

THE LAW OF NATIONS IN THE UNITED STATES CONSTITUTION AFTER THE CASES SOSA V. ALVAREZ AND KIOBEL V. ROYAL DUTCH PETROLEUM CO.*

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Recibido: 30.01.2014 / Aceptado: 20.02.2014

Abstract: American scholars discuss the meaning of the Law of Nations in the United States Constitution. On the one side, the Modern view interprets the Law of Nations as customary international law. On the other side, the Traditional view considers the Law of Nations as a dead concept that only Congress can bring back to life through its legislation. The case *Sosa v. Alvarez* defined the Law of Nations in the Alien Tort Statute as customs sufficiently precise to be recognized as law among civilized nations. The recent case *Kiobel et al. v. Royal Dutch Petroleum Co. et al.* confirmed the *Sosa v. Alvarez*'s definition of the Law of Nations, but rebutted some extraterritorial application of the Alien Tort Statute. The purpose of this paper is to reconsider the meaning of the Law of Nations in the United States Constitution after *Sosa v. Alvarez* and *Kiobel et al. v. Royal Dutch Petroleum Co. et al.* This paper argues that American courts should extend the *Sosa v. Alvarez*'s definition of the Law of Nations to the United States constitutional context.

Key words: United States Constitution, Law of Nations, *Sosa v. Alvarez*, *Kiobel et al. v. Royal Dutch Petroleum Co. et al.*, Modern view, Traditional view, Alien Tort Statute.

Estratto: La dottrina Americana discute il significato della "Law of Nations" all'interno della Costituzione Americana. Da un lato, la dottrina cosiddetta "moderna" interpreta la "Law of Nations" in qualità di consuetudini di diritto internazionale. Dall'altro, la dottrina cosiddetta "tradizionale" considera la "Law of Nations" quale lettera morta, che solo il Congresso Americano potrebbe riportare in vita attraverso un atto legislativo. Il caso *Sosa v. Alvarez* ha definito la "Law of Nations" nell'Alien Tort Statute quale consuetudine sufficientemente precisa da essere riconosciuta in qualità di legge dalle nazioni civili del mondo. Il recente caso *Kiobel et al. v. Royal Dutch Petroleum Co. et al.* ha da un lato confermato la definizione della Law of Nations del caso *Sosa v. Alvarez*, ma dall'altro rigettato l'applicazione extraterritoriale dell'Alien Tort Statute. Lo scopo di questo articolo è di riconsiderare il significato della "Law of Nations" nella Costituzione Americana dopo i casi *Sosa v. Alvarez* e *Kiobel et al. v. Royal Dutch Petroleum Co. et al.* Questo articolo argomenta che le corti Americane dovrebbero estendere la definizione della "Law of Nations", indicata nel caso *Sosa v. Alvarez*, al contesto della Costituzione Americana.

Parole chiave: Costituzione Americana, Law of Nations, *Sosa v. Alvarez*, *Kiobel et al. v. Royal Dutch Petroleum Co. et al.*, dottrina moderna, dottrina tradizionale, Alien Tort Statute.

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* This article is based in part on the author's 2012 LL.M. paper, "Shall Jus Cogens Rights be Part of the United States Constitution after the case *Sosa v. Alvarez*?" written at Harvard Law School, in Cambridge, MA, USA.

I. Introduction

1. The term “Law of Nations” appears in two main United States laws: Article I Section VIII Clause X of the United States Constitution and the Alien Tort Statute.

Article I Section VIII Clause X of the United States Constitution states:

“The Congress shall have Power [..t]o define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations”¹.

The Alien Tort Statute states:

“The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States”².

2. The meaning of the Law of Nations in the Constitution is controversial among scholars³. American scholars are divided in two main schools of Constitutional interpretation. The Traditional view, also named the Originalist or Textualist view, believes that the Law of Nations no longer has a meaning in the United States Constitution as it referred to the law between the civilized nations of 1787⁴. The Modern view, also named the Pragmatic or Activist view, believes that the Law of Nations means customary international law in both the Alien Tort Statute and the United States Constitution⁵. In the Alien Tort Statute’s context, the Supreme Court clarified that the current definition of the Law of Nations includes recognized international customs⁶.

3. This essay proposes to apply the Alien Tort Statute’s definition of the Law of Nations to the Constitution. It analyzes the Law of Nations’ meaning in the United States Constitution in light of the Supreme Court’s decisions in *Sosa v. Alvarez*⁷ and *Kiobel et al. v. Royal Dutch Petroleum Co. et al.*⁸, the current leading cases concerning the United States’ interpretation of the Law of Nations in the Alien Tort Statute. First, this essay will analyze the cases *Sosa v. Alvarez* and *Kiobel et al. v. Royal Dutch Petroleum Co. et al.*, detailing the impact on the interpretation of the Law of Nations. Second, this essay revisits the Constitutional debate concerning the meaning of the Law of Nations in light of the cases *Sosa v. Alvarez* and *Kiobel et al. v. Royal Dutch Petroleum Co. et al.* This essay concludes, in favor of the Modern view, and against the Traditional view, that the Supreme Court should extend the definition of the Law of Nations found in *Sosa v. Alvarez* to the meaning of the Law of Nations in the Constitution. The Judiciary should recognize that the Law of Nations includes *Jus Cogens* rights⁹.

¹ U.S. Constitution art. I, § 8.

² Alien’s Action for Tort, 28 U.S.C.A. § 1350, 25 June 1948.

³ See Traditional view A. J. BELLIA JR & BRADFORD R. CLARK, “The Alien Tort Statute and the Law of Nations”, *University of Chicago Law Review*, n. 78/2, 2011; J. L. GOLDSMITH & C. A. BRADLEY, “Customary International Law as Federal Common Law: A Critique of the Modern Position”, *Harvard Law Review*, n. 110, 1997; C. A. BRADLEY, “The Alien Tort Statute and Article III”, *Virginia Journal of International Law*, n. 42, 2002. See modern views D. M. GOLOVE & D. J. HULSEBOSCH, “A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition”, *New York University Law Review*, n. 85, 2010; J. STEWART, “The Status of the Early American Law of Nations”, *Vanderbilt Law Review*, n. 42, 1989.

⁴ See BELLIA, BRADLEY, GOLDSMITH, *supra* note 3.

⁵ See G. NEUMAN, “International Law as a Resource in Constitutional Interpretation”, *Harvard Journal of Law & Public Policy*, n. 30, 2006. See also J. D. VAN DER VYVER, “Prosecuting Offenses Against the Law of Nations in the United States”, *Emory International Law Review*, n. 20, 2006; see also GOLOVE, STEWART *supra* note 3.

⁶ U.S. Supreme Court 29 June 2004, *Sosa v. Alvarez*, 542 U.S. 692, 124 S.Ct. 2739.

⁷ *Id.*

⁸ U.S. Supreme Court 17 April 2013, *Kiobel v. Royal Dutch Petroleum Co.* 133 S.Ct. 1659.

⁹ *Jus Cogens* are the most fundamental human rights principles. “The International Court of Justice has sometimes referred to [*Jus Cogens* Rights as] ‘fundamental principles’, (or ‘cardinal’ or ‘intransgressible’ rules) as a category differentiated from ordinary custom or treaty norms” L. F. DAMROSCH, L. HENKIN, S. D. MURPHY, H. SMIT, *International Law Cases and Materials*, West 5th ed., pp. 105, 2009.

II. *Sosa v. Alvarez*

4. This section analyzes the *Sosa v. Alvarez*'s interpretation of the Law of Nations in the Alien Tort Statute's context. In *Sosa v. Alvarez* one of the main issues addressed by the Supreme Court was whether or not the Alien Tort Statute referred to customary international law throughout the Law of Nations clause. United States authorities suspected Alvarez, a Mexican citizen, to have murdered and tortured a United States Drug Enforcement (hereinafter USDEA) agent. The USDEA engaged Sosa, another Mexican citizen, to capture Alvarez. Sosa kidnapped Alvarez and handed him over to the USDEA. Alvarez sued Sosa for violation of the Law of Nations. According to Alvarez, courts must interpret the Law of Nations as a fundamental human right not to be kidnapped and detained¹⁰.

5. The Supreme Court unanimously held kidnapping is not part of customary international law and therefore Sosa did not violate the Law of Nations under the Alien Tort Statute. However, Justice Scalia wrote a separate partly concurring, partly concurring with the judgment opinion, joined by Chief Justice Rehnquist and Justice Thomas, and Justice Breyer also wrote a concurring opinion¹¹. Justice Ginsburg also wrote a concurring opinion, which does not focus on the Law of Nations. The Supreme Court's sophisticated reasoning can be broken down in the following sections: The Historical Meaning of the Law of Nations; The Alien Tort Statute as Only Jurisdictional Act; The Limited Use of the Common Law after *Eire R. Co. v. Tompkins*; and The Role of the Judiciary after *Eire R. Co. v. Tompkins*.

1) The Historical Meaning of the Law of Nations

The Supreme Court analyzed the historical meaning of the Law of Nations. "[.T]he law of nations [.. is 'a]ncient usage among civilized nations, beginning centuries ago, and gradually ripening into a rule of international law' *The Paquete Habana*, 175 U.S. 677, 686, 20 S.Ct. 290, 44 L.Ed. 320 (1900)"¹². The United States has always showed its commitment to follow the Law of Nations, as binding international law, even before enacting the Alien Tort Statute. Then, Congress enacted the Alien Tort Statute to further implement international treaties and the Law of Nations in the United States.

2) The Alien Tort Statute as Only Jurisdictional Act

Congress intended the Alien Tort Statute to be jurisdictional. The Alien Tort Statute is not meant to create causes of actions. Instead "[.t]he 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"¹³ Therefore, the common law, not the Alien Tort Statute, provides for the legal causes of actions which establish personal liability, on a case by case analysis, for the violations of the Law of Nations.

3) The Limited Use of Common Law after *Eire R. Co. v. Tompkins*

The common law's perception changed with the time. While the founding fathers believed that the common law was the application of fundamental legal principles, the common law is currently considered to be the judges' creation. After the decision in *Eire R. Co. v. Tompkins*¹⁴, Federal common law no longer exists and Federal courts cannot create common law anymore. Therefore, the use of common law to create causes of actions is limited. However, as the Supreme Court pointed out, "[.E]rie did not in terms bar any judicial recognition of new substantive rules, no matter what the circumstances, and post-*Erie* understanding has identified limited enclaves in which federal courts may derive some substantive law in a common law way. For two centuries we have affirmed that the domestic law of the

¹⁰ U.S. Supreme Court 29 June 2004, *Sosa v. Alvarez*, 542 U.S. 692, 124 S.Ct. 2739.

¹¹ *Id.*

¹² *Id.* at 715.

¹³ *Id.* at 724.

¹⁴ *Eire R. Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 818, 82 L. Ed. 1188 (1938).

United States recognizes the law of nations. [...]It would take some explaining to say now that federal courts must avert their gaze entirely from any international norm intended to protect individuals¹⁵.

4) The Role of the Judiciary after *Eire R. Co. v. Tompkins*

Unless Congress clearly defines the Law of Nations by specifying the Alien Tort Statute's causes of action, the Judiciary has the duty to cautiously determine whether or not a custom is part of the Law of Nations on a case-by-case analysis. The Supreme Court held "[a] claim rests on a tort in violation of international law and is actionable under the ATS where it: (1) rests on a norm of international character accepted by the civilized world; and (2) is defined with specificity comparable to those violations of international law that existed at the time the ATS was enacted. With regard to the second prong, the *Sosa* Court noted that it considered only three offenses to have been recognized in the eighteenth-century as violations of the law of nations: offenses against ambassadors, violations of safe conduct, and individual actions arising out of prize captures and piracy¹⁶. The Judiciary must interpret the Law of Nations as intended in our modern time and identify those violations comparable to the eighteenth-century ones. Kidnapping is not comparable to the offenses against ambassadors, violations of conducts and piracy crimes of the eighteenth-century. It is not heinous and specific enough to constitute a violation of the Law of Nations as there is no established international law practice considering kidnapping as a human rights violation. However, the door is open to other customary international norms that may be comparable to the eighteenth-century violations¹⁷.

6. According to the partly concurring, partly concurring with the judgment opinion of Justices Scalia, Thomas and Chief Justice Rehnquist, Congress is the only institution entitled to determine the meaning of the Law of Nations clause. As long as Congress does not define it, the Law of Nations does not have any meaning. The Law of Nations was originally intended to be Federal common law which nowadays no longer exists. Congressional silence concerning the Law of Nations simply reiterates that Congress is not willing to give any meaning to Article I Section VIII Clause X of the Constitution. The Judiciary does not have the authority to consider customary international law as part of American law without Congressional approval¹⁸.

7. Justice Breyer also wrote a concurring opinion. He argued that American courts should be willing to interpret the Alien Tort Statute as a Universal Jurisdiction statute and allow alien vs. alien claims for human rights violations¹⁹. Universal Jurisdiction is one of the most important grounds of modern international law as it emphasizes that *Jus Cogens* rights are common values in different national legal systems. Under Universal Jurisdiction the place where a person committed the crime, the victim and perpetrator's nationality are irrelevant to determine the jurisdiction of a court. Every court has jurisdiction on the sole basis that the perpetrator violated fundamental rights²⁰. According to Justice Breyer,

¹⁵ U.S. Supreme Court 29 June 2004, *Sosa v. Alvarez*, 542 U.S. 692, 124 S.Ct. 2739. 2004, p. 729-730.

¹⁶ G. V. MONKEN, "The *Sosa* Standard: What Does It Mean for Future ATS Litigation?", *Pepperdine Law Review*, n. 33, 2006, pp. 479.

¹⁷ *Id.*, see also U.S. Supreme Court 29 June 2004, *Sosa v. Alvarez*, 542 U.S. 692, 124 S.Ct. 2739. 2004, p. 697-739.

¹⁸ U.S. Supreme Court 29 June 2004, *Sosa v. Alvarez*, 542 U.S. 692, 124 S.Ct. 2739. 2004, p. 739-760. See *Constitutional Relevance of Foreign Court Decisions*, FREE REPUBLIC (27 FEB. 2005), <http://www.freerepublic.com/focus/news/1352357/posts> [hereinafter Scalia-Breyer Debate Report]; M. T. MORLEY, "The Law of Nations and the Offenses Clause of the Constitution: A Defense of Federalism", *Yale Law Journal*, n.112, 2002, pp. 109.

¹⁹ U.S. Supreme Court 29 June 2004, *Sosa v. Alvarez*, 542 U.S. 692, 124 S.Ct. 2739. 2004, p. 760-763.

²⁰ See R. KENNETH, "The Case for Universal Jurisdiction", *Foreign Affairs*, n. 80/5, 2001, pp. 150; *The Princeton Principles on Universal Jurisdiction*, (Princeton University Program in Law and Public Affairs, 2001), available at http://www.law.depaul.edu/centers_institutes/ihrli/downloads/Princeton%20Principles.pdf; see also the debate concerning criminal vs. civil Universal Jurisdiction liability A. BIANCHI, "International Decision: Ferrini v. Federal Republic of Germany: Italian Court of Cassation, March 11, 2004: Italian Court of Cassation ruling on immunity from suit for damages for deportation and forced labor during World War II", *The American Journal of International Law*, n. 99, 2005, pp. 242; P. DI CIACCIO, "A Torturer's Manifesto? Impunity through Immunity in *Jones v The Kingdom of Saudi Arabia*", *Sydney Law Review*, n. 30, 2008, p. 551.

the United States should be open to such new international legal order that establishes human rights as fundamental ground among civilized nations²¹.

8. Therefore, the Supreme Court maintains that the Judiciary must verify on a case-by-case analysis whether customary international norms are applicable in American adjudication. However, the concurring in the judgment opinion of Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, underlines the contrast between customary international law and the separation of powers. Instead, Justice Breyer believes that American adjudication should be open to human rights and Universal Jurisdiction.

III. *Kiobel v. Royal Dutch Petroleum Co. et al.*

9. This section analyzes the recent decision *Kiobel et al. v. Royal Dutch Petroleum Co. et al.* as it pertains to the Law of Nations' meaning. *Kiobel et al. v. Royal Dutch Petroleum Co. et al.* confirmed the *Sosa v. Alvarez*'s interpretation of the Law of Nations, but presented two different tests for the extraterritorial application of the Alien Tort Statute. The Supreme Court unanimously concurred in the judgment. The majority opinion, composed of Justices Roberts, Scalia, Alito, Thomas and Kennedy, based its reasoning on the presumption against extraterritoriality and limited the extraterritorial application of the Alien Tort Statute to a few cases. Instead, Justices Breyer, Ginsburg, Sotomayor and Kagan based their reasoning on international human rights law and allowed for the extraterritorial application of the Alien Tort Statute to a variety of cases²².

10. In *Kiobel et al. v. Royal Dutch Petroleum Co. et al.*, the plaintiffs, Nigerian nationals residing in the United States, accused the defendant, Royal Dutch Petroleum Co., a corporation incorporated in the Netherlands and the United Kingdom with a subsidiary in Nigeria, of violating the Law of Nations. All alleged violations occurred in Nigeria and included “[..](1) extrajudicial killings; (2) crimes against humanity; (3) torture and cruel treatment; (4) arbitrary arrest and detention; (5) violations of the rights to life, liberty, security, and association; (6) forced exile; and (7) property destruction.”²³ The defendant owns an office in the United States and its shares are traded in the New York Stock Exchange²⁴.

11. The nine Justices unanimously reaffirmed the *Sosa v. Alvarez*'s decision and interpretation of the Law of Nations. According to all Justices, the Law of Nations is the collection of customs sufficiently recognized by the international community and comparable to “[..v]iolation of safe conducts, infringement of the rights of ambassadors, and piracy.”²⁵ As it did in the *Sosa v. Alvarez*'s decision, the majority left open several questions. It analyzed neither whether the alleged violations are customs recognized by the international community, nor whether the Alien Tort Statute allows aliens vs. aliens suits²⁶. Instead, the Breyer's opinion concurring in the judgment, went deep enough to specify that a) torture and genocide are violations of the Law of Nations as “[..c]ertainly today's pirates include torturers and perpetrators of genocide”²⁷; and b) the Alien Tort Statute allowed aliens vs. aliens claims²⁸.

12. The issue that divided the Court was not the definition of the Law of Nations, but rather whether the Alien Tort Statute was applicable extraterritorially. The majority and the opinion concurring in the judgment provided two different tests to determine whether the Alien Tort Statute is applicable

²¹ U.S. Supreme Court 29 June 2004, *Sosa v. Alvarez*, 542 U.S. 692, 124 S.Ct. 2739. 2004, p. 760-763.

²² U.S. Supreme Court 17 April 2013, *Kiobel v. Royal Dutch Petroleum Co.* 133 S.Ct. 1659.

²³ *Id.* at 1663.

²⁴ U.S. Supreme Court 17 April 2013, *Kiobel v. Royal Dutch Petroleum Co.* 133 S.Ct. 1659.

²⁵ *Id.* at 1666; U.S. Supreme Court 29 June 2004, *Sosa v. Alvarez*, 542 U.S. 692, 124 S.Ct. 2739. 2004, pp. 715.

²⁶ *Id.* at 1662-1669.

²⁷ *Id.* at 1672.

²⁸ *Id.* at 1670-1678.

extraterritorially. The majority proposed the Presumption Against Extraterritoriality Test, while Justice Breyer's opinion proposed the Minimal Presence Test.

1) Presumption Against Extraterritoriality Test

According to the majority, the *Morrison v. National Australia Bank Ltd.*'s²⁹ presumption against extraterritoriality calls for judicial restraint and thereafter the Alien Tort Statute is applicable extraterritorially only in the following two cases.

- a) Congress enacts a law with a cause of action clearly stating that human rights norms are applicable extraterritorially³⁰; or
- b) The conduct arose in international waters, outside the territory of any foreign country³¹.

The presumption against extraterritoriality prevents the Judiciary from condemning foreign citizens when the conduct arose in a foreign country that would have legitimate jurisdiction over the case. Only Congress may clarify when a particular conduct is so outrageous to rebut the presumption against extraterritoriality and impose United States' decisions over foreign conducts. Instead, the Judiciary could condemn crimes occurred in international waters. Like piracy, such conducts do not occur within the jurisdiction of any particular foreign country and do not interfere with United States' foreign policy. Therefore, conducts occurred in international waters do not require legislative intervention to rebut the presumption against extraterritoriality. In the case at hand, the defendant committed the alleged violations in Nigeria. Therefore, the presumption against extraterritoriality applied and the majority dismissed the entire complaint³². Justice Kennedy, the swing vote, wrote a concurring opinion underlying that in other human rights cases the presumption against extraterritoriality may be interpreted in different ways and the majority "[..]was careful to leave open a number of significant questions regarding the reach and interpretation of the Alien Tort Statute."³³

2) Minimal Presence Test

According to Justice Breyer's opinion concurring with the judgment, the presumption against extraterritoriality is not applicable to the case at hand. Instead, he proposes a different test to determine whether the Alien Tort Statute is applicable extraterritorially. "[..Justice Breyer] would find jurisdiction under this statute where (1) the alleged tort occurs on American soil, [or] (2) the defendant is an American national, or (3) the defendant's conduct substantially and adversely affects an important American national interest, and that includes a distinct interest in preventing the United States from becoming a safe harbor [..]or a torturer or other common enemy of mankind"³⁴. In the case at hand, the defendant's presence in the United States did not meet the minimal presence required by Justice Breyer's test³⁵.

Therefore, *Kiobel et al. v. Royal Dutch Petroleum Co. et al.* did not overrule the *Sosa v. Alvarez*'s holding. Under the Alien Tort Statutes, the Law of Nations refers to rules recognized as customs among civilized nations. The Judiciary must determine on a case-by-case analysis which rules are specific enough to be considered as international customs. However, the Supreme Court diverged on a different issue that was not at stake in *Sosa v. Alvarez*: whether the Alien Tort Statute is applicable extraterritorially. The majority applied the Presumption Against Extraterritoriality Test, while the opinion concurring in the judgment applied the Minimal Presence Test³⁶.

²⁹ *Morrison v. National Australia Bank Ltd.*, 561 U.S., 130 S.Ct. 2869, 177 L.Ed.2d 535, (2010).

³⁰ See for example, the Torture Victim Protection Act of 1991, H.R. 2092, 102th Cong., § 2 (1991).

³¹ U.S. Supreme Court 17 April 2013, *Kiobel v. Royal Dutch Petroleum Co.* 133 S.Ct. 1659. 2013, pp. 1662-1669.

³² *Id.*

³³ *Id.* at 1669.

³⁴ *Id.* at 1671.

³⁵ *Id.* at 1670-1678.

³⁶ U.S. Supreme Court 17 April 2013, *Kiobel v. Royal Dutch Petroleum Co.* 133 S.Ct. 1659.

IV. The Law of Nations Meaning in the Alien Tort Statute

13. In *Sosa v. Alvarez*, the Supreme Court reiterated that Federal courts could not remain silent and wait for Congress to define the Law of Nations.

“[..]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. [..F]or two centuries we have affirmed that the domestic law of the United States recognizes the Law of Nations³⁷. [..]It would take some explaining to say now that federal courts must avert their gaze entirely from any international norm intended to protect individuals. [..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”³⁸.

14. Similarly to the case *The Paquete Habana*³⁹, the Supreme Court left an open question: what are the international customs that are specific enough to be part of the Law of Nations? Scholars are now debating where to draw the line. This question is very old. Since the beginning of international law, many scholars debated how many countries, how many people and how many times a rule has to be used to be considered an international law custom. This is not a domestic, but rather an international issue, often resolved by international courts⁴⁰. This section argues that the Law of Nations in the United States Constitution includes Jus Cogens rights.

15. International law is divided into two main parts: treaties and the international law of nations, also named customary law. A treaty is a written agreement between two or more countries that want to establish a binding international law obligation. Customary international law is a collection of “[..i]nternational custom[s], [..which are] evidence of a general practice accepted as law”⁴¹. An international rule is binding when it is officially recognized as an international obligation. For example, in the United States an international treaty is binding when it is signed/ratified. Although customary international law may eventually be codified in an international law restatement, most customs are binding despite the existence of a written agreement between different countries. A custom is binding when it is recognized as established practice among civilized nations. How a custom becomes binding is controversial. There are many open questions: how many countries have to adopt a practice in order to define it as binding, who is entitled to recognize a custom as binding, whether or not a national court or Government can recognize a custom as binding and whether or not an international tribunal or an international organization may recognize it as binding. The number of binding customs has increased over the last centuries. In 1787, when the founding fathers wrote the United States Constitution, customary international law included few rules such as the ones against piracy. However, current customary international law includes many norms such as immunity, international humanitarian law, refugee law and many others⁴².

³⁷ “See, e.g., *Sabbatino*, 376 U.S., at 423, 84 S.Ct. 923 ([I]t is, of course, true that United States courts apply international law as a part of our own in appropriate circumstances’); *The Paquete Habana*, 175 U.S., at 700, 20 S.Ct. 290 (‘International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination’); *The Nereide*, 9 Cranch 388, 423, 3 L.Ed. 769 (1815) (Marshall, C.J.) ([T]he Court is bound by the law of nations which is a part of the law of the land’); see also *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641, 101 S.Ct. 2061, 68 L.Ed.2d 500 (1981) (recognizing that ‘international disputes implicating ... our relations with foreign nations’ are one of the ‘narrow areas’ in which ‘federal common law’ continues to exist”) as cited by U.S. Supreme Court 29 June 2004, *Sosa v. Alvarez*, 542 U.S. 692, 124 S.Ct. 2739. 2004, p. 729-30.

³⁸ U.S. Supreme Court 29 June 2004, *Sosa v. Alvarez*, 542 U.S. 692, 124 S.Ct. 2739. 2004, p. 729-733.

³⁹ U.S. Supreme Court January 8 1900, *The Paquete Habana*, 175 U.S. 677, 20 S. Ct. 290, 44 L. Ed. 320.

⁴⁰ See A. BIANCHI, “Fear’s Legal Dimension Counterterrorism and Human Rights”, in *Liber Amicorum Vera Gowlland International Law and the Quest for its Implementation / Le droit international et la quête de sa mise en oeuvre: Liber Amicorum Vera Gowlland-Debbas*, Martinus Nijhoff Publishers, 2010; A. M. SLAUGHTER, “Judicial Globalization”, *Virginia Journal of International Law*, n. 40, 1999-2000, p. 1103.

⁴¹ Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1055, U.S.T.S. 993, art. 38.

⁴² L. HENKIN & S. CLEVELAND & L. R. HELFER R. & G. L. NEUMAN. & D. F. ORENTLICHER *Human Rights*, Foundation Press, 2nd ed. 2009, pp.193-205; see DAMROSCH, *supra* note 9 pp. 105-112.

16. Customary international law also includes the most fundamental and essential human rights named *Jus Cogens*. Nowadays, it is well recognized that *Jus Cogens* violations include crimes against humanity, war crimes, genocide and torture. However, some international judges and scholars include among *Jus Cogens* other rules such as the non-refoulement principle (under which country A cannot expel a person to country B where his/her right to life or freedom may be in danger⁴³). The list of *Jus Cogens* rights is open as several tribunals around the world are recognizing an increasing number of rights to be part of *Jus Cogens*. Every time a human rights violation is so heinous to be considered a *Jus Cogens* right, such right become more binding all over the world⁴⁴. While it is not clear whether the whole customary international law is specific enough to be comparable to the eighteen century Law of Nations violations, *Jus Cogens* rights are without doubts part of the Law of Nations for the following reasons⁴⁵.

17. First, while both treaties and general customary international law are derogable, *Jus Cogens* rights can never be derogated as they are absolute⁴⁶. As Justice Breyer argued in *Kiobel et al. v. Royal Dutch Petroleum Co. et al.*, the perpetrator of *Jus Cogens* violations is a current pirate:

“That is why we asked, in *Sosa*, who are today’s pirates? Certainly today’s pirates include torturers and perpetrators of genocide. And today, like the pirates of old, they are ‘fair game’ where they are found. Like those pirates, they are ‘common enemies of all mankind and all nations have an equal interest in their apprehension and punishment.’”⁴⁷

18. Second, after the Second World War different countries recognized the rule *nulla poena sine lege* (no ex post facto law), according to which no one should be held liable for committing a crime in the absence of a law, as not applicable to *Jus Cogens* rights violations. Under such assumption, the Nuremberg and Tokyo tribunals convicted the Nazis for the violation of *Jus Cogens* rights. The Nuremberg and Tokyo tribunals established that *Jus Cogens* rights go beyond national constitutions and laws. Although under German and Japanese laws citizens had an obligation to commit heinous crimes, under *Jus Cogens* rights such practice is illegal. Therefore, the Nazis could not justify their conducts as legal⁴⁸.

19. Therefore, although it is not clear whether the whole customary international law would be comparable to the eighteen century Law of Nations violations, it is clear that *Jus Cogens* rights are the current Law of Nations as the most absolute and widely recognized human rights in the world.

V. Apply the Alien Tort Statute Definition of the Law of Nations to the United States Constitution

⁴³ See U.N. Refugee Agency, Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1953 Convention relating to the Status of Refugees and its 1967 Protocol, 26 June 2007, 189 U.N.T.S. 150, 176 (1954); available at <http://www.unhcr.org/refworld/pdfid/45f17a1a4.pdf>

⁴⁴ See DAMROSCH, *supra* note 9 pp. 105-112, HENKIN, *supra* note 42.

⁴⁵ See for example P. J. STEPHENS, “A Categorical Approach to Human Rights Claims: *Jus Cogens* as a Limitation on Enforcement?”, *Wisconsin International Law Journal*, n. 22/2, 2004, pp. 245.

⁴⁶ See DAMROSCH, *supra* note 9 pp. 105-112, HENKIN, *supra* note 42.

⁴⁷ U.S. Supreme Court 17 April 2013, *Kiobel v. Royal Dutch Petroleum Co.* 133 S.Ct, 1659. 2013, p. 1672.

⁴⁸ “At the Nuremberg Tribunals the ex post facto argument regarding the three primary charges (the commission of crimes against peace, war crimes, and crimes against humanity) was rejected in all cases. The Tribunal maintained that: ‘[t]o assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighboring states without warning is obviously untrue, for in such circumstances the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished’. Needless to say, the Nuremberg Tribunals have had an impact on international criminal law. With regard to the principle *nullum crimen sine lege*, although it was recognized at this time as a general principle of criminal law and a principle of justice, the Tribunal diluted its rigidity. Additionally, the Nuremberg Tribunal influenced the drafting of the human rights conventions with regard to the article addressing the principle *nullum crimen sine lege*” A. MOKHTAR, “Nullum Crimen, Nulla Poena Sine Lege: Aspects and Prospects”, *Statute Law Review*, n. 26/1, 2005, pp. 52-53; see also H. KELSEN, “Collective and Individual Responsibility in International Law with Particular Regard to the Punishment of War Criminals”, *California Law Review*, n. 31/5, 1943, pp. 530; VAN DER VYVER, *supra* note 5, 487-488.

20. *Sosa v. Alvarez and Kiobel et al. v. Royal Dutch Petroleum Co. et al.* did not take into account the following issue: whether the Judiciary can extend the Alien Tort Statute's interpretation of the Law of Nations to the United States Constitutional context. This section argues that the interpretation of the Law of Nations in the Alien Tort Statute's context should be extended to the United States Constitution as the founding fathers wanted to establish a constitutional system that would allow the United States to meet its international legal obligations. The United States must comply with human rights international obligations that are now worldwide considered part of the Law of Nations. The founding fathers included the Law of Nations in the Constitution because they wanted to comply with customary international law: a body of rules that was always intended to change with the time and already included some fundamental rights in 1787.

21. International law requires every country to comply with its international obligations. However, each country can choose how to enforce international law within its own domestic soil. Every country may determine whether to enforce human rights norms at a constitutional or statutory level⁴⁹. In other words, international law does not require the United States to include customary international law or treaty law in a particular domestic body of law as long as the United States complies with its obligations by enforcing international law on its domestic soil⁵⁰.

22. The United States enforces customary international law by incorporating it at three different legal levels: 1) the Law of Nations as constitutional clause; 2) the Law of Nations as Alien Tort Statute; and 3) the Law of Nations as common law⁵¹. At a constitutional level, "[.C]ongress shall have Power to"⁵² define the offenses against the Law of Nations in order to ensure a consistent application of customary international law on United States' soil. Particular emphasis is made on the verb "shall" which according to the Modern approach means "can". Congress can, but has no obligation to, define the offenses against the Law of Nations⁵³. "According to Jordan Paust, Article I, Section 8, Clause 10 merely afforded to Congress 'a concurrent power to define and punish offenses against international law, not an exclusive power at the expense of the treaty power and that of the judiciary, which are also constitutionally based'⁵⁴. An original draft of the concerned provision in The Judiciary Act referred to 'offenses that shall be cognizable under the authority of the United States and defined by the laws of the same'⁵⁵. Therefore, the fact that Congress has not defined the Law of Nations yet does not necessarily mean that the Law of Nations is inapplicable in the United States. At a statutory level, the Alien Tort Statute protects aliens from Law of Nations' violations. At a common law level, States protect citizens from Law of Nations' violations.

23. Both the founding fathers and the Judiciary have always been perfectly aware of international laws' crucial role in American adjudication. The founding fathers wanted the United States to obtain international recognition and acquire the status of a "civilized Nation". American courts must take into consideration such historical analysis in the interpretation of the United States Constitution, including the Law of Nations⁵⁶. As Professor Golove argues, one of the main purposes of the United States Constitution was to seek European recognition through adherence to the European international legal system. When the founding fathers drafted the Constitution, the European international legal system was based on the Law of Nations. European recognition was key to obtain loans, war alliance and to succeed in the

⁴⁹ See NEUMAN, *supra* note 5.

⁵⁰ *Id.*

⁵¹ See GOLOVE, STEWART *supra* note 3.

⁵² U.S. Constitution art. I, § 8.

⁵³ See VAN DER VYVER, *supra* note 5.

⁵⁴ J. J. PAUST, "Congress and Genocide: They're Not Going to Get Away With It", *Michigan Journal of International Law*, n. 11, 1989, pp. 103, as cited by VAN DER VYVER, *supra* note 5 at 480.

⁵⁵ VAN DER VYVER, *supra* note 5 at 480; see also C. WARREN, "New Light on the History of the Federal Judiciary Act of 1789", *Harvard Law Review*, n. 37, 1923, pp. 73, as cited by VAN DER VYVER, *supra* note 5 at 480.

⁵⁶ See STEWART *supra* note 3.

revolution⁵⁷. Therefore, the framers wrote the Declaration of Independence looking at Europe as their primary audience. They wanted to establish a civilized Nation at the same level of the European powers. While the Declaration of Independence was sufficient for *de jure* recognition, the framers wrote the Constitution to obtain a *de facto* stable recognition in Europe⁵⁸. “The Constitution drafted in 1787 served the dual purpose of signaling to Europe that the Americans were prepared to act like an international state and capable of building the foundations for a polity capable of sustaining that performance. The republican government that the Constitution created was, of course, quite different from those in the European monarchies. Nevertheless, the fundamental idea [..w]as legible enough to those monarchies and enabled the text to carry at least some of the burden of proof⁵⁹ .

As Justice Ireland said in 1794

“The Common Law of England, from which our own is derived, fully recognizes the principles of the Law of Nations, and applies them in all cases falling under its jurisdiction, where the nature of the subject requires it...In whatever manner the Law of Nations is violated, it is subject to national not personal complaint. [..E]ven the Legislature cannot rightfully control the law of nations, but if it passes any law on such subjects is bound by the dictates of moral duty to the rest of the world in no instance to transgress them⁶⁰ .

As Chief Justice Jay explained in 1790

“[w]e had become a nation—as such, we were responsible to others for the observance of the Laws of Nations [..which is p]art of the laws of this, and of every other civilized nation⁶¹ .

24. For these reasons, the framers included in the Constitution some clauses to ensure that the United States would comply with international law obligations: the Law of Nations clause, to ensure United States’ compliance with customary international law, Article I section X⁶² , Article II section II⁶³ , Article III section II⁶⁴ and Article VI⁶⁵ to ensure United States compliance’ with treaty obligations. Therefore, the founding fathers adhered to the Law of Nations. They interpreted the Law of Nations as a legal obligation that the United States had to enforce within its national system and which could not be modified through national law⁶⁶. Such supremacy derives from the concept of natural law: a law that is always enforceable to protect the right of the people. Already in the Roman Empire, many scholars developed the concept of natural law and natural rights as the law belonging to every person in the world: both Romans and foreigners. Natural law was in contrast with *Jus Civile*, civil law, applicable only to the civil Roman people⁶⁷. Later on, the enlightened movement revisited the concept of natural law. They interpreted natural rights as the rights of every human being to be free from coercion⁶⁸. At the end of the XVIII century, Locke, Rousseau, Hume and Paine already recognized the importance of fundamental rights⁶⁹. Both the American founding

⁵⁷ GOLOVE, *supra* note 3, at 942-944.

⁵⁸ *Id.*

⁵⁹ *Id.* at 943.

⁶⁰ See STEWART *supra* note 3 at 825-827; Charge to the Grand Jury for the District of South Carolina, 12 May 1794, in *Gazette of the United States*, Philadelphia 1794, as cited by STEWART *supra* note 3 at 825-827.

⁶¹ See STEWART *supra* note 3 at 825; Charge to the Grand Jury for the District of New York, 4 Apr 1790, in *New Hampshire Gazette*, Portsmouth 1790, as cited by STEWART *supra* note 3 at 825.

⁶² U.S. Constitution art. I, § 10 “No State shall enter into any Treaty, Alliance, or Confederation [..]”.

⁶³ U.S. Constitution art. II, § 2 “The President [..s]hall have Power, by and with the Advice and Consent of the Senate, to make Treaties [..]”.

⁶⁴ U.S. Constitution art. III, § 2 “The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority [..]”.

⁶⁵ U.S. Constitution art. VI “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land [..]”.

⁶⁶ See STEWART, GOLOVE *supra* note 3.

⁶⁷ SCHERILLO-DELL’ORO, *Manuale di storia del diritto romano*, Cisalpino, Milano 1988.

⁶⁸ See STEWART *supra* note 3 at 824.

⁶⁹ See J. LOCKE, D. HUME, J.-J. ROUSSEAU & S. E. BARKER, *Social Contract: Essay by Locke, Hume, and Rousseau*, Oxford University Press 1962; T. PAINE, *Rights of Man*, The Heritage Press New York 1961, pp. 180-200.

fathers and the National Assembly of France acknowledged such views in the “United States Declaration of Independence”⁷⁰ and the “Declaration of the Rights of Man and of Citizens”⁷¹. The United States Declaration of Independence incorporated natural law as one of the Revolution’s core principle.

“When in the Course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature’s God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation. We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.--That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed [..]”⁷².

25. Therefore, already in the XVIII century the Law of Nations included natural rights: supreme rights that every country has to guarantee. The people have a right to overthrow the Government that does not recognize natural rights. The founding fathers believed in the existence of unalienable rights that go beyond a positive legal definition. They were also aware that the Law of Nations is a term of art with no crystalized definition. The meaning of the Law of Nations changes with the evolution of international law and society⁷³. Currently, the international community defines such supreme fundamental rights as *Jus Cogens*⁷⁴. As reflected by the text of the Declaration of Independence, the framers already believed in the idea of *Jus Cogens* even though such rights gained international recognition only after World War II. In fact, only the Nuremberg and Tokyo trials clarified that fundamental human rights have always been part of the Law of Nations. Therefore, the Nazis could be held liable for violating human rights norms even though German and Japanese national positive law allowed and, in certain cases, imposed the violation of such fundamental rights⁷⁵.

26. Despite the founding fathers’ intent to comply with international law, the United States has often failed to enforce international law obligations through Federal statutes or common law⁷⁶. Federal statutes are crystalized laws that are not able to capture the increasing importance of human rights norms and the evolution of the jurisprudential dialogue between domestic and international courts all over the world. Common law is the law of State judges who are representing the values of fifty different States and are not able to express the voice of one country in the international arena. Therefore, applying the Alien Tort Statute’s evolutionary interpretation of the Law of Nations to the United States Constitution would be appropriate to implement customary international law in the United States. Instead, referring to the XVIII century customary international law would be against the framers’ intent to comply with international law, as current customary international law is different from the XVIII century Law of Nations. Now that courts worldwide recognize *Jus Cogens* rights as binding, United States judges should consider them as part of the United States Constitution⁷⁷. Interpreting the Law of Nations Clause to include *Jus Cogens* rights would be in compliance with both international obligations and the founding fathers’ intent. An evolutionary interpretation is particularly relevant to human rights because several countries, including the United States, are increasingly taking them into account⁷⁸. For

⁷⁰ The U.S. Declaration of Independence, 1776.

⁷¹ The Declaration of the Rights of Man and of the Citizen, France 1789.

⁷² The U.S. Declaration of Independence, 1776.

⁷³ See STEWART *supra* note 3; see also NEUMAN *supra* note 5.

⁷⁴ See the *Jus Cogens*’ definition *supra* note 9.

⁷⁵ See VAN DER VYVER, *supra* note 5; see also MOKHTAR and KELSEN *supra* note 48.

⁷⁶ See, for example, P. J. HONIGSBERG, E. CHERMERINSKY, *Our Nation Unhinged: The Human Consequences of the War on Terror*, University of California Press, 2009.

⁷⁷ See for example D. M. GOLOVE, “Leaving Customary International Law Where It Is: Goldsmith and Posner’s The Limits of International Law”, *Georgia Journal of International and Comparative Law*, n. 34, 2006.

⁷⁸ See S. BREYER, *Active Liberty: Interpreting Our Democratic Constitution*, Alfred A. Knopf ed., 2005; see also W. DODGE, “After Sosa: The Future of Customary International Law in the United States”, *Willamette Journal of International Law and Dispute Resolution* n. 17, 2009.

example, in *Hamdan v. Rumsfeld*⁷⁹ the United States Supreme Court held the United States Government violated both international human rights norms and the Geneva Convention. Both international and domestic courts are involved in a constant dialogue concerning the definition and the implementation of human rights norms that are recognized as international customs. United States courts contribute to such dialogue and are increasingly recognizing fundamental human rights as binding norms⁸⁰. Among human rights, *Jus Cogens* are the most fundamental and recognized norms worldwide. An evolutionary interpretation of the Constitution, inclined to recognize the increasing importance of *Jus Cogens* norms, would be appropriate to both follow the dialogue with foreign/international courts and meet the United States' international obligations. Interpreting the Law of Nations Clause as a door that judges may open to customary international law on a case-by-case analysis would implement international law in State and Federal courts⁸¹. Every time a statute or an Executive order would be inconsistent with *Jus Cogens* rights, American courts would simply declare it unconstitutional. The United States would guarantee compliance with the most binding and fundamental international law obligations, such as *Jus Cogens* rights, through the Constitution.

27. Therefore, the United States Constitution refers to *Jus Cogens* rights through the Law of Nations clause. Applying the Alien Tort Statute's evolutionary interpretation of the Law of Nations to the United States Constitution would be in compliance with the historical meaning of the Constitution, the founding fathers' intent, the United States' international obligations and the increasing importance of human rights norms everywhere in the world.

VI. Traditional Argument's Deficiencies

28. According to the Traditional view, the Law of Nations no longer has a meaning in United States Constitutional law. This section argues against the Traditional argument by analyzing its substantial and procedural deficiencies.

1. Historical Interpretation's Deficiencies

29. According to the Traditional view, the Law of Nations is not part of United States law for the following two main reasons:

1) Article I Section VIII Clause X of the United States Constitution states:

“The Congress shall have Power [...] to define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations”⁸²; and

2) Article III and IV of the United States Constitution do not mention the Law of Nations⁸³.

⁷⁹ U.S. Supreme Court, 29 June 2006, *Hamdan v. Rumsfeld*, 548 U.S. 557, 126 S. Ct. 2749.

⁸⁰ See BIANCHI, SLAUGHTER, *supra* note 40.

⁸¹ U.S. Supreme Court 29 June 2004, *Sosa v. Alvarez*, 542 U.S. 692, 124 S.Ct. 2739. 2004.

⁸² U.S. Constitution art. I, § 8.

⁸³ U.S. Constitution art. III, § 2, cl. 1 “The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States;--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.”; U.S. Constitution art. IV, § 1 “Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.”

30. According to the Traditional view, the Law of Nations is nothing more than common law incorporated into State law unless Congress defines it as Federal law through a specific statute. The founding fathers granted Federal power over foreign policy and introduced the Law of Nations clause in the Constitution (Article I Section VIII Clause X) to supervise the States' use of international law. The Constitution grants Congress the power to define the Law of Nations as Federal law. The founding fathers chose the Legislative power to ensure a uniform interpretation of the Law of Nations in the United States. They did not intend to grant power to the Judiciary over a sensitive issue such as international relations⁸⁴. In fact, there is no mention of the Law of Nations in either Article III Section II Clause I⁸⁵ or Article IV Section I⁸⁶ of the Constitution, which define the power of Federal courts over United States law. The Constitution does not "[...]grant the federal courts a general law of nations jurisdiction"⁸⁷. Therefore, according to the Traditional view, absent Congressional action, imposing an alternative judicial interpretation of the Law of Nations would represent a clear violation of the Constitution and of the founding fathers' intent. Federal courts, including the Supreme Court, are not entitled to define the Law of Nations, as Federal judges are neither able to create common law, nor establish Federal American laws. The Legislative has to establish a body of law in order to be applicable in America. Any other body of law is foreign and is not applicable on American soil⁸⁸.

31. According to the Traditional view, human rights are not part of the American Constitution and are not part of American law unless Congress specifically ratifies them⁸⁹. The fact that other foreign countries consider human rights as binding everywhere in the world is irrelevant to the American adjudication as foreign countries or foreign judges are not entitled to enforce a law in the United States⁹⁰. No American judge can enforce a law in the United States based on the simple fact that other countries have already successfully used such law. Imposing a law created by a judge to the United States would be anti-democratic as such legal document would be established by only one branch of the Government instead of three. The founding fathers wrote the Constitution to limit each branch of the Government: the Judiciary has the limited duty to apply American law, the Legislative has the duty to establish American law and the Executive has the duty to execute American law. According to the Traditional view, there is no foreign or human rights law in the American Constitution. The founding fathers did not intend to include human rights in American adjudication and the Judiciary cannot include them without Congressional approval⁹¹.

32. The Traditional view bases such reasoning on two negative inferences: 1) The Law of Nations is not part of Federal law as Articles III and IV do not mention it; and 2) Article I Section VIII Clause X establishes that Congress shall define the Law of Nations. Therefore, the Law of Nations is not part of United States law unless Congress defines it⁹². This approach is incorrect for the following reasons.

33. First, the Traditional view relies on negative inferences. The founding fathers decided to mention the Law of Nations only once in the entire Constitution. They wrote the term Law of Nations only in Article I Section VIII Clause X, which is designed to establish Congressional Federal power. The term Law of Nations never appears in any article of the Constitution as related to State law or State courts. If the founding fathers wanted to establish the Law of Nations as State law, they would have written that States, instead of Congress, have the power to define the Law of Nations. The founding fathers wanted to transfer all international/foreign relations to the Federal level, as they believed one country

⁸⁴ See GOLDSMITH, *supra* note 3.

⁸⁵ U.S. Constitution art. III, § 2, cl. 1, *see supra* note 83.

⁸⁶ U.S. Constitution art. IV, § 1, *see supra* note 83.

⁸⁷ BRADLEY, *supra* note 3 at 598.

⁸⁸ See Scalia opinion in U.S. Supreme Court 29 June 2004, *Sosa v. Alvarez*, 542 U.S. 692, 124 S.Ct. 2739, pp. 739-760; GOLDSMITH *supra* note 3.

⁸⁹ See A. SCALIA, *A Matter of Interpretation*, Princeton University Press ed., 1998.

⁹⁰ See Scalia-Breyer Debate Report, *supra* note 18.

⁹¹ *Id.*

⁹² BELLIA, GOLDSMITH, BRADLEY *supra* note 3.

should have one voice on foreign policy⁹³. Therefore, they divided the power to define American foreign policy and the Law of Nations between the President and Congress. It would have made little sense to keep the Law of Nations' adjudication in State courts, but transfer all international and foreign relations to the Federal level. Although the Constitution does not establish the role of the Judiciary over the interpretation of the Law of Nations, as explained in *Marbury v. Madison*⁹⁴, the Judiciary should interpret the Constitution to ensure individual liberties against the elected powers⁹⁵.

34. Second, the Traditional view may encourage State courts to dictate their interpretation of the Law of Nations over Federal courts. As Professor Vazquez⁹⁶ points out, customary international law is made out of practice. Worldwide holdings shape and define customary international law case after case. Therefore, if the United States Constitution would truly delegate the power to define customary international law to State courts, they would be able to impose their definition of customary international law on Federal courts⁹⁷. Most importantly, the State definition of customary international law would represent the United States definition of customary international law in the international arena, thereby giving no chance for Federal courts to intervene. "The ability of States to incorporate customary international law as State law would thus interfere with the federal government's conduct of foreign relations by hindering the ability to establish norms that it champions, and potentially, by contributing toward the establishment of norms that it does not favor, and which could ultimately bind it"⁹⁸. Such interpretation of the Constitution would be against the founding fathers' intent to establish a Nation with one voice in the international arena and one Supreme Court entitled to give the last word on State courts' decisions.

35. Professor Jessup made a very similar argument after the United States Supreme Court's decision *Erie R. Co. v. Tompkins*⁹⁹. In this case, the Supreme Court held that the Federal Government and Federal courts could not create common law. Federal courts have the limited role to apply Federal law, while State courts have common law jurisdiction. According to Professor Jessup, *Erie R. Co. v. Tompkins* is not applicable to customary international law because that would mean imposing State views concerning international law on the Federal Government¹⁰⁰. Both the Supreme Court and the academia embraced Professor Jessup's view. The Supreme Court ruled in *Banco Nacional de Cuba v. Sabbatino*:

"Professor Philip C. Jessup, now a judge of the International Court of Justice, recognized the potential dangers were Erie extended to legal problems affecting international relations. He cautioned that rules of international law should not be left to divergent and perhaps parochial [S]tate interpretations"¹⁰¹.

In addition, the Restatement of Foreign Law states:

"(1) International law and international agreements of the United States are law of the United States and supreme over the law of the several States.

(2) Cases arising under international law or international agreements of the United States are within the Judicial Power of the United States and, subject to Constitutional and statutory limitations and requirements of justiciability, are within the jurisdiction of the federal courts.

⁹³ See STEWART *supra* note 3 at 836-837.

⁹⁴ U.S. Supreme Court Court 24 February 1803, *Marbury v. Madison*, 1 Cranch 137, 5 U.S. 137, 1803 WL 893 (U.S. Dist. Col.), 2 L.Ed. 60.

⁹⁵ See STEWART *supra* note 3 at 836-837; see also GLENNON, "Can the President Do No Wrong?", *The American Journal of International Law*, n. 80, 1986, pp. 927; See also VAN DER VYVER, *supra* note 5.

⁹⁶ C. M. VAZQUEZ, "Customary International Law as U.S. Law: A Critique of the Revisionist and Intermediate Positions and a Defense of the Modern Position", *Notre Dame Law Review*, n. 86, 2011, pp. 1629-1633.

⁹⁷ *Id.* at 1535-1538; P. C. JESSUP, "The Doctrine of *Erie Railroad v. Tompkins* Applied to International Law", *The American Journal of International Law*, n. 33/4. 1939, pp. 740-743.

⁹⁸ VAZQUEZ, *supra* note 96, pp. 1629.

⁹⁹ U.S. Supreme Court April 25 1938, *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817.

¹⁰⁰ See JESSUP, *supra* note 97.

¹⁰¹ U.S. Supreme Court 23 March 1964, *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 84 S. Ct. 923, pp. 425 as cited by Vazquez pp. 1536.

(3) Courts in the United States are bound to give effect to international law¹⁰².

36. Furthermore, as argued by Professor Stewart, the framers did not include the Law of Nations in Article 3 of the United States Constitution for the following reasons. First, the Law of Nations could not be framed as law of the United States, because its binding force is generated in the international law, outside of the Federal system. The Law of Nations is international law rooted in natural law, binding on every civilized Nation including the United States¹⁰³. Second, the Law of Nations was a very broad concept including much more than just natural rights. For example, it included merchant and commercial law. The Law of Nations' boundaries were not clear. Transferring contract cases to the Federal system would have gone beyond the scope of the Law of Nations in the United States Constitution¹⁰⁴.

37. Therefore, there is evidence that the Traditional view is inconsistent with the literal meaning of the Constitution and with the founding fathers' intent to establish a Nation with one voice in the international arena.

2. Incoherent Argument

38. The Traditional view is also incoherent. According to the Traditional view, there are two different Laws of Nations: the Law of Nations in the Constitution and the Law of Nations in the Alien Tort Statute. The Constitution refers to the common Law of Nations incorporated in State law and eventually defined by Congress. Instead, the Law of Nations in the Alien Tort Statute was intended to provide Federal jurisdiction to Federal courts under Article III of the United States Constitution¹⁰⁵. Therefore, the *Sosa v. Alvarez*'s holding, concerning the Alien Tort Statute, is not applicable to the Law of Nations in the United States Constitution. According to the Traditional view, the founders established two different courts to claim a violation of the Law of Nations. United States citizens have to file their complaints in State courts and would eventually get in front of Federal courts in interstate cases. Aliens have to file their complaints in Federal courts through the Alien Tort Statute. The reason for having two Laws of Nations would be the protection of aliens. While the founders relied on State common law and State courts to protect citizens against a violation of the Law of Nations, they did not trust States to protect aliens. The United States Federal law and courts had to assure aliens' protection against the Law of Nations violations by American citizens. They created a common Law of Nations for citizens and a Federal Law of Nations for aliens¹⁰⁶. Such historical interpretation leaves an open question: whether or not the Alien Tort Statute allows also an alien to sue another alien in Federal courts. In other words, whether or not the Alien Tort Statute may be considered as the United States' Universal Jurisdiction Statute. According to the Traditional interpretation, the Alien Tort Statute does not allow aliens to sue other aliens, as Universal Jurisdiction is a new international law concept not taken into account by the framers¹⁰⁷. Neither the founding fathers nor Congress ever considered the Alien Tort Statute as applicable among aliens. The Alien Tort Statute is applicable when an alien sues an American citizen for a violation of the Law of Nations. While the founding fathers could not know Universal Jurisdiction as it did not exist in 1787, Congress did not pass any Universal Jurisdiction Statute. Some courts have already interpreted the Alien Tort Statute as allowing suits among aliens. However, according to the Traditional view, such interpretation is incorrect and in violation of the separation of powers. Under the separation of powers, only Congress can establish a law. Federal courts cannot create a law by interpreting a Statute out of its

¹⁰² Restatement (Third) of Foreign Relations Law, 1987, § 111.

¹⁰³ STEWART, *supra* note 3 at 829-833; as James Wilson stated "[t]o pretend to define the law of nations which depended on the authority of all the Civilized Nations of the World, would have a look of arrogance that would make [.. the United States] ridiculous" *The Records of the Federal Convention of 1787*, Vol. 2, Max Farrand ed., 1911, pp. 615.

¹⁰⁴ STEWART, *supra* note 3 at 831-837.

¹⁰⁵ See BRADLEY and BELLIA, *supra* note 3.

¹⁰⁶ *Id.*

¹⁰⁷ See H. KISSINGER, "The Pitfalls of Universal Jurisdiction", FOREIGN AFFAIRS, n. 80/4, 2001.

historical and political context¹⁰⁸. Therefore, according to the Traditional view, the interpretation of the Law of Nations in the Alien Tort Statute is irrelevant to the interpretation of the Law of Nations in the Constitution as the former is Federal and the latter is common law¹⁰⁹.

39. Such reasoning is illogical because different courts do not necessarily imply substantial differences in the meanings of the Law of Nations. Two different courts do not necessarily mean two different interpretations of the Law of Nations. Even if the founders intended to diversify the complaints between State and Federal courts, there is no evidence they wanted to establish two different Law of Nations' meaning.

40. In addition, even the Traditional view acknowledges that one of the main goals of the United States was to appear as one Nation able to comply with its international law obligations. There is evidence the founding fathers wanted to reassure foreign Nations that every State would follow the Law of Nations and the United States was a reliable country within the global arena¹¹⁰. One of the main goals of the Constitution was to build up a nation "by strengthening national political authority over determinations of war and peace"¹¹¹. There was no reason to diversify the interpretation of international law: an area of law where the United States was clearly intended to have only one voice¹¹².

41. Furthermore, as Justice Breyer emphasized in *Sosa v. Alvarez*¹¹³, under Universal Jurisdiction, the Alien Tort Statute allows also aliens vs. aliens' claims. In *Kiobel et al. v. Royal Dutch Petroleum Co. et al.*, while the majority opinion limited its holding to extraterritorial applications of the Alien Tort Statute and did not rule on the subject of Universal Jurisdiction, four Justices confirmed that the Alien Tort Statute allows aliens vs. aliens' claims in their opinion concurring in the judgment¹¹⁴. Universal Jurisdiction is based on the assertion that the victim of a heinous act, criminalized everywhere in the world may seek justice in every forum worldwide. So far Universal Jurisdiction cases include the Eichmann case¹¹⁵ where Israeli courts prosecuted a German Nazi for committing genocide in Europe, the Pinochet case¹¹⁶ where a Spanish court issued an arrest warrant to prosecute the former President of Chile Augusto Pinochet for crimes committed in Chile and some United States' cases such as *Demjanjuk v. Petrovsky*¹¹⁷ where the Sixth Circuit declared that under Universal Jurisdiction the United States could extradite the Nazi Demjanjuk to Israel even though he allegedly committed war crimes and crimes against humanity in Poland. United States Federal courts have interpreted the Alien Tort Statute to allow alien vs. alien claims¹¹⁸. "[..A]ccording to Jordan Paust, universal jurisdiction over international crimes has been recognized in the United States since 'the dawn of ... [its] history.'¹¹⁹ The United States has certainly since early times recognized the power of its courts to prosecute persons for acts of piracy, and by participating in the Nuremberg and Tokyo trials, it has recognized the validity of universal jurisdiction at least as to war crimes and crimes against humanity. American courts often refer with approval to

¹⁰⁸ See BELLIA, *supra* note 3 at 546-551.

¹⁰⁹ *Id.*, see GOLDSMITH, BRADLEY *supra* note 3.

¹¹⁰ See BELLIA *supra* note 3 pp. 494-507.

¹¹¹ *Id.* at 507.

¹¹² See GOLOVE, *supra* note 3 at 943; see also K. ROOSEVELT, *Conflict of Laws*, Foundation Press, 2010.

¹¹³ U.S. Supreme Court 29 June 2004, *Sosa v. Alvarez*, 542 U.S. 692, 124 S.Ct. 2739.

¹¹⁴ U.S. Supreme Court 17 April 2013, *Kiobel v. Royal Dutch Petroleum Co.* 133 S.Ct. 1659.

¹¹⁵ H. ARENDT, *Eichmann in Jerusalem: A Report on the Banality of Evil*, Penguin Books 1963; Israel Supreme Court, May 29 1962, *Attorney General of the Government of Israel v. Eichmann*, 36 I.L.R. 277.

¹¹⁶ A. BIANCHI, "Immunity versus Human Rights: The Pinochet Case", *European Journal of International Law*, 1999.

¹¹⁷ U.S. Court of Appeal for the 6th Circuit, 31 October 1985, *Demjanjuk v. Petrovsky*, 776 F.2d 571, C.A.6 (Ohio).

¹¹⁸ U.S. Court of Appeal for the 2nd Circuit, 30 June 1980, *Filártiga v. Peña-Irala*, 630 F.2d 876, C.A.N.Y., 1980. See also VAN DER VYVER, *supra* note 5 at 496.

¹¹⁹ "Jordan J. Paul, *Federal Jurisdiction over Extraterritorial Acts of Terrorism and Nonimmunity for Foreign Violators of International Law under the FSIA and the Act or Stute Doctrine*, 23 VA. J. INT'L L. 191, 211 (1983). See Henry T. King & Theodore C. Theofrastous, *From Nuremberg to Rome: A Step Backward for U.S. Foreign Policy*, 31 CASE W.J. INT'L L. 47, 56 (1999); Ruth Wedgwood, *The Constitution and the ICC*, in THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT 119, 125-26 (Sarah B. Sewall & Carl Kaysen eds. 2000)" as cited by VAN DER VYVER, *supra* note 5 at 495.

the principle of universality with regard to crimes other than piracy¹²⁰. As the Law of Nations evolves, also the meaning of the Alien Tort Statute evolves by allowing aliens to sue other aliens for violations of fundamental human rights¹²¹.

42. Therefore, the founding fathers referred in both the Constitution and the Alien Tort Statute to only one Law of Nations applicable in both Federal and State courts. The *Sosa v. Alvarez*'s interpretation of the Law of Nations is applicable to the meaning of the Law of Nations in the Constitution.

VII. Conclusion

43. The framers introduced the term Law of Nations in both the United States Constitution and the Alien Tort Statute to establish a Nation that would comply with international law obligations. Therefore, the interpretation of the Constitution should not diverge from the interpretation of the Alien Tort Statute as they both refer to customary international law obligations. As the United States Supreme Court pointed out in the case *Sosa v. Alvarez* and confirmed in *Kiobel et al. v. Royal Dutch Petroleum Co. et al.*, customary international law is an evolving concept that changes with the time. Federal courts should cautiously determine if and when it is appropriate to interpret a custom as part of the Law of Nations. A violation of the most fundamental *Jus Cogens* rights would clearly represent a violation of customary international law. Such interpretation of the Law of Nations in the Alien Tort Statute's context should be extended to the United States Constitution as consistent with the founding fathers' intent to establish one country with a uniform voice in the international arena.

¹²⁰ VAN DER VYVER, *supra* note 5 at 495.

¹²¹ *Id.* at 495-496.