HUMAN RIGHTS ACCOUNTABILITY: CONGRESS, FEDERALISM AND INTERNATIONAL LAW

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I. INTRODUCTION

While regularly seeking to apply international human rights norms to judge the behavior of other governments, the United States has vehemently rejected efforts to apply such rules to United States domestic behavior. Variously described as hypocritical and shortsighted, or pragmatic and morally valid, this dichotomy is well-ingrained in our legal system. The tensions produced by United States resistance to domestic application of international law have heightened in recent years, as the United States seeks to cement its position as leader of the post-cold war world community and as human rights and humanitarian law have reached a position of unprecedented importance on the world stage. Over the course of less than twelve months in 1998 and 1999, the United States and its European allies fought a war in Kosovo with the avowed

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purpose of forcing a sovereign State[1] to obey international human rights norms within its own territorial borders. The sitting head of the State of Yugoslavia faced indictment by an international criminal tribunal for violations of human rights and humanitarian law. A former head of the State of Chile fought to avoid prosecution in Spain for international law violations committed in his home country. The vast majority of the world's nations endorsed a permanent International Criminal Court over the vehement objections of the United States. Each of these international confrontations turned upon the relationship between international and domestic law. Each demanded examination of the extent to which international law norms govern the internal domestic actions of a sovereign State.

A variety of doctrines, briefly summarized in the following section, limit the application of international norms to events within the United States or to abuses committed by United States officials. Recent litigation under the Alien Tort Claims Act (ATCA), however, has created a small window through which international human rights law can be applied both to United States-based private actors and to United States government officials. As this ATCA window expands, it challenges traditional barriers to domestic enforcement of international law. In this paper, after a brief review of the interpretive structure limiting United States domestic incorporation of international law, I trace the development of the ATCA doctrine and its expansion to a wider range of possible defendants. I then analyze the current cases in light of what is known about the original goals of the statute, concluding that the modern application of the statute is both constitutional and consistent with the apparent intent of its framers. Finally, I explore the challenge these cases pose to the traditional reluctance to enforce international norms within the United States, and the statute's potential for bringing the United States, kicking and screaming, into the modern age of international law.

II. UNITED STATES DOMESTIC APPLICATION OF INTERNATIONAL LAW

While actively engaged in international efforts to force governments and officials of other countries to obey international law, the United States government has sharply restricted the domestic application of those same rules. Although scholars continue to debate the interrelationship between international law and the Constitution, statutes and executive decrees,[2] courts generally agree

1. I use State, with a capital letter, to indicate the government of an independent nation, and state to indicate one of the fifty United States.

2. Among the extensive literature, *see, e.g., Agora: May the President Violate Customary International Law?*, 80 AM. J. INT'L L. 913 (1986) (exchange of views); Jack M. Goldklang, *Back on Board The Paquete Habana: Resolving the Conflict Between Statutes and Customary International Law*, 25 VA. J. INT'L L. 1 (1984) (concluding that statutes override inconsistent customary international law); Louis

that both statutes and executive actions override inconsistent *customary international law*, thus enabling either of the political branches to render unenforceable any international obligation deriving from customary law.[3] *Treaties* receive greater respect within the United States domestic law structure, being viewed as of equal stature as statutes - the last in time governs over prior inconsistent provisions - but inferior to the Constitution.[4] The impact of treaties, however, is sharply restricted by the view that they are enforceable only where they explicitly provide for a private right of action,[5] a condition that the United States has explicitly attached to several recently ratified human rights treaties.[6]

Given this restrictive approach to domestic implementation of international law within the United States, virtually all such enforcement depends upon the actions of Congress or the executive branch.[7] Congress took such action in 1789 with the enactment of the ATCA, and then again over 200 years later with the Torture Victim Protection Act (TVPA). These statutes and the cases applying them provide one of the few judicial arenas in which issues of this nature are decided. After exploring how the statutes have been applied over the past twenty years, I will discuss the implications of this line of cases for the larger issues of domestic application of human rights norms within the United States.

Henkin, *International Law as Law in the United States*, 82 MICH L. REV. 1555, 1561-69 (1984) (arguing that customary international law is "equal in authority to an act of Congress." *id.* at 1566, but that in some circumstances, the President is authorized to disregard such law, *id.* at 1568-69); Jules Lobel, *The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law*, 71 VA. L. REV. 1071, 1130-53 (1985) (fundamental international law norms bind both Congress and the President).

3. Although the Supreme Court has never directly decided the place of customary international law in the hierarchy, its decisions imply that both statutes and executive actions override inconsistent customary law, and this has been the holding of all modern court decisions. *See* The Paquete Habana, The LoLa.,175 U.S. 677, 700 (1899) ("where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations . . ."); *id.* at 708 (courts must apply a rule of international law "in the absence of any treaty or other public act of their own government in relation to the matter."); *See* Beth Stephens, *The Law of Our Land: Customary International Law as Federal Law After Erie*, 66 FORDHAM L. REV. 393, 397-98 (1997).

4. *See* The Chinese Exclusion Case, 130 U.S. 581 (1889); Whitney v. Robertson, 124 U.S. 190 (1888); The Head Money Cases, 112 U.S. 584 (1884).

5. *Id.*; *See* Lobel, *supra* note 2, at 1108-10 (criticizing the doctrine of "self-executing" treaties).

6. The United States has attached "reservations, understandings or declarations" to several recently ratified treaties stating that the treaties create no private right of action, do not effect any changes in United States law, and do not "federalize" areas otherwise left to the control of the states. *See* Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT'L L. 341, 341 (1995) (discussing the recent attachments to human rights conventions); David P. Stewart, *United States Ratification of the Covenant on Civil and Political Rights: The Significance of the Reservations, Understandings, and Declarations*, 42 DEPAUL L. REV. 1183, 1206 (1993).

7. One exception is the enforcement of customary international law norms where there has been no overriding action from the political branches. *See* Stephens, *supra* note 3.

III. THE UNIQUE AND EVOLVING ROLE OF THE ALIEN TORT CLAIMS ACT

Given the barriers preventing direct application of most international human rights law within the United States, one of the few arenas in which international norms are regularly applied by United States courts are cases arising under the 200-year-old ATCA[8] and its younger cousin, the TVPA, enacted in 1992.[9] The ATCA grants federal courts jurisdiction over a claim by an alien for "a tort only committed in violation of the law of nations." The statute has been interpreted to allow noncitizens to bring suit for violations of the evolving body of customary international law norms. The TVPA authorizes a civil suit by any individual, citizen and noncitizen alike, for two violations, extrajudicial execution and torture, when committed "under actual or apparent authority, or color of law, of any foreign nation."[10] The TVPA includes detailed definitions of the two torts that reflect, but do not duplicate, accepted international standards.[11]

These two statutes provide the only consistent means by which international law claims are adjudicated within the United States, a result of the explicit authorization of Congress. The constitutionality of the two statutes has been upheld by every court that has considered the issue.[12] But as litigants increasingly seek to apply the statutes to domestic conduct, the statutes are likely to draw increasing scrutiny.

A. *Evolving ATCA Claims*

The ATCA affords plaintiffs a broad right to file claims for violations of the evolving body of customary international law. The proper interpretation of "the law of nations" was a key issue in the first modern ATCA decision, *Filártiga v. Peña-Irala,*[13] in which the family of a young man tortured to death in Paraguay sought damages from the police officer who had tortured him. The defendant argued that international law did not apply to a government's treatment of its own citizens, relying on prior Second Circuit decisions. The *Filártiga* court disagreed, holding that "it is clear that courts must interpret international law not as it was in 1789, but as it has evolved and exists among

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8. 28 U.S.C. § 1350 (1994).

9. 28 U.S.C. § 1350 (note) (1994).

10. *Id.*, § 2(a).

11. *Id.* at §§ (a), & (b). *See* comparison of TVPA definitions with international law norms in BETH STEPHENS & MICHAEL RATNER, INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS 63-68 (1996).

12. *See, e.g.*, Abebe-Jira v. Negewo, 72 F.3d 844, 848 (11th Cir. 1996); Trajano v. Marcos, 978 F.2d 493, 501-03 (9th Cir. 1992); Filártiga v. Peña-Irala, 630 F.2d 876, 885-87 (2d Cir. 1980).

13. *Filártiga v. Peña-Irala*, 630 F.2d 876.

the nations of the world today."[14] All courts that have decided the issue have agreed that the statute refers to current norms of international law,[15] and Congress has indicated its agreement as well.[16]

This interpretation is consistent with the Supreme Court's understanding of the meaning of the law of nations. In one of the few cases to apply constitutional language authorizing Congress to "define and punish . . . offenses against the law of nations," for example, the Court held that the clause encompassed violations of the law of nations as it had evolved, regardless of whether the particular violation existed at the time the Constitution was drafted.[17] In *Arjona,* the defendant was charged with violating a federal statute making it a crime to counterfeit notes issued by a government-owned foreign bank.[18] Arjona pointed out that such foreign notes were unknown at the time the Constitution was drafted. The Court nevertheless found the statute to be within Congress' constitutional power to "define and punish . . . offenses against the law of nations" because the law of nations, as used in the Constitution, encompassed this "more recent custom among bankers of dealing in foreign securities . . . ," even though the framers would not have contemplated such an act as a violation of the law of nations.[19] Similarly, the Court held in 1900 that the law of nations encompassed a newly developed rule of international law governing the protection of an enemy's fishing vessels, a rule that had evolved into a binding norm over the course of the 19th century.[20]

The Courts' conclusion that the ATCA permits suits for violations of currently existing international law norms has enabled the courts to recognize a growing list of violations as triggering ATCA jurisdiction. *Filártiga* and its progeny require that a norm be "universal, obligatory, and definable."[21] *Filártiga* itself held that torture by a government official of a citizen of his own state violated international law. Subsequent cases have recognized both

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14. *Id.* at 881.

15. *See, e.g.,* Abebe-Jira v. Negewo, 72 F.3d at 848; Filártiga, 630 F.2d at 881.

16. *See* TVPA Legislative Report, H.R. Rep. No. 367, 102d Cong., 1st Sess. 4 (1992), *reprinted in* 1992 U.S.C.C.A.N. 84, noting that the ATCA permits suits based on "norms that already exist or may ripen in the future into rules of customary international law."

17. United States v. Arjona, 120 U.S. 479 (1887).

18. *Id.* at 480-82.

19. *Id.* at 485-86.

20. In The Paquete Habana, 175 U.S. 686, 694, the Supreme Court concluded that although the rule had previously been followed as a matter of comity, it had since ripened into "a settled rule of international law."

21. This standard, first articulated in Forti v. Suarez-Mason, 672 F. Supp. 1531 (N.D. Cal. 1987) [hereinafter *Forti I*], on reconsideration on other grounds 694 F. Supp. 707 (N.D. Cal. 1988), has since been widely accepted. STEPHENS & RATNER, *supra* note 11, at 51-52; *see, e.g.,* Martinez v. City of Los Angeles, 141 F.3d 1373, 1383 (9th Cir. 1998); Beanal v. Freeport-McMoran, Inc., 969 F. Supp. 362, 370 (E.D. La. 1997); Xuncax v. Gramajo, 886 F. Supp. 162, 184 (D. Mass. 1995).

additional human rights violations and additional actors as falling within the reach of the statute. Thus, cases alleging summary execution, disappearance, arbitrary detention, cruel, inhuman or degrading treatment, genocide, war crimes, and crimes against humanity have all been found to state claims under the ATCA.[22] Of particular note, one court initially rejected a claim based on disappearance, but reversed itself based on plaintiff's showing that international law had recognized such a violation over the preceding decade.[23]

Cases over the past twenty years have also expanded the range of defendants who can be held accountable under the ATCA. Whereas the defendant in *Filártiga* was the actual torturer, later suits targeted defendants in a position of command responsibility: those who planned, ordered, or directed human rights abuses, or who knew or should have known about the abuses and failed to prevent their occurrence or punish those responsible.[24]

B. *Private Actors: Individuals and Corporations*

In Kadic v. Karadzic,[25] the Second Circuit recognized two additional principles of ATCA jurisprudence as applied to the potential defendants. The *Kadic* decision arose out of claims filed against Radovan Karadzic, the leader of the Bosnian Serbs at the time of the Bosnian war and the head of an unrecognized de facto state: although based on an illegal seizure of power, his "government" controlled both territory and population, through a legislature, executive officers, and a powerful military force. The court first noted that

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22. *See, e.g.*, Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995) (genocide, war crimes and crimes against humanity); Doe I v. Unocal Corp., 963 F. Supp. 880, 891-92 (C.D. Cal. 1997) (slavery); Xuncax, 886 F. Supp. at 185-89 (certain acts of cruel, inhuman, or degrading treatment); *id.* at 173-75 (gender violence such as rape as a form of torture); Forti I, 672 F. Supp. at 1541-42 (summary execution, prolonged arbitrary detention); Forti v. Suarez-Mason, 694 F. Supp. 707, 709-11 (N.D. Cal. 1988) [hereinafter *Forti II*] (on reconsideration) (disappearance). Cases currently pending ask the courts to find gender violence to be an independent violation of human rights, Doe v. Islamic Salvation Front (FIS), 993 F. Supp. 3 (D.D.C. 1998) (suit against Islamic fundamentalist group sued for attacks on women and girls), along with egregious violations of environmental standards, Jota v. Texaco, Inc., 157 F.3d 153, 159 (2d Cir. 1998) (noting issue but declining to decide whether claim triggered ATCA jurisdiction); Beanal. 969 F. Supp. at 382-84. In *Beanal*, the district court held that corporate actions that harm the environment did not violate established norms of international law. This issue is currently on appeal. *Beanal, 969 F. Supp. at 382-84.*

23. *Cf.* Forti I, 672 F. Supp. at 1542-43 (rejecting claim based on disappearance), with Forti II, 694 F. Supp. at 709-11 (accepting disappearance claim as triggering ATCA jurisdiction).

24. *See, e.g., Kadic v. Karadzic*, 70 F.3d 232 (holding de facto head of state responsible for abuses committed by his military forces); Hilao v. Estate of Marcos, 25 F.3d 1467 (9th Cir. 1994) (holding ex-dictator of the Philippines responsible for abuses committed by his security forces); *Xuncax v. Gramajo*, 886 F. Supp. at 171-73, 174-75 (holding Guatemalan general responsible for violations committed by his forces); Forti I, 672 F. Supp. at 1537-38 (holding Argentine general responsible for abuses committed by troops under his command).

25. Kadic, 70 F.3d 232.

certain international human rights norms prohibit private conduct as well as public acts, and it concluded that the ATCA applies to suits alleging such violations committed by private parties. In particular, violations such as genocide and certain war crimes trigger ATCA jurisdiction when committed by private actors because the international law definitions of those offenses indicate that the prohibition binds private parties as well as public actors.[26]

Second, the *Kadic* court recognized that human rights violations such as torture and summary execution, as defined by international law, do require state action,[27] but held that the requisite "official capacity" could be supplied by an official of an unrecognized de facto state. The opinion notes that underlying the state action requirement is a regime's ability to exert official power over those living under its control, not diplomatic recognition:

> [I]t is likely that the state action concept, where applicable for some violations like "official" torture, requires merely the semblance of official authority. The inquiry, after all, is whether a person purporting to wield official power has exceeded internationally recognized standards of civilized conduct, not whether statehood in all its formal aspects exists.[28]

The decision reflects the Court's willingness to examine the underlying purpose of modern international human rights law, applying the ATCA in a manner designed to implement that purpose.

The *Kadic* court also recognized that the state action requirement may extend accountability to otherwise private actors who act in complicity with

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26. *Id.* at 239-43. The Convention on the Prevention and Punishment of the Crime of Genocide of December 9, 1948 specifically prohibits genocide whether committed by a public or private actor. 78 U.N.T.S. 277, art. 4. Common article 3 of the Geneva Conventions, applicable to internal conflicts, is binding on all parties to a conflict, whether or not they constitute state actors. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

27. The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment of 10 December 1984, art. 1, for example, prohibits acts of torture "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." G.A. Res. 39/46, 39 U.N. GAOR, Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984).

28. *Kadic*, 70 F.3d at 245. In Islamic Salvation Front (FIS) 993 F. Supp. at 9. The district court recognized that, for the purposes of the state action requirement, the Islamic Salvation Front in Algeria might constitute a de facto state in the areas under its control, but withheld determination of that factual issue until later in the litigation.

public actors.[29] As one district court stated, "it would be a strange tort system that imposed liability on state actors but not on those who conspired with them to perpetrate illegal acts through the coercive use of state power."[30] In defining the state action requirement in ATCA cases, United States courts have applied the standards developed in litigation under §1983, the key United States civil rights statute that also requires state action.[31] The Supreme Court has found otherwise private action to satisfy the United States state action requirement in many factual settings, including where a private party performs a public function; where the state commandeers private parties and assigns them public responsibilities; where the state and private actions are so interrelated as to be indistinguishable; and where the private and state parties are engaged in "joint action."[32] As the *Doe v. Unocal* court noted, a private party's actions will be considered state action where the private party "willfully participate[s] in joint action with the state or its agents;" enters into an agreement with a government actor; "engages in a conspiracy" or "acts in concert" with state agents; or aids and abets state agents.[33] The court summarized, "where there is 'a substantial degree of cooperative action' between the state and private actors in effecting the deprivation of rights, state action is present."[34]

These concepts permit suits against non-governmental groups such as corporations.[35] Under the same principles applicable to individual private actors, corporations can be held liable for human rights abuses when they are

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29. *Kadic*, 70 F.3d at 245.

30. Eastman Kodak Comp. v. Kavlin, 978 F. Supp. 1078, 1091 (S.D. Fla. 1997).

31. 42 U.S.C. § 1983 (1994). "To the extent a state action requirement is incorporated into the ATCA, courts look to the standards developed under 42 U.S.C. § 1983." Doe I v. Unocal Corp., 963 F. Supp. 880, 890 (C.D. Cal. 1997), *citing Kadic*, 70 F.3d at 245. *See also* Beanal, 969, 375-80 (E.D. La. 1997) (appeal pending). Forti v. Suarez-Mason, 672 F. Supp. 1531, 1546 (N.D. Cal. 1987); TVPA Legislative Report, H.R. Rep. No. 367, *supra* note 16.

32. *See* summaries of this doctrine in Doe I, 963 F. Supp. at 890-91; National Coalition of Government of the Union of Burma v. Unocal, Inc., 176 F.R.D. 329, 345-49 (C.D. Cal. 1997); *Beanal*, 969 F. Supp. at 376-80.

33. Doe I v. Unocal Corp., 963 F. Supp. at 890-91.

34. *Id.* In a related case against Unocal, the same judge found the allegations of state action to be sufficient where "defendants' challenged actions are allegedly inextricably intertwined with those of the [Burmese military] government." *National Coalition of Government of the Union of Burma* v. *Unocal, Inc.*, 176 F.R.D. at 349.

35. Similar doctrines permit human rights litigation against unincorporated associations, including paramilitary groups. For example, the plaintiff in Belance v. Front for Advancement and Progress in Haiti, Civ. No. 94-2619 (E.D.N.Y., filed June 1, 1994), seeks to hold the Front for Advancement and Progress in Haiti (FRAPH), a terrorist organization, liable for her torture in Haiti. The complaint charges that the association acted in complicity with the illegal Haitian military regime, and was "present" in New York because it had opened an office with a representative in New York City. In Islamic Salvation Front (FIS), 993 F. Supp. 3 (suit against Islamic fundamentalist group sued for attacks on women and girls), the defendant association may be held liable as an unincorporated association and/or as a de facto government.

responsible for violations of international human rights norms that apply to private actors; or when they act in complicity with government officials to commit other human rights violations. Thus, a corporation can be held liable for using slave labor, as alleged in the *Doe v. Unocal* case,[36] or when responsible for genocide, as alleged in *Beanal v. Freeport*,[37] since both of these international law prohibitions apply to private actors as well as government officials. Likewise, corporate actors can be held liable for violations requiring state action, such as torture and summary execution, when they act in complicity with state actors. As the *Beanal* court concluded, "a corporation found to be a state actor can be held responsible for human rights abuses which violate international customary law."[38] Applying the §1983 civil rights standards, corporations satisfy the state action requirement when they engage in "joint action" with a government or government officials, or conspire with or otherwise act in concert with those officials, or perform a public function, such as taking responsibility for law enforcement. In a suit against a private corporation operating a detention facility, for example, a court held that the defendant corporation and its employees were state actors because they were "acting under contract" with the United States government and were "performing governmental services."[39]

C. *Domestic Applications*

Most ATCA cases concern violations occurring abroad, committed by foreign government officials or foreign citizens, and much of the commentary on the statute assumes that it is limited to such claims. But the statute in no way bars claims addressing international law violations within the United States or abuses committed by United States citizens or United States government officials, as long as the defendants are not protected by any applicable immunities. In the case on behalf of immigrants detained in the United States, a trial court judge recently upheld the immigrants' right to sue their jailers for cruel, inhuman, or degrading treatment and other human rights violations.[40] The immigration officials had contracted with a private corporation to operate

36. Unocal Corp., 963 F. Supp. 880.

37. Beanal v. Freeport-McMoran, Inc., 969 F. Supp. 362, 370-73 (E.D. La. 1997). In *Beanal*, however, the district court dismissed plaintiff's third amended complaint, holding that even as amended it still did not adequately allege genocide, Beanal v. Freeport-McMoran, Inc., 1998 WL 92246 (E.D. La. March 3, 1998) (unpublished opinion), aff'd on appeal, 197 F.3d 161.

38. Beanal, 969 F. Supp. at 376.

39. Jama v. U.S. Immigration and Naturalization Service, 22 F. Supp. 2d 353, 365-66 (D.N.J. 1998).

40. *Id.*

the facility; the defendants include the corporation, as well as both private individuals and government officials.

Litigation against the United States government is regulated by the restrictive Federal Tort Claims Act, which permits such claims for many torts committed within the United States, but prohibits most claims arising out of abuses in foreign countries, as well as most of those committed as intentional acts or in the implementation of discretionary policy decisions.[41] It is possible, however, to sue United States government officials for abuses committed outside the scope of their authority, or if those acts constitute violations of the Constitution or specific statutory protections. Thus, United States courts have refused to dismiss claims against immigration officials for violations of the rights of detainees[42] and against individual employees of the Central Intelligence Agency accused of responsibility for torture and execution in Guatemala.[43]

IV. THE CONSTITUTIONAL FOUNDATION OF THE ATCA

The *Filártiga* approach to the ATCA has been remarkably successful on several fronts. United States courts have followed the precedent in dozens of cases, producing not a single contradictory holding.[44] Congress has indicated its agreement with the case and its interpretation of the ATCA, praising the decision in the legislative reports accompanying the passage of the TVPA.[45] Until very recently, however, almost all of the United States cases have addressed abuses committed by foreigners in foreign countries. As the targets of this litigation expand to include United States based corporations as well as United States government officials, the cases may begin to provoke a more serious backlash. Thus, it is important to review the constitutional basis for the statute, and to evaluate whether it will survive increasingly hostile scrutiny, as

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41. The Foreign Tort Claims Act and the exceptions to United States government liability are codified at 28 U.S.C. §§ 1346, 2680.

42. Jama, 22 F. Supp.2d at 365.

43. Harbury v. Deutch, Civ. No. 96-00438 (D.D.C. March 9, 2000) (Order granting in part/denying in part defendants' Motion to Dismiss) (unpublished opinion). In a suit against the City of Los Angeles, the Ninth Circuit recognized that the ATCA would support a claim against a municipal government for arbitrary arrest and detention, but found the claim was not supported under the facts. Martinez v. City of Los Angeles, 141 F.3d 1373, 1383-84 (9th Cir. 1998).

44. Only one judge has written an opinion rejecting *Filártiga*, Judge Bork's concurring opinion in Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 798-823 (D.C. Cir. 1984); neither of the other judges on the panel joined his opinion (the case produced three separate opinions, agreeing only in the result), and no judge since has adopted Judge Bork's reasoning.

45. The House TVPA Report states that the ATCA has important uses and should not be replaced, and notes that the *Filártiga* decision "has met with general approval." H.R. Rep. No. 367, *supra* note 16, at notes 3, 4.

the inevitable evolution of the law of nations triggers ATCA litigation under increasingly controversial circumstances.

A. *Federal Foreign Affairs Powers*

As with many congressional enactments, the ATCA rests on several alternative constitutional provisions. All derive to some extent from the framers' expressed intent to centralize foreign affairs powers in the federal government.

The roots of the ATCA have been traced to a series of crises during the period between independence and the ratification of the Constitution, a time when the Continental Congress struggled ineffectively to govern the loose federation of independent states.[46] One of the prime areas of concern was the Confederation's inability to prevent the states from violating international obligations. After two incidents in which foreign diplomats were assaulted but the states failed to act to protect their diplomatic status, Congress twice called on the states to both prosecute crimes in violation of international law and to permit civil suits for damages by those injured by such violations. Only one state, Connecticut, is known to have responded.[47] The states' refusal to force repayment of private debts to the British and their allies - as promised in the treaty ending the war - threatened to precipitate new hostilities.[48]

Leading participants at the Constitutional Convention described federal control over foreign affairs as a central objective of the new Constitution. In particular, they emphasized the need for federal supervision of domestic actions that might have an impact on foreign relations.[49] The violent crimes committed against diplomats, for example, were of concern not because the underlying crime - assault and battery - had international implications, but because the target of the assault brought the crime into the realm of foreign affairs. Similarly, debt repayment, normally a domestic affair, became a national and international crisis when such payments were governed by international commitments.

The Constitutional Convention responded by centralizing foreign affairs powers in the federal government through a series of clauses granting particular

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46. *See* Stephens, *supra* note 3, at 402-03.

47. *Id.*; William R. Casto, *The Federal Courts' Protective Jurisdiction Over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467, 490-04 (1986); William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the "Originalists,"* 19 HASTINGS INT'L & COMP. L. REV. 221, 226-30 (1996).

48. *See* Dodge, *supra* note 47, at 236, 254; Dunlop v. Ball, 6 U.S. 180 (1804) ("Until the act of 1793, from the obstacles interposed by juries, and the proceedings of some courts of Virginia, a general opinion prevailed among the inhabitants of the state of Virginia, and among juries, that a British debt could not be recovered.").

49. Stephens, *supra* note 3, at 402-07.

powers to the federal government and prohibiting the states from exercising others.[50] In addition, as the Supreme Court has stated repeatedly, certain foreign affairs powers arise out of the very structure of our government. As summarized in a case addressing federal authority over immigration, "[f]or local interests the several States of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power."[51] In a later case, the Court relied upon the supremacy of federal authority over "the general field of foreign affairs," a supremacy to which the Court has "given continuous recognition."[52] "The Federal Government, representing as it does the collective interests of the forty-eight states, is entrusted with full and exclusive responsibility for the conduct of affairs with foreign sovereignties."[53]

This federal authority over foreign relations provides support for congressional power to regulate foreign affairs. In upholding the constitutionality of the Foreign Sovereign Immunities Act, for example, the Supreme Court found that Congress has the power to define the circumstances under which foreign governments can be sued in United States courts.

> By reason of its authority over foreign commerce and foreign relations, Congress has the undisputed power to decide, as a matter

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50. The Constitution grants Congress the authority to "regulate Commerce with foreign Nations," "establish an uniform Rule of Naturalization," "define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations," "declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water," and "repel Invasions," and "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof," U.S. CONST. Art. I, § 8, while the President is to serve as "Commander in Chief of the Army and Navy of the United States," "make Treaties," with the "Advice and Consent of the Senate," U.S. CONST. Art. II, § 2, appoint ambasadors subject to Senate approval, and "receive Ambassadors and other public Ministers." *Id.* at § 3. The states are prohibited from entering into "any Treaty, Alliance, or Confederation;" or granting "Letters of Marque and Reprisal;" or, without the consent of Congress, "lay[ing] any Duty of Tonnage, keep[ing] Troops, or Ships of War in time of Peace, enter[ing] into any Agreement or Compact with another State, or with a foreign Power, or engag[ing] in War, unless actually invaded, or in such imminent Danger as will not admit of delay." U.S. CONST. Art. I, § 10.

51. The Chinese Exclusion Case, 130 U.S. 581, 606 (1889). *See also* MacKenzie v. Hare, 239 U.S. 299, 311 (1915), where the court stated, "As a government, the United States is invested with all the attributes of sovereignty. As it has the character of nationality it has the powers of nationality, especially those which concern its relations and intercourse with other countries."

52. Hines v. Davidowitz, 312 U.S. 52, 62 (1941).

53. *Id.* at 63-64 (citations omitted). This has been the consistent holding of the Supreme Court, stated most strongly in United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936), where Justice Sutherland reasoned, "[T]he powers of external sovereignty [do] not depend upon the affirmative grants of the Constitution," but rather are "vested in the federal government as necessary concomitants of nationality." *Id.* at 318, 325-26. The Constitution, Sutherland concluded, was based upon the "irrefutable postulate that though the states were several their people in respect of foreign affairs were one." *Id.* at 317.

> of federal law, whether and under what circumstances foreign nations should be amenable to suit in the United States. Actions against foreign sovereigns in our courts raise sensitive issues concerning the foreign relations of the United States, and the primacy of federal concerns is evident. To promote these federal interests, Congress exercised its Article I powers by enacting a statute comprehensively regulating the amenability of foreign nations to suit in the United States.[54]

Similarly, Congress has the power to decide "whether and under what circumstances" claims alleging violations of international law trigger liability in United States courts. In the TVPA, a modern Congress defined specific examples of such liability. In the ATCA, the 18th century Congress delegated to the courts the task of defining the exact contours of such claims.[55]

Such delegation was unexceptionable to the framers, who assumed that customary international law was a part of the common law of both the states and of the new federal government.[56] In our modern, post-*Erie* world, this unwritten international law is part of the federal common law, a source of both supreme federal law, binding on the states, and of federal court jurisdiction.[57] Indeed, the *Filártiga* court rested its analysis of the ATCA in part upon the fact that customary international law is part of the federal common law, and, as such, cases alleging violations of such international norms "arise under" federal law for the purposes of Article III of the Constitution.[58]

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54. *Id.* at 493 (footnote and citations omitted). The Court explained that the application of federal law thus triggered federal court jurisdiction:

> The statute must be applied by the District Courts in every action against a foreign sovereign, since subject matter jurisdiction in any such action depends on the existence of one of the specified exceptions to foreign sovereign immunity. At the threshold of every action in a District Court against a foreign state, therefore, the court must satisfy itself that one of the exceptions applies - and in doing so it must apply the detailed federal law standards set forth in the Act. Accordingly, an action against a foreign sovereign arises under federal law, for purposes of Article III jurisdiction.

Id. at 493-94 (footnote and citation omitted).

55. "[W]e conclude that the Alien Tort Claims Act establishes a federal forum where courts may fashion domestic common law remedies to give effect to violations of customary international law." Abebe-Jira v. Negewo, 72 F.3d 844, 848 (11th Cir. 1996).

56. *See* Stephens, *supra* note 3, at 408-13. Debate over this issue continues. *See, e.g.*, Curtis A. Bradley & Jack L. Goldsmith, *Federal Courts and the Incorporation of International Law*, 111 HARV. L. REV. 2260 (1998); Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824 (1998).

57. Stephens, *supra* note 3, at 433-53.

58. Filártiga v. Peña-Irala, 630 F.2d 876, 887 (2d. Cir. 1980).

B. *The Offenses Clause*

The Constitutional Convention also included an apparently noncontroversial clause empowering Congress to "define and punish . . . offenses against the law of nations."[59] The first Congress codified several crimes committed against diplomats as offenses against the law of nations.[60] Further criminal codification was unnecessary, given that federal courts prosecuted common law crimes without codification for the first thirty years of the new nation.[61] The civil side, however, was also codified by the first Congress, by including the ATCA as a section of the First Judiciary Act.[62] The language of the ATCA tracts that of the Constitution, granting federal courts jurisdiction over torts "in violation of the law of nations," and it is likely that the offenses clause served as an important piece of constitutional support in the minds of its framers.[63]

C. *The ATCA and the Evolving Law of Nations*

Given this constitutional history, the current interpretation of the ATCA seems both plausible and consistent with the general intentions of the framers. This is not to say, of course, that any participant in the drafting and ratification of the statutes foresaw its application, for example, to a claim of genocide against the leader of a de facto regime in Europe. Such an action was no more foreseeable in 1791 than was the federal government's power to regulate interstate commerce conducted by means of the Internet. An attack on the

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59. U.S. CONST., Art. I, § 8, cl. 10. For a comprehensive discussion of the offenses clause and its relationship to the ATCA, *see* Beth Stephens, *Federalism and Foreign Affairs: Congress' Power to Define and Punish Offenses Against the Law of Nations*, ____ Wm. & Mary L. Rev. ____ (forthcoming Dec. 2000).

60. Diplomatic Relations Act of Apr. 30, 1790, ch. 9, 1 Stat. 117-18 (declaring certain acts against diplomats to be crimes against the law of nations).

61. United States v. Hudson, 11 U.S. 32 (1812); *see* Note, *The Sound of Silence: United States v. Hudson & Goodwin, the Jeffersonian Ascendancy, and the Abolition of Federal Common Law Crimes*, 101 YALE L. J. 919 (1992) (discussing history of common law crimes and the controversy surrounding the Supreme Court rejection of the concept).

62. The civil side of the offenses clause has been frequently overlooked. The only commentators to address the clause have assumed without discussion that it applies only to *criminal* prosecutions. *See* Howard S. Fredman, Comment, *The Offenses Clause: Congress' International Penal Power*, 8 COLUM. J. TRANSNAT'L L. 279 (1969) (reflecting the criminal limitation in its title, without further discussion); Charles D. Siegal, *Deference and Its Dangers: Congress' Power to "Define . . . Offenses Against the Law of Nations,"* 21 VAND. J. TRANSNAT'L L. 865, 866 (1988) (describing the clause as "permitting Congress to define violations of customary international law as domestic *crimes*," also without further discussion (*emphasis added*)). Congress, however, cited the clause in support of congressional power to impose civil liability in enacting both the Foreign Sovereign Immunities Act, 28 U.S.C. 1330, 1602-11 (1994), and the TVPA. As explained in Stephens, Congress is clearly correct in relying on the offenses clause for *civil* as well as *criminal* powers, *supra* note 59.

63. *See* Stephens, *supra* note 59.

Filártiga approach based on supposed unforeseeability is meaningless; most of the core institutions of our current society were unforeseeable at the time the Constitution - and the foundational statutes passed by the first Congress - were enacted.

One recent argument posits that the First Congress intended to create a cause of action only for claims for which the United States would be held accountable if it failed to provide redress. Thus, the international law crises during the Confederation were triggered by attacks on foreign diplomats and by treaty violations. In such situations, the injured parties looked to the United States government for satisfaction; when it was not forthcoming, the national government risked reprisals from the victim's government.

But the language of the ATCA was not restricted to violations of diplomatic privileges. Instead, Congress chose much more expansive language, creating remedies for all torts in violation of the law of nations. The plain meaning of this language is exactly that applied by *Filártiga:* torts that violate currently existing norms of international law. And the background understandings of the framers, to the extent that we can uncover them, support this meaning. Indeed, when the offenses clause was adopted at the Constitutional Convention, authorizing Congress to "define and punish . . . offenses against the law of nations," the only recorded opposition addressed the incongruence of a claim that the United States could "define" the law of nations. "To pretend to define the law of nations which depended on the authority of all the Civilized Nations of the World, would have a look of arrogance that would make us ridiculous."[64] The framers understood that the world community would take international law along paths that they could not predict; rather than fixing its content, they chose a standard that would enable the statute to evolve along with the law of nations.

Moreover, to the extent that the goal of the statute was to avoid international disputes, the drafters chose language that accommodated the reality that they could not predict what issues would be considered to be of international concern in the future. In their day, diplomatic protection and treaty violations were of central concern. Today, issues of trade and human rights are just as likely to provoke international uproars. Well aware both of the changing nature of the law of nations and the reality that no one nation could control its evolution, the framers crafted the ATCA broadly enough to encompass

64. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 614-15 (Max Farrand ed., rev. ed. 1937). The language was accepted only with the explanation that "define" was intended to suggest the need to provide detail, not to create offenses where none had previously existed: "The word define is proper when applied to offenses in this case; the law of nations being often too vague and deficient to be a rule." *Id.* at 615.

changing notions of international obligations. Interpretation of the ATCA is in this sense quite simple: it means what it says, as several courts have held.[65]

V. FEDERALISM AND CONGRESS' POWER TO ENFORCE INTERNATIONAL LAW

Congress' power to implement international law rests upon several constitutional provisions, including the federal structural foreign affairs power, the federal common law status of customary international law, the power to "define and punish . . . offenses against the law of nations," and the interactions between each of these and the wide-ranging "necessary and proper" clause.[66] How far does the power to implement international obligations extend? Can Congress enact statutes pursuant to this power that would not otherwise fall within the federal legislative powers? In particular, what constitutional result if Congress enacts a statute regulating foreign affairs that infringes into an area otherwise reserved to the states?

Both the logic of the foreign affairs power and Supreme Court decisions in analogous areas indicate that Congress can take such actions. Each of the congressional powers constitutes a specific grant to the federal government of the authority to regulate activities that fall within its reach; only those powers that are not assigned to the federal government are reserved to the states. In an analogous area, the Supreme Court held long ago that congressional power to implement treaties extends into areas over which Congress could not otherwise legislate.[67] Despite recent criticism, this doctrine remains good law.[68]

Similarly, the congressional foreign affairs powers - the structural power and the enumerated powers, including that contained in the offenses clause - afford Congress the authority to take any and all actions to implement international law and regulate foreign relations, as long as such actions do not violate specific constitutional mandates.

Thus, in *Boos v. Barry*,[69] one of the few cases relying on the offenses clause, the Supreme Court analyzed congressional statutes barring certain peaceful protests in the vicinity of foreign embassies.[70] The Court found one

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65. *See, e.g.*, Kadic v. Karadzic, 70 F.3d 232, 238 (2d Cir. 1995), holding that the ATCA "confers federal subject matter jurisdiction when the following three conditions are satisfied: (1) an alien sues; (2) for a tort; (3) committed in violation of the law of nations (i.e., international law)."

66. Particular congressional actions, of course, might also rest upon anyone of the specific congressional powers, *see supra* note 50.

67. Missouri v. Holland, 252 U.S. 416, 423-33 (1920).

68. *See* Martin Flaherty, *Are We to be A Nation? Federal Power vs. States' Right in Foreign Affairs*, 70 UNIV. COL L. REV. 1277, 1297-1316 (1999).

69. Boos v. Barry, 485 U.S. 312 (1988).

70. The case addressed the constitutionality of a statute governing protests within the District of Columbia, but compared the District of Columbia statute to a similar, but less restrictive statute governing

statute to violate the First Amendment, noting that "it is well established that 'no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution.'"[71] However, the Court accepted without question Congress' power to legislate in this area, despite the fact that the federal government would otherwise have had no power to regulate peaceful political protests. Noting that "[t]he need to protect diplomats is grounded in our Nation's important interest in international relations," the Court reviewed efforts to protect foreign diplomats dating back to the pre-constitutional era of the Confederation. Indeed, the Court noted that, if anything, the pressing national interest in diplomatic protection is "even more true today given the global nature of the economy and the extent to which actions in other parts of the world affect our own national security."[72]

Boos v. Barry addressed a statute aimed at protecting diplomats, a centuries-old topic of international law. But the constitutional analysis would be no different applied to a modern application of international law. As with the ATCA, nothing in the Constitution freezes foreign affairs to the areas of concern they occupied at the time the document was drafted and ratified. In particular, the available evidence as to the intentions and understandings of the framers, confirmed by early Supreme Court opinions, indicates that the Constitution incorporates the assumption that the issues governed international law necessarily evolve over time.

Consider, for example, the international law provisions governing imposition of the death penalty on juveniles. Much of the world considers such executions to be barred by international law; the United States, however, through reservations to treaties and other objections has attempted to bar the international norm from applying to United States conduct.[73] In the absence of such objections, the norm would be binding on the United States, either through treaty obligations or as a norm of customary international law.[74] In such a situation, failure to obey the prohibition would place the United States in

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such protests around the country. The Court noted that Congress had enacted the District of Columbia statute pursuant to its authority under Article I, § 8, cl. 10, of the Constitution to "define and punish . . . offenses against the Law of Nations." *Id.* at 321. The Court also referred to the United States treaty obligation to protect diplomats, contained in the Vienna Convention on Diplomatic Relations, April 18, 1961, 23 U.S.T. 3227, T.I.A.S. No. 7502. *Id.* at 322.

71. *Id.* at 324, *cited in* Reid v. Covert, 354 U.S. 1, 16 (1957).

72. *Id.* at 322.

73. *See, e.g.*, Ved P. Nanda, *The United States Reservation to the Ban on the Death Penalty for Juvenile Offenders*, 42 DEPAUL U. L. REV. 1311, 1328-34 (1993); Joan F. Hartman, *"Unusual" Punishment: The Domestic Effects of International Norms Restricting the Application of the Death Penalty*, 52 U. CIN. L. REV. 655 (1983).

74. Some commentators have argued that United States objections have been ineffective, and that the norm is already binding within this country. *See* Hartman, *supra* note 73.

violation of its international law obligations, although repercussions from other members of the world community would likely be limited to criticism, rather than concrete reprisals. In the absence of domestic incorporation of the international rule, United States courts would refuse to enforce it, on behalf, for example, of a person sentenced to death for a crime committed as a juvenile.

But if Congress chose to adopt the norm as binding on the United States, it would obtain the force of federal law. Congress could constitutionally enact legislation implementing the prohibition on the juvenile death penalty relying on the federal foreign affairs power. Such a statute would no more infringe upon states' rights than the 1790 classification of assaults upon diplomats as federal crimes, or the more recent federal prohibition of certain acts in the vicinity of foreign embassies, upheld in *Boos v. Barry.* In each of these examples, Congress has the authority to regulate activities that would otherwise fall within the control of the states because Congress has determined that such regulation implicates foreign policy concerns. Although the issues of international importance have changed, congressional power to determine the content of such issues remains the same.

VI. CONCLUSION

The modern expansion of human rights law to cover private actors is firmly founded both in 18th century concepts of the evolving law of nations and in developments in international law over the past fifty years, developments that the United States has both guided and accepted during that time period. Indeed, in a world in which private corporations wield more power than most governments and are increasingly active in areas formerly reserved for diplomats, it is inevitable that international law must increasingly address the behavior of both private individuals and private corporations. The acceptance of norms governing private actors into international law reflects a new international consensus that such issues are of international concern, that they affect international relations.

Similarly, international law recognizes no exceptions either for United States government officials acting abroad, or for the actions of the United States government within our borders. It is time for the United States to accept this reality and to bring the nation into compliance with international obligations. ATCA litigation has opened a window for litigating such issues in United States courts; the opening must be strengthened and enlarged if the United States wishes to be recognized as a law-abiding member of the world community.