Wrongful Death and Survival Actions for Torts in Violation of International Law

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TABLE OF CONTENTS

I. INTRODUCTION .................................................................................................. 384
II. THE SOSA FRAMEWORK .............................................................................. 389
   A. Sosa and the ATS ..................................................................................... 391
   B. The “Sosa Claim” .................................................................................... 394

III. SOSA CLAIMS BASED ON HARM TO DECEASED VICTIMS:
   THE PREVAILING APPROACH .............................................................................. 396
   A. The Xuncax Approach ............................................................................. 397
   B. Evaluation of the Xuncax Approach ........................................................ 400
      1. Inconsistencies with Precedent ......................................................... 400
      2. Difficulties in Practice ...................................................................... 405

IV. SOSA CLAIMS BASED ON HARM TO DECEASED VICTIMS:
   A NEW APPROACH ............................................................................................. 409
   A. Wrongful Death and Survival Claims Under Sosa .................................. 409
      1. Wrongful Death Claims Under Sosa .................................................... 412
         a. Relevant Precedent ....................................................................... 412
         b. Availability of Wrongful Death Recovery
            Under Sosa .................................................................................. 418

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I. INTRODUCTION

International human rights litigation often showcases the worst in humanity—genocide, summary execution, torture, disappearance, and war crimes, to name just a few of the atrocities alleged in these cases over the past several years.\(^1\) In the United States, the principal vehicle for litigating these human rights violations is the Alien Tort Statute (ATS),\(^2\) a famously enigmatic provision of the United States Code enacted by the First Congress in 1789.\(^3\) ATS suits run the gamut, raising diverse issues

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1. See, e.g., Doe v. Exxon Mobil Corp., 654 F.3d 11, 15–17 (D.C. Cir. 2011) (describing allegations that security forces of Exxon Mobil Corporation engaged in “a systematic campaign of extermination of the people [of the Aceh province of Indonesia],” including acts of “genocide, extrajudicial killing, torture, crimes against humanity, sexual violence, and kidnap[ping]”), vacated, Nos. 09-7125, 09-7127, 09-7134, 09-7135, 2013 WL 3970103 (D.C. Cir. July 26, 2013); Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 123 (2d Cir. 2010) (involving allegations that a multinational energy conglomerate aided and abetted the Nigerian government’s violent suppression of the residents of the Ogoni region of Nigeria in response to protests against the energy company’s oil production in the Niger Delta), aff’d, 133 S. Ct. 1659 (2013); Sarei v. Rio Tinto, PLC, 550 F.3d 822, 825–26 (9th Cir. 2008) (en banc) (recounting allegations that the government of Papua New Guinea, in collusion with a British mining company, “engaged in aerial bombardment of civilian targets, wanton killing and acts of cruelty, village burning, rape, and pillage” that resulted in the deaths of an estimated fifteen thousand people on the South Pacific island of Bougainville).

2. 28 U.S.C. § 1350 (2006) (providing in its entirety 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. As is often recounted, Judge Friendly once labeled the ATS “a kind of legal Lohengrin . . . no one seems to know whence it came.” ITT v. Vencap, Ltd., 519 F.2d 1001, 1015 (2d Cir. 1975). Indeed, despite the amount and depth of scholarship produced over the past three decades regarding the origins of the statute, the original purpose of the ATS is still subject to debate. Compare Curtis A. Bradley, The Alien Tort Statute and Article III, 42 VA. J. INT’L L. 587, 619–37 (2002) (advancing the theory that the First Congress “viewed at least the law of nations portion of the Alien Tort Statute as an implementation of Article III alienage jurisdiction”), with William S. Dodge, The Historical Origins of the Alien Tort Statute: A Response to the “Originalists,” 19 HASTINGS INT’L & COMP. L. REV. 221, 237 (1996) (interpreting historical evidence as showing that the ATS was meant to provide a “broad civil remedy for violations of the law of nations”).
of international human rights law involving many of the world’s most infamous humanitarian crises. Despite this thematic variety, ATS cases frequently share a common feature: given the brutal events underlying many of these suits, the actual victims of the human rights abuses alleged are often deceased, missing, or otherwise incapable of litigating their claims personally. As a result, human rights cases commenced pursuant to the ATS are regularly prosecuted not by the alleged tort victims but by the victims’ surviving relatives.

Deceased-victim ATS cases are nothing new; in fact, the pathmarking Second Circuit case *Filartiga v. Pena-Irala* involved plaintiffs who were

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4. See Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244, 247–48 (2d Cir. 2009) (Second Sudanese Civil War); Saleh v. Titan Corp., 580 F.3d 1, 2 (D.C. Cir. 2009) (Abu Ghraib prison scandal); Khulumani v. Barclay Nat’l Bank Ltd., 504 F.3d 254, 258 (2d Cir. 2007) (South African apartheid); *In re Estate of Ferdinand Marcos, Human Rights Litig.*, 25 F.3d 1467, 1469 (9th Cir. 1994) (dictatorship of Ferdinand Marcos); Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 776 (D.C. Cir. 1984) (Israel-Palestinian conflict). Recently, in *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1669 (2013), the Supreme Court dismissed an international human rights complaint between Nigerian plaintiffs and Dutch and English corporations, reasoning that “all the relevant conduct took place outside the United States,” and thus a presumption against extraterritorial application of U.S. law applied to preclude the lawsuit. See *id.* (holding that “mere corporate presence” in the United States does not suffice to “displace the presumption against extraterritorial application” of federal law). Although the Court’s opinion in *Kiobel* “leave[s] open a number of significant questions regarding the reach and interpretation of” the ATS, see *id.* (Kennedy, J., concurring), its basic holding requiring some connection between ATS suits and U.S. interests potentially limits the ability of human rights claimants to redress global humanitarian crises through ATS litigation.

5. See, e.g., Mohamad v. Rajoub, 634 F.3d 604, 605–06 (D.C. Cir. 2011) (describing the complaint as alleging that the plaintiffs’ relative was “tortured and killed” in violation of U.S. law); Bowoto v. Chevron Corp., 621 F.3d 1116, 1122 (9th Cir. 2010) (noting that “[o]f the four victim Plaintiffs in this case, one died as a result of the injuries suffered” as a result of the defendants’ allegedly illegal conduct); Sinaltrainal v. Coca-Cola Co., 578 F.3d 1252, 1258–59 (11th Cir. 2009) (recounting that the defendants “hired, contracted with, or otherwise directed paramilitary security forces that murdered, tortured, or silenced leaders of the trade union representing workers at the Bebidas bottling facility”).

6. See, e.g., Licci *ex rel.* Licci v. Lebanese Canadian Bank, SAL, 673 F.3d 50, 54–55 (2d Cir. 2012) (noting that “[t]he plaintiffs are several dozen American, Canadian, and Israeli citizens, all of whom reside in Israel, who were injured, or whose family members were killed or injured” by alleged international human rights violations); Aziz v. Alcolac, Inc., 658 F.3d 388, 391 (4th Cir. 2011) (noting that the appellants “are either victims of mustard gas attacks or family members of deceased victims”); Mamani v. Berzain, 654 F.3d 1148, 1150–51 (11th Cir. 2011) (noting that “[p]laintiffs are the relatives of persons killed in Bolivia in 2003” as a result of alleged international law violations).
not the victims of the international law violations alleged. Yet notwithstanding the prevalence of these cases, surprisingly little attention has been paid to the basic question of whether nonvictim plaintiffs may nonetheless bring suit and recover damages for the violations at issue. Indeed, many of the most prominent cases in ATS law—including *Filartiga*—took for granted the fact that the claimants before the court were not the actual victims of the human rights abuses alleged. Similarly, legal commentary has largely ignored this open question of ATS jurisprudence, devoting more energy to defining the role of customary international law in domestic courts.

Absent authoritative guidance on this issue, courts confronted with the deceased-victim scenario have generally framed the relevant inquiry as a question of plaintiff “standing” under the ATS. The ATS, however,

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7. 630 F.2d 876, 878 (2d Cir. 1980) (construing the plaintiffs’ complaint to raise claims of torture in violation of the law of nations but indicating that the plaintiffs were not themselves subject to the alleged illegal conduct). Prior to *Filartiga*, only a handful of cases utilized the ATS as a basis for jurisdiction. See Kenneth C. Randall, *Federal Jurisdiction over International Law Claims: Inquiries into the Alien Tort Statute*, 18 N.Y.U. J. INT’L L. & POL. 1, 4 n.15 (1985) (reporting that from the time of the ATS’s enactment to *Filartiga*, “plaintiffs asserted jurisdiction under the statute in only . . . 21 cases”).

8. See, e.g., Kadic v. Karadžić, 70 F.3d 232, 236–37 (2d Cir. 1995) (failing to consider whether the nonvictim plaintiffs could rightfully sue for damages on claims based on harm to deceased parties); *Tel-Oren*, 726 F.2d at 776–77 (Edwards, J., concurring) (same); *id.* at 799–802 (Bork, J., concurring) (same); *Filartiga* v. Pena-Irala, 577 F. Supp. 860, 862–64 (E.D.N.Y. 1984) (same).


Wrongful Death and Survival Actions

SAN DIEGO LAW REVIEW

has always been an awkward fit for the source of these substantive requirements, given its obscure origins and concise phrasing. This criticism became all the more trenchant after the Supreme Court’s reorienting decision in Sosa v. Alvarez-Machain, which clarified that the ATS is a purely jurisdictional provision that simply opened the federal courts to substantive causes of action based in federal common law. Still, even after Sosa, the prevailing standing formulation remained the only game in town on the deceased-victim issue, leaving courts to develop a patchwork of ATS standing rules drawn from state, federal, and even foreign law sources. Not surprisingly, this ad hoc approach has resulted in inconsistent and at times illogical results for human rights plaintiffs in federal court.

This Article aims to make sense of this neglected area of ATS law. I contend that the salient issue in these deceased-victim cases is not whether the nonvictim plaintiffs have standing to sue but rather whether they have a viable cause of action in the first place. Standing and cause of action concepts have an uneasy relationship in law. Although the

(addressing the question of who can sue for human rights violations to a deceased party as raising an issue of “standing to sue for . . . wrongful death or disappearance”).

11. See, e.g., Xuncax, 886 F. Supp. at 189 (noting that the ATS is “silent concerning a plaintiff’s standing to bring suit based on injury to another”); see also STEPHENS ET AL., supra note 10, at 45 (“The ATS gives no guidance as to standing to sue and the required relationship between the victim and the alleged violation.”).

12. 542 U.S. 692, 714, 724 (2004) (holding that the ATS is “jurisdictional in the sense of addressing the power of the courts to entertain cases concerned with a certain subject” but that 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”); see also infra notes 25–44 and accompanying text.

13. See, e.g., Wiwa, 2009 WL 464946, at *9 (applying New York state law to determine whether relatives of deceased international human rights victims could properly bring suit in an ATS action); Bowoto, 2006 WL 2455761, at *11–12 (applying Nigerian law to a similar question); see also infra notes 59–76 and accompanying text.


15. See Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154, 161 (2010) (expressing “a marked desire to curtail” so-called “drive-by jurisdictional rulings, which too easily . . . miss the critical differences between true jurisdictional conditions and nonjurisdictional limitations on causes of action” (citation omitted) (internal quotation marks omitted)); Steel Co. v. Citizens for a Better Env’t, 523 U.S. 83, 89 (1998) (“It is firmly established in our cases that the absence of a valid (as opposed to [an] arguable) cause of action does not implicate subject-matter jurisdiction, i.e., the courts’ statutory or constitutional power to adjudicate the case.”); see also Davis v. Passman, 442 U.S. 228, 239 n.18 (1979) (explaining the lower court’s error in conflating the standing and cause of action
The distinction between constitutional standing and cause of action inquiries is well established, the division is less clear where, as here, standing doctrine is used to define a plaintiff’s eligibility to bring suit. Indeed, reliance on standing terminology in this context often obscures and confuses what should otherwise be a straightforward determination into the merits of a litigant’s claim. Building on this insight, I argue that, at bottom, the deceased-victim issue in ATS cases turns not on statutory standing principles but on whether the plaintiff satisfies the substantive conditions that trigger recovery. In this way, the alternative framework I propose recasts the deceased-victim issue as essentially a merits inquiry into the nonvictim plaintiff’s eligibility to recover damages. Given the kinds of damages typically requested in these ATS cases, I conclude that wrongful death and survivorship principles ultimately govern this analysis.

Part II of this Article begins with the Supreme Court’s seminal opinion in Sosa, which offers the High Court’s most authoritative discussion to date on the scope of the ATS and the litigation commenced pursuant to its authority. Although Sosa does not address the deceased-victim issue directly, the decision establishes several principles that guide the analysis of this open question of ATS law. Next, Part III examines the prevailing approach to the deceased-victim issue, which as described above, adopts a formulation rooted in the terminology of standing doctrine. After describing this approach in some detail, I argue that it is untenable in both theory and practice, citing different instances in which courts have wrestled with the current framework to rather unsatisfactory results.

Part IV then outlines the alternative framework previewed above. First, I lay out the proposed approach in general terms, comparing deceased-victim human rights claims to wrongful death and survival actions available in traditional tort litigation. I then argue that courts should analyses by describing that a plaintiff’s cause of action “depends not on the quality or extent of her injury, but on whether the class of litigants of which [the plaintiff] is a member may use the courts to enforce the right at issue”). But see Steel Co., 523 U.S. at 97 n.2 (“[T]he merits inquiry and the statutory standing inquiry often overlap . . . . [S]o that it would be exceedingly artificial to draw a distinction between the two.” (citation omitted) (internal quotation marks omitted)).

16. See Davis, 442 U.S. at 239 n.18 (noting that “standing is a question of whether a plaintiff is sufficiently adversary to a defendant to create an Art. III case or controversy, or at least to overcome prudential limitations on federal-court jurisdiction,” whereas “cause of action is a question of whether a particular plaintiff is a member of the class of litigants that may, as a matter of law, appropriately invoke the power of the court”); see also Steel Co., 523 U.S. at 92 (holding that the question of whether a plaintiff has a cause of action under applicable law “goes to the merits and not to statutory standing”); 13A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE: JURISDICTION AND RELATED MATTERS § 3531 (3d ed. 2008) (encouraging “greater care” in distinguishing between “complex standing doctrine” and “questions of private right”).

17. See infra notes 79–90 and accompanying text.
recognize a federal common law cause of action for death in violation of international law, as well as a federal common law rule of survivorship for international law tort claims litigated in federal court. I further contend that state law should generally supply the rules of decision for determining the proper plaintiff in ATS cases involving deceased victims. This analysis relies on federal common law principles deployed in the analogous jurisprudential settings of constitutional tort litigation and maritime wrongful death law. Part IV concludes with a discussion of the conceptual and practical advantages of the proposed approach as compared with the prevailing framework.

II. THE Sosa FRAMEWORK

Sosa represents the Supreme Court’s first comprehensive appraisal of the ATS since the statute’s enactment in 1789. Prior to Sosa, the touchstone for most ATS jurisprudence was the Second Circuit’s seminal decision in Filartiga, the progenitor of the modern line of international human rights litigation in federal court. In that case, two Paraguayan nationals brought suit against a former Paraguayan police official for the alleged death by torture of their young relative at the hands of state

18. Prior to Sosa, only five published Supreme Court opinions referenced the ATS, and in none did the Court address the origins and scope of the statute in any depth. See Rasul v. Bush, 542 U.S. 466, 484–85 (2004) (noting in dicta that jurisdiction under § 1350 is unaffected by the fact that a plaintiff is “being held in military custody”); Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 436–37 (1989) (rejecting the argument that Congress’s failure to enact a “pro tanto repealer” of the ATS indicated a legislative intent to permit the continued exercise of federal jurisdiction over foreign states beyond the limits imposed by the Foreign Sovereign Immunities Act); Lynch v. Household Fin. Corp., 405 U.S. 538, 549 & n.17 (1972) (listing § 1350 among the “many statutes that confer federal-question jurisdiction without an amount-in-controversy requirement”); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 427 & n.25 (1964) (stating that “[v]arious constitutional and statutory provisions,” including § 1350, “indirectly support” the conclusion that the act of state doctrine should be “determined according to federal law”); O’Reilly de Camara v. Brooke, 209 U.S. 45, 48–53 (1908) (dismissing a claim brought pursuant to the jurisdiction provided by the ATS on the grounds that the plaintiff had failed to alleges an actionable violation of international law or treaty).


389
police. The district court dismissed the complaint for lack of subject matter jurisdiction, but the Second Circuit reversed, ruling that the ATS supplied jurisdiction over the plaintiffs’ claims. In sustaining federal jurisdiction, the court also implicitly recognized the existence of a private right of action in federal court for violations of the law of nations—today’s “customary international law,” or simply, “international law.” The court, however, failed to specify the source of this right beyond stating that the ATS works to “open[] the federal courts for adjudication of the rights already recognized by international law.”

In the years following Filartiga, the majority of courts to address the scope of the ATS agreed with the broad outlines of the Second Circuit’s ruling, making Filartiga the “standard-bearer” for a new wave of ATS litigation in American courts. Prominent dissenting voices, however, fiercely resisted the emerging doctrinal uniformity, challenging both the theoretical underpinnings of Filartiga and the purported benefits of ATS litigation. Sosa represents the Supreme Court’s initial attempt to settle this ongoing jurisprudential debate.

20. See Filartiga v. Pena-Irala, 630 F.2d 876, 878 (2d Cir. 1980). Plaintiffs Joel and Dolly Filartiga alleged that the defendant Americo Norberto Pena-Irala, then Inspector General of Police in Asunción, Paraguay, “kidnapped and tortured to death” J oelito Filartiga, Joel’s son and Dolly’s brother, “[as retaliation for] Joel’s political activities and beliefs.” Id. The Filartigas brought suit under unspecified “wrongful death statutes,” several international human rights agreements, “customary international law,” and federal law. Id. at 879.

21. Id. at 878, 880.

22. Id. at 880, 887; see also Childress, supra note 9, at 718 (“[Filartiga] left open whether the ATS could provide a private cause of action for a harm under international law, or whether it merely opened the federal courthouse doors to such claims, subject to standard choice-of-law principles that might be used to choose . . . the substantive law to be applied.”).

23. See Philip Mariani, Comment, Assessing the Proper Relationship Between the Alien Tort Statute and the Torture Victim Protection Act, 156 U. PA. L. REV. 1383, 1390 (2008); see also Stephens et al., supra note 10, at 12–18 (describing how by “the fall of 2003, the Second, Fifth, Ninth, and Eleventh Circuit Courts of Appeals, along with district courts in the First and D.C. Circuits, had all applied the ATS more or less as outlined in Filartiga”).

24. Principal opposition to the Filartiga line of authority can be traced to Judge Bork’s concurring opinion in the Tel-Oren case. There, Judge Bork rejected the view that the ATS either creates an explicit cause of action for suits in violation of international law or evinces a congressional understanding that such a cause exists as a matter of federal common law. See Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 811–16 (D.C. Cir. 1984) (Bork, J., concurring). Curtis Bradley and Jack Goldsmith expanded upon this logic in their seminal 1997 article on the domestic status of customary international law (CIL), arguing that CIL was not part of the federal common law post-Erie, and thus federal courts cannot properly apply this law absent explicit congressional authorization. See Curtis A. Bradley & Jack L. Goldsmith, Customary International Law as Federal Common Law: A Critique of the Modern Position, 110 HARV. L. REV. 815, 856–57.
A. Sosa and the ATS

For a decision heralded as a victory for human rights advocates, Sosa involved decidedly inauspicious facts and a rather unsavory human rights “victim.” Humberto Alvarez-Machain was a Mexican doctor accused by the U.S. government of participating in the interrogation and torture of Drug Enforcement Administration agent Enrique Camarena-Salazar by Mexican drug traffickers in 1985. After his indictment was dismissed in federal district court, Alvarez sued the U.S. government and Jose Francisco Sosa, among others, claiming that the Drug Enforcement Administration had hired Sosa to capture and transport him into the United States to face criminal charges related to Camarena-Salazar’s murder. Alvarez asserted relief in part under the ATS, alleging that Sosa’s participation in his kidnapping constituted a tort in violation of international law. The lower courts agreed with Alvarez on his ATS-related claim, but the Supreme Court reversed, concluding that Alvarez had failed to assert an actionable violation of international law.

In so holding, the Court propounded three basic principles regarding the scope of the ATS and the international law tort claims brought pursuant to its authority.

First, the Court held that the ATS is “strictly jurisdictional,” in that it addresses “the power of the courts to entertain cases concerned with a
certain subject.” So construed, the statute does not itself create any
substantive rights or private tort remedies for violations of international
law. Nonetheless, the Court concluded that the relevant history
surrounding the statute’s enactment also indicated that the grant of
jurisdiction was meant to serve as more than a mere “jurisdictional
convenience” for the benefit of some future legislature in later enacting a
substantive right of action. Rather, the ATS was intended to have
“practical effect the moment it became law.”

This latter observation led the Court to its second central holding: the
cause of action cognizable under 28 U.S.C. § 1350 is a product of federal
common law. Surveying the relevant history, the Court explained that the
ATS was most likely intended to provide jurisdiction over a limited set
of actions recognized by the common law at the time of the statute’s
enactment. The Court further concluded that although “the prevailing
conception of the common law has changed since 1789” in a way that
reflects a more positivistic understanding of judicial authority, federal
courts today retain an element of “residual common law discretion
allowing them to recognize additional common law causes of action derived
from present-day international law. Although the Court in recent years
has been reluctant to sanction similar judicial lawmaking in other

32. Sosa, 542 U.S. at 713–14.
33. Id. at 713 (describing as “implausible” the contention that “the ATS was
intended not simply as a jurisdictional grant, but as authority for the creation of a new
cause of action for torts in violation of international law”).
34. Id. at 719.
35. Id. at 724. The Court based this historical conclusion on evidence that the
First Congress may have enacted the ATS to address concerns “over the inadequate
vindication of the law of nations” during the preconstitutional period. Id. at 717. Specifically,
the Court pointed to the Continental Congress’s 1781 resolution implo red the states to
provide civil remedies for violations of the law of nations, as well as two well-known
incidents preceding the Constitutional Convention involving assaults against foreign
ambassadors, both of which showcased the young national government’s inability to
provide federal remedies for law of nations violations. See id. at 716–17. But see
Bradley, supra note 3, at 637–46 (advancing the competing historical claim that the First
Congress intended the ATS to implement Article III’s alienage jurisdiction provision and
not to provide a forum for all suits alleging law of nations violations).
37. Id. at 724 (“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.”).
38. See id. at 724–25, 738 (“[N]o development in the two centuries from the
enactment of § 1350 to the birth of the modern line of cases beginning with Filartiga v.
Pena-Irala has categorically precluded federal courts from recognizing a claim under the
law of nations as an element of common law . . . .” (citation omitted)). But see Bradley
& Goldsmith, supra note 24 at 852–56 (arguing forcefully that the “suggestion that
federal courts can apply CIL in the absence of any domestic authorization cannot survive
[Erie R. Co. v. Tompkins, 304 U.S. 64 (1938)]” (footnote omitted)).
contexts,\(^39\) the majority reasoned that in this case the “door is still ajar” to “further independent judicial recognition of actionable international norms” given both the federal courts’ vestigial “civil common law power” post-

\textit{Erie} and Congress’s implicit sanction of this exercise of authority since the enactment of the ATS.\(^40\)

This lingering common law authority, however, is not unbound, and the Court took pains to emphasize several “good reasons for a restrained conception of the discretion a federal court should exercise in considering a new cause of action” under international law.\(^41\) This series of considerations underlies the final doctrinal tenet of the \textit{Sosa} decision: any new common law cause of action cognizable under the ATS must “rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features” of the narrow set of international law violations actionable at the time of the statute’s enactment in 1789.\(^42\) These historic paradigms comprise “three specific offenses against the law of nations addressed by the criminal law of England: violation of safe conducts, infringement of the rights of ambassadors, and piracy.”\(^43\) In Justice Souter’s words, it was these three offenses, “admitting of a judicial remedy and at the same time threatening


\(^41\) \textit{Sosa}, 542 U.S. at 725.

\(^42\) \textit{Id.}

\(^43\) \textit{Id.} at 715 (citing 4 WILLIAM BLACKSTONE, COMMENTARIES *68).
serious consequences in international affairs, that [were] probably on the minds of the men who drafted the ATS with its reference to tort."

B. The “Sosa Claim”

The Sosa decision was a jurisprudential innovation. Prior to Sosa, prevailing jurisprudence was split on the source of the cause of action cognizable under the ATS: the Second Circuit adopted the view that the substantive right to sue derived from some unspecified, nonstatutory source of law, and the Ninth Circuit advanced the theory that the ATS itself supplied the private right of action. In rejecting both theories, the Supreme Court clarified that the right to sue in any ATS litigation comes from the federal judiciary’s “civil common law power” and thus is principally a product of judicial lawmakers.

For present purposes, the practical implications of the Court’s determination are twofold. First, to borrow the words of William Casto, Sosa “uncouple[d]” the federal cause of action for torts in violation of international law from the ATS. As a result, it is no longer accurate to say that ATS litigation involves “ATS claims” or “ATS cause[s] of action,” at least to the extent that these descriptions imply that the substantive right to sue derives from § 1350. Sosa squarely held that the federal claim cognizable under the statute is a product of federal common law. Therefore, much like other judicially crafted causes of action, this newly recognized claim should draw its title not from the statute but the court decision to which it owes its existence. The claim

44. Id. at 696, 715.
45. Compare Flores v. S. Peru Copper Corp., 414 F.3d 233, 243 & n.17 (2d Cir. 2003) (stating that Filartiga did not identify the ATS as the source of the private right of action for violations of international law), with In re Estate of Ferdinand Marcos, Human Rights Litig., 25 F.3d 1467, 1475 (9th Cir. 1994) (“[T]he ATS creates a cause of action for violations of specific, universal and obligatory international human rights standards . . . .”); see also Abebe-Jira v. Negewo, 72 F.3d 844, 848 (11th Cir. 1996) (“[T]he ATS establishes a federal forum where courts may fashion domestic common law remedies to give effect to violations of customary international law.”).
50. Accord 1 CIVIL ACTIONS AGAINST THE UNITED STATES: ITS AGENCIES, OFFICERS, AND EMPLOYEES § 3:1 (2d ed. 2002) (noting that the “judicially created causes of action” for violations of constitutional rights are widely known as “Bivens actions” after the Supreme Court case Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), which first recognized the nonstatutory private right to sue for constitutional violations).
Wrongful Death and Survival Actions

Sosa is thus properly named the “Sosa claim”: a product of the Supreme Court’s Sosa decision and cognizable in federal court pursuant to the ATS.

The second practical consequence of Sosa’s ruling pertains to the rules of decision applicable to litigation under the newly identified common law claim. As Casto explains,

The new cause of action envisioned by Sosa is unintelligible unless the well-established distinction between rights and remedies is kept clearly in mind. The concept of a cause of action requires a plaintiff to establish that a defendant has violated a legal norm designed to protect the plaintiff and that the plaintiff is entitled to a remedy, which typically will be damages in ATS litigation. Under this traditional dichotomy, the norm that is enforced in ATS litigation comes from international law and therefore is to a significant degree beyond the federal courts’ lawmakers’ powers. . . . Sosa’s pronouncement that the federal courts have discretion to create or deny a cause of action relates to the remedy rather than the norm.51

Pursuant to this theory, “[a]ll questions as to whether the defendant has acted unlawfully must be answered by recourse to rules of decision found in international law.”52 By contrast, all other aspects of the Sosa claim are to be governed by domestic law.53 Casto clarifies that although these two sources of law are nominally distinct, both form a part of the federal common law.54 Thus, although “[t]here has been a tendency to view ATS litigation as centered on international law,” the Court’s analysis in Sosa “directs us to traditional, well-established concepts of domestic,

52. Id. at 643.
53. See id. at 641. Casto explains that, in ATS litigation, “the most obvious divide between international and pure United States domestic law is the separation of substance from procedure” in that the federal courts will necessarily apply domestic procedural rules in ATS cases. Id. at 642. Casto adds that domestic law will also govern “a number of substantive issues that do not bear on the lawfulness of the defendant’s conduct,” from the very existence of a private damages remedy for the norm of international law violated to the availability of an official immunity defense for alleged perpetrators. See id. at 643–44; see also Chimène I. Keitner, Conceptualizing Complicity in Alien Tort Cases, 60 Hastings L.J. 61, 78–82 (2008) (arguing that post-Sosa, international law governs “conduct-regulating norms,” whereas federal common law applies to “other rules of decision” such as personal jurisdiction and procedure).
54. See Casto, supra note 47, at 641–42 (explaining that “international law is incorporated into United States domestic law as a form of federal common law”).
federal common law” in fashioning appropriate rules of decision in these cases.  

III. **SOSA CLAIMS BASED ON HARM TO DECEASED VICTIMS: THE PREVAILING APPROACH**

*Sosa* did not have cause to address the question of who is the proper plaintiff in an ATS suit where the victim of the international law violation alleged is deceased. The purported victim in *Sosa* was alive and well and was the plaintiff in the lawsuit. As described above, however, ATS cases frequently concern victims who are not so fortunate. In those situations, the plaintiffs in the resulting lawsuits are normally the surviving relatives or other next of kin of the decedents, raising the question of

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55. *Id.* at 639. Casto’s hybrid theory is consistent with the language of *Sosa*. For one, the opinion makes clear that the norms to be enforced in any ATS litigation are born of international law. *See* *Sosa v. Alvarez-Machain*, 542 U.S. 692, 720 (2004) (“Congress intended the ATS to furnish jurisdiction for a relatively modest set of actions alleging violations of the law of nations.”). The decision also indicates that the remedy for violations of those international norms—the private right to sue for damages in federal court—derives from the judiciary’s “civil common law power” to create domestic legal remedies. *See id.* at 725, 729–31 (observing that federal courts retain the authority to “derive some substantive law in a common law way”). At the same time, the Court elaborated that “the domestic law of the United States recognizes the law of nations” and that the exercise of judicial discretion sanctioned in ATS cases involves the creation of “federal common law rules in interstitial areas of particular federal interest.” *Id.* at 726, 729. The Court’s language in this regard signals that although international law is certainly relevant to the litigation of *Sosa* claims, principles of federal common law ultimately determine the rules of decision applicable in any given case. *See* Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1661 (2013) (observing that the cause of action in an ATS suit does not derive from “foreign or even international law” but rather from “U.S. law”); *see also* Beth Stephens, Comment, *Sosa v. Alvarez-Machain: “The Door Is Still Ajar” for Human Rights Litigation in U.S. Courts*, 70 BROOK. L. REV. 533, 558 (2004) (“*Sosa* does not require that every ancillary rule applied in an ATS case meet the level of international consensus required for the definition of the underlying violation. As in any case in which the federal courts exercise discretion to recognize federal common law, the courts will fashion rules to fill gaps, borrowing from the most analogous body of law.”); *accord* Doe v. Exxon Mobil Corp., 654 F.3d 11, 41–43 (D.C. Cir. 2011) (interpreting *Sosa* to hold that “customary international law provides rules for determining whether international disapproval attaches to certain types of conduct,” while domestic federal common law determines “the nature of any remedy” for these violations); *cf.* Ingrid Wuerth, *The Alien Tort Statute and Federal Common Law: A New Approach*, 85 NOTRE DAME L. REV. 1931, 1932–33 (2010) (“[T]he relationship between federal common law and international law is not binary but instead is best understood on a continuum, with certain aspects of ATS litigation governed by federal common law that is tightly linked to international law, other aspects governed by federal common law that is not derived from international norms, and still others that fall somewhere in between.”).


57. *See supra* notes 5–8 and accompanying text.
whether these individuals may properly bring suit for injury befalling the deceased party. Absent authoritative guidance on this question, lower courts have coalesced around the approach pioneered by Xuncax v. Gramajo from the District of Massachusetts. The remainder of Part III reviews the analytical framework offered in Xuncax and concludes that it is untenable in both theory and practice.

A. The Xuncax Approach

In Xuncax, nine Guatemalan nationals and an American citizen brought suit against Hector Gramajo, the former head of the Guatemalan Ministry of Defense, for violations of state, federal, and international law. The plaintiffs sought damages for alleged human rights abuses perpetrated against them and their relatives by the Guatemalan military during the country’s long civil war. Gramajo, for his part, refused to participate in the proceedings, and default was subsequently entered.


60. See id. at 169–75. The complaint described “numerous acts of gruesome violence inflicted by military personnel” under Gramajo’s “direct command.” Id. at 169. With respect to the Guatemalan plaintiffs, the court described that “[s]ome of the plaintiffs were themselves subjected to torture and arbitrary detention; others were forced to watch as their family members were tortured to death or summarily executed; one plaintiff’s father was caused to ‘disappear.’” Id. With respect to the American plaintiff, Dianna Ortiz, an Ursuline nun who had been performing missionary work in Guatemala at the relevant time, the district court recounted how she had been “kidnapped, tortured and subjected to sexual abuse in Guatemala by personnel under Gramajo’s command. When word of her treatment became public, Gramajo defamed her by falsely asserting her injuries were inflicted by an angry lover.” Id. at 173.
against him. Before entering judgment, however, the court explicitly addressed the question raised by this Article: whether the plaintiffs were eligible to bring suit for harms suffered by their deceased or otherwise incapacitated relatives.

In analyzing this open question of ATS law, the court made two principal assumptions. First, the court construed the relevant inquiry as whether the plaintiffs had “standing to bring suit based on injury to another.” By “standing,” the court apparently meant to refer to the concept of statutory standing under the ATS, as opposed to constitutional standing under Article III. Statutory standing generally refers to the issue of “whether a statute creating a private right of action authorizes a particular plaintiff to avail herself of that right of action.” Although Sosa later clarified that the ATS does not provide a substantive right of action for torts in violation of international law, Xuncax read the prevailing precedent

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61. Id. at 169.

62. See id. at 169, 189–92. Three plaintiffs, Teresa Xuncax, Juan Doe, and Elisabet Pedro-Pascual, alleged summary execution claims based on the unlawful killings of their respective relatives. Id. at 169–70, 184. One plaintiff, Jose Alfredo Callejas, alleged a disappearance claim based on the alleged abduction of his father. Id. at 171, 184. Teresa Xuncax and Juan Doe also raised torture and arbitrary detention claims on behalf of deceased relatives. Id. at 184. Plaintiff Juan Diego-Francisco asserted torture and arbitrary detention claims for himself and on behalf of his wife. Id. at 169, 184. The decision did not indicate whether Diego-Francisco’s wife was alive at the time of the lawsuit. See id. at 170 (recounting that after being released from military custody, Diego-Francisco “left for Mexico that same day with his wife”).

63. Id. at 189.

64. Constitutional standing under Article III requires plaintiffs to establish that they suffered an “injury in fact” that is “fairly traceable” to the defendants’ conduct and that a favorable judicial determination is likely to redress the injury. See, e.g., Bennett v. Spear, 520 U.S. 154, 162 (1997). The court in Xuncax did not once mention these Article III limitations in its discussion of the plaintiffs’ eligibility to bring suit based on injury to their relatives. See 886 F. Supp. at 189–92.

65. See Radha A. Pathak, Statutory Standing and the Tyranny of Labels, 62 OKLA. L. REV. 89, 91 (2009). Supreme Court decisions have also suggested that statutory standing implicates the prudential “zone of interests” test for party standing. See, e.g., Holmes v. Sec. Investor Prot. Corp., 503 U.S. 258, 287 (1992) (Scalia, J., concurring) (stating that an “element of statutory standing is compliance with . . . the ‘zone-of-interests’ test, which seeks to determine whether, apart from the directness of the injury, the plaintiff is within the class of persons sought to be benefitted by the provision at issue”). However, the Court has never clearly articulated the relationship between these two variants of standing law. See Lerner v. Fleet Bank, N.A., 318 F.3d 113, 127 n.12 (2d Cir. 2003) (noting that the Supreme Court has previously labeled the zone of interests test as a statutory standing inquiry but that courts have treated the inquiries as separate on different occasions); cf. Robert H. Marquis, The Zone of Interests Component of the Federal Standing Rules: Alive and Well After All?, 4 U. ARK. LITTLE ROCK L.J. 261, 286 (1981) (arguing for the elimination of “any theoretical distinction between the tests applicable in determining the existence of an implied statutory right of action against governmental and against private defendants”).
at the time as supporting the alternate conclusion that “§ 1350 yields both a jurisdictional grant and a private right to sue for tortious violations of international law (or a treaty of the United States).”

The second assumption underlying the court’s approach was that federal law should supply the applicable rules of decision for claimant standing under the ATS. Noting that the ATS is “silent” on the issue of standing, the court cited the conventional practice of borrowing substantive requirements from “analogous state statutes” to furnish “important details” missing from a federal cause of action. The court explained, however, that analogous federal provisions may be borrowed where the “application of the state law would defeat the purpose of the federal statute . . . or if there is a special federal need for uniformity.”

With this rubric in mind, the court ultimately chose to apply the liability provisions of the Torture Victims Protection Act (TVPA), a federal statute establishing causes of action for extrajudicial killing and torture. According to the court, the TVPA permitted recovery for harms suffered by third parties only by “a claimant in an action for wrongful death.” Moreover, the court ruled that although forum state law generally defines who qualifies as a wrongful death claimant, the TVPA also permits the use of “foreign law recognizing a claim by a more distant relation in a wrongful death action” where “application of Anglo-American law would result in no remedy whatsoever for an extrajudicial killing.” Relying on this interpretation of the statute, the court then applied a combination of state and foreign law to determine each plaintiff’s standing to sue.

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66. 886 F. Supp. at 179–80; see also Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 780 n.5 (D.C. Cir. 1984) (Edwards, J., concurring) (construing Filartiga to hold that “aliens granted substantive rights under international law may assert them under § 1350”).


68. Id. at 189–90.

69. Id. at 190 (citation omitted).


71. Id. (quoting 28 U.S.C. § 1350 note (2006) (Establishment of Civil Action § 2(a)(2))). The court also noted that the TVPA permits recovery by the victim’s “legal representative.” Id. However, the court did not rely on this language in analyzing the viability of the plaintiffs’ third party claims. See id. at 191–92.

72. See id. at 191 (quoting S. REP. NO. 102-249, at 7 n.10 (1991)).

73. With respect to the plaintiffs’ summary execution and disappearance claims, the court relied on the Massachusetts Wrongful Death Act and the Guatemalan Civil Code. Id. at 191–92. The Massachusetts Wrongful Death Act permitted a decedent’s spouse or children to sue for damages, while the Guatemalan Civil Code also gave the
The court’s decision to apply the TVPA in this regard turned in large part on its view that state law is “ill-tailored for cases grounded on violations of the law of nations” and that using state law by itself as the applicable rule of decision would “mute[] the grave international law aspect of the tort, reducing it to no more (or less) than a garden-variety municipal tort.”

B. Evaluation of the Xuncax Approach

As described above, the Xuncax approach represents the prevailing framework for determining whether a plaintiff may properly assert international law tort claims based on injury to a deceased party. Unfortunately, although Xuncax’s analysis has some surface appeal, a closer review reveals that it is both inconsistent with governing precedent and unwieldy in practice.

1. Inconsistencies with Precedent

As an initial matter, Xuncax led with the wrong foot by characterizing the relevant inquiry as a question of statutory standing under the ATS. Indeed, by asking whether a plaintiff has standing under § 1350, Xuncax necessarily adopted an incorrect and now overruled interpretation of the statute—that the ATS supplies a private right of action for violations of international law. Sosa later made clear, however, that the ATS is purely jurisdictional and does not create any new substantive rights; thus, it is at best anachronistic to speak in terms of a plaintiff’s “standing” under the ATS.

decendent’s siblings that right of action. See id. at 191. As for the plaintiffs’ arbitrary detention and torture claims, the court found that neither Massachusetts tort law nor the relevant Guatemalan statutes permitted an individual to bring suit on behalf of a third party victim. Id. at 192. Significantly, the court did not explain why Guatemalan law was the appropriate “foreign law” to apply in this case. Presumably, the court turned to Guatemalan law after performing some unspecified choice of law analysis. See, e.g., Filartiga v. Pena-Irala, 577 F. Supp. 860, 863–65 (E.D.N.Y. 1984) (applying, on remand, principles from the Restatement (Second) of Conflict of Laws section 6(2) to determine the availability of punitive damages in a case alleging violations of international law cognizable under the ATS).

74. See Xuncax, 886 F. Supp. at 192.
75. See id. at 183 (emphasis omitted).
76. See supra note 58 and accompanying text.
77. Xuncax, 886 F. Supp. at 189 (framing the issue as whether the plaintiffs had “standing to bring suit based on injury to another” under the ATS).
ATS because the statute generates no right of action under which a plaintiff may have standing to assert.

But even if translated into present-day jurisprudence, Xuncax’s standing formulation still trespasses salient legal principles. Specifically, by asking whether the plaintiff in a deceased-victim case has standing to sue, Xuncax assumes that the plaintiff possesses a cognizable cause of action in the first place. On this point, the decision in Dohaish v. Tooley is instructive. In that case, the plaintiff brought suit for alleged due process violations arising from a district attorney’s failure to prosecute an individual allegedly responsible for the death of the plaintiff’s son. On appeal from the district court’s dismissal, the appellate court noted that although the lower court had dismissed the plaintiff’s claims for lack of “standing,” the “major obstacle” to the plaintiff’s action was instead “the weakness in the suit itself,” by which the court meant to refer to the plaintiff’s failure to identify a viable cause of action. In this regard, the court noted that to the extent the plaintiff sought to raise claims on behalf of his deceased son, the dispositive question was whether these claims survived his son’s death under the applicable survivorship law. Moreover, to the extent the plaintiff sought damages for his own injuries flowing from the death of his son, the court noted that he should investigate whether governing law supplied him with a wrongful death cause of action.

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80. See Davis v. Passman, 442 U.S. 228, 237 (1979) (explaining that the term cause of action traditionally refers to “the alleged invasion of ‘recognized legal rights’ upon which a litigant bases his claim for relief”).

81. Id. at 935.

82. Id. at 936 (observing that “[b]oth the question of standing and the question of legal sufficiency of the action focus on the nature of the plaintiff’s injury and the nature of the invasion of his alleged right but different considerations underlie the two concepts”).

83. See id. at 937.

84. See id. at 938; cf. Liberty Nat’l Ins. Holding Co. v. Charter Co., 734 F.2d 545, 553 n.19 (11th Cir. 1984) (applying cause of action analysis, as opposed to standing doctrine, to the issue of whether the plaintiff could bring suit under the federal securities
Xuncax’s focus on plaintiff standing mirrors the lower court’s mistaken analysis in Dohaish. Specifically, with respect to those international law tort claims seeking damages personal to the decedent—claims for arbitrary detention and torture—the Xuncax approach fails to consider whether these claims survive the death of the actual victim. Yet basic principles of tort law teach that a tort victim’s cause of action abates upon the victim’s death absent explicit injunction to the contrary. With respect to those claims seeking damages for a third party’s death itself—claims for summary execution or disappearance—the Xuncax approach similarly assumes that governing law supplies the plaintiffs with a cause of action for death in violation of international law. Yet after Sosa, federal courts cannot so lightly presume the existence of a cause of action as a matter of federal common law. Thus, as in Dohaish, Xuncax’s use of standing terminology obscures the actual issue at stake, that is, whether the plaintiffs asserted a viable cause of action.

In addition to this substantive obfuscation, the Xuncax approach is also ill-advised for its reliance on federal law as supplying the applicable rules of decision. Xuncax resolved what it saw as the open question of the ATS’s standing requirements by fashioning a federal common law rule drawn from the liability standards of the TVPA, a federal statute because the scope of right to sue under a particular law does not implicate issues of whether there is a “justiciable case or controversy”).

86. Xuncax v. Gramajo, 886 F. Supp. 162, 192 (D. Mass. 1995) (noting that the claims for arbitrary detention and torture were brought “on behalf of a husband, father, and wife, respectively,” yet failing to discuss whether such claims survived the death of the victims (emphasis added)).

87. See 1 AM. JUR. 2d Abatement, Survival, and Revival § 51, at 137 (2005); see also Henshaw v. Miller, 58 U.S. 212, 222–24 (1854) (holding that actions for trespass to land and for tort “did not survive the death of the defendant, but abated upon the occurrence of that event”).

88. Xuncax, 886 F. Supp. at 191 (announcing that certain plaintiffs have “a cause of action under 28 U.S.C. § 1350” for the death or disappearance of their relatives in violation of international law).


90. See 13A WRIGHT ET AL., supra note 16, § 3531 (noting that by construing a cause of action dispute as a standing issue, courts often obscure what should normally be a simple private law question of enforceable interests behind the “special justiciability concerns surrounding public-interest litigation”). Indeed, standing doctrine has largely been a product of “litigation asserting the illegality of government action,” implicating public concepts of judicial competence and separation of powers that are less relevant in the context of a dispute between private persons and often serve only to confuse otherwise straightforward private law questions. See id. See generally Lee A. Albert, Justiciability and Theories of Judicial Review: A Remote Relationship, 50 S. CAL. L. REV. 1139 (1977) (discussing the relationship between justiciability and ideas on judicial review and restraint and concluding that the relationships are incidental and remote).
providing damages for extrajudicial killing and torture. In choosing to adopt the TVPA’s requirements over analogous state law, the court justified its position on the authority of Agency Holding Corp. v. Malley-Duff & Associates. In that case, the Supreme Court fashioned a timeliness rule for civil RICO enforcement actions by adopting a federal limitations period over the relevant state provision. The Court’s choice of federal law over state law in this regard turned on two factors: (1) “the lack of any satisfactory state law analogue to RICO” and (2) the possibility that application of state law would “thwart the legislative purpose of creating an effective remedy” for RICO violations. Neither factor, however, was present in Xuncax.

With respect to the first factor—the availability of satisfactory state law analogues—Xuncax itself recognized that Massachusetts law provided readily apparent analogues to the plaintiffs’ claims. Actions under the Massachusetts Wrongful Death Act approximated the plaintiffs’ claims for summary execution and disappearance, and state law claims for personal injury mirrored those for arbitrary detention and torture. Xuncax discarded these state law parallels, however, on the grounds that “municipal law is ill-tailored for cases grounded on violations of the law of nations.” But as the Supreme Court has observed, domestic law for centuries has recognized international law as part of the general common law. Thus, municipal law is quite accustomed to adjudicating disputes involving international law violations. More to the point, even if state law is generally unfamiliar with violations of the scale and seriousness of present-day human rights claims, municipal codes are certainly familiar

92. Id. at 190–92 (citing Agency Holding Corp. v. Malley-Duff & Assocs., 483 U.S. 143 (1987)).
94. See id. at 152.
95. See id. at 154.
97. Id.
98. Id. at 192.
99. Sosa v. Alvarez-Machain, 542 U.S. 692, 729 (2004) (“For two centuries we have affirmed that the domestic law of the United States recognizes the law of nations.”); see also Ku & Yoo, supra note 9, at 202 (noting that “most scholars agree that CIL formed part of the general common law” pre-Erie).
100. See Ku & Yoo, supra note 9, at 202–03 (recounting how early state court decisions applied CIL independently of federal courts).
with legal principles regarding recovery for death and personal injury, precisely the decisional rules relevant to Xuncax’s inquiry. 101

Regarding the second factor in Agency Holding, the adoption of state law as the applicable rule of decision would not “thwart the legislative purpose” behind the federal claim. As the Supreme Court described, the First Congress envisioned the common law claim recognized in Sosa as providing an essential remedy for certain widely accepted and clearly defined violations of the law of nations. 102 Applying state law to determine who may litigate these claims would not impinge upon that remedial objective in any meaningful way. In fact, the application of state law in Xuncax would have permitted a remedy for the violations alleged—the decedents’ spouses and children could have recovered for death damages, and the decedents’ personal representatives could have recovered personal injury damages on behalf of the deceased. 103 Simply because state law would have barred recovery for one class of plaintiffs—siblings—does not mean the federal interest had been “thwarted.” 104 Thus, contrary to Agency Holding, Xuncax was wrong to rely on federal law for the applicable rules of decision on the deceased-victim issue. 105

103. See Xuncax, 886 F. Supp. at 190–92.
104. Cf. Robertson v. Wegmann, 436 U.S. 584, 594 (1978) (holding that state law did not undermine the effectiveness of a federal remedial scheme where it barred the plaintiff’s claim but was not otherwise generally “inhospitable” to the federal remedy); see also infra notes 243–54 and accompanying text.
105. Moreover, even if Xuncax was right to turn to federal law for the relevant substantive standards, the court misread the TVPA as permitting courts to look to foreign law in determining the proper plaintiff. As described above, the court held that under the TVPA, courts could apply foreign law as the applicable rule of decision where “application of Anglo-American law would result in no remedy whatsoever” for the ATS claimant. See Xuncax, 886 F. Supp. at 191. The court based this reading of the statute on an “important footnote” in what it claimed to be the Senate Committee Report on the TVPA. Id. at 191 (citing S. Rep. No. 102-249, at 7 n.10 (1991)). This legislative history, however, is in no way authoritative on the meaning of the statutory text. For one, the Senate Committee Report on which the court based its interpretation addressed statutory language that is different from what was actually enacted. The bill that became the TVPA originated in the House of Representatives as House Report 2092 and was introduced on April 24, 1991. See 138 CONG. REC. 31,246 (1992); 137 CONG. REC. 9071 (1991); see also Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified as amended at 28 U.S.C. § 1350 (2006)). The Senate Committee Report cited by Xuncax commented on a parallel version of this legislation introduced in the Senate as Senate Report 313 on January 31, 1991. See S. Rep. No. 102-249 (1991). Notably, the Senate version included different language on the proper plaintiffs in an extrajudicial killing action: whereas the TVPA permits “any person who may be a claimant in an action for wrongful death” to bring suit for extrajudicial killing,
2. Difficulties in Practice

*Xuncax*’s conceptual failings also foretold the framework’s unwieldiness in practice, as courts relying on *Xuncax*’s analysis struggled to make sense of its prescribed methodology for determining the applicable rules of decision. As described above, *Xuncax* held that the ATS shares the TVPA’s “standing” requirements and that under the TVPA, courts may turn to foreign law to determine a plaintiff’s standing to sue where “application of [state] law results in no remedy whatsoever.” Unfortunately, this choice of law rule provided little principled guidance to courts adjudicating deceased-victim cases.

In *Beanal v. Freeport-McMoran, Inc.*, for example, the court cited *Xuncax* in determining whether an Indonesian citizen could properly raise disappearance and summary execution claims on behalf of certain deceased victims of whom he was not a relative. However, when it became clear that the application of state law would foreclose the plaintiff’s claim, the court did not then turn to foreign law to answer the “standing” issue as *Xuncax* had instructed. Although *Beanal* did not explicitly address its deviation from *Xuncax*’s methodology, the court likely saw no need to resort to foreign law because *Xuncax*’s holding was technically

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106. See *Xuncax*, 886 F. Supp. at 191.
108. See id. (applying Louisiana wrongful death law to conclude that the plaintiff “lacks . . . standing to sue on behalf of victims of disappearance or summary execution under § 1350”).
limited to persons related to the deceased, and the plaintiff in Beanal had not identified himself as a relative of any victim.

A few years later, in Estate of Cabello v. Fernandez-Larios, the court attempted to reconcile Beanal and Xuncax to rather unsatisfying results. Cabello hewed closely to Xuncax’s choice of law principle, applying a combination of forum state law and foreign law to the question of whether the individual plaintiffs could bring suit for the extrajudicial killing of their relative. First, the court observed that forum state law, Florida, would permit only one of the individual plaintiffs to bring suit for the decedent’s extrajudicial killing. Following Xuncax, however, the court determined that “analogous Chilean law” should apply because “Florida law does not result in a remedy for the remaining Plaintiffs.” Under that foreign law, all of the remaining individual plaintiffs could bring suit for the decedent’s extrajudicial killing. The court acknowledged that Beanal, decided previously, “did not turn to analogous foreign law” after finding that state law provided no relief to the plaintiffs but nonetheless distinguished that case as addressing only “third party standing, as opposed to whether an indirect or mediate victim of a wrongful death may have standing to sue for extrajudicial killing under the

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109. See Xuncax, 886 F. Supp. at 191–92 (resolving the deceased-victim issue with respect to plaintiffs who were all relatives or related to the alleged victims).
110. See Beanal, 969 F. Supp. at 368.
111. See 157 F. Supp. 2d 1345, 1355–58 (S.D. Fla. 2001). Cabello arose out of the 1973 killing of Winston Cabello, a government appointee of then-Chilean President Salvador Allende. Id. at 1349. The complaint alleged that after General Augusto Pinochet’s successful coup of the Allende government, military officers in the new regime, including the defendant Armando Fernandez-Larios, detained Cabello in Copiapó, Chile and then illegally executed him along with twelve other political prisoners. Id. The plaintiffs in the case brought suit for extrajudicial killing, torture, crimes against humanity, and cruel, inhuman, or degrading treatment or punishment. Id. at 1350–51. All these claims were based on harm suffered by the decedent. Id.
112. See id. at 1355–58.
113. Id. at 1357. The court determined that the “applicable state law” was Florida’s wrongful death statute, which provided that “wrongful death actions shall only be brought by the decedent’s personal representative, when one exists under law.” Id. (citing Benson v. Benson, 533 So. 2d 889, 889 (Fla. Dist. Ct. App. 1988)). Of the individual plaintiffs, only the decedent’s sister, Zita Cabello-Barrueto, had been appointed personal representative. Id. at 1350, 1357. Therefore, the court concluded that only she would have “standing” to bring an extrajudicial killing claim should Florida law apply. Id. at 1357.
114. Id. (citing Xuncax, 886 F. Supp. at 191). As in Xuncax, the Cabello court presumably chose Chilean law as the events underlying the plaintiffs’ allegations occurred in Chile, although the court offered no express discussion of this specific choice of law decision. See id. at 1357–58.
115. Id. With respect to the specific foreign law applied, the court turned to Chile’s wrongful death law under Articles 2314 and 2329 of the Chilean Civil Code. Id. at 1357.
TVPA."  Given the Beanal court’s explicit references to the Xuncax framework, however, Cabello’s reasoning on this point is far from convincing.

More recently, a pair of opinions from different federal district courts demonstrated the continuing uncertainty surrounding the application of Xuncax’s choice of law rule. In the earlier case, Bowoto v. Chevron Corp., several Nigerian plaintiffs brought international law tort claims on behalf of relatives killed in a “series of brutal attacks” occurring in and around Nigeria in the mid- to late-1990s. The defendants asserted that these plaintiffs lacked “standing” under the ATS to sue on behalf of their deceased relatives. Applying the choice of law rule outlined in Xuncax, the court first looked to forum state law, California, but concluded that California law would not allow persons in the plaintiffs’ positions to bring suit on behalf of a deceased relative. Citing Xuncax and Cabello, however, the court then applied Nigerian wrongful death law as the applicable rule of decision. In so doing, the court did not attempt to define the scope of this choice of law principle, although it did cite the Beanal decision as authority against relying on foreign law sources under certain circumstances.

In Wiwa v. Royal Dutch Petroleum Co., by contrast, the court offered some limited guidance on when courts should resort to foreign law sources over forum law. In that case, Nigerian plaintiffs alleged that an international energy conglomerate, acting in concert with the Nigerian government, perpetrated a “host of human rights violations” against the plaintiffs in response to the plaintiffs’ protests against the energy company’s oil production in the Niger Delta. The defendants moved to dismiss on the familiar grounds that the plaintiffs lacked “standing” to sue for

116. Id. at 1357 n.5.
118. Id. at *11.
119. Id. (noting that the plaintiffs disclaimed reliance on California law “[b]ecause the decedents at issue all have surviving spouse(s) and children”).
120. Id. at *11–12.
121. See id. at *11.
123. Id. at *1–2.
the injuries suffered by deceased third parties. 124 The court summarized
the prior authority on this issue beginning with Xuncax and concluded
that “[o]nly if the application of state law would defeat the purpose of an
asserted federal cause of action do courts look instead to the most
analogous federal statute,” the TVPA, which prior decisions had also
concluded permitted the use of foreign law. 125 The court determined,
however, that it need not look beyond state law in this instance because
the plaintiffs were capable of receiving “letters of administration” under
state law that would allow them to bring suit based on the harm alleged
to deceased victims. 126

Wiwa’s struggle to reconcile the varying precedents utilizing Xuncax’s
choice of law framework highlights a fundamental weakness in Xuncax’s
approach, namely, the lack of any real principle guiding a court’s choice
of the applicable rule of decision. Xuncax held that in determining what
persons are eligible to assert international law tort claims based on harm
to deceased parties, courts should look to state law unless doing so
provides “no remedy whatsoever” to the plaintiff, at which point courts
may then apply “foreign law recognizing a claim by a more distant relation
in a wrongful death action.” 127 But does this rule apply only to plaintiffs
who are related to the deceased, as Beanal suggests? Also, what situations
qualify as providing “no remedy whatsoever”? As in Wiwa, is it accurate
to say that state law provides a remedy where the plaintiffs can acquire
representative status through the forum’s probate laws? Moreover, even
assuming all conditions are satisfied to resort to “foreign law,” on what
foreign law should the court rely? Cabello and Bowoto answered this
question with little analysis, but there will undoubtedly be situations
where the answer is not so evident. 128

All told, the Xuncax framework fails to set out a principled rubric for
determining whether a given ATS plaintiff may bring suit based on
international law violations befalling a deceased party. For absence of
any alternatives, however, courts confronted with this issue began their

124. Id. at *8. The court noted that the parties had referred “interchangeably” to
the defendants’ arguments as a lack of “standing” and “capacity.” Id. at *8 n.30. The court,
however, construed the issue as one of “statutory standing,” which implicated “prudential
considerations” on federal jurisdiction under Second Circuit law. See id. at *8 & n.31.
1995)).
126. Id. at *9.
128. See Stephens et al., supra note 10, at 36 (“Determining what body of law
governs particular issues in ATS cases is one of the most unsettled post-Sosa issues
facing the lower courts.”); see also id. at 233 (stating that “[i]n the case law under the ATS
is not always clear about what law applies” to questions of who may bring suit based on
harm suffered by deceased victims).
analysis with the *Xuncax* decision. By virtue of its longevity then, more than its accuracy, *Xuncax* has become the prevailing approach for assessing a plaintiff’s ability to raise *Sosa* claims based on harm to a deceased victim.

IV. *SOSA* CLAIMS BASED ON HARM TO DECEASED VICTIMS: A NEW APPROACH

The prevailing approach to the deceased-victim issue in ATS cases is untenable in both theory and practice. However, the basic principles underlying this flawed methodology suggest a new way forward. *Xuncax* erred at the outset by framing the relevant inquiry in terms of the plaintiff’s standing to sue under the ATS. Although the court’s reliance on standing terminology is analytically imprecise, the court’s initial instinct to question the plaintiff’s eligibility to bring suit was sound. At bottom, the salient issue in these cases is whether an individual who is not the victim of the international law violation alleged may nonetheless recover damages for the illegal conduct at issue. Although it is tempting to couch this issue in the language of standing law, the inquiry more accurately turns on a straightforward analysis of whether the plaintiff has stated a viable cause of action for relief.

The following Part outlines an alternative approach to the deceased-victim issue based on this fundamental insight. First, I explain that the search for the proper plaintiff in these ATS cases is essentially a cause of action inquiry regarding the availability of wrongful death and survival damages. I then argue that courts should recognize a federal common law cause of action for death in violation of international law, as well as a federal common law rule of survivorship for international law tort claims in federal court. This Part concludes with a discussion of the doctrinal and practical advantages of this proposed approach over the prevailing *Xuncax* framework.

A. Wrongful Death and Survival Claims Under *Sosa*

Wrongful death actions seek recovery for injuries suffered by one person resulting from the death of another.129 By contrast, survival claims

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129. See DAN B. DOBBS, THE LAW OF TORTS § 294, at 804 (2000) (“Wrongful death statutes create a new action in favor of certain beneficiaries who suffer from another’s death as a result of a tort.”).
request relief on behalf of a deceased individual’s estate for injuries suffered by the decedent prior to death. In wrongful death cases, whether a given plaintiff can bring suit is a function of the applicable wrongful death law, which generally creates a cause of action for the decedent’s death and also defines the class of persons that may recover wrongful death damages. In survival cases, a plaintiff’s right to recovery similarly turns on the applicable survivorship law, which typically prescribes the categories of claims that survive the decedent’s death and also the persons who may sue on behalf of the victim’s estate in any resulting survival action.

Sosa claims based on harm to deceased victims present situations analogous to both of these types of traditional tort actions. Specifically, these claims generally seek either (1) damages for harm to the plaintiff, resulting from the death of the plaintiff’s close relative or next of kin, or (2) damages for injuries suffered directly by the deceased relative prior to death. Claims in the first category approximate wrongful death actions, while those in the second category are analogous to survival actions.

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130. See id. (“Survival statutes do not provide for an independent action in favor of the deceased’s dependents. . . . They provide for the survival of whatever action the deceased herself would have had if she had been able to sue at the moment of her death . . . .”). See generally 1 SPEISER & ROOKS, supra note 101, § 1:13 (describing the conceptual differences between survival and wrongful death actions).


132. See 1 SPEISER & ROOKS, supra note 101, § 1:15 (describing different survival statutes).

133. See, e.g., Baloco ex rel. Tapia v. Drummond Co., 640 F.3d 1338, 1341 (11th Cir. 2011) (“[Plaintiffs] allege that the murders of their fathers caused them damages including emotional harm, loss of companionship and financial support.”).


135. See, e.g., Bowoto v. Chevron Corp., 621 F.3d 1116, 1122–23 (9th Cir. 2010) (accepting the district court’s characterization of plaintiffs’ Sosa claims alleging death or nonfatal injury to third parties as “ATS wrongful death and survival claims”); In re Estate of Ferdinand Marcos, Human Rights Litig., 25 F.3d 1467, 1476 (9th Cir. 1994) (applying survivorship principles developed in the context of federal civil rights jurisprudence to an abatement argument advanced in the ATS context); Wiwa v. Royal Dutch Petroleum Co., Nos. 96 Civ. 8386(KMW)(HBP), 01 Civ. 1909(KMW)(HBP), 02 Civ. 7618(KMW)(HBP), 2009 WL 46946, at *9 (S.D.N.Y. Feb. 25, 2009) (noting that plaintiffs’ claims “can be divided into two categories: (1) claims for damages resulting from
Thus, as in those more traditional tort actions, the answer to the proper plaintiff issue in deceased-victim ATS cases depends on the type of Sosa claim asserted.\footnote{136. See Davis v. Passman, 442 U.S. 228, 240 n.18 (1979) (holding that the cause of action analysis turns on the “nature of the right” asserted); see also 13A WRIGHT ET AL., supra note 16, § 3531.6 (explaining that courts engaged in the cause of action analysis must first determine “whether [the] particular category of wrong is ever open to correction by injunction, declaratory judgment, or damages,” then, if so, “whether [the] particular plaintiff satisfies the conditions on which one or another of these remedies is available”).}

With respect to those cases seeking wrongful death-style damages, the inquiry is twofold: the reviewing court must first determine whether there is a cause of action under governing law for an individual’s death in violation of international law, then, if so, whether the plaintiff falls within the class of persons eligible to assert that cause of action.\footnote{137. Cf. Brazier v. Cherry, 293 F.2d 401, 403–09 (5th Cir. 1961) (performing a similar two-step analysis in the context of determining whether the plaintiff may seek wrongful death damages for death caused by an alleged violation of federal civil rights laws).} For ATS suits seeking survival damages, the analysis is similarly sequential. Courts must make the preliminary determination of whether the decedent’s claim survives the decedent’s death, then, if so, whether the plaintiff can properly bring suit on behalf of the decedent’s estate in the resulting survival action.\footnote{138. Cf. Robertson v. Wegmann, 436 U.S. 584, 590–94 (1978) (holding that a federal civil rights claim survives in accordance with forum state law, which prescribes both the types of claims that survive the death of the victim and the persons eligible to then raise those claims on behalf of the decedent’s estate).}

\footnote{139. As discussed above, under Sosa, international law determines all questions regarding the standards and scope of the defendant’s liability, while domestic law supplies the rules of decision for all other aspects of the litigation. See Casto, supra note 47, at 641; see also Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1661 (2013) (noting that the claims underlying an ATS suit do not arise from “foreign or even international law” but rather from “U.S. law”). The availability of wrongful death and survival actions in Sosa cases pertains solely to the scope of the remedy for violations of international law alleged, not the extent of the defendant’s liability under the relevant norm of conduct. See Moragne v. States Marine Lines, Inc., 398 U.S. 375, 382 (1970) (“[T]he decision whether to allow recovery for violations causing death is entirely a remedial matter.”); 1 SPEISER & Rooks, supra note 101, § 1:13 (noting that survivorship laws are “remedial in nature”).} The remainder of this Part addresses each point in turn.

\footnote{411}
1. Wrongful Death Claims Under Sosa

a. Relevant Precedent

The Supreme Court has not directly addressed whether federal common law recognizes a cause of action for an individual’s death in violation of international law. Several lines of precedent, however, inform this inquiry. First and foremost is Sosa itself. In that case, the Court focused its attention on the distinct question of what types of international law norms may support a claim of relief in domestic courts. Sosa’s reasoning thus pertains primarily to the kinds of legal norms that may be enforced through the common law, not the “technical accoutrements” of the underlying litigation such as the availability of wrongful death recovery. Nonetheless, given Sosa’s extensive discussion regarding the limits on the exercise of judicial discretion in the ATS context, the Court’s analysis in that case necessarily guides the present inquiry into the availability of a wrongful death cause of action.

On that score, the principles articulated in Sosa prescribe that courts may devise common law causes of action for violations of international law where these judicial remedies comport with the discernible intent of Congress. Sosa held that any claim based on the present-day law of nations must rest on a norm of international character that is as widely accepted and clearly defined as the trio of eighteenth-century offenses against the law of nations recognized in Blackstone’s Commentaries. In delineating this standard, the Court relied upon a “series of reasons argu[ing] for judicial caution” in crafting common law remedies for
international rights violations. These reasons included (1) the “general understanding” that the federal courts’ exercise of common law power includes “a substantial element of discretionary judgment”; (2) “the general practice” of looking for “legislative guidance before exercising innovative authority over substantive law”; (3) the recognition that “a decision to create a private right of action is one better left to legislative judgment in the great majority of cases”; (4) “the potential implications for the foreign relations of the United States” when courts recognize common law remedies for violations concerned with the “power of foreign governments over their own citizens”; and (5) the apparent lack of any “congressional mandate to seek out and define new and debateable violations of the law of nations.”

Underlying these cautionary factors is a palpable concern that judicial lawmaking in the field of foreign affairs may run afoul of the expressed intent of the political branches of government, particularly that of Congress. Thus, in limiting the class of new international law torts to those similar to Blackstone’s trio of offenses, the Court found dispositive the intent of the First Congress in enacting the ATS in the first place. Reviewing the relevant history, the Court concluded that the First Congress “intended the ATS to furnish jurisdiction for a relatively modest set of actions alleging violations of the law of nations,” including offenses against ambassadors, violations of safe conducts, and piracy. Given the cautionary factors described above, the Court then determined that these three “historical antecedents” should serve as exemplars for any new claim drawn from international law. Consistent with the Court’s reasoning, any exercise of common law authority to recognize a cause of action for wrongful death under Sosa must at the very least come to terms with the available evidence of legislative intent on that issue.

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144. See id. at 725.
145. See id. at 725–28.
146. See David H. Moore, Medellín, the Alien Tort Statute, and the Domestic Status of International Law, 50 Va. J. Int’l L. 485, 496–97 (2010) (arguing that Sosa manifests “a separation of powers vision that leaves primary responsibility for lawmakering and foreign affairs to the political branches rather than the courts”).
148. See id. at 732.
149. Cf. Doe v. Exxon Mobil Corp., 654 F.3d 11, 43–46 (D.C. Cir. 2011) (examining the “historical context” of the ATS’s passage to determine whether corporations may be held liable for torts in violation of international law under Sosa).
Sosa’s deference to congressional attitudes points to another line of precedent relevant to the present inquiry. In Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, the Supreme Court recognized a private right of action under federal common law for violations of the Fourth Amendment. This landmark ruling birthed a body of case law principally concerned with policing the boundaries of the federal courts’ authority to craft common law remedies for violations of constitutional rights. In that regard, before courts may create a cause of action for constitutional violations under Bivens, they must first ask whether Congress or a state legislature has enacted “any alternative, existing process for protecting the interest” at stake, and then, even in the absence of such statutory alternatives, whether there are any “special factors counselling hesitation” in the exercise of the courts’ common law discretion. This latter inquiry focuses on the institutional competence of the courts, relative to the legislature, to devise remedies implicating sensitive government policy.

These principles of judicial deference to congressionally designed remedies should find even greater currency in the jurisprudence of Sosa. Like Bivens actions, litigation under Sosa involves judicially crafted, common law remedies for violations of rights guaranteed under a discrete body of law: international law, in the case of Sosa, and the Constitution, in the case of Bivens. Moreover, as with Sosa claims, the nature and scope of the Bivens remedy is primarily a project of the federal courts, with congressional intent acting as a backstop to judicial discretion.


153. See I CIVIL ACTIONS AGAINST THE UNITED STATES, supra note 50, § 3:5.

154. Compare Sosa v. Alvarez-Machain, 542 U.S. 692, 732 (2004) (holding that federal courts may recognize “private claims under federal common law” for violations of certain clearly defined and widely accepted norms of international law), with Wilkie, 551 U.S. at 549–50 (observing that the Bivens line of precedents authorizes “nonstatutory damages remedies” for “constitutional violation[s]”).

155. Compare Sosa, 542 U.S. at 725–28 (“[T]he general practice has been to look for legislative guidance before exercising innovative authority over substantive law.”), with Bush, 462 U.S. at 389 (refusing to create a Bivens remedy for a NASA employee alleging First Amendment violations because “Congress is in a far better position than a
Wrongful Death and Survival Actions
SAN DIEGO LAW REVIEW

The Supreme Court itself relied on Bivens case law in articulating the cautionary factors that federal courts must consider when determining the scope of the common law remedy for torts in violation of international law.156  Given the similarities between the common law remedies in Bivens and Sosa, respectively, the principles of judicial deference articulated in the Bivens context should also guide the instant determination of whether to allow wrongful death recovery under Sosa.157

Further direction on this issue can be gleaned from the Supreme Court’s seminal discussion of American wrongful death law in Moragne v. States Marine Lines, Inc.158  In that case, the Court established a nonstatutory cause of action under the general maritime law for deaths caused by a violation of maritime duties.159  In so doing, the Court overruled its nearly century-old precedent The Harrisburg, which previously determined that the general maritime law did not furnish a cause of action for wrongful death.160  Although Moragne’s precise holding thus addressed a specific question of maritime law, the Court’s opinion in that case advanced two broader propositions relevant to the availability of recovery for death in violation of international law.161


157. See Casto, supra note 47, at 639–40, 645 (relying on Bivens principles to propose an analytical framework for litigation under Sosa because “ATS litigation in Sosa’s wake is so obviously analogous to Bivens litigation”); see also Harold Hongju Koh, The Ninth Annual John W. Hager Lecture, The 2004 Term: The Supreme Court Meets International Law, 12 TULSA L. COMP. & INT’L L. 1, 13 (2004) (describing the cause of action under Sosa as “kind of an international law version of the Bivens remedy, a federal common law, civil remedy for a very limited class of gross human rights violations” (footnote omitted)).


159. See Moragne, 398 U.S. at 409.

160. See id. (overruling The Harrisburg, 119 U.S. 199 (1886)).

161. Accord 1 SPEISER & ROOKS, supra note 101, § 1:8 (noting that although Moragne is nominally a maritime case, “its significance and relevance as a precedent are not at all limited to the field of maritime law”).
First, in overruling *The Harrisburg*, *Moragne* concluded that American common law generally recognizes a cause of action for wrongful death.\(^{162}\) To reach that conclusion, the Court began by acknowledging the general consensus among domestic courts at the time that “in American common law, as in English, ‘no civil action lies for an injury which results in . . . death.”\(^{163}\) Upon reviewing the history of this common law rule, however, the Court determined that “it was based on a particular set of factors that had . . . long since been thrown into discard even in England, and that had never existed in this country at all.”\(^{164}\) As further proof of the common law rule’s disrepute, the Court recounted that as early as the mid-nineteenth century, “legislatures both here and in England began to evidence unanimous disapproval of the rule,” resulting in the “wholesale abandonment” of the rule through state and federal legislation affirmatively providing for wrongful death recovery.\(^{165}\) Given these “numerous and broadly applicable statutes,” the Court ultimately concluded that “the allowance of recovery for wrongful death [has become] the general rule of American law, and its denial the exception.”\(^{166}\)

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162. See 398 U.S. at 393 (“[T]he allowance of recovery for wrongful death [is] the general rule of American law, and its denial the exception.”).

163. See id. at 380 (quoting Ins. Co. v. Brame, 95 U.S. 754, 756 (1878)). The Court traced the origins of the common law prohibition against wrongful death recovery to “a feature of the early English law that did not survive into this century—the felony-merger doctrine.” Id. at 382. As the Court described, although this doctrine “found practical justification” in the idiosyncrasies of seventeenth-century English jurisprudence, “[t]he historical justification marshaled for the rule in England never existed in this country.” Id. at 382–84. For an authoritative review of the history of the common law rule prohibiting recovery for wrongful death, see T. A. Smedley, *Wrongful Death—Bases of the Common Law Rules*, 13 VAND. L. REV. 605 (1960).

164. *Moragne*, 398 U.S. at 381. Indeed, the Court observed that the rule represented a “striking departure” from “elementary principles in the law of remedies. Where existing law imposes a primary duty, violations of which are compensable if they cause injury, nothing in ordinary notions of justice suggests that a violation should be nonactionable simply because it was serious enough to cause death.” Id.

165. See id. at 388–90.

The second relevant principle articulated in *Moragne* pertains to the Court’s methodology in recognizing a wrongful death cause of action under the general maritime law. As with *Bivens* claims, the Court held that the creation of a nonstatutory remedy for wrongful death is not appropriate where congressional enactments evince a “legislative direction to except” the particular right to recovery requested. To that end, the Court in *Moragne* characterized its ultimate inquiry as deciding “whether Congress has given such a direction in its legislation granting remedies for wrongful deaths in portions of the maritime domain.” From there, the Court evaluated the principal legislative enactments in the field of maritime law, the Death of the High Seas Act (DOHSA) and the Jones Act, to conclude that “Congress has given no affirmative indication of an intent to preclude the judicial allowance of a remedy for wrongful death” based on a breach of maritime duties. Specifically, the Court concluded that “no intention appears that [DOHSA] have the effect of foreclosing any nonstatutory federal remedies that might be found appropriate to effectuate the policies of general maritime law.” This conclusion was also “wholly consistent with the congressional purpose” evident in the Jones Act of ensuring the “uniform vindication of federal policies.”

Together, *Sosa*, the *Bivens* line of authority, and *Moragne* establish several principles that guide the determination of whether to recognize a common law cause of action for death in violation of international law. First, under *Moragne*, the provision of wrongful death recovery is now “the general rule of American law, and its denial the exception.” *Sosa* warns, however, that federal courts must exercise “judicial caution” in using the common law to devise remedies for violations of international rights. In particular, any judicially crafted remedies must substantially
align with the discernible intent of Congress, a criterion similarly reflected in the Bivens line of authority. Therefore, under these precedents, federal courts may recognize a cause of action for death in violation of international law only where (1) Congress has expressed no intent to prohibit this recovery by, for example, enacting an “alternative, existing process” protecting the interest at stake, and (2) even in the absence of such discernible congressional intent, there are no “special factors counselling hesitation” or other “reasons argu[ing] for judicial caution” with respect to the creation of a common law remedy. The next subpart applies these principles to the present inquiry.

b. Availability of Wrongful Death Recovery Under Sosa

Federal courts should recognize a common law cause of action for death in violation of international law because Congress has expressed no intent to bar this relief and there are no “special factors counselling hesitation” with respect to the creation of this judicial remedy. First, Congress has not enacted any “alternative, existing process” addressing the interests at stake or otherwise indicating a legislative intent to preclude the common law wrongful death remedy at issue here. The most relevant federal statute on the issue of wrongful death recovery for international law violations is the TVPA, which “establish[es] an unambiguous and modern basis for federal claims of torture and extrajudicial killing,” two widely accepted and clearly defined violations of international law. In the case of an “extrajudicial killing,” the statute extends a cause of action to “any person who may be a claimant in an action for wrongful death” of the victim. This congressionally designed process does not, however,

174. See id. at 727.
176. Id. (quoting Bush v. Lucas, 462 U.S. 367, 378 (1983)).
177. See Sosa, 542 U.S. at 725.
178. See Wilkie, 551 U.S. at 550.
179. See id.
180. See Sosa, 542 U.S. at 728 (quoting H.R. Rep. No. 102-367, pt. 1, at 3 (1991)); see also Stephens et al., supra note 10, at 140, 148 (stating that “every court to consider the issue has agreed” that torture is a “widely accepted, clearly defined violation[] of international law” and that “[a]n extrajudicial killing or summary execution is a violation of the most basic internationally protected right, the right to life” (footnotes omitted)).
181. 28 U.S.C. § 1350 note (2006) (Establishment of Civil Action § 2(a)(2)); see also Baloco ex rel. Tapia v. Drummond Co., 640 F.3d 1338, 1347 (11th Cir. 2011) (holding that the TVPA permits recovery of wrongful death damages in addition to damages resulting from injury to the deceased). As defined by the statute, an “extrajudicial killing” is “a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.” 28 U.S.C. § 1350 note (2006) (Definitions § 3(a)).
preclude a nonstatutory remedy for deaths in violation of international law.182

In Carlson v. Green, the Supreme Court rejected a similar argument regarding the preclusive effect of the Federal Tort Claims Act (FTCA) in the context of a Bivens action for violations of the Eighth Amendment.183

In that case, the administratrix of the estate of a deceased federal prisoner brought suit against federal prison officials alleging that the decedent suffered fatal injuries caused by the officials’ failure to provide

182. Congress has also enacted three additional statutory causes of action that may potentially be used to recover for death in violation of international law. The first is 28 U.S.C. § 1605A, which “provides that designated state sponsors of terrorism may be subject to a federal cause of action for money damages if those terrorist states cause or otherwise provide material support for an act of terrorism that results in the death or injury of a United States citizen or national.” In re Islamic Republic of Iran Terrorism Litig., 659 F. Supp. 2d 31, 59 (D.D.C. 2009) (citing 28 U.S.C. § 1605 (2006)). Second, there is 28 U.S.C. § 1605 note, commonly referred to as the “Flatow Amendment,” which “provides a private right of action [only] against [individual] officials, employees, and agents of a foreign state, [but] not against the foreign state itself,” where the foreign state is a designated state sponsor of terrorism. See Cicippio-Puleo v. Islamic Republic of Iran, 353 F.3d 1024, 1033 (D.C. Cir. 2004). Third is the Death on the High Seas Act (DOHSA), 46 U.S.C. §§ 30301-30308 (2006), which “create[s] a remedy in admiralty for wrongful deaths more than three miles from shore.” See Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 620 (1978).

The two former statutory causes of action are primarily designed to “protect American victims of state-sponsored terrorism,” and in particular, to hold foreign states liable in damages for acts of international terrorism. See In re Islamic Republic, 659 F. Supp. 2d at 41–49 (recounting the passage of these two statutes and the consequent litigation brought under their authority); see also Gates v. Syrian Arab Republic, 580 F. Supp. 2d 53, 71 n.16 (D.D.C. 2008) (noting that the Flatow Amendment “came into disuse” after the D.C. Circuit ruled that it did not provide a cause of action against foreign states). DOHSA, as the title suggests, addresses only deaths occurring on the high seas, and although the statute could be read to cover certain conduct causing death in violation of international law, see, e.g., Bowoto v. Chevron Corp., 621 F.3d 1116, 1121 (9th Cir. 2010), the Supreme Court has stated that DOHSA “does not address every issue of wrongful-death law,” Higginbotham, 436 U.S. at 625, and further suggested that common law claims for international torts occurring on the high seas are not preempted by DOHSA. See Sosa, 542 U.S. at 720 (noting that claims arising out of acts of piracy are cognizable under federal common law).

Thus, unlike the TVPA, these three statutes do not represent explicit congressional action on the specific topic of wrongful death caused by international law violations. Cf. H.R. Rep. No. 102-367, pt. 1, at 4 (1991), reprinted in 1992 U.S.C.C.A.N. 84, 86 (stating that the TVPA is “expressly addressed” to providing a remedy for the practices of “[o]fficial torture and summary executions”).

him with “competent medical attention.” 184 In rejecting the officials’ argument that the FTCA precluded the creation of a separate Bivens remedy, the Court reasoned that the statute’s legislative history indicated that “Congress views FTCA and Bivens as parallel, complementary causes of action.” 185 These “congressional comments” included statements that the FTCA should be seen as a “counterpart” to Bivens and that victims of intentional conduct “will have a cause of action against the individual Federal agents [through Bivens] and the Federal Government [through the FTCA].” 186 Based on these and other statements from legislative history, the Court declared that the FTCA “contemplates that victims of the kind of intentional wrongdoing alleged in this complaint shall have an action under [the] FTCA against the United States as well as a Bivens action against the individual officials alleged to have infringed their constitutional rights.” 187

A similar congressional intent exists here with respect to the relationship between the TVPA and the common law remedy recognized by Sosa. The TVPA’s legislative history is rife with statements indicating a desire to supplement rather than replace the federal remedy for international law violations once found in the ATS and now recognized at common law. 188 For example, the relevant congressional committee report acknowledges that “[s]ection 1350 has other important uses and should not be replaced.” 189 Moreover, the report speaks of the TVPA as “enhanc[ing] the remedy already available under section 1350.” 190 Most significantly, the legislative record explicitly acknowledges that the claims subject to the TVPA “do not exhaust the list of actions that may appropriately be covered b[y] section 1350. That 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.” 191 Although this statement refers specifically to the norms underlying the common law remedy, the overall sentiment of the TVPA’s legislative history supports the conclusion that, as with the FTCA in Carlson, the statute was not

184. Id. at 16 n.1.
185. Id. at 19–20.
187. Id. at 20.
188. In describing the relationship between the TVPA and the ATS, the House Committee Report reflected the prevailing jurisprudence of the time by noting that the federal cause of action for torts in violation of international law “has been successfully maintained under . . . section 1350.” H.R. REP. NO.102-367, pt. 1, at 3 (1991).
189. Id.
190. Id. at 4.
191. Id.
meant to preclude common law remedies for violations of international law.\footnote{192}

Next, with respect to the existence of any “special factors counselling hesitation,” concerns over the judiciary’s institutional competence should not bar the creation of a freestanding common law remedy for death in violation of international law.\footnote{193} In \textit{Bush v. Lucas}, the Supreme Court concluded that “special factors counselling hesitation” preclude the creation of a \textit{Bivens} claim where Congress is in a better position to determine the most effective way to remedy a violation of legal rights.\footnote{194} In that case, a federal employee claimed First Amendment violations based on his alleged retaliatory demotion from a post at NASA.\footnote{195} In declining to create a \textit{Bivens} claim, the Court observed that the employee already had available to him an “elaborate remedial system that has been constructed step by step [through several decades of federal legislation], with careful attention to conflicting policy considerations.”\footnote{196} Thus, the Court reasoned, the issue in the case was not “what remedy the court should provide for a wrong that would otherwise go unredressed” but rather, whether the court should “augment[]” the “existing regulatory structure” by creating a “judicial remedy” for the violations alleged.\footnote{197} Given the legislature’s “considerable familiarity with balancing governmental efficiency and the rights of employees” in the context of the federal civil service, the Court concluded that “Congress is in a better position to decide whether or not the public interest would be served” by the “addition of another remedy for violations of employees’ First Amendment rights.”\footnote{198}

\footnote{192} Carlson v. Green, 446 U.S. 14, 20 (1980). The decision in \textit{Enahoro v. Abubakar}, 408 F.3d 877, 884–85 (7th Cir. 2005), is not to the contrary. In that case, the Seventh Circuit ruled that the TVPA preempts any common law claims for torture and extrajudicial killing cognizable under the ATS. See \textit{id. But see} Aldana v. Del Monte Fresh Produce, N.A., Inc., 416 F.3d 1242, 1250–51 (11th Cir. 2005); \textit{In re Estate of Ferdinand Marcos, Human Rights Litig.}, 25 F.3d 1467, 1475 (9th Cir. 1994). Given the TVPA’s legislative history recounted above, however, even if the statute provides the exclusive remedy for extrajudicial killing, the TVPA should not be read as expressing a congressional intent to bar other common law causes of action for conduct causing death in violation of international law.


\footnote{194} See \textit{id. at} 378, 388–89.

\footnote{195} \textit{Id. at} 369–72.

\footnote{196} \textit{Id. at} 388.

\footnote{197} \textit{Id.}

\footnote{198} \textit{Id. at} 388–90; see also Schweiker v. Chilicky, 487 U.S. 412, 428–29 (1988) (declining to create a \textit{Bivens} remedy for alleged due process violations arising out of the
More recently, in *Wilkie v. Robbins*, the Court relied on similar reasoning to deny a *Bivens* remedy to a private landowner alleging that the Bureau of Land Management violated his Fourth and Fifth Amendment rights.\(^{199}\) That case concerned allegations that the bureau had engaged in years of “harassment and intimidation” aimed at securing for the government an easement over the landowner’s property.\(^{200}\) In denying the plaintiff a *Bivens* remedy for his allegations, the Court lamented the “difficulty of devising a workable cause of action” encompassing the landowner’s complaints.\(^{201}\) Indeed, in the Court’s view, “[a] judicial standard to identify illegitimate pressure going beyond legitimately hard bargaining would be endlessly knotty to work out, and a general provision for tortlike liability . . . would invite an onslaught of *Bivens* actions.”\(^{202}\) In such a case, the Court concluded, Congress is better suited to “tailor [a] remedy to the problem perceived.”\(^{203}\)

The concerns expressed in *Bush* and *Wilkie* do not apply here. Unlike *Bush*, Congress has not enacted an “elaborate remedial system” designed to redress violations of international law causing death.\(^{204}\) Thus, in determining whether to create a common law remedy for these violations, courts need not engage in the kind of detailed policy analysis better left to the institutional competence of the legislature.\(^{205}\) Indeed, to the extent that Congress has implemented a remedial framework addressing violations of international law, the legislature has acknowledged and affirmed the judiciary’s role in developing the federal government’s response to these denial of Social Security benefits because “Congress is the body charged with making the inevitable compromises required in the design of [the] massive and complex welfare benefits program” embodied by the federal Social Security system).


\(^{200}\) Id. at 542–47.

\(^{201}\) Id. at 562.

\(^{202}\) Id.

\(^{203}\) Id.

\(^{204}\) See Bush v. Lucas, 462 U.S. 367, 388 (1983). As discussed above, only four federal statutes address violations of international law causing death: the TVPA, 28 U.S.C. § 1605A, the Flatow Amendment, and DOHSA. See supra note 182. This statutory scheme does not come close to matching the comprehensive regulatory structure at issue in *Bush*. See *Bush*, 462 U.S. at 385 (describing the regulatory protections afforded federal civil service employees as an “elaborate, comprehensive scheme” built by decades of legislation, “Executive Orders, and the promulgation of detailed regulations by the Civil Service Commission” (citation omitted)); see also Schweiker v. Chilicky, 487 U.S. 412, 424 (1988) (describing the Social Security system as affecting “virtually every American” and “of a size and extent difficult to comprehend” (quoting Richardson v. Perales, 402 U.S. 389, 399 (1971))).

\(^{205}\) See *Bush*, 462 U.S. at 388 (stating that the decision to “augment[]” the civil service system necessitates “a thorough understanding of the existing regulatory structure and the respective costs and benefits that would result from the addition of another remedy for violations of employees’ First Amendment rights”).
Wrongful Death and Survival Actions

SAN DIEGO LAW REVIEW

violations through common law legislation. In that regard, unlike Wilkie, courts are perfectly capable of crafting wrongful death causes of action that balance the competing interests of victims and tortfeasors, and to the extent they need guidance, wrongful death legislation at both the state and federal level provides a plethora of examples to steer judicial discretion.

The question remains, however, whether “special factors” unique to the ATS setting counsel against the creation of a common law remedy for death in violation of international law. Of particular relevance here is the Supreme Court’s directive in Sosa that courts should be “wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs” for fear that judicially crafted remedies addressing international law violations “would raise risks of adverse foreign policy consequences.”

Several doctrinal safeguards, however, assuage these concerns. First, under Sosa, any wrongful death remedy would be available only against conduct that violates a norm of international law already meeting the high bar of general acceptance and clear definition outlined by the Supreme Court. This rigorous standard acts to limit undue judicial


207. The Moragne decision is particularly on point here. In that case, the Supreme Court rejected arguments that the federal courts would be at a loss in determining the content of a nonstatutory cause of action for wrongful death. See Moragne v. States Marine Lines, Inc., 398 U.S. 375, 405 (1970). Such “fears,” the Court concluded, “are exaggerated” because “[i]n most respects the law applied in personal-injury cases will answer all questions that arise” and “numerous state wrongful-death acts have been implemented with success for decades.” See id. at 405–06, 408. As Justice Harlan aptly stated, “The experience thus built up counsels that a suit for wrongful death raises no problems unlike those that have long been grist for the judicial mill.” Id. at 408.

208. See Sosa, 542 U.S. at 727–28; see also Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1664 (2013) (“[T]he danger of unwarranted judicial interference in the conduct of foreign policy is magnified in the context of the ATS, because the question is not what Congress has done but instead what courts may do.”).

209. See Sosa, 542 U.S. at 732 (“[F]ederal 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.”).
interference into foreign policy as “courts can then focus on the application of an agreed principle to circumstances of fact rather than on the sensitive task of establishing a principle not inconsistent with the national interest or with international justice.” Second, even where the application of clearly established international principles would raise foreign policy concerns, courts may assess the political implications of creating a wrongful death remedy using well-worn principles of political question doctrine or as the Court itself acknowledged, a “policy of case-specific deference to the political branches.” In all events, although there may be situations where a wrongful death remedy is inappropriate, that determination can be made on a case-by-case basis and need not preclude the recognition of this common law cause of action as a general matter.

Accordingly, for these reasons, courts should recognize a cause of action under federal common law for the death of an individual caused by a violation of international law.

2. Identity of the Wrongful Death Claimant

Having determined that applicable law militates in favor of a wrongful death remedy in the ATS context, I now turn to the details of that cause of action, specifically, the class of persons eligible to bring suit. The Supreme Court has made clear that in crafting federal common law rules, courts must adhere to the general “presumption” that forum state law supplies the rules of decision in the vast majority of cases. Courts may develop “uniform federal rules” to fill the interstices of federal law only when the federal scheme at issue “evidences a distinct need for nationwide legal standards” or “when express provisions in analogous statutory schemes embody congressional policy choices readily applicable to the matter at hand.” In all other circumstances, forum state law should provide the rules of decision, “unless application of [the particular] state law [in question] would frustrate specific objectives of the federal

211. See, e.g., Bancoult v. McNamara, 445 F.3d 427, 437 (D.C. Cir. 2006) (dismissing ATS claim on political question grounds).
212. See Sosa, 542 U.S. at 733 n.21.
213. See Kamen v. Kemper Fin. Servs., Inc., 500 U.S. 90, 98 (1991); see also Northwest Airlines, Inc. v. Transp. Workers Union, 451 U.S. 77, 95 (1981) (holding that federal courts must be cautious in fashioning common law rules because “the federal lawmaking power is vested in the legislative, not the judicial, branch of government”); Wheeldin v. Wheeler, 373 U.S. 647, 651 (1963) (noting that the situations justifying the creation of a federal common law rule are “few and restricted”).
214. See Kamen, 500 U.S. at 98.
programs.”215 These factors counsel the adoption of forum state law as the rules of decision for determining the class of plaintiffs eligible to bring suit for a death in violation of international law.

a. Necessity of Nationwide Legal Standards

First, there is no “distinct need for nationwide legal standards” regarding the proper plaintiff in these cases. In the seminal case Clearfield Trust Co. v. United States, the Supreme Court relied on this concern for national uniformity to fashion uniform federal rules regarding the rights and duties of the United States with respect to its commercial paper.216 In that case, the U.S. Treasury sought reimbursement for a payment it had issued pursuant to a forged check collected by Clearfield Trust Company as agent for J.C. Penney Company.217 The Court first determined that federal law governs “[t]he duties imposed upon the United States and the rights acquired by it as a result of the issuance” of its commercial paper.218 Then, with respect to the content of that federal law, the Court rejected the lower court’s call to apply the laws of the forum state, observing that “[t]he issuance of commercial paper by the United States is on a vast scale and transactions in that paper from issuance to payment will commonly occur in several states.”219 To leave these transactions “to the vagaries of the laws of the several states,” the Court held, would “subject the rights and duties of the United States to exceptional uncertainty.”220

This concern for avoiding uncertainty is less important, however, where the rights and duties at issue are tangential to the core question of liability. In O’Melveny & Myers v. Federal Deposit Insurance Corp., the FDIC, as receiver to a troubled corporation, sued the law firm O’Melveny & Myers for professional negligence and breach of fiduciary duty in connection with the firm’s work for the corporation on several real estate transactions.221 O’Melveny argued that the FDIC was estopped from pursuing its claims because certain of the corporation’s executives

217. Id. at 364–66.
218. Id. at 366.
219. Id. at 367.
220. Id.
had engaged in malfeasance with respect to these transactions and California law imputed the executives’ knowledge of wrongdoing to the FDIC as receiver.\textsuperscript{222} The FDIC argued in response that the Court should fashion a uniform federal rule against the imputation of the executives’ knowledge to the FDIC.\textsuperscript{223} The Court rejected the FDIC’s request, concluding that the FDIC’s stated interest in promoting national uniformity on the imputation question was insufficient to justify the creation of a uniform federal rule.\textsuperscript{224} In so holding, the Court reasoned that the imputation rules at issue “affect only the FDIC’s rights and liabilities, as receiver, with respect to primary conduct on the part of private actors that has already occurred.”\textsuperscript{225} Thus, although the adoption of federal rules in such cases may ease the litigation burden on the FDIC by “eliminating state-by-state research and reducing uncertainty,” so “generic” an interest in avoiding the “ordinary consequences” of nationwide litigation could not support the exercise of judicial discretion requested.\textsuperscript{226}

Under this case law, there is no “distinct need” for national standards on the question of who is the proper plaintiff in wrongful death actions under \textit{Sosa}. Unlike the rules at issue in \textit{Clearfield}, these proper plaintiff rules do not implicate the “rights and duties” of the parties regarding the core question of liability.\textsuperscript{227} Rather, as in \textit{O’Melveny}, these rules concern only the tangential question of who may bring suit based on “primary conduct . . . that has already occurred.”\textsuperscript{228} Thus, as was the case with the FDIC, although the creation of a uniform federal rule on this issue may ease the litigation burden on \textit{Sosa} plaintiffs, this interest in avoiding the “ordinary consequences” of litigation is too “generic” to displace the usual presumption in favor of state law.\textsuperscript{229} This is particularly true given the fact that the plaintiffs in ATS actions, like all plaintiffs, can choose

\begin{itemize}
\item \textsuperscript{222} \textit{Id.} at 82–83.
\item \textsuperscript{223} \textit{Id.} at 85.
\item \textsuperscript{224} \textit{Id.} at 87–88.
\item \textsuperscript{225} \textit{Id.} at 88.
\item \textsuperscript{226} \textit{Id.}
\item \textsuperscript{227} \textit{See Clearfield Trust Co. v. United States}, 318 U.S. 363, 366–67 (1943); \textit{see also} 2 \textit{Speiser & Rooks}, supra note 101, § 13:34 (“A personal representative proceeding under wrongful death statutes requiring him to bring the action for the benefit of certain designated beneficiaries is a mere nominal party having no interest in the case for himself or the estate he represents.”).
\item \textsuperscript{228} \textit{O’Melveny}, 512 U.S. at 87–88; \textit{see also} Glenn v. Johnson, 764 N.E.2d 47, 52 (Ill. 2002) (“The personal representative is merely a nominal party to this action, effectively filing suit as a statutory trustee on behalf of the surviving spouse and next of kin, who are the true parties in interest.”).
\item \textsuperscript{229} \textit{See O’Melveny}, 512 U.S. at 88; \textit{cf. United States v. Yazell}, 382 U.S. 341, 347 n.13 (1966) (observing that the “desirability of a uniform federal rule” does not justify “failure to comply with reasonable requirements of local law” (quoting \textit{Bumb v. United States}, 276 F.2d 729, 738 (9th Cir. 1960))).
\end{itemize}
the forum for litigation and thus have the ability to predetermine which state’s wrongful death rules will govern their claims.\textsuperscript{230}

\textit{b. Congressional Policy Choices}

Second, there are no “express provisions in analogous statutory schemes embody[ing] congressional policy choices” on the proper plaintiff issue.\textsuperscript{231} In \textit{DelCostello v. International Brotherhood of Teamsters}, the Supreme Court held that provisions in a federal statute may serve as the basis for a federal common law rule where the provisions evince a congressional judgment regarding a point of law bearing a “close similarity” to the matter at hand.\textsuperscript{232} In that case, the Court concluded that section 10(b) of the National Labor Relations Act would supply the limitations period for an employee’s claims for wrongful termination and unfair representation.\textsuperscript{233} In rejecting analogous limitations periods from state law, the Court held that section 10(b) is “actually designed to accommodate a balance of interests very similar to that at stake” in the case at bar.\textsuperscript{234} The Court determined that in enacting section 10(b), “Congress established a limitations period attuned to what it viewed as the proper balance between the national interests in stable bargaining relationships and finality of private settlements, and an employee’s interest in setting aside what he views as an unjust settlement under the collective-bargaining system.”\textsuperscript{235} Thus, the Court concluded, section 10(b) represented a “more appropriate vehicle for interstitial lawmaking” than forum state law.\textsuperscript{236}

With respect to the proper plaintiff issue, there are no express provisions of analogous federal statutes evidencing a congressional judgment on the proper plaintiff in cases alleging death in violation of international law. The federal statutory scheme most analogous to a wrongful death action

\textsuperscript{230} See Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 507 (1947) (noting that venue statutes “are drawn with a necessary generality and usually give a plaintiff a choice of courts, so that he may be quite sure of some place in which to pursue his remedy”); STEPHENS ET AL., supra note 10, at 397–98 (discussing choice of forum for human rights plaintiffs in U.S. courts).


\textsuperscript{233} See id. at 154–55.

\textsuperscript{234} See id. at 165, 169.

\textsuperscript{235} Id. at 171 (quoting United Parcel Serv., Inc. v. Mitchell, 451 U.S. 56, 70–71 (1981)) (Stewart, J., concurring).

\textsuperscript{236} Id. at 172.
under *Sosa* is the TVPA. As the Supreme Court described, this statute represents Congress’s attempt to codify certain aspects of the common law remedy for torts in violation of international law first recognized in *Filartiga*. In that regard, the TVPA creates a statutory cause of action for the extrajudicial killing of an individual, actionable by that individual’s “legal representative”, or “any person who may be a claimant in an action for wrongful death.” Notably, however, the TVPA is silent on the precise definitions of these two categories of claimants. Instead, the legislative intent discernible from the statute indicates that state law supplies the rules of decision on this issue. Thus, to the extent Congress has

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237. See supra note 180–82 and accompanying text.
241. Normally, undefined terms in a federal statute of national application are defined by reference to federal standards. See, e.g., Info-Hold Inc. v. Sound Merch., Inc., 538 F.3d 448, 455–56 (6th Cir. 2008); Spina v. Dep’t of Homeland Sec., 470 F.3d 116, 126 (2d Cir. 2006). However, where Congress indicates an intent to define such terms by reference to state law, courts must defer to the legislature’s expectations. See *Reconstruction Fin. Corp. v. Beaver Cnty.*, 328 U.S. 204, 209–10 (1946). In *Reconstruction Finance*, the Supreme Court found just this sort of legislative intent with respect to the term *real property* in the federal Reconstruction Finance Corporation Act (RFCA). *Id.* at 206, 210. The RFCA provided that any “real property” of certain federal agencies would be subject to the same state and local taxes as “other real property” in the state in which such federal property was located. *Id.* at 206. In holding that the term *real property* should be defined in accordance with applicable state law, the Court reasoned that Congress intended this result by subjecting this type of property to municipal taxation in the first place. *Id.* at 209 (“Congress, in permitting local taxation of the real property, made it impossible to apply the law with uniform tax consequences in each state and locality.”). “Concepts of real property are deeply rooted in state traditions, customs, habits, and laws,” the Court observed, and “[l]ocal tax administration is geared to those concepts.” *Id.* at 210. By subjecting federal “real property” to municipal taxation, the Court determined, the RFCA necessarily indicated a congressional intent to define that term in accordance with the states’ “long-standing practice of assessments and collections.” *Id.*

A similar congressional intent to incorporate state law is evident in the TVPA’s “extrajudicial killing” provision. As described above, that provision permits both the victim’s “legal representative” and a designated wrongful death “claimant” to bring suit for damages. See 28 U.S.C. § 1350 note (2006) (Establishment of Civil Action § 2(a)(2)). In so doing, the statute creates a damages remedy for both the harm suffered by the victim and the harm caused by the victim’s death; in other words, the statute creates both a survival claim and a wrongful death claim based on an extrajudicial killing. *See Baloco ex rel. Tapia v. Drummond Co.*, 640 F.3d 1338, 1347–48 (11th Cir. 2011) (holding that the TVPA permits “appropriate wrongful death claimants to be able to sue alongside representatives of the deceased”). State law has long been the primary source of law on questions of survivorship and wrongful death, and many state statutes expressly define both who may be a victim’s “personal representative” in a survival action and who the proper “claimants” may be in a wrongful death action. *See generally 1 SPEISER & ROOKS, supra* note 101, § 1:9. Thus, as in *Reconstruction*
expressed any “policy choices” with respect to the proper claimant in cases alleging international law violations causing death, the legislature’s judgment is that forum state law should supply the rules of decision.242

c. Frustration of Important Federal Interests

The final consideration—whether the application of a particular state law would frustrate important federal interests—is context specific and depends on the facts of each case.243 However, to the extent that reliance on forum state law in a wrongful death action under Sosa would result in only some of the victim’s surviving relatives being eligible to bring suit,244 state law should still supply the rules of decision.

Finance, by creating causes of action so rooted in state law concepts, the TVPA necessarily indicates a legislative intent to integrate applicable state law definitions into its remedial scheme. Cf. Davies Warehouse Co. v. Bowles, 321 U.S. 144, 155–56 (1944) (defining the term public utility in the federal Price Control Act in terms of state law because “[t]he great body of law in this country which controls acquisition, transmission, and transfer of property, and defines the rights of its owners in relation to the state or to private parties, is found in the statutes and decisions of the state”).

This intent is further confirmed by the House Committee Report on the legislation that became the TVPA, which expressly states that “[c]ourts may look to state law for guidance as to which parties would be proper wrongful death claimants” under the statute. See H.R. REP. NO. 102-367, pt. 1, at 4 (1991).

242. Congressional guidance on the proper plaintiff issue can also arguably be gleaned from the DOHSA, which designates a decedent’s “personal representative” as the proper plaintiff in an action involving death on the high seas. See 46 U.S.C. § 30302 (2006). As described, however, DOHSA is inapposite to Sosa claims alleging deaths in violation of international law generally. See supra note 182. Moreover, even if DOHSA were to supply the rule of decision on the proper plaintiff issue, the statute itself still does not define precisely who is the decedent’s “proper representative,” again indicating that forum state law governs this issue. See supra note 241; see also Complaint of Cosmopolitan Shipping Co., S.A., 453 F. Supp. 265, 266 (S.D.N.Y. 1978) (holding that the term “‘personal representative’” in DOHSA “‘refer[s] to one who receives authority of some sort from a state’” (quoting Briggs v. Pennsylvania R. Co., 153 F.2d 841, 842 (2d Cir. 1946))).

243. See 19 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE: JURISDICTION AND RELATED MATTERS § 4518 (2d ed. 1996) (describing different contexts in which courts have concluded that the application of state law would disrupt a stated federal purpose).

244. See, e.g., Xuncax v. Gramajo, 886 F. Supp. 162, 191 (D. Mass. 1995) (applying federal law to determine who is the proper plaintiff to sue in an ATS case alleging death in violation of international law where the application of state law would have precluded recovery by the decedent’s sister).
Indeed, the application of state law to an interstitial question of federal law does not undermine the effectiveness of a federal remedial scheme simply because the state law permits recovery for only certain classes of plaintiffs. In *Robertson v. Wegmann*, the Supreme Court addressed whether a state survival statute was “inconsistent” with federal law where the statute dictated that only certain of the decedent’s surviving relatives could maintain the underlying § 1983 action on behalf of the deceased. In that case, the original plaintiff in the lawsuit died before his case went to trial, and the executor of his estate was subsequently substituted as the plaintiff. On appeal, the petitioners argued that the case should be dismissed because state survivorship law applied to the question of survival of claims, and under this law, the executor was not among the class of individuals authorized to maintain a survival action. The Supreme Court agreed with the petitioners, reasoning that although the application of state law in this case would bar the plaintiff’s suit, the state law in question was not “inhospitable” to survivorship claims in general because it permitted the survival of claims in the majority of cases. As the Court explained, “A state statute cannot be considered ‘inconsistent’ with federal law merely because the statute causes the plaintiff to lose the litigation.”

*Robertson*’s reasoning is equally applicable to the situation where the application of state law would permit only a certain class of relatives to bring wrongful death claims under *Sosa*. As the Supreme Court held, Congress understood the common law claim identified in *Sosa* as providing a meaningful remedy to aliens for violations of international law. As in *Robertson*, this remedial purpose is not undermined simply because one class of plaintiffs is barred from recovery. So long as the applicable state law is not generally “inhospitable” to wrongful death claims—the state law does not bar wrongful death claims altogether or otherwise restrict wrongful death actions in an “unreasonable” manner—

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246. *Id.*
247. *Id.* at 587.
248. *Id.* at 594.
249. *Id.* at 593; *see also* 42 U.S.C. § 1988 (2006) (allowing courts to look to “the constitution and statutes of the State wherein” when federal-jurisdiction-granting statutes are insufficient “to furnish suitable remedies and punish offenses against law”).
250. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 716–17 (2004) (observing that the ATS was most likely meant to address “concern over the inadequate vindication of the law of nations”); *see also* Casto, *supra* note 78, at 499–500 (explaining that the historical record indicates the ATS was meant to be a “broad, sweeping provision” addressing “all foreseeable and unforeseeable violations by individuals of the law of nations”).
state law should still govern the question of proper plaintiff. 252 Thus, as in the case of § 1983 actions, the applicability of state law should not turn “solely on which side is advantaged thereby.”253 This is so because “[i]f success of the [action] were the only benchmark, there would be no reason at all to look to state law, for the appropriate rule would then always be the one favoring the plaintiff, and its source would be essentially irrelevant.”254

Accordingly, in the vast majority of cases, forum state law should determine the identity of the proper plaintiff in Sosa actions seeking recovery for the death of an individual caused by a violation of international law.

3. Survival Claims Under Sosa

The survivorship of Sosa claims presents a related yet distinct question from whether to recognize a common law cause of action for death in violation of international law. Survivorship rules determine whether an existing claim survives the death of the injured party as an asset of the party’s estate, whereas wrongful death rules establish a new cause of action, accruing to specified beneficiaries, for damages arising from the injured party’s death.255 As Speiser and Rooks describe, “Although originating in the same wrongful act or neglect, the cause of action which survives . . . is for the wrong to the injured person, while the wrongful death action . . . is for the wrong to the beneficiaries.”256 Because of these theoretical differences, the relevant inquiry with respect to the survivorship of Sosa claims is not whether courts should recognize a new cause of action upon the injured party’s death but rather whether governing law provides for the survival, or continuation, of the party’s existing claim after the party’s death.257

252. Id. at 591–94.
253. Id. at 593.
254. Id.
255. DOBBS, supra note 129, § 294.
256. 1 SPEISER & ROOKS, supra note 101, § 1:13.
257. Cf. Estate of Masselli ex rel. Masselli v. Silverman, 606 F. Supp. 341, 343 (S.D.N.Y. 1985) (holding that in a case alleging injuries to a deceased victim of federal civil rights violations, the “right of action belongs to the [decedent],” and thus, the viability of his claims does not turn on whether the plaintiff in the lawsuit has a cause of action for the decedent’s death but rather whether the decedent’s claims themselves survive his death under federal law).
The survivorship rules governing a federal claim are a matter of federal law, or more specifically here, federal common law.\textsuperscript{258} As described above, federal common law normally incorporates state law as the substantive rules of decision in a given case.\textsuperscript{259} However, a court may set aside state law and instead craft uniform federal rules where there is a distinct need for national uniformity, where related federal legislation evidences congressional policy choices on an analogous point of law, or where the application of a particular state law would frustrate important federal interests.\textsuperscript{260}

With respect to the survivorship of \textit{Sosa} claims, federal courts should adopt a uniform federal rule drawn from the limited guidance on this issue offered by Congress in the TVPA. As described above, the TVPA represents the principal legislative statement on the scope of domestic remedies for international law torts since the ATS.\textsuperscript{261} Therefore, to the extent the statute speaks to the issue of survivorship of claims, these provisions reflect the balance struck by Congress between the interests of providing adequate remedies for these international law violations and limiting these actions to certain classes of claimants.\textsuperscript{262}

In that regard, the TVPA prescribes a bifurcated rule of survival for claims of torture and extrajudicial killing. With respect to torture claims,

\begin{itemize}
  \item 258. \textit{See} 7C \textit{Charles Alan Wright et al., Federal Practice and Procedure: Federal Rules of Civil Procedure} § 1952 (3d ed. 2007) (“In a federal-question case, federal law and federal decisions, rather than state law, determine whether the action survives the death of a party . . . .” (citing \textit{Schreiber v. Sharpless}, 110 U.S. 76, 80 (1884))); \textit{cf.} \textit{Carlson v. Green}, 446 U.S. 14, 23 (1980) (“\textit{Bivens} actions are a creation of federal law and, therefore, the question whether respondent’s action survived [the decedent’s] death is a question of federal law.”).
  \item 259. \textit{See supra} notes 213–15 and accompanying text.
  \item 260. \textit{See supra} notes 213–15 and accompanying text.
  \item 261. \textit{See supra} notes 180–82 and accompanying text; \textit{see also} \textit{Sosa v. Alvarez-Machain}, 542 U.S. 692, 730–31 (2004) (observing that the TVPA offers the legislature’s rejoinder to the federal courts’ assumption of common law power with the \textit{Filartiga} line of cases).
  \item 262. \textit{Cf.} \textit{DelCostello v. Int’l Brotherhood of Teamsters}, 462 U.S. 151, 169 (1983) (holding that section 10(b) of the National Labor Relations Act was “designed to accommodate a balance of interests very similar” to those at stake in determining the statute of limitations on claims for wrongful termination and unfair representation). In the recent case \textit{Bowoto v. Chevron Corp.}, 621 F.3d 1116 (2010), the Ninth Circuit held that the DOHSA governed the survivorship of \textit{Sosa} claims arising out of alleged international law violations occurring off the coast of Nigeria. \textit{Id.} at 1125–26 (“DOHSA preempts all survival claims for deaths on the high seas unless there is clear indication that Congress intended otherwise.”). The court’s ruling, however, necessarily turned on the fact that the \textit{Sosa} claims at issue alleged international law violations occurring on the “high seas.” \textit{See id.} Therefore, assuming \textit{Bowoto’s} reasoning is accurate, DOHSA would still not prescribe the survivorship rule for other types of \textit{Sosa} claims. Rather, as described above, the TVPA represents Congress’s most relevant statement on the applicable survivorship rule.
\end{itemize}
only the torture victim may bring suit against the alleged torturer.263 There is no provision for the survival of torture claims beyond the victim’s death.264 By contrast, in the case of extrajudicial killing, the statute permits the victim’s “legal representative” to bring suit for damages on behalf of the decedent.265 Thus, under the TVPA, claims of torture abate upon the victim’s death, while claims of extrajudicial killing survive and may be pursued by the victim’s “legal representative.” In accordance with this framework, Sosa claims should be subject to a similar survivorship rule providing that claims based on fatal injury, like extrajudicial killing, survive to the decedents’ estate, while claims based on nonfatal injury, like torture, abate upon the victim’s death.

This bifurcated survivorship rule is consistent with the Court’s reasoning in the analogous setting of Bivens litigation. In Carlson v. Green, discussed previously, the Supreme Court held that a Bivens claim based on a constitutional deprivation causing fatal injury survives the death of the alleged victim.266 In that regard, the Court concluded that “whenever the relevant state survival statute would abate a Bivens-type action brought against defendants whose conduct results in death, the federal common law allows survival of that action.”267 The Court stressed that its holding turned on the “essentiality of the survival of civil rights claims for complete vindication of constitutional rights” in cases alleging fatal injury.268 To rule otherwise, the Court pronounced, would “frustrate in [an] important way the achievement of the goals of Bivens actions.”269

In fashioning this common law rule of survivorship, Carlson distinguished an earlier precedent set by Robertson v. Wegmann, also discussed above, wherein the Supreme Court held that a constitutional tort claim under § 1983 would abate in accordance with the law of the

265. 28 U.S.C. § 1350 note (Establishment of Civil Action § 2(a)(2)); see also Baloco ex rel. Tapia v. Drummond Co., 640 F.3d 1338, 1347, 1348 n.11 (11th Cir. 2011) (holding that the TVPA permits the recovery of damages suffered by the deceased victim of an extrajudicial killing).
267. Id. at 24 (quoting Green v. Carlson, 581 F.2d 669, 675 (7th Cir. 1978), aff’d, 446 U.S. 14 (1980)) (internal quotation marks omitted).
268. Id. (quoting Green, 581 F.2d at 674) (internal quotation marks omitted).
269. Id. at 25 (alteration in original) (quoting UAW v. Hoosier Cardinal Corp., 383 U.S. 696, 702 (1966)) (internal quotation marks omitted).
The Court reasoned that *Robertson* was inapposite because the plaintiff’s death in that case “was not caused by the acts of the defendants upon which the suit was based.” As a result, there was little concern that allowing the plaintiff’s claim to abate would undermine the remedial policies underlying the federal civil rights statutes. By contrast, in *Carlson*, the alleged illegal conduct did in fact cause the plaintiff’s death, increasing the risk that potential tortfeasors could take advantage of disparate state survivorship rules to avoid liability. Accordingly, the Court reasoned that where the illegality alleged causes the plaintiff’s death, only a uniform federal rule of survivorship is “compatible” with the goal of providing adequate vindication of constitutional rights.

The survivorship rule for *Sosa* claims suggested above comports with this reasoning. As in *Carlson*, the proposed rule acknowledges that the survival of a *Sosa* claim based on fatal injury is essential to the vindication of the remedial policies animating these common law actions. The Supreme Court understood the common law remedy identified in *Sosa* as providing a vehicle for the vindication of widely accepted and clearly defined international law norms in federal court. This policy would be subverted without a rule allowing for the survival of claims alleging international law torts causing fatal injury. The reasoning of the lower court in *Carlson*, which the Supreme Court ultimately adopted, is on point: “Allowing recovery for injury but denying relief for the ultimate injury—death—would mean that it would be more advantageous for a

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271. *Id.* at 24. Moreover, the Court noted that the claims at issue in *Robertson*—federal civil rights claims against state officials under 42 U.S.C. § 1983—are statutorily obligated to incorporate forum state law where federal law is silent on a matter of remedial procedure, so long as the state law is not “inconsistent” with federal law. *Id.* at 24 n.11 (quoting 42 U.S.C. § 1988 (2006)). The Court noted that *Bivens* claims are not subject to the same statutory incorporation requirement and “cogent reasons” argued against the application of state law to the particular survival question presented in *Carlson*, namely, the survivorship of a federal constitutional tort claim based on fatal injury. *See id.*
272. *See Robertson*, 436 U.S. at 592 (holding that “in situations in which there is no claim that the illegality caused the plaintiff’s death,” the application of a state survival rule that would abate the plaintiff’s claim “surely would not adversely affect § 1983’s role in preventing official illegality”).
273. *See Carlson*, 446 U.S. at 24, 25 & n.12 (holding that application of state survivorship law to *Bivens* claims where the alleged illegality caused the victim’s death would undermine the remedial purpose of *Bivens* actions because “an official could know at the time he decided to act whether his intended victim’s claim would survive”).
274. *Id.* at 23.
275. *Id.* (“[O]nly a uniform federal rule of survivorship will suffice to redress the constitutional deprivation here alleged and to protect against repetition of such conduct.”).
276. *See supra* notes 25–44 and accompanying text.
tortfeasor to kill rather than to injure. Surely this cannot be the intent of the law."277 In line with this reasoning, the proposed survivorship rule permits the survival of Sosa claims based on fatal injury.

The same cannot be said, however, about Sosa claims based on nonfatal injury. As Carlson acknowledged, different considerations apply where the plaintiff’s death was not caused by the illegal conduct alleged.278 Indeed, Carlson expressly limited its survivorship holding to Bivens claims based on fatal injury, while distinguishing the rationale in its previous precedent Robertson as applying to claims based on nonfatal injury.279 In that regard, Robertson stands for the proposition that where the plaintiff’s death was not caused by the illegality alleged, a rule permitting claim survival is unnecessary to secure the benefits of a given remedial scheme.280 A similar judgment is evidenced by the TVPA in the context of a nonfatal violation of international law.281 Although a different policy choice may be valid, the judicial deference outlined in Sosa commands that the common law rules applicable to Sosa claims adhere as closely as possible to Congress’s expressed judgment.282 Thus, in accordance with this congressional intent, the proposed survivorship rule would abate Sosa claims based on nonfatal injury upon the victim’s death.

Based on this reasoning, courts should adopt a survivorship rule for Sosa claims providing that those claims based on nonfatal injury abate upon the victim’s death, while those based on fatal injury survive to the decedent’s estate.

4. Identity of the Survival Claimant

The TVPA also points to the appropriate rules of decision for determining who is the proper plaintiff in a survival suit under Sosa. The TVPA provides that in the case of an extrajudicial killing, a victim’s “legal representative” may bring suit for damages on behalf of the

277. Green v. Carlson, 581 F.2d 669, 674 (7th Cir. 1978), aff’d, 446 U.S. 14 (1980).
278. Carlson, 446 U.S. at 24–25 (observing that the abatement of a federal civil rights claim would not undermine the remedial purpose of federal civil rights law where “the plaintiff’s death was not caused by the acts of the defendants upon which the suit was based”).
279. See id.
282. See supra notes 143–49 and accompanying text.
Although the statute itself does not define “legal representative,” the discernible congressional intent indicates that this term should be applied in accordance with state law.\(^{284}\)

The survivorship rule for *Sosa* claims should similarly rely on state law to determine who may bring a survival suit. As with the statute’s main survivorship rule, the TVPA’s claimant provisions express Congress’s considered judgment on the issue of who precisely may bring suit on behalf of a deceased victim of international rights abuses. Moreover, this direction to incorporate state law as the applicable rule of decision comports with the general practice of adopting forum state rules to fill the interstices in federal remedial schemes.\(^{285}\) Thus, in accordance with the congressional intent expressed in the TVPA, the proper plaintiff in a survival suit under *Sosa* should be determined by reference to forum state law.

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**B. Advantages of the Proposed Approach**

The proposed wrongful death-survivorship framework improves upon the prevailing *Xuncax* approach in a number of ways. First, this new approach abandons *Xuncax*’s conceptually flawed standing formulation in favor of

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283. 28 U.S.C. § 1350 note (Establishment of Civil Action § 2(a)(2)).
284. See supra note 241.
285. See supra note 213.
a cause of action analysis more in line with governing precedent. By framing the deceased-victim issue as a pure merits determination, the proposed analysis focuses attention on the true nature of the inquiry, that is, whether to recognize a wrongful death cause of action and rule of survivorship. Indeed, with respect to those *Sosa* claims seeking wrongful death damages, the prevailing standing formulation assumes without analysis that a cause of action already exists for death in violation of international law and that the only question remaining is whether the particular plaintiffs are authorized to assert that action as a matter of law. In truth, however, by borrowing “standing” requirements from the TVPA, the court created a new cause of action—a new federal remedy—without confronting the various limitations attendant to that exercise of judicial power.

A similar obfuscation occurs with respect to *Sosa* claims seeking survival damages. Again, the *Xuncax* approach focuses exclusively on the plaintiff’s ability to raise the decedent’s claim in a representative capacity. In so doing, however, this analysis ignores the preliminary question of whether the claim at issue survives the decedent’s death in the first place. Basic principles of tort law, however, dictate that a person’s claim abates upon that person’s death absent explicit injunction to the contrary. *Xuncax* fails to come to terms with this rule and skips immediately to the issue of the proper plaintiff to bring suit on behalf of the decedent. The proposed approach, by contrast, forces courts to confront this issue squarely, thereby producing clearer doctrine more aligned with precedent.

In addition to these conceptual improvements, the proposed framework also provides the federal courts with clearer guidance on the resolution of the deceased-victim issue. As described above, even accepting the *Xuncax* framework’s standing formulation, the federal courts continued to express uncertainty regarding the proper application of the framework’s

287. *Id.* at 189–92.
288. See *supra* notes 140–77 and accompanying text.
289. See 1 *Am. Jur. 2d*, *supra* note 87, § 51; see also *Henshaw* v. *Miller*, 58 U.S. (17 How.) 212, 224 (1854) (“[T]his action did not survive the death of the defendant, but abated upon the occurrence of that event . . . .”).
290. See 13A *Wright et al.*, *supra* note 16, § 3531.6 (noting that “[a]s to private disputes, it would be good to displace standing by direct inquiry into the existence of a claim for an available remedy” because a cause of action analysis “is more likely to yield cogent results” than complex standing tests in the majority of cases).
analysis, particularly its choice of law rule.\textsuperscript{291} The proposed approach reduces this uncertainty by grounding its analysis in longstanding principles of federal common law.\textsuperscript{292} Whereas under \textit{Xuncax}, courts must utilize the ambiguous standard of whether the application of a given state law leaves a decedent’s relatives with “no remedy whatsoever,” the proposed approach directs courts to principles of federal common law for the appropriate rules of decision, a rubric that points to well-developed state law on wrongful death and survivorship.\textsuperscript{293} By offering courts a defined body of legal principles from which to draw decisional rules, the proposed approach promotes greater consistency in the resolution of international law tort cases brought in federal court.

A potential objection to this proposed framework argues that reliance on state law rules of decision would in fact engender greater uncertainty in the litigation of the proper plaintiff issue. However, any “uncertainty” generated is simply the predictable consequence of our federal system, and as discussed, concerns over national uniformity do not justify displacement of generally applicable state law rules.\textsuperscript{294} Moreover, whatever “uncertainty” may result from adoption of the proposed approach would be less than the uncertainty attendant to the \textit{Xuncax} formulation. Indeed, as discussed above, \textit{Xuncax} essentially leaves courts to apply some unspecified choice of law analysis that could potentially lead to the application of foreign state law.\textsuperscript{295} By contrast, the proposed approach points to well-settled federal common law rubrics and defined state rules on wrongful death and survival. Even granting that some state law may too point to foreign law for the applicable rule of decision, at least under the proposed approach, that choice of law analysis will be spelled out in the relevant state jurisprudence.

Critics of the proposed framework may also parrot \textit{Xuncax}’s argument that state law is simply “ill-tailored for cases grounded on violations of the law of nations.”\textsuperscript{296} This position rests on a fundamental misunderstanding of the wrongful death-survivorship framework. Under the proposed

\begin{itemize}
\item \textsuperscript{291} See supra notes 106–28.
\item \textsuperscript{292} Accord Casto, supra note 47, at 644–45 (observing that given that ATS litigation is “so obviously analogous to \textit{Bivens} litigation,” courts should “draw upon all the usual resources of the common law to fashion appropriate rules of decision”).
\item \textsuperscript{293} Accord Philip A. Scarborough, Note, \textit{Rules of Decision for Issues Arising Under the Alien Tort Statute}, 107 COLUM. L. REV. 457, 460–62, 501 (2007) (arguing that in the vast majority of cases, federal common law rules developed under \textit{Sosa} should adopt state law as the applicable rules of decision because state law constitutes “an understandable, well-defined, democratically sufficient body of law” on which federal courts can rely).
\item \textsuperscript{294} See supra notes 216–30 and accompanying text.
\item \textsuperscript{295} See supra notes 67–73 and accompanying text.
\end{itemize}
approach, the law applied is federal law—federal common law, to be precise. State law rules of decision become relevant only to the extent they are incorporated as federal common law. More to the point, as described above, even if state law is not accustomed to dealing with the magnitude of present-day human rights violations, municipal regulations are certainly familiar with issues pertaining to recovery for death and personal injury, precisely the decisional rules relevant to the deceased-victim issue.297

V. CONCLUSION

This Article proposes a solution to an increasingly common question in ATS litigation: Who is the proper plaintiff in suits where the actual victim of the international law violations alleged is deceased? Contrary to prevailing jurisprudence, I contend that courts should view this question not as an issue of plaintiff standing but as a cause of action inquiry rooted in wrongful death and survivorship law. By reframing the question in these terms, the proposed approach allows courts to focus on what is actually at stake in these deceased-victim cases: whether an individual who is the not victim of the international law violation alleged may nonetheless seek a remedy for the illegal conduct at issue. Moreover, the proposed analysis avoids the unnecessary confusion wrought by the prevailing standing formulation and also ameliorates the uncertainty surrounding what body of law supplies the rules of decision on this issue. The resulting doctrine will be more consistent with governing precedent and easier for courts to apply in practice.

Beyond these tangible advantages, the proposed framework also serves as a model for deciphering other issues in ATS litigation unrelated to the defendant’s liability. Sosa established that the standards and scope of liability in any ATS case are drawn principally from international law. Yet once the standards of liability are in place, a host of other questions arise that are just as important to the resolution of a particular case. What, if any, nonstatutory immunities can a defendant assert? Must plaintiffs exhaust domestic remedies before filing suit?298 What is the proper measure

297. See supra notes 96–102 and accompanying text.
298. See, e.g., Sarei v. Rio Tinto, PLC, 550 F.3d 822, 832 (9th Cir. 2008) (en banc) (imposing a prudential exhaustion requirement on ATS actions).
This Article suggests that the answers to these and related questions can be determined through the application of established principles of federal common law decisionmaking. In that regard, judges hearing ATS disputes should be mindful of precedents in similar contexts where courts have crafted common law remedies for violations of legally enforceable rights.