ASSESSING THE PROPER RELATIONSHIP BETWEEN THE ALIEN TORT STATUTE AND THE TORTURE VICTIM PROTECTION ACT

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INTRODUCTION

On October 17, 2005, a bill entitled the Alien Tort Statute Reform Act was introduced in the Senate, proposing to amend 28 U.S.C. § 1350 in order to, among other things, “clarify jurisdiction of Federal Courts over a tort action brought by an alien.”¹ To those who have tangled with this section of the U.S. Code over roughly the past three decades, the proposal of such legislation to amend it likely comes as no surprise: the proper interpretation of § 1350 and the provisions contained therein has generated much debate among courts and legal scholars alike. Section 1350, commonly known as the Alien Tort Statute (ATS),² was originally enacted in 1789 and guarantees, in its current language, that “[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”³ Another provision under § 1350, the Torture Victim Protection Act of 1991 (TVPA),⁴ is related to the ATS and is over two hundred years its junior. Codified as a note to the ATS, the TVPA provides a federal cause of action to aliens and U.S. citizens for certain claims of torture and extrajudicial killing. Namely, it states that

[a]n 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

¹ S. 1874, 109th Cong. (2005). Once introduced, this bill was referred to the Committee on the Judiciary; at the time of this writing, no further action has been taken on the bill.
² Courts and legal scholars have also referred to the ATS as the Alien Tort Claims Act (ATCA) and the Alien Tort Act (ATA). For the sake of clarity, this Comment will refer to this provision as the ATS throughout, altering quoted text accordingly to maintain consistency.
to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.\footnote{TVPA § 2(a), 28 U.S.C. § 1350 note.}

In addition to creating this explicit basis of liability, the TVPA sets out terms and requirements that further define the cause of action it provides. For instance, the TVPA includes detailed definitions for "torture" and "extrajudicial killing,"\footnote{Id. § 3.} and also establishes a statute of limitations\footnote{Id. § 2(c).} and an exhaustion of remedies requirement\footnote{Id. § 2(b).}—all of which apply to any claim brought under the TVPA.

In terms of form, then, the ATS and the TVPA are an exercise in contrasts. The ATS, enacted at the outset of this nation's history, speaks in terse, open-ended, and somewhat cryptic language, offering little to define its terms, scope, or even nature. For instance, on its face, the ATS does not make clear whether it provides only a grant of federal jurisdiction for certain claims or also creates an implicit cause of action for those claims. Nor does it indicate what exactly is meant by the "law of nations" or what constitutes a "tort... in violation" of it. The TVPA, on the other hand, is a more recent and detailed expression of legislative will, and provides significantly more guidance to those seeking to interpret and apply it. The TVPA creates an explicit cause of action for a narrow set of conduct, precisely defines that conduct, and details the manner in which that cause of action must be pursued. In short, it lacks the fundamental ambiguity that characterizes the ATS.

For all its clarity and detail, however, the TVPA is silent on at least one significant point: How exactly should it be understood to interact with the ATS? More particularly, to what extent should the TVPA be considered to inform or limit the causes of action that the ATS may support? Though the two statutes are codified in the same section of the U.S. Code, neither offers any clear indication as to how it is supposed to fit with the other. The nature of this relationship has emerged as one of many uncertainties that federal courts have had to address regarding the proper interpretation of § 1350, largely without assistance from Congress or the Supreme Court. This Comment attempts to identify the contours of this uncertainty, and suggests, based on the little guidance that Congress and the Supreme Court have
given, the appropriate manner in which federal courts should construe this statutory relationship.

Part I of this Comment summarizes the history of the ATS/TVPA relationship and outlines the prevailing precedent that has emerged in the federal courts regarding how the two statutes should be understood to interact. Courts generally have held that the TVPA should be read as supplemental to, rather than preclusive of, the ATS, and thus that the ATS and the TVPA are both able to support their own distinct yet potentially overlapping causes of action for alien plaintiffs' claims of official torture and extrajudicial killing.\(^9\) That said, courts have not treated these statutes as fully independent of one another, but rather have often imported some (but not all) of the terms and requirements from the more detailed TVPA into their ATS analyses.\(^10\)

In *Enahoro v. Abubakar*, however, the Seventh Circuit rejected this prevailing supplemental interpretation of the ATS/TVPA relationship, and held instead that the TVPA should be read to "occupy the field" of the ATS with respect to claims of official torture and extrajudicial killing.\(^11\) Under this preclusive interpretation, alien plaintiffs seeking to bring such claims must do so under the TVPA, not the ATS, and thus must comply with all of the TVPA's terms and requirements. Discussion of this decision and the arguments on its behalf constitutes Part II of this Comment.

Part III then argues that the Seventh Circuit's preclusive interpretation, though it has its appeal, nonetheless produces an inappropriate result for courts to follow. Instead, a supplemental understanding of the two statutes corresponds most closely with the limited guidance that Congress and the Supreme Court have offered on the matter,\(^12\) and creates an interaction between the statutes that allows both to retain a meaning and value in the statutory scheme that most accurately reflect their respective language and purposes.\(^13\)

This rejection of the Seventh Circuit's preclusive interpretation, however, does not necessarily amount to a wholesale endorsement of the prevailing precedent in other circuits. Building off of Part III's analysis, Part IV examines how a supplemental understanding of the ATS/TVPA relationship can be applied most properly to the details of

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\(^9\) See infra Part I.D, I.F.
\(^10\) See infra Part I.F.
\(^12\) See infra Part III.A-B.
\(^13\) See infra Part III.C.
the interactions between the statutes and, in so doing, suggests how the prevailing precedent may be modified so as to respect more completely this supplemental understanding.

I. THE HISTORY AND DEVELOPMENT OF THE ATS/TVPA RELATIONSHIP

A. The "Legal Lohengrin": Early History of the ATS

The ATS was initially enacted as part of the Judiciary Act of 1789, and its language has survived with relatively few modifications for over two hundred years. Beyond that, not much can be said definitively about the origins of this statute or the intentions underlying its enactment. As the Supreme Court noted in its recent treatment of the ATS in *Sosa v. Alvarez-Machain*, the statute suffers from a "poverty of drafting history," which has prevented "a consensus understanding of what Congress intended" from forming, "despite considerable scholarly attention." Moreover, the ATS was seldom invoked and applied in the courts for nearly two centuries following its enactment, further frustrating any efforts to pin down the original contours and intentions of this statute. Such ambiguous origins led Judge Friendly to aptly describe the ATS as a "legal Lohengrin; . . . no one seems to know whence it came."

What little information courts and legal scholars have been able to glean regarding the early life of the ATS has yielded much speculation but limited cohesive insight. As one commentator has noted, "Some scholars speculate that the framers of the statute designed the legisla-

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14 Federal Judiciary Act, ch. 20, § 9(b), 1 Stat. 67, 77 (1789).
15 The original language of the statute read, "[T]he district courts . . . shall also have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States." Id.
16 542 U.S. 692, 718-19 (2004); see also Sarei v. Rio Tinto, PLC, 456 F.3d 1069, 1091 (9th Cir. 2006) (noting the "complete silence in the [ATS]'s legislative history" and compiling previous cases that have found the same), withdrawn and superseded in part on reh'g, 487 F.3d 1193 (9th Cir. 2007), reh'g en banc granted, 499 F.3d 923 (9th Cir. 2007).
18 IIT v. Vencap Ltd., 519 F.2d 1001, 1015 (2d Cir. 1975).
tion in order to avoid conflicts with other nations over mistreatment of non-U.S. citizens," thus characterizing the ATS as an effort "to provide national security at a time when the United States, a newly formed nation, was seeking a foothold in its diplomatic relations with other nations." Other scholars have explained the original intent of the ATS more narrowly, "limit[ing] the purpose of its enactment to providing the legal foundation to protect the rights of foreign ambassadors" or "to provid[ing] jurisdiction only in maritime cases dealing with prizes." Though none of these particular perspectives has proven to be more authoritative than the others per se, they all, at the least, support the generalized conclusion that the ATS, through its plain language and historical context, was enacted to ensure some form of previously unavailable civil remedy to aliens in U.S. federal courts for certain violations of the law of nations. Beyond this level of generality, the ATS—with its terse language, scant legislative history, and rare invocation in the courts prior to the second half of the twentieth century—hides its original intentions well.

B. Rejuvenation of the ATS: Filartiga and Its Progeny

After nearly two hundred years of obscurity and general disuse, the ATS experienced a rejuvenation of relevance at the end of the twentieth century. This can be attributed in large part to the emer-
gence of a new field of potential application for the statute—international human rights. "Since 1980, plaintiffs have invoked the [ATS] in United States federal courts to sue perpetrators of such international human rights violations as torture, disappearances, summary execution, genocide, cruel, inhuman, and degrading treatment, arbitrary detention, and crimes against humanity."

Ushering in this era of rejuvenation was the Second Circuit's decision in Filartiga v. Pena-Irala, in which a Paraguayan family sought to use the ATS to sue a former Paraguayan police inspector-general for torturing and killing a member of their family in Paraguay. Reversing the decision of the lower court, the Second Circuit held that the ATS provided a legitimate source of subject matter jurisdiction for the claim and, in so doing, breathed new life into the statute. In making the jurisdictional determination that "deliberate torture perpetrated under the color of official authority" constituted a "tort . . . in violation of the law of nations" under the ATS, the Second Circuit held that the ATS should be read to incorporate "international law not as it was in 1789, but as it has evolved and exists among the nations of the world today." Applying this standard, the court found that official torture constituted a violation of "established norms of the international law of human rights, and hence the law of nations." "Indeed, for purposes of civil liability, the torturer has become—like the pirate and slave trader before him—hostis humani generis, an enemy of all mankind." Thus, the court determined, "whenever an al-

Hugh King, Sosa v Alvarez-Machain and the Alien Tort Claims Act, 37 VICT. U. WELLINGTON L. REV. 1, 2 (2006) (footnotes omitted); see also Stephens, supra note 17, at 7 ("Since 1980, a series of decisions has slowly developed the jurisdictional reach of the [ATS]. Federal courts have assumed jurisdiction over cases between aliens alleging abuses such as genocide, war crimes, summary execution, disappearance, and arbitrary detention, as well as torture."); Trnavci, supra note 17, at 246 (noting that U.S. courts, in applying the ATS, have held that certain "gross violations of human rights" violate the law of nations).

650 F.2d 876, 878 (2d Cir. 1980).

See, e.g., King, supra note 25, at 4 ("Filartiga saw the Second Circuit rescue the [ATS] from almost two hundred years of near-obscurity.").

Filartiga, 630 F.2d at 878.


Filartiga, 630 F.2d at 881.

Id. at 880; see also id. at 884 ("Having examined the sources from which customary international law is derived—the usage of nations, judicial opinions and the works of jurists—we conclude that official torture is now prohibited by the law of nations." (footnote omitted)).

Id. at 890.
leged torturer is found and served with process by an alien within our borders, § 1350 provides federal jurisdiction."\textsuperscript{34}

In acknowledging that official torture, as a tort in violation of the law of nations, was sufficient to establish federal subject matter jurisdiction under the ATS, the Second Circuit also implicitly recognized "the existence of a private right of action for aliens only seeking to remedy violations of customary international law or of a treaty of the United States."\textsuperscript{35} Holding that "the law of nations . . . has always been part of the federal common law," the court deemed it appropriate to construe the ATS as "opening the federal courts for adjudication of the rights already recognized by international law."\textsuperscript{36}

In the years following the decision, \textit{Filartiga} emerged as the standard-bearer for claims brought under the ATS for human rights violations such as official torture. Federal courts largely adopted the Second Circuit's holdings and reasoning as a general framework for their own ATS analyses, producing a line of precedent that was generally consistent but also undeveloped and unpredictable in important respects, such as the definition of the appropriate scope of violations covered by the statute.\textsuperscript{37}

Even with a general consistency emerging in the courts, however, there was still ample room for interpretation and disagreement regarding the fundamental quality of the ATS. Such uncertainty was epitomized by the D.C. Circuit's fractured decision in \textit{Tel-Oren v. Libyan Arab Republic}.\textsuperscript{38} In \textit{Tel-Oren}, the three reviewing judges affirmed the lower court's dismissal of the plaintiffs' ATS claim but were unable to reach any consensus beyond that in their interpretations of the ATS, resulting in a per curiam decision supported by three distinct—and, in some respects, fundamentally conflicting—concurring opin-

\textsuperscript{34} \textit{Id.} at 878.
\textsuperscript{35} Flores v. S. Peru Copper Corp., 414 F.3d 233, 243 (2d Cir. 2003) (summarizing \textit{Filartiga}).
\textsuperscript{36} \textit{Filartiga}, 630 F.2d at 885, 887.
\textsuperscript{37} \textit{See} King, \textit{supra} note 25, at 5 ("Since \textit{Filartiga}, United States federal courts have entertained many actions brought under the [ATS] by aliens alleging international human rights abuses. The courts, with little judicial dissent, have followed \textit{Filartiga} in finding that the [ATS] provides both subject matter jurisdiction and a cause of action for serious violations of international law. . . . The same level of judicial consensus, however, has not been reached in respect of the standards to be applied in determining which torts in violation of international law are actionable under the [ATS].") \textit{See also id.} at 5-10 (summarizing cases and delineating the divergent standards).
\textsuperscript{38} 726 F.2d 774 (D.C. Cir. 1984), \textit{cert. denied}, 470 U.S. 103 (1985).
ions. Of particular relevance here is the debate between Judges Edwards and Bork regarding the nature and scope of the ATS. Judge Edwards endorsed Filartiga's general formulation of the ATS as "more faithful to the pertinent statutory language and to existing precedent." He noted that, under this formulation, "[t]he Second Circuit did not require plaintiffs to point to a specific right to sue under the law of nations in order to establish jurisdiction under [the ATS]; rather, the Second Circuit required only a showing that the defendant's actions violated the substantive law of nations." Once that showing had been made, the ATS would provide both a forum and a cause of action. Judge Edwards also joined the Second Circuit in its construction of the "law of nations" under § 1350, interpreting it to incorporate modern principles of international law.

Judge Bork, on the other hand, believed that this formulation of the ATS amounted to an impermissible encroachment by the judiciary on the powers of the legislative and executive branches, and thus advocated that "it is essential that there be an explicit grant of a cause of action before a private plaintiff be allowed to enforce principles of international law in a federal tribunal." Under Judge Bork's interpretation, the ATS would operate strictly as a jurisdictional statute, and would not, in itself, give rise to a right to sue. Judge Bork did, however, recognize that the ATS could be read to support a cause of action for a very limited number of "torts . . . in violation of the law of nations"—namely, those that the parties originally drafting and enacting the ATS likely had in mind. To Judge Bork, then, whatever implicit right to sue there may be in the ATS would not properly include modern principles of international law.

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39 Id. at 775.
40 Id. at 775 (Edwards, J., concurring).
41 Id. at 777.
42 Id. at 780.
43 Id. at 789.
44 Id. at 801 (Bork, J., concurring).
45 Id. at 815-16. In identifying such torts, Judge Bork focused on those violations of the law of nations enumerated by Blackstone and given particular attention by the Constitution and the Judiciary Act of 1789—for instance, "piracy" and "infringement of the rights of ambassadors." Id. at 813-15.
46 Id. at 816-19.

After roughly a decade of judicial construction (and, as seen in Tel-Oren, dispute) regarding the proper nature and role of the ATS, Congress offered some measure of guidance by enacting the Torture Victim Protection Act of 1991.\(^4\) Codified as a note appended to the ATS, the TVPA stands in contrast to the ATS in its length, detail, and relatively extensive legislative history. According to this history, the TVPA was designed to "carry out the intent of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which was ratified by the U.S. Senate on October 27, 1990... by making sure that torturers and death squads will no longer have a safe haven in the United States."\(^4\)8 As the Senate Judiciary Committee noted, Congress, by enacting the TVPA, recognized the line of precedent stemming from Filartiga, acknowledged the uncertainty still surrounding the nature of the ATS as seen in Tel-Oren, and responded by creating "an unambiguous basis for a cause of action that has been successfully maintained under [the ATS]."\(^4\)9 The TVPA would provide an alien with a federal cause of action "against any individual who, under actual or apparent authority or under color of law of any foreign nation, subjects any individual to torture or extrajudicial killing"—as cases such as Filartiga had already deemed to be available under the ATS itself—and "would also enhance the remedy already available under [the ATS]... [by] extend[ing] a civil remedy also to U.S. citizens who may have been tortured abroad."\(^4\)0 In addition to creating this "unambiguous basis," Congress chose to flesh out the contours of the TVPA's cause of action in some detail—for instance, by explicitly imposing a statute of limitations and an exhaustion of remedies requirement and providing definitions for "torture" and "extrajudicial killing."\(^4\)1

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\(^4\)8 S. REP. NO. 102-249, at 3 (1991); see also H.R. REP. NO. 102-367, at 3 (1991), reprinted in 1992 U.S.C.C.A.N. 84, 85-86 (stating that the TVPA satisfied the obligation under this Convention "to provide means of civil redress to victims of torture").

\(^4\)9 S. REP. NO. 102-249, at 4; see also H.R. REP. NO. 102-367, at 3, reprinted in 1992 U.S.C.C.A.N. at 86 ("The TVPA would establish an unambiguous and modern basis for a cause of action that has been successfully maintained under [the ATS]... ").

\(^4\)0 S. REP. NO. 102-249, at 3-5; see also H.R. REP. NO. 102-367, at 3-4, reprinted in 1992 U.S.C.C.A.N. at 86 (recognizing the TVPA's interaction with and enhancement of the Filartiga line of precedent by creating such a cause of action).

The legislative history of the TVPA also sheds some limited light on the manner in which Congress generally intended the ATS and the TVPA to interact with one another. Although Congress was fully aware of the potential overlap in coverage between the ATS and the TVPA, none of the TVPA's legislative history speaks directly or specifically to it. As a general matter, both the Senate and House Judiciary Committees made it a point to indicate that the TVPA was not intended to supplant the ATS, but rather that the ATS was to “remain intact.”

In apparent affirmation of this general intention, Congress enacted the TVPA without amending or repealing any of the language of the ATS itself.

D. Pre-Sosa Interaction Between the ATS and the TVPA

Since enacting the TVPA, Congress has left the ATS intact and has not passed any further legislation to address it, the TVPA, or the proper interaction between the two. Furthermore, as discussed in Part I.E, infra, the Supreme Court did not speak on the ATS or the TVPA in any substantial manner until its opinion in *Sosa v. Alvarez-Machain*, which came nearly twenty-five years after *Filartiga* and over ten years after the enactment of the TVPA. Given this silence and the TVPA's apparent endorsement of *Filartiga*, the years following the TVPA's enactment saw federal courts continuing to adopt the *Filartiga* formulation of the ATS to develop the contours of the statute in its modern context, and now also using it to inform their understanding of the ATS/TVPA relationship. In construing this relationship, most courts clung to the few general statements made about it in the legislative history of the TVPA, and recognized that claims of official

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52 S. REP. NO. 102-249, at 4-5 (“Section 1350 has other important uses and should not be replaced. . . . [C]laims based on torture or summary executions do not exhaust the list of actions that may appropriately be covered by section 1350. Consequently, that statute should remain intact.”). The House Report mirrored this sentiment, but with slightly different language, stating that “claims based on torture and summary executions do not exhaust the list of actions that may appropriately be covered” under the ATS, and thus “[t]hat statute should remain intact to permit suits based on other norms that already exist or may ripen in the future into rules of customary international law.” H.R. REP. NO. 102-367, at 4, reprinted in 1992 U.S.C.C.A.N. at 86.


54 See, e.g., Abebe-Jira v. Negewo, 72 F.3d 844, 846-47 (11th Cir. 1996) (outlining and adopting the *Filartiga* formulation of the ATS and citing cases, both pre- and post-TVPA, to support its conclusion that “[s]ince *Filartiga*, a majority of courts have interpreted section 1350 as providing both a private cause of action and a federal forum where aliens may seek redress for violations of international law”).
torture and extrajudicial killing could be brought under the TVPA, the ATS, or both.55

Just as it had with Filartiga, the Second Circuit played a prominent role in developing this line of precedent. In Kadic v. Karadžić, the Second Circuit considered the plaintiffs’ claims of official torture and summary execution under both the ATS and the TVPA simultaneously.56 In so doing, the court stated its belief that “Congress enacted the [TVPA] to codify the cause of action recognized by this Circuit in Filartiga” and, after reviewing the legislative history of the TVPA, concluded that “[t]he scope of the [ATS] remains undiminished by enactment of the [TVPA].”57 Thus, in addition to acknowledging the explicit cause of action granted by the TVPA, the court also deemed it appropriate to recognize a cause of action under the ATS independent of the TVPA, much as it would have prior to the TVPA’s enactment.58 The Second Circuit’s analysis in Kadic set the general tone for other courts’ interpretations of the ATS/TVPA relationship, and in the years leading up to the Supreme Court’s decision in Sosa, claims for official torture and extrajudicial killing were often permitted to be brought not just under the TVPA, but also under the ATS.59 Despite this loose consen-

55 See infra note 59 and accompanying text.
56 70 F.3d 232, 243-46 (2d Cir. 1995). The court also recognized that in certain limited circumstances the ATS may be able to support claims of torture against private parties, without regard to official status or state action. Id. at 243-44. The TVPA, due to its plain language and legislative history, would not be able to support such claims. Id. at 244-45.
57 Id. at 241.
58 The court, for instance, did not subject the claims for torture and summary execution under the ATS to an exhaustion of remedies analysis, as the TVPA requires of its claims. Id. at 243-45.
59 See Wiwa v. Royal Dutch Petroleum Co., No. 96-8386, 2002 WL 319887, at *4 (S.D.N.Y. Feb. 28, 2002) (noting that “no court that has evaluated [ATS] claims since the enactment of the TVPA has held that the TVPA in any way preempts [ATS] claims for torture and extrajudicial killings” and thus holding that the “plaintiffs’ claims under [the ATS] are not preempted by the TVPA,” but rather, “[i]n the instant case, the TVPA simply provides an additional basis for assertion of claims for torture and extrajudicial killing”); see also Doe I v. Unocal Corp., 395 F.3d 932, 945-46 (9th Cir. 2002) (relying on Kadic and recognizing that claims of official torture are actionable under the ATS without any reference to the TVPA), reh’g en banc granted, 395 F.3d 978 (9th Cir. 2003), case dismissed per parties’ stipulation, 403 F.3d 708 (9th Cir. 2005); Beanal v. Freeport-McMoran, Inc., 197 F.3d 161, 164-69 (5th Cir. 1999) (discussing separately claims under the ATS and the TVPA that are based on the same individual human rights violations); Hilao v. Estate of Marcos, 103 F.3d 767, 772-73, 778-79 (9th Cir. 1996) (applying simultaneous and independent analyses to ATS and TVPA claims arising from the same acts of official torture and extrajudicial killing); Abebe fira, 72 F.3d at 847-48 (interpreting the enactment of the TVPA as a congressional endorsement of the Filartiga line of precedent and finding that the ATS itself provides a private right of
sus, however, the proper interaction between the TVPA and the ATS remained a largely unsettled matter.60

E. Sosa v. Alvarez-Machain: The Supreme Court Speaks (on the ATS, at Least)

As Judge Edwards lamented in Tel-Oren, the rejuvenation of the ATS in Filartiga and its subsequent development in the federal courts created "an area of law that crie[d] out for clarification by the Supreme Court."61 Nearly twenty-five years after Filartiga, the Supreme Court obliged—to some extent. In Sosa v. Alvarez-Machain, the Court held that the plaintiff's particular arbitrary detention claim was not sufficient to give rise to a cause of action under the ATS.62 The Court's analysis of the plaintiff's claim largely affirmed the general line of ATS precedent that had developed through Filartiga and its progeny, but tailored the scope of the statute's potential coverage.63 The Court first determined that the ATS is fundamentally a jurisdictional statute.64 The Court, however, also recognized that the ATS has a limited substantive quality, as "the First Congress did not pass the...
ATS as a jurisdictional convenience to be placed on the shelf for use by a future Congress or state legislature.\textsuperscript{65}

\textit{[A]}lthough the ATS is a jurisdictional statute creating no new causes of action, the reasonable inference from the historic materials is that the statute was intended to have practical effect the moment it became law. The jurisdictional grant is best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time.\textsuperscript{66}

Based on this understanding of the original intent of the statute, the Court concluded that the ATS is properly read as supporting, at the least, a limited set of claims that were sufficiently recognized as violations of the law of nations at the time of the ATS’s enactment.\textsuperscript{67} The Court did not, however, foreclose the possibility that the ATS may provide grounds for other common law causes of action that are based on more modern violations of international law, provided that these modern violations are sufficiently equivalent to those “original” violations of 1789: “federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted.”\textsuperscript{68} The Court urged a very “restrained conception of the discretion a federal court should exercise in considering a new cause of action of this kind,”\textsuperscript{69} cautioning that “the judicial power should be exercised on the understanding that the door is still ajar subject to vigilant doorkeeping, and thus open to a narrow class of international norms today.”\textsuperscript{70} Lastly, in recognition of the difficulties inherent in the application of such a

\textsuperscript{65} Id. at 719; see also id. ("There is too much in the historical record to believe that Congress would have enacted the ATS only to leave it lying fallow indefinitely.").

\textsuperscript{66} Id. at 724.

\textsuperscript{67} The Court indicated that this "modest set" of violations likely included offenses against ambassadors, violations of safe conduct, and individual actions arising out of prize captures and piracy. Id. at 720.

\textsuperscript{68} Id. at 732; see also id. at 725 ("[C]ourts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized.").

\textsuperscript{69} Id. at 725.

\textsuperscript{70} Id. at 729.
standard, the Court called for legislative clarification regarding the ATS and the field of law that has developed around it in the courts.

Throughout its fairly extensive treatment of the ATS, the Court made little mention of the TVPA or its relationship with the ATS. The Court acknowledged the TVPA as a congressional affirmation of the *Filartiga* precedent\(^7\) and as an argument for exercising judicial caution in recognizing new causes of action under the ATS,\(^7\) but said nothing explicit regarding the proper interaction between the two statutes. The Court did note that, while there is no exhaustion of remedies requirement in the ATS, it “would certainly consider this requirement in an appropriate case.”\(^7\)\(^4\) This comment could be interpreted as implicitly addressing the interaction between the ATS and the TVPA—namely, as suggesting that, because of the potential overlap of coverage between the ATS and the TVPA, it would be appropriate to apply the TVPA's exhaustion requirement to claims of official torture and extrajudicial killing that could be brought under the TVPA but are brought instead under the ATS. Such an interpretation would be more speculative than authoritative, however, as the Court, in this brief consideration of an exhaustion requirement for the ATS, only cited to the TVPA in passing and without any mention of its proper relationship with the ATS.\(^7\)\(^5\)

**F. Post-Sosa Interaction Between the ATS and the TVPA and the Current Prevailing Precedent**

Given the Supreme Court’s qualified affirmance of the *Filartiga* line of precedent and its general silence on the nature of the ATS/TVPA relationship, many federal courts have continued to handle the interaction between the two statutes after the *Sosa* decision in much the same way as they had beforehand. That is, courts generally have interpreted *Sosa* (and its silence) as confirming, or at least not refuting, that claims

\(^7\) See *id.* at 731 (noting that the Court “would welcome any congressional guidance in exercising jurisdiction with such obvious potential to affect foreign relations”).

\(^7\) See *id.* (referencing the *Filartiga* line of precedent and the TVPA in concluding that Congress “has not only expressed no disagreement with our view of the proper exercise of the judicial power [in construing actionable violations under the ATS], but has . . . enact[ed] legislation supplementing the judicial determination in some detail”).

\(^7\) See *id.* at 728 (noting that the limited scope of the TVPA and Congress’s failure to codify any other causes of action since the TVPA’s enactment support a constrained interpretation of the reach of the ATS).

\(^7\) *Id.* at 738 n.21.

\(^7\) *Id.*
of official torture and extrajudicial killing may be brought under both (or either) the ATS and the TVPA,\(^76\) as had been the trend since *Kadic*.\(^77\) Some have further suggested, based on the language of *Sosa*, that the enactment of the TVPA directly affirms that official torture and extrajudicial killing are violations of the law of nations actionable under the ATS.\(^78\)

\(^76\) *See, e.g.*, *Arce v. Garcia*, 434 F.3d 1254, 1257 (11th Cir. 2006) (allowing plaintiffs to seek relief under the ATS and/or the TVPA for acts of official torture); *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242, 1250-51 (11th Cir. 2005) (stating that, in *Sosa*, "the Court did not say that the authority granted in the Torture Victim Protection Act provided the exclusive authority to hear torture claims," and thus holding that "a plaintiff may bring distinct claims for torture under each statute"); *Cabello v. Fernández-Larios*, 402 F.3d 1148, 1156-58 (11th Cir. 2005) (analyzing claims of official torture and extrajudicial killing simultaneously under the ATS and the TVPA); *In re Sinaltrainal Litig.*, 474 F. Supp. 2d 1273, 1279-1301 (S.D. Fla. 2006) (entertaining plaintiffs' simultaneous claims for official torture and extrajudicial killing under the ATS and the TVPA and analyzing those claims independently from one another where appropriate); *Kiobel v. Royal Dutch Petroleum Co.*, 456 F. Supp. 2d 457, 465 & n.10 (S.D.N.Y. 2006) (analyzing plaintiffs' claims for torture and extrajudicial killing under the ATS alone and rejecting defendants' contention that the TVPA preempts the ATS torture claims); *Chavez v. Carranza*, 413 F. Supp. 2d 891, 899-903 (W.D. Tenn. 2005) (citing cases to support its conclusion that "courts have... construed *Sosa* to permit claims of torture and extrajudicial killing to go forward under the [ATS]," and analyzing a plaintiff's claim of official torture and extrajudicial killing under both the TVPA and the ATS); *Doe I v. Exxon Mobil Corp.*, 393 F. Supp. 2d 20, 24-28 (D.D.C. 2005) (applying independent analyses to simultaneous ATS and TVPA claims for official torture and extrajudicial killing); *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164, 1182, 1178 n.13 (C.D. Cal. 2005) (finding that claims of official torture and extrajudicial killing brought simultaneously under the ATS and the TVPA are not duplicative and noting that the court "does not believe that the TVPA precludes claims of torture and extrajudicial killing under the ATS"); *Doe v. Saravia*, 348 F. Supp. 2d 1112, 1145 (E.D. Cal. 2004) (looking to both *Sosa* and pre-*Sosa* decisions such as *Kadic* to support the decision to allow the plaintiff to "assert a claim for extrajudicial killing under both the TVPA and [the ATS]" because, "[a]lthough the TVPA provides a statutory basis for a claim of extrajudicial killing, the enactment of the TVPA did not diminish the scope of the [ATS] in any way"). This is not to say, however, that all courts clearly embrace this understanding in their handling of ATS and TVPA claims. *See, e.g.*, *Ruiz v. Martinez*, No. 07-0078, 2007 WL 1857185, at *6, *8 (W.D. Tex. May 17, 2007) (evaluating and dismissing plaintiff's claim of official torture under the TVPA even though plaintiff did not plead under the TVPA, and though not stating that the claim must be addressed under the TVPA, declining to consider the claim under a simultaneous and independent ATS analysis).

\(^77\) *See supra Part I.D.*

\(^78\) *See, e.g.*, *Exxon*, 393 F. Supp. 2d at 25 (citing *Sosa*'s "clear mandate" characterization of the TVPA as support for viewing claims of official torture and extrajudicial killing as potentially actionable under the ATS); *Mujica*, 381 F. Supp. 2d at 1179 (recognizing the plaintiffs' claims of torture and extrajudicial killing under the ATS and holding that, "[a]s with Plaintiffs' claims for extrajudicial killings,... the existence of the TVPA is strong evidence that the prohibition against torture is a binding customary international law norm"); *Saravia*, 348 F. Supp. 2d at 1154 (supporting its decision to
While courts, both before and after Sosa, have recognized that the ATS and the TVPA each may support its own claims for official torture or extrajudicial killing, they have not treated the statutes as fully independent of one another. Rather, courts frequently have chosen to import certain elements of the more detailed TVPA into their analyses of ATS claims, even when those ATS claims would not otherwise be covered by the TVPA. For instance, both pre- and post-Sosa courts generally have found it appropriate to apply the TVPA's ten-year statute of limitations to all causes of action brought under the ATS.\(^7\)

 Courts have been seemingly less consistent, on the other hand, in applying the TVPA's definitions for torture and extrajudicial killing to ATS claims, sometimes adopting the TVPA definitions in their ATS analyses and other times looking to international sources for guidance. Recognize the plaintiff's claim of extrajudicial killing under the ATS by concluding, through reference to Sosa, that "Congress' enactment of the TVPA, singling out torture and extrajudicial killing, confirms that extrajudicial killing provides a cause of action under federal law".\(^7\) See Arce, 434 F.3d at 1261 n.17, 1264 (noting that the ATS and the TVPA share the same ten-year statute of limitations); Jean v. Dorélien, 431 F.3d 776, 778 (11th Cir. 2005) ("Under the TVPA and the [ATS], Plaintiffs have ten years from the date the cause of action arose to bring suit for torture, extrajudicial killing and other torts committed in violation of the law of nations or a treaty of the United States."); Cabello, 402 F.3d at 1153 (finding it "clear" that the TVPA's ten-year statute of limitations can be extended to the ATS); Papa v. United States, 281 F.3d 1004, 1012 (9th Cir. 2002) ("[T]he statute of limitations applicable to the [ATS] is that provided by the TVPA."); Doe I v. Unocal Corp., 395 F.3d 932, 944 n.13 (9th Cir. 2002) (noting that ATS claims are governed by a ten-year statute of limitations, per the decision in Papa), reh'g en banc granted, 395 F.3d 978 (9th Cir. 2003), case dismissed per parties' stipulation, 403 F.3d 708 (9th Cir. 2005); Hereros v. Deutsche Afrika-Linien GMBLT & Co., No. 05-1872, 2006 WL 182078, at *6-7 (D.N.J. Jan. 24, 2006) (holding that courts should continue to apply the TVPA's statute of limitations to ATS claims after Sosa, just as was done before Sosa); Jama v. INS, 343 F. Supp. 2d 338, 366 (D.N.J. 2004) (same); Saravia, 348 F. Supp. 2d at 1146 ("Although there is no express limitation period prescribed by the [ATS], the Ninth Circuit has held the applicable limitations period to be the 10-year period set out in the TVPA."); Wiwa v. Royal Dutch Petroleum Co., No. 96-8386, 2002 WL 319887, at *19 (S.D.N.Y. Feb. 28, 2002) (applying the TVPA's statute of limitations to ATS claims, explaining the reasoning for doing so, and citing cases in support). For the general reasoning behind the application of the TVPA's statute of limitations requirement to ATS claims, see infra notes 181-183 and accompanying text. Not all courts, however, have conclusively adopted this view. See, e.g., Xuncax v. Gramajo, 886 F. Supp. 162, 192-93 (D. Mass. 1995) (declining to determine whether the TVPA's statute of limitations requirement is the proper one to apply to ATS claims); see also Jacques deLisle, Human Rights, Civil Wrongs and Foreign Relations: A "Sinical" Look at the Use of U.S. Litigation To Address Human Rights Abuses Abroad, 52 DEPAUL L. REV. 473, 558 (2002) ("Cases under the [ATS] generally face the same [statute of limitations as TVPA cases do], although some courts may apply the usually more restrictive limits that the U.S. forum state imposes on tort actions.").
Lastly, in contrast to their more welcoming treatment of the statute of limitations requirement, courts both before and after Sosa have been reluctant to impose the TVPA's exhaustion of remedies requirement on claims brought under the ATS—whether it be to all such claims or just to claims for official torture and extrajudicial killing, and even when the court may already be applying that exhaustion requirement to claims brought simultaneously under the TVPA. 81

Thus, as has tended to be the case with the ATS in general, not much is clear regarding how exactly the ATS and the TVPA should be understood to interact with one another. Federal courts have at-

80 See Aldana, 416 F.3d at 1251 (analyzing a claim of torture under the ATS and looking to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) to "decide[e] what constitutes torture according to the laws of nations"); Chavez, 413 F. Supp. 2d at 899-900, 902 (referencing cases both before and after Sosa and finding that "[c]ourts analyzing [ATS] torture claims generally rely on the definition set forth in the [CAT]," and that "[c]ourts rely on [the TVPA] definition to analyze claims of extrajudicial killing under the [ATS]"); Saravia, 348 F. Supp. 2d at 1148, 1153-54 (acknowledging, in its analysis of simultaneous ATS and TVPA claims for extrajudicial killing, that the TVPA provides a definition for the claim whereas the ATS does not, but not going so far as to state that the TVPA definition should be applied to the ATS claim); Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289, 326 (S.D.N.Y. 2003) (applying the CAT definition of torture to an ATS claim).

81 See Sarei v. Rio Tinto, PLC, 456 F.3d 1069, 1099 (9th Cir. 2006) ("[I]t would be inappropriate, given the lack of clear direction from Congress (either in 1789 or . . . in 1991), and with only an aside in a footnote on the issue from the Supreme Court, now to superimpose on our circuit's existing [ATS] jurisprudence an exhaustion requirement where none has been required before."); withdrawn and superseded in part on reh'g, 487 F.3d 1193 (9th Cir. 2007), reh'g en banc granted, 499 F.3d 923 (9th Cir. 2007); Jean, 431 F.3d at 781 ("[T]he exhaustion requirement [of the TVPA] does not apply to the [ATS]."); Exxon, 395 F. Supp. 2d at 24-25 (recognizing that Sosa left the door open for applying an exhaustion requirement to ATS claims in certain cases, but declining to conclude that such a requirement is necessary or that, even if necessary, the requirement would be imported from the TVPA); Mujica, 381 F. Supp. 2d at 1178 n.13 (noting that the court "does not believe that ATS claims must now be modeled after the TVPA to include an administrative exhaustion requirement," since "[n]othing in Sosa indicates that the Supreme Court worked such a dramatic change to the ATS"); Saravia, 348 F. Supp. 2d at 1151-52, 1157 (applying the exhaustion requirement to the TVPA claim for extrajudicial killing but not to the simultaneous ATS one, stating that "[p]laintiffs asserting claims under the [ATS] are not required to exhaust their remedies in the state in which the alleged violations of customary international law occurred" (citing pre- and post-Sosa cases)); Wiwa, 2002 WL 319887, at *17-19 (applying the TVPA's exhaustion requirement to the TVPA claims but making no mention that it should be applied to the ATS claims as well, even though the ATS claims are subject to the TVPA's statute of limitations); Jodie Michalski, Comment, The Careless Gatekeeper: Sarei v. Rio Tinto, PLC, and the Expanding Role of U.S. Courts in Enforcing International Norms, 15 TUL. J. INT'L & COMP. L. 731, 744 (2007) ("Despite the prevalence of exhaustion in the broader international context, it is not mandated under the [ATS] and courts have proved unwilling to read such a requirement into the statute.").
tempted to read both statutes in accordance with the sparse guidance provided by Congress and the Supreme Court. This has resulted in, among other things, the acknowledgment of two distinct yet potentially overlapping federal causes of action for aliens seeking to bring claims of official torture and extrajudicial killing. Courts have allowed the ATS and the TVPA to inform one another in some respects but not in others, perhaps in an effort to allow each to benefit practically from the other's existence without unduly diminishing either statute's proper scope. Not surprisingly, these efforts to strike such a vague, uneasy balance have produced some muddied doctrinal waters and arguably undesirable results. The prospect of such results, and the general lack of clarity regarding the proper interaction between the two statutes, led the Seventh Circuit to break with the prevailing precedent and adopt an alternate, more straightforward interpretation of the ATS/TVPA relationship. In Enahoro v. Abubakar, the Seventh Circuit held that the TVPA "occup[ies] the field" of the ATS with regard to claims of official torture and extrajudicial killing, and thus precludes aliens from bringing such claims under the ATS.\footnote{408 F.3d 877, 884-85 (7th Cir. 2005), cert. denied, 564 U.S. 1175 (2006).} This Comment now turns to the Seventh Circuit's decision in Enahoro, and the rationale and consequences of its preclusive interpretation of the ATS/TVPA relationship.

\footnote{408 F.3d 877, 884-85 (7th Cir. 2005), cert. denied, 564 U.S. 1175 (2006). It is not entirely clear, from the language used by the Seventh Circuit in this opinion, what exactly the scope of this occupation is intended to be. The court’s opinion could be read as determining that the TVPA occupies the field of the ATS with respect to all potential claims of torture and extrajudicial killing, not just those claims alleging official torture and extrajudicial killing. See id. at 885, 886 (finding that “the implications [of Sosa] are that the cause of action Congress provided in the [TVPA] is the one which plaintiffs alleging torture or extrajudicial killing must plead,” and that “[i]t is hard to imagine that the Sosa Court would approve of common law claims based on torture and extrajudicial killing when Congress has specifically provided a cause of action for those violations and has set out how those claims must proceed”). Since adopting the broader interpretation of this holding is unnecessary—the Seventh Circuit in Enahoro was only confronted with allegations of official torture and extrajudicial killing—and would only weaken the Seventh Circuit's position with respect to my criticism below, I adopt the narrower interpretation for the purposes of this Comment and assume that the Seventh Circuit's holding only pertains to claims of official torture and extrajudicial killing.}
II. Enahoro v. Abubakar and Arguments for "Occupying the Field"

A. Overview of the Case

In Enahoro v. Abubakar, Nigerian plaintiffs sought to bring suit under the ATS against a Nigerian general and former head of state for acts of official torture and extrajudicial killing that occurred in Nigeria. The Seventh Circuit's review of this case covered both the applicability of immunity under the Foreign Sovereign Immunities Act to the defendant and also the ability of the ATS to independently sustain a cause of action for official torture and extrajudicial killing in light of the TVPA. With regard to the ATS issue, the plaintiffs brought their claims of official torture and extrajudicial killing under the ATS alone, and made no simultaneous claim under the TVPA. The district court, in line with the prevailing precedent in other circuits, recognized that the ATS provided a cause of action for the plaintiffs' claims independent of the one provided under the TVPA; accordingly, the district court held that the plaintiffs did not need to bring their claims under the TVPA, nor did they need to satisfy the TVPA's exhaustion requirement.

The Seventh Circuit, in a 2-1 decision, declined to adopt this understanding of the interaction between the ATS and the TVPA. It rejected the notion that the statutes provide "two bases for relief against torture and extrajudicial killing"—the TVPA and the "independently existing common law of nations condemning torture and killing"—that would "simultaneously exist to provide content to the ATS." Instead, according to the Seventh Circuit, the TVPA should be read to "occupy the field" of the ATS with respect to claims of official torture and extrajudicial killing, thus precluding the ATS from providing its own cause of action for such claims. Furthermore, since such claims must be brought under the TVPA, they must comply with the TVPA's requirements, such as exhaustion of remedies. As the plaintiffs did

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83 Id. at 879.
84 Id. at 880-83.
85 Id. at 883-86.
86 See Abiola v. Abubakar, 267 F. Supp. 2d 907, 910 (N.D. Ill. 2003) ("An alien plaintiff basing federal jurisdiction on the [ATS] need not also assert a claim under, or comply with the terms of, the TVPA . . . . [B]ecause plaintiffs have not alleged a TVPA claim, the TVPA's exhaustion requirement does not apply.").
87 Enahoro, 408 F.3d at 884.
88 Id. at 884-85.
89 Id. at 886.
not bring their claim under the TVPA, the court remanded the case for determination of "whether the plaintiffs should be allowed to amend their complaint to state such a claim and, if they do, whether, in fact, the exhaustion requirement in the [TVPA] defeats their claim." 90

B. Occupation: Rationale and Consequences

The Seventh Circuit found support for its "occupying the field" interpretation both in the legislative history of the TVPA and in the Supreme Court's treatment of the ATS (and the TVPA) in Sosa. The court did not read the House and Senate Judiciary Committees' statements that the ATS should "remain intact"91 after the enactment of the TVPA as necessarily indicating that Congress intended there to be two overlapping causes of action for official torture and extrajudicial killing that aliens may pursue. Rather, these statements only indicated "that the enactment of the [TVPA] did not signal that torture and killing are the only claims which can be brought under the [ATS]."92 By the Seventh Circuit's logic, interpreting the TVPA to occupy the field of the ATS renders the cause of action provided by the TVPA truly "unambiguous,"93 as Congress intended. Meanwhile, the ATS, though precluded in this respect, would "not be replaced" but instead would "remain intact" to carry out its "other important uses,"94 such as providing a jurisdictional basis for TVPA claims and supporting implied common law causes of action for certain other ATS claims not covered by the TVPA.

The Seventh Circuit also indicated that its interpretation of the ATS/TVPA relationship as preclusive abided by the spirit of judicial restraint espoused by the Supreme Court in Sosa.95 The Seventh Circuit noted that the Sosa Court strongly urged caution in recognizing private causes of action based on violations of international law be-

90 Id. On remand, the district court analyzed the plaintiffs' claims under the TVPA's exhaustion requirement and found that the requirement did not prevent the claims from going forward, as the plaintiffs "satisfied their burden of proving that Nigeria did not and does not provide them an adequate forum for their lawsuit." Abiola v. Abubakar, 435 F. Supp. 2d 830, 838 (N.D. Ill. 2006).
91 See supra note 52 (discussing this portion of the TVPA's legislative history).
92 Enahoro, 408 F.3d at 885 n.2.
94 Id. at 4-5.
95 See Enahoro, 408 F.3d at 885 ("While there is no explicit statement to this effect in Sosa, the implications are that the cause of action Congress provided in the [TVPA] is the one which plaintiffs alleging torture or extrajudicial killing must plead.").
cause the Court was wary of encroaching upon the legislative and executive spheres. This led the Seventh Circuit to conclude, "It is hard to imagine that the Sosa Court would approve of common law claims based on torture and extrajudicial killing when Congress has specifically provided a cause of action for those violations and has set out how those claims must proceed."96 Thus, under the Seventh Circuit's analysis, interpreting the TVPA to occupy the field of the ATS with respect to claims of official torture and extrajudicial killing not only complies with the intent of the statute as expressed in its legislative history, but it also allows courts to heed the Supreme Court's cautionary tone in Sosa most fully.

In addition to its apparent compliance with both the will of Congress and the disposition of the Supreme Court, the Seventh Circuit's interpretation is also appealing because of the facially sensible consequences that it yields. First, this interpretation eliminates a potential overlap in coverage between the two statutes, thereby cleaning up the statutory structure and dispelling some of the ambiguity regarding the statutes' relationship to one another. Under the "occupying the field" reading, if a claim falls within the scope of the TVPA, then it must be brought under the TVPA and must comply with all of the TVPA's requirements and definitions. Such an interpretation simplifies the stance of the prevailing precedent in other circuits, which allows claims of official torture and extrajudicial killing to be brought under both statutes but applies certain aspects of the TVPA to ATS claims in an unclear and perhaps even inconsistent fashion.97

The Seventh Circuit's approach also ensures that aliens and U.S. citizens are held to the same standards and requirements when bringing claims for official torture and extrajudicial killing. This symmetry corresponds to the plain language and apparent intention of the TVPA, which addresses aliens and U.S. citizens together without any suggested differentiation in treatment. The outcome under the prevailing precedent lacks this logical symmetry: it seems to make U.S. federal courts more accessible to aliens than to U.S. citizens with respect to such claims by affording aliens two distinct causes of action (as opposed to one) and by allowing them to circumvent the TVPA's

96 Id. at 885-86.
97 See supra Part I.F (discussing how courts generally have interpreted the TVPA's statute of limitations, definitions, and exhaustion of remedies requirements to interact with claims brought under the ATS).
terms and requirements, such as exhaustion, via the ATS. Furthermore, one could argue that, by demanding that all claims potentially covered by the TVPA be brought under the TVPA and thus be subject to the TVPA’s terms and requirements, U.S. federal courts can ensure that their treatment of such claims aligns with norms of international law as codified domestically in the TVPA. This result would respect the specific legislative intent of Congress while also achieving greater conformity with the general practices of the international community to whom this cause of action may apply.

Lastly, as the Seventh Circuit noted, the recognition of independent causes of action under the ATS and the TVPA for claims of official torture and extrajudicial killing creates a potential overlap in coverage between the statutes; this overlap, in turn, may provide alien plaintiffs with an end run around the TVPA and its terms and requirements, and thus creates the risk that the TVPA may be rendered effectively “meaningless” in the statutory scheme. The Seventh Circuit’s inter-

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58 See Christopher W. Haffke, Comment, The Torture Victim Protection Act: More Symbol than Substance, 43 Emory L.J. 1467, 1484 (1994) (“Unless the TVPA is interpreted to implicitly restrict the [ATS] to circumstances where all available remedies within the violating nation have been exhausted, the TVPA’s exhaustion of remedies requirement can be circumvented.”).

59 See Sosa v. Alvarez-Machain, 542 U.S. 692, 733 n.21 (2004) (noting the argument presented by the European Commission as amicus curiae that “basic principles of international law require that before asserting a claim in a foreign forum, the claimant must have exhausted any remedies available in the domestic legal system, and perhaps in other forums such as international claims tribunals”); Enahoro, 408 F.3d at 890 nn.6-7 (Cudahy, J., dissenting) (compiling international and domestic sources to demonstrate that “[e]xhaustion of remedies requirements are a well-established feature of international human rights law,” and pointing out that “[i]t is also well-established that, as a general proposition, U.S. law should incorporate and comport with international law where appropriate” and that “[t]he TVPA’s legislative history reveals that its exhaustion provisions are expressly modeled on those of customary international law”); Rosica Popova, Sarei v. Rio Tinto and the Exhaustion of Local Remedies Rule in the Context of the Alien Tort Claims Act: Short-Term Justice, but at What Cost?, 28 Hamline J. Pub. L. & Pol’y 517, 533, 529-30 (2007) (concluding that “the exhaustion rule has been accepted and well-recognized as a customary rule of international law” and that, given “the exhaustion rule’s unchallenged acceptance in international law[,] ... it would be a mistake to regard [it] as optional, dispensable, or severable from the norms of customary international law”).

100 Enahoro, 408 F.3d at 885 (majority opinion) (“No one would plead a cause of action under the [TVPA] and subject himself to its requirements if he could simply plead under international law.”); see also Haffke, supra note 98, at 1483 (concluding that “[i]t was undoubtedly Congress’ intent that torture and extrajudicial killing claims be brought under the TVPA, thereby implicitly repealing the [ATS],” because “[i]f the TVPA is not construed as an implied repealer of the [ATS], [the statute of limitations and exhaustion of remedies] provisions of the TVPA will be rendered inutile”).
pretation eliminates this concern and guarantees that claims of official torture and extrajudicial killing are handled in accordance with Congress's most recent and specific expression of legislative will. Surely this outcome is more appropriate, the argument goes, than allowing the TVPA to be reduced to a formality by the vague language and unstated authority of an ancient statute.

III. A CASE AGAINST OCCUPATION: ARGUMENTS FOR A SUPPLEMENTAL INTERPRETATION

Though the Seventh Circuit's decision in Enahoro to adopt a preclusive reading of the ATS/TVPA relationship is not unreasonable or without its appeal, it nonetheless produces an inappropriate result for courts to follow. Instead, a supplemental understanding of the two statutes, in which both provide alien plaintiffs with distinct yet potentially overlapping federal causes of action for claims of official torture and extrajudicial killing, corresponds most closely with the discernible indications of legislative intent underlying each statute and with the disposition adopted toward the statutes by the Supreme Court in Sosa. As demonstrated below, an examination of the structure, plain language, and legislative history of the statutes reveals no clear manifestation of congressional intent to have the TVPA limit or preclude the scope of the ATS. Given this lack of clear and manifest intent, generally accepted principles of statutory interpretation suggest that courts should not make the legislative decision to read the TVPA to limit or preclude the ATS, but should instead interpret both statutes to their fullest acceptable extent. Such judicial restraint in construing this particular field of law is encouraged further by the clear, general mandate to that effect that the Supreme Court put forth in Sosa. Furthermore, the particular attitude that the Court appears to adopt toward the TVPA in its analysis of the ATS in Sosa also argues against a preclusive interpretation of the relationship. Lastly, the practical consequences of adopting a supplemental interpretation by no means undermine the interpretation's legitimacy, as those advocating for a preclusive reading may argue. To the contrary, a supplemental interpretation encourages courts to read the ATS and the TVPA in a manner that tracks each statute's distinct language, structure, and purpose most closely, and allows both statutes to retain a significance in the statutory scheme that reflects these distinctions accurately.
A. Statutory Language, Structure, and Intent

The appropriate relationship between the ATS and the TVPA is difficult to ascertain because neither the plain meaning nor the legislative history of the statutes presents a clear, definitive statement of congressional intent in that regard. That said, when the statutes' structure, language, and discernible legislative intent are examined in light of established principles of statutory interpretation, they indicate that the Seventh Circuit takes an unnecessary and undue amount of legislative liberty in construing the ATS/TVPA relationship preclusively. Understanding this relationship as one of mutual reinforcement, on the other hand, grants fuller recognition and respect to the intimations of congressional intent presented by the statutes, as well as to the general interpretive principles used by courts to assess this intent.

This conclusion is suggested first by the language and structural relationship of the statutes. On its face, the TVPA does not directly repeal or amend the ATS. Instead, the TVPA is codified as a note to the ATS and leaves untouched the actual text of the preexisting ATS provision. This structure does seem to imply that the TVPA and the ATS are intended to interact closely and directly with one another; the choice to cast the TVPA in terms of an appended note to the ATS, however, further implies that this interaction was not intended to function as a direct repeal of or amendment to the ATS, but rather as a reinforcement of or supplement to it. Furthermore, there is no language in the TVPA itself that plainly speaks to the ATS or its ability to support a cause of action for claims of official torture and extrajudicial killing, nor has Congress inserted any such language into the ATS itself. At the time of the TVPA's enactment, a discernible precedent had emerged that recognized the ability of the ATS to support a cause of action for claims of official torture and extrajudicial killing, and this precedent has persisted in the years since. Presumably, if the TVPA's enactment was motivated by a desire to limit this aspect of the ATS, this motivation would have been codified either by initially incorporating the TVPA

101 See supra Part I.C (discussing the enactment of the TVPA).
102 See Enahoro, 408 F.3d at 887 (Cudahy, J., dissenting) (interpreting the fact that "the TVPA itself was codified as part of the Historical and Statutory Notes of the [ATS]" as "suggest[ing] that the TVPA was meant to augment or elaborate the [ATS], not replace it").
103 See supra Part I.B (discussing the general precedent that courts followed in interpreting the ATS prior to the enactment of the TVPA).
104 See supra Part I.D, I.F (discussing the general precedent that courts have followed in interpreting the ATS since the enactment of the TVPA).
into the language and statutory structure of the ATS more directly, or by subsequently amending the statutes in order to clarify the precedent that has emerged from this ambiguity. At the very least, the language of the two statutes and the structural relationship that Congress has chosen to create between them fails to manifest a clear legislative intent that the TVPA should occupy the field of the ATS.

The legislative history of the ATS and the TVPA (or rather, of just the TVPA, given the lack of such history for the ATS\(^{105}\)) also fails to manifest any clear congressional intent to create a preclusive ATS/TVPA relationship. The legislative history of the TVPA states that the statute was enacted to create "an unambiguous basis for a cause of action that has been successfully maintained under [the ATS]."\(^{106}\) The legislative history does not state, however, that this unambiguous basis should also be the exclusive basis for such a cause of action. In creating the TVPA's unambiguous basis, the House and Senate Judiciary Committees acknowledged the Filartiga precedent of recognizing an implicit common law cause of action under the ATS for certain violations of the law of nations, such as official torture and extrajudicial killing, and expressed no apparent intention to disrupt that precedent.\(^{107}\) Rather, the TVPA was intended to function as a mechanism for clarifying the ATS's ability in this regard, as called for by the divergent opinions in Tel-Oren.\(^{108}\) When addressing the interaction between the ATS and the TVPA more directly, these Committees declined to draw any specific conclusions, but did adopt a general tone of collaboration and mutual reinforcement to characterize the relationship—stating, for instance, that the TVPA would "enhance the

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\(^{105}\) See supra Part I.A (discussing the uncertain origins of the ATS).


remedy already available under section 1350” and that the ATS “should remain intact.”109 As one commentator has noted, “[T]he clearly expressed legislative intent was that the TVPA not act to limit potential claims under the [ATS].”110 Of course, reports such as these do not amount to binding authority in statutory interpretation, and the Committees’ particular statements here contain enough ambiguity that they could be read not to rule out definitively the Seventh Circuit’s “occupying the field” interpretation. At the very least, however, the legislative history of the TVPA, like the language of the two statutes and the structural relationship between them, fails to manifest any clear congressional intent to restrict the ATS by enacting the TVPA.

This absence of clear congressional intent, when viewed in light of generally accepted principles of statutory interpretation, argues against a preclusive reading of the ATS/TVPA relationship. Most relevantly, the Supreme Court has ruled that “when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.”111 Or, as the Court stated more fully in Posadas v. National City Bank,

The cardinal rule is that repeals by implication are not favored. Where there are two acts upon the same subject, effect should be given to both if possible. . . . [T]he intention of the legislature to repeal must be clear and manifest; otherwise, at least as a general thing, the later act is to be construed as a continuation of, and not a substitute for, the first act and will continue to speak, so far as the two acts are the same, from the time of the first enactment.112

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112 296 U.S. 497, 503 (1936); see also Enahoro v. Abubakar, 408 F.3d 877, 887 (7th Cir. 2005) (Cudahy, J., dissenting) (quoting Posadas in concluding that “[i]t is a long-standing canon of statutory construction that repeals by implication are disfavored”), cert. denied, 546 U.S. 1175 (2006). The Supreme Court has repeatedly recognized and reinforced this principle of statutory interpretation since its statement in Posadas. See, e.g., Branch v. Smith, 538 U.S. 254, 273 (2003) (“An implied repeal will only be found where provisions in two statutes are in ‘irreconcilable conflict,’ or where the latter Act covers the whole subject of the earlier one and ‘is clearly intended as a substitute.’” (quoting Posadas, 296 U.S. at 503)); Cook County, Ill. v. United States ex rel. Chandler,
As many circuits have determined since Kadic, and as is demonstrated more fully below, the ATS and the TVPA are fully capable of coexisting with one another without adopting the preclusive reading of the Seventh Circuit. A supplemental reading of the statutes does not render them inherently incompatible; it simply creates the possibility that alien plaintiffs may have two distinct and potentially (though not necessarily) overlapping causes of action for certain claims of official torture and extrajudicial killing.

Furthermore, the distinctions between the statutes in focus and scope indicate that the TVPA was not meant to function as "a substitute for" the ATS with respect to claims of official torture and extrajudicial killing, reinforcing the conclusion that the TVPA should be interpreted as supplemental to, rather than preclusive of, the ATS. First, by their plain language, the TVPA grants a cause of action to aliens and U.S. citizens alike, whereas the ATS speaks only to aliens.

538 U.S. 119, 132 (2003) (concluding, after referencing Posadas, that "[i]nferring repeal from legislative silence is hazardous at best"); Rodriguez v. United States, 480 U.S. 522, 524 (1987) ("It is well settled . . . that repeals by implication are not favored, and will not be found unless an intent to repeal is clear and manifest." (citation and internal quotation marks omitted)); Universal Interpretive Shuttle Corp. v. Wash. Metro. Area Transit Comm'n, 393 U.S. 186, 193, 191 (1968) (finding "no reason to ignore the principle that repeals by implication are not favored" where "[t]here is no indication from statutory language or legislative history" that such a repeal was intended by Congress); United States v. Borden Co., 308 U.S. 188, 198 (1939) ("When there are two acts upon the same subject, the rule is to give effect to both if possible.").

Arguing that the Seventh Circuit's preclusive reading does not call for implicit repeal of the ATS, per se, but only of the common law causes of action for official torture and extrajudicial killing that it supports, does not disrupt the outcome of this analysis. As the Court held in Norfolk Redevelopment & Housing Authority v. Chesapeake & Potomac Telephone Co. of Virginia, "It is a well-established principle of statutory construction that '[t]he common law . . . ought not to be deemed to be repealed, unless the language of a statute be clear and explicit for this purpose.'" 464 U.S. 30, 35-36 (1983) (quoting Fairfax's Devisee v. Hunter's Lessee, 11 U.S. (7 Cranch) 603, 623 (1812), and citing other cases for this general proposition). See, e.g., Isbrandtsen Co. v. Johnson, 343 U.S. 779, 783 (1952) ("Statutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident."); see also United States v. Texas, 507 U.S. 529, 534 (1993) (quoting the "longstanding . . . principle" expressed in Isbrandtsen, noting that its "presumption favoring retention of existing law" applies in the context of federal common law, and finding that while "Congress need not affirmatively proscribe the common-law doctrine at issue" in order for it to be repealed, "courts may take it as a given that Congress has legislated with an expectation that the [common law] principle will apply except when a statutory purpose to the contrary is evident" (alteration in original) (citation and internal quotation marks omitted) (quoting Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104, 108 (1991))).

See supra Part I.D, I.F (identifying this line of precedent).

Posadas, 296 U.S. at 503.
Second, the TVPA provides a clear, domestically codified cause of action for a narrow set of expressly defined violations, while the right to sue available under the ATS is less defined and is heavily reliant upon determinations of international norms. Granted, the TVPA, as indicated by its legislative history, is derived from and informed by international norms to some extent as well.\textsuperscript{115} The TVPA, however, extracts these norms from their international context, transplants them into an environment controlled only by domestic forces, and codifies them in a very particular manner. The existence of the specific cause of action granted by the TVPA, as defined by its terms, is clear and indisputable so long as the statute remains in effect, whereas the ATS cause of action can only exist if it is deemed by a court to constitute a violation of the law of nations, a much more mutable and organic concept.\textsuperscript{116} In this sense, then, the TVPA creates "a clear, safe-harbor cause of action" for aliens with claims of official torture and extrajudicial killing, the presence of which need not suggest a preclusive relationship with the ATS and its more ambiguous cause of action.\textsuperscript{117} To the contrary, by providing such a safe harbor and at the same time creating a parallel cause of action for U.S. citizens, the TVPA seems to operate as an expansion of the remedies previously available under the ATS, not as a limitation of or replacement for them.\textsuperscript{118}

As a final statutory distinction in support of this conclusion, the TVPA—by opening its remedy to aliens and U.S. citizens alike while at the same time restricting its remedy to only certain violations—appears to be oriented, in its intent and focus, primarily toward the violator. As expressed in its legislative history, the TVPA was enacted to ensure "that torturers and death squads will no longer have a safe

\textsuperscript{115}See S. REP. NO. 102-249, at 6, 10 (1991) (noting that the TVPA's definitions of "torture" and "extrajudicial killing" are derived from international sources and that the interpretation of the TVPA's exhaustion requirement, "like the other provisions of this Act, should be informed by general principles of international law"); see also infra notes 151-153 and accompanying text.

\textsuperscript{116}See Trnavci, supra note 17, at 265 ("The law of nations under the [ATS] has proven to be an ever-changing category.").

\textsuperscript{117}See Sarei v. Rio Tinto, PLC, 456 F.3d 1069, 1094 n.26 (9th Cir. 2006) ("[T]he TVPA confirmed the existence of a clear, safe-harbor cause of action for alien victims of torture and extrajudicial killings. . . . We do not read torture and extrajudicial killing out of the [ATS] . . . . [A] clear safe harbor statute need not eclipse the more general and ambiguous statute that preceded it."), withdrawn and superseded in part on reh'g, 487 F.3d 1193 (9th Cir. 2007), reh'g en banc granted, 499 F.3d 923 (9th Cir. 2007).

\textsuperscript{118}See id. (noting that, in these two ways, "the TVPA has expanded rather than narrowed U.S. remedies for torture and extrajudicial killing overseas," making it inappropriate to adopt a preclusive reading of the statutes).
haven in the United States,"\textsuperscript{119} regardless of the citizenship of the victim. While the original intent of the ATS is unclear,\textsuperscript{120} the statute—by creating an open-ended class of potential violations, but specifically limiting the availability of the remedy to aliens—appears to be oriented more toward providing a remedy to a certain type of victim rather than deterring a specific type of violator. Scholarly theories that depict the ATS as an effort to secure the status of the United States as an emerging nation in the international context especially reinforce this understanding of the statute.\textsuperscript{121} This apparent distinction in focus and intent, when taken with the other distinctions mentioned above, makes it difficult to argue that Congress clearly intended the TVPA to act as a substitute for the ATS with respect to claims of official torture and extrajudicial killing; rather, it suggests that a supplemental reading of the statutes, in which each may support its own independent cause of action for such claims, more aptly reflects the distinctive nature of each statute.

In sum, there is much ambiguity surrounding how Congress intended the ATS and the TVPA to interact. The few things that are clear in this regard seem to intimate a relationship of mutual reinforcement and collaboration rather than one of preclusion. Admittedly, such intimations are not conclusive, and they leave room for other rational interpretations (as presented by the Seventh Circuit, for instance). Even if these intimations are construed neutrally, however, the acknowledgment of the ambiguity itself points toward a supplemental interpretation. The lack of a clear and manifest congressional intent regarding the proper interaction between the ATS and the TVPA, coupled with the inherent distinctions between the two statutes and their capacity to be read as supplemental to one another, indicates that, as a matter of statutory interpretation, the ATS and the TVPA are best understood as each providing its own distinct, independent cause of action for claims of official torture and extrajudicial killing.

\textsuperscript{119} S. REP. NO. 102-249, at 3; see also H.R. REP. NO. 102-367, at 3 (1991), \textit{reprinted in} 1992 U.S.C.C.A.N. 84, 85 (stating that the TVPA would serve as a "measure[] to ensure that torturers are held legally accountable for their acts").

\textsuperscript{120} See \textit{supra} Part I.A (discussing the difficulties in identifying the original intent of the ATS).

\textsuperscript{121} See \textit{supra} note 19 and accompanying text.
B. The Spirit of Sosa: The Supreme Court’s Take on the ATS, the TVPA, and Judicial Restraint

The Supreme Court, like Congress, has failed to provide any definitive guidance on the proper interaction between the ATS and the TVPA. In Sosa, the Court was concerned only with claims brought under the ATS that were not within the scope of the TVPA, and thus the Court was not called upon to confront the relationship between the two statutes directly. The Court did, however, make a few passing mentions of the TVPA in the context of its discussion of the ATS, which provide some limited insight into how courts should interpret the ATS/TVPA relationship. The Court also, on a broader scale, adopted a cautionary tone regarding the degree of legislative liberty courts generally should take when construing the ATS. This cautionary tone, and the limited treatment that the Court gives to the TVPA, are both open to interpretation. The implications of this tone and treatment, however, especially when informed by the analysis of statutory construction and legislative intent above, weigh in favor of a supplemental rather than preclusive understanding of the statutes’ relationship.

1. The Sosa Court’s Treatment of the TVPA

The Supreme Court in Sosa, much like the House and Senate Judiciary Committees in their reports on the TVPA, generally affirmed the reading of the ATS that had developed through Filartiga and its progeny. While the Court perhaps limited that reading by restricting the scope of the causes of action provided by the ATS, the Court did not clearly express any particular desire to overturn or significantly disrupt the precedent underlying it. Reading the TVPA to occupy the field of the ATS, however, would create a significant disruption of that precedent. While the Court did not explicitly state that this would be an inappropriate result, such a result does not seem to fit with the Court’s general acceptance and affirmance of the prevailing Filartiga precedent.

122 For a more detailed discussion of this case, see supra Part I.E.
123 Sosa v. Alvarez-Machain, 542 U.S. 692, 731 (2004); see also supra note 63 and accompanying text.
124 See Enahoro v. Abubakar, 408 F.3d 877, 889 (7th Cir. 2005) (Cudahy, J., dissenting) (observing that interpreting the TVPA to occupy the field of the ATS “would implicitly undercut more than twenty years of jurisprudence, inaugurated by Filartiga”), cert. denied, 546 U.S. 1175 (2006).
The Court's few direct mentions of the TVPA in Sosa strengthen the view that the ATS/TVPA relationship should be construed as supplemental rather than preclusive. Though the Court did not speak to this relationship directly, it did recognize the TVPA as a legislative affirmation of the Filartiga line of precedent and as a "clear mandate" from Congress regarding the ability of the ATS to support certain common law causes of action for sufficiently established and defined violations of the modern-day law of nations. Much like the language found in the legislative history of the TVPA, this treatment of the statute by the Court suggests a supplemental and reinforcing relationship with the ATS, not a preclusive or occupying one. That is, while the decision in Sosa imposes limitations on the potential reach of the ATS, nothing in the decision indicates that the TVPA should be thought of as one such limitation. To the contrary, the Court interpreted the TVPA as follows:

Congress... has not only expressed no disagreement with our view of the proper exercise of the judicial power [in construing causes of action actionable under the ATS, as expressed through the Filartiga line of precedent], but has responded to its most notable instance by enacting legislation[, the TVPA,] supplementing the judicial determination in some detail.

Such treatment of the TVPA in the context of the ATS led Judge Cudahy, in his Enahoro dissent, to conclude, "[Sosa] in fact relies on the TVPA as evidence of Congressional acceptance of torture as a norm enforceable via the [ATS]. There is nothing, express or implied, in Sosa to suggest anything about preclusion."
2. The Sosa Court’s Call for Judicial Caution

The Court’s limited treatment of the TVPA dovetails with its general disposition in discussing the proper role of the courts in construing the ATS, which provides further support for a supplemental reading of the statutes. The Court, while recognizing the discretionary role that the lower courts will inevitably play in determining what causes of action are to be recognized under the ATS, strongly urged judicial restraint in the exercise of this discretion. The Court noted that “although we have even assumed competence to make judicial rules of decision of particular importance to foreign relations, . . . the general practice has been to look for legislative guidance before exercising innovative authority over substantive law,” and the Court advocated adherence to that general practice in construing the ATS. In addition, the Court welcomed congressional clarification regarding the ATS, which would mitigate the need for the courts to legislate themselves.

This call for judicial restraint and legislative guidance can be interpreted in the context of the ATS/TVPA relationship in various ways. One can read it, in line with the majority in Enahoro, as suggesting that the ATS and the common law causes of action that it may support should be limited whenever possible. Therefore, since the TVPA provides a statutory cause of action for claims of official torture and extrajudicial killing, there is no reason for the judicially construed common law to provide the same under the ATS. This understanding of judicial restraint, however, is not required by Sosa. The Court’s apparent affirmance of the Filartiga precedent and the TVPA’s place within it suggests that the recognition of ATS claims of official torture and extrajudicial killing would fall within the restrained conception of the ATS outlined by the Sosa Court. The TVPA provides legislative endorsement for those causes of action, and so recognizing them under the ATS would not seem to violate the Court’s mandate for judicial restraint.

Furthermore, this mandate not only permits a supplemental reading of the statutes, but also supports it. As mentioned above, the Sosa

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129 Sosa, 542 U.S. at 726.
130 Id. at 729 (noting that, when construing the ATS and the causes of action that it supports, courts should understand that “the door is still ajar subject to vigilant doorkeeping”).
131 Id. at 731.
132 See supra notes 95-96 and accompanying text.
Court, in its treatment of both the ATS and the TVPA, endorsed the *Filartiga* line of precedent. Part of that precedent at the time of the *Sosa* decision was a distinct trend in the lower courts toward recognizing independent causes of action for official torture and extrajudicial killing under the ATS and the TVPA. The Court, in its discussion of either statute, did not indicate any desire to disrupt that trend or drastically alter the broader line of precedent of which it was a part. By endorsing *Filartiga* and inviting legislative intervention, the Court seemed to express, if anything, a desire to stabilize the existing ATS precedent, limit its growth to reasonable boundaries, and allow Congress to respond as it sees fit, rather than having courts unduly (and perhaps inconsistently) legislate their way through the many statutory ambiguities of the ATS. At the time of the *Sosa* decision, the ability of a plaintiff to bring a claim of official torture or extrajudicial killing under the ATS itself was not ambiguous; rather, it was a well-established and, through the TVPA, congressionally affirmed part of the *Filartiga* precedent. Continuing to understand the ATS and TVPA in this supplemental manner, as precedent has indicated and as Congress has endorsed, and declining to implicitly repeal the ATS in this respect without clear and manifest legislative guidance, seems to fit more closely with the *Sosa* Court’s call for judicial caution than does the Seventh Circuit’s preclusive interpretation of the statutes.

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133 *See supra* notes 63, 72.
134 *See supra* note 59 and accompanying text.
135 *See* Beth Stephens, Comment, "The Door Is Still Ajar" for Human Rights Litigation in U.S. Courts, 70 BROOK. L. REV. 533, 534-35 (2005) ("[T]he careful tone and the actual wording of the standard [in *Sosa*] mirror the narrow holding of the *Filartiga* decision and most of the cases that followed, indicating that most of the lower court precedents remain valid."); *see also* Kiobel v. Royal Dutch Petroleum Co., 456 F. Supp. 2d 457, 463 (S.D.N.Y. 2006) ("In light of *Sosa’s* ambiguities, it would be inappropriate for a district court to assume that *Filartiga’s* view of the scope of ATS jurisdiction no longer controls.").
136 The Ninth Circuit, in declining to read an implicit exhaustion requirement into the ATS, interpreted the Supreme Court’s tone of judicial restraint in *Sosa* in the same fashion as is suggested here. *See* Sarei v. Rio Tinto, PLC, 456 F.3d 1069, 1099 (9th Cir. 2006) ("Absent any clear congressional guidance on importing a blanket exhaustion requirement into the [ATS], *Sosa* counsels against doing so by judicial fiat . . . ."), withdrawn and superseded in part on reh’g, 487 F.3d 1193 (9th Cir. 2007), reh’g en banc granted, 499 F.3d 923 (9th Cir. 2007).
137 This congressional affirmation, in turn, alleviates the need for courts to “infer intent” when recognizing a cause of action for claims of official torture and extrajudicial killing under the ATS, and indicates that such recognition is fully compatible with the *Sosa* Court’s cautious stance that “a decision to create a private right of action is one better left to legislative judgment in the great majority of cases.” *Sosa* v. Alvarez-Machain, 542 U.S. 692, 727 (2004).
Judicial restraint, understood in this light, indicates that the ATS and the TVPA should continue to be understood as each supporting a cause of action for official torture and extrajudicial killing. Sosa should not be read to disrupt this understanding. Such an interpretation complies with the prevailing precedent at the time of Sosa, fits with the Court's endorsement of the Filartiga precedent and its view of the TVPA's role within that precedent, and does not require the courts to make any unnecessary legislative determinations about the statutes without the express will of Congress to support them. According to this understanding of Sosa, if true judicial restraint is exercised, the conclusion that the TVPA should occupy the field of the ATS is better left for Congress to make expressly, not for the courts to determine implicitly.

C. Consequences of a Supplemental Reading

As demonstrated above, analysis of both congressional intent and the disposition of the Supreme Court in Sosa indicates that the ATS and the TVPA should be read supplementally, not preclusively, and thus courts should continue to recognize under both statutes a cause of action for claims of official torture and extrajudicial killing brought by aliens in U.S. federal courts. Those arguing for the Seventh Circuit's approach, however, would stress that these sources of authority do not draw this conclusion definitively. Accordingly, the decision of which interpretation to adopt—and, more particularly, of whether to recognize a common law cause of action for claims of official torture and extrajudicial killing under the ATS—is left to the discretion of the courts, and that discretion should be guided by an assessment of the practical consequences that result from the application of each interpretation.138

The immediate outcome of reading the ATS and the TVPA supplementally is that aliens have two distinct, potentially overlapping causes of action for claims of official torture or extrajudicial killing, each subject to its own independent analysis by the courts. Thus, aliens might choose to sue under the ATS instead of the TVPA for claims covered by the TVPA's cause of action, despite the newer statute's direct treatment of the subject matter. As discussed in Part II.B, supra, those in favor of the Seventh Circuit's preclusive interpretation would find the resulting practical consequences of this outcome un-

138 Cf. id. at 732-33 ("[T]he determination whether a norm is sufficiently definite to support a cause of action should (and, indeed, inevitably must) involve an element of judgment about the practical consequences of making that cause available to litigants in the federal courts." (footnote omitted)).
satisfactory and illogical. Their chief concern would be the potential end run around the TVPA and its requirements that a supplemental reading would make available to aliens. This, in turn, would give rise to a host of subsidiary concerns. For instance, (1) it affords aliens an undue amount of access to U.S. federal courts when raising claims of official torture and extrajudicial killing, and creates an imbalance of treatment between aliens and U.S. citizens that contradicts the congressional intent expressed in the TVPA; (2) it allows claims of official torture and extrajudicial killing to go forward without necessarily complying with the TVPA's terms and requirements, such as exhaustion of remedies, thus treating them in a manner that may be inconsistent with the international norms codified by Congress in the TVPA; and (3) most importantly, it renders the TVPA effectively meaningless in the overall statutory scheme.

Though these concerns, much like the rest of the reasoning that underlies the "occupying the field" approach, are not unreasonable, they overstate and mischaracterize the practical consequences of reading the ATS and the TVPA supplementally. Instead, the practical consequences of such an interpretation, when it is properly applied, are fully consistent with the language, structure, and discernible intent of each statute and accurately reflect the distinctions that exist between them. That is, these consequences are not, in fact, illogical or concerning, but rather represent the proper outcomes of the statutes; courts should not attempt to avoid them by legislating a preclusive relationship into the ATS/TVPA statutory scheme.

1. Access to Courts and Imbalance in Treatment

Under a supplemental reading, aliens derive two independent, potentially overlapping causes of action for claims of official torture and extrajudicial killing from the ATS/TVPA statutory scheme; U.S. citizens, on the other hand, derive only one. This creates an apparent imbalance between aliens and U.S. citizens in the scope of their respective rights to sue for claims of official torture and extrajudicial killing in U.S. federal courts. Furthermore, U.S. citizens pursuing their claims for official torture and/or extrajudicial killing will necessarily have to do so according to the terms and requirements specified in the TVPA, whereas aliens, due to their ability to bring a claim under the ATS alone, may not have to meet such requirements. Thus, for instance, while U.S. citizens will need to demonstrate exhaustion
of local remedies before bringing their TVPA claim in U.S. federal court, aliens may not be, and often have not been, required to make a similar showing for their ATS claims. By granting aliens two causes of action and an end run around the TVPA's terms and requirements, the supplemental reading of the ATS/TVPA relationship seems to afford aliens a disproportionate amount of access to U.S. federal courts for claims of official torture and extrajudicial killing. This is despite the fact that Congress recently and clearly expressed, through the TVPA, a desire for aliens and U.S. citizens to be treated in the same manner with respect to such claims.

The existence of this apparent imbalance in treatment, however, does not undermine the propriety of a supplemental understanding of the ATS/TVPA relationship. To the contrary, it reflects the plain language, structure, and intent of the statutes most accurately. That aliens are contemplated under both the ATS and the TVPA whereas U.S. citizens are only contemplated under the TVPA, and that the TVPA contains certain terms and requirements that the ATS does not, are both inherent and explicit qualities of the language and structure of the statutes. This is the legislative scheme that Congress chose to create when it enacted the TVPA as a note to the ATS—a choice it made with full awareness of the Filartiga decision and the ability of the ATS under that decision to support a cause of action for claims of official torture and extrajudicial killing. Had Congress wanted to insure against this outcome, it could have eliminated its source and amended the ATS directly. Instead, Congress chose both to endorse the Filartiga precedent and to leave the text of ATS itself untouched and intact, and Congress has stood by that choice in the years since—even as a prevailing precedent developed in the courts affording aliens two causes of action under the ATS/TVPA statutory scheme. That a supplemental understanding of the ATS/TVPA relationship respects Congress's legislative choices by adhering as closely as possible to the plain language and structure of the statutes is not a concern. Rather, it would be overly aggressive for courts to impose legislative judgment where none expressly exists and force the TVPA's various terms and requirements into the ATS in order to achieve an

139 See supra note 81 and accompanying text (noting the general reluctance courts have expressed to impose an exhaustion requirement on ATS claims).

140 See supra notes 49-50 and accompanying text.
overall balance in treatment in the ATS/TVPA statutory scheme that is not otherwise called for.\textsuperscript{141}

Furthermore, a supplemental understanding of the statutes, and the apparent imbalance it creates between aliens and U.S. citizens, pays due recognition to the respective purposes underlying each statute: the ATS's desire to ensure aliens access to judicial remedies for certain violations while in the United States,\textsuperscript{142} and the TVPA's desire to express the United States' unity with the international community in condemning official torture and extrajudicial killing and to ensure that the United States does not become a safe haven for perpetrators of such acts.\textsuperscript{143} These purposes are similar but nonetheless distinct, and may call for different statutory manifestations. For instance, the ATS, given its purpose, does not have the same interest in providing courtroom access to U.S. citizens, or even perhaps in imposing an exhaustion requirement on its claims, as the TVPA does. Thus, it cannot simply be presumed that, since the TVPA intends one thing, so too does the ATS. To argue that an imbalance in treatment between aliens and U.S. citizens within the ATS/TVPA statutory scheme calls for a preclusive reading of the two statutes is to overlook and undermine the distinction in purpose between the statutes without, once again, any express congressional mandate to do so.

It should also be noted that, even if this imbalance in treatment were a theoretical concern, the actual disparity in access that it creates should not be overestimated. First, under a supplemental reading of the ATS and the TVPA, the extent to which a claim for official torture or extrajudicial killing under the ATS actually differs in its terms and requirements from a claim under the TVPA will depend on how that

\textsuperscript{141} See Bates v. United States, 522 U.S. 23, 29-30 (1997) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (alteration in original) (internal quotation marks omitted) (quoting Russello v. United States, 464 U.S. 16, 23 (1983))); see also Sarei v. Rio Tinto, PLC, 456 F.3d 1069, 1093 (9th Cir. 2006) ("Because Congress was obviously aware of the [ATS], it could have amended the statute to include an exhaustion requirement similar to the one contained in the TVPA." (citing Bates)), withdrawn and superseded in part on reh'g, 487 F.3d 1193 (9th Cir. 2007), reh'g en banc granted, 499 F.3d 923 (9th Cir. 2007).

\textsuperscript{142} See supra Part I.A (discussing the theories espoused regarding the original motivation behind the enactment of the ATS).

\textsuperscript{143} See infra notes 151-154 and accompanying text; supra note 48 and accompanying text.
ATS claim is construed by the courts; there may prove to be no discernible difference in access between them, or the ATS claim may even prove to be more restrictive in this respect. Second, even though it is possible that aliens may be able to sidestep certain terms and requirements of the TVPA by bringing suit under the ATS, an ATS suit is difficult to maintain successfully in its own right due to the many procedural and substantive hurdles that ATS claimants must surmount:

In practical terms, plaintiffs suing under the [ATS] face several obstacles that include: (1) the requirement of a high factual threshold; (2) overcoming a forum non conveniens motion; (3) obtaining personal jurisdiction over the defendant; (4) the requirement that defendants must not be protected by sovereign immunity; (5) showing state action for most human rights allegations and (6) the case must not present a non-justiciable political question.

Thus, while aliens may not be required to demonstrate exhaustion of local remedies when bringing suit under the ATS rather than the TVPA, for instance, they still face a broad spectrum of obstacles that, as a practical matter, may render the courts no more accessible under the ATS than under the TVPA.

\[144\] It could be, for instance, that a supplemental reading leads to the conclusion that an exhaustion requirement should be applied to ATS claims of official torture and extrajudicial killing. See infra notes 178-180 and accompanying text.

\[145\] Trnavci, supra note 17, at 258. For a fuller enumeration and discussion of the obstacles that plaintiffs bringing claims under the TVPA and the ATS must surmount, see deLisle, supra note 79, at 515-42; Eric Engle, The Torture Victim’s Protection Act, the Alien Tort Claims Act, and Foucault’s Archaeology of Knowledge, 67 ALB. L. REV. 501, 504-13 (2003).

\[146\] For instance, the application of a forum non conveniens analysis to a plaintiff’s claim under the ATS calls for an inquiry into the availability and effectiveness of potential alternate fora. See Trnavci, supra note 17, at 259 ("U.S. courts will act upon claims based on the [ATS] only if a case cannot be pursued more effectively and fairly in another country that is more closely related to it. Otherwise, they will grant the objecting defendant’s motion for dismissal for forum non conveniens."). This inquiry, though certainly distinct from the one called for by an exhaustion requirement, covers some fundamentally similar ground in preventing the avoidance (and undermining) of more appropriate foreign fora. See deLisle, supra note 79, at 540-42 (characterizing forum non conveniens and exhaustion of remedies requirements as “[a]lternative forum-related issues” and discussing their impact on ATS and TVPA suits together); Haffke, supra note 98, at 1484-85 (noting that forum non conveniens and exhaustion of remedies are both oriented toward mitigating the same “injustice caused by adjudicating suits in an inappropriate forum”); see also Coliver et al., supra note 63, at 218 (“ATS cases involving foreign plaintiffs suing foreign defendants for harms occurring in a foreign country have the highest risk of being dismissed based on the forum non conveniens doctrine.”); Engle, supra note 145, at 506-07 (discussing the forum non conveniens procedural hurdle as it applies to ATS and TVPA claims).
Third, the actual disparity created by the potential circumvention of the TVPA's terms and requirements is further diminished when the actual effects of some of those requirements are analyzed. Take, for instance, the TVPA's exhaustion requirement, which was at issue in Enahoro: though it is certainly, in form, a barrier to courtroom access, the TVPA's legislative history indicates that, in practice, it should not prove to be particularly difficult to overcome. As the Senate Judiciary Committee noted, the fundamental nature of the claims covered by the TVPA urges that courts generally should treat the "initiation of litigation under this legislation [as] virtually prima facie evidence that the claimant has exhausted his or her remedies in the jurisdiction in which the torture occurred." Moreover, the Senate Judiciary Committee indicated that, under the TVPA, "[t]he ultimate burden of proof and persuasion on the issue of exhaustion of remedies... lies with the defendant": the defendant must "rais[e] the nonexhaustion of remedies as an affirmative defense and must show that domestic remedies exist that the claimant did not use," and the plaintiff is then able "to rebut [this defense] by showing that the local remedies were ineffective, unobtainable, unduly prolonged, inadequate, or obviously futile." Thus, as a general matter, satisfaction of the TVPA's exhaustion requirement does not present an especially substantial hurdle for either aliens or U.S. citizens in gaining access to U.S. federal courts, and the fact that the ATS might provide aliens with a potential end run around it is more a formal than functional benefit. This is certainly not to assume that this requirement may never carry actual consequence, or that there are not other terms or requirements of the

147 S. REP. NO. 102-249, at 9-10 (1991); see also id. ("Cases involving torture abroad which have been filed under the [ATS] show that torture victims bring suits in the United States against their alleged torturers only as a last resort. The committee believes that courts should approach cases brought under the proposed legislation with this assumption."); Cabiri v. Assasi-Gyimah, 921 F. Supp. 1189, 1197 n.6 (S.D.N.Y. 1996) ("[T]he legislative history to the [TVPA] indicates that the exhaustion requirement of § 2(b) was not intended to create a prohibitively stringent condition precedent to recovery under the statute." (quoting Xuncax v. Gramajo, 886 F. Supp. 162, 178 (D. Mass. 1995))).

148 S. REP. NO. 102-249, at 10; see also Jean v. Dorélien, 431 F.3d 776, 781 (11th Cir. 2005) (recognizing that the TVPA's exhaustion requirement is "an affirmative defense, requiring the defendant to bear the burden of proof," and noting that "[t]his burden of proof is substantial"); Doe v. Saravia, 348 F. Supp. 2d 1112, 1151 (E.D. Cal. 2004) (recognizing and finding in favor of the plaintiff's argument of futility in satisfying the TVPA's exhaustion requirement); Engle, supra note 145, at 505 ("In practice, the realities of lawless regimes indicate that the requirement of exhaustion of local remedies [under the TVPA] will not be problematic for litigants. This obstacle is more theoretical than practical." (footnote omitted)).
TVPA whose circumvention may yield a more substantive effect on the actual disparity of access between aliens and U.S. citizens. Rather, it is simply an indication that, especially in light of the many substantial hurdles that ATS claimants face, aliens do not necessarily enjoy greater actual access to U.S. federal courts than U.S. citizens do simply because they may not have to clear the additional hurdles of the TVPA. A supplemental reading, then, does not grant to aliens a disproportionate amount of access to U.S. federal courts, either in theory or in practice, and whatever disparity it may create between aliens and U.S. citizens in that regard is an appropriate reflection of the statutory scheme chosen by Congress.

2. Compliance with the Norms of International Law

Those criticizing the supplemental reading of the ATS/TVPA relationship may next argue that, even if the ability of aliens to potentially circumvent the TVPA does not afford them an undue amount of access to the courtroom, it does risk that their claims will not be handled properly once in the courtroom. In particular, they may argue that the TVPA represents a clear statement of Congress's intent that claims of official torture and extrajudicial killing be handled according to prevailing international norms, and also that it codifies the precise manner in which those international norms should be adopted and applied. The ATS, meanwhile, provides only a vague and malleable reference to the "law of nations," and does not itself indicate in what manner and to what extent that law of nations should, or must, be applied. A supplemental interpretation of the ATS/TVPA relationship, by giving aliens a way to sidestep the TVPA and its terms and requirements, risks allowing claims of official torture and extrajudicial killing to go forward in a manner potentially inconsistent with the international norms that the statute embraces, and thus may undermine the legitimacy and effect of Congress's determination in that regard. For instance, many courts that have adopted a supplemental interpretation have also declined to impose an exhaustion requirement on ATS claims of official torture and extrajudicial killing, despite the requirement's prevalence in the international community and the TVPA's clear congressional mandate that such claims warrant it.

149 See supra note 81 and accompanying text (providing such cases).
150 See supra note 99 (compiling sources that support this characterization of the exhaustion requirement).
As indicated by its legislative history, the TVPA's terms and requirements, as a general matter, were born from the context of international norms and codified Congress's intention that those norms be accepted and applied in a certain manner to claims of official torture and extrajudicial killing. The statute was enacted to "carry out the intent of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment," and it derived important aspects of its content, such as its definition of "torture," from the same international instrument. Additionally, the Senate Judiciary Committee indicated that the TVPA, and more particularly the TVPA's exhaustion requirement, "should be informed by general principles of international law," thereby suggesting a broader congressional desire to allow international norms to shape the way that U.S. federal courts treat claims of official torture and extrajudicial killing. Thus, it seems fair to characterize the TVPA as a representation of Congress's intent to accept and apply international norms in the domestic context with respect to such claims, at least to the extent that Congress saw fit.

That Congress may intend claims of official torture and extrajudicial killing to comply with certain norms of international law, however, does not argue against the adoption of a supplemental interpretation of the ATS/TVPA relationship, nor does it indicate that the adoption of a preclusive interpretation instead is necessary, appropriate, or preferable. If the concern is just that ATS claims of official torture and extrajudicial killing comply with norms of international law, then there is no need to read the TVPA to occupy the field of the ATS in order to address it. Rather, courts can simply construe such ATS claims in light of the international norms themselves without intervention by the TVPA. While nothing in the ATS expressly requires this method of analysis, construing ATS claims according to the norms of international law flows naturally from the plain language and pur-

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151 S. REP. NO. 102-249, at 3.
152 See id. at 6 ("The definition of torture in this bill includes word-for-word the understandings included by the Senate concerning the definition of torture in the Torture Convention when it ratified that convention on October 27, 1990 (Understandings 1 (a) and (b)).").
153 Id. at 10.
154 See, e.g., Henderson, supra note 125, at 200, 213 & n.183 (identifying distinctions between the definition of torture presented in the CAT and the definition that the United States adopted in ratifying the CAT and incorporated into the TVPA).
pose of the ATS and tracks the approach adopted in Sosa. That the cause of action under the ATS is based on federal common law does not interfere with this approach, as "there is little doubt that international law is incorporated into United States domestic law as a form of federal common law," and since "[i]nternational law is part of our law, . . . [it] must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending on it are duly presented for their determination." Accordingly, the recognition of a cause of action under the ATS, based on federal common law as derived from the "law of nations," does not risk undermining an intention that such a cause of action be informed by principles of international law. A proper supplemental interpretation of the ATS and the TVPA, which construes claims of official torture and extrajudicial killing according to the norms of international law, negates any such concern without unduly legislating a preclusive effect into the ATS/TVPA relationship.

If the concern, however, is not that claims of official torture and extrajudicial killing under the ATS may not comply with norms of international law themselves, but rather that such claims may not comply with Congress's precise determination and appropriation of those norms as expressed in the TVPA, then that concern would likely persist under a supplemental reading of the ATS/TVPA relationship. It could very well be a consequence of the supplemental interpretation that a court, in analyzing an ATS claim under international law, may find that certain norms manifest themselves differently in that international context than they do in the TVPA's domestic codification. This potential distinction in construction, however, much like the potential disparity in access discussed above, is not properly characterized as a "concern" to be avoided. Rather, it is an appropriate reflec-

155 See Enahoro v. Abubakar, 408 F.3d 877, 890 n.6 (7th Cir. 2005) (Cudahy, J., dissenting) ("Certainly in applying a statute like the [ATS], where liability is predicated on 'violation of the law of nations,' it would seem natural to honor the basic tenets of public international law.").
156 See Sosa v. Alvarez-Machain, 542 U.S. 692, 729, 733 (2004) (noting that "[f]or two centuries we have affirmed that the domestic law of the United States recognizes the law of nations" and determining that, under the ATS, "Alvarez's detention claim must be gauged against the current state of international law").
157 Casto, supra note 107, at 641.
158 The Paquete Habana, 175 U.S. 677, 700 (1900); see also Enahoro, 408 F.3d at 890 n.6 (Cudahy, J., dissenting) (citing past Supreme Court cases, including The Paquete Habana, in concluding that it is "well-established that, as a general proposition, U.S. law should incorporate and comport with international law where appropriate").
tion of the language, structure, and respective purposes of each statute, and it does not call for the adoption of a preclusive rather than supplemental interpretation of the ATS/TVPA relationship. The TVPA, by its plain language, does not focus on international law. Though its legislative history indicates the statute's relationship with this body of law, the statutory language itself only calls for actual reference to it once, in assessing a portion of the definition of "extrajudicial killing." The TVPA is not so much an incorporation of international norms as it is a domestic selection and codification of some of those norms in a very particular manner. It is a statement of the United States' stance toward particular acts of official torture and extrajudicial killing, and while it demonstrates a desire to comply with international law, it sets forth the terms of such compliance in a static and unilateral manner. Meanwhile, the ATS, by its plain language, speaks directly to the "law of nations" itself, not to any domestically codified version thereof. It operates to provide a judicial remedy to aliens for violations of that law of nations and the norms of the international community that form it. There is nothing in the statute to suggest that Congress, and not the international community, should be the arbiter of those norms, or that the United States' recognition of such norms through the ATS should be limited by forces other than the inherently international law of nations. The enactment of the TVPA as simply a note to the ATS does not suggest otherwise. If anything, it suggests that this domestic codification is meant to supplement, not preclude (as a direct amendment or repeal could), the law of nations already covered by the ATS.

Lastly, this understanding of the language and purpose of the ATS is reinforced by the Court's construction of the statute in Sosa, which indicates that the ATS is able to support causes of action that are not statutorily codified, but rather that are based on federal common law and derived from and informed by the law of nations as "gauged against the current state of international law." The Court's subsequent application of this analysis to the facts of Sosa does not indicate that Congress is or should be the sole authoritative source for this international law, nor does the Court's treatment of the TVPA indi-

159 See TVPA § 3(a), 28 U.S.C. § 1350 note (2000) (indicating that the definition of "extrajudicial killing" under the TVPA "does not include any such killing that, under international law, is lawfully carried out under the authority of a foreign nation").

160 Sosa, 542 U.S. at 733.

161 Id. at 733-38 (analyzing primarily international, as well as some domestic, sources to determine whether plaintiff has a common law cause of action).
cate that this must be otherwise with respect to ATS claims of official torture and extrajudicial killing.\textsuperscript{162}

Thus, the existence of a potential disparity between the judicial construction of international norms under the ATS and the congressional codification of them under the TVPA is an appropriate reflection of the distinct language, structure, and function of each statute. To seek to eliminate this potential disparity by adopting a preclusive reading of the statutes is to unduly disregard these inherent distinctions. The supplemental reading, on the other hand, uncouples the ATS from the TVPA in its determination of the law of nations, and thus gives the ATS the freedom to respond to and incorporate the norms of the international community as they develop. It allows those construing the statute to discern most accurately what the "law of nations" itself currently is, as opposed to what the domestic appropriation or dissection of it may be. Courts certainly could and should look for congressional insight and guidance in making the determination of what the current norms may be. Precluding the courts from making the determination themselves, however, as the "occupying the field" approach does, would unduly restrict the ATS's ability to operate responsively in the international context, as its language and purpose urge. That a supplemental reading of the ATS and the TVPA preserves this ability is not a concern, but rather a desirable practical consequence of its implementation.

3. Meaningfulness of the TVPA Under a Supplemental Reading

For those in favor of the "occupying the field" approach, the strongest and most fundamental objection to a supplemental reading of the ATS/TVPA relationship still remains: a supplemental reading, by affording aliens the choice between two distinct and potentially overlapping causes of action for claims of official torture and extrajudicial killing, risks rendering the TVPA and its terms and requirements effectively meaningless. While gutting the TVPA of its statutory significance and worth would raise legitimate concern, this is not an actual or necessary consequence of a supplemental reading of the ATS/TVPA relationship. To the contrary, the TVPA, as an express and defined grant of a cause of action, retains a very certain and sub-

\textsuperscript{162} See supra Part III.B.1 (arguing that the Court's treatment of the TVPA in \textit{Sosa} generally suggests an informing and reinforcing, not limiting or precluding, interaction between that statute and the courts' exercise of judicial discretion in analyzing common law causes of action under the ATS).
stantial meaning under a supplemental reading; there is no need to occupy the field of the ATS in order to preserve it. In addition, by interpreting the statutes supplementally, the ATS retains its own distinct meaning with respect to claims of official torture and extrajudicial killing as well, thereby allowing the ATS/TVPA statutory scheme to realize its overall meaning and value as fully as possible—an effect not achieved by a preclusive reading of the statutes.

First, regardless of how the relationship between the statutes is interpreted, the TVPA retains meaning relative to the ATS simply by providing an explicit cause of action to U.S. citizens for claims of torture and extrajudicial killing committed under actual or apparent authority, or color of law, of any foreign nation. The ATS does not support an equivalent cause of action, and thus the TVPA is certainly meaningful for those U.S. citizens who rely on it to provide them with an explicit right to sue. Where the TVPA risks losing meaning, however, is with respect to aliens bringing claims of official torture and extrajudicial killing—that is, the area of potential overlap between the ATS and the TVPA. Merely because the TVPA does not provide the exclusive basis for aliens to pursue such a cause of action, however, does not mean that the TVPA loses its worth and statutory effectiveness in that area. As stated in Part I.C, supra, the TVPA was enacted to provide an “unambiguous” cause of action for victims of torture and extrajudicial killing, regardless of citizenship, in order to ensure “that torturers and death squads will no longer have a safe haven in the United States.” Regardless of how the ATS is read, the TVPA will retain independent significance as a clear and stable declaration of U.S. policy in this regard, something that the ATS itself does not offer.

In addition to retaining this symbolic value, the TVPA, because of its lack of ambiguity relative to the ATS, will also continue to have significant practical value under a supplemental interpretation. As mentioned above, the TVPA effectuates U.S. policy with respect to official torture and extrajudicial killing, and this domestic codification of a cause of action puts to rest any doubt (as expressed in Tel-Oren, for instance) that aliens have at least some form of civil remedy for such vio-

163 See Enahoro, 408 F.3d at 888 (Cudahy, J., dissenting) (“The majority’s contention that the TVPA would be ‘meaningless’ if it did not preempt the [ATS] is ... incorrect—the TVPA still serves its purpose of filling a gap in the [ATS]’s coverage by providing a cause of action for certain human rights violations.”).
165 Id. at 3.
lations in U.S. federal courts. The ATS, on the other hand, does not by its own language provide a comparable degree of specificity, certainty, or stability. To start, the ATS itself does not contain any express mandate requiring that it be able to support federal common law causes of action. Though Sosa holds that the ATS has this ability to a limited extent, the Court made this determination with much caution and qualification, and over the pointed objection of three of its members. Based on this opinion, it is difficult to derive much lasting confidence or certainty about the ATS's ability in this regard. Furthermore, it is difficult to reliably predict which causes of action will be recognized under the ATS or anticipate what their exact scope and shape may be. These causes of action arise from judicial discernment of the abstract concept of "a tort... committed in violation of the law of nations," and thus their existence and contours are derived from mutable sources such as the norms of international law and the discretion of the courts. The ATS, by not explicitly specifying or defining the causes of action it supports, provides no substantive guidance in this determination.

The ATS offers no guarantee, then, that aliens seeking to bring a claim of official torture and extrajudicial killing will have a right to do so. The ATS itself does not require that such a cause of action exist, nor, necessarily, does the federal common law. While the Court in Sosa appears to affirm the status of official torture and extrajudicial killing as within the current substantive scope of the ATS, this is not a foregone conclusion based on that opinion. And even if there currently is such a cause of action under the ATS, there is nothing to ensure that the international community's norms with respect to official torture and extrajudicial killing, and thus ATS's coverage of them, will not change. Considering the uncertainty and instability presented

166 See Sosa, 542 U.S. at 739 (Scalia, J., concurring in part and concurring in the judgment) (declining, along with Chief Justice Rehnquist and Justice Thomas, to join the majority's "reservation of a discretionary power in the Federal Judiciary to create causes of action for the enforcement of international-law-based norms... because the judicial lawmaking role it invites would commit the Federal Judiciary to a task it is neither authorized nor suited to perform").


168 See supra note 116 and accompanying text.

169 See supra notes 63, 72, 78, 125, and accompanying text.

170 See, e.g., Richard Henry Seamon, U.S. Torture as a Tort, 87 RUTGERS L.J. 715, 764 n.207 (2006) ("The [Sosa] Court's discussion of torture was... arguably dicta. Its status as dicta is important because it leaves open a plausible argument that the ATS does not, after all, provide a broad cause of action for torture claims.").
by the ATS, the TVPA's unambiguous and detailed cause of action for claims of official torture and extrajudicial killing retains a very significant practical value and meaning for those aliens, present or future, who have been victims of such acts. It secures for them a right to sue, defines the scope of that right, and specifies how they need to pursue it. Given the choice between the ambiguous and discretionary quality of the ATS, and the unambiguous and well-defined quality of the TVPA, it seems as though many plaintiffs would opt to sue under the TVPA rather than undertake the complexity and uncertainty of the ATS. At the least, it is certainly not inevitable that plaintiffs would flock to the ATS and allow the TVPA to descend into disuse and obscurity simply because of the potential overlap between the two.

Thus, adopting a construction of the ATS that overlaps with part of the TVPA's scope does not disgorge the TVPA of its intended statutory value as an unambiguous and stable cause of action for claims of official torture and extrajudicial killing, available to aliens and U.S. citizens alike. Indeed, the meaningfulness of such clarity should not be undervalued in an area of law ripe with as much ambiguity and potential for change as that surrounding the ATS. Furthermore, a supplemental reading preserves the meaning of the TVPA in a manner that does not unnecessarily diminish the meaning of the ATS. Under that reading, the TVPA is able to effectuate U.S. policy with respect to claims of official torture and extrajudicial killing, and the ATS, at the same time, is able to track and reflect the norms of the international community with respect to such claims, just as it does with respect to all potential causes of action it may support. Thus, a supplemental reading of the ATS/TVPA relationship preserves the meaning and value of both statutes while at the same time creating a dynamic between them that appropriately captures their structural relationship as well as the distinctions between them. A preclusive reading of the statutes, meanwhile, diminishes the scope of the ATS unnecessarily and without clear congressional mandate, disregards the statutory distinctions between the ATS and TVPA, and squanders the particular value that a cause of action for claims of official torture and extrajudicial killing under the ATS may bring to the statutory scheme.

The TVPA, then, would not be rendered effectively meaningless by a supplemental reading of the ATS/TVPA relationship. To the contrary, the TVPA would retain significant value both as a theoretical and practical matter, and the net value of the ATS/TVPA relationship would be realized more fully than it would under a preclusive reading of the statutes. This outcome does not give rise to concern.
Thus, the consequences of a supplemental interpretation of the ATS/TVPA relationship do not argue against its legitimacy, as those supporting a preclusive reading of the relationship may suggest. Instead, a supplemental reading retains the meaning and effectiveness of the ATS/TVPA statutory scheme as fully as possible, recognizes and respects the nature and intent of each statute, and does not require courts to make any undue legislative assumptions—none of which a preclusive reading accomplishes. Furthermore, as demonstrated above, reading the statutes supplementally rather than preclusively adheres more closely to the discernible legislative intent underlying the statutes and to the spirit of the Supreme Court’s decision in Sosa. While reading the TVPA to occupy the field of the ATS has an admitted rationale and appeal, it nonetheless is an inappropriate and unnecessary interpretation for courts to apply without a clear manifestation of legislative will to that effect. As such a manifestation is lacking, a supplemental reading of the ATS/TVPA relationship is the preferable interpretation for courts to adopt.

IV. REVISITING THE PREVAILING PRECEDENT

Though the conclusion reached by this Comment generally aligns with the prevailing precedent that has developed in the courts since Kadic, this does not necessarily mean that the prevailing precedent offers a supplemental interpretation of the statutes that is beyond improvement. The prevailing precedent, for instance, has properly recognized that the ATS is capable of supporting its own claims of official torture and extrajudicial killing. It has been less consistent, however, in indicating if and when those ATS claims should be informed by the more specific terms and requirements of the TVPA. In their handling of ATS claims, courts have tended to import the TVPA’s statute of limitations, not import its exhaustion of remedies requirement, and sometimes import its definitions of “torture” and “extrajudicial killing.”

It is not surprising that, given the prevailing precedent’s piecemeal and seemingly inconsistent importation of the TVPA into the ATS, an approach like the Seventh Circuit’s would emerge as appealing: preclusion simply takes importation to its full and logical extreme and, in so doing, standardizes and simplifies what is an other-

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\[171\] See supra notes 79-81 and accompanying text (outlining these trends and compiling cases).
wise muddied statutory interaction. Though the Seventh Circuit’s approach is ultimately improper, its exaggerated nature helps bring to the surface both how a proper supplemental interpretation of the ATS/TVPA relationship ought to be implemented, and how the prevailing precedent, by occasionally “supplementing” the ATS with certain pieces of the TVPA, may not be following it.

A proper supplemental interpretation of the ATS/TVPA relationship begins with the recognition that the causes of action offered under each statute, though potentially overlapping, are fundamentally distinct from and independent of one another. As discussed in Part III.A, the TVPA provides a cause of action that is well defined and tailored toward a particular set of violations; it is an unambiguous and self-contained piece of domestic law. The ATS, on the other hand, provides a cause of action to a certain class of individuals for an open-ended set of violations; it is ambiguous, undefined, and heavily reliant on international norms for its substantive scope. The statutes, then, are supplemental in the sense that, if their distinct purposes and functions align with respect to a given claim, they will end up overlapping in the cause of action for official torture and extrajudicial killing that they each provide. They should not, however, be considered supplemental in the sense that the terms and requirements of one can be presumptively assumed to apply to and fill out the other; this understanding of “supplemental,” though tempting in its efficiency, would be inappropriate for the same reasons as a preclusive reading of the statutes is, albeit more subtly so.

This general understanding of the interaction between the statutes, in turn, should inform how the statutes are permitted to interact in more particular respects. Namely, the Sosa Court’s conclusion that causes of action under the ATS must be “gauged against the current state of international law”¹⁷² should be applied as fully as possible to the assessment of those causes of action. For instance, under Sosa, the existence and scope of federal common law claims that are actionable under the ATS are derived from international norms; such a claim will only be recognized if it can be shown to have no “less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted.”¹⁷³ It seems appropriate, by extension, that courts derive the definitions for these claims from the same international sources of authority that made the claims “sufficiently

¹⁷³ Id. at 732.
definite to support a cause of action," rather than simply importing definitions directly from a domestic statute (such as the TVPA) with no further analysis. Granted, Congress may have intended the definitions provided in the TVPA to reflect international norms, and thus this distinction in methodology may not amount, in practice, to much more than a formality at the present time given the likely overlap between the current international definitions and the TVPA ones. That said, these definitions may also diverge in potentially significant respects, either at present or in the future. Allowing the ATS to track the development of international norms, rather than being bound strictly by the language of the TVPA, would correspond to the Supreme Court's general construction of the ATS in Sosa and the amount of judicial discretion it authorizes, and would also properly reinforce the distinction—be it philosophical or practical—between the causes of action that each statute provides.

This same logic can be applied to the TVPA's exhaustion of remedies requirement. Most courts, just as they have recognized the ability of the ATS and the TVPA to provide distinct causes of action, have correspondingly declined to impose the TVPA's exhaustion requirement on ATS claims. While this threshold determination is

174 Id.

175 See S. REP. NO. 102-249, at 6 (1991) (noting that "[t]he TVPA incorporates into U.S. law the definition of extrajudicial killing found in customary international law[, which] . . . conforms with that found in the Geneva Convention for the Amelioration of the Wounded and Sick in Armed Forces in the Field (1949)," and that "the definition of torture in this bill includes word-for-word the understandings included by the Senate concerning the definition of torture in the Torture Convention when it ratified that convention on October 27, 1990 (Understandings 1 (a) and (b))" (footnotes omitted)).

176 For instance, the Eleventh Circuit, in addressing a claim of official torture brought under the ATS, looked to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which courts often look to when "seek[ing] to define torture in international law." Aldana v. Del Monte Fresh Produce, N.A., Inc., 416 F.3d 1242, 1251 (11th Cir. 2005). Most federal courts have looked to this convention to provide a definition of torture for ATS purposes. Chavez v. Carranza, 413 F. Supp. 2d 891, 899-900 (W.D. Tenn. 2005). In adopting this definition, the Eleventh Circuit noted that it differed from the definition provided in the TVPA and hypothesized that "[i]n some case [sic], the different definitions might actually make a difference." Aldana, 416 F.3d at 1252; see also supra note 154 (indicating distinctions between the TVPA definition of torture and the definition put forth in the CAT itself).

177 See supra notes 68-70, 160-162, and accompanying text.

178 See supra note 81 and accompanying text. For a criticism of this prevailing approach, and an argument for the application of the TVPA's exhaustion requirement to all ATS claims, see Casto, supra note 107, at 660-62.
correct under a proper supplemental reading of the statutes, this is not to say that, under such a reading, a claim under the ATS will never have to satisfy an exhaustion requirement such as the TVPA's. The question of whether and how an ATS claimant must demonstrate exhaustion of remedies will ultimately depend on the court's assessment of whether the relevant norms of the international community call for the cause of action in question to be qualified by such a requirement. Even though the ATS does not expressly incorporate such a requirement, the "law of nations" incorporated by the ATS and controlling the analysis may.\footnote{\textit{Compare} Enahoro v. Abubakar, 408 F.3d 877, 890 n.6 (7th Cir. 2005) (Cudahy, J., dissenting) (noting that "[e]xhaustion of remedies requirements are a well-established feature of international human rights law" and compiling treatises and international sources to support that conclusion), \textit{cert. denied}, 546 U.S. 1175 (2006), \textit{and supra} note 99 (compiling sources that discuss the general acceptance of exhaustion of remedies as an international norm), \textit{with} Sarei v. Rio Tinto, PLC, 456 F.3d 1069, 1094 n.27 (9th Cir. 2006) (engaging in a thorough treatment of whether the ATS should be read to impose an exhaustion requirement and noting that, "[t]hough reading exhaustion into the [ATS] would be consistent with international law norms, failing to read exhaustion into the [ATS] would not violate those norms"), \textit{withdrawn and superseded in part on reh'g}, 487 F.3d 1193 (9th Cir. 2007), \textit{reh'g en banc granted}, 499 F.3d 923 (9th Cir. 2007), \textit{and id.} at 1096 (questioning whether international exhaustion requirements are properly applied in the context of "hybrid" ATS litigation).} This approach, in addition to appropriately reflecting the nature of the ATS/TVPA relationship and the inherent distinctions between the two statutes, also corresponds with the Supreme Court's particular statement in \textit{Sosa} that it "would certainly consider [an exhaustion] requirement in an \textit{appropriate} case."\footnote{542 U.S. 692, 733 n.21 (2004) (emphasis added).} The TVPA may be used to help inform the courts' determinations of what an "appropriate" case may be—for instance, by pointing the courts in the direction of the relevant international norms that will control the analysis, or by reflecting Congress's insight on the matter. The mere fact that the TVPA requires a certain showing of exhaustion of remedies, however, should not amount to conclusive authority that the ATS should (or should not) require the same. Thus, a supplemental reading of the interaction between the ATS and the TVPA is not necessarily incompatible with the application of some sort of exhaustion requirement to claims brought under the ATS. Such a reading, however, does argue against reflexively importing this exhaustion requirement from the TVPA rather than allowing the international norms already informing the overall ATS analysis to guide this particular determination as well.
The approach applied above to the definitions and the exhaustion requirement of the TVPA may not likewise control the analysis of whether the TVPA’s statute of limitations should be applied to claims brought under the ATS, as there appears to be controlling judicial authority that limits the courts’ discretion on the matter. The Supreme Court has established that, when a federal statute fails to provide a statute of limitations period for causes of action that it creates, courts should fill that gap by “look[ing] to the state statute most closely analogous to the federal Act in need.”\footnote{N. Star Steel Co. v. Thomas, 515 U.S. 29, 34 (1995) (internal quotation marks and citations omitted).} Courts, however, should look to the most closely analogous federal, not state, statute in cases when “a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking.”\footnote{Id. at 35 (internal quotation marks and citations omitted).} The determination of whether the TVPA constitutes the “most closely analogous statute” to the ATS for the purposes of this test is beyond the scope of this particular discussion.\footnote{Given the clear connection between the statutes and the foreign policy implications that they involve, most courts have held that the TVPA does constitute the “most closely analogous” statute to the ATS for the purposes of construing the proper statute of limitations for ATS claims. See supra note 79 and accompanying text (compiling cases that demonstrate how courts have handled this issue).} What is important to glean from this discussion, however, is the more fundamental recognition that, if such definitive authority exists to guide the courts’ resolution of this ambiguity in the ATS/TVPA relationship, it must be followed. A supplemental interpretation of the ATS and TVPA, after all, is a method to guide courts in their exercise of discretion. It does not require or suggest that when binding authority, be it legislative or judicial, exists to settle a matter, it should not be respected. Thus, should it be determined that the TVPA is the statute most closely analogous to the ATS under this standard, then courts, in turn, should heed the Supreme Court and apply the TVPA’s statute of limitations to the ATS—regardless of whether the courts otherwise read the statutes supplementally. It could be argued that this “most closely analogous statute” analysis should be extended and applied to other elements of the TVPA, such as the exhaustion requirement. This argument has its appeal and may prove to be a fair interpretation of that analysis. That said, such an interpretation does seem to call for an unnecessary extension of a lim-
ited standard and an unwarranted departure from the scope of direct authority set out by the Supreme Court. As such, it seems more appropriate to construe those other provisions of the TVPA in accordance with the overall supplemental scheme of interpretation that is otherwise applied to the two statutes, while permitting the TVPA (if deemed to be "most closely analogous") to inform the ATS with regard to its unspecified statute of limitations.

In short, then, courts can properly implement a supplemental reading of the ATS and the TVPA by, whenever the matter is within their discretion, choosing not to rely authoritatively on the TVPA to fill out the ambiguities and contours of the ATS, but rather using the general method of analysis authorized under Sosa to do so. This is not to say that the two statutes may not overlap or lead to the same results—they simply should achieve this uniformity through their respective independent analyses, not by "supplementing" the terms of one another. Nor is this to say that, under a proper supplemental interpretation, it is impermissible for the statutes to interact with and inform one another in certain circumstances. Given the manner in which international norms have informed the TVPA, courts certainly may look to that statute as a reference, where appropriate, to help guide their assessment of the international norms that control in the ATS analysis. They should not, however, rely on the TVPA itself as binding authority in this analysis. By exercising their discretion in this manner, courts can afford the ATS and the TVPA the freedom to coexist without deviating from the realm of judicial discretion authorized by Sosa and without causing the statutes to bind or rewrite one another to an extent not otherwise required by the Supreme Court or manifestly indicated by Congress. Granted, this approach has its difficulties: namely, requiring the courts to ascertain international norms

184 For instance, it seems fair to assume from the Supreme Court’s statement in North Star Steel Co. v. Thomas that, “like any other civil cause of action considered by the Supreme Court, an [ATS] suit must have a limitations period,” Sarei, 456 F.3d at 1094 n.28, leaving only the question of what that limitations period should be. Id. The Court’s limited ruling in North Star Steel, however, does not likewise answer the “question of whether exhaustion should be imported into the [ATS] in the first instance.” Id. Due to this distinction, the Ninth Circuit found no inconsistency between its decision to refuse to import the TVPA exhaustion requirement across the board into the ATS and its prior decision to apply the TVPA’s statute of limitations to ATS claims. Id.; see also Papa v. United States, 281 F.3d 1004, 1011-13 (9th Cir. 2002) (outlining the reasoning for importing the TVPA’s statute of limitations requirement into the ATS).

185 See supra notes 151-154 and accompanying text (discussing the influence of international norms on Congress’s determination of the TVPA’s terms and requirements).
creates a much more involved and labor-intensive analysis than simply importing the requirements from the TVPA would, and asking domestic courts to make determinations based on international law inherently carries a general risk of confusion or misconstruction. Nonetheless, the ATS explicitly puts the courts in this position by extending a federal judicial remedy to aliens based on “violation[s] . . . of the law of nations,”86 and the TVPA, as existing supplementally with the ATS, should not be assumed to alter this position except where explicitly indicated.187 This outcome most accurately reflects the ATS/TVPA relationship as it is best understood through the available authority. Should Congress find this outcome inconsistent with its intentions, then it can change the legislation upon which this outcome is based. That decision, however, as indicated in Sosa, is best left to the legislature, not the judiciary.

CONCLUSION

Throughout the history of the ATS and its development in the courts, there has been, by necessity, a good deal of feeling around in the dark. The interpretation of the proper relationship between the ATS and the TVPA is no exception. Neither Congress nor the Supreme Court has spoken definitively or directly to the issue, leaving the federal courts largely to figure it out for themselves—a familiar position for courts that have been confronted with claims brought under §1350 over the past thirty years in the modern context of human rights. This Comment has attempted, as those courts have, to feel out the proper shape of the interaction between the ATS and the TVPA based on the little definitive light that has been cast upon it. According to what sparse authority can be gleaned from the intimations of Congress and the Supreme Court, it is most appropriate for courts to interpret this interaction between the two statutes as fundamentally supplemental rather than preclusive. The Seventh Circuit’s adoption of a preclusive reading of the statutes, though reasonable and appealing in some respects, nonetheless takes a degree of liberty

187 The Supreme Court, for its part, has demonstrated a willingness, both in Sosa and in other decisions, to assume the risks associated with judicial utilization of international law in certain domestic contexts. See Coliver et al., supra note 63, at 183, 189 (citing cases and indicating that “over the past few years, the Supreme Court has increasingly referred to international law in deciding domestic cases”).
in its interpretation that, in light of the discernible authority controlling the matter, is ultimately unnecessary and unwarranted.

That said, the approach taken by the Seventh Circuit toward the interaction between the ATS and the TVPA is certainly plausible, and indicates how much ambiguity continues to permeate this area of the law. By adopting a supplemental interpretation of the relationship between these statutes and applying that interpretation as consistently as possible to all levels of their interaction with one another, courts can clarify this one particular ambiguity in a way that is most faithful to the statutes and their discernible purposes. Resolving this ambiguity within the courts, however, does not diminish the need for further authoritative guidance. Regardless of how courts choose to interpret the interaction between the ATS and the TVPA—supplementally, preclusively, or otherwise—there is an inherent, unsettling need for some degree of judicial legislation on the courts' part to reach that result. Even if Congress approves of the precedent currently prevailing in most circuits, a clear statement of intent to that effect would free the courts from this undue burden and allow them to proceed more comfortably and confidently within the realm of interpretation. More fundamentally, such guidance would provide the general field of law that has grown up around the ATS with a much-needed foundation of stability and legitimacy upon which to stand. The debate raised by the Enahoro decision, and the legitimate arguments that can be made on both sides of it, offer just one indication of this basic need for clarity. For, while courts and scholars may differ over their interpretations of the ATS, the TVPA, and the proper interaction between the two, most would likely agree on one point, at least: a little bit more light in the room would be nice.