will abandon a judicial role for that of the legislative is heightened by the mass of potential sources from which he might find “authority,” the large number of commentators willing to profess that some principle is “law” (via The Paquete Habana), and the fact that international documents purporting to be law are ever-growing. To borrow from Judge Harold Levanthal, the use of international sources in judicial decision-making might be described as “the equivalent of entering a crowded cocktail party and looking over the heads of the guests for one’s friends.” See Conroy v. Aniskoff, 507 U.S. 511, 519 (1993) (Scalia, J., concurring) (quoting Levanthal on the subjective process of using legislative history in statutory interpretation).

\textsuperscript{197} Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 775 (D.C. Cir. 1984) (Edwards, J., concurring). Because the precedents expansively employing the ATCA are fairly new and because the Supreme Court has never spoken on the subject of the ATCA’s scope, it is not, nor could it ever be, too late to correct the constitutionally infirm application of the ATCA. Justice Oliver Wendell Holmes said in arguing for restricting the use of federal common law before \textit{Erie}, that the fact that the federal courts can ascertain “general law” under the \textit{Swift v. Tyson} doctrine is a “fallacy [that] has resulted in an unconstitutional assumption of powers by courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct.” Black & White Taxi-Cab Co. v. Brown & Yellow Taxi-Cab Co., 276 U.S. 518, 532-33 (1928) (Holmes, J., dissenting). The same conclusion should be drawn in relation to the ATCA, a doctrine with
constitutional role of the ATCA is becoming increasingly important as internationalism increases. The number of international and intergovernmental organizations, and the consequent number of pronouncements, declarations and the like from such groups, is continuously expanding. The increasing number of international and multinational tribunals, such as those related to the World Trade Organization and North American Free Trade Agreement, also adds to the body of extraterritorial "judicial" pronouncements on the law of nations.\textsuperscript{198} As a result, the ATCA's reach, if left unchecked, will continue to grow dramatically.

Though a limit on the ATCA's scope and the courts' use of international law can, as this Note has argued, be justified solely by a proper reading of constitutional powers, the strength of international law itself can be increased through the exercise of judicial restraint. Employing international law is most effective when done with a careful and reasoned approach, conservatively enough so that each application retains a significance of its own. In this sense, it is important for the U.S. government as a whole to exercise discretion when it chooses which norms it will accord "legal" status. The key aspects of international law become diffuse and lose legitimacy when the body of law becomes so diverse that any sense of a boundary disappears. Furthermore, the ability of the United States to take the lead when it wants to promote a norm in the international community diminishes. First, in order to be heard, the U.S. government must have an identifiable voice on international affairs. Additionally, even that identifiable voice must use discretion in choosing when to speak. The occasional deliberate statement by the U.S. government on an issue concerning international principles will be noticed, remembered, and influential. However, if the statements of the U.S. government become too regular because of judicial opinions on the law of nations from a multitude of courts, then those statements lose significance and become mere chatter.\textsuperscript{199}

\textsuperscript{198} For a discussion of the emerging presence of pronouncements from international tribunals and their effect in U.S. courts, including an opening essay by U.S. Supreme Court Justice Sandra Day O'Connor on this subject, see generally Symposium, The Interaction Between National Courts and International Tribunals, 28 N.Y.U. J. Int'l L. \\& Pol. 1-483 (1996).

\textsuperscript{199} Writing on the importance of Congress exercising care before defining a "law of nations" under Article I, Siegel provides an analogous precaution:

When Congress determines that a certain set of actions constitutes an offense against the law of nations, it is doing more than establishing a domestic crime. It is putting its imprimatur on certain international practice and saying that that practice has reached a level at which it is binding upon nations. Congress has every reason to be especially careful before reaching such a conclusion. Obvi-
With an increasing acceptance of the *Filartiga* rationale and with its expansive nature as evidenced by *Kadic*, there is no time to waste in reining in the doctrine of ATCA jurisdiction. This Note has argued that courts applying the ATCA must only apply the "law of nations" in a manner consistent with the text and structure of the Constitution. Article III enumerates specific areas of law in which the law of nations plays an integral role, and Article I grants Congress the power to define offenses against the "law of nations." The judiciary must exercise caution to ensure that it stays within the constitutional bounds of its power and refrains from infringing the power of other branches.

Oszlanyi, if Congress bestows legal status on rules that lack the requisites of a norm — practice and *opinio juris* — international law suffers. It is hard enough to convince people the reality of international law without debasing it by giving a false status to some 'rules.' . . . Determining the norms of customary international law is a complex and often indeterminate enterprise. Congress must exercise its best judgment in making that determination. Siegel, *supra* note 160, at 962-63. Given the careful judgment that is required, even by Congress, in defining international law, and given the ramifications of such a determination, it seems clear that such determinations should not normally be made by various judges, incapable of speaking in one voice and not meant to make such politically-laden judgments.