

THE NATURE OF THE BEAST: USING THE ALIEN TORT CLAIMS ACT TO COMBAT INTERNATIONAL HUMAN RIGHTS VIOLATIONS

I. INTRODUCTION

The Alien Tort Claims Act (the ATCA),¹ lay nearly dormant for 191 years. Today, the ATCA is at the center of a reformation in the enforcement of international human rights. The rationale behind the ATCA's enactment in 1789 is unclear, but as it stands today, the Act provides federal jurisdiction to any alien alleging a tort "committed in violation of the law of nations."² In 1980, the United States Court of Appeals for the Second Circuit gave the ATCA an interpretation that has produced a large body of case law both criticizing and affirming the principles that the court announced.³

In *Filartiga v. Pena-Irala*,⁴ the Second Circuit interpreted the ATCA as granting federal jurisdiction to a Paraguayan citizen after she alleged that a former Inspector General of Police in Paraguay tortured and killed her son.⁵ The court's modern view of the "law of nations," now more commonly referred to as "international law," encouraged other plaintiffs to follow suit and led to even more expansive interpretations of the Act.⁶ In September 2000, three separate sets of plaintiffs, emboldened by these modern interpretations, brought suit in federal district courts. In one suit, five plaintiffs from Zimbabwe filed suit against the president of that country, Robert Mugabe, in Federal District Court in Manhattan.⁷ They alleged that

1. 28 U.S.C. § 1350 (1994).

2. *Id.*

3. *See* *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980). Other courts, drawing from the Second Circuit's holding, have interpreted the ATCA to grant the alien both a cause of action and a forum. *See, e.g., In re Estate of Ferdinand Marcos*, 25 F.3d 1467, 1474, 1475 (9th Cir. 1994) (same); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 777 (D.C. Cir. 1984) (Edwards, J., concurring) (holding that the ATCA provides a cause of action as well as a forum).

4. 630 F.2d 876 (2d Cir. 1980).

5. *Id.* at 878. *See infra* Part II.C.1 for a discussion of the *Filartiga* case.

6. *See, e.g., Kadic v. Karadzic*, 70 F.3d 232, 236 (2d Cir. 1995) (holding that the ATCA permits claims against nonstate actors because international law prohibits private individuals from engaging in genocide); *Doe v. Unocal*, 963 F. Supp. 880, 884 (C.D. Cal. 1997) (holding that a private corporation acting jointly with a state could be held liable under the ATCA for violations of international law committed by the state).

7. The five plaintiffs all alleged that they were the victims of political violence ordered by President Mugabe through his political party, ZANU-PF. Graham Rayman, *Zimbabwe Leader Sued*, *NEWSDAY*, Sept. 9, 2000, at A3. Most of the plaintiffs were affiliated with the opposition party, the Movement for Democratic Change (MDC). *Id.* One plaintiff, Adella Tichaona, was the widow of the MDC's youth organizer whom Mugabe's supporters set on fire and killed while he was campaigning. *Id.* Two other plaintiffs, Elliot and Efridah Pfebve, were the brothers of an MDC parliamentary

Mugabe committed violations of international law during the run-up to the June 2000 Zimbabwean Parliamentary elections.⁸ In a second suit, Chinese plaintiffs sued the former Chinese Prime Minister Li Peng in federal court for atrocities committed in the massacre of prodemocracy advocates in Tiananmen Square.⁹ In a third suit, fifteen Japanese plaintiffs sued Japan for being forced into brothels by the military during World War II.¹⁰ Suits such as these have prompted criticism questioning the propriety of adjudicating these claims in United States federal court as opposed to some other forum.¹¹ The effect of the suits on the U.S. government's foreign policy has not gone unnoticed either.¹²

Not all courts agree with *Filartiga*. Courts disagree with either the *Filartiga* court's interpretation of the ATCA or on the standard to apply in determining whether a violation of international law has in fact taken place.¹³ Critics question whether international law referred to in the ATCA grants rights to individual nonstate actors.¹⁴ Critics further question whether the "political question" and "act of state" doctrines allow such claims against

candidate whom ZANU-PF supporters dragged from his house, and allegedly tortured and killed. *Id.* The fourth plaintiff, Evelyn Masaiti, was another MDC candidate, currently a Minister of Parliament, who alleged that Mugabe supporters beat her, burned her with a gasoline bomb, and forced her from her home. *Id.* The fifth plaintiff was Maria Del Carmen Stevens, the widow of the first white farmer that Mugabe supporters killed in the run-up to the June 2000 elections. *Id.* ZANU-PF thugs allegedly kidnapped Mr. Stevens, beat him, and forced him to drink gasoline before shooting him in the head. *Id.*

8. Bill Miller, *Mugabe Sued in N.Y. over Rights Abuses*, WASH. POST, Sept. 9, 2000, at A3.

9. Edward Wong, *Chinese Leader Sued in New York over Deaths Stemming from Tiananmen Crackdown*, N.Y. TIMES, Sept. 1, 2000, at A6.

10. Agence France-Presse, *15 to Sue Japan in U.S. over Sex Slavery*, N.Y. TIMES, Sept. 16, 2000, at A5.

11. See Anne-Marie Slaughter & David Bosco, *Plaintiff's Diplomacy*, FOR AFFAIRS, September/October 2000, at 102, 103. See also Pia Zara Thadhani, *Regulating Corporate Human Rights Abuses: Is Unocal the Answer?* 42 WM. & MARY L. REV. 619, 636 (2000). In effect, hardly any alternative fora exist for individual plaintiffs to bring a claim. Such situations have heretofore mainly been dealt with on a political front. See MARK W. JANIS & JOHN E. NOYES, INTERNATIONAL LAW: CASES AND COMMENTARY 211 (1997). In addition, of the mere handful of *ad hoc* courts created to deal with international violations, only two currently exist, both under the auspices of the United Nations: the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). See United Nations, *ICTY-Home Page*, Dec. 26, 2001, at <http://www.un.org/icty>.

12. See Slaughter & Bosco, *supra* note 11, at 102 (noting that the suits have a "powerful impact" on America's international relations).

13. See *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 777 (D.C. Cir. 1984) (Edwards, J., concurring) (claiming to be "substantially in accord" with the holding in *Filartiga*); *Doe v. Unocal*, 110 F. Supp. 2d 1294, 1310 (C.D. Cal. 2000) (holding that evidence private defendant knew of state's forced labor practices is not enough to prove that defendant acted under color of state law, thereby violating international law).

14. As used in this Note, "nonstate actors" refers to private individuals acting in their own private capacity, as opposed to those representing a governmental entity.

foreign defendants to be brought at all.¹⁵ Moreover, scholars find fault with this modern use of the ATCA on the grounds that it politicizes American courts, and that the issues deserve a more controlled response instead of haphazard litigation.¹⁶ Finally, commentators note that nongovernmental organizations often bring these ATCA lawsuits and that such entities have no political accountability, despite the high international exposure of these suits and their potential effect on U.S. foreign policy.¹⁷

This Note attempts to show that while such criticisms should not impede this important development in the law of international human rights, the ATCA is merely one small contribution to what should be an overall scheme aimed at the heart of the problem: the ease and impunity with which human rights atrocities are committed. Part II begins with a history of the ATCA, from its cloudy beginnings through the landmark *Filartiga* decision to the modern day. Part III summarizes and rebuts some courts' and commentators' recent criticism of the modern use of the ATCA. Part IV attempts to show how international law should operate in this age of increased human rights awareness, using the suit against Robert Mugabe to help define the nature of the beast against which ATCA plaintiffs battle.

II. HISTORY OF THE MODERN ATCA

A. *The Enactment of the Alien Tort Claims Act*

Very little legislative history surrounds the original enactment of the Alien Tort Claims Act in 1789.¹⁸ Indeed, courts have noted the resulting difficulties in divining the legislative intent behind the Act.¹⁹ The original

15. Scholars describe these doctrines as a mix between prudential considerations and constitutional law. See *infra* note 132, 166-76 and accompanying text.

16. See Slaughter & Bosco, *supra* note 11, at 103. See also Thadhani, *supra* note 11, at 636 (arguing that the "beneficial side effects" that result from using the ATCA to regulate private corporations, namely enforcing human rights, "do not justify the use of the legal system to impose indirect sanctions" and that the political system should be used instead).

17. See Slaughter & Bosco, *supra* note 11, at 11.

18. Much scholarly debate centers over the origins and congressional intent of the ATCA. See, e.g., William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the "Originalists,"* 19 HASTINGS INT'L & COMP. L. REV. 221, 224 (1996) (arguing that the *Filartiga* reading of the statute is closer to the original intent of the ATCA than are the interpretations of the "originalists"); Beth Stephens, *Federalism and Foreign Affairs: Congress's Power to "Define and Punish Offenses Against the Law of Nations,"* 42 WM. & MARY L. REV. 447, 490-91 (2000) (positing that despite the absence of direct records, legislative intent may be gleaned from the resolutions of the Continental Congress).

19. *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975) (noting that the ATCA is a "kind of legal Lohengrin" and that "no one seems to know [from] whence it came"). See also *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984). In *Tel-Oren*, a divided court disagreed over

precursor to the ATCA first appeared in the Judiciary Act of 1789.²⁰ The provision gives district courts original jurisdiction over “all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States.”²¹ Various scholars and judges believe that Congress incorporated this language into the 1789 Judiciary Act to prevent the type of international incident that could have arisen if a country were to refuse a forum to a foreigner injured on its own soil.²² If the United States were to offer no forum to foreign visitors, the alien’s home country would have a claim against the United States under international law.²³ As a young country, the United States was presumably very cautious about its obligations to other states under the law of nations.²⁴ The writings of Alexander

how to interpret the Act. *Id.* at 775. One source of the dispute was the inability to find authoritative information as to why Congress passed the Act in the first place. *Id.* at 812. Judge Bork’s concurring opinion stated that he had “discovered no direct evidence of what Congress had in mind when enacting the provision.” *Id.* He pointed out that the Senate debates over the Judiciary Act of 1789 (of which the Alien Tort Claims Act was a part) were not even recorded, and that the House debates did not even mention the provision. *Id.* However, other courts and commentators have looked for indirect evidence of what Congress was hoping to achieve in opening up the federal courts to suits by aliens. For a discussion of the indirect evidence, see *infra* text accompanying note 22.

20. Judiciary Act, ch. 20, §9, 1 Stat. 73, 77 (1789).

21. Dodge, *supra* note 18, at 224.

22. See *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 783 (D.C. Cir. 1984) (Edwards, J., concurring) (stating that “[u]nder the law of nations, states are obliged to make civil courts of justice accessible for claims of foreign subjects against individuals within the state’s territory”). See also Debra A. Harvey, *The Alien Tort Statute: International Human Rights Watchdog or Simply ‘Historical Trivia’?*, 21 J. MARSHALL L. REV. 341, 343 (1988).

23. Marc Rosen, *The Alien Tort Claims Act and the Foreign Sovereign Immunities Act: A Policy Solution*, 6 CARDOZO J. INT’L & COMP. L. 461, 464 (1998). See also *Tel-Oren*, 726 F.2d at 783 (Edwards, J., concurring) (noting that if a foreigner were denied a forum, then “under the law of nations the United States would become responsible for the failure of its courts and be answerable not to the injured alien but to his home state”).

24. See *JANIS & NOYES*, *supra* note 11, at 211 (citing *Respublica v. De Longchamps*, 1 U.S. (1 Dall.) 111 (1784)). In *Respublica*, a case that predates the United States Constitution, the court convicted an alien for violating the law of nations under the common law of Pennsylvania. *Respublica*, 1 U.S. (1 Dall.) at 114. The defendant, a French citizen, had assaulted the consul-general of France to the United States on U.S. soil. *Id.* at 111-12. However, immediately following the incident, many leading Americans including George Washington and Thomas Jefferson expressed concern over the fact that Pennsylvania was so indecisive in taking action in the matter that serious international consequences could result. *JANIS & NOYES*, *supra* note 11, at 211. In fact, the case “provided ammunition for those favoring the creation of a federal judiciary under the U.S. Constitution with jurisdiction to hear cases involving foreign citizens.” *Id.*

These prominent Americans made successful arguments because the Constitution does indeed extend jurisdiction to “[c]ontroversies . . . between a State, or the citizens thereof, and foreign States, Citizens or Subjects.” U.S. CONST. art. III, §2, cl. 1. Jurisdiction over cases between two aliens is predicated on Article III Section 2 clause 1 in that “[t]he judicial Power shall extend to all Cases . . . arising under . . . the Laws of the United States.” *Id.* International law has been recognized as being part of the “laws of the United States” and such recognition dates back to the late nineteenth and early twentieth Centuries. See, e.g., *Respublica*, 1 U.S. (1 Dall.) at 111. The Supreme Court recognized this fact in the case of *The Paquete Habana* with the famous phrase that “[i]nternational law is part of our

Hamilton demonstrate these concerns.²⁵ In the *Federalist Papers*, Hamilton argued that “[t]he Union will undoubtedly be answerable to foreign powers for the conduct of its members” and that because “the denial or perversion of justice by the sentences of the courts, as well as in any other manner, is with reason classed among the just causes of war, it will follow that the federal judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned.”²⁶

B. *Origins of the Law of Nations*

The idea of international law may have originated with the Roman civilization and the use of a *jus gentium*, or “law of nations.”²⁷ It referred to the law that the Romans applied in cases involving foreigners when the law of the foreigners’ own country was unknown.²⁸ In 1625, the Dutch jurist Hugo Grotius argued that the law of nations also applied to the emerging countries of Europe in their dealings with one another.²⁹ In 1789, the English philosopher Jeremy Bentham renamed this notion “international law,” and today, the terms “the law of nations” and “international law” are used interchangeably.³⁰ A number of sources embody the specific rules of international law.³¹ Courts consult treaties,³² the works of jurists³³ or

law.” 175 U.S. 677, 700 (1900). This notion is demonstrated by the fact that in *Respublica*, Pennsylvania convicted the defendant under the criminal common law of that state, which was construed to include violations of international law. *Respublica*, 1 U.S. (1 Dall.) at 114.

However, commentators have not always accepted the notion that international law is incorporated into the laws of the United States, but the issue encompasses a larger question concerning the relationship between a country’s municipal law and international law. See, e.g., Andrew D. Mitchell, *Genocide, Human Rights Implementation and the Relationship Between International and Domestic Law*, 24 MELB. U. L. REV. 15, 25-28 (2000). The discussion on this question centers on the split between the monist and dualist views of international law. See *id.* at 25-30 (explaining the monist versus dualist philosophy). Monists subscribe to the theory that international law and municipal law are part of the same legal system, and that international law supercedes contrary municipal law. *Id.* at 25-26. Dualists, on the other hand, hold that municipal law and international law are separate systems entirely, and that municipal systems must expressly adopt international law in order to incorporate such law into the state’s system. *Id.* at 26.

25. Hamilton expressed some of these concerns in the *Federalist Papers*. See THE FEDERALIST NO. 80 at 509 (Alexander Hamilton) (Robert Seigliano ed., 2000).

26. *Id.*

27. MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 1 (2d ed. 1993).

28. *Id.* Romans would apply *jus gentium* only if Roman law was also inapposite. *Id.*

29. *Id.* Many regard Grotius’s famous work, entitled *The Law of War and Peace*, as the foundation of the modern notion of the law of nations. *Id.*

30. *Id.*

31. See *The Paquete Habana*, 175 U.S. 677, 700 (1900). See also L.C. Green, *The Raw Materials of International Law*, INT’L & COMP. L.Q. 187 (1980). In addition, Article 38 of the Statute of the International Court of Justice, the principal judicial organ of the United Nations, lists sources of international law the Court is to employ. The Article reads as follows:

international law scholars, and prior opinions construing international law.³⁴ Perhaps most controversially, courts also look to international custom to determine whether a certain practice has become so widespread and accepted that the court can truly label it as an international law and enforce it as such.³⁵ Judicial recognition that a certain practice has “ripened” into a legal norm is thus the process that builds the body of international customary law over time.³⁶ When determining customs, courts must also consider *opinio juris*, or a sense of duty with which nations follow such custom.³⁷ In this way,

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognized by civilized nations;
- d. subject to the provisions of Article 59 [which states that the opinions of the court have no *stare decisis* effect], judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.

STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, Art. 38. The term “*ex aequo et bono*” refers to principles of equality that the court feels it should apply in a given case. JANIS & NOYES, *supra* note 11, at 21. Such principles are not found in any body of law, but are simply the reflections of the judges as to what they consider as “equal and good”. *Id.* Perhaps because of this vague definition, no party has ever elected to submit a case for the court to decide *ex aequo et bono*. *Id.* at 129.

32. Treaties can provide the court with evidence of an international custom that has become so widespread that it reflects an international legal norm. *See, e.g.*, *Filartiga v. Pena-Irala*, 630 F.2d 876, 882-84 (1980). *See also infra* note 52 and accompanying text.

33. *See infra* note 196. A court examines the works of jurists in order to discover international legal norms that have developed.

34. Article 38 of the Statute of the International Court of Justice states that judicial opinions and juridical writings are to be secondary sources of what the rules of international law are. *See supra* note 31. In addition, Article 38 does not state which courts to look to in order to find authoritative pronouncements on international law. *Id.* In fact, courts are free to look to the opinions of any municipal or international tribunal. *See JANIS & NOYES, supra* note 11, at 108.

35. Because custom is commonly seen as a nonconsensual source of international law, this method is controversial. *Id.* at 66. Furthermore, courts must face the same problem with regard to where to look for evidence of custom. *Id.* at 107. Courts have in the past merely examined the judicial opinions of western legal systems, but this practice has been rejected. *Id.* at 108 (citing GERRIT W. GONG, *THE STANDARD OF “CIVILIZATION” IN INTERNATIONAL SOCIETY* (1984)).

36. *See, e.g.*, *The Paquete Habana*, 175 U.S. 677, 686-700 (1900) (finding that a custom prohibiting the capture of fishing vessels during war time that could be traced back to 1403 through the birth of the United States and into the modern day had sufficiently ripened into international law).

37. *See Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 97 (June 27) (finding states’ adoption of a United Nations resolution as evidence of *opinio juris*). *Opinio juris* is the idea that countries feel a duty to follow a certain custom, and that they treat the custom as though it were law. JANIS & NOYES, *supra* note 11, at 75. *Opinio juris* is required before a court will recognize that a custom has become part of international law. *Id.*

widespread custom, coupled with *opinio juris*, can ripen from merely a common practice into an international legal norm.³⁸

C. Use of the ATCA

Early cases concerning jurisdiction under the ATCA mostly involved piracy or war prize actions.³⁹ However, because of the Supreme Court's narrow interpretation, the Act was used extremely rarely for most of the nineteenth and twentieth centuries.⁴⁰ In addition, the law of nations was far from the substantive body of law that it is today. Several decades of international cooperation under the United Nations⁴¹ and cases from the International Court of Justice (ICJ) have made international law significantly more discernable.⁴² Even in the middle of the twentieth century, courts hesitated to grant jurisdiction under the ATCA because of their outdated view of the law of nations⁴³ and their belief that the original purpose of the ATCA was to prevent international incidents.⁴⁴ In fact, courts only heard twenty-one lawsuits under the ATCA prior to 1980 and granted jurisdiction in only two.⁴⁵

1. The *Filartiga Decision*

In 1980, the landmark decision of *Filartiga v. Pena-Irala*⁴⁶ renewed the vitality of the then 191-year-old Alien Tort Claims Act. In that case, the plaintiffs were the father and sister of a seventeen-year-old Paraguayan boy whom the Inspector General of Police in Asuncion, Paraguay allegedly

38. Congress has also expressed its agreement with this proposition in recognizing that "norms . . . may ripen in the future into rules of customary international law." H.R. REP. NO. 102-367, at 4 (1991), reprinted in 1992 U.S.C.C.A.N. 84, 86.

39. See Harvey, *supra* note 22, at 344 n.18. See also Moxon v. Brigantine Fanny, 17 F. Cas. 942 (D. Pa. 1793) (seeking restitution for capture of ship); Bolchos v. Darrell, 3 F. Cas. 810 (D.S.C. 1795) (claiming damages for wrongful capture and sale of slaves).

40. See Harvey, *supra* note 22, at 344 & n.18.

41. JANIS & NOYES, *supra* note 11, at 445.

42. The International Court of Justice is the judicial organ of the United Nations and has rendered decisions on international customary law. *Id.* See, e.g., Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27).

43. In fact, William Blackstone identified only three offenses that could violate the law of nations, these being "violations of safe conduct, infringements on the rights of ambassadors, and piracy." Rosen, *supra* note 23, at 466 (citing 4 WILLIAM BLACKSTONE, COMMENTARIES *67).

44. See Rosen, *supra* note 23, at 468.

45. Kenneth C. Randall, *Federal Jurisdiction over International Law Claims: Inquiries into the Alien Tort Statute*, 18 N.Y.U. J. INT'L L. & POL. 1, 4-5 nn.15 & 16 (1985). The two cases in which the court granted jurisdiction are *Bolchos v. Darrell*, 3 F. Cas. 810 (D.S.C. 1795), and *Adra v. Clift*, 195 F. Supp. 857 (D. Md. 1961).

46. 630 F.2d 876 (2d Cir. 1980).

tortured and killed.⁴⁷ The plaintiffs were Paraguayan citizens who brought an action against the former police Inspector General, also a Paraguayan citizen, in the United States District Court for the Eastern District of New York predicated jurisdiction on the ATCA.⁴⁸ The district court dismissed the suit for lack of jurisdiction, but the Second Circuit reversed, holding that international law should be interpreted as it exists today, not as it existed in 1789.⁴⁹ The court went on to find that torture violates modern international law and that therefore federal subject-matter jurisdiction exists under the ATCA.⁵⁰

The court first looked to Supreme Court precedent and discovered that international law may be ascertained by “consulting the works of jurists . . . or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law.”⁵¹ The court then examined several United Nations General Assembly Resolutions and other treaties that condemn the use of torture in an effort to find evidence that the proscription on torture had become an international custom.⁵² In finding such a custom, the court noted that the prohibition of torture as contained in the Universal Declaration of Human Rights constitutes one of the “basic principles of

47. *Id.* at 878. The plaintiffs alleged that the defendant kidnapped, tortured, and killed Joelito Filartiga. *Id.* Later that day, the police allegedly took Joelito’s sister, Dolly, to the defendant’s house where they confronted her with the battered body of her brother. *Id.* Dolly alleged that as she fled, the defendant followed her and called out that she had got what she deserved. *Id.* She claimed that her brother was tortured and killed in retaliation for her father’s opposition to the government of President Alfredo Stroessner. *Id.*

48. The plaintiffs claimed that torture violated the “law of nations” as referenced in the ATCA and that therefore the Act granted them a federal forum. *Id.* at 879.

49. *Id.* at 881.

50. *Id.* at 880. The court had personal jurisdiction over the Paraguayan defendant because he had been served with summons while in the United States on a visitor’s visa. *Id.* at 878. He was later deported because he overstayed the length of his visa. *Id.* at 878-79.

51. *Id.* at 880 (quoting *United States v. Smith*, 18 U.S. (5 Wheat.) 153 (1820)). The court confirmed these sources by quoting from *The Paquete Habana*, 175 U.S. 677, 700 (1900), and from the Statute of the International Court of Justice. 630 F.2d at 880-81 & n.8. *See supra* note 31 and accompanying text.

Citing the U.S. Supreme Court’s enumeration of the sources of the law of nations in *The Paquete Habana*, the court concluded that a practice can ripen and evolve into an international law by the “general assent of civilized nations.” 630 F.2d at 881. Therefore, the court concluded that international law is not static and must therefore be interpreted “not as it was in 1789, but as it has evolved and exists among the nations of the world today.” *Id.* *See supra* note 49 and accompanying text.

52. *Filartiga*, 630 F.2d at 882-84. The court pointed to, *inter alia*, the Universal Declaration of Human Rights, which states that “no one shall be subjected to torture.” *Id.* (quoting G.A. Res. 217(III), U.N. Doc. A/810, (1948)). The court also relied on the Declaration on the Protection of All Persons from Being Subjected to Torture, G.A. Res. 3452, U.N. GAOR, 30th Sess., Supp. No. 34, at 91, U.N. Doc. A/1034 (1975); the American Convention on Human Rights; the International Covenant on Civil and Political Rights, G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. No. 6, at 49, U.N. Doc. A/6316 (1986); and the European Convention for the Protection of Human Rights and Fundamental Freedoms Art. 3, Jan. 1, 1966, Europ. T.S. No. 55, 200, 202. *Filartiga*, 630 F.2d at 884.

international law.”⁵³ After reviewing multiple sources, the court concluded that torture violates international law to such an extent that the “torturer has become—like the pirate and slave trader before him—*hostis humani generis*, an enemy of all mankind.”⁵⁴ This rationale has led some commentators to note that it is unclear whether the court’s reasoning rested on customary international law or on the principle of *jus cogens*.⁵⁵ The latter principle states that certain acts are so despised that they are simply forbidden, and the prohibition against such acts achieves the status of a peremptory norm that is binding without regard to a state’s consent.⁵⁶ Whichever formulation the court meant to employ, the result is the same—torture committed under color of law violates the law of nations as it exists today and therefore invokes the federal jurisdiction granted by the Alien Tort Claims Act.⁵⁷ The court found this holding consistent with the original intent of the Act because it addressed the “Framers’ overarching concern that control over international affairs be vested in the new national government to safeguard the standing of the United States among the nations of the world.”⁵⁸

In reaching its decision in *Filartiga*, the Second Circuit had to overrule some of its own precedent construing international law.⁵⁹ In fact, the district court had dismissed the *Filartigas’* suit for lack of jurisdiction because the judge had felt “constrained by dicta contained in two recent opinions” of the Second Circuit.⁶⁰ These cases held that international law did not apply to a state’s treatment of its own citizens.⁶¹ However, relying on the principle that international law is not static and must be read as it exists in the modern

53. *Filartiga*, 630 F.2d at 882 (quoting G.A.Res. 2625. U.N. GAOR, 25th Sess., Supp. No. 28, at 121, U.N. Doc. A/8028 (1970)).

54. *Id.* at 890.

55. See, e.g., JANIS & NOYES, *supra* note 11, at 121-22 (citing Mark Janis et al., *Colloquy: Jus Cogens*, 3 CONN. J. INT’L L. 359 (1988)).

56. See JANIS & NOYES, *supra* note 11, at 108. Article 53 of The Vienna Convention on the Law of Treaties defines a peremptory norm (*jus cogens*) to be “a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.” The Vienna Convention on the Law of Treaties, May 23, 1969, art. 53, 1155 U.N.T.S. 331, 344. Article 53 voids any treaty that is concluded in violation of a *jus cogens* norm. *Id.*

57. *Filartiga*, 630 F.2d at 884-85. Also note that a state official conducted the torture, acting at the very least under color of state law.

58. *Id.* at 887. The court believed that Congress had intended to provide a forum for aliens just like the *Filartigas* in order to prevent the international incident that would occur if an infraction of the law of nations were to go unpunished. *Id.*

59. *Id.* at 880, 884.

60. *Id.* at 880. The cases were *Dreyfus v. Von Finck*, 534 F.2d 24, 31 (2d Cir. 1976), and *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975). *Filartiga*, 630 F.2d at 880.

61. *Filartiga*, 630 F.2d at 880.

day,⁶² the court found that international law in 1980 prohibited torture even if perpetrated by a state on its own citizens.⁶³ The *Filartiga* decision, therefore, was a major turning point in the interpretation of the ATCA.

2. *Tel-Oren v. Libyan Arab Republic*

The *Filartiga* decision was not universally accepted by all federal circuits. In fact, four years later the Court of Appeals for the District of Columbia Circuit declined to exercise jurisdiction under the ATCA in *Tel-Oren v. Libyan Arab Republic*.⁶⁴ However, the three judges in the case each gave differing opinions as to the underlying rationale for declining jurisdiction.⁶⁵ Only Judge Edwards agreed with the basic holding of *Filartiga*, although his application led him to a different result in this case.⁶⁶

In *Tel-Oren*, the plaintiffs were several survivors of a terrorist attack in Israel by members of the Palestinian Liberation Organization (PLO).⁶⁷ The terrorists landed in Israel by boat and embarked on a violent rampage against civilians.⁶⁸ The plaintiffs alleged that these terrorists were under orders from the PLO “to seize and hold Israeli civilians in ransom for the release of PLO members incarcerated in Israel jails” and if their plans broke down, to kill the civilian hostages.⁶⁹ In the course of the vicious campaign, the terrorists seized two buses, one taxi, and one passing car and held the occupants hostage.⁷⁰ The terrorists tortured the passengers and murdered some of them.⁷¹ In all, twenty-two adults and twelve children were killed, and seventy-three adults

62. See discussion *supra* note 51. The court held in line with *The Paquete Habana* that the prohibition on a state from committing torture on its own citizens had evolved and ripened into an international law. *Filartiga*, 630 F.2d at 884.

63. *Id.* The court’s holding suggests, therefore, that the very reach of the law of nations can itself develop over time in the same manner as do the substantive rules that form the body of customary international law. *Id.*

64. 726 F.2d 774, 775 (D.C. Cir. 1984).

65. *Id.* There was no majority opinion in the case, but instead, three separate opinions concurring in the judgment that jurisdiction should be denied. The panel comprised Judges Harry T. Edwards, Robert Bork, and Roger Robb. *Id.*

66. *Id.* (Edwards, J., concurring).

67. *Id.* (Edwards, J., concurring).

68. *Id.* at 776 (Edwards, J., concurring). The PLO terrorists numbered thirteen. *Id.*

69. *Id.* at 799 (Bork, J., concurring).

70. *Id.* The campaign began with the terrorists killing an American photographer that they encountered on the beach. *Id.* They then hijacked a civilian bus on the main highway between Haifa and Tel Aviv and later seized a taxi, another passing car, and a second civilian bus and took the occupants hostage. *Id.*

71. *Id.* The police finally brought the rampage to an end by shooting the tires and engine of the terrorists’ bus as it passed through a police barricade. *Id.* The terrorists in turn shot some of their hostages and blew up their bus with grenades. *Id.*

and fourteen children were seriously wounded.⁷² As in *Filartiga*, the plaintiffs⁷³ in this case asserted jurisdiction under the ATCA.⁷⁴

In denying ATCA jurisdiction in *Tel-Oren*, Judge Edwards found the principles established in *Filartiga* to be sound.⁷⁵ However, he concluded that international law does not impose liability on nonstate actors for torture, and that because the PLO is not a state,⁷⁶ its members cannot act under color of state law.⁷⁷ Therefore, he reasoned that the terrorists were free from the

72. *Id.* at 776 (Edwards, J., concurring).

73. The plaintiffs were sixty-five of the hostages who the terrorists had seriously wounded and the survivors of twenty-nine of the hostages who were killed. *Id.* at 798 (Bork, J., concurring).

74. *Id.* (Edwards, J., concurring). The plaintiffs also asserted jurisdiction under 28 U.S.C. § 1331 (1976), claiming a federal question. *Id.* at 799.

75. 726 F.2d at 776-77 (Edwards, J., concurring). Judge Edwards stated that the *Filartiga* case stands for four propositions, which include:

First, the law of nations is not stagnant and should be construed as it exists today among the nations of the world. Second, one source of that law is the customs and usages of civilized nations, as articulated by jurists and commentators. Third, international law today places limits on a state's power to torture persons held in custody, and confers fundamental rights upon all people to be free from torture. Fourth, section 1350 [i.e., the ATCA] opens the federal courts for adjudication of the rights already recognized by international law.

726 F.2d at 777 (Edwards, J., concurring) (internal quotation marks and citations omitted). Judge Edwards then confirmed that he was "substantially in accord with these four propositions." *Id.* (Edwards, J., concurring).

76. Judge Edwards noted that in order to determine whether an entity qualifies as a state for the purposes of international law, courts have traditionally looked to United States foreign policy. 726 F.2d at 791 n.21 (Edwards, J., concurring). *Cf. Kadic v. Karadzic*, 70 F.3d 232, 244 (2d Cir. 1995). This view is no longer the prevailing one because the Second Circuit has held that the law of nations can indeed obligate unrecognized states. *Id.*

In *Kadic*, the court had to determine whether the self-proclaimed entity of Srpska within the recognized nation of Bosnia-Herzegovina was a "state" for purposes of international law prohibiting official torture. *Id.* Turning to the definition of a "state" given by the *Third Restatement of Foreign Relations Law of the United States*, the court determined that a state is an entity with a defined territory and population, a government, and the *capacity* to enter into relations with other states. *Id.* The court noted that the entity need not be formally recognized by other states in order to have the capacity to enter into relations with them. *Id.* Rather, the court noted that

[i]t would be anomalous indeed if non-recognition by the United States, which typically reflects disfavor with a foreign regime—sometimes due to human rights abuses—had the perverse effect of shielding officials of the unrecognized regime from liability for those violations of international law norms that apply only to state actors.

Id. at 245.

Whether the PLO would satisfy this test of statehood for purposes of "official action" committed in violation of international law is unclear, but quite possibly it could. Judge Edwards's dismissal of such a possibility was cursory, stating that "there is no allegation here that the PLO does or could meet this standard [of statehood]." *Tel-Oren*, 726 F.2d at 791 n.21 (Edwards, J., concurring). One certainty exists: an entity may be considered a "state" for some purposes, yet not for others. *See JANIS & NOYES*, *supra* note 11, at 366. For example, an entity may be considered a state for purposes of international law violations, but not for purposes of being admitted to the United Nations or being a party before an international tribunal. *Id.*

77. An individual acts under the "color of state law" when he performs an action with the apparent, but not necessarily the actual, backing of a state's power or laws. *See* 42 U.S.C. § 1983

restrictions of international law—the court could not grant jurisdiction under the ATCA because the plaintiffs could not allege any violation of international law.⁷⁸ Judge Edwards believed a finding of jurisdiction under the ATCA in *Tel-Oren* would be “an extension of *Filartiga*” that he was unwilling to undertake.⁷⁹

In his concurring opinion in *Tel-Oren*, Judge Bork agreed that international law was confined to imposing obligations upon state actors,⁸⁰ but he rejected the *Filartiga* holding and rationale.⁸¹ Judge Bork believed that the reference to the “law of nations” in the ATCA was only intended to cover those violations of international law that existed in 1789.⁸² At that time, only three offenses were violations of the law of nations: violations of safe conduct, infringements on the rights of ambassadors, and piracy.⁸³ Judge Bork’s opinion seemed to limit the ATCA to only these three violations.⁸⁴ However, in order to conform with the line of reasoning extracted from the Court’s early case, *The Paquete Habana*,⁸⁵ concerning the evolutionary nature of international law,⁸⁶ he distinguished *Filartiga* on its facts:

It is one thing for a case like *The Paquete Habana* to find that a rule has evolved so that the United States may not seize coastal fishing boats of a nation with which we are at war. It is another thing entirely . . . to find that a rule has evolved against torture by government so that our courts must sit in judgment of the conduct of foreign officials in their own countries with respect to their own citizens [The

(1994). The court in *Kadic v. Karadzic* held that the jurisprudence of §1983 is a relevant guide in determining “color of law” for purposes of violations of international law. 70 F.3d 232, 245 (2d Cir. 1995). See *infra* note 130.

78. 726 F.2d at 776-77 (Edwards, J., concurring).

79. *Id.* at 795 (Edwards, J., concurring).

80. Judge Bork believed in “the general rule that international law imposes duties only on states and on their agents or officials.” *Id.* at 805-06 (Bork, J., concurring). Much academic literature supports this view, although the literature also recognizes the trend toward placing duties upon nonstate actors and individuals. See Rosen, *supra* note 23, at 469. See also discussion *infra* note 110.

81. Specifically, Judge Bork rejected the view that courts should read the law of nations as referenced in the ATCA to be the equivalent of modern international law. 726 F.2d at 812 (Bork, J., concurring). He was particularly troubled by the fact that “[h]istorical research has not as yet disclosed what [the ATCA] was intended to accomplish.” *Id.*

82. *Id.* at 813 (Bork, J., concurring). Judge Bork found it “important to remember that in 1789 there was no concept of international human rights.” *Id.*

83. The scholar William Blackstone enumerated these offenses. See Rosen, *supra* note 23, at 466. See also *supra* note 43 and accompanying text.

84. 726 F.2d at 813 (Bork, J., concurring).

85. 175 U.S. 677 (1900).

86. See discussion *supra* note 51. Judge Bork stated that the framers did not intend the ATCA to grant federal jurisdiction in cases such as *Filartiga*. 726 F.2d at 813 (Bork, J., concurring). He stated that this “problem is not avoided by observing that the law of nations evolves.” *Id.*

ATCA] does not embody a legislative judgment that is either current or clear and the statute must be read with that in mind.⁸⁷

In addition, Judge Bork believed that the ATCA could only grant prospective plaintiffs a federal forum; it did not provide the underlying cause of action, or substantive right to sue.⁸⁸ Nor did Judge Bork find such a right in international law itself.⁸⁹ Rather, he found that even if international law prohibited torture, it did not grant the injured parties a right to sue the perpetrators in court.⁹⁰ In his opinion, the Second Circuit should have embarked on this very question in *Filartiga*.⁹¹ Finally, Judge Bork stated that recognizing the plaintiffs' suit would be "inappropriate" because of "separation of powers principles" included in, among others, the act of state doctrine.⁹² However, he stopped short of applying the act of state doctrine directly because he felt constrained by the Supreme Court's definition that the doctrine only applies to acts of recognized states.⁹³ Reasoning that the PLO is not a recognized state,⁹⁴ Judge Bork noted that the doctrine seemed

87. *Id.*

88. *Id.* at 799 (Bork, J., concurring). He concluded that the ATCA "merely define[s] a class of cases federal courts can hear . . . [but does not] even by implication authorize individuals to bring such cases." *Id.* at 811. Judge Edwards disagreed with Judge Bork on this point as well, arguing that if neither international law nor the ATCA provided a right to sue, then the ATCA would be, in effect, negated. *Id.* at 777 (Edwards, J., concurring). See also *infra* note 183.

89. *Tel-Oren*, 726 F.2d at 816. Judge Bork stated that "international law today does not provide plaintiffs with a cause of action." *Id.* Judge Bork also conducted an extensive review of the treaties under which the plaintiffs alleged that their action arose. *Id.* at 808-09. The plaintiffs alleged that the defendants had violated thirteen treaties, but Judge Bork concluded that the United States was only bound by five of them. *Id.* Judge Bork found that the treaties did not provide a cause of action because the five applicable treaties in the plaintiffs' complaint do not specifically provide for private enforcement; nor do treaties "generally create rights that are privately enforceable in courts." *Id.* To hold otherwise, Judge Bork reasoned, would be to hold that because of the ATCA, "all existing treaties became, and all future treaties will become, in effect, self-executing when ratified." *Id.* at 820.

90. *Id.* at 817. He stated that "as a general rule, international law does not provide a private right of action." *Id.* According to Judge Bork, the right of action belongs to the state itself, but not the individual, because international law recognizes that states are the primary players. *Id.* The Second Circuit has confronted the question of whether international law can apply to actors other than state entities and has found that indeed it can. See discussion *infra* note 110.

91. *Id.* at 820 (Bork, J., concurring).

92. *Id.* at 799, 805 (Bork, J., concurring). See discussion *infra* note 174 and accompanying text. The Supreme Court has defined the act of state doctrine as precluding "the courts . . . from inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own territory." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964).

93. *Tel-Oren*, 726 F.2d at 803 (Bork, J., concurring).

94. Judge Edwards also rejected the idea that the PLO could be a state, but his analysis was in the context of a person being a "state actor." *Id.* at 791 n.21 (Edwards, J., concurring). However, neither Judge Edwards nor Judge Bork conducted any meaningful discussion of whether the PLO could be a "state" for purposes of international law. *Id.* at 775, 798. Judge Bork merely stated that the act of state doctrine "would seem not to apply . . . to the alleged acts of the PLO . . . [which does not] seem to be a state under international law." *Id.* at 803-04 (Bork, J., concurring). See discussion, *supra* note 76.

facially inapplicable;⁹⁵ nevertheless, he argued that the doctrine should be extended by “its own rationale” to include acts by nonrecognized entities.⁹⁶

Judge Robb found that the suit in *Tel-Oren* should be dismissed on other grounds—he decided that the case presented a nonjusticiable political question.⁹⁷ He stated that the judiciary should not decide cases that interfere with issues that are traditionally left to the political branches of government. Judge Robb argued that cases involving international terrorism “touch on sensitive matters of diplomacy that uniquely demand a singlevoiced statement of policy by the Government.”⁹⁸ The suit in *Tel-Oren*, according to Judge Robb, was just such a case.

Finally, Judge Robb disagreed with *Filartiga*, calling the Second Circuit’s holding an “unfortunate position.”⁹⁹ He included little discussion of the ATCA and its construction in his opinion and called his colleagues efforts at doing so “quite unnecessary.”¹⁰⁰ A fair summation of his position is that he completely disagreed with the new turn that the Second Circuit took in the *Filartiga* case, and he counseled against any further intrusion into the foreign affairs arena in this manner.¹⁰¹

3. Kadic v. Karadzic

Kadic v. Karadzic,¹⁰² like *Filartiga*, arose in the Second Circuit. The plaintiffs were Croat and Muslim citizens of Bosnia-Herzegovina who alleged that they were victims and representatives of victims of a genocide campaign.¹⁰³ The military forces of the self-proclaimed republic of Srpska, within Bosnia-Herzegovina, under the direction of the defendant, Radovan

95. *Tel-Oren*, 726 F.2d at 803 (Bork, J., concurring). Although unsure of the doctrine’s applicability, Judge Bork concluded that there was no need “to consider whether the act of state doctrine applies to bar this case from going forward.” *Id.*

96. *Id.* at 804. Judge Bork found that the case presented such “grave separation of powers problems” that it would be “inappropriate” for the court to recognize a cause of action for the plaintiffs. *Id.* at 805.

97. *Id.* at 823 (Robb, J., concurring). The “political question” doctrine is taken up in more detail below. See *infra* notes 132, 171 and accompanying text. Judge Edwards took issue with Judge Robb’s invocation of the doctrine in this case. *Id.* at 796 (Edwards, J., concurring). After noting that not every case involving foreign affairs lies outside of the purview of the judiciary, he asserted that the political question doctrine is very narrow in scope and should not be used by courts as an excuse to avoid adjudicating difficult and complicated questions. *Id.* at 797 (Edwards, J., concurring).

98. *Id.* at 824 (Robb, J., concurring).

99. *Id.* at 826 (Robb, J., concurring).

100. *Id.* at 827 (Robb, J., concurring).

101. *Id.* (Robb, J., concurring).

102. 70 F.3d 232 (2d Cir. 1995).

103. *Id.* at 236-37.

Karadzic, carried out this campaign.¹⁰⁴ The plaintiffs asserted causes of action for “genocide, rape, forced prostitution and impregnation, torture and other cruel, inhuman, and degrading treatment, assault and battery, sex and ethnic inequality, summary execution, and wrongful death.”¹⁰⁵ They asserted subject-matter jurisdiction under, *inter alia*, the ATCA.¹⁰⁶

The district court dismissed the action for lack of jurisdiction because no violation of the law of nations had been alleged, as required under the ATCA. The court held that “acts committed by non-state actors do not violate the law of nations,”¹⁰⁷ and relied in part on the *Filartiga* decision for this proposition.¹⁰⁸ The court noted that the defendant in *Filartiga* had acted as a government official (Inspector General of Police), whereas Karadzic was not a state actor because Srpska was not a recognized state.¹⁰⁹ However, the Second Circuit reversed, holding that international law can indeed apply to individual nonstate actors when they engage in genocide and war crimes.¹¹⁰ The Second Circuit conducted a thorough review of the actions that courts and commentators had recognized as violations of international law, and found that some nonstate actors could indeed be held liable in certain circumstances.¹¹¹ Drawing from the *Third Restatement of the Foreign*

104. The forces committed the atrocities during the Bosnian civil war, allegedly as part of a genocidal campaign. *Id.* Karadzic possessed ultimate command authority over the military forces. *Id.* at 237.

105. *Id.* at 237.

106. *Id.* The plaintiffs alleged that the atrocities committed were violations of international law and that because they were aliens, jurisdiction existed under the ATCA. *Id.*

107. *Doe v. Karadzic*, 866 F. Supp. 734, 739 (S.D.N.Y. 1994).

108. *Id.* In fact, the court implied that the *Filartiga* decision was itself an example that international law “evolved” from formerly imposing obligations only on states’ relationships with each other, to now encompassing a state’s relationship with its own citizens. *Id.* The court repeatedly emphasized that the *Filartiga* case dealt only with a state actor and noted that international law has not been extended to impose obligations on nongovernmental actors. *Id.* at 739-40. Including a reference to Judge Edwards’s opinion in *Tel-Oren*, the district court pointed out that “a number of Federal Courts have applied . . . [the ATCA] but, in doing so, have also declined to extend it to cover the conduct of nonstate actors.” *Id.* at 740.

109. *Id.* at 739, 741. The court noted that just as the PLO did not constitute a recognized state in *Tel-Oren*, neither did Sprksa. *Id.* Therefore, the court held that Karadzic could not have acted under color of state law and was thus beyond the reach of international law. *Id.* See *supra* note 76 and accompanying text.

110. *Kadic*, 70 F.3d at 239-40. The court noted that whether a nonstate actor can be held liable under international law depends entirely on the crime alleged. *Id.* Indeed, “certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals.” *Id.* at 239. Genocide and war crimes are examples of such forms of conduct, but torture is not. *Id.* at 240.

111. *Id.* Pointing to the Nineteenth Century cases of *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 161 (1820), and *United States v. Furlong*, 18 U.S. (5 Wheat.) 184, 196-97 (1820), as well as to modern scholars in international law, the court noted that an early example of the nonstate actor reach of international law was the prohibition against piracy. *Kadic*, 70 F.3d at 239. Modern examples include the prohibitions against the slave trade and certain war crimes. *Id.*

Relations Law of the United States, as well as from the two cases prior to *Filartiga* that had exercised jurisdiction under the ATCA, the court found support for this conclusion.¹¹²

Turning to the specific allegations of genocide, the court conducted an examination into the accepted sources of international law to determine whether nonstate actors could be liable for such conduct.¹¹³ After examining authorities such as United Nations General Assembly Resolutions,¹¹⁴ the Convention on the Prevention and Punishment of the Crime of Genocide,¹¹⁵ and the United States' Genocide Convention Implementation Act of 1987,¹¹⁶ the court concluded that private individuals could indeed be liable for genocide under international law.¹¹⁷

Similarly, the court assessed the conventional sources of international law¹¹⁸ and found that the law of nations prohibits as war crimes acts of murder, rape, torture, and the arbitrary detention of civilians when "committed in the course of hostilities."¹¹⁹ The court also found that the law of nations controls the conduct of private as well as state actors.¹²⁰ The sources that the court used included four Geneva Conventions, ratified by 180 countries, codifying the law of war.¹²¹ These conventions confirm that

112. *Id.* The two cases prior to *Filartiga* to find jurisdiction under the ATCA were *Bolchos v. Darrell*, 3 F. Cas. 810 (D.S.C. 1795), and *Adra v. Clift*, 195 F. Supp. 857 (D. Md. 1961). The defendants in both of these cases were nonstate actors. *See supra* note 45.

The Second Circuit's opinion also responded to the district court's reliance on Judge Edwards's opinion in *Tel-Oren*. The court noted that Judge Edwards did not foreclose the possibility that international law could prohibit certain private conduct. Rather, he merely held that torture was not one of those violations applicable to private actors as well. *Kadic*, 70 F.3d at 240.

113. *See supra* notes 31-38 and accompanying text.

114. In 1946, a U.N. General Assembly Resolution declared genocide to be a crime under international law, whether perpetrated by "private individuals, public officials or statesmen." 70 F.3d at 241 (quoting G.A. Res. 96(I), 1 U.N. GAOR at 188-89, U.N. Doc. A/64/Add.1, (1946)). In addition, the Nuremberg War Crimes Tribunal, set up by the United Nations, received a mandate to punish persecutions regardless of whether the offenders were acting as individuals. *Kadic*, 70 F.3d at 241.

115. Jan. 12, 1951, 78 U.N.T.S. 277, *cited in* 70 F.3d at 241. This Convention defined genocide to include actions taken by persons "whether they are constitutionally responsible rulers, public officials, or private individuals." 70 F.3d at 241 (quoting 78 U.N.T.S. 277, 280).

116. 18 U.S.C. §1091 (1988), *cited in* 70 F.3d at 242. This Implementation Act prohibits genocide regardless of whether the perpetrator acts under color of law. 70 F.3d at 242.

117. *Kadic*, 70 F.3d at 241-42.

118. *Id.* at 242. Just as the *Filartiga* court had done, in addition to reviewing treaties and other sources, the *Kadic* court consulted international practices, conventions, and norms as evidence of international law. *See supra* notes 31-38 and accompanying text.

119. *Kadic*, 70 F.3d at 242, 244.

120. *Id.* at 242-43. Citing to a Supreme Court decision, *In Re Yamashita*, 327 U.S. 1, 14 (1946), the court noted that such acts have "long been recognized in international law as violations of the law of war." *Kadic*, 70 F.3d at 242. The question for determination was, however, whether private individuals could be liable for such violations. *Id.*

121. The court examined the following four treaties: the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Oct. 21, 1950, 6 U.S.T. 3114,

all “parties,” whether private or state actors, are bound by the law of war.¹²² Such longstanding practice, coupled with recognition by scholars,¹²³ convinced the court that the prohibition against private individuals committing war crimes had ripened into an international norm.¹²⁴

Turning to the allegations of torture and summary execution, the court held, with one important exception, that international law only proscribes these specific crimes when committed by *state* officials or by persons acting under color of law.¹²⁵ However, the court carefully noted the exception that if a private individual carried out torture or summary execution in the pursuance of a genocide campaign, then that individual *could* be held liable under international law.¹²⁶ Because Karadzic allegedly tortured the plaintiffs while on a genocide campaign, he could be held liable for that torture, even if he were found to be a private nonstate actor.¹²⁷ The *Kadic* court further held that Karadzic was indeed a state actor because of his connection with the self-proclaimed state of Srpska.¹²⁸ Even though Srpska was not recognized by the United States, the court was satisfied that for purposes of international law, it was a “state,”¹²⁹ or at the very least, the defendant was acting under color of law.¹³⁰

75 U.N.T.S. 31; the Geneva Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Oct. 21, 1950, 6 U.S.T. 3217, 75 U.N.T.S. 85; the Convention Relative to the Treatment of Prisoners of War, Oct. 21, 1950, 6 U.S.T. 3316, 75 U.N.T.S. 135; and the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Oct. 21, 1950, 6 U.S.T. 3516, 75 U.N.T.S. 287. *Kadic*, 70 F.3d at 242 n.7. The United States ratified all four. *Id.* at 242.

122. *Kadic*, 70 F.3d at 243.

123. The court cited to various scholarly works in support of its conclusion. *Kadic*, 70 F.3d at 243. These works were: Telford Taylor, *Nuremberg Trials: War Crimes and International Law*, 450 INT'L CONCILIATION 241 (1949); Jordan J. Paust, *After My Lai: The Case for War Crimes Jurisdiction over Civilians in Federal District Courts*, in 4 THE VIETNAM WAR AND INTERNATIONAL LAW 447 (Richard A. Faulk ed., 1976).

124. *Kadic*, 70 F.3d at 243.

125. *Id.* The court reached this conclusion after drawing from three authoritative definitions of torture: the Declaration on Torture, *supra* note 52; the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85; and the Torture Victim Act, 28 U.S.C. § 1350(3)(b) (1993). All three sources defined torture as being inflicted by a public official. Furthermore, this definition parallels that given by the *Filartiga* court, where the defendant was in fact a public official. *See supra* text accompanying note 57.

126. *Kadic*, 70 F.3d at 244. The court noted that the plaintiffs' allegations of genocide and war crimes encompassed many of their torture and summary execution allegations. *Id.* Therefore, jurisdiction existed for their claims either because the atrocities allegedly committed were war crimes, or because they were crimes committed in the furtherance of a campaign of genocide. *Id.* Neither of these two options required the participation of a state actor for jurisdiction to exist under the ATCA.

127. *Id.*

128. *Id.* at 245.

129. *See supra* note 76.

130. The court proceeded to hold that even if Srpska were not a state, the plaintiffs had sufficiently alleged that Karadzic had acted in concert with the recognized state of Yugoslavia and was

The court then assessed the claim that the case against Karadzic presented a nonjusticiable “political question” that was best left to the political branches of government.¹³¹ This doctrine is a prudential consideration that a court uses to dismiss a case when jurisdiction would normally be proper were it not for the intrusion into matters better left to the executive or legislative branches.¹³² After acknowledging Judge Robb’s concurrence in *Tel-Oren*,¹³³ the court concluded that the doctrine was inapplicable in *Kadic*.¹³⁴ Relying on the Supreme Court’s treatment of the “political question” doctrine in *Baker v. Carr*,¹³⁵ most importantly the factors that the Court established in that case,¹³⁶ the *Kadic* court cautioned that “[n]ot every case ‘touching foreign relations’ is nonjusticiable.”¹³⁷ The court applied the *Baker* factors and found that they supported the exercise of jurisdiction even though the case implicated very well publicized foreign matters, such as ethnic cleansing in Bosnia-Herzegovina.¹³⁸ A letter from the Solicitor General and the State

hence acting under “color of law.” *Kadic*, 70 F.3d at 245. The court noted that acting under color of law suffices for a claim of “official” torture under international law. *Id.* Furthermore, the court noted that the “color of law” jurisprudence of 42 U.S.C. § 1983 is a relevant guide to whether a defendant has engaged in official action for purposes of jurisdiction under the [ATCA].” *Id.*

131. The court recognized that despite having found that jurisdiction existed under the ATCA, prudential considerations could still counsel against the court hearing the case. *Id.* at 249.

132. *Id.* According to some constitutional law scholars, the doctrine “rests on a blend of themes, in part reflecting normal constitutional interpretation and in part resting on prudential considerations that counsel against rulings that might generate excessive conflicts with the other branches.” GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 45-46 (13th ed. 1997). These authors also recognize that some commentators refute the fact that any such doctrine exists. *Id.* at 46. However, courts continue to look to the Supreme Court opinion of *Baker v. Carr* when confronted with an argument raising the political question doctrine. *Id.* (citing *Baker v. Carr*, 369 U.S. 186 (1962)).

133. *Kadic*, 70 F.3d at 249. Judge Robb did not discuss the ATCA in much detail when he dismissed the action in *Tel-Oren* for lack of subject-matter jurisdiction. *See Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 823 (D.C. Cir. 1989) (Robb, J., concurring). Instead, he relied solely on the “political question” doctrine. *Id.* *See supra* note 97 and accompanying text.

134. *Kadic*, 70 F.3d at 250.

135. 369 U.S. 186 (1962).

136. In *Baker v. Carr*, the Supreme Court set out a number of factors for a court to apply when confronted with the political question doctrine. 369 U.S. at 217. A court is to determine whether the case involves the following:

[1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; [2] a lack of judicially discoverable and manageable standards for resolving it; [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; [4] the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; [5] an unusual need for unquestioning adherence to a political decision already made; [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id.

137. *Kadic*, 70 F.3d at 249 (quoting *Baker*, 369 U.S. at 211).

138. When the court applied the *Baker* factors, it found that the coordinate branch to whom the issue at hand had been committed was “none other than our own—the Judiciary.” Furthermore, the

Department's Legal Adviser denying that the suit presented any nonjusticiable political question further assuaged the court.¹³⁹

The *Kadic* case seems to extend *Filartiga* by expanding of the law of nations to hold private individuals liable. On the other hand, the *Filartiga* court found that only a state "official" could violate the prohibition on torture.¹⁴⁰ However, commentators have recognized the *Kadic* decision as simply an application of the principles laid out in *Filartiga*—that international law must be read as it exists today, and must be found by ascertaining the international consensus on a given violation.¹⁴¹ The *Kadic* court found that the international consensus was to hold individual nonstate actors liable for only certain actions, and that among these are genocide and war crimes.¹⁴²

fact that judicially manageable standards exist for resolving the question at hand "undermines the claim that such suits relate to matters that are constitutionally committed to another branch." *Kadic*, 70 F.3d at 249. Citing to *Filartiga*, the court held that judicially manageable standards of discovering international law did in fact exist, as was shown in that case. *Id.*

The standard's existence "obviates any need to make initial policy decisions of the kind normally reserved for nonjudicial discretion." *Id.*

The final three factors come into play only when "judicial resolution of a question would contradict prior decisions taken by a political branch in those limited contexts where such contradiction would seriously interfere with important governmental interests." *Id.*

139. *Kadic*, 70 F.3d at 250. The letter further noted that "[a]lthough there might be instances in which federal courts are asked to issue rulings under the Alien Tort Statute . . . [i.e., the ATCA] . . . that might raise a political question, this is not one of them." *Id.* The court was quick to point out, however, that "even an assertion of the political question doctrine by the Executive Branch, [although] entitled to respectful consideration, would not necessarily preclude adjudication." *Id.*

The Eleventh Circuit also rejected an argument based upon the political question doctrine as it relates to the ATCA in *Abebe-Jira v. Negewo*. See 72 F.3d 844 (11th Cir. 1996). Without much discussion, the court found that the official torture of former Ethiopian prisoners did not amount to a nonjusticiable political question. *Id.* at 848. The court quoted *Baker*, stating that "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." *Id.* (quoting *Baker*, 369 U.S. at 211).

140. *Filartiga v. Pena-Irala*, 630 F.2d 876, 884 (2d Cir. 1980).

141. See, e.g., Rosen, *supra* note 23, at 491 (acknowledging that "viewing the Second Circuit's decision in *Kadic* as an application, rather than an expansion, of *Filartiga* seems appropriate"). Cf. David P. Kunstle, *Kadic v. Karadzic: Do Private Individuals Have Enforceable Rights and Obligations Under the Alien Tort Claims Act?*, 6 DUKE J. COMP. & INT'L L. 319, 321 (1996) (noting that *Karadzic* "departs substantially" from *Filartiga* by holding nonstate actors liable).

142. *Kadic*, 70 F.3d at 243. Nor was the *Kadic* court the first to recognize private individual liability under international law. The court itself acknowledged that the "liability of private individuals for committing war crimes has been recognized since World War I and was confirmed at Nuremberg after World War II." *Id.* For documentation on the cases at Nuremberg, see Court TV, *Famous Cases: A Look Back at Nuremberg*, Dec. 26, 2001, at <http://www.courtstv.com/casefiles/nuremberg/index.html>.

4. Doe v. Unocal

Doe v. Unocal,¹⁴³ decided by the United States District Court for the Central District of California, is one of the more recent cases to test the limits of the ATCA. In *Unocal*, the court held that a private corporation acting jointly with a state could be held liable under the ATCA for state violations of international law.¹⁴⁴ The plaintiffs were Burmese villagers and the survivors of villagers¹⁴⁵ who alleged that the Burmese military government (called the State Law and Order Restoration Council, or SLORC)¹⁴⁶ used violence and intimidation to relocate entire villages, to torture and enslave farmers, and to rape the women left behind after relocation in order to build a pipeline for the private corporate defendants.¹⁴⁷ The plaintiffs further alleged that the corporate defendants knew of SLORC's human rights abuses, and that by entering into an agreement whereby Unocal paid SLORC to provide armed "security for the pipeline," they benefited from SLORC's use of forced labor.¹⁴⁸ The plaintiffs sued for damages under theories of, *inter alia*, forced labor, crimes against humanity, torture, cruel, inhuman, or degrading treatment, assault and battery, and negligence.¹⁴⁹ The defendants moved for dismissal on the grounds that subject-matter jurisdiction did not exist under the ATCA.¹⁵⁰

In denying the defendants' motion, the court drew from both Ninth¹⁵¹ and Second Circuit¹⁵² precedent. The court held that subject-matter jurisdiction existed under the ATCA because the defendants had acted under color of law to effectively commit human rights violations, even though the SLORC

143. 963 F. Supp. 880 (C.D. Cal. 1997).

144. *Id.* at 891.

145. *Id.* at 883.

146. The SLORC government renamed the country Myanmar shortly after coming into power. *Id.* at 884.

147. *Id.* at 885. The defendants were actually two corporations, Unocal Corporation and Total Corporation. *Id.*

148. *Id.*

149. *Id.* at 883-84.

150. *Id.* at 884.

151. The court relied on the seminal Ninth Circuit case construing the ATCA, *In Re Estate of Ferdinand E. Marcos Human Rights Litigation (Marcos II)*, 25 F.3d 1467 (9th Cir. 1994). *Unocal*, 963 F. Supp. at 890.

152. The court relied on *Kadic* for the proposition that international law can indeed hold private individuals liable for a "handful of crimes." *Unocal*, 963 F. Supp. at 891-92. The court even noted that its holding squared with Judge Edwards' opinion in *Tel-Oren*. The court noted that despite holding that the *Tel-Oren* plaintiffs had no jurisdiction under ATCA, Judge Edwards had recognized that in some circumstances private individual liability may lie under international law, even absent state action. *Id.* at 891.

government actually carried out the torture and forced labor.¹⁵³ In effect, the court treated the private corporate defendants as though they were state actors for the purposes of international law.¹⁵⁴ This rationale was necessary to uphold a finding of subject-matter jurisdiction over the torture claims because, according to the *Kadic*¹⁵⁵ and *Tel-Oren*¹⁵⁶ courts, international law requires that a state “official” carry out the torture.¹⁵⁷

The color of law rationale was not necessary to find jurisdiction over the forced labor claims.¹⁵⁸ The court held that forced labor was an international law violation that private entities could indeed commit and did not require official state action.¹⁵⁹ Pointing to both Judge Edwards’ *Tel-Oren* concurrence and the Second Circuit’s *Kadic* opinion, the court noted the long history of including slave trading in “that ‘handful of crimes’ for which the law of nations attributes [private] individual responsibility.”¹⁶⁰ The court found that forced labor by SLORC, coupled with payment by the defendants for SLORC’s services, was tantamount to slave trading.¹⁶¹ Therefore, the private defendants could be held liable for violating the international law prohibiting slave trade.¹⁶²

153. *Id.*

154. *See id.* at 891-92. The *Unocal* court followed the *Kadic* court’s holding that the ACTA’s “color of law” requirement be examined under the standards developed for the Civil Rights Act. *Id.* *See supra* note 130. Examining Supreme Court precedent interpreting 42 U.S.C. § 1983, the court found that a private party can act under color of law when it acts in concert with the state. 963 F. Supp. at 891. This “joint action” rationale led the court to hold that the plaintiffs had sufficiently alleged that the defendants were “jointly engaged with state officials” so that the defendants were acting under color of law. *Id.*

155. *Kadic*, 70 F.3d at 243. *See supra* text accompanying note 125.

156. *Tel-Oren*, 726 F.2d at 777 (Edwards, J., concurring). *See supra* text accompanying note 78.

157. The court did not need to conduct a search of the customs of civilized nations or the juridical writings of international law scholars to determine that torture violates international law because the court was bound by the Ninth Circuit decision, *In re Estate of Ferdinand E. Marcos Human Rights Litigation (Marcos II)*. *Unocal*, 963 F. Supp. at 890 (citing *In re Estate of Ferdinand E. Marcos Human Rights Litigation*, 25 F.3d 1467 (9th Cir. 1994)). In *Marcos II*, the Ninth Circuit held that the prohibition on torture is actually a *jus cogens* norm. 25 F.3d at 1475. *See supra* note 56.

158. The court found two reasons for finding subject-matter jurisdiction over the forced labor allegations: first, private individuals were working in concert with the state, and second, the slave-trade rationale. *Unocal*, 963 F. Supp. at 891-92. *See infra* text accompanying note 161.

159. *Unocal*, 963 F. Supp. at 891. The *Kadic* court held that genocide and war crimes were also violations that private individuals could commit. *See supra* text accompanying notes 117, 120.

160. *Unocal*, 963 F. Supp. at 891-92.

161. *Id.*

162. A possible explanation for the court offering two rationales for finding jurisdiction over the forced labor claim is that, as the *Unocal* court itself acknowledged, the Ninth Circuit had not directly confronted the question whether private individuals could be held liable under international law. *Id.* at 892 n.10. In using the slave-trade rationale, the District Court actually followed Second Circuit precedent because the Ninth Circuit’s private liability holdings conflicted with one another. In *Marcos I*, the Ninth Circuit “stated, without significant analysis, that “[o]nly individuals who have acted under official authority or under color of such authority may violate international law.” *Unocal*, 963 F.

In sum, the interpretation of the ATCA and its effectiveness as a “watchdog” against human rights abuses underwent a major shift with the *Filartiga* decision and has come a long way since then.¹⁶³ The ATCA expanded out of the purely public sphere with the *Kadic* decision¹⁶⁴ and crossed the murky line into the private domain where it seems to be firmly planted in *Unocal*.¹⁶⁵ The *Unocal* decision has been viewed as part of a big step forward in the fight for human rights.¹⁶⁶ Although *Unocal* was ultimately dismissed on the merits,¹⁶⁷ the basic premise that even large multinational corporations can be held liable based on their complicity with foreign governments has drawn much attention and some criticism.¹⁶⁸

Supp. at 891 (quoting *In re Estate of Ferdinand E. Marcos, Human Rights Litigation (Marcos I)*, 978 F.2d 493, 501 (9th Cir 1992)). However, in *Hamid v. Price Waterhouse*, the “Ninth Circuit ignored its earlier comment . . . and merely noted . . . that it did ‘not need to reach the issue of whether the law of nations applies to private as opposed to governmental conduct.’” *Unocal*, 963 F. Supp. at 892 n.10 (quoting *Hamid v. Price Waterhouse*, 51 F.3d 1411, 1417 (9th Cir. 1995)). Therefore, the color-of-law rationale that the *Unocal* court employed was in line with this Ninth Circuit dictum because the court found that the defendant was acting under color of state law. *Id.* at 891.

163. In his opinion in *Tel-Oren*, Judge Edwards asserted that he was “substantially in accord” with *Filartiga*. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 77 (D.C. Cir. 1984) (Edwards, J., concurring). See discussion *supra* Part II.C.2. The Second Circuit expounded on the *Filartiga* principles to hold that private individuals could be held liable for some violations of international law. *Kadic v. Karadzic*, 70 F.3d 232, 239-40 (2d Cir. 1995). See discussion *supra* Part II.C.3. Finally, the *Unocal* court concluded that a private corporate defendant could itself be liable for violations of international law that require state action, merely by acting in concert with a state. *Unocal*, 963 F. Supp. at 891. See discussion *supra* Part II.C.4.

164. Note that *Kadic*, like *Filartiga*, was a Second Circuit opinion. See discussion *supra* Part II.C.3.

165. Note that although *Unocal* was a District Court decision in the Ninth Circuit, the Court drew on principles from the more developed law in the Second Circuit. See discussion *supra* note 162.

166. See Elizabeth Amon, *Coming to America: Alien Tort Claims Act Provides a Legal Forum for the World*, NAT. L.J., Oct. 23, 2000, at A1.

167. See *Doe v. Unocal*, 110 F. Supp. 2d 1294 (C.D. Cal. 2000). On defendant’s motion for summary judgment, the court found that the plaintiffs had not presented evidence that the defendant had participated in or influenced the SLORC military’s conduct or that the defendants had “conspired” with the military. *Id.* at 1306-07. Furthermore, the court found that no evidence showed that the defendants had “controlled” the military’s decision to commit the violations. *Id.* at 1307. Based upon these findings, the court found for the defendants on the plaintiffs’ claims that Unocal had acted under “color of law.” *Id.*

The court also found for the defendants on the forced labor claims, pointing out that there were “no facts suggesting that Unocal sought to employ forced or slave labor.” *Id.* at 1310. In addition, the court held that while Unocal may have known about the military’s use of forced labor and benefited from it, “such a showing is insufficient to establish liability under international law.” *Id.*

168. See *Slaughter & Bosco*, *supra* note 11, at 103 (warning that holding private corporations liable will subject developing countries to conflicting pressures). See also *infra* note 200.

III. RECENT CRITICISM CONCERNING MODERN USE OF THE ATCA

A. *Constitutional Arguments*

1. *The Political Question Doctrine*

Several defendants in ATCA actions have raised the defense that the claims before the court constitute nonjusticiable political questions because of their international, and therefore political, nature.¹⁶⁹ This constitutional doctrine prohibits courts from deciding issues that are best left to the political branches.¹⁷⁰ However, courts disagree as to whether the doctrine should apply to ATCA cases.¹⁷¹ A strong proponent of applying the doctrine in these suits was Judge Roger Robb, as shown by his concurrence in *Tel-Oren*.¹⁷² Judge Robb hardly examined the ATCA at all, but rather held that the question was a political one and therefore not fit to be decided by the judiciary.¹⁷³

2. *The Act of State Doctrine*

The act of state doctrine holds that a court in one country may not “sit in judgment on the acts of the government of another done within its own territory.”¹⁷⁴ The doctrine arose under common law,¹⁷⁵ but according to the Supreme Court, has “‘constitutional’ underpinnings.”¹⁷⁶ The Supreme Court’s rationale is that a judicial pronouncement on the validity of foreign acts may “hinder rather than further this country’s pursuit of goals.”¹⁷⁷ Defendants to ATCA claims often invoke the doctrine, although such a

169. The *Tel-Oren* and *Kadic* courts confronted this issue. *See supra* notes 97, 131-39.

170. *See supra* note 132.

171. Compare the opinions of Judges Bork and Robb in *Tel-Oren* with the *Kadic* decision. *See supra* notes 97, 132-39 and accompanying text. While Judges Bork and Robb base their opinions in large part on the political question doctrine, the *Kadic* court simply applied the *Baker* factors and found no justiciability problem at all. *See supra* note 136.

172. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 823 (D.C. Cir. 1984) (Robb, J., concurring).

173. *Id.*

174. *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897).

175. *See JANIS & NOYES, supra* note 11, at 688.

176. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964). The constitutional implications arise from the doctrine’s concern with the “basic relationships between branches of government in a system of separation of powers.” *Id.* In his *Tel-Oren* concurrence, Judge Bork expressed his opinion that the act of state doctrine should be merged with the political question doctrine because both deal with fundamental separation of powers principles. *Tel-Oren*, 726 F.2d at 805 (Bork, J., concurring). He posited that the analysis in each should be along the same lines. *Id.*

177. *Sabbatino*, 376 U.S. at 423.

defense has not yet been successful. However, no court has ruled definitively that a bright line rule exists as to whether the doctrine applies to ATCA claims.¹⁷⁸ Therefore, litigants contest the issue in every ATCA claim, and it is still a hurdle for every plaintiff to overcome.¹⁷⁹

B. Interpretation of the ATCA

As the above discussion discloses, courts disagree on how to interpret the ATCA. An early issue of contention was whether the ATCA grants a plaintiff a cause of action as well as a federal forum.¹⁸⁰ The *Filartiga* court did not confront the issue, but Judges Edwards and Bork in *Tel-Oren* strongly disagreed with one another.¹⁸¹ Judge Edwards argued that international law by its very nature does not grant a cause of action to prospective plaintiffs, but rather leaves each state to decide how its municipal law will deal with international law violations, if at all.¹⁸² He argued that it would therefore be contrary to the intent of the ATCA to find that it denies plaintiffs a cause of action and only grants a federal forum.¹⁸³ In that case, aliens would actually have no forum at all because they would not be able to find any right to sue in international law.¹⁸⁴ Judge Bork disagreed, believing that for reasons related to the act of state doctrine, the ATCA should not be read to grant the alien a right to sue.¹⁸⁵

A second point of contention over ATCA interpretation is whether

178. Margaret G. Perl, *Not Just Another Mass Tort: Using Class Actions to Redress International Human Rights Violations*, 88 GEO. L.J. 773, 790 (2000).

179. *Id.* at 790.

180. In addition to Judges Edwards and Bork in *Tel-Oren*, the *Kadic* court recognized the issue. *Kadic v. Karadzic*, 70 F.3d 232, 246 (2d Cir. 1995). However, in *Kadic* the court found it unnecessary to decide definitively whether the ATCA grants a cause of action and simply rested its holding on *Filartiga*. *Id.*

181. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 777-78 (D.C. Cir. 1984) (Edwards, J., concurring). Judge Edwards believed that the ATCA granted both a forum and a right to sue, but Judge Bork held that the ATCA only granted the forum. *Id.* at 799 (Bork, J., concurring). He believed that the alien must invoke some other substantive right to sue. *Id.* See also *supra* note 88 and accompanying text.

182. *Tel-Oren*, 726 F.2d at 777-78 (Edwards, J., concurring).

183. *Id.* More precisely, Judge Edwards argued that holding that the ATCA does not grant a cause of action would eviscerate a portion of the Act completely because, according to Judge Edwards, international law by definition does not grant causes of action. *Id.*

184. See *id.* at 778. Judge Edwards also argued that the ATCA does not use the “arising under” language that the federal question jurisdiction statute does, and that Congress would have used that language if its intent had been to require a showing of a separate cause of action. *Id.* at 779. See also 28 U.S.C. § 1331 (1994 & 1998 Supp.)

185. *Tel-Oren*, 726 F.2d at 804 (Bork, J., concurring). See *supra* notes 92-96 and accompanying text.

international law can apply to private individuals.¹⁸⁶ Rather than maintaining a *per se* rule that no private individual can be liable under the ATCA, courts have generally looked to the specific substantive international law violation to determine whether private individuals are susceptible to such claims.¹⁸⁷ However, at least one judge in the *Tel-Oren* court believed that, as a general rule, international law as a whole applied only to actions of states.¹⁸⁸

Finally, courts debate whether *Filartiga* correctly reasoned that the ATCA refers to international law as it exists today, or as it existed in 1789, the time of the ATCA's original passage.¹⁸⁹ Judge Bork in *Tel-Oren* noted that while the law of nations may evolve, courts must view international law as it existed in 1789 in order to apply the legislative intent of the ATCA.¹⁹⁰ Judge Bork argued that because no concept of "international human rights" existed at that time, Congress could hardly have intended courts to use the ATCA in the way that the *Filartiga* court construed it.¹⁹¹

More courts seem to favor the *Filartiga* interpretation of the ATCA than the *Tel-Oren* approach.¹⁹² In addition, recent cases "expanding" on *Filartiga* are really applications of the original ideas set down by the Second Circuit.¹⁹³ This holds true especially concerning the private nonstate actor liability under international law.¹⁹⁴ The second Circuit successfully rebutted the *Tel-Oren* criticism that international law can never apply to private individuals. In *Kadic*, the Court simply remained true to the principle of *Filartiga* that international law can evolve, and must be interpreted as it exists today.¹⁹⁵

186. See *supra* notes 80, 110-24 and accompanying text. Compare the opinions of Judges Edwards and Bork to that of the *Kadic* court.

187. See *Kadic v. Karadzic*, 70 F.3d 232, 243 (2d Cir. 1995).

188. See *Tel-Oren*, 726 F.2d at 805-06 (Bork, J., concurring).

189. See *supra* notes 45, 62 and accompanying text.

190. *Tel-Oren*, 726 F.2d at 813 (Bork, J., concurring). See *supra* note 82 and accompanying text.

191. See *Tel-Oren*, 726 F.2d at 813.

192. At least two other circuits now accept the *Filartiga* interpretation. See *Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996); *In Re Estate of Ferdinand Marcos, Human Rights Litigation*, 25 F.3d 1467 (9th Cir. 1994). In addition, the Fifth Circuit was faced with an ATCA suit, which it dismissed on other grounds. *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161, 165 (5th Cir. 1999) (acknowledging *Filartiga* and *Kadic* but noting that "[a]lthough the day may come when we will have to join other jurisdictions who have tackled head-on complex issues involving international law, this case, however, does not require that we stand up and be counted") (citations omitted).

193. See *supra* notes 140-42 and accompanying text. The *Filartiga* court set out the framework for ATCA analysis, and one of the most important concepts recognized by the court was the evolutionary nature of international law. See *Filartiga*, 630 F.2d 876, 881.

194. Many ATCA plaintiffs revert to suing private individuals because of the foreign sovereign immunity of heads of state. Therefore, private nonstate actor liability is crucial to the success of many ATCA claims. See *Rosen*, *supra* note 23, at 491. See also *Perl*, *supra* note 178, at 788-92.

195. See *supra* note 51. The fundamental disagreement seems to be whether a *per se* rule exists with respect to private liability under the law of nations. The *Tel-Oren* court answers in the affirmative. See *Tel-Oren*, 726 F.2d at 776-77 (Edwards, J., concurring). However, the *Kadic* court

Furthermore, international law “jurists”¹⁹⁶ have agreed with the proposition that in some cases the law of nations does place responsibility on private individuals, as evidenced by the Nuremberg trials after World War II.¹⁹⁷ This area of ATCA interpretation has solid foundations and has developed logically into a well-formed body of law that should not be abandoned despite some discontent by the D.C. Circuit.¹⁹⁸

C. Policy-Based Criticism

Some scholars argue that in hearing ATCA litigation, courts delve into a very sensitive area because of the resulting “powerful impact on America’s international relations.”¹⁹⁹ Two concerns are that these suits lead to the politicization of American courts²⁰⁰ and that haphazard litigation coupled

disagrees, holding that the answer depends on the specific violation. *See Kadie*, 70 F.3d at 241-42. *See also supra* notes 186-88.

196. Such scholars are “trustworthy evidence of what the law [of nations] really is.” *The Paquete Habana*, 175 U.S. 677, 700 (1900).

197. *See JANIS & NOYES, supra* note 11, at 316 (quoting Mark W. Janis, *Individuals as Subjects of International Law*, 17 CORNELL INT’L L.J. 61 (1984)).

198. *See Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 808 (D.C. Cir. 1984).

199. *Slaughter & Bosco, supra* note 11, at 102.

200. *See id.* Scholars note that the politicization of American courts creates conflicting pressures on the governments of developing countries when the ACTA defendants are private corporations. *Id.* at 110. The argument is that developing countries are greatly dependent on foreign investment. While an ATCA suit may generate massive public support tending to push the government to side with the plaintiff, a large verdict against the corporation could scare away future investment. Loss of investment could harm the country further and thus encourage the government to side with the corporate defendant. *Id.* Furthermore, scholars argue that each country needs to set its own “economic priorities” and timetable for improving its human rights situation, policies that should not be dictated by an American court. *Id.* at 111.

A related concern is the lack of political accountability for the nongovernmental organizations (NGOs) that bring most ATCA suits. *Id.* at 110-11. Although the authors of *Plaintiff’s Diplomacy* do not explore this concern in great detail, it is an important one that deserves a response. The argument is presumably that a political check on the plaintiffs prevents baseless claims from being filed. The danger of frivolous suits is the high profile nature of claims and the concomitant mixed pressures on a government that result from a suit against a private corporate defendant. *See generally id.*

The potential for corporate liability that would reduce a country’s foreign investment can, however, provide a very strong incentive to a government to improve its human rights record. *Id.* Moreover, this pressure will not likely be misused by greedy plaintiffs because private corporations can only be held liable under the ATCA for the most egregious violations of human rights, such as slavery, genocide, and war crimes. *See supra* notes 110, 159 and accompanying text. The heinous nature of such crimes is undisputed, and they cannot be justified by fitting them under the rubric of an “economic priority.” *See supra* Parts II.C.1, 3, 4 for a discussion of court decisions finding certain actions so universally condemned that they have become prohibited by international law. In addition, the rationale behind requiring litigants in a dispute to have “public accountability” is not persuasive. Our system of government is more concerned with the checks and balances between branches of government than with making plaintiffs to a dispute politically accountable. *See, e.g., HERBERT JACOB ET AL., COURTS, LAW, AND POLITICS IN COMPARATIVE PERSPECTIVE* 21-24 (1996) (noting the political nature of U.S. courts and its use of the adversarial system). In any event, many checks already

with high damages awards is not the method by which grave international issues should be resolved.²⁰¹

1. Politicization of the Judiciary

At the heart of much skepticism surrounding the ATCA lies the belief that the courts should simply not be involved in international relations matters.²⁰² The act of state doctrine, the political question doctrine, and the arguments by some scholars concerned with the politicization of the courts all underlie this position.²⁰³ However, as the Supreme Court has noted, this knee-jerk reaction against adjudicating issues associated with foreign relations is unwarranted.²⁰⁴ The judicial branch has often been involved in political matters.²⁰⁵ In fact, it is probably more accurate to conceptualize the judiciary's role in the system as bringing to bear an independent judgment on the matter, as opposed to the concern that the matter itself will destroy the independence of the judiciary. Furthermore, the fact that international relations involve some political issues should not be used to preclude the involvement of the judiciary, especially in the adjudication of human rights as fundamental as the freedom from genocide, torture, and war crimes. That these acts are forbidden by international law is undebatable.

prevent misuse of the ATCA. *See Rosen, supra* note 23, at 491. Courts primarily provide a check against specious claims, and they are often helped by briefs from the Department of State. In fact, the *Kadic* Court affirmatively consulted the Department of State. *See supra* note 139 and accompanying text. Furthermore, the many hurdles plaintiffs must overcome to bring an ATCA claim will severely limit their number. As one example, commentators point to the difficulty that plaintiffs often encounter when attempting to bring an ATCA claim, including the fact that no bright line rule yet exists on the act of state doctrine or the political question doctrine. *See Rosen, supra* note 23, at 491. *See also* Perl, *supra* note 178, at 788-92. A plaintiff would have to be very determined and very lucky to successfully bring a purely harassing and baseless claim.

201. Scholars argue that reform in a country's human rights standards should be the result of a more controlled approach, such as deliberation by foreign policy experts, instead of ad hoc litigation. *See generally* Slaughter & Bosco, *supra* note 11. Commentators reason that not all countries can share the same goals concerning their economic priorities or development policies. *Id.*

202. *See* Thadhani, *supra* note 11, at 636-37.

203. The act of state and political question doctrines overlap in this sense because they are both concerned with fundamental separation of powers principles. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 805 (D.C. Cir. 1984) (Bork, J., concurring). *See supra* note 176.

204. The Court in *Baker v. Carr* made it clear that "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." 369 U.S. 186, 211 (1962).

205. Perhaps the most striking contemporary example is the judicial involvement in the 2000 presidential elections at both the federal and state levels.

2. *Litigation as the Weapon of Choice*

The argument that haphazard litigation and the “clumsy weapons” of massive damages awards are inappropriate methods of dealing with human rights abuses deserves close scrutiny.²⁰⁶ The proponents of this argument assert that “smart sanctions,” which can be carefully formulated and imposed by the executive, should be used instead.²⁰⁷ However, these “massive” damages awards have gone unpaid in all ATCA cases so far.²⁰⁸ In fact, most ATCA plaintiffs rely on free services provided by nongovernmental organizations to organize and bring their claims to court.²⁰⁹ The damages awards at the moment serve two functions: as a public declaration for the plaintiffs and as a constraint on the human rights violator’s freedom to enter the United States in the future for fear of having his assets attached by the court.²¹⁰

The weapons of damages awards could conceivably still be termed “clumsy” in that they are not narrowly tailored to a specific type of violation. However, ATCA plaintiffs generally have received no redress at all prior to filing suit. In fact, the very failure of the Japanese government to offer so much as an apology drove the Japanese “comfort women” to sue.²¹¹ Congress “ignored” the Mugabe plaintiffs²¹² when it failed to pass the

206. See generally Slaughter & Bosco, *supra* note 11.

207. *Id.* at 113. The scholars’ argument is that carefully tailored sanctions would more effectively achieve their purpose because they can be directed at individual leaders rather than adversely affecting the general population, which such sanctions are supposed to protect. *Id.*

208. See generally Amon, *supra* note 166.

209. *Id.*

210. Slaughter & Bosco, *supra* note 11, at 106 (noting that the “principal benefit of [ATCA] suits to their plaintiffs is the public attention they generate”). Travel restrictions on the violator have a very real effect as well. Zimbabwean President Robert Mugabe was nearly placed under citizen’s arrest in London for human rights violations, and has not been back to the United Kingdom since that time. See *Mugabe: UK set ‘gay gangsters’ on me*, BBC NEWS, Nov. 8, 1999, at http://news.bbc.co.uk/hi/english/world/africa/newsid_508000/508712.stm. An activist from a gay pressure group in the United Kingdom attempted to perform a citizen’s arrest on Mugabe for his alleged human rights abuses against the people of Zimbabwe. *Id.* The same activist attempted the arrest a second time in Belgium. *Tatchell defends Mugabe ‘Arrest,’* BBC NEWS, Mar. 6, 2001 at http://news.bbc.co.uk/hi/english/uk/newsid_1204000/1204719.stm. Mugabe has now been found liable under the ATCA in the United States and will likely be extremely hesitant to continue living the lifestyle of international travel that he has so enjoyed during his twenty years in power. *Tachiona v. Mugabe*, 169 F. Supp. 2d 259, 318 (S.D.N.Y. 2001) (entering default judgment against Mugabe and holding that while Mugabe enjoyed head of state immunity, he may be held liable as the head of his political party because he was sued in both capacities).

211. See *15 to Sue Japan in U.S. over Sex Slavery*, N.Y. TIMES, Sept. 16, 2000, at A5. The District Court for the District of Columbia has since dismissed the “comfort women” suit. See *Hwang Geum Joo v. Japan*, 172 F. Supp. 2d 52, 55 (D.D.C. 2001) (dismissing suit on the basis of the Foreign Sovereign Immunities Act with no discussion of the ATCA).

212. See *supra* note 8 and accompanying text.

Zimbabwe Democracy Act immediately after parliamentary election violence in that country.²¹³ The United States normalized trade relations with China²¹⁴ despite the human rights violations for which the Li Peng plaintiffs filed suit.²¹⁵ The courts, through the ATCA, are therefore providing a much needed forum to empower disenfranchised victims after the executive and legislative branches have passed on the issue and subsequently neglected it. An ATCA suit has enormous potential to spur future negotiation and perhaps encourage a settlement.²¹⁶ Even if the somewhat predictable pattern of ATCA suits can be termed “haphazard,” these suits are better than forgoing negotiation on the issue because of the fundamental rights involved in almost every ATCA case.²¹⁷

Finally, the United States is not alone in bearing the perceived burden of righting international wrongs. In fact, “English law relies heavily on precedent from the United States” in delineating the “proper relationship between domestic and international law.”²¹⁸ In addition, New Zealand is at the forefront of a new approach in sovereign immunity law in the context of *jus cogens* violations.²¹⁹ Modern ATCA litigation, then, is leading the way for the United States and the rest of the world to finally deal forcefully with violators of human rights. Nothing short of a fundamental change in the way politicians deal with these violators should stop this truly phenomenal development.

213. See Iden Wetherell & Rashweat Mukundu, *Zimbabwe Democracy Bill Stalls*, ZIM. INDEP., Sept. 22, 2000, at 1. Subsequent to the judgment of the District Court for the Southern District of New York against Mugabe, the U.S. Congress passed the Zimbabwe Democracy and Economic Recovery Act (ZDERA). Christopher Marquis, *U.S. Is Trying to Lure Zimbabwe to Democracy*, N.Y. TIMES, Dec. 5, 2001, at A14. ZDERA has been described as a type of “targeted sanction” in that it imposes sanctions on President Mugabe and his ruling elite directly while leaving the innocent citizens of the country untouched. *Sanctions Loom for Zimbabwe*, BBC NEWS, Dec. 5, 2001 at http://news.bbc.co.uk/1/hi/english/world/africa/newsid_1693000/1693150.stm.

214. See CNN.COM, *Clinton Signs China Trade Bill Tuesday*, <http://www.cnn.com/2000/ALLPOLITICS/stories/10/10/clinton.china/index.html> (last modified Oct. 10, 2000).

215. See *supra* note 9 and accompanying text.

216. Slaughter & Bosco, *supra* note 11, at 108 (observing that while political and private negotiation has ultimately settled many disputes, “it was litigation that put the issue on the agenda in the first place”).

217. The holding in *Kadic* effectively limits ATCA suits against nonstate actors to only those involving grave violations of fundamental human rights. *Kadic v. Karadzic*, 726 F.3d 232, 239-40 (2d Cir. 1995). Genocide is a cognizable claim against a nonstate actor, whereas torture is not. *Id.* See *supra* note 110.

218. Rosen, *supra* note 23, at 507-08.

219. *Id.* at 513.

IV. THE WAY FORWARD

The ATCA has yielded tremendous gains in empowering the United States judiciary to bring to justice autocratic leaders who have little or no concern for human rights. However, a much more complete response is needed.²²⁰ Before this response can occur the problem must accurately defined.

At the heart of an ATCA claim is a plaintiff who has been seriously wronged, invariably by a political establishment that is pursuing its own objectives regardless of the human cost. The plaintiffs in the Mugabe lawsuit are a clear example of the high costs inflicted by the single-minded pursuit of political self-interest.²²¹ The plaintiffs are all victims of state-sponsored political violence committed by an administration attempting to hold on to power by any means necessary and for whom the resulting loss of life and disregard for basic human rights are no barrier.²²² The plaintiffs incurred the wrath of the state and truly have nowhere else to turn.²²³

In addition, many observers accuse Mugabe of using the state instrumentality for his own personal enrichment.²²⁴ Such observers claim that Mugabe's primary concern lies not with the good of his constituents, but with his own personal wealth and power.²²⁵ Furthermore, the immense power inherent in the machinery of even a small third-world state is no match for a despised and outcast individual, despite what the international order defines as "human rights."²²⁶ In the case against Mugabe, the District Court for the

220. The goal of such a response should be to eliminate the *source* of the human rights violations and not merely to compensate the victim of one particular instance of such.

221. The plaintiffs in the Mugabe suit all allege that he committed atrocities during the run-up to parliamentary elections in which Mugabe's party sought a victory at any cost. See *Tachiona v. Mugabe*, 169 F. Supp. 2d 259, 266-67 (S.D.N.Y. 2001). See also *supra* note 7.

222. Such violations continued after the filing of the suit, and even after the default judgment was entered for the plaintiffs. 'They Say the Law Can Burn in Hell . . .', THE GUARDIAN, Mar. 3, 2001, at <http://www.guardian.co.uk/Archive/Article/0,4273,4145507,00.html>; Ann M. Simmons, *Tension Rises as Zimbabwe Tries to Stifle Dissent*, L.A. TIMES, Nov. 21, 2001, at A20.

223. See *Zimbabwe President Accused of Orchestrating Terror in U.S. Suit*, CNN.COM Sept. 13, 2000, at <http://cnn.com/2000/WORLD/africa/09/10/us.mugabesued.ap/index.html>. See also *Forced to Flee Zimbabwe*, BBC NEWS Feb. 5, 2001, at http://news.bbc.co.uk/1/hi/english/world/africa/newsid_818000/818766.stm.

224. See Rotberg, *Africa's Mess, Mugabe's Mayhem*, FOR. AFFAIRS, Sept./Oct. 2000, at 47, 53 (denouncing Mugabe's decision to send Zimbabwean troops to the Democratic Republic of Congo in exchange for diamond concessions from that government).

225. See *id.* The United Nations has denounced the Zimbabwe government's economic "looting" of the Democratic Republic of Congo. *DR Congo 'Looters' Condemned*, BBC NEWS, Nov. 20, 2001, at http://news.bbc.co.uk/1/hi/english/world/africa/newsid_1665000/1665952.stm.

226. The atrocities mentioned above committed in China, Zimbabwe, and Japan are examples of the relative powerlessness of the individual against state machinery. See *supra* text accompanying notes 7-10, 211-15.

Southern District of New York entered a default judgment against the Zimbabwean president.²²⁷ The court found that Mugabe could be held liable in his capacity as head of his political party, even though he enjoys head of state immunity.²²⁸ Yet, the difficulty attendant in bringing a successful ATCA claim, coupled with a money judgment that will only serve to deter a defendant's international travel plans, amounts to only a very small hiccup in the running of a well-greased state engine.

No single congressional act will likely be able to deal with this problem conclusively.²²⁹ However, the United States and the First World must do all they can to prevent themselves from inadvertently aiding violators of fundamental human rights. First, countries should take scrupulous care not to lend the protection of the state to the personal wealth of these autocrats.²³⁰ Included in this idea is that ATCA remedies should be made easier to collect from the individual defendants, given that much of the offending dictators' assets lie in First World countries' financial institutions.²³¹ In addition, corporate responsibility in dealings with foreign countries is a necessity. This responsibility could take the form of mandating careful analysis of the likely immediate impacts on human rights arising from an intended project.²³² The ATCA, therefore, is one small part of a possible overall scheme to at least lessen the curse of serious violators of human rights.

227. *Tachiona v. Mugabe*, 169 F. Supp. 2d 259, 318 (S.D.N.Y. 2001).

228. *Id.* at 309.

229. Rather, the solution will most likely have to involve international cooperation between countries that have already begun dealing with the problem judicially. *See supra* text accompanying notes 218-19. *See also* Thomas E. Vanderbloemen, 50 DUKE L.J. 917, 931 (2000) (discussing the possible influence on ATCA suits of the proposed Hague convention, which "would obligate a contracting state's courts to observe certain rules for jurisdiction . . . and to recognize and enforce civil and commercial judgments rendered by the courts of other contracting states as long as the rendering court had observed the prescribed jurisdictional rules").

230. Care should also be taken to prevent dictators from publicly floating stock in companies that profit from ill-gotten gains. One example is the recent furor over the fact that Mugabe's political party is involved with Oryx, a company involved in extracting so-called "blood diamonds" from the former Zaire. *See Diamond Row Scuppers Float*, BBC NEWS, Feb. 5, 2001, at http://news.bbc.co.uk/hi/english/business/newsid_787000/787698.stm (noting the British government's influence in preventing Oryx from floating stock on the London Stock Exchange due to that company's involvement with "blood diamonds" and the company's murky ties with the Zimbabwean government).

231. *See Sanctions Loom for Zimbabwe*, BBC NEWS, Dec. 5, 2001, at http://news.bbc.co.uk/hi/english/world/africa/newsid_1693000/1693150.stm (describing sanctions that have the effect of "freezing *foreign* assets belonging to President Robert Mugabe") (emphasis added). For example, Congress could pass financial regulations that make it easier to track and freeze a foreign dictator's U.S. assets.

232. The similarity to an endangered species impact assessment is intentional because human life should be valued more highly than that of an endangered wild species. *See* 16 U.S.C. § 1536(a)(2) (1994).

V. CONCLUSION

The recent development in ATCA litigation is without a doubt extraordinarily positive. However, in its current state, the Act is merely one small contribution to what should be a comprehensive scheme aimed at the root cause of the problem—defiant autocrats using state machinery for personal goals. Once a comprehensive approach is accomplished, international human rights will achieve the important stature that their nature demands.

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