

April 2012

The Future of the Alien Tort Claims Act of 1789: Lessons from In re Marcos Human Rights Litigation

Joan Fitzpatrick

Follow this and additional works at: <https://scholarship.law.stjohns.edu/lawreview>

Recommended Citation

Fitzpatrick, Joan (1993) "The Future of the Alien Tort Claims Act of 1789: Lessons from In re Marcos Human Rights Litigation," *St. John's Law Review*: Vol. 67 : No. 3 , Article 3.
Available at: <https://scholarship.law.stjohns.edu/lawreview/vol67/iss3/3>

This Symposium is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in St. John's Law Review by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact selbyc@stjohns.edu.

THE FUTURE OF THE ALIEN TORT CLAIMS ACT OF 1789: LESSONS FROM *IN RE MARCOS HUMAN RIGHTS LITIGATION*

JOAN FITZPATRICK*

INTRODUCTION

On September 24, 1992, a federal civil jury in Honolulu rendered a verdict for the plaintiffs in the multidistrict human rights litigation against the estate of Ferdinand Marcos and several of his former associates and family members.¹ *In re Marcos Human Rights Litigation* ("Marcos") is a milestone for the Alien Tort Claims Act ("ATCA")² for several reasons. First, *Marcos* was the first human rights case brought under the ATCA to be fully contested in a trial on the merits, illustrating the numerous obstacles that plaintiffs must overcome in proving human rights allegations. Second, *Marcos* was the first human rights case under the ATCA to be decided by a jury, testing the ability and willingness of ordinary Americans to provide redress for violations of fundamental human rights committed abroad. Third, *Marcos* was the first human rights case under the ATCA to be brought as a class action, presenting unique issues of proof, damages, and potential divergence of priorities among victims, nongovernmental organizations and counsel.

The Ninth Circuit's October 1992 disposition of a separate appeal by Imee Marcos-Manotoc, from a default judgment entered against her on behalf of the survivors of Archimedes Trajano,³ presents a challenging new view of the relevance of the Foreign

* Professor and Associate Dean for Academic Affairs, University of Washington; B.A., Rice University; J.D., Harvard Law School; Diploma in Law, Oxford University. I would like to thank Dan Bodansky and Paul Hoffman for comments, the Ford Foundation and the University of Washington Law School Foundation for research support, and Matthew Miller for his fine research assistance.

¹ *In re Ferdinand E. Marcos Human Rights Litigation*, MDL No. 840 (D. Haw. Sept. 24, 1992) [hereinafter *Marcos*]. For a discussion of the *Marcos* case, see *Jury: Marcos' Estate Liable for Atrocities*, CHI. TRIB., Sept. 25, 1992, at 18.

² 28 U.S.C. § 1350 (1988).

³ *In re Marcos Human Rights Litigation* (Trajano v. Marcos and Marcos-Manotoc), 978 F.2d 493 (9th Cir. 1992), cert. denied sub nom. Marcos-Manotoc v. Trajano, 113 S. Ct. 2960 (1993) [hereinafter *Trajano II*].

Sovereign Immunities Act ("FSIA")⁴ to suits against individual officials under the ATCA. Although foreign sovereign immunity was rejected as a defense, the implications of the *Trajano* opinion could lead to severe limits on jurisdiction under both the ATCA and the recently enacted Torture Victim Protection Act ("TVPA").⁵ While these consequences might be avoided by the transplantation of the *ultra vires*/under color of law paradox⁶ from constitutional tort doctrine into the realm of human rights litigation, that already vexing doctrine presents additional difficulties in the international human rights context.

Two suits filed by Bosnian war victims against Radovan Karadzic, the Bosnian Serb leader,⁷ present a key test for defining the future scope of the ATCA. The *Karadzic* suits mark a new stage in human rights litigation in United States courts, by attempting to confront gross violations of human rights while they continue in a context of armed conflict. The *Karadzic* suits raise additional noteworthy questions concerning immunity for quasi-state actors and the human rights obligations of those without recognized official status.

I. THE ALIEN TORT CLAIMS ACT OF 1789

The ATCA permits federal jurisdiction over suits by aliens only for torts committed in violation of a treaty of the United States or the law of nations. Although the reasons for its inclusion in the Judiciary Act of 1789 remain unclear,⁸ Congress apparently believed that the provision of remedies in federal court for aliens victimized by violations of international law was an important aspect of the new republic's responsibilities as a member of the com-

⁴ 28 U.S.C. §§ 1330, 1602-11 (1988).

⁵ Pub. L. No. 102-256, 106 Stat. 73 (1992).

⁶ See, e.g., *Hafer v. Melo*, 112 S. Ct. 358, 363-64 (1991) (imposing personal liability on state official for federal civil rights violations for acts taken under color of state law and within official's capacity); *Scheuer v. Rhodes*, 416 U.S. 232, 237-38 (1974) (noting that Eleventh Amendment does not afford personal immunity for state official who deprives claimant(s) of federal rights under color of state law); *Ex parte Young*, 209 U.S. 123 (1908) (allowing injunctions against state officials acting pursuant to sovereign law, in violation of Constitution).

⁷ *Doe v. Karadzic*, No. 93 Civ. 0878 (S.D.N.Y. filed Feb. 11, 1993); *Kadic v. Karadzic*, No. 93 Civ. 1163 (S.D.N.Y. filed March 2, 1993).

⁸ See Jeffrey M. Blum & Ralph G. Steinhardt, *Federal Jurisdiction Over International Human Rights Claims: The Alien Tort Claims Act*, 22 HARV. INT'L L.J. 53, 54 n.3 (1981); Anthony D'Amato, *The Alien Tort Statute and the Founding of the Constitution*, 82 AM. J. INT'L L. 62, 62 (1988).

munity of nations.⁹ The statute lapsed into disuse until the 1980s, when growing interest in the protection of human rights and the emergence of advocates familiar with the body of international human rights law sparked a revival. While the number of human rights cases brought under the ATCA remains modest, each has significantly advanced the understanding of its scope and possible barriers of immunity and nonjusticiability.

The "law of nations" referred to in the ATCA encompasses norms of international human rights law whose breach would constitute a tort.¹⁰ Such norms include claims of summary execution, disappearances, torture, and prolonged arbitrary detention, as alleged in the *Marcos* cases.¹¹ Successful ATCA suits have involved claims against former foreign state officials discovered by their victims to have taken up residence in the United States, either lawfully¹² or irregularly.¹³ Unsuccessful suits have sought redress directly from foreign states¹⁴ or from defendants who were not clearly acting under color of foreign law.¹⁵

⁹ Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AM. J. INT'L L. 461, 475-80 (1989).

¹⁰ Blum & Steinhardt, *supra* note 8, at 54 n.3, 88.

¹¹ See, e.g., *Filartiga v. Pena-Irala*, 630 F.2d 876, 878 (2d Cir. 1980) (maintaining wrongful death action under ATCA for death following kidnapping and torture); *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1535 (N.D. Cal. 1987) (bringing suit under ATCA for torture, murder, and prolonged arbitrary detention), *modified*, 694 F. Supp. 707 (N.D. Cal. 1988).

¹² Ferdinand Marcos asserted in portions of the litigation concerning his assets that "it had not been his intention to go to Hawaii and that he had been taken there involuntarily by the government of the United States." *Republic of the Philippines v. Marcos*, 862 F.2d 1355, 1362 (9th Cir. 1988), *cert. denied*, 490 U.S. 1035 (1989) [hereinafter *Philippines II*].

Kelbessa Negewo had obtained asylum status prior to being found liable for the torture and arbitrary detention in Ethiopia of three plaintiffs, one of whom inadvertently discovered that he was employed at the same Atlanta hotel that she was. *Abebe-Jiri v. Negewo*, Civ. Action No. 1:90-cv-2010 GET (N.D. Ga., judgment filed August 20, 1993).

¹³ *Pena-Irala* and *Suarez-Mason* were both found living as undocumented aliens in the United States. *Pena-Irala* entered on a visitor's visa and remained beyond the expiration date. *Filartiga*, 630 F.2d at 878-79. *Suarez-Mason* fled criminal prosecution in Argentina. *Forti*, 672 F. Supp. at 1536.

¹⁴ See, e.g., *Von Dardel v. U.S.S.R.*, 736 F. Supp. 1, 8 (D.D.C. 1990) (holding that court lacked jurisdiction in claim against Soviet Union). *But see Siderman de Blake v. Republic of Argentina*, 965 F.2d 699 (9th Cir. 1992) (stating that foreign state may have waived sovereign immunity), *cert. denied*, 113 S. Ct. 1812 (1993).

¹⁵ *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 791-95 (D.C. Cir. 1984) (Edwards, J., concurring), *cert. denied*, 470 U.S. 1003 (1985).

From the outset of the revival of the ATCA about a decade ago in *Filartiga v. Pena-Irala*,¹⁶ the propriety of the federal judiciary's attempt to provide redress to victims of extraterritorial human rights abuse has been challenged. The objections have been several. First, the competence of the federal courts to determine the substantive scope of international human rights law has been doubted, sometimes reflecting deeper doubt whether any such law exists.¹⁷ Second, skepticism has been voiced whether those norms may be legally enforced in the context of domestic litigation, in the absence of specific implementing legislation.¹⁸ Third, the hypothetical danger of retaliation by means of suits in foreign countries against United States officials has been cited as a reason for the courts to decline jurisdiction until more clearly commanded by Congress to act.¹⁹ Fourth, the constitutionality of conferring jurisdiction over suits between aliens for violations of the law of nations has been questioned.²⁰ Finally, the dominance by the political branches over foreign policy has been deemed responsible for an exceedingly cautious approach by the courts to ATCA suits, especially those brought against an exiled dictator or other leading figure whose presence in the United States is explained by a policy objective of the Executive.²¹ These concerns figured at various points in the *Marcos* litigation, though ultimately none served as a bar to adjudication.

¹⁶ 630 F.2d 876, 878 (2d Cir. 1980).

¹⁷ *Tel-Oren*, 726 F.2d at 827 (Robb, J., concurring).

Courts ought not to serve as debating clubs for professors willing to argue over what is or what is not an accepted violation of the law of nations The typical judge or jury would be swamped in citations to various distinguished journals of international legal studies, but would be left with little more than a numbing sense of how varied is the world of public international "law."

Id.

¹⁸ *Id.* at 816-19 (Bork, J., concurring); Philip Trimble, *A Revisionist View of Customary International Law*, 33 UCLA L. REV. 665, 692 n.98 (1986) (citing differences between international and United States law as to effective date of treaty).

¹⁹ Brief of the United States as Amicus Curiae in *Trajano v. Marcos*, No. 86-2448, 1989 WL 79894 (9th Cir. July 10, 1989) (reported in table at 878 F.2d 1438).

²⁰ *Trajano II*, 978 F.2d at 501-02.

²¹ See Peter E. Bass, *Note: Ex-Head of State Immunity: A Proposed Statutory Tool of Foreign Policy*, 97 YALE L.J. 299 (1987) (suggesting limited immunity from suit for ex-heads of state brought into United States for policy reasons).

II. *IN RE MARCOS HUMAN RIGHTS LITIGATION* — CLASS ACTION JURY TRIAL

In re Marcos Human Rights Litigation consolidated five separate civil suits originally filed in three different judicial districts shortly after Ferdinand Marcos was forced into exile in Hawaii by the popular reaction to his purported re-election to the presidency.²² In *Sison v. Marcos*, Florentina Sison, Ramon Sison, and Jose Maria Sison alleged the disappearance of Francisco Sison (son of Florentina and brother of Ramon and Jose Maria) and the torture and prolonged arbitrary detention of Jose Maria Sison.²³ Jaime Piopongco, a United States citizen, joined the suit alleging assault, arrest, torture, and seizure of his radio station. In *Trajano v. Marcos*, the mother of Archimedes Trajano alleged that her son had been arrested, tortured, and murdered by security agents acting at the behest of Imee Marcos-Manotoc, whom he had questioned at a university meeting.²⁴ *Hilao v. Marcos* was a class action of Philippine torture and summary execution victims.²⁵ *Ortigas v. Marcos* and *Clemente v. Marcos* were actions filed by two groups of plaintiffs who were victims of arbitrary detention and, in some cases, torture.²⁶

All five suits were dismissed on act of state grounds by district courts in Hawaii²⁷ and California.²⁸ Ruling on all five cases

²² *Hilao v. Marcos*, No. CV-86-390-HMF (D. Haw. filed June 3, 1986) (originally filed in March 1986, E.D. Pa., but transferred pursuant to 28 U.S.C. § 1631); *Sison v. Marcos*, No. CV-86-225-HMF (D. Haw. filed Mar. 26, 1986); *Clemente v. Marcos*, No. CV-86-1449-SW (N.D. Cal. filed Mar. 20, 1986); *Trajano v. Marcos*, No. CV-86-207-HMF (D. Haw. filed Mar. 20, 1986); *Ortigas v. Marcos*, No. CV-86-975-SW (N.D. Cal. filed Mar. 4, 1986).

²³ *Sison v. Marcos, Co.* CV-86-225-HMF (D. Haw. filed Mar. 26, 1986). Jose Maria Sison was a prominent dissident imprisoned without charge from 1977 to 1986. *Id.* Francisco Sison was a government economics official who disappeared on a day in 1971 when he was scheduled to attend a luncheon meeting at Malacanang Palace in Manila. *Id.*

²⁴ *Trajano v. Marcos*, Civ. No. 86-0207 (D. Haw. filed Mar. 20, 1986) [hereinafter *Trajano*].

²⁵ *Trajano v. Marcos*, No. 86-2448, 1989 WL 76894, *1 (9th Cir. July 10, 1989) (reported in table at 878 F.2d 1438) [hereinafter *Trajano I*].

²⁶ *Id.*

²⁷ *Hilao*, *Sison*, and *Trajano* were dismissed on act of state grounds by Judge Harold Fong on July 18, 1986. *Id.* at *1-2. On May 29, 1986, a default judgment had been entered against Imee Marcos-Manotoc in *Trajano*, when she failed to enter an appearance in the case. *Id.* *In re Marcos Human Rights Litigation* (*Trajano v. Marcos and Marcos-Manotoc*), 978 F.2d 493, 496 (9th Cir. 1992), *cert. denied sub nom.*, *Marcos-Manotoc v. Trajano*, 113 S. Ct. 2960 (1993). *Marcos-Manotoc* filed a motion to set aside this default on March 25, 1991 (No. 86-207-HMF). *Id.* The motion was de-

in a brief unpublished decision, the Ninth Circuit reversed the dismissals.²⁹ On remand, the cases were consolidated for trial in the District of Hawaii by the Judicial Panel on Multidistrict Litigation.³⁰

The act of state defense requires brief discussion as background to the command responsibility issues in the *Marcos* trial and the determination of the FSIA issue in the *Trajano* appeal. The two district courts had rested their dismissals on the premise that all of Marcos's acts had been undertaken pursuant to his powers as President of the Philippines, that adjudication of the claims would require inquiry into the legality of those acts under international and Philippine law, and that such adjudication would risk the embarrassment and interference with foreign relations that the act of state doctrine was intended to prevent.³¹

nied and judgment was entered against her on May 13, 1991. *Id.* Marcos-Manotoc's appeal was rejected by the Ninth Circuit on October 21, 1992. *Id.*

²⁸ *Ortigas* and *Clemente* were dismissed on January 22, 1987, by Judge Spencer Williams of the Northern District of California. *Trajano I*, 1989 WL 76894 at *2.

²⁹ *Id.*

³⁰ MDL No. 840, Order of September 13, 1989. The cases were assigned to Judge Manuel Real. *Id.*

³¹ *Trajano v. Marcos*, Civ. No. 86-0207. (D. Haw. filed Mar 20, 1986). In dismissing the three cases before him, Judge Fong of the District of Hawaii made the following observations:

To sustain jurisdiction under 28 U.S.C. § 1350, the plaintiffs must allege that the tortious acts were official acts or acts committed under color of law This theory of recovery requires precisely the type of inquiry in which the federal courts have refused to engage under the act of state doctrine For purposes of arguing that jurisdiction existed under § 1350, Marcos' actions were characterized as a "systematic governmental operation to suppress dissent." In contrast, when the act of state arose, this case was characterized as one involving "discrete violations" of international human rights. Plaintiffs cannot have it both ways. However Marcos' acts are characterized, it is clear that this case would require examination of official policies of the Marcos administration. Regardless of the semantics, these cases would still involve judicial review of the acts of the duly recognized head of a foreign sovereign committed under authority of law. Such cases have long been considered non-justiciable under the act of state doctrine.

Id.

Judge Williams noted "the turmoil in the Philippines, the role of the Reagan Administration in the exit and current status of Mr. Marcos, and the continuing importance of the Philippine nation to U.S. interests" and "the potential for interference in foreign relations" in invoking the act of state doctrine. *Trajano v. Marcos*, Civ. No. 86-0207 (D. Haw. July 18, 1986) (LEXIS, Genfed library, Dist file). Brief for Appellee Ferdinand E. Marcos at 12, *Hilao v. Marcos*, Nos. 86-2449, 86-2496, 86-2448, 87-1706, 87-1707 (9th Cir., filed Mar. 26, 1987).

The act of state doctrine, broadly applied, would swallow up much of the ATCA and all of the TVPA.³² Human rights violations within the scope of the "law of nations" generally may be committed only by those exercising power conferred on them by the state,³³ since human rights law primarily imposes obligations upon states. This is especially true of the TVPA, which permits actions only for torture and extrajudicial killing, defined specifically to require a showing that the torts were inflicted "under color of foreign law."³⁴ If every tortious act is *per se* an act of state (and thus nonactionable) when committed by a foreign official, then neither the ATCA nor the TVPA can serve as vehicles for classic human rights violations such as those alleged in *Marcos*.

The Ninth Circuit, reversing the dismissals of the five *Marcos* suits, avoided this undesirable result, but failed to grapple with the crucial issues. The unpublished decision relied primarily upon the rejection of Marcos's act of state defense in *Republic of Philippines v. Marcos*,³⁵ a civil action to recover assets embezzled by Marcos during his presidential tenure. *Republic of Philippines* had rested on several compelling grounds: (1) the foreign state whose "embarrassment" was "at risk" in the adjudication was the plaintiff itself;³⁶ (2) the United States government suggested that the act of state doctrine did not apply in the circumstances;³⁷ and (3) the conduct at issue, embezzlement of state assets, was more personal than sovereign in nature³⁸ and thus, not really an act of "state" meriting insulation from review by a United States court.³⁹

The Ninth Circuit, comparing the consolidated *Marcos* actions to *Republic of Philippines*, found "no material distinctions between these cases . . ."⁴⁰ The human rights suits focused on Marcos's abuse of his coercive power as a government leader to oppress his subjects violently to preserve his political hegemony, while the assets litigation concerned personal monetary gain. The

³² See Anne Bayefsky & Joan Fitzpatrick, *International Human Rights Law in United States Courts: A Comparative Perspective*, 14 MICH. J. INT'L L. 1, 13-18 (1992).

³³ See *infra* notes 162-85 and accompanying text (discussing *Karadzic* suits).

³⁴ Pub. L. No. 102-256, 106 Stat. 73 (1992).

³⁵ 862 F.2d 1355, 1360-61 (9th Cir. 1988).

³⁶ *Id.*

³⁷ *Id.* at 1361.

³⁸ *Id.* (citing *Jimenez v. Aristeguieta*, 311 F.2d 547 (5th Cir. 1962), *cert. denied sub nom.*, *Jimenez v. Hixon*, 373 U.S. 914 (1963)). *Jimenez* concerned the embezzlement of state assets by a deposed Venezuelan ruler. *Jimenez*, 311 F.2d at 547.

³⁹ *Philippines II*, 862 F.2d at 1360-61.

⁴⁰ *Trajano I*, 1989 WL 76894 at *2.

Ninth Circuit's implicit ruling that this distinction is not "material" may indicate that gross human rights violations, just like looting the national treasury, are acts that cannot reasonably be attributable to the state.

Such an approach could constitute the basis for a judicially crafted *ultra vires* exception to the act of state doctrine.⁴¹ As Judge Sofaer noted in *Sharon v. Time, Inc.*, "actions of an official acting outside the scope of his authority as an agent of the state are simply not acts of state. In no sense are such acts designed to give effect to a State's public interests."⁴² The Ninth Circuit, however, declined to develop this theory, and rather seemed driven primarily by the attitudes of political actors, the United States and current Philippine governments, neither of which had raised the act of state or other objections to the justiciability of the human rights claims.⁴³

Once the barrier of act of state had fallen, the *Marcos* cases proceeded to trial. Although a head of state immunity claim had been raised initially by Marcos, on the premise that he rather than Corazon Aquino was the *de jure* head of the Philippine government,⁴⁴ this claim disappeared early in the litigation. Former head of state immunity was not recognized as a barrier to justiciability.⁴⁵

With Judge Real exercising a tight rein over the proceedings, the five consolidated cases concerning the claims of approximately 10,000 human rights victims were tried in a two-week period. While many victims of torture and arbitrary detention were present to testify in detail about their individual trauma, and in some cases to relate Marcos's personal involvement in their suffer-

⁴¹ The issue was thoroughly briefed by counsel for Sison. Brief of Appellants, at 13-28, in *Trajano I* (No. 86-2448).

⁴² 599 F. Supp. 538, 544 (S.D.N.Y. 1984) (libel suit by Israeli official concerning allegations of his complicity in massacres).

⁴³ *Trajano I*, 1989 WL 76894 at *2. Harold Koh has noted the retreat of the courts from their own autonomous determination of international law issues toward a posture of greater deference to the wishes of the Executive, dating from the 1930s and 1940s. Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2357 (1991).

⁴⁴ Memorandum of Points and Authorities in Support of Ferdinand Marcos' Motion to Dismiss, at 4-9 in *Trajano v. Marcos*, Civ. No. 86-0207 (D. Haw., filed Apr. 10, 1986).

⁴⁵ See *Estate of Domingo v. Republic of Philippines*, 694 F. Supp. 782, 786 (W.D. Wash. 1988) (holding that former head of state immunity was no barrier to justiciability).

ings,⁴⁶ claims of disappearances rested largely on circumstantial evidence. With respect to the class members who were not named plaintiffs, torture and arbitrary detention allegations required the jury to base its verdict on an assumption that, given the proven violations, thousands of similar violations more likely than not occurred. This extrapolation was supported in large part by the testimony of human rights monitors representing international and national nongovernmental organizations, whose fact-finding methods were criticized by lawyers for Marcos as insufficient to meet the burden of proof in civil litigation.⁴⁷

One of the greatest challenges was establishing the responsibility of Marcos himself. In the cross-examination of Michael Posner, head of the Lawyers Committee for Human Rights, counsel for Marcos questioned whether Marcos "sanctioned" the abuses or simply failed to prevent or stop them.⁴⁸ Posner replied that since Marcos "had to an unusual degree taken central control of the judicial, legislative and military powers of government" during the martial law period he was responsible for the continuing violations.⁴⁹ Marcos's failure to undertake serious investigations of claims of human rights violations was also stressed as evidence of Marcos's complicity in the particular abuses. As American Civil Liberties Union attorney Paul Hoffman argued with respect to the disappearance of Francisco Sison, "the absence of any investigation speaks volumes about Ferdinand Marcos' responsibility because he didn't investigate the disappearance of one of his own high officials. . . . [Y]ou don't need to investigate when you know what happened."⁵⁰

In his instructions to the jury, Judge Real noted that both direct ordering of and the failure to take effective measures to prevent torture, summary execution or disappearance were sufficient bases for Marcos's liability:

⁴⁶ Jose Maria Sison was taken to meet Marcos personally within 12 hours of his arrest and had various emissaries sent to him in his prison cell by Marcos throughout his nine-year detention. Transcript of Trial Sept. 22, 1992, at 29-31, *Marcos*, MDL No. 840 (D. Haw.).

⁴⁷ See, e.g., cross-examination of Diane Orentlicher, Transcript of Trial, Sept. 17, 1992, at 17-23, *Marcos* (MDL No. 840).

⁴⁸ Transcript of Trial, Sept. 15, 1992, at 6, *Marcos* (MDL No. 840).

⁴⁹ *Id.* Posner was asked about 1984 Senate testimony in which he asserted that he had no information that Marcos was "ordering abuses to take place." *Id.* at 7.

⁵⁰ Transcript of Trial, Sept. 22, 1992, at 27, *Marcos* (MDL No. 840).

You may find the defendant Estate liable to plaintiffs if you find, by a preponderance of the evidence, that Ferdinand Marcos acting under color of law either (1) directed, ordered, conspired with or aided Philippine military, paramilitary and/or intelligence forces to torture, summarily execute or cause the disappearance of plaintiffs and the class or (2) had knowledge that Philippine military, paramilitary and/or intelligence forces tortured, summarily executed, caused the disappearance of, or arbitrary detention [of] plaintiffs and the class, and having the power failed to take effective measures to prevent the practice.⁵¹

In the *Marcos* case, the plaintiffs presented two kinds of evidence: the direct, detailed and individualized testimony of the surviving victims themselves; and oral versions of human rights fact-finding reports, presented through witnesses from nongovernmental organizations involved in monitoring human rights abuses during the Marcos era, along with the testimony of State Department witnesses regarding their own contacts with Marcos and their knowledge of human rights conditions in the Philippines during his regime.⁵² The former type of evidence is unremarkable in a civil tort action, aside from the unusual locale of the events recounted and the atrocious nature of the injuries described. The latter type of evidence seems less familiar in the courtroom setting, and became the subject of close questioning by defense counsel with respect to potential witness bias and flaws in fact-finding methodology.⁵³ To succeed in a class action, where the stories of a few individuals must embody the experiences of a large number, general reporting of patterns of human rights abuse is a virtual necessity. Without it, the jury would have difficulty concluding that a class of similar victims exists and merits compensation.

As Harold Koh has remarked, "transnational public law [suits seek] redress, deterrence, and reform of national governmental policies through clarification of rules of international conduct."⁵⁴ The goals of plaintiffs in ATCA suits are multiple:

[A]lthough transnational public law plaintiffs routinely request retrospective damages or even prospective injunctive relief, their

⁵¹ Jury Instructions at 10, *Marcos* (MDL No. 840).

⁵² Witnesses included Sister Mariani of Task Force Detainees and Diane Orentlicher and Michael Posner of the Lawyers Committee for Human Rights, as well as former State Department officials Charles Salmon, Stephen Bosworth and Stephen Cohen.

⁵³ See *supra* notes 47-52.

⁵⁴ Koh, *supra* note 43, at 2348.

broader strategic goals are often served by a declaratory or default judgment announcing that a transnational norm has been violated. Even a judgment that the plaintiff cannot enforce against the defendant in the rendering forum empowers the plaintiff by creating a bargaining chip for use in other political fora.

[A]ll tort judgments, whether domestic or transnational, serve several ends: compensation for victims; denial of safe haven to the defendant in the judgment-rendering forum; deterrence of others who might contemplate similar conduct; and enunciation of legal norms opposing the conduct for which the defendant has been found liable. . . . [N]orm-enunciation, deterrence, and denial of safe haven assume greater prominence in a transnational setting, where highly mobile defendants and the absence of full faith and credit impair the collectability of judgments.⁵⁵

Given these largely abstract and normative aims of ATCA litigation, the logic of proceeding by class action is not obvious. It is striking that the nongovernmental human rights organizations involved in the *Marcos* trial, the American Civil Liberties Union and Human Rights Watch, represented a relatively small group of four plaintiffs.⁵⁶ It has been the tradition of human rights groups such as Amnesty International to focus upon the stories of individual victims, to put a human face upon violations that might otherwise seem too abstract and remote to engage public attention. Quantification of the scope of human rights violations, while important in some circumstances,⁵⁷ can diminish the impact of human rights reporting by diverting public attention from the outrageousness of the abuse to the accuracy of the numerical data.⁵⁸

For personal injury lawyers,⁵⁹ ideological objectives may carry less force. The class device has well established attractions

⁵⁵ *Id.* at 2349 n.11.

⁵⁶ The clients were three members of the Sison family and Jaime Piopongco. *Trajano I*, 1989 WL 76894 at *1.

⁵⁷ ECOSOC Resolution 1503, for example, provides a complaint procedure for "consistent pattern[s] of gross and reliably attested violations of human rights and fundamental freedoms." 48 U.N. ESCOR, Supp. (No. 1A) 8, U.N. Doc. E/4832/Add.1 (1970). See generally *Symposium: Statistical Issues in the Field of Human Rights*, 8 *HUM. RTS. Q.* 551, 551-699 (1986).

⁵⁸ For example, Aryeh Neier of Human Rights Watch wrote a piece attacking the accuracy of the reporting by other human rights groups of the number of rapes of Bosnian Muslim women. *THE NATION*, Mar. 1, 1993, at 259.

⁵⁹ Well-known lawyer Melvin Belli was among the counsel for the larger groups of plaintiffs in *Marcos*. *Marcos*, MDL No. 840.

for litigation cost-sharing and diminution of the risk of nonrecovery, especially with respect to mass torts. Patterns of gross human rights violations can be approached in litigation as "disasters" akin to airplane crashes or products liability crises. Among ATCA cases, *Marcos* presented an unusually great possibility that a judgment for money damages might ultimately be executed. As a result, the damages issue became especially nettlesome.⁶⁰ Human rights groups in the Philippines might plausibly prefer to use the Marcos assets for program building to prevent ongoing or future deprivations of rights in that still-volatile country. Moreover, the Philippine government actively seeks to recover Marcos's assets as the ill-gotten gains of illegal corruption.⁶¹ Nevertheless, the Philippine government consistently refused to interpose objections to the ATCA litigation and recently announced that it would not assert precedence over human rights claims.⁶²

Human rights organizations, with their commitment to institution-building to prevent future violations, may sympathize with the efforts of national human rights groups and newly democratic governments to gain access to the assets of a fallen dictator, and find the "people's" entitlement more weighty than that of the individuals who participated as plaintiffs in the ATCA action. The attitude of personal injury counsel cannot realistically be expected to be the same.

Human rights lawyers face many of the same dilemmas as lawyers engaged in other areas of public interest law, in discharging their duty of loyalty to their clients while promoting the public values that constitute the heart of their mission.⁶³ As David Luban has cogently demonstrated,⁶⁴ traditional notions of client

⁶⁰ Class members had until July 31, 1993 to file claims with the court; as of July 10, however, only 2,000 of 10,000 potential claimants had filed for damages. *Only 2,000 of 10,000 Victims of Marcos Regime File for Damages*, Agence France Presse, July 11, 1993, available in LEXIS, Nexis library, AFP file. Lawyers for the class have indicated that they would request three million dollars for each deceased victim and two million dollars for each victim of torture. *Id.*

⁶¹ See, e.g., *Philippines II*, 862 F.2d at 1357-58.

⁶² See *Manila to Share Marcos Loot with Rights Victims*, Reuter Library Report, May 11, 1993, available in LEXIS, Nexis Library, Reuter file.

⁶³ See Deborah L. Rhode, *Class Conflicts in Class Actions*, 34 STAN. L. REV. 1183 (1982). Rhode notes that conflicts among class members and between class members and counsel frequently emerge during the settlement or remedial phases of the litigation. *Id.* at 1188-89.

⁶⁴ DAVID LUBAN, *LAWYERS AND JUSTICE* 324-57 (1988). Luban suggests four models for devising strategy in public interest class actions: (1) the direct delegation

control and loyalty must give way where the public interest lawyer and client are colleagues in an ideological struggle.

But it is not clear whether Marcos's victims more resemble the ideologically motivated plaintiffs in desegregation suits, or the compensation-seeking victims of an ordinary tort. In situations of gross human rights violations, some victims' political beliefs are the magnet for their victimization, which in turn reinforces their ideological commitment. Random or mistaken victimization can radicalize additional victims, providing an ideological impulse to enter the litigation. But other random targets of repression may focus on their individual trauma without being ideologically transformed, behaving like typical mass tort victims in seeing individual compensation as their highest, if not sole, priority. While many ATCA suits have involved the kind of lawyer/client solidarity that is the premise of Luban's theory, class actions managed by personal injury lawyers do not fit his paradigm. As a result, conflicts within the class may be less easily resolved.⁶⁵

III. IMMUNITY ISSUES IN *TRAJANO*: IMEE MARCOS-MANOTOC AS THE STATE

In March 1986 Agapita Trajano, a Philippine citizen residing in Hawaii, filed suit against Imee Marcos-Manotoc, her father Ferdinand Marcos, and former military intelligence chief Fabian Ver in the United States District Court for the District of Hawaii.⁶⁶ Trajano alleged that her son, Archimedes Trajano, a student at the Mapua Institute of Technology, had been seized on August 31, 1977, tortured for a period of twelve to thirty-six hours and killed by police and military intelligence personnel acting under Marcos-Manotoc's orders. Archimedes Trajano had attended a public meeting at which Marcos-Manotoc had spoken, and had questioned her concerning her appointment as the director of a government-sponsored organization.⁶⁷ Although Ferdi-

model, where the class is small and able to convey its wishes to the lawyers; (2) the indirect delegation model, where the class picks the named plaintiffs who then direct the lawyers; (3) the interest representation model, where the class is "unmobilized" and the lawyers take cues from class members who seem to be representative; and (4) best-world representation, in which the lawyers strive to create the best possible world for present and future class members, largely by making unilateral strategic decisions. *Id.* at 351-52.

⁶⁵ See *supra* notes 63-64 and accompanying text.

⁶⁶ *Trajano II*, 978 F.2d at 496.

⁶⁷ Answering Brief for the Appellees, *Trajano* (No. 91-15891).

nand Marcos actively contested the court's jurisdiction, Imee Marcos-Manotoc did not enter an appearance and default judgment was entered against her after she had left the United States. The court awarded damages in excess of four million dollars.⁶⁸

On appeal to the Ninth Circuit, Marcos-Manotoc argued that the suit was barred by foreign sovereign immunity. A "foreign state" is defined in section 1603(b) of the FSIA as including "an agency or instrumentality of a foreign state."⁶⁹ Whether individual foreign officials fit within section 1603(b) is a question of potentially great moment in ATCA and TVPA litigation, though *Trajano* is the first such case to require its decision.

Several courts have explicitly or implicitly held that an individual official is not an "agency or instrumentality" entitled to foreign sovereign immunity under section 1603(b). In *Republic of Philippines v. Marcos*,⁷⁰ the Solicitor General of the Philippines sought to quash a subpoena served on him by Ferdinand Marcos while the official was in the United States on official business. The United States government filed a "Suggestion of Immunity" requesting that the district court defer to its determination that the official should enjoy immunity under the FSIA.⁷¹ The district court refused, finding that the plain meaning and the legislative history⁷² of the statute excluded individual officials from the definition of a sovereign,⁷³ further noting that the government's re-

⁶⁸ *Trajano II*, 978 F.2d at 496 n.4.

⁶⁹ 28 U.S.C. § 1603(a) (1988).

⁷⁰ 665 F. Supp. 793, 797 (N.D. Cal. 1987).

⁷¹ *Id.* at 795.

⁷² The House Report on the FSIA discusses the "agency or instrumentality" language purely in terms of artificial entities and not natural persons. H.R. REP. NO. 1487, 94th Cong., 2d Sess., reprinted in 1976 U.S.C.C.A.N. 6604, 6614. The Report states that § 1603(b) "is intended to include a corporation, association, foundation, or any other entity which, under the law of the foreign state where it was created, can sue or be sued in its own name . . ." and that § 1603(b)(2) "requires that the entity be either an organ of a foreign state . . . or that a majority of the entity's shares or other ownership interest be owned by a foreign state . . ." *Id.* at 15, reprinted in 1976 U.S.C.C.A.N. at 6613-14. The Report further states:

As a general matter, entities which meet the definition of an "agency or instrumentality of a foreign state" could assume a variety of forms, including a state trading corporation, a mining enterprise, a transport organization such as a shipping line or airline, a steel company, a central bank, an export association, a governmental procurement agency or a department or ministry

. . . .

Id. at 15-16, reprinted in 1976 U.S.C.C.A.N. at 6614. At no point is the possibility of a natural person being such an agency or instrumentality mentioned.

⁷³ *Republic of Philippines v. Marcos*, 665 F. Supp. 793, 797 (N.D. Cal. 1987) [hereinafter *Philippines I*].

quest for deference to its recommendation was directly contrary to the prime aim of the FSIA—to codify sovereign immunity and transform it into an issue for judicial resolution rather than executive discretion.⁷⁴ The Solicitor General, however, received diplomatic immunity.⁷⁵

A claim of sovereign immunity for Ferdinand Marcos was rejected by the Second Circuit in a different phase of the assets litigation, without extensive discussion.⁷⁶ Manuel Noriega's request for sovereign immunity from prosecution likewise was rejected, but without close analysis of the FSIA text or legislative history.⁷⁷

Yet when Imee Marcos-Manotoc raised the claim of sovereign immunity, it had surface plausibility because of precedent established in yet another Marcos-related case. In *Chuidian v. Philippine National Bank*,⁷⁸ Vincente Chuidian sued Raul Daza, a member of the Presidential Commission on Good Government, established by Corazon Aquino to recover the "ill-gotten wealth" which Marcos had amassed.⁷⁹ During the Marcos period, Chuidian had been engaged in litigation in a California court with the state-owned Philippine Export and Foreign Loan Guarantee Corporation, which resulted in his receipt of an irrevocable letter of credit from the institution as settlement. The Commission suspected that the settlement had been engineered to conceal Marcos's corrupt relationship with Chuidian's businesses, and Daza ordered that the letter of credit not be honored. Chuidian sued in state court on the letter of credit, and the institution removed the suit to federal court.⁸⁰ Chuidian then joined Daza as a party defendant, alleging interference with contractual relations.

The United States government filed a statement of interest in *Chuidian*,⁸¹ this time asserting that as an individual Daza was not entitled to sovereign immunity under the FSIA because he

⁷⁴ *Id.* at 796-97.

⁷⁵ *Id.* at 799-800.

⁷⁶ *Republic of Philippines v. Marcos*, 806 F.2d 344, 360 (2d Cir. 1986) (holding that sovereign immunity would not extend to former head of state and that alternatively appellants, Marcos's business associates, lacked standing to raise claim) [hereinafter *Philippines*].

⁷⁷ *United States v. Noriega*, 746 F. Supp. 1506, 1519-23 (S.D. Fla. 1990).

⁷⁸ 912 F.2d 1095 (9th Cir. 1990).

⁷⁹ *Id.* at 1097.

⁸⁰ 28 U.S.C. § 1441(d) (1973 & Supp. 1993) (permitting removal by agencies and instrumentalities of foreign sovereigns).

⁸¹ This statement of interest thus differed from that filed in *Philippines I*, 665 F. Supp. at 793.

was not an "agency or instrumentality."⁸² Instead, the government urged the court to apply general principles of sovereign immunity, as reflected in the *Restatement (Second) Foreign Relations Law of the United States*.⁸³ The *Chuidian* court rejected that argument⁸⁴ on grounds that the FSIA provides the exclusive basis for the recognition of claims of sovereign immunity, which must be determined by the courts and not by executive advice.⁸⁵

But there *Republic of Philippines* and *Chuidian* part company dramatically. While conceding that the argument that individuals are not encompassed in the FSIA "draws some significant support from the legislative history of section 1603(b)"⁸⁶ and that "the Act is ambiguous as to its extension to individual foreign officials,"⁸⁷ the Ninth Circuit in *Chuidian* chose to extend sovereign immunity to individuals.

The court justified this holding on grounds that failing to do so would mark a departure from common law that could not reasonably be attributed to the Congress that enacted the FSIA.⁸⁸ The court noted other cases reading the FSIA to extend sovereign immunity to individual officials, without examining the shallow analysis of those holdings.⁸⁹ The Ninth Circuit buttressed its

⁸² *Chuidian*, 912 F.2d at 1099.

⁸³ The second edition of the RESTATEMENT provided that sovereign immunity could be extended to any official of a foreign state with respect to acts performed in an official capacity, if the effect of exercising jurisdiction would be to enforce a rule of law against the state. RESTATEMENT (SECOND) FOREIGN RELATIONS LAW OF THE UNITED STATES § 66(e). However, no such provision exists in the third edition, in light of the codification of different principles of sovereign immunity in the 1976 FSIA. See *Chuidian*, 912 F.2d at 1099-1101 (reviewing RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES (1987)).

⁸⁴ The reasoning resembled that of the District Court in *Philippines I*, 665 F. Supp. at 793.

⁸⁵ *Chuidian*, 912 F.2d at 1100.

⁸⁶ *Id.* at 1100-01 (quoting passages from House Report on FSIA); see also *supra* note 72.

⁸⁷ *Chuidian*, 912 F.2d. at 1101.

⁸⁸ *Id.*

⁸⁹ *Id.* at 1103. The notion that natural persons are "agencies or instrumentalities" under § 1603(b) of the FSIA apparently was first accepted in *Rios v. Marshall*, 530 F. Supp. 351 (S.D.N.Y. 1981). A complex antitrust and civil rights action by American farm workers against numerous apple and sugar cane growers and federal and state officials, *Rios* also involved claims against the government of Jamaica, the British West Indies Central Labour Organization ("BWICLO," a labor recruitment consortium funded by 12 West Indian governments) and Harold Edwards, BWICLO's chief liaison officer in the United States. *Id.* at 371. The claims against Jamaica, BWICLO and Edwards were all dismissed under the FSIA. *Id.* at 372-73. The totality of the discussion of Edwards' immunity is the court's statement, "insofar as Ed-

broad reading of section 1603(b) through reliance on immunity doctrines which establish that "official capacity" suits brought against state and local officials in the United States are considered suits against the sovereign.⁹⁰ The court sweepingly rejected Chuidian's claim that Daza had acted for malicious reasons and, thus, *ultra vires*.⁹¹ Noting that since Daza's order to stop payment on the letter of credit was possible only by virtue of his power as a member of the Commission, the court held Daza was by definition acting in his official capacity.⁹² He was thus immune from suit regardless of motive or abuse of authority.⁹³

There is no recognition in *Chuidian* of the consequences to human rights suits of this reading of the FSIA. Because "color of law" requirements are essential to make out many violations of human rights norms, including protections against summary execution, torture, and arbitrary detention, a broad *Chuidian* approach would render the ATCA a dead letter for all but piracy-type cases. Since Congress failed to address extraterritorial

wards is sued in his official capacity as agent of the instrumentality, he is equally protected by principles of foreign sovereign immunity." *Id.* at 371. In *dictum* concerning BWICLO's act of state defense, however, the court found the doctrine inapplicable because BWICLO's acts were not "pursuant to a particular, formal edict or resolution" *Id.* at 371 n.22.

Rios was followed without serious discussion in two other cases. In *Mueller v. Diggelman*, No. 82 Civ. 5513 (CBM), 1983 WL 25419 (S.D.N.Y. May 13, 1983), a libel suit against the judges and clerks of a Swiss court was dismissed on FSIA grounds on the basis of a bare citation to *Rios*. The same holding without reasoning was made in *American Bonded Warehouse Corp. v. Compagnie Nationale Air France*, 653 F. Supp. 861, 863 (N.D. Ill. 1987) (employees of Air France "sued in their respective capacities as employees of Air France, are also protected by the FSIA"—but not immune under commercial activity exception of § 1605(a)(2)).

In *Kline v. Kaneko*, 685 F. Supp. 386, 389-90 (S.D.N.Y. 1988), *Rios* was again reflexively followed, though the court explicitly noted and rejected the contrary ruling in *Republic*. One of the *Kline* defendants was the Mexican Secretary of Government (Manuel Bartlett Diaz), who was alleged to have illegally expelled Kline from Mexico as part of a conspiracy concerning the supply of steel pipes to Pemex, the Mexican petroleum company. 685 F. Supp. at 388-89. Also named as a defendant was Paloma Cordero de la Madrid, wife of the Mexican President. *Id.* at 388. Bartlett Diaz' immunity was said to rest on whether he had acted in his official capacity, and "Kline's assertion that she was not accorded due process is in no way inconsistent with Bartlett Diaz having acted in his official capacity." *Id.* at 390. Cordero de la Madrid was not protected by the FSIA since she "has no official role or duties," but since the parties were not diverse and the claims were based on state law, the court lacked subject matter jurisdiction over the claims against her. *Id.* at 392.

⁹⁰ *Chuidian*, 912 F.2d at 1101-02.

⁹¹ *Id.* at 1106-07.

⁹² *Id.* at 1106.

⁹³ *Id.*

human rights torts specifically in the FSIA, suits against individual officials for foreign acts of torture would suffer the same fate of dismissal on the pleadings as ATCA suits naming foreign states.⁹⁴

Chuidian's analogy to "official capacity" suits against state and federal officials is misleading, since sovereign immunity in that context is moderated by important qualifications and fictions. *Ex parte Young*⁹⁵ permits federal injunctions to restrain state officials from acting in violation of the Constitution, on the theory that they have no discretion to do so.⁹⁶ They are stripped of their official capacity when so acting, even when they are faithfully applying their sovereign's law.⁹⁷ *Hafer v. Melo*⁹⁸ clarifies that damages suits can be brought against state officials on the fiction of suing them in their "personal capacity," even though the claim requires proof that the official was acting under color of state law in committing the constitutional tort.⁹⁹ The courts accept the inherent contradictions of these immunity doctrines for the sake of striking a balance between the legitimate interests of the sovereign and the compelling need of the victims of constitutional torts for redress. Without these fictions, sovereign immunity would make constitutional protections illusory.

Chuidian strikes no such balance for human rights victims. The starkness of its principle is well-illustrated in *Herbage v. Meese*.¹⁰⁰ *Herbage* had been extradited to the United States from the United Kingdom.¹⁰¹ He alleged that he had been the victim of

⁹⁴ See *supra* note 14 and accompanying text.

⁹⁵ 209 U.S. 123 (1908).

⁹⁶ *Id.* at 159.

⁹⁷ This point was raised in Justice Harlan's dissent in *Ex parte Young*, emphasizing the fact that Attorney General Young acted within the scope of his official duties and that states can only act through their agents. *Id.* at 182-204.

⁹⁸ 112 S. Ct. 358 (1991).

⁹⁹ Were the damages action to be brought against a state official in her official capacity, it would be barred by the Eleventh Amendment, which provides that "[t]he Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101 (1984). Even federal injunction suits against state officials acting in their official capacity are regarded as suits virtually against the state and thus presumptively barred by the Eleventh Amendment; that bar falls only where the federal cause of action is based on an alleged violation of the Constitution under the fiction of *Ex parte Young* or where the state has waived or Congress has abrogated its immunity. See *Pennhurst*, 465 U.S. at 102.

¹⁰⁰ 747 F. Supp. 60 (D.D.C. 1990), *aff'd*, 946 F.2d 1564 (D.C. Cir. 1991).

¹⁰¹ *Id.* at 62.

a violation of the specialty clause¹⁰² of the extradition treaty and that various British officials had deprived him of procedural rights guaranteed by the treaty during his extradition hearing.¹⁰³ His suit against the British officials was dismissed on sovereign immunity grounds.¹⁰⁴ Herbage argued that when the sovereign's agents act illegally they do not enjoy the sovereign's immunity because the sovereign has not authorized them to so act.¹⁰⁵

Herbage's theory has a formidable pedigree, with roots in cases dating to the fifteenth century, recognition by Blackstone and the status of being "so well settled [by the nineteenth century] as to not require the citation of authority."¹⁰⁶ Yet the district court flatly rejected Herbage's argument and any notion of an *ultra vires* limit on sovereign immunity for individual officials, holding:

[T]hese men were acting in their official capacities as agents of the British government . . . those actions cannot and do not subject them to liability in the courts of the United States. . . .

The FSIA is absolute in this regard, no matter how heinous the alleged illegalities. The Court has no authority to address the legality of the defendants' actions Herbage's arguments are unavailing. The basis of this type of immunity doctrine is to protect the executive prerogative and not to enter into the sphere of relations between sovereign states: comity.¹⁰⁷

Poorly reasoned and potentially disastrous from a human rights perspective, *Herbage* was nevertheless summarily affirmed by the District of Columbia Circuit.¹⁰⁸ Even more chilling, *Herbage* was cited with apparent approval in Justice Souter's majority opinion in *Saudi Arabia v. Nelson*,¹⁰⁹ for the proposition that acts of wrongful arrest, arbitrary detention, and torture are "peculiarly sovereign in nature,"¹¹⁰ and thus especially likely to be immune under the FSIA.

¹⁰² *Id.* The doctrine of specialty provides that a prisoner extradited to stand trial on one charge cannot be tried by the receiving state on a different charge. See *United States v. Rauscher*, 119 U.S. 407, 424 (1886).

¹⁰³ *Herbage*, 747 F. Supp. at 62-63.

¹⁰⁴ *Id.* at 65-68.

¹⁰⁵ *Id.* at 67.

¹⁰⁶ *Pennhurst*, 465 U.S. at 142-43 (Stevens, J., dissenting).

¹⁰⁷ *Herbage*, 747 F. Supp. at 67.

¹⁰⁸ *Herbage v. Meese*, 946 F.2d 1564 (D.C. Cir. 1991).

¹⁰⁹ 113 S. Ct 1471, 1480 (1993), *vacated*, 996 F.2d 270 (11th Cir. 1993).

¹¹⁰ *Id.* at 1479.

As the Supreme Court noted in *Amerada Hess*, the ATCA "of course has the same effect after the passage of the FSIA as before with respect to defendants other than foreign states."¹¹¹ The question is who these defendants may be. Are all foreign officials who commit human rights violations under color of foreign law encompassed within section 1603(b) of the FSIA? Are former as well as current officials immunized? If so, the Supreme Court's observation in *Amerada Hess* that the defendant in *Filartiga* was a police official rather than "the Paraguayan Government" would be rather pointless.¹¹²

In the *Trajano* appeal, the Ninth Circuit failed to probe these questions adequately, holding that the argument that the FSIA does not extend to individual officials was "foreclosed by *Chuidian*."¹¹³ *Trajano*'s counsel urged that acts of torture and arbitrary killing are by definition beyond the scope of any official's duties and thus cannot be immunized under the FSIA.¹¹⁴

Reaching an assertedly "easy"¹¹⁵ result, the Ninth Circuit focused upon the fact that Marcos-Manotoc had defaulted. By so doing, she had conceded that she had acted in her personal capacity and "not on the authority of the Republic of the Philippines."¹¹⁶ Judge Rymer observed in *Trajano* that this disposition is consistent with the Ninth Circuit's rejection of the act of state defense, because that holding "implicitly rejected the possibility that the acts set out in *Trajano*'s complaint were public acts of the sovereign."¹¹⁷ While this is true, Judge Rymer did not acknowledge that the degree of flexibility a court has to modify the act of state doctrine, to achieve an appropriate balance between the interests of the foreign state and those of the litigants, may be quite different from that enjoyed by courts applying the FSIA, especially in light of the rigid literalism of *Amerada Hess*.¹¹⁸

Strong evidence of this possible lack of interpretive flexibility is found in Judge Fletcher's reluctant rejection in *Siderman de*

¹¹¹ *Argentine Republic v. Amerada Hess*, 488 U.S. 428, 438 (1989).

¹¹² *Id.* at 436 n.4.

¹¹³ *Trajano II*, 978 F.2d at 497 n.8. The argument had been presented by amici Allard K. Lowenstein International Human Rights Clinic, the Center for Constitutional Rights, and Human Rights Watch. *Id.*

¹¹⁴ Answering Brief for Appellees, *Trajano II* (No. 91-15891) at 33-35.

¹¹⁵ *Trajano II*, 978 F.2d at 498.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 498 n.10.

¹¹⁸ 488 U.S. 428, 433-35 (1989) (FSIA sole basis for obtaining jurisdiction over foreign state in U.S. courts); see *supra* notes 111-12 and accompanying text.

*Blake v. Republic of Argentina*¹¹⁹ of an implicit *jus cogens* exception to the FSIA, an exception equally premised on a theory that sovereigns lack discretion to commit gross violations of customary human rights law.¹²⁰ Arguably, the codified exceptions to the FSIA are themselves designed to indicate when the acts of foreign states and their agencies are not truly “sovereign.”¹²¹

Marcos-Manotoc’s default permitted the court to find that Trajano’s killing, though possible only because Marcos-Manotoc enjoyed access to the state security apparatus by virtue of her official (or quasi-official) status, was ordered by Marcos-Manotoc in her personal capacity and thus, was not attributable to the sovereign.¹²² In reaching this conclusion, the court implicitly reconciled itself to the contradiction inherent in the *Ex parte Young* and *Hafer* fictions—that an official may simultaneously act “under color of law” and *ultra vires*.¹²³

The flaw in *Trajano* is the court’s failure to confront this contradiction directly. While many ATCA defendants do default, others may choose to contest liability. If *Chuidian*’s reading of section 1603(b) of the FSIA is correct, all ATCA defendants sued for human rights torts that require proof that the violator acted under color of foreign law will be immune, having been able to commit the torts in question only by exercising power delegated to them by the sovereign.¹²⁴ *Chuidian* and *Herbage* insist that the fact that the official used his power abusively, to pursue personal gratification or to commit “heinous” acts, is irrelevant.¹²⁵

Trajano is the first case to apply the *Chuidian/Herbage* rationale in the context of an ATCA case concerning gross human rights violations. While its result is palatable, the reasoning of the panel bodes ill for the future. The flaws in the interpretive approach of *Chuidian* and *Herbage* must be confronted, and the courts must either import a variant of the *Ex parte Young* exception to sovereign immunity into ATCA litigation against foreign officials or jettison the notion that individuals are “agencies and instrumentalities” contemplated in section 1603(b) of the FSIA.

¹¹⁹ 965 F.2d 699 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 1812 (1993).

¹²⁰ *Id.* at 717-19.

¹²¹ 28 U.S.C. § 1605(a)(2), (5) (1988).

¹²² *Trajano II*, 978 F.2d at 498.

¹²³ *Ex parte Young*, 209 U.S. at 157; *Hafer*, 112 S. Ct. at 363-64.

¹²⁴ *Chuidian*, 912 F.2d at 1107.

¹²⁵ *Id.* at 1106; *Herbage*, 747 F. Supp. at 67.

The 1992 enactment of the TVPA¹²⁶ makes resolution of this confusion even more compelling. Only two violations of the law of nations are actionable under the TVPA—torture and extrajudicial killing.¹²⁷ Each specifically requires proof that the tortfeasor acted with actual or apparent authority or under color of foreign law. Yet, under *Chuidian* and *Herbage*, such allegations would automatically lead to dismissal on the pleadings, establishing the “official” character of the individual defendant’s conduct and categorically immunizing him from liability under the FSIA.¹²⁸

The drafters of the TVPA have offered confusing guidance as to how it should be reconciled with the FSIA. The House Report¹²⁹ states that “[t]he TVPA is subject to restrictions in the Foreign Sovereign Immunities Act of 1976” with respect to a foreign state, its agency, or instrumentality.¹³⁰ The Report, however, goes on immediately to state that “sovereign immunity would not generally be an available defense.”¹³¹ Instead, the Report explains that “nothing in the TVPA overrides the doctrines of diplomatic and head of state immunity. These doctrines would generally provide a defense to suits against foreign heads of state and other diplomats visiting the United States on official business.”¹³²

This is sensible and casts serious doubt on *Chuidian*. Numerous courts¹³³ and commentators¹³⁴ have continued to apply the common-law doctrines of head of state and diplomatic immunity since the enactment of the FSIA in 1976; for example, in *Saltany v. Reagan*,¹³⁵ Prime Minister Thatcher asserted head of state im-

¹²⁶ Pub. L. No. 102-256, 106 Stat. 73 (1992).

¹²⁷ *Id.*

¹²⁸ See, e.g., colloquy between Senators Specter and Grassley, 138 CONG. REC. S2667-S2669 (daily ed. Mar. 3, 1992); H.R. REP. NO. 102-367, 102d Cong., 1st Sess. 5, reprinted in 1992 U.S.C.C.A.N. 84, 86.

¹²⁹ H.R. REP. NO. 102-367, 102d Cong., 1st Sess. 5, reprinted in 1992 U.S.C.C.A.N. 84, 88.

¹³⁰ *Id.* at 88.

¹³¹ *Id.*

¹³² *Id.*

¹³³ See *infra* notes 135-36 and accompanying text.

¹³⁴ See, e.g., Jerrold L. Mallory, Note, *Resolving the Confusion over Head of State Immunity: The Defined Rights of Kings*, 86 COLUM. L. REV. 169, 169, 171 (1986) (FSIA “failed to establish guidelines for making immunity determinations for heads of state . . . [and] does not include immunity for heads of state”); Bass, *supra* note 21, at 301-02 (noting that “despite the historical conflation of head of state and sovereign immunity, contemporary American practice treats nation-states and individual leaders as distinct juridical entities” after enactment of FSIA).

¹³⁵ 702 F. Supp. 319 (D.D.C. 1988), modified, 886 F.2d 438 (D.C. Cir. 1989), cert. denied, 495 U.S. 932 (1990).

munity while defendant United Kingdom relied upon its sovereign immunity under the FSIA.¹³⁶ Since head of state immunity has the disadvantage of requiring a "suggestion of immunity" by the United States State Department,¹³⁷ it is difficult to see why Thatcher and others similarly situated would rely upon the common-law doctrine rather than simply designating themselves "instrumentalities" of their foreign state. Recent commentators on head of state immunity uniformly proceed under the assumption that it remains a viable and distinct doctrine post-FSIA.¹³⁸ Yet of all foreign state officials, who, if not the head of state, should enjoy the broadest scope of immunity based on an agency relationship with the sovereign? Furthermore, why should diplomats be remitted to the complexities of diplomatic immunity¹³⁹ rather than the "absolute" protection of the FSIA as recognized in *Herbage*?¹⁴⁰

The intended interaction of the TVPA and the FSIA is confused, however, by passages in the Senate Report¹⁴¹ and statements of TVPA sponsor Senator Specter,¹⁴² asserting that foreign officials would enjoy immunity under the FSIA if they had an "agency relationship" with the sovereign. This "agency relationship" requires the state to "admit some knowledge or authorization of relevant acts."¹⁴³ The standard seems intended to exploit the human rights hypocrisy of many foreign states which officially condemn but nevertheless engage in practices of torture and summary execution. With respect to human rights violations by low-level officials, this "hypocrisy" exception to the FSIA may largely suffice to drop the sovereign immunity barrier to ATCA or TVPA suits.

Where the target of the suit is a policy-making official or a former head of state, however, section 1603(b) of the FSIA (as interpreted in *Chuidian*) may pose more severe obstacles. For example, many of the allegations against Ferdinand Marcos concerned his tolerance for a pattern of human rights abuses

¹³⁶ *Id.* at 320, 321 n.3.

¹³⁷ Mallory, *supra* note 134, at 175-76.

¹³⁸ Mallory, *supra* note 134, at 172-75; Bass, *supra* note 21, at 301-02.

¹³⁹ See generally GRANT V. McCLANAHAN, DIPLOMATIC IMMUNITY (1989) (discussing various topics associated with diplomatic immunity).

¹⁴⁰ *Herbage*, 747 F. Supp. at 67.

¹⁴¹ S. REP. NO. 102-249, 102d Cong., 1st Sess. at 8 (1991).

¹⁴² 138 CONG. REC. S2667, 2668 (daily ed. Mar. 3, 1992).

¹⁴³ *Id.*

perpetrated by underlings without his direct involvement.¹⁴⁴ To establish the command responsibility of such high-level officials, plaintiffs must essentially prove that the actual policy of the government was encouragement of torture or summary execution. The fact that the foreign government simultaneously criticized human rights violations for public relations purposes has hitherto not defeated plaintiffs' efforts to establish the complicity of high-ranking officers in cases such as *Marcos*¹⁴⁵ and *Forti v. Suarez-Mason*.¹⁴⁶

Yet the same "knowledge or authorization" of human rights abuses at the policy-making level that establishes the command responsibility of high officials now apparently threatens to make those cases nonjusticiable under the FSIA. Who is the "state" in Senator Specter's vision?¹⁴⁷ As Justice Harlan cogently observed a century ago, the "state" is incapable of action, including tortious action, without the human agency of its officials.¹⁴⁸ And the state has no policies, either candid or hypocritical, explicit or *de facto*, that are not made by human actors. In constitutional tort litigation, an official policy of rights violation serves to *expand* the scope of liability.¹⁴⁹ Under the TVPA, a candid policy of human rights violation would apparently extend foreign sovereign immunity from the state to its officials.¹⁵⁰

Perhaps this extension would come at a high cost to the state, however. A ruling that a defendant official had an "agency relationship" with the state, and is thus immunized under section

¹⁴⁴ See *supra* notes 46-53.

¹⁴⁵ *Marcos*, MDL No. 840.

¹⁴⁶ 672 F. Supp. 1531 (N.D. Cal. 1987), *reconsideration granted in part*, 694 F. Supp. 707 (N.D. Cal. 1988).

¹⁴⁷ See *supra* notes 142-43.

¹⁴⁸ *Young*, 209 U.S. at 182-204 (Harlan, J., dissenting).

¹⁴⁹ See *Monell v. New York City Dep't of Social Servs.*, 436 U.S. 658 (1978).

¹⁵⁰ In *Monroe v. Pape*, Justice Frankfurter argued in dissent that suits against state police officers under 42 U.S.C. § 1983 should be permitted only upon a showing that their conduct was authorized at least at the "custom and usage" level. 365 U.S. 167, 211-46 (1961). The majority ruled that proof of such a policy was not a prerequisite in a suit for damages against the individual officers. *Id.* at 183-87. Only where a reasonable official in defendant's position would not have known the conduct in question was unconstitutional will the lawsuit fail—not because of sovereign immunity but due to common-law official immunities presumed to survive the passage of § 1983. See *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). The existence of rights-violating official policies might be relevant in assessing the reasonableness of the conduct of street-level officers. See *Oklahoma City v. Tuttle*, 471 U.S. 808 (1985) (jury acquits officer in killing of suspect but holds city liable for inadequate training in use of deadly force).

1603(b) of the FSIA, would also constitute a judicial finding that the foreign state had an official policy of gross human rights violations. Such findings are often one of the key aims of litigants in ATCA and TVPA cases.¹⁵¹ Under this scenario, the finding of systematic human rights violations would come at the outset of the litigation, in the context of establishing jurisdiction, rather than at the conclusion as has previously been the case.

Assuming that ATCA and TVPA litigants often want more than this abstract vindication, however, further solutions should be sought. First, the cases that have jumped to the conclusion that all foreign officials are "agencies and instrumentalities" of their sovereigns must be rejected. In many the rationale is palatable only because the results seem eminently reasonable, often because the actions challenged were clearly acts of state or because the individuals sued had no contact with the United States.¹⁵² Reliance on flawed and dangerous interpretations of the FSIA, rather than more pertinent grounds for dismissal, is often a regrettable but remediable indication of the courts' unfamiliarity with transnational litigation.

Second, the later enactment of the TVPA, and its clear anticipation that extraterritorial torts "under color of foreign law" would be actionable against individual foreign officials, should be taken to clarify that sovereign immunity of natural persons in human rights cases should be the exception and not the rule. Because human rights received no attention in the drafting of the FSIA, it is unreasonable to assume that the FSIA enacted a repeal by implication of the ATCA for all but cases against non-state actors.

Third, if there is to be presumptive inclusion of individual foreign officials within section 1603(b) of the FSIA, it must be made subject to an exception analogous to that of *Ex parte Young*. Just as state officials can never be delegated the power to violate the Constitution, foreign officials can never be delegated the power to torture, summarily execute, or commit violations of other *jus cogens* norms, because the sovereign itself lacks the power to engage in such acts.

This leaves the problem of the apparent straightjacket of *Amerada Hess* and its rejection of implicit exceptions to the FSIA.

¹⁵¹ See *supra* notes 54-55.

¹⁵² The opinion in *Herbage* mentions no contact between the defendant British officials and the United States. 747 F. Supp. at 60.

Why should the *jus cogens* nature of certain torts permit the creation of an implicit exception to the immunity of individual officials, when the grossness of Argentina's torture of Siderman¹⁵³ and the USSR's summary execution of Raoul Wallenberg¹⁵⁴ did not strip those states of sovereign immunity? "Easy"¹⁵⁵ answers to these important questions are not available. Perhaps the courts will accept the appropriateness of a more flexible approach in light of the legislative history of the TVPA,¹⁵⁶ which indicates a Congressional intent to strike a fair balance between foreign sovereign immunity and the rights of human rights victims for judicial redress.

If an analogue to *Ex parte Young* were imported into ATCA and TVPA litigation, the courts might further ponder analogies to the official immunities doctrines that limit the liability of state and federal officials sued for constitutional torts. Doctrines of head of state or diplomatic immunity provide no protection for the former officials who are the targets of human rights suits.¹⁵⁷ While the question remains hypothetical, former foreign judges might be given absolute immunity for violations committed in a judicial capacity.¹⁵⁸ Police officials might be excused for committing human rights violations in good faith ignorance of their illegality.¹⁵⁹ The grossness of the violations litigated to date make these questions moot, but future cases might require their consideration.

The *Trajano* opinion, while intelligent and careful, provides an unsatisfactory resolution of the FSIA issue. Given the muddle in the legislative history of the TVPA,¹⁶⁰ one is cautious about seeking clarification of section 1603(b) from Congress. But if the courts continue down the ill-conceived *Chuidian* path there may be no alternative. The future viability of both the ATCA and the TVPA depends on the clear recognition of at least some form of

¹⁵³ *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 1812 (1993).

¹⁵⁴ *Von Dardel v. U.S.S.R.*, 736 F. Supp. 1 (D.D.C. 1990).

¹⁵⁵ *Trajano II*, 978 F.2d at 498.

¹⁵⁶ *See supra* notes 128-32, 141-43.

¹⁵⁷ *See Bass, supra* note 21.

¹⁵⁸ *See, e.g., Stump v. Sparkman*, 435 U.S. 349 (1978).

¹⁵⁹ *See, e.g., Harlow v. Fitzgerald*, 457 U.S. 800 (1982) (limiting scope of qualified good faith immunity); *Wood v. Strickland*, 420 U.S. 308 (1975) (recognizing that officials are entitled to qualified good faith immunity from liability for damages).

¹⁶⁰ *See supra* notes 128-32, 141-43 and accompanying text.

ultra vires exception to immunity for gross violations of human rights by foreign officials acting under color of law.¹⁶¹

IV. *DOE V. KARADZIC* — THE FUTURE OF THE ALIEN TORT CLAIMS ACT?

In February 1993 the Center for Constitutional Rights filed a class action suit under the ATCA and the TVPA against Radovan Karadzic, the Bosnian Serb leader, and served him with process at a New York hotel.¹⁶² Shortly thereafter, several other plaintiffs represented by Catherine MacKinnon and the National Organization for Women Legal Defense and Education Fund served process on Karadzic in a separate suit.¹⁶³ Karadzic had been admitted to the United States on a C-2 visa¹⁶⁴ as an alien in transit to the United Nations, to participate in the UN-sponsored peace talks on Bosnia. Karadzic did not enter on a diplomatic visa, since he is not an official of any recognized state, but instead is the leader of an insurgent group battling Bosnia's elected leadership.¹⁶⁵

Karadzic has been accused of masterminding the program of ethnic cleansing against Bosnian Muslims through gross human rights and humanitarian law violations, including arbitrary killings of civilians, systematic rape, enforced prostitution, and forced pregnancy.¹⁶⁶ The Acting Secretary of State publicly labelled Karadzic a war criminal because of his responsibility for these atrocities.¹⁶⁷ While Karadzic might be considered a leading candidate for prosecution in the war crimes proceedings before the International Tribunal established by the United Nations Security

¹⁶¹ Codification of a *jus cogens* exception to the immunity of states might also be considered, though graver "floodgates" and friction concerns might be raised than in the context of suits against individuals found in the United States. See Joan Fitzpatrick, *Reducing the FSIA Barrier to Human Rights Litigation—Is Amendment Necessary or Possible?*, 86 PROCS. AM. SOC. INT'L L. 338 (1992).

¹⁶² *Doe v. Karadzic*, No. 93 Civ. 0878 (S.D.N.Y. filed Feb. 11, 1993).

¹⁶³ *Kadic v. Karadzic*, No. 93 Civ. 1163 (S.D.N.Y. filed Mar. 2, 1993).

¹⁶⁴ 28 U.S.C. § 1101(a)(15)(C) (1988) ("an alien who qualifies as a person entitled to pass in transit to and from the United Nations Headquarters District").

¹⁶⁵ *Doe v. Karadzic*, No. 93 Civ. 0878 ¶¶ 3, 6.

¹⁶⁶ See AMNESTY INTERNATIONAL, BOSNIA-HERZEGOVINA: GROSS ABUSES OF BASIC HUMAN RIGHTS 7 (1992); Commission on Human Rights Resolution 1992/S-2/1, U.N. Doc. E/CN.4/1992/S-2/6 (1992) (condemning practice of "ethnic cleansing" and "recognizing that Serbian leadership in territories under their control in Bosnia and Herzegovina, the Yugoslav Army and the political leadership of the Republic of Serbia bear primary responsibility for this reprehensible practice.").

¹⁶⁷ See *War Crimes in the Former Yugoslavia*, U.S. Report to the UN Security Council, 3 U.S. DEP'T. OF STATE DISPATCH 721, 732 (Sept. 1992).

Council,¹⁶⁸ the course of the war in Bosnia will likely determine whether he enjoys impunity from criminal process.

The complaints against Karadzic allege specific acts of arbitrary killing, rape, and arbitrary detention concerning the plaintiffs, who are now refugees.¹⁶⁹ The *Doe* plaintiffs are alleged to represent a class of all persons who are victims of war crimes and human rights violations in Bosnia by forces under Karadzic's control.¹⁷⁰

The cases against Karadzic present an important opportunity for development of the ATCA and the TVPA. As the Eleventh Circuit noted in *Linder v. Calero Portocarrero*,¹⁷¹ there is no "foreign civil war exception" to the norms against torture and arbitrary killing. Nevertheless, the context of ongoing conflict and the class action nature of the *Doe* complaint, sweeping in all breaches of humanitarian and human rights law attributable to Karadzic, are likely to raise concerns about judicial "intrusion" into the arena of politics.

Yet, the greatest symbolic value of the Karadzic suits may be precisely their audacity. The Bosnian conflict has been a terrible ordeal not only for the many victims of the war and genocidal policies. It has been a severe trial for the system for international protection of human rights and enforcement of humanitarian norms—a trial the international system has so far failed. Despite invocation of new and innovative mechanisms for the protection of human rights, including special sessions of the Commission on Human Rights;¹⁷² fact-finding missions from that body as well as

¹⁶⁸ Security Council Resolution 827 of 25 May 1993, *reprinted in* 32 I.L.M. 1203 (1993). Article 7(3) of the proposed statute of the International Tribunal, drafted by the Secretary-General, provides that a superior is personally responsible for war crimes "if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof;" Article 7(2) provides that the official position of an accused person, including a head of state, neither relieves the person of criminal responsibility nor mitigates punishment. *Report of the Secretary-General Pursuant to paragraph 2 of Security Council Resolution 808 (1993)*, U.N. Doc. S/25704 para. 59 (1993).

¹⁶⁹ *Doe v. Karadzic*, No. 93 Civ. 0878 ¶¶ 7-8.

¹⁷⁰ *Id.* ¶¶ 9-14.

¹⁷¹ 963 F.2d 332 (11th Cir. 1992) (avoiding jurisdictional issues of international law by allowing claims under Florida tort law).

¹⁷² Commission on Human Rights Resolution 1992/S-2/1, U.N. Doc. E/CN.4/1992/S-2/6 (1992).

the European Community¹⁷³ and the Conference on Security and Cooperation in Europe; and creation of the United Nations War Crimes Commission and International Tribunal,¹⁷⁴ no one has been punished or authoritatively held responsible.

The service of the complaints on Karadzic provided the first occasion on which he has been called to account for his gross violations of fundamental norms. His shocked response to the complaints¹⁷⁵ indicates that they have already served one of the key purposes of ATCA and TVPA litigation—to convey to the torturers and killers that they have no safe haven from responsibility for their crimes in the United States, though they may be granted impunity elsewhere.¹⁷⁶

Karadzic's threat not to return to New York without a grant of immunity¹⁷⁷ will attract the concern of ATCA skeptics. Why, they may ask, should the rights of an individual or even a class of human rights victims be given judicial protection in United States courts, if such suits create a risk of upsetting the negotiation process that might end the war? In the *Klinghoffer* case,¹⁷⁸ the district and circuit courts grappled with a related issue—given the importance of the PLO's presence in New York for the purpose of participating in the work of the United Nations, should its presence in New York be burdened by exposure to suit for acts of extraterritorial terrorism in which the PLO is alleged to be complicit?

These questions are best resolved not by a mechanical invocation of the political question doctrine¹⁷⁹ nor by rejecting the legitimacy of ATCA suits in all circumstances, but by careful application of established immunities doctrines and jurisdictional

¹⁷³ 20,000 Muslim Women Raped in Bosnia, *EC Says*, S.F. CHRON., Jan. 9, 1993, at A10.

¹⁷⁴ U.N. Docs. A/47/666 - S/24809; E/CN.4/1992/S-1/9 and E/CN.4/1992/S-1/10 (1992); *Legal Commission to Start Investigation of Mass Graves in Former Yugoslavia*, Agence France Presse, Dec. 14, 1992, available in LEXIS, Nexis library, AFP file; *CSCE Considers Yugoslav War Crimes Trial*, Agence France Presse, Dec. 15, 1992, available in LEXIS, Nexis library, AFP file.

¹⁷⁵ Paul Lewis, *Immunity Sought for Bosnian Serb*, N.Y. TIMES, Feb. 23, 1993, at A8.

¹⁷⁶ See *supra* notes 54-55.

¹⁷⁷ Lewis, *supra* note 175.

¹⁷⁸ *Klinghoffer v. S.N.C. Achille Lauro*, 937 F.2d 44 (2d Cir. 1991); *Klinghoffer v. S.N.C. Achille Lauro*, 795 F. Supp. 112 (S.D.N.Y. 1992).

¹⁷⁹ *Klinghoffer*, 937 F.2d at 49 (observing that doctrine "restrains courts from reviewing an exercise of foreign policy judgment by the coordinate political branch to which authority to make that judgment has been constitutional[ly] commit[ted]").

principles such as minimum contacts and *forum non conveniens*. Karadzic seeks an exercise of judicial creativity to fashion for him a new form of functional immunity, for those admitted to the United States solely for the purpose of conducting UN business of a "diplomatic" sort.¹⁸⁰ Under the United Nations Headquarters Agreement, Karadzic is entitled at best to immunity from arrest, not immunity from civil suit.¹⁸¹ Assuming that his physical presence in New York suffices to establish personal jurisdiction,¹⁸² the case cannot be dismissed on jurisdictional grounds. A claim of *forum non conveniens* would obviously fail, given the victims' lack of access to effective judicial remedies at the situs of the torts.

The international legal definitions of torture and arbitrary killing require proof of tortious action with actual or apparent authority or under color of foreign law.¹⁸³ For Karadzic and others like him, this requires proof that his acts are attributable to a sovereign, in this case Serbia through its various forms of support for Karadzic and his military forces. These state responsibility issues resemble those encountered in assessing the acts of "death squads" and other quasi-state actors. Yet the more Karadzic is seen as an agent of the Milosevic government in Serbia, the more weighty his claims to diplomatic or sovereign immunity.

Alternatively, Karadzic can be sued for torts committable by non-state actors under norms of humanitarian law and terrorism. While the ATCA can serve as a vehicle for such claims, Judge Edwards's opinion in *Tel-Oren* sounds a cautionary note.¹⁸⁴ The preference of the Eleventh Circuit to limit Linder's claims against the Nicaraguan *contra* leaders to those derived from Florida tort law in preference to humanitarian law¹⁸⁵ additionally signals judicial reluctance.

¹⁸⁰ Memorandum in Support of Motion to Dismiss before Answer, *Doe v. Karadzic*, No. 93 Civ. 878 (S.D.N.Y. filed May 10, 1993) at 6-7.

¹⁸¹ Agreement between the United Nations and the United States of America Regarding the Headquarters of the United Nations, 61 Stat. 3416, T.I.A.S. No. 1676, 11(2) U.N.T.S. 11, entered into force, Nov. 21, 1947, Article III Section 9(a), Article IV Section 11.

¹⁸² See *Burnham v. Superior Court*, 495 U.S. 604 (1990) (transient presence in state sufficient to establish personal jurisdiction).

¹⁸³ Pub. L. No. 102-256, 106 Stat. 73 (1992).

¹⁸⁴ *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 791 (D.C. Cir. 1984) (Edwards, J., concurring).

¹⁸⁵ *Linder v. Calero Portocarrero*, 963 F.2d 332 (11th Cir. 1992).

CONCLUSION

The jury trial of the consolidated *Marcos* suits and the Ninth Circuit's decision of Imee Marcos-Manotoc's appeal in *Trajano* are important milestones in litigation brought under the Alien Tort Claims Act. This two-hundred-year-old statute is beginning to achieve its full flowering not only as a vehicle for vindicating the rights of victims of extreme tortious conduct but also as an emblem of United States commitment to respect for principles of customary international law and faithful provision of judicial remedies for its breach, despite the cynicism, indifference, or impotence of other states and international institutions. While class action ATCA suits present new dilemmas for human rights lawyers, these dilemmas are not markedly different from those faced by other lawyers involved in public interest or institutional reform litigation. The recently-filed ATCA suits against Radovan Karadzic, concerning gross human rights and humanitarian law violations in Bosnia-Herzegovina, present both a beacon of hope and a challenging opportunity to advance understanding of the ATCA and its role in the system for international protection of human rights.

