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The Alien Tort Statute: Legislative History and Executive Branch Views

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Jennifer K. Elsea
Legislative Attorney
American Law Division

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Summary

The Alien Tort Statute (ATS), also known as the Alien Tort Claims Act (ACTA), provides that "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." The Second Circuit's 1980 decision in *Filartiga v. Pena-Irala*, a case involving torture and wrongful death that occurred in Paraguay, opened the door for the use of the ATS for aliens to assert jurisdiction in federal court for human rights violations and other violations of international law. Since 1980, the ATS has been asserted in numerous cases, with varying success, involving issues ranging from environmental torts and expropriation to torture and genocide. While human rights advocates and plaintiffs' lawyers may see great promise in the ATS as a way to vindicate human rights worldwide, others warn that it could easily spiral out of control, resulting in a deluge of foreign cases in federal courts, to the possible detriment of U.S. foreign policy interests. Of particular concern to many is the apparent rise in litigation against U.S. companies operating abroad that are accused of complicity in human rights abuses committed by the governments of their host countries.

The Bush Administration is seeking to overrule *Filartiga* and its progeny, and has set forth its interpretation of the ATS in an *amicus* brief to the 9th Circuit in *Doe v. Unocal*, in which plaintiffs, citizens of Burma, filed suit against Unocal, a U.S. corporation, for its alleged complicity with the Burmese military to use forced labor in connection with the company's oil pipeline project, as well as other human rights abuses allegedly committed by the military.

The ATS originated as part of the Judiciary Act of 1789. This report traces the legislative history of the Alien Tort Statute and summarizes some of the theories that have been put forth to explain the congressional intent behind its enactment. These include the theory that its purpose was to give federal courts jurisdiction over matters concerning foreigners and foreign affairs, that the statute was meant to preclude the denial of justice to aliens (possibly a cause for war), or to address a few offenses against the law of nations that could be committed by individuals (as opposed to States), such as piracy or the violation of diplomatic privileges. Also noted are the theories that the ATS is an assertion of universal jurisdiction, or that it was meant to cover only a limited type of offenses related to the law of prize. The report provides a historical overview of court decisions interpreting the ATS, followed by an overview of the positions taken by the U.S. government in published opinions of the Attorney General and in court briefs related to ATS claims.

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Introduction

The Alien Tort Statute (ATS) provides that "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."[1] The ATS is nearly as old as the United States itself, but it was not until a quarter of a century ago that it captured the attention of human rights lawyers, law professors, and prospective litigants. The 1980 decision in *Filartiga v. Pena-Irala* opened the door for the use of the ATS for aliens to assert jurisdiction in federal court for human rights violations and other violations of international law. In that case, the 2d Circuit overturned a lower court's dismissal of an action for damages in a case involving torture and wrongful death at the hands of a foreign official in a foreign country, finding jurisdiction was authorized under the ATS. Since 1980, the ATS has been asserted in numerous cases, with varying success, involving issues ranging from environmental torts and expropriation to torture and genocide. While human rights advocates and plaintiffs' lawyers may see great promise in the ATS as a way to vindicate human rights worldwide, others warn that it could easily spiral out of control, resulting in a deluge of foreign cases in federal courts, to the possible detriment of U.S. foreign policy interests. Of particular concern to many is the apparent rise in litigation against U.S. companies operating abroad that are accused of complicity in human rights abuses committed by the governments of their host countries.

The U.S. government interpretation of the ATS has varied from administration to administration. While the Carter and Clinton Administrations supported the federal courts' jurisdiction over actions for certain human rights abuses that occurred abroad, the Reagan and Bush Administrations supported a narrower reading of the statute. The George W. Bush Administration has advanced an interpretation of the ATS that it recognizes would render the ATS superfluous, and has sought to intervene more frequently than past administrations on behalf of U.S. defendants. The Bush Administration interpretation of the ATS is set forth in an *amicus* brief to the 9th Circuit in *Doe v. Unocal*, in which plaintiffs, citizens of Burma, filed suit against Unocal, a U.S. corporation, for its alleged complicity with the Burmese military to use forced labor in connection with the company's oil pipeline project, as well as other human rights abuses allegedly committed by the military. In a similar

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[1] 28 U.S.C. § 1350 (2002).

case, the Bush Administration filed a letter with the court asking it not to hear a case against a multi-national corporation based on possible foreign policy complications.[2]

This report traces the legislative history of the Alien Tort Statute and summarizes some of the theories that have been put forth to explain the congressional intent behind its enactment. The report provides a historical overview of court decisions interpreting the ATS, followed by an analysis of the positions taken by the U.S. government in published opinions of the Attorney General and in court briefs related to ATS claims.

The ATS originated as part of the Judiciary Act of 1789. After the Second Circuit's decision in the *Filartiga* case, scholars embarked on a search for relevant legislative history, but have, for the most part, come up empty-handed. Consequently, some have proceeded by interpreting the text of the ATS in light of the eighteenth-century understanding of international law, or have posited that certain contemporaneous events might have made the First Congress think it advisable to give federal courts jurisdiction over certain causes of action brought by aliens. Some stress that the ATS was not intended to create a new cause of action available only to aliens, but merely gave aliens the right to pursue claims involving international law in federal, as opposed to state court, in order to keep issues touching on foreign affairs within federal purview. Speculation about the original intent behind the ATS does not end the contemporary inquiry. While some believe the ATS should be applied to only those types of cases envisioned in 1789, others argue the ATS should be interpreted to evolve along with international law (the position taken by the *Filartiga* court). The debate about the ATS spills over into the larger debate concerning the role international law plays in U.S. law and the role national courts of all countries might play in enforcing international law.

Legislative History

28 U.S.C. § 1350, frequently referred to as the Alien Tort Claims Act (ACTA), is probably more accurately called simply the Alien Tort Statute, the former title implying that Congress passed the measure as a separate act, in which case one would expect to find legislative documents from which Congress' intent might readily be divined. Such is not the case, however, leading many legal scholars to begin their quest for the true meaning and purpose of the statute from the intent of the Constitution's framers and their envisioned interrelationship between the federal government and state governments in matters touching on foreign affairs, as well as the new courts' function with respect to interpreting and applying international law.

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[2] *See* Letter from William H. Taft, IV, Legal Advisor, Department of State, to Louis F. Oberdorfer, District Court Judge, United States District Court for the District of Columbia (July 29, 2002), *available at* http://www.hrw.org/press/2002/08/exxon072902.pdf (last visited Sep.25, 2003).

The Constitution

At the Constitutional Convention in Philadelphia, the overriding issue was the tension between Federalists, who supported a strong central government with an independent judiciary, and anti-Federalists, who were concerned that the draft Constitution would allocate too much power to the central government, leaving the states in much the same position as the Thirteen Colonies under British dominion.[3] In the area of the judiciary, the tension played out in the debate as to whether to establish federal courts other than the Supreme Court, and how judicial power was to be allocated among state and federal courts.[4] The delegates reached a compromise under which the Congress would be empowered (but not obligated) to provide for such inferior courts as it saw fit,[5] and could grant or restrict the jurisdiction of those courts through legislation.[6]

It appears to have been less controversial that observance of the law of nations, a necessity for a fledgling nation hoping to maintain peaceful foreign relations with respect to established military powers, was fundamentally a federal role.[7] The need to consolidate foreign affairs in the federal government, rather than allowing states to conduct their own foreign policies was part of the impetus for replacing the Articles of Confederation.[8]

It is less clear whether or how the Framers intended to incorporate international law within the scope of judicial power of the United States.[9] Article III of the Constitution extends the federal judicial power "to all cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made under their Authority...."[10] Article VI provides that "all Treaties made, or which shall be made, under the Authority of the United States, shall

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[3]*See* Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: Early Implementation of and Departures from the Constitutional Plan*, 86 COLUM. L. REV. 1515 (1986).

[4]*See id.* at 1541.

[5]U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.").

[6]*See* Clinton, *supra* note 3, at 1518.

[7]*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, 12 (1985).

[8]*See* Clinton, *supra* note 3, at 1529 (noting that members of the First Congress, "fresh from their experience with the ambiguous and malleable provisions of the Articles of Confederation, viewed the drafting of the first legislation on the federal judiciary principally as a political, rather than legal or constitutional, challenge").

[9]Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor, in* THE ALIEN TORT CLAIMS ACT: AN ANALYTICAL ANTHOLOGY (Ralph G Steinhardt and Anthony D'Amato eds. 1999)(*hereinafter* ATCA ANTHOLOGY) at 264 note 38.

[10]U.S. CONST. art. III, § 2, cl. 1.

be the supreme Law of the Land...."[11] Thus, there is clearly a constitutional basis for the federal courts to hear cases arising from violations of treaties. However, the Constitution does not expressly provide that customary international law is a source of federal law, possibly casting doubt on the constitutionality of the part of the ATS that refers to the "law of nations."[12] Most legal scholars agree that the phrase "Laws of the United States" includes customary international law as a subset of federal common law.[13]

The Judiciary Act of 1789

As one of its first official duties, the First Congress undertook to create a system of courts to implement Article III of the Constitution. The effort culminated in the Act of September 24, 1789 establishing the Judicial Courts of the United States,[14] now known as the Judiciary Act of 1789 ("Act" or "Judiciary Act").

The Alien Tort Statute originated as part of the Judiciary Act. The ninth clause of the Act, setting forth jurisdiction of the newly formed federal district courts read:

> SEC. 9. And be it further enacted, That the district courts have, exclusively of the courts of the several States, cognizance of crimes and offences that shall be cognizable under the authority of United States, committed within their respective districts, or upon high seas; where no other punishment than whipping, not exceeding thirty stripes, a fine not exceeding one hundred dollars, or a term of imprisonment not exceeding six months, is to be inflicted; and shall also have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation or trade of the United States, where the seizures are made, on waters which are navigable from the sea by vessels of ten or more tons burthen, within their respective districts as well as upon the high seas; saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it; and shall also have exclusive original cognizance of all seizures on land, or other waters than as aforesaid, made, and of all suits for penalties and forfeitures incurred, under the laws of the United States. **And shall also have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States.** And shall also have cognizance, concurrent as last mentioned, of all suits at common law where the United States sue, and the matter in dispute amounts, exclusive of costs, to the sum or value of one hundred dollars. And shall also have jurisdiction exclusively of the courts of the several States, all suits against consuls or vice-consuls, except for offences above the description aforesaid. And the trial of issues in fact, in the

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[11] *Id*. art. VI, cl. 2.

[12] *See* Randall, *supra* note 7, at 54-55.

[13] *See id*. at 54 (citing Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1566 (1984)). *But see* Curtis A. Bradley and Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997).

[14] 1 Stat. 73, 77 (1789) (codified at 28 U.S.C. § 1350).

> district courts, in all causes except civil causes of admiralty and maritime jurisdiction, shall be by jury.[15]

Other sections of the Act also dealt with cases involving foreigners, in general giving jurisdiction over them to federal courts, albeit not always exclusively.[16] Section 13 provided that the Supreme Court shall have exclusive jurisdiction "of suits or proceedings against ambassadors, or other public ministers, . . . as a court can have or exercise consistently with the law of nations . . . ." as well as "original, but not exclusive jurisdiction of all suits brought by ambassadors, or other public ministers, or in which a consul, or vice consul, shall be a party." Other provisions of the Judiciary Act conferred jurisdiction over actions involving aliens, without regard to their diplomatic status. Section 11 established original, but not exclusive, "alienage jurisdiction" in the circuit courts, over "all civil actions at common law or equity where the "dispute exceeds . . . the sum or value of five hundred dollars, and . . . an alien is a party . . . ."[17] Additionally, section 12 of the Act permitted aliens named as defendants in civil suits to remove the case to the federal circuit courts where the amount-in-controversy requirement could be met. Section 13 provided original, but not exclusive jurisdiction to the Supreme Court over cases between a state and an alien ("diversity jurisdiction").

Subsequent Amendments

1878 Codification of Federal Law. With the first edition of the Revised Statutes, the Alien Tort Statute was amended somewhat in form but not in content. The new version of the Judiciary Act divided the jurisdictional provisions according to which court or courts were to exercise it, and the Alien Tort Statute appeared as a separate clause in the section establishing concurrent jurisdiction with state courts. The amended version read as follows:

> The district courts shall have jurisdiction ... [o]f all suits brought by any alien for a tort 'only' in violation of the law of nations, or of a treaty of the United States.[18]

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[15] 1 Stat. 76-77 (Alien Tort Statute in bold type, references omitted).

[16] *See* Randall, *supra* note 7, at 15.

> As evidenced by several provisions of the Judiciary Act, the drafters thought it necessary to confer jurisdiction in the federal courts over actions involving aliens. While those provisions represented "compromises, limitations and . . . ambiguities, . . . the broad outlines of an intended national jurisdiction with respect to foreigners were fairly clear."

See id. (quoting Dickinson, *The Law of Nations as Part of the National Law of the United States*, 101 U. PA. L. REV. 26, 26-34 (1952). The provisions of the Judiciary Act that affect aliens include sections 9, 11, 12, and 13.

[17] Section 11 also established diversity jurisdiction where parties are not citizens of the same state, with a $500 amount-in-controversy requirement. Alienage jurisdiction is currently codified at 28 U.S.C. § 1332(a) (2002). Under § 1332(a), an alien can sue, or be sued by, a citizen where the amount-in-controversy exceeds $75,000.

[18] Rev. Stat. § 563 (1879).

The legislative record does not disclose the reason for enclosing the word 'only' in single quotations marks. The omitted reference to concurrent state court jurisdiction should not be read to deprive the state courts of jurisdiction without the explicit clarification that district court jurisdiction was to be exclusive.[19]

The Revised Statutes also incorporated the recently established federal question jurisdiction, which permitted federal courts to hear cases in which the resolution of a dispute required an interpretation of federal law, as long as the amount in dispute met or exceeded $500.[20] Some have suggested that the new federal question jurisdiction rendered the Alien Tort Statute all but obsolete, because international law and treaties are seen as "federal common law."[21] At any rate, the Alien Tort Statute remained on the books,[22] unaccompanied by recorded debate that might clarify what purpose it was meant to serve.

1911 Amendments. When the federal judiciary was reorganized in 1911, the Alien Tort Statute was renumbered as clause 17 of section 563, and underwent some apparently minor changes in punctuation. The 1911 version read:

> The district courts shall have jurisdiction ... [o]f all suits brought by any alien for a tort only, in violation of the law of nations, or of a treaty of the United States.[23]

The comma inserted between "only" and "in violation" appears to clarify the emphasis on torts (as opposed to actions based on contract law), where the earlier version might have been read emphasize that only those torts in violation of international law were actionable under the section, but the record does not disclose the reason for the changes.

1948 Judicial Code. The current language appeared in the 1948 revision of the judicial code, with minor changes.[24] The phrase "civil action" was substituted for "suits" to comport with Rule 2 of the Federal Rules of Civil Procedure.[25] "An alien" was substituted for "any alien." The word "committed" was inserted prior to "in

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[19]*See* William R. Casto, *The Federal Courts' Protective Jurisdiction Over Torts Committed in Violation of the Law of Nations*, *in* ACTA ANTHOLOGY, *supra* note ?, at 119 & n. 4.

[20]Judiciary Act of March 3, 1875, ch. 137, § 1, 18 Stat. 470 (circuit courts given concurrent jurisdiction over "all suits of a civil nature at common law or in equity . . . arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority . . . ." where a $500 amount requirement could be met) (current version, requiring no minimum amount, at 28 U.S.C. § 1331 (2002)).

[21]*See* Randall, *supra* note 7, at 17-18 (noting that authority is split over whether jurisdiction based on a violation of the law of nations or a treaty is subsumed into federal question jurisdiction).

[22]Rev. Stat. § 563(17) (1879).

[23]Act of March 3d, 1911, ch. 231, § 24, 36 Stat. 1087, 1093.

[24]62 Stat. 934 (1948).

[25]*See* H.R. Rep. No. 308, 80th Cong., 1st Sess. App. at 124 (1947).

violation of the law of nations." Again, the legislative record is devoid of description or debate about what sorts of cases were meant to be covered.

Torture Victim Protection Act. In 1990 Congress enacted the Torture Victim Protection Act (TVPA) for the express purpose of codifying the *Filartiga* decision.[26] The TVPA created a cause of action for any person, citizen as well as alien, to seek recovery for acts of torture committed overseas from an individual responsible for the acts who can be "found" within the United States for the purpose of serving process.[27] Only individuals with a certain level of personal responsibility may be sued under the TVPA; other entities are not amenable to suit. Heads of state and others with diplomatic immunity cannot be sued while they are in office, and foreign sovereign immunity is not automatically waived with respect to these claims. The legislative history clarifies that the TVPA is not meant to supercede the ATS. The drafters explained that the ATS should remain intact for suits by aliens in cases involving international wrongs other than torture and summary execution.[28] At least one court has interpreted the TVPA as indicative of Congress' support for the ATS to address human rights issues, at least with respect to cases involving torture and extrajudicial killing.[29]

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[26]*See* S. Rep. No. 249, 102nd Cong., 1st Sess., at 4 (1991) (noting that the TVPA "would establish an unambiguous basis for a cause of action that has been successfully maintained under an existing law, section 1350 of title 28 of the U.S. Code," but that "at least one Federal judge ... has questioned whether section 1350 can be used by victims of torture committed in foreign nations absent an explicit grant of a cause of action by Congress.).

[27]28 U.S.C. § 1350 note.

[28]*See* S. Rep. No. 249, 102nd Cong., 1st Sess., at 5 (1991).

[29]*See* Wiwa v. Royal Dutch Petroleum Co. 226 F.3d 88 (2d Cir. 2000), *cert denied* 532 U.S. 941 (2001)(permitting Nigerian emigrants to sue two foreign holding companies for alleged complicity in human rights violations against them in retaliation for their opposition to the companies' oil exploration activities in Nigeria). The court stated:

> Whatever may have been the case prior to passage of the TVPA, we believe plaintiffs make a strong argument in contending that the present law, in addition to merely permitting U.S. District Courts to entertain suits alleging violation of the law of nations, expresses a policy favoring receptivity by our courts to such suits. Two changes of statutory wording seem to indicate such an intention. First is the change from addressing the courts' "jurisdiction" to addressing substantive rights; second is the change from the ATCA's description of the claim as one for "tort ... committed in violation of the law of nations ..." to the new Act's assertion of the substantive right to damages under U.S. law. This evolution of statutory language seems to represent a more direct recognition that the interests of the United States are involved in the eradication of torture committed under color of law in foreign nations.

Id at 105.

Some Theories on Congressional Intent

Most commentators regard the Alien Tort Statute as a product of the Framers' desire to give the federal government supremacy over foreign affairs and avoid international conflict arising from disputes about U.S. treatment of aliens.[30] Scholars and judges have advanced several theories to explain what sort of threat the statute was meant to avert.

Protection of Foreign Diplomats. Focusing on a limited number of offenses against the law of nations that were clearly recognized as such at the time of the First Congress, some theorists interpret the Alien Tort Statute as a means to protect the rights of foreign ambassadors.[31] Presuming that, in general, international law was viewed in the eighteenth century as a body of principles regulating States' interaction with one another and not the rights of individuals, they reason Congress could not have meant to provide a cause of action for individual aliens for suits against States. However, since only States were viewed as having the capacity to commit violations of law, Congress would not have presumed that individuals could be the targets of lawsuits for violations of international law, except perhaps in the narrow category of offenses against the law of nations that *could* at that time be committed by individuals. Blackstone listed three of these: the violation of safe-conducts or passports, infringement of the rights of ambassadors, and piracy.[32]

To buttress this theory, they point to a high-profile incident involving an ambassador as the possible catalyst for the Alien Tort Statute. In 1784, a Frenchman attacked French Consul General Marbois in Philadelphia, causing a diplomatic imbroglio with France, who expressed indignance over the Continental Congress' seeming impotence to address the matter.[33] The Supreme Court of Pennsylvania eventually upheld the offender's conviction for violating the law of nations.[34] Several years after the so-called "Marbois Affair," there was a similar infamous outrage against a foreign diplomat, this time committed by a New York police officer, who arrested a servant at the home of the Dutch ambassador in violation of the diplomatic immunity that attached to the premises.[35] Proponents of the "ambassadorial protection" theory behind the ATS argue that these two incidents probably exemplified the need to enforce international law regarding the inviolability

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[30]*See* Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, *in* ACTA ANTHOLOGY *supra* note 9, at 257, 261.

[31]*See* William R. Casto, *The Federal Courts Jurisdiction over Torts Committed in Violation of the Law of Nations*, *in* ACTA ANTHOLOGY , *supra* note 9, at 119.

[32]*See* Burley, *supra* note 9, at 265 (citing W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 881 (G. Chase 4th ed. 1923)).

[33]*See* Burley, *supra* note 9, at 265-67.

[34]*See id.* 265 (citing Respublica v. DeLongchamps, 1 U.S. (1 Dall.) 111 (1784).

[35]Dutch Ambassador Van Berckel objected vigorously, which led to the sentencing of the police officer to three months' imprisonment for violating the law of nations. *See* Curtis Bradley, *The Alien Tort Statute and Article III*, 42 VA J. INT'L L. 586, 641-42 (2002) (finding no relevance between this incident and the ATS).

of foreign diplomats, and was at least one of the purposes for the inclusion of the ATS into the Judiciary Act.[36]

Critics of this theory note that neither of theses case involved claims for civil damages. Both were treated as criminal violations, and although a great deal of commentary was devoted to the legal issues involved, no one ever suggested that the proper remedy was to give ambassadors civil right of action.[37] Moreover, the critics note, while the incidents were undoubtedly fresh in the minds of the First Congress, the First Judiciary Act gave original (though not exclusive) jurisdiction to the Supreme Court in cases brought by ambassadors.[38] These critics further doubt that the First Congress would have used the broad term "alien" where it meant to limit the class of aliens meant to benefit from the provision to diplomats.[39]

Prize Cases. Another type of cases implicating international law that would have been familiar to drafters of the Judiciary Act was cases involving the law of prize, in which the wartime capture of a merchant vessel is disputed. While these disputes about rightful ownership of seized vessels and their cargoes would have been covered under admiralty jurisdiction clause, some argue that the phrase "tort only" was meant to cover prize claims involving damage or injury to property.[40] However, the statute does not appear to have been invoked in many prize cases.

Denial of Justice. It was apprehended that state courts deciding issues involving aliens, presumably lacking in understanding for national concerns related to foreign policy, might render decisions biased in favor of their own citizens. Citizens of foreign countries would then have grounds to complain that they were denied the opportunity to seek redress in U.S. courts, in disregard for U.S. responsibility under international law, giving their home country the right to seek diplomatic redress or, in extreme cases, perhaps the right to declare war. There is evidence that this concern was a motive for including the alienage provision of the Diversity Clause in Article III of the Constitution.[41] The Alien Tort Statute would have been an incomplete remedy, however, because it is limited to cases in which an alien is a *plaintiff* suing for a tort that implicates international law. Denial of justice cases could arise as easily in contractual disputes and cases where an alien is sued as defendant charged with a crime, even in cases not implicating international law. The diversity jurisdiction clause in section 13 of the Judiciary Act filled some of this void by granting jurisdiction to federal courts in cases where the amount in controversy exceeded $500 and one party to the suit was an alien. It has been suggested that the Alien Tort Statute was a compromise between those who advocated full diversity

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[36]*See* Randall, *supra* note 7, at 24-28.

[37]*See* Bradley, *supra* note 35, at 642.

[38]1 Stat. 80-81 (1789).

[39]*See* Burley, *supra* note 9, at 268-69.

[40]*See* Joseph Modeste Sweeney, *A Tort Only in Violation of the Law of Nations*, 18 HASTINGS INT'L & COMP. L. REV. 445 (1995).

[41]*See* Burley, *supra* note 9, at 261 (citing a passage by Alexander Hamilton in The Federalist (No. 80)).

jurisdiction and those who wanted to preserve for states the right to apply their own contract law to disputes involving international contracts.[42]

Fulfillment of State Responsibility. Related to the "denial of justice" theory is the theory that the Alien Tort Statute was meant to provide remedies for aliens injured by U.S. citizens in ways that would implicate the responsibility of the United States for a breach of a treaty or violation of customary international law. This would have been one way for the United States to fulfill its obligations under international law, which generally leaves it up to States to implement means to fulfill those obligations and to remedy breaches. At a minimum, States were said to be obligated to enforce treaties by enacting criminal statutes to penalize conduct by its citizens that would contradict international. Under this theory, the alien's right to sue was intended to apply to cases in which the defendant is a U.S. citizen or alien residing in the United States. Jurisdiction for such cases would find constitutional support in the alienage clause of Article III.[43] However, the ATS does not specifically require that the defendant be a U.S. citizen. Moreover, the ATS has never been construed to imply a waiver of U.S. sovereign immunity.

Universal Jurisdiction. A broader version of the state responsibility theory, one that would not rest on alienage jurisdiction or require a U.S. connection to the tortious activity giving rise to a suit, presumes that the courts of all nations have jurisdiction to address certain breaches of the law of nations. Under this view, the ATS provides a means to assert a type of "universal jurisdiction," which defines a category of crimes that are so egregious as to be the object of universal concern, regardless of the situs of the offense and the nationalities of the offenders or victims.[44] The theory of universal jurisdiction is rooted in international law allowing any state to punish pirates and slave traders, who have long been considered *hostis humani generis* – enemies of all humanity.[45] Universal jurisdiction is ordinarily associated with criminal prosecutions rather than civil suits; however, there is authority to support the view that civil suits providing redress for those crimes covered by universal jurisdiction is a proper exercise of a State's jurisdiction.[46]

Legal experts continue to debate the extent to which the theory of universal jurisdiction is accepted by States, with some arguing that international law may require a nexus between the crime (or accused criminal) and the State that seeks to assert jurisdiction in order for that jurisdiction to be valid. The controversy over the validity of universal jurisdiction recently gained prominence when the United States objected to a Belgian law that would have given Belgian courts jurisdictions over war crimes that occurred outside Belgium, where neither the victims or perpetrators had

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[42]*See* Randall, *supra* note 7, at 28-31.

[43]*See* Bradley, *supra* note 9, at 619.

[44]*See* STATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 404 [hereinafter "RESTATEMENT"].

[45]*See* M. Cherif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, 42 VA. J. INT'L L. 81, 95 (2001).

[46]*See*, RESTATEMENT, *supra* note 44, § 404, comment b; Kadic v. Karadzic, 70 F.3d 232, 240 (2d Cir. 1995).

any connection to Belgium. The Belgian Parliament withdrew the law under international pressure. Some observers compared the ATS to the Belgian statute, arguing that the ATS allows U.S. courts to accomplish what was deemed objectionable in the case of Belgium.[47]

Judicial Interpretation

Few aliens invoked the Alien Tort Statute prior to the *Filartiga* decision in 1980,[48] and there appears to have been little controversy over its interpretation in those few cases that mention it. Jurisdiction was sustained in only two of these cases, possibly owing to the difficulty for foreign plaintiffs to establish "a tort only in violation of the law of nations or a treaty of the United States."[49]

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[47]Jeremy Rabkin, *Constitutional Opinions: Getting It in U.S. Courts*, THE AMERICAN SPECTATOR June 2003-July 2003; Courtney Richard, *Belgium Waffles*, THE AMERICAN ENTERPRISE, September 1, 2003 at 7 (No. 6 Vol. 14).

[48]*See* Randall, *supra* note 7, at 4 (counting 21 cases prior to *Filartiga* in which a plaintiff invoked the Alien Tort Statute).

[49]The following cases found that tort claims asserted by aliens did not involve a violation of international law or a treaty of the United States: Akbar v. New York Magazine Co., 490 F. Supp. 60, 63 (D.D.C. 1980) (plaintiffs' failure to allege that libel violated any treaty or the law of nations precluded jurisdiction); Huynh Thi Anh v. Levi, 586 F. 2d 625, 629 (6th Cir. 1978) (finding no universally accepted international right grants grandparents rather than foster parents custody of children); Benjamins v. British European Airways, 572 F.2d 913, 916 (1978), cert. denied, 439 U.S. 1114 (1979) (finding that claims arising out of airplane crash may constitute a tort, but not one in violation of the law of nations or U.S. treaty); Dreyfus v. Von Finck, 534 F.2d 24, 30 (2d Cir.), *cert. denied* 429 U.S. 835 (1976)(seizure of Jewish plaintiff's property in Nazi Germany and repudiation of 1948 settlement agreement may have been tortious but not an international law violation); ITT v. Vencap, Ltd., 519 F.2d 1001, 1015 (2d Cir. 1975) (suit for fraud, conversion and corporate waste not sustainable as claim for violation of the law of nations); Abiodun v Martin Oil Service, Inc., 475 F.2d 142, 145 (7th Cir.), cert. denied, 414 U.S. 866 (1973) (Nigerians' claims alleging fraudulent employment training contracts failed to state a claim involving an international law violation); Valanga v. Metropolitan Life Insurance Company, 259 F. Supp. 324, 327 (E.D. Pa. 1966) (defendant's failure to pay insurance proceeds to Russian beneficiary not a violation of the law of nations or of a U.S. treaty under section 1350); Damaskinos v. Societa Navigacion Interamericana, S.A., Panama, 255 F. Supp. 919, 923 (S.D.N.Y. 1966) (seaman's personal injury action alleging unsafe work place and unseaworthiness of vessel did not satisfy requirement for a violation of the law of nations); Lopes v. Reederei Richard Schroeder, 225 F. Supp. 292, 294-97 (E.D. Pa. 1963) (seaman's personal injury claims of negligence and unseaworthiness of vessel did not present claim for a violation of international); Khedivial Line, S.A.E. v. Seafarers' International Union, 278 F.2d 49, 52 (2d Cir. 1960) (finding no actionable claim under section 1350 since union picketing which prevented plaintiff from unloading cargo was not an international law violation).

Cases Prior to Filartiga

The first suit claiming jurisdiction under the Alien Tort Statute for a treaty violation was the 1795 case *Bolchos v. Darrell*.[50] That case arose in the context of war pitting Spain and Great Britain against France. Slaves, at the time considered "neutral property" ordinarily not subject to capture by a belligerent, were mortgaged by a Spanish citizen to a British citizen and placed on board a Spanish vessel. Captain Bolchos, a French citizen, captured the Spanish vessel as prize and brought it to a U.S. port. While the vessel was in port, the defendant Darrell, acting as agent for the mortgagee, seized and sold the slaves. Bolchos brought suit against the agent for restitution of the slaves, arguing that a treaty between the United States and France mandated that the property of friendly nation found aboard an enemy vessel was to be forfeited. The court upheld jurisdiction under admiralty laws and, based on the defendant's violation of the Treaty of Amity and Commerce with France, on the Alien Tort Statute, and ordered the defendant to return the slaves or proceeds from their sale to the plaintiff. Notably, the court did not require that the treaty in question provide for redress in the courts of the treaty parties, and there was no question as to whether the defendant was capable, as an individual human being rather than a state, of breaching the treaty.

The second suit that succeeded in asserting jurisdiction under the Alien Tort Statute was brought in 1961. *Adra v. Clift*[51] was an international child custody case in which a Lebanese national brought suit against his ex-wife and her husband, a U.S. citizen, for having used forged passports to bring the children into the United States, tortiously interfering with his custody of the children. The court found the interference to be a tort and the passport fraud to be a violation of the law of nations (the court appears to have presumed that the 'tort' and the 'violation of the law of nations' were separate elements, but did not discuss its reasoning). In another case, the court suggested that "illegal seizure, removal and detention of an alien against his will in a foreign country" might be a tort in violation of the "law of nations." [52]

Nineteen other cases asserting jurisdiction under the Alien Tort Statute prior to 1980 were unsuccessful. In *Moxon v. The Brigantine Fanny*,[53] a case involving unlawful capture of a French vessel by a British ship in neutral U.S. waters, the court found the action did not qualify as one in "tort only" because restitution of the prize itself was sought.[54]

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[50] 3 F. Cas. 810 (D.S.C. 1795).

[51] 195 F. Supp. 857 (D. Md. 1961).

[52] Nguyen Da Yen v. Kissinger, 528 F.2d 1194, 1201 (9th Cir. 1975) (finding jurisdiction on other grounds in child custody case).

[53] 17 F.Cas. 942 (D.C.Pa. 1793).

[54] *See id*. at 948 ("It cannot be called a suit for a tort only, when the property, as well as damages for the supposed trespass, are sought for.").

In *O'Reilly de Camara v. Brooke*,[55] a Spanish citizen asserted that the loss of her right to emoluments incident to a hereditary title in Cuba, which was abolished after the Spanish-American War, was a tort attributable to the American governor. The Supreme Court found that her right to the title ceased when Spain ceded sovereignty of Cuba, but also thought it

> plain that where, as here, the jurisdiction of the case depends upon the establishment of a 'tort only in violation of the law of nations, or of a treaty of the United States,' it is impossible for the courts to declare an act a tort of that kind when the Executive, Congress, and the treaty-making power all have adopted the act.[56]

The next alien tort case did not occur until 1958. In *Pauling v. McElroy*,[57] plaintiffs, who included aliens and U.S. citizens resident in the Marshall Islands, sued to enjoin the United States from conducting nuclear weapons testing in their midst. Although the plaintiffs amended their complaint to ask for damages, the court found the claim did not amount to "tort" and that international law did not extend a private cause of action. As to the alien plaintiffs, the court found that they had no constitutional right to challenge the statute and that it was "doubtful" that the Alien Tort Statute provided jurisdiction, but did not explain that conclusion.

Filartiga v. Pena-Irala

In 1980, the 2d Circuit revived the ATS after two centuries of near obscurity. In *Filartiga v. Pena-Irala*,[58] a Paraguayan dissident and his daughter, after immigrating to the United States, brought suit against a former Paraguayan official for the torture and wrongful death of Joelito Filartiga, the teenage son and brother of the plaintiffs. The district court dismissed the Filartigas' complaint for lack of subject matter jurisdiction; however, the court of appeals reversed, recognizing the emergence of a universal consensus that international law affords certain substantive rights to individuals and may implicate a State's treatment of its own citizens.[59]

The approach taken by the court of appeals combined several traditional doctrines.[60] It applied the fiction of the transitory tort, which holds that liability for personal injury torts follows the tortfeasor across international boundaries.[61] It emphasized that federal courts should interpret international law as it has evolved and

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[55]209 U.S. 45 (1908).

[56]*Id.* at 52.

[57]164 F.Supp. 390 (D.D.C. 1958).

[58]630 F.2d 876 (2d Cir. 1980).

[59]*Id*. at 880-87.

[60]*See* Jeffrey M.Blum and Ralph G. Steinhardt, *Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act After Filartiga v. Pena Irala*, *in* ATCA ANTHOLOGY, *supra* note 9, at 49, 54.

[61]*Id*. at 58.

exists at the time of the case.[62] The court found that torture, when committed under color of state authority, violates international law and is actionable under the ATS. Although official action was necessary to bring the conduct under international law (and the ATS), the court declined to dismiss the action under the act of state doctrine. The court did not explicitly address the question of whether the ATS provides a private right of action. However, it "construe[d] the Alien Tort Statute, not as granting new rights to aliens, but simply as opening the federal courts for adjudication of the rights already recognized by international law."[63]

Tel-Oren

The Filartiga case raised the possibility that human rights litigation had finally breeched the barrier of sovereign immunity that had precluded cases of this type. The likelihood of this was soon dampened by the D.C. Circuit's dismissal of *Tel-Oren v. Libya*.[64] Plaintiffs in that case were victims or survivors of a terrorist attack on a civilian bus traveling on an Israeli highway, allegedly carried out by members of the Palestine Liberation Organization (PLO) with the assistance of Libya. In arriving at a determination to dismiss for lack of subject-matter jurisdiction, the court issued three separate concurring opinions.

Judge Edwards concluded that the ATS permitted federal jurisdiction over cases involving some violations by individuals of established international law, such as genocide, slavery, and systematic racial discrimination.[65] However, he concluded terrorism was not one of those offenses, noting that although terrorism is repugnant to many countries, "to some states acts of terrorism, in particular those with political motives, are legitimate acts of aggression and therefore immune from condemnation." With respect to the PLO, he opined that allegations that its members committed torture did not implicate international law because the PLO is not a State, and it could not have committed the alleged offenses under color of law. He would have followed *Filartiga* to find that the ATS does not require the plaintiff to allege a cause of action specifically defined by Congress or in international law.

Judge Bork followed a more statist approach, inquiring into the intent of the framers of the ATS to determine the original scope of the statute. He concluded that "in 1789 there was no concept of international human rights; neither was there, under the traditional version of customary international law, any recognition of a right of private parties to recover. Clearly, in his view, cases like *Filartiga* and *Tel-Oren* were beyond the framers' contemplation. In the absence of express legislative enactments or clarifying judicial decisions, Judge Bork was not prepared to hold that an alien had a cause of action within the jurisdiction of U.S. courts for terrorism, on the ground that terrorism was an unknown phenomenon at the time of the ATS' creation.

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[62]630 F.2d at 881.

[63]*Id*. at 887.

[64]726 F.2d 774 (D.C. Cir. 1984).

[65]*Id*. at 781 (Edwards, J., concurring).

Judge Robb, on the other hand, would have declined to review the case as nonjusticiable. He was adamant that courts should 'steer resolutely away from involvement in this manner of case' since there is 'no obvious or subtle limiting principle in sight.'[66] He also objected to the federal courts' pursuit of the judicially unmanageable question of the international legal status of terrorism, instead preferring to leave such a politically sensitive issue such as this to the executive branch for diplomatic resolution.

Post-Filartiga Cases

After *Filartiga* and *Tel-Oren,* foreign litigants pursued actions under the ATS more frequently than before, although it has been noted that the number of cases is not so high as to validate opponents' predictions that a flood-gate would open. The primary issues in these cases seems to be whether a particular tort violates the law of nations and whether the ATS provides a cause of action as well as jurisdiction over such cases. Many of the actions have been dismissed according to doctrines of judicial avoidance, such as *forum non conveniens*, sovereign immunity, or the political question doctrine. In a few cases, actions were dismissed on constitutional due process grounds because the defendant was not given adequate notice or lacked minimum contacts with the United States.[67]

International Torts. In order for federal courts to hear a case under the ATS, the plaintiff must first allege a violation of the law of nations. Some courts have construed this to include only violations of *jus cogens* rather than simply customary international law.[68] Ironically, it has been more difficult for plaintiffs to succeed in pleading a violation of a treaty as a basis for jurisdiction, because the treaties they seek to invoke are found to be non-self-executing, that is, they do not give rise to a private right that can be enforced in court unless Congress specifically creates a cause of action when it enacts implementing legislation.

Most courts have followed the *Filartiga* holding rather than adopting the approaches of any of the three *Tel-Oren* judges. The list of human rights violations found to constitute international torts for the purpose of the ATS include genocide,[69]

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[66]*Id.* at 826-27 (Robb, J., concurring).

[67]*See* Plaintiffs A, B, C, D, E, F v. Zemin, ___ F.Supp.2d ___, 2003 WL 22118924, (N.D.Ill. 2003.) In finding an exercise of personal jurisdiction meets due process standards, a court must determine whether the defendant purposefully established "minimum contacts" in the forum State. Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

[68]*See, e.g., In re* Estate of Ferdinand E. Marcos Human Rights Litig., 978 F.2d 493, 503 (9th Cir. 1992); Xuncax v. Gramajo, 886 F. Supp. 162, 184 (D. Mass. 1995). Customary International Law (CIL) is the body of law arising from custom rather than treaties. All nations are bound by a rule of CIL except those that have persistently objected to it. The fact that a particular rule is found in many treaties may serve as proof that it has become custom. *Jus cogens* is the body of non-derogable rules of international law, binding on all nations whether or not they agree to be bound. *See* RESTATEMENT, *supra* note 44, § 102 comment k.

[69]Kadic v. Karadzic, 70 F.3d 232 (2d. Cir. 1995)(jurisdiction found based on allegation that
(continued...)

war crimes,[70] extrajudicial killing,[71] slavery,[72] torture,[73] unlawful detention,[74] and crimes against humanity.[75] These violations are generally considered to be *jus cogens* violations.[76] Some courts have held that the ATS requires that an international tort be "definable, obligatory (rather than hortatory), and universally condemned."[77]

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[69](...continued)
self-proclaimed leader planned and ordered a campaign of rape, murder, and forced impregnation and other forms of torture designed to destroy religious and ethnic groups); Presbyterian Church of Sudan v. Talisman Energy Inc., 244 F.Supp.2d 289 (S.D.N.Y.,2003) (oil company alleged to have hired Sudanese military for security services knowing such services would involve genocidal acts against non-Muslim minorities could be sued under ATS); Xuncax v. Gramajo, 886 F. Supp. , 187-88 & n. 35 (military defendant's alleged attacks on indigenous population could be considered genocide).

[70]Kadic v. Karadzic, 70 F.3d at 240-43; Doe v. Islamic Salvation Front, 993 F. Supp. 3, 8 (D.D.C. 1998).

[71]*See* Kadic, 70 F.3d at 240-41, 243-44 (noting that when Congress enacted the TVPA, it codified the ATS jurisdiction over extrajudicial killing and torture); Estate of Cabello v. Fernandez-Larios, 157 F. Supp. 2d 1345 (S.D Fla. 2001) (finding subject matter jurisdiction under the ATS and TVPA for the extrajudicial killing of plaintiff in Chile by a member of the Chilean military); Forti v. Suarez-Mason, 672 F.Supp. 1531 (N.D. Cal.1987)(member of Argentine junta alleged to have directed and supervised murder and summary execution of accused dissidents could be sued under the ATS).

[72]*See, e.g.*, Doe v. Unocal Corp., 110 F. Supp. 2d 1294, 1307-08 (C.D. Cal. 2000) (citing Kadic, 70 F.3d at 234); NCGUB v. Unocal Corp., 176 F.R.D. 329, 348 (C.D. Cal. 1997); Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424, 443 (D.C. N.J. 1999) (plaintiff alleged violation of the law of nations in asserting that she had been purchased by German automobile company and forced to perform unpaid labor; however, claim was time-barred).

[73]*See, e.g.*, Abebe-Jira v. Negewo, 72 F.3d 844 (11th Cir.1996) (affirming judgment under ATS against former Ethiopian official for torture and cruel, inhuman, and degrading treatment); Kadic v. Karadzic, 70 F.3d 232 (2d Cir.1995) (concluding that alleged war crimes, genocide, torture, and other atrocities committed by a Bosnian Serb leader were actionable under the ATS); *In re* Estate of Marcos Human Rights Litig., 25 F.3d 146 (9th Cir. 1994), *cert. denied*, 532 U.S. 941 (1995); Xuncax v. Gramajo, 886 F.Supp. 162 (D.Mass.1995) (deeming torture by Guatemalan military to be actionable under the ATS).

[74]*See, e.g.*, Abebe-Jira, 72 F.3d at 844; Alvarez-Machain v. United States, 266 F.3d 1045, 1052 (9th Cir. 2001). Martinez v. City of Los Angeles, 141 F.3d 1373, 1384 (9th Cir. 1998)(allegations did not make out a claim for arbitrary etention); Paul v. Avril, 901 F.Supp. 330, 333-35 (S.D.Fla.1994) (concluding plaintiff suffered arbitrary detention although he was held for less than ten hours); Forti v. Suarez-Mason, 672 F.Supp. at 1541 ("There is case law finding sufficient consensus to evince a customary international human rights norm against arbitrary detention. The consensus is even clearer in the case of a state's prolonged arbitrary detention of its own citizens."); Kodak v. Kavlin, 978 F.Supp. 1078 (S.D. Fla. 1997).

[75]*See* Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88 (S.D.N.Y. 2002) (defining crimes against humanity as, inter alia, "torture ... [and] inhumane acts ... intentionally causing great suffering or serious injury to body or mental or physical health").

[76]*See* RESTATEMENT, *supra* note 44, § 702.

[77]Forti v. Suarez-Mason, 672 F. Supp. 1531, 1539-40 (N.D. Cal. 1987).

Most of the human rights violations require State action as an element of the offense. Individuals unconnected with any government can be sued under the ATS only for genocide, war crimes, and crimes against humanity.[78] Plaintiffs must be able to link a specific personal injury to the act of a defendant, rather than assert a connection to government conduct that resulted in general human rights violations.[79] Some courts have required the alleged conduct to be "shockingly egregious" to be actionable under the ATS,[80] but that alone has not sufficed to turn conduct into a violation against the law of nations.[81] Conduct found not give rise to jurisdiction under the ATS includes libel,[82] violation of free speech rights,[83] negligence resulting in death or personal injury,[84] expropriation of property,[85] and commercial torts.[86]

Cause of Action. Judge Bork, in his concurring opinion in *Tel-Oren*, argued that the ATS should be viewed merely as a grant of jurisdiction to the federal courts rather than a statute that creates a cause of action.[87] Under this view, jurisdiction under the ATS requires that international law provide a specific remedy for the violation alleged, in treaty or in customary law, or that Congress has created a statutory right to sue for the violation. Some judges have supported this theory, although it does not appear to have been dispositive grounds for rejecting a suit.[88]

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[78]Kadic, 70 F.3d at 239-40.

[79]Beanal v. Freeport-McMoran, Inc., 969 F. Supp. 362 (E.D. La. 1997), *aff'd*, 197 F.3d 161 (5th Cir.1999).

[80]Zapata v. Quinn, 707 F.2d 691 (2d Cir.1983)(alien could not use ATS to bring suit against state-run lottery to object to its policy for paying out winnings in an annuity rather than a lump sum).

[81]Flores v. Southern Peru Copper Corp., ___ F.3d ___ (2d Cir. 2003).

[82]De Wit v. KLM Royal Dutch Airlines, 570 F.Supp. 613 (S.D. N.Y. 1985); Akbar v. New York Magazine Co., 490 F.Supp. 60 (D.D.C. 1980).

[83]Guinto v. Marcos, 654 F.Supp. 276 (S.D. Cal. 1986); De Wit v. KLM Royal Dutch Airlines, 570 F.Supp. 613 (S.D. N.Y. 1985).

[84]Jones v. Petty Ray Geophysical Geosource, Inc., 722 F.Supp. 343 (S.D. Tex. 1989); Hedge v. British Airways, (N.D. Ill. 1982)

[85]Bigio v. Coca-Cola Co., 239 F.3d 440 (2nd Cir. 2000); Jafari v. Islamic Republic of Iran, 539 F.Supp. 209 (N.D. Ill. 1982)(State's expropriation of property from its own citizens not covered by ATS).

[86]De Wit, *supra* note 81; Canadian Overseas Ores, Ltd. v. Compania de Acero del Pacifico S.A., 528 F.Supp. 1337 (S.D. N.Y. 1982).

[87]*See* Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 799 (D.C. Cir. 1984) (Bork, J., concurring).

[88]*See* Al Odah v. United States, 321 F.3d 1134, 1145-50 (D.C. Cir. 2003) (Randolph, J., concurring).

The *Filartiga* opinion did not expressly hold that the ATS creates a cause of action,[89] but subsequent cases have construed it in that way.[90]

Some legal scholars have pointed out that the concept of a "cause of action" did not enter the legal lexicon until 1848,[91] and point out that earlier cases did not require more than a showing that the plaintiff had a right under international law and could allege facts that, if true, showed a violation of that right. They therefore consider it unlikely that Congress would have intended to require additional statutory provisions for a cause of action before the ATS could be invoked, arguing that such an interpretation would have defeated the presumptive purpose for the ATS. Some regard it as significant that, the Judiciary Act being among the first statutes, there were virtually no provisions for any types of lawsuits on the books at the time. If Congress had really been motivated by the pressing need to protect the United States from liability for its actions abroad – or those of its citizens – that might have invited international objections, they argue, Congress might have been expected to enact such causes of action with greater dispatch. The issue of whether a cause of action is necessary will likely remain at the center of the debate.

Judicial Abstention. Courts have dismissed ATS cases for a variety of reasons even when they found a violation of international law could be actionable, often invoking the doctrine of *forum non conveniens*, which permits a court to decline jurisdiction over a case if it determines there is a "forum which is the more suitable for the ends of justice, and [which] is preferable because pursuit of the litigation in that forum is more likely to secure those ends."[92] Courts have also declined to decide ATS suits on the merits where the defendant is a State, applying the rule that sovereigns are immune from lawsuit unless an exception can be found

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[89]Filartiga v. Pena-Irala, 630 F.2d 876, 885 (2d Cir. 1980)(finding that "customary international law" is part of federal common law).

[90] *See, e.g.*, Abebe-Jira v. Negewo, 72 F.3d 844, 847 (11th Cir. 1996); Kadic v. Karadzic, 70 F.3d 232, 240-41 (2d Cir. 1995). Alvarez-Machain v. U.S., 331 F.3d 604, 612 (9th Cir. 2003) (*en banc*); Papa v. U.S., 281 F.3d 1004, 1013 (9th Cir. 2002); Martinez v. City of Los Angeles, 141 F.3d 1373, 1383 (9th Cir. 1998); *In re* Estate of Marcos Human Rights Litig., 25 F.3d 1467, 1475 (9th Cir. 1994); Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 711 (9th Cir. 1992); *see also* Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 796 (D.C. Cir. 1984).(Edwards, J., concurring) (ATS confers both jurisdiction and a right of action, but terrorism is not a universally condemned violation of the law of nations).

[91]*See* William S. Dodge, *The Constitutionality of the Alien Tort Statute*, 42 VA. J. INT'L L. 687, 690 (2002)(citing Davis v. Passman, 442 U.S. 228, 237 (1979)).

[92]*See* Aric K. Short, *Is the Alien Tort Statute Sacrosanct? Retaining Forum non Conveniens in Human Rights Litigation*, 33 N.Y.U. J. Int'l L. & Pol. 1001, 1016 (2001)(citing Lord Sumner). Claims of environmental harm that were dismissed for *forum non conveniens* include Aguinda v. Texaco, 142 F. Supp. 534 (S.D.N.Y. 2001); Bano v. Union Carbide Corp., 273 F.3d 120 (2d Cir. 2001)(claims related to Bhopal disaster to be resolved in India); Flores v. Southern Peru Copper Corp., 253 F. Supp. 2d 510 (S.D.N.Y. 2002).

in the Foreign Sovereign Immunities Act (FSIA)[93] to waive jurisdiction.[94] Courts have also held that the United States cannot be sued under the ATS because the statute does not imply a waiver of U.S. sovereign immunity.[95] Similarly, courts may decline jurisdiction over suits under the "act of state doctrine," which bars courts from questioning the validity of the sovereign acts of a foreign State that occur within its own jurisdiction.[96] Courts have also declined to hear ATS suits where they determine that, due to the sensitive foreign policy issues presented, their jurisdiction is foreclosed by the doctrine of political question.[97]

Current Cases of Interest

The following section summarizes some cases at the center of the current debate.

Alvarez-Machain v. United States.[98] This case concerned the arrest in Mexico and transborder abduction of Alvarez for his alleged participation in the 1985 murder of a Drug Enforcement Agency (DEA) Special Agent. The DEA authorized the employment of Sosa, a former Mexican policeman, who abducted Alvarez in Mexico and turned him over to DEA agents for trial in the United States. At his trial for murder, Alvarez moved to dismiss the indictment, on the grounds that his arrest violated the United States-Mexico Extradition Treaty. The Supreme Court held that Alvarez's arrest did not violate the treaty, since law enforcement abduction was not

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[93]*Codified at* 28 U.S.C. §§ 1330, 1602- 11.

[94]Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428 (1989).

[95]*See, e.g.*, Goldstar (Panama) S.A. v. United States, 967 F.2d 965 (4th Cir.), *cert. denied*, 506 U.S. 955 (1992); Saltany v. Reagan, 886 F.2d 438 (D.C. Cir. 1989); Industria Panificadora, S.A. v. United States, 957 F.2d 886, 886 (D.C.Cir.), *cert. denied*, 506 U.S. 908 (1992); Rosner v. United States, 231 F.Supp.2d 1202, 1210 (S.D.Fla.2002).

[96]*See* Roe v. Unocal Corp., 70 F. Supp. 2d 1073, 1076-82 (C.D. Cal. 1999) (holding that the act of state doctrine precluded judicial review of the propriety of a Burmese officer's order that his soldiers dig a drainage ditch for a gas pipeline being constructed by Unocal); Sampson v. Federal Republic of Germany, 975 F.Supp. 1108 (N.D.Ill.1997), *aff'd on other grounds*, 250 F.3d 1145 (7th Cir. 2001); Sarei v. Rio Tinto PLC, 221 F.Supp.2d 1116 (C.D.Cal.2002)(act of state doctrine barred adjudication of environmental tort and racial discrimination claims but did not bar claims asserting war crimes and crimes against humanity). *But see* Kadic, 70 F.3d at 250 (noting that because the act of state doctrine only applies to acts validly undertaken as part of an official's duties, "it would be a rare case in which the act of state doctrine precluded suit under [the ATS]").

[97]*See, e.g.*, Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424, 485- 89 (D.N.J. 1999) (dismissing forced labor claims because, inter alia, claims arising out of the war were constitutionally committed to the political branches rather than the judiciary); *In re* Nazi Era Cases Against German Defendants Litig., 129 F. Supp. 2d 370, 372, 374-86 (D.N.J. 2001); Burger-Fischer v. DeGussa AG, 65 F. Supp. 2d 248 (D.N.J. 1999) (declaring that World War II slave labor claims presented non-justiciable political questions); Hwang Geum Joo v. Japan, 172 F. Supp 2d 52, 64-67 (D.D.C. 2001).

[98]266 F.3d 1045 (9th Cir. 2001), *vacated and rehearing en banc granted*, 284 F.3d 1039 (9th Cir. 2002), 331 F.3d 604 (9th Cir. 2003)(*en banc* decision).

expressly prohibited,[99] and found that a U.S. court retained its power to try him even though he was brought within the court's jurisdiction by forcible abduction.[100]

On remand, Alvarez was acquitted of the charges. He subsequently brought suit under the ATS against Sosa and other Mexican nationals, four DEA agents and the United States for his abduction, alleging kidnapping, torture, cruel, inhuman and degrading punishment, arbitrary detention, assault and battery, and false imprisonment, in violation of the treaty with Mexico and customary international law. The district court dismissed claims against the United States and the DEA agents on the grounds that the ATS does not constitute a waiver of sovereign immunity, but allowed a claim for false arrest based on the Federal Tort Claims Act.[101] The court entered summary judgment for Alvarez's claims against Sosa for kidnapping and arbitrary detention, finding that state-sponsored, cross-border abductions and arbitrary detention violated customary international law.

The 9th Circuit, in a 6-5 *en banc* opinion, reversed with respect to the kidnapping claim, finding that no clear and universally recognized norm prohibits transborder abduction under customary international law; and that the treaty with Mexico did not give Alvarez a cause of action cognizable under the ATS. However, it affirmed the finding as to the claim for arbitrary arrest and detention, finding evidence in major comprehensive human rights treaties and more than a hundred national constitutions that arbitrary arrest and detention violate a recognized norm of customary international law. It also upheld the claim against the United States under the FTCA, finding that the exception for conduct in foreign countries does not apply. Petitions for certiorari were filed by Sosa and the United States on September 2 and October 1, 2003.[102]

Doe v. Unocal. *Doe v. Unocal* is the first ATS suit brought against corporate defendants based on alleged human rights abuses, and is being watched closely by human rights advocates as well as corporate interests. Plaintiffs are Burmese peasants who seek redress for human rights abuses associated with Unocal's pipeline project in Burma. The plaintiffs allege a variety of serious human rights violations at the hands of Burmese army units that were securing the pipeline route, including forced relocation, forced labor, rape, torture, and murder. The district court denied jurisdiction over the Burmese military and the State-owned Myanmar oil company on the basis of foreign sovereign immunity, but allowed jurisdiction as to Unocal, a California corporation.[103] The plaintiffs allege that Unocal, knowing that the military had a record of committing human rights abuses, hired the military to provide security for its pipeline project. They allege that the military forced the villagers to

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[99]The Supreme Court noted that transborder abduction may be a violation of international law, but noted that the determination of the appropriate remedy for that violation is "a matter for the Executive Branch." 504 U.S. at 666-70 & n.15-16.

[100]504 U.S. at 670.

[101]Claims against the United States for false arrest were allowed under Federal Tort Claims Act ("FTCA" 28 U.S.C.A. § 1346(b)(1)).

[102]Supreme Court Docket Nos. 03-339 and 03-485.

[103]Doe v. Unocal Corp., 963 F. Supp. 880 (C.D. Cal. 1997).

work on the project without compensation, and forced entire villages to relocate for the benefit of Unocal, and that Unocal knew or should have known that the military did commit, was committing and would continue to commit these tortious acts.

The district court initially denied jurisdiction for failure to state a claim, because plaintiffs had not shown that Unocal controlled the Burmese military's actions, a necessary element in order to establish Unocal's liability.[104] The Ninth Circuit reversed, holding that the plaintiffs need only demonstrate that Unocal knowingly assisted the military in perpetrating the abuses to establish Unocal's liability. The court found that, although ATS liability for actions such as rape, torture, or summary execution does not normally extend to a private party in the absence of state action, it could extend to Unocal if those actions were taken in furtherance of international crimes like slave trading. Concluding that forced labor "is a modern variant of slavery," the court held that Unocal could be subject to aiding and abetting liability even absent a finding of State action.[105] However, the 9th Circuit granted the government's request for a rehearing *en banc*,[106] and the case was reargued in June. A decision is pending.

Doe v. Exxon. Exxon Mobil, a New Jersey corporation, operates an oil field in the Aceh region in Indonesia, an area that has experienced civil war violence since 1976. In 2000, rebel insurgents began to attack Exxon's property, asserting that rights to the oil revenue belonged to the people of Aceh. To counter the continuing guerilla threat, Exxon Mobil relied upon Indonesian military forces to protect its resources and employees. The government of Indonesia boosted its military strength in Aceh by sending an additional two thousand troops to Exxon Mobil's oil fields. Villagers and human rights groups accuse the Indonesian security forces of wide-spread abuses in Aceh, including murder, torture and kidnapping. In June 2001, eleven villagers from Aceh filed suit under the ATS against Exxon Mobil and its business partners in the D.C. Circuit for genocide, murder, torture, crimes against humanity and other human rights abuses.[107] The defendant has moved to dismiss.

Executive Branch Views

During its first two centuries, the ATS evoked as little comment from the executive branch as from the other two branches. The Carter Administration took a broad view of the statute, urging the *Filartiga* court to apply the ATS to address human rights abuses that occurred abroad. The Reagan Administration took a narrower view of the ATS (similar to the views expressed by Judge Bork in his *Tel-Oren* concurrence), interpreting congressional intent to limit the statute's application to cases in which the defendant was a U.S. entity, not including cases against the United States itself, but declined to address whether the political question doctrine or other doctrines of judicial avoidance should be invoked to dismiss the *Marcos* suit.

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[104]Doe v. Unocal Corp., 110 F. Supp. 2d 1294, 1310 (C.D. Cal. 2000).

[105]Doe v. Unocal, ___ F.3d ___ 2002 WL 31063976 (9th Cir. 2002).

[106]Doe v. Unocal Corp., ___ F.3d ___, 2003 WL 359787 (9th Cir. 2003).

[107]Doe v Exxon Mobil Corporation, 01-1257 (D.D.C. filed 11 June 2001).

The Reagan State Department filed an amicus brief in the *Amerada Hess*[108] case asking the circuit court to affirm dismissal of the suit based on Argentina's sovereign immunity. The Clinton Administration returned to an interpretation similar to that expressed by the Carter Administration, urging the courts to expand the ATS to cover certain non-State actors, but declining to read it as a waiver of sovereign immunity. The Department of Justice under the Clinton Administration filed briefs opposing use of the ATS where a lawsuit directly implicated U.S. actions (*Alvarez-Machain*), but declined to intervene on behalf of corporate defendants.[109] The Bush Administration is taking a stronger position against the ATS, and in effect seeks to overturn *Filartiga* and its progeny.

Early Cases

Soon after the enactment of the Judiciary Act, the Attorney General was asked to give his opinion regarding U.S. jurisdiction over acts committed in 1794 by U.S. citizens abroad. The incident involved a group of U.S. merchants who were alleged to have "voluntarily joined, conducted, aided, and abetted a French fleet in attacking the settlement [in the British Colony of Sierra Leone], and plundering or destroying the property of British subjects on that coast." Because the United States was neutral in the war between France and Britain, the hostile actions were regarded as breaches against the United States and could be tried in U.S. courts, to the extent that the crimes occurred on the high seas. The Attorney General opined that the federal courts lacked criminal jurisdiction to try acts committed by U.S. citizens on foreign soil, but noted that

> ... there can be no doubt that the company or individuals who have been injured by these acts of hostility have a remedy by a civil suit in the courts of the United States; jurisdiction being expressly given to these courts in all cases where an alien sues for a tort only, in violation of the laws of nations, or a treaty of the United States; and as such a suit may be maintained by evidence taken at a distance, on a commission issued for that purpose, the difficulty of obtaining redress would not be so great as in a criminal prosecution, where viva voce testimony alone can be received as legal proof.[110]

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[108] Amerada Hess Shipping Corporation v. Argentine Republic, , 638 F. Supp. 73 (S.D.N.Y. 1986), *rev'd* 830 F.2d 421 (2d Cir. 1987), *rev'd*, 109 S.Ct. 683 (1989)(Argentina immune from suit by merchant shipper whose vessel was destroyed during Falklands War, by reason of the FSIA).

[109] *See* Myanmar v. Nat'l Coalition Gov't of Burma v. Unocal, Inc., 176 F.R.D. 329, 362 (C.D. Cal. 1997)(citing U.S. Statement of Interest indicating that adjudication of claims based on allegations of torture and slavery would not impede conduct of U.S. foreign relations with current government of Burma, but taking no position on legal issues presented in the litigation); Brian C. Free, Comment, *Awaiting Doe v. Exxon Mobil Corp.: Advocating the Cautious Use of Executive Opinions in Alien Tort Claims Act Litigation*, 12 PAC. RIM L. & POL'Y J. 467, 484 (2003); *see also* Terry Collingsworth, *Separating Fact from Fiction in the Debate over Application of the Alien Tort Claims Act to Violations of Fundamental Human Rights by Corporations*, 37 U.S.F. L. REV. 563 (2003).

[110] 1 U.S. Op. Att'y. Gen. 57 (1795).

The Attorney General went on to advise that the "government does not seem bound to do more than has already been done by the President, who, by his proclamation of the 22d of April, 1793, warned all citizens of the United States against all such proceedings," putting them on notice that the diplomatic protection of the United States would not be available to offenders facing prosecution in foreign courts. Thus, in 1795, it seems to have been the view of the executive that aliens could sue in U.S. courts for actions committed abroad by U.S. citizens in violation of neutrality laws, and that no further statutory basis for civil damages was required.

In 1907, Attorney General Charles J. Bonaparte was asked for an opinion regarding the available remedy for a breach of the boundary convention between the United States and Mexico by an American company.[111] The convention gave to the International Boundary Commission the exclusive jurisdiction to decide disputes, but not to adjudicate private rights and liabilities, in cases arising from changes in the beds of the Rio Grande and Colorado rivers where they form the boundary line between the United States and Mexico. The American Rio Grande Land and Irrigation Company was determined by the Commission to have altered the course of the river, violating U.S. treaty obligations. The Attorney General took the view

> that a treaty of the United States, which is part of the supreme law of the land, having been violated, a remedy exists to redress that wrong. The United States owes the duty and has the right of vindicating the treaty. It can hardly be doubted that in a proper case calling for prevention the United States may proceed by bill in equity to obtain an injunction, and that in a case like the present, where the prohibited thing has been done, the United States may proceed in the same way to obtain mandatory relief in some appropriate form to compel the restoration of the status quo ante.[112]

As to whether the Mexican citizens injured by the conduct could seek compensation from the company responsible, the Attorney General understood that such plaintiffs could sue under the Alien Tort Statute.[113] He emphasized that

> ... the statutes thus provide a forum and a right of action. I can not, of course, undertake to say whether or not a suit under either [the Alien Tort Statute or the provision for diversity jurisdiction] would be successful. That would depend upon whether the diversion of the water was an injury to substantial rights of citizens of Mexico under the principles of international law or by treaty, and could only be determined by judicial decision.[114]

Thus, in 1907 it appears to have been the view of the executive that redress for breaches of treaties was available in federal courts even though the treaty did not contain language providing for such redress. The Attorney General found the Alien Tort Statute provided both a forum and a cause of action, and did not look further for a specific statutory cause of action. He also appears to have had no objection to

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[111] 26 U.S. Op. Att'y. Gen. 250 (1907).

[112] *Id.* at 253.

[113] *Id.* at 252.

[114] *Id.* at 253.

holding an American company accountable for actions that brought the United States in violation of a treaty, and thought the courts to be the proper branch to determine the remedy.

Filartiga v. Pena-Irala

On appeal from the district court decision to dismiss the Filartiga case, the Second Circuit requested a brief from the United States. The Carter Administration submitted a brief strongly supporting the plaintiffs' action against the defendant, an ex-official from Paraguay then living in New York whom plaintiffs, also citizens of Paraguay living in the United States, alleged was responsible for the torture and death of their brother and son, Joelito Filartiga. The district court granted the defendant's motion to dismiss, finding that a nation's treatment of its own citizens is not subject to international law. The Second Circuit reversed, finding that torture is among the narrow class of violations of international law that can be committed by a State against its own citizens.

The government brief, submitted jointly by the Departments of State and Justice, argued that the term "law of nations" as used in the Alien Tort Statute was meant to be interpreted as international law evolves rather than as it existed at the time of the First Judiciary Act.[115] While the government recognized that the district court's view would likely have been accurate at the onset of the twentieth century, "today a nation has an obligation under international law to respect the right of its citizens to be free of official torture."[116] Moreover, the government noted, the Supreme Court had recognized the evolutionary nature of customary international law as early as 1900, when it held that

> the period of a hundred years which has ... elapsed [since an earlier case the lower court had relied on for precedent] is amply sufficient to have enabled what originally may have rested in custom or comity, courtesy or concession, to grow, by the general assent of civilized nations, into a settled rule of international law.[117]

To interpret "Section 1350 [as] limited to the subjects encompassed by the law of nations in 1789, leaving only the state courts competent to administer any rules of international law that might subsequently develop, ... would ... frustrate the statute's

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[115]Memorandum for the United States Submitted to the Court of Appeals for the Second Circuit in Filartiga v. Pena-Irala, *reprinted at* 19 I.L.M. 585, 588 (1980) (hereinafter "Gov't Brief, Filartiga")

> The law of nations in Section 1350 refers to the law of nations as that body of law may evolve. There is no reason to believe that Congress intended to freeze the meaning of the law of nations in this statute as of 1789, any more than it intended the simultaneous grant of jurisdiction over maritime actions to be limited to maritime law as it then existed. Since the law of nations had developed in large measure by reference to evolving customary practice, the framers of the first Judiciary Act surely anticipated that international law would not be static after 1789.

[116]*Id*. at 587.

[117]*Id*. at 588 (citing *The Paquete Habana*, 175 U.S. 677, 694 (1900)).

central concern for uniformity in this country's dealings with foreign nations," according to the government brief.[118]

The government next argued that the evolution of international law "has produced wide recognition that certain fundamental human rights are now guaranteed to individuals as a matter of customary international law."[119] However, it argued, this did "not mean that all such rights may be judicially enforced," and recognized that "only a few rights have the degree of specificity and universality to permit private enforcement and that the protection of other asserted rights must be left to the political branches of government."[120] The government cited numerous sources of international law to support its contention that torture violated international law, concluding with a quote from a State Department report to Congress that argued

> There now exists an international consensus that recognizes basic human rights and obligations owed by all governments to their citizens. ... There is no doubt that these rights are often violated; but virtually all governments acknowledge their validity.[121]

In the government's view, the prohibition against torture had achieved the status of customary international norm, that is, one that is accepted by all nations as a binding legal obligation under international law.[122] Moreover, it argued, the prohibition against torture was one of the few rights that could give rise to judicial remedy because it implicated "the sphere of the minimum standard for the protection of human rights."[123]

The government also argued that the customary rule that "only states, not individuals, could seek to enforce rules of international law," was an outmoded doctrine, and cited evidence that international law had long provided for individual remedies in certain cases.[124] As a result, it argued, "in nations such as the United States where international law is part of the law of the land, an individual's

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[118]*Id*. at 588-89.

[119]*Id.* at 589.

[120]*Id*. at 589-90.

[121]*See* Gov't Brief, Filartiga, *supra* note 113, at 594 (citing Department of State, Country Reports on Human Rights Practices for 1979, *published as* Joint Committee Print, House Comm. on Foreign Affairs & Senate Comm. on Foreign Relations, 96th Cong., 2d Sess. (February 4, 1980) Introduction at 1).

[122]*Id*. at 598.

> International custom also evidences a universal condemnation of torture. While some nations still practice torture, it appears that no state asserts a right to torture its nationals. Rather, nations accused of torture unanimously deny the accusation and make no attempt to justify its use. That conduct evidences an awareness that torture is universally condemned. (Citations omitted).

[123]*Id*. at 604 (citing decision of the Constitutional Court of Germany, In Matter of the Republic of the Philippines, 46 BVerfGE 342, 362 (2 BvM 1/76, December 13, 1977)).

[124]*Id.* at 602 (citing *The Paguete Habana* and the Marbois Affair, described *supra* at note 8 and accompanying text, among other incidents).

fundamental human rights are in certain situations directly enforceable in domestic courts."[125] The government also noted that "considerations of comity or a proper construction of Section 1350 might require a different result" if Paraguayan law did not prohibit torture.[126] The government urged the court to reverse the district court's decision and remand the case for further proceedings to decide whether the case should be dismissed and turned over to the courts of Paraguay. The Second Circuit complied, largely adopting the views expressed in the government's brief as its own.

Tel-Oren v. Libyan Arab Republic

In 1985, the D.C. Circuit dismissed a case against the PLO and Libya arising from an act of terrorism against an Israeli bus in which several U.S. citizens as well as Israelis and Dutch citizens were injured or killed. The three judges of the D.C. Circuit agreed that the case should be dismissed, but could not reach a consensus for the reason for dismissal. Plaintiffs petitioned for certiorari with the Supreme Court, and the United States government was asked for its views. The Department of Justice, advised the Supreme Court not to hear the case, arguing that the separate concurring opinions from the D.C. Circuit did not form a precedent that would conflict with the Second Circuit opinion in Filartiga.[127] The most that could be discerned from the D.C. Circuit opinions was that under the circumstances of the case, the requirements for jurisdiction under the Alien Tort Statute were not met.[128] Furthermore, it argued, another dispositive reason for dismissing the case existed that had not been addressed in Tel-Oren: the district court found the plaintiffs had never obtained personal jurisdiction over Libya and the PLO by effecting service on them.[129] Moreover, with respect to Libya, there was no disagreement that the Foreign Sovereign Immunity Act (FSIA) did not waive Libya's sovereign immunity, precluding the court from deciding Libya's liability.[130]

The government agreed that the Alien Tort Statute might give rise to questions worthy of Supreme Court review, but argued essentially that Tel-Oren was the wrong vehicle for resolving them. The government did not argue that the result in Filartiga had been a mistake, but suggested that it may have been retreating from its position in that case. The government referred to a brief it had recently submitted to the D.C. Circuit on appeal in the case of *Sanchez - Espinoza v. Reagan*, involving a claim against the United States government for damages suffered by persons resident in

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[125]*Id*. at 603 (citing *The Paquete Habana*, 175 U.S. at 700).

[126]*Id*. at 606.

[127]United States Brief Submitted to Supreme Court in Response to Court's Invitation in Reviewing Petition for a Writ of Certiorari, Tel-Oren v. Libyan Arab Republic, *reprinted at* 24 I.L.M. 427 (1985) (hereinafter "Gov't Brief, Tel-Oren").

[128]*Id*. at 431.

[129]*Id.* at 434.

[130]28 U.S.C. 1602 *et seq*.

Nicaragua allegedly due to U.S. support of the Contras.[131] In it, the government argued that

> the Alien Tort Statute is purely jurisdictional and cannot be interpreted either to mandate the creation of a federal common law of international tort or to authorize individuals to enforce in domestic courts private rights of action derived directly from customary international law ... [and] that the Alien Tort Statute does not waive either the sovereign immunity of the United States or the official immunities of individual government officials from alien tort claims arising out of actions in foreign countries.[132]

Marcos Litigation

After Philippine President Ferdinand Marcos was deposed in 1986, several claims were filed against him in U.S. federal courts.[133] In *Trajano v. Marcos*,[134] plaintiffs brought suit for wrongful death and torture, allegedly committed in the Philippines by a government official against a Philippine national, asserting jurisdiction on the Alien Tort Statute. The district court dismissed the claims based on the act of state doctrine, which holds that the courts of one country will not judge the official acts of a foreign government. On appeal, the 9th Circuit asked the government for its views as *amicus curiae*. The Justice Department filed a brief urging the court not to reach the question of whether the act of state doctrine barred the suits, arguing instead that the Alien Tort Statute does not give jurisdiction over a suit against a foreign government official for acts that occurred in a foreign country.[135] Even if the statute did reach the conduct alleged, the government argued, the litigants had no valid cause of action under federal law, since the alleged conduct did not break any law or treaty of the United States that gives private victims the right to sue in court. The government argued that the Alien Tort Statute is purely jurisdictional in nature and could not itself create a private action enforceable by alien litigants in U.S. federal courts, even though the alleged conduct violated international norms.

The government brief argued that the Alien Tort Statute, in order to be valid under Article III of the Constitution, must be based on either the Alien Diversity

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[131]Sanchez - Espinoza v. Reagan, 568F.Supp 596 (D.D.C. 1983), *aff'd* 770 F.2d 202 (D.C. Cir. 1985). The D.C. Circuit affirmed the lower court's dismissal of the claim, finding that the Alien Tort Statute did not constitute a waiver of U.S. sovereign immunity, noting that nothing in its decision necessarily conflicted with *Filartiga*. 770 F.2d at 207 & n.5. The court did not address the issue raised in the government's brief as to whether the ATS creates a cause of action.

[132]Gov't Brief, Tel-Oren, *supra* note 125, at 433 & n. 11.

[133]*See In re* Estate of Ferdinand E. Marcos Human Rights Litigation, 978 F.2d 493 (9th Cir. 1992), *cert denied*, 508 U.S. 972 (1993).

[134]878 F.2d 1439 (9th Cir.1989).

[135]*See* Brief for the United States as Amicus Curiae, Trajano v. Marcos, C.A. 86-2448 and 86-15039, 878 F.2d 1439 (9th Cir. 1989), *experts reprinted in* 1 CUMULATIVE DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 1981-1988, 887 -893 (1993) (hereinafter "Gov't Brief, Trajano)".

Clause or the Federal Question Clause. The government argued that neither clause could support jurisdiction over the case. The government noted that the background of the statute "suggest[s] that one purpose of the Alien Tort Statute was to be a "small claims" subset of alien diversity jurisdiction, giving aliens who sue in diversity cases involving tortious violations of international law a Federal forum without regard to the $500 amount in controversy requirement [at that time] that would otherwise apply." However, it concluded, the ATS does not on its face require diversity of citizenship, so its legitimacy could not rest solely on the alien diversity clause of the Constitution.

Citing the Marbois Affair[136] as probable catalyst of the "define and punish" clause of the Constitution, the government argued the purpose of that clause "was to enable it to prevent the United States from becoming embroiled in a war or other dispute with a foreign nation that might be offended by a breach of the law of nations attributable to the United States or an individual under its jurisdiction."[137]

> Elsewhere in the Constitution, in the 'law of nations' clause of Article I, Congress was explicitly given the power, which the national government lacked under the Articles of Confederation, '[t]o define and punish . . . Offences against the Law of Nations.' Art. 1,s 8, Cl. 10. This suggests that the use of the identical phrase 'law of nations' in the contemporaneously enacted Alien Tort Statute was intended to give the Federal courts subject matter jurisdiction insofar as a cause of action is afforded by Federal law of the United States enacted pursuant to the law of nations clause in order to 'define and punish' violations of the law of nations *that are the responsibility of the United States*.[138]

Addressing whether the ATS might rely on the "arising under federal law" clause of Article III of the Constitution, the government concluded that to the extent that it did, it must be read to be limited to conduct Congress was empowered to "define and punish" as "offenses against the law of nations" under Article I, section 8, clause 10. The government argued that

> Congress intended in section 1350 to confer jurisdiction over torts committed "in violation of the law of nations or a treaty of the United States" only insofar as the law of nations principle or the treaty provision is a part of federal law of the United States that regulates the alleged conduct and affords a cause of action....There is no evidence that Congress intended to grant the district courts jurisdiction over nondiversity cases such as the present ones, where the subject matter and the parties are foreign to the United States and are not governed by "the Laws of the United States."

Moreover, the government argued, the background of the Alien Tort Statute supported the conclusion that it does not grant jurisdiction over suits like the Marcos case.

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[136]*See supra* note 33 and accompanying text.

[137]*Id.* (noting "[t]he individuals for whom the United States might be held responsible in this sense include not only United States citizens but also aliens who commit wrongs while physically present in the United States").

[138]Gov't Brief, Trajano, *supra* note 133, at 888 (emphasis added).

> That background indicates that the Statute's scope is limited to torts (amounting to violations of either a treaty or the law of nations) committed by citizens of the United States or other persons subject to its jurisdiction, under circumstances in which the United States might be held accountable to the offended nation. These would principally include violations occurring within the United States and perhaps certain other violations, such as piracy on the high seas, committed outside of the United States but within the reach of its laws. Such torts would not, however, include violations, such as those claimed in these cases, committed by officials of a foreign sovereign within its territory and against its own nationals -- a context in which the United States bears no responsibility under the law of nations for either preventing the conduct or affording redress.[139]

The government position in the *Trajano* case is not easily reconciled with the prior Administration's position in *Filartiga*. The 9th Circuit reversed the dismissal and remanded the case to the district court. It did not adopt the government's interpretation of the ATS. Plaintiffs eventually were awarded nearly two billion dollars against Marcos' estate.[140]

The government did not appear to view the assertion of criminal jurisdiction over the Marcos' as problematical. In 1988, Ferdinand and Imelda Marcos, among others, were indicted in the Southern District of New York for embezzlement, theft, and diversion of Philippine government funds into U.S. bank accounts held by the Marcos'. The indictment was based on the Racketeer Influenced and Corrupt Organizations Act (RICO), and had the support of the Philippine government. The Marcos were also charged with obstruction of justice in connection with civil litigation against them. The Republic of the Philippines brought a civil RICO action against the Marcos.[141]

Kadic v. Karadzic

During the Clinton Administration, the government returned to its earlier position on the ATS, urging the 2nd Circuit to apply *Filartiga* to a case against Radovan Karadzic by victims of ethnic cleansing in Bosnia, even though the defendant was not an official for any government recognized by the United States.[142] The government's brief took *Filartiga* as a starting point, since the case was argued before the 2d Circuit, and did not re-examine the reasoning it had presented in *Filartiga*.[143]

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[139] *Id.* at 890 (footnotes omitted).

[140] *In re Estate of Marcos Litigation*, 25 F.3d 1467 (9th Cir. 1994), cert. denied, 532 U.S. 941 (1995);

[141] Republic of the Philippines v. Marcos, 862 F.2d 1355, 1360-61 (9th Cir.1988) (*en banc*) (civil RICO action brought by the Philippines against Marcos not barred by act of state doctrine), *cert. denied*, 490 U.S. 1035 (1989).

[142] *See* Statement of Interest of the United States, *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995).

[143] BETH STEPHENS AND MICHAEL RATNER, INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS 19-20 (1996) (pointing to the brief as "a strong indication that the Clinton (continued...)

Under *Filartiga*, the government argued, "an alien may pursue an action under the Alien Tort Statute, even for transitory tort claims between individuals, when a federal court has personal jurisdiction and the claim involves a violation of universally recognized norms of international law, and hence 'the law of nations.'" Furthermore, it argued, the wording and history of the statute further make it "clear that the Alien Tort Statute may encompass violations of customary international law committed by non-state actors," noting that "when the perpetrators of human rights violations are ... in control of territory and exercise authorities of a governmental character, they may be held accountable under international law even though the regime on whose behalf they act is not recognized and does not satisfy the requirements for independent statehood."[144] However, the government brief offered the view that the ATS should not necessarily be construed to provide jurisdiction over international norms outside the realm of human rights, such as norms regarding the use of force, the law of the sea, or ocean dumping.[145] The government also argued that appellants could not proceed directly under treaties, such as the Geneva, Genocide, and Torture Conventions, because those treaties are not self-executing,[146] although they may serve as evidence that a claimed right has become a customary norm of international law.

Alvarez-Machain v. Sosa

In Alvarez-Machain v. Sosa, the Justice Department petitioned for a rehearing of the case, arguing that the 9th Circuit's opinion allowing suit against the United States under the FTCA "threatens to impair the ability of federal officials to arrest perpetrators of serious federal crimes who are harbored by a foreign country."[147] The Department s of State and Justice then filed a brief as *amicus curiae* on behalf of Sosa,[148]arguing that the alleged violation of customary norm, that every nation has exclusive jurisdiction over its own territory, could not give rise to an individual action under the ATS, and that only Mexico could have standing to assert a violation of its sovereignty by requesting a State-to-State remedy. For similar reasons, the government argued, the plaintiff may not rely on treaty provisions concerning territorial integrity in the U.N. Charter and other international agreements. Moreover, it argued that transborder abductions do not violate any "specific, universal and obligatory" rule of customary international law.

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[143](...continued)
administration has returned the executive branch to a position in support of *Filartiga* and its progeny").

[144]*Id*. at 5-6 & n.3.

[145]*Id.* at 15.

[146]*Id* at 15-18.

[147]Petition for Rehearing and Rehearing En Banc for the United States of America, Alvarez-Machain v. Sosa, *available at* http://www.state.gov/documents/organization/16530.pdf (last visited Sep.23, 2003).

[148]Brief for the United States as Amicus Curiae in Support of Reversal of the Judgment Against Defendant-Appellant Jose Francisco Sosa, Alvarez-Machain v. Sosa, No. 99-56880, *available at* http://www.state.gov/documents/organization/6595.doc (last visited Sep. 23, 2003)(hereinafter "U.S. Brief for Reversal, Alvarez-Machain").

Acknowledging that the 9th Circuit had previously held that "prolonged arbitrary detention" is an actionable violation of international human rights law under the ATS,[149] the government argued that Sosa's alleged conduct could not amount to prolonged arbitrary detention because it lasted less than 24 hours and was authorized pursuant to an arrest warrant issued in the United States. However, the government brief did not argue that the premise underlying *Filartiga* was faulty. Instead, the government cautioned the court against "[e]xpand[ing] ... the Alien Tort statute to permit individuals to complain of violations of international norms governing relations between sovereign States[, which] may ... have dangerous international consequences for the United States." This danger, the government argued, could occur because

> In pursuit of its legitimate foreign policy objectives, the United States occasionally may take actions that some would say violate its international obligations; this could include actions alleged to violate the territorial sovereignty of another State. In order to effectively carry out its legitimate policies, the United States may violate international law.[150]

Doe v. Unocal and Doe v. Exxon

The Bush Administration takes a position with respect to the ATS similar to the Reagan Administration's views filed in conjunction with the Marcos litigation. The Department of Justice filed a brief as *amicus curiae*[151] seeking to overturn *Filartiga,* arguing that

> [i]n recent years ... the ATS has been commandeered and transformed into a font of causes of action permitting aliens to bring human rights claims in United States courts, even when the disputes are wholly between foreign nationals and when the alleged injuries were incurred in a foreign country, often with no connection whatsoever with the United States.

The government warns that U.S. assertion of jurisdiction over such cases could have foreign policy repercussions for the United States. Moreover, it argues, "[a]lthough often asserted against rogues and terrorists, these claims are without bounds, and can easily be asserted against allies of our Nation."[152] The government has filed a similar brief in the *Exxon* case,[153] and also sought to intervene on the

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[149]*Id.* at 28 (citing Martinez v. City of Los Angeles, 141 F.3d 1373, 1383-84 (9th Cir. 1998).

[150]*Id.* at 7 (citing United States v. Howard-Arias, 679 F.2d 363, 371-72 (4th Cir.), *cert. denied*, 459 U.S. 874 (1982)).

[151]Brief for the United States of America, as Amicus Curiae, Doe v. Unocal, Nos. 00-56603, 00-56628 (hereinafter "Gov't Amicus Brief, Unocal").

[152]*Id.*

[153]*See* Supplemental Statement of Interest of the United States of America, Doe v. Exxon-Mobil Corp. (D.C. Cir.)(1-01-CV-1357-LFO).

grounds that U.S. foreign policy may be harmed and because of the detrimental effect the continued litigation could have on U.S. efforts in the war against terrorism.[154]

The Justice Department charged that the 9th Circuit had made "several fundamental analytical errors" in construing "a statute that on its face merely confers subject matter jurisdiction as also affording an implied private right of action."[155] Moreover, it argued, "it is clearly error to infer a right of action to enforce unratified or non-self-executing treaties, and non-binding United Nations General Assembly resolutions."[156] The Justice Department also argued that the extraterritorial application of the Alien Tort Statute was erroneous because it would "extend the causes of action recognized under the ATS to conduct occurring wholly within the boundaries of other nations, involving only foreign sovereigns or nationals, and causing no direct or substantial impact in the United States."

The Justice Department objected to this "new view of the ATS," which has given federal courts the role of "discern[ing], and enforc[ing] through money damage actions, norms of international law."[157] The government argued that Congress could not have intended for the courts to play such a role, pointing to the TVPA as demonstrating that "[w]hen Congress wants the courts to play such a role, it enacts specific and carefully crafted rules...."[158]

Noting that *Filartiga* did not expressly find that the ATS created a cause of action, the government argues that later cases in the 9th Circuit finding an implied cause of action were mistaken. Instead, the government urges the court to interpret the ATS in light of its probable purpose, that is, to avoid international conflagrations brought about by any U.S. "denial of justice" with regard to aliens.[159] In the government's current view, Congress intended to cover only torts "arising under Acts of Congress incorporating principles of the 'law of nations' into the laws of the United States or under 'treaties of the United States.'" The government finds further support for its historical interpretation in the fact that Congress, one year after passing the Judiciary Act, made punishable as federal crimes assault against an ambassador, violation of safe conduct, and piracy – Blackstone's listed crimes against international law.[160] In the government's view, the ATS was later made

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[154]*See* Taft, *supra* note 2.

[155]Gov't Amicus Brief, Unocal, *supra* note 31, at 2 (noting that "[r]ecent Supreme Court precedent ... prohibits finding an implied private right of action in this jurisdictional grant").

[156]*Id.* at 2-3.

[157]*Id.* at 3 (presenting the government view that "the assumption of this role by the courts under the ATS not only has no historical basis, but, more important, raises significant potential for serious interference with the important foreign policy interests of the United States, and is contrary to our constitutional framework and democratic principles.")

[158]*Id.* at 4.

[159]*See id.* at 9.

[160]1 Stat. 113-115, 117-118. The government does not discuss whether these criminal statutes would have created implied causes of action under the ATS at the time.

superfluous by the elimination of the amount-in-controversy requirement and the introduction of federal question jurisdiction.

The second part of the government's brief challenges the court's interpretation of customary international law, arguing that non-self-executing treaties and non-binding international declarations cannot serve as the basis for implied causes of action. Citing the Supreme Court's 2001 decision in *Alexander v. Sandoval*,[161] the government argues that courts will no longer find implied private rights in statutory language, including statutes as old as the ATS. Moreover, it argued, finding an implied right of action to enforce non-binding agreements and statements runs against 9th Circuit precedent limiting the ATS to international norms that are "specific, universal, and obligatory."[162] Instead, if the United States "refuses to ratify a treaty, or regards a U.N. resolution as non-binding, or declares a treaty not to be self-executing,"[163] the court should not infer a cause of action to enforce the norms embodied in those materials. This is so, it argues, even where a customary norm of international law is held to be part of federal common law.[164]

Noting that modern human rights treaties have been declared by the President and the Senate not to be self-executing, the government argues that these treaties neither create causes of action nor provide rules that a court may properly enforce in a legal action brought by a private party.[165] According to the government, labeling the purported rights as *jus cogens* does not give them any more legitimacy in support of an implied private cause of action.[166] The court's interpretation cannot, the government argues, be squared with the language of the ATS, which "refers to both

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[161]532 U.S. 275 (2001).

[162]International agreements that the United States has refused to join, nonbinding agreements, and agreements that are not self-executing, as well as political resolutions of UN bodies and other non-binding statements," are not, according to the government, obligatory, because "none in itself creates duties or rights enforceable by private parties in court." *See* Gov't Amicus Brief, Unocal, *supra* note,31 at 14.

[163]*Id* at 15. The government notes that

> Even where a treaty is self-executing, that fact does not necessarily mean that it provides a cause of action. Rather, it means only that the treaty is 'regarded in courts of justice as equivalent to an act of the legislature.' Like an Act of Congress, a treaty may establish legal standards or rules of decision in litigation without itself creating a private right of action.

Id. at 15-16, n. 7 (citing Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 442 (1989) for the proposition that " the 'treaties at issue only set forth substantive rules of conduct and state that compensation shall be paid for certain wrongs,' but did not 'create private rights of action for foreign corporations to recover compensation from foreign states in United States courts'").

[164]*Id.* at 21.

[165]*Id.* at 15 (citing Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829) (Marshall, C.J.). for the proposition that a non-self-executing treaty "addresses itself to the political, not the judicial department; and the legislature must execute the [treaty] before it can become a rule for the Court").

[166]*Id.* at 16.

'treaties of the United States' and the 'law of nations.'"[167] The role of courts in interpreting the law of nations is, in the government's view, confined to cases properly before the court under some other explicit grant of jurisdiction. Otherwise, the government seems to believe, constitutional separation of powers could arise, because

> [m]atters that implicate international affairs are the quintessential example of a context where a court may not infer a cause of action. Permitting such implied causes of action under the ATS infringes upon the right of the political Branches to exercise their judgment in setting appropriate limits upon the enforceability or scope of treaties and other documents.[168]

Moreover, it notes, under the approach of the 9th Circuit,

> ATS actions are not limited to rogues and outlaws. As mentioned above, such claims can easily be asserted against this Nation's friends, including our allies in our fight against terrorism. A plaintiff merely needs to accuse a defendant of, for example, arbitrary detention to support such a claim.[169]

The government argues that the court has compounded its erroneous reading of the ATS by ignoring the presumption against extraterritoriality of U.S. statutes.[170] The government points out that early cases – as well as incidents thought to have served as catalyst for the ATS – had to do with domestic occurrences, and that the Attorney General's opinion in the Sierra Leone issue described *supra* stated that "as the transactions complained of originated or took place in a foreign country, they are not within the cognizance of our courts."[171] It may be recalled, however, that in 1795, the Attorney General had concluded in that opinion that while the conduct at issue could not be prosecuted under domestic criminal law, "there could be no doubt" that the injured parties could bring a suit in tort under the ATS against the wrongdoers.

In sum, the government argues, given that the point of the ATS was to avoid international conflict, the court should overrule its earlier interpretation of the ATS that held that conduct occurring abroad could be challenged under the ATS.[172] The

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[167] *Id.* at 17.

[168] *Id.* at 20.

[169] *Id.* at 21-22 (citing the *Alvarez-Machain* and *Al Odah*, in which plaintiffs brought suit against the United States on behalf of detainees held at Guantánamo Bay, to underscore the danger of the court's interpretation). This point may appear to litigants as a contradiction the position the government took in *Trajano*, in which it was asserted that the intent of the ATS was to provide redress for international law violations that implicate the responsibility of the United States and its nationals.

[170] *Id.* at 27 (arguing the presumption against extraterritoriality "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord" (citing EEOC v. Arabian American Oil Co., 499 U.S. 244 (1991)).

[171] *Id.* at 28 (citing 1 Op. Att'y Gen. 57, 58 (1795)).

[172] *Id.* at 28-29 (citing Judge Bork's concurring opinion in *Tel-Oren*, 726 F.2d at 812, that

(continued...)

government's brief does not address the specific facts of *Doe v. Unocal*, so it does not discuss what foreign policy complications might arise if the court decides the case on the merits. It may be argued that the involvement of the Burmese military raises foreign policy questions, yet the suit was dismissed as to Burmese officials based on the act of state doctrine. Given that the defendant is a U.S. corporation, there would appear to be a U.S. nexus to the case.

Conclusion

It may never become clear what the First Congress intended to accomplish when it enacted the Alien Tort Statute. It appears that the 108th Congress may be asked to clarify its intent by passing new legislation to amend or repeal it. Multinational corporations are likely to argue that the ATS unfairly subjects them to liability for the conduct of host governments, over which they may have little influence. In the view of some, the use of the ATS to interfere with corporations operating oversees is an attempt by human rights activists to place economic sanctions on repressive regimes by treating the corporation as a proxy. They predict that if the lawsuits succeed, the people whose rights are alleged to be violated will sink into deeper poverty as jobs are lost and constructive engagement with foreign corporations is no longer possible. Little evidence is currently available to evaluate the extent to which U.S. economic interests might be harmed by ATS lawsuits. Human rights advocates dispute the notion that corporations are targetted unfairly, arguing that some multinational corporations are actively participating in the human rights abuses, sometimes paying local military and paramilitary groups to use violent means to suppress local dissent and union activism, for example. Victims have no local recourse to a fair and impartial judicial system, they argue, and the United States has an interest in adjudicating and enforcing international human rights standards on the part of its corporations that conduct operations overseas. They will likely urge Congress to strengthen the ATS, or at least let it stand in its present form

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[172](...continued)
"those who drafted the Constitution and the Judiciary Act of 1789 wanted to open federal courts to aliens for the purpose of avoiding, not provoking, conflicts with other nations .... A broad reading of section 1350 runs directly contrary to that desire").