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Adjudicating Violations of International Law: Defining the Scope of Jurisdiction Under the Alien Tort Statute—*Trajano v. Marcos*

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Introduction

The proper scope of the Alien Tort Statute[1] (ATS) has been an issue of uncertainty since its enactment in 1789.[2] Its uncertain status recently increased when victims of human rights violations invoked it to obtain jurisdiction over defendants.[3] The increase in both the use of the ATS[4] and the relative importance of the judicial rulings brought under the ATS makes the resolution of this problem crucial.[5]

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1. 28 U.S.C. § 1350 (1988). The Alien Tort Statute [hereinafter ATS] is also referred to as the Alien Tort Claims Act ("ATCA"). *See, e.g.*, Benjamins v. British European Airways, 572 F.2d 913, 916 (2d Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979) and Jeffery M. Blum & Ralph G. Steinhardt, *Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act after* Filartiga v. Pena-Irala, 22 HARV. INT'L L.J. 53 (1981).

2. The ATS was first enacted as a part of the Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 77.

3. The first case to invoke § 1350 jurisdiction over a human rights case was Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980), a case involving torture and wrongful death; *see infra* part I.B.1. When *Filartiga* showed that § 1350 could be used to obtain jurisdiction over human rights cases, other actions arising from similar fact patterns followed. *See, e.g.*, Siderman de Blake v. Republic of Argentina, 965 F.2d 699 (9th Cir. 1992) and, most recently, Trajano v. Marcos, 978 F.2d 493 (9th Cir. 1992).

4. Kenneth C. Randall, *Federal Jurisdiction over International Law Claims: Inquiries into the Alien Tort Statute*, 18 N.Y.U. J. INT'L L. & POL. 1, 4-6 (1985). Professor Randall's research compared the number of cases before and after *Filartiga*, *supra* note 3, in which the plaintiffs asserted jurisdiction under the ATS. From his work, Professor Randall has been able to conclude that, as compared to the first 191 years of its existence, the ATS has become much more popular after *Filartiga* and has been asserted in a wide variety of fact patterns.

5. The recent Torture Victim Protection Act of 1991, Pub. L. 102-256, 106 Stat. 73 (1992), is not, as some hoped, the legislative answer to the controversy over the ATS. While the Act, being a codification of the *Filartiga* decision, settles the controversial issues in cases dealing with similar factual situations, it unfortunately does not cover many of the cases that may be brought under the ATS. Kathryn L. Pryor, Note, *Does the Torture Victim Protection Act Signal the Imminent Demise of the Alien Tort Claims Act?*, 29 VA. J. INT'L L. 969, 1010-26 (1989). Therefore, the controversial issues surrounding the ATS must be resolved by other means.

The authoritative cases on this subject have expressed divergent views[6] and have lead one judge to conclude that only the Supreme Court can settle this dispute.[7] The Supreme Court, however, has yet to take the opportunity to hear the dispute.

In *Trajano v. Marcos*,[8] the Ninth Circuit heightened the controversy by adding yet another interpretation of the ATS, thus exacerbating the split among the circuits. Continued Supreme Court inactivity will lead to much confusion, inconsistent application among the circuits, and, inevitably, injustice.

This Note considers the issues involved in defining the scope of the ATS, as applied in prior cases, and the statute's potential application in future cases. Part I describes the background of the ATS and explains how previous courts have ruled on these issues. Part II then examines the *Trajano* decision in detail. Finally, part III compares the rulings of the Ninth Circuit with those of other circuits, evaluates their applications of the ATS, and suggests alternative interpretations and applications of the ATS.

I. Background

The ATS was initially part of the Judiciary Act of 1789.[9] The ATS provides: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations[10] or a treaty of the United States."[11]

Although the ATS authorized federal jurisdiction over appropriate cases,[12] this obscure jurisdictional statute laid dormant for most of its existence. Prior to 1980, litigants successfully invoked this nearly 200 year

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6. The two circuit court cases which have completely considered the ATS are *Filartiga v. Pena-Irala* from the Second Circuit, *see infra* part I.B.1., and Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984), *see infra* part I.B.2.

7. Judge Edwards has stated that this "area of the law . . . cries out for clarification by the Supreme Court." *Tel-Oren*, 726 F.2d at 775 (Edwards, J., concurring).

8. Trajano v. Marcos, 978 F.2d 493 (9th Cir. 1992).

9. The statute originally read:

> Sec. 9. And be it further enacted, That the district courts . . . shall also have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States.

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

10. While traditionally referred to as the "law of nations," modern legal scholars have relabeled this body of law "international law." The two terms are synonymous. BLACK'S LAW DICTIONARY 816, 886 (6th ed. 1990); David Cole et al., *Interpreting the Alien Tort Statute: Amicus Curiae Memorandum of International Law Scholars and Practitioners in* Trajano v. Marcos, 12 HASTINGS INT'L & COMP. L. REV. 1, 3 (1988).

11. 28 U.S.C. § 1350 (1988). Throughout the years, there have been several changes in the wording of the statute, but the substantive meaning of the statute has not been significantly affected. For a more detailed history of the statute, see William R. Casto, *The Federal Courts' Protective Jurisdiction over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467, 468 n.4 (1986).

12. As a part of The Judiciary Act of 1789, the ATS was a component of Congress's first enactment defining the jurisdiction of the lower federal courts.

old statute to confer jurisdiction only twice.[13] This lack of precedent, in conjunction with an absence of legislative intent,[14] has led to uncertainty in the application of the statute. The two principal controversies surrounding the ATS are the determination of the statute's scope and deciding whether the statute creates a cause of action.

A. Actionable Defendants Under the ATS: Jurisdiction over Foreign Sovereigns

A major limitation on ATS jurisdiction is that the statute does not confer subject-matter jurisdiction over foreign sovereigns.[15] In these actions, the Foreign Sovereign Immunities Act[16] (FSIA) must "be applied by the district courts in every action against [the] foreign sovereign. . . ."[17]

In *Argentine Republic v. Amerada Hess*,[18] the plaintiffs, two Liberian corporations, alleged that an Argentine military aircraft bombed the Hercules, an oil tanker owned and operated by the plaintiff corporations, in international waters and in violation of international law.[19] The plaintiffs sought to recover for damage to the ship and cargo by suing in New York federal district court under the ATS.[20] The district court dismissed the case for lack of subject-matter jurisdiction,[21] and the Second Circuit reversed.[22]

On appeal, the Supreme Court reversed the Second Circuit and dismissed the claims,[23] stating that the ATS does not authorize U.S. courts to render judgments against foreign states, but rather that "the FSIA [is] the sole basis for obtaining jurisdiction of a foreign state in our courts."[24]

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13. The two cases which invoked ATS jurisdiction were Bolchos v. Darrell, 3 F. Cas. 810 (D.S.C. 1795) (No. 1,607) (a French citizen brought an action for restitution of "neutral property," slave cargo on a Spanish ship owned by a neutral, British owner, captured as a prize of war) and Adra v. Clift, 195 F. Supp. 857 (D. Md. 1961) (a Lebanese father sued an Iraqi mother for custody of his daughter. The plaintiff claimed jurisdiction under the ATS alleging that falsifying a passport to bring a child into the United States and concealing a child's nationality were violations of international law as required by the ATS.).

14. *See* Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AM. J. INT'L L. 461, 463 n.15 (1989) (citing Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 812 (1984) (Bork, J., concurring)).

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

16. 28 U.S.C. §§ 1330, 1441(d), 1602-11 (1988).

17. *Amerada Hess*, 488 U.S. at 434-35 (quoting Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 493 (1983)).

18. 488 U.S. 428 (1989).

19. *Id.* at 431-32. Plaintiffs alleged that attacking a neutral ship which clearly identified itself was in violation of international law. *Id.* at 432.

20. *Id.* at 432.

21. Amerada Hess Shipping Corp. v. Argentine Republic, 638 F. Supp. 73 (S.D.N.Y. 1986).

22. Amerada Hess Shipping Corp. v. Argentine Republic, 830 F.2d 421 (2d Cir. 1987).

23. *Amerada Hess*, 488 U.S. at 443.

24. *Id.* at 434. The Court gleaned from the language, structure, and the legislative history of the FSIA that Congress intended the FSIA to be the only statute conferring jurisdiction over a foreign sovereign. The Court also considered the history of the ATS and rejected the plaintiffs' arguments stating that "[i]n light of the comprehensiveness

Amerada Hess thus effectively eliminated foreign sovereigns from the pool of possible defendants in an ATS action.[25] After *Amerada Hess*, federal courts could obtain subject-matter jurisdiction over a foreign sovereign through the ATS only in the following two situations: 1) where the FSIA does not apply, i.e., where the defendant cannot be considered a "foreign state" as defined by the FSIA,[26] or 2) where the FSIA does not afford immunity to the foreign sovereign because the action falls within one of the FSIA's exceptions.[27] The relevant question not answered by *Amerada Hess* is: since defendants of an ATS action must violate international law, and since, traditionally, only states can violate international law, who remains subject to suit as proper defendants under the ATS?

B. The *Filartiga* and *Tel-Oren* Decisions: Three Constructions of the ATS

1. Filartiga v. Pena-Irala[28]

In *Filartiga*, Dr. Joel Filartiga and his daughter Dolly, both citizens of Paraguay, brought suit against Americo Pena-Irala, also a citizen of Paraguay, for the torture and wrongful death of Dr. Filartiga's seventeen year old

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of the statutory scheme in the FSIA, we doubt that even the most meticulous draftsman would have concluded that Congress also needed to [enact a *pro tanto* repealer of] the Alien Tort Statute. . . ." *Id.* at 437. For a more detailed discussion of the Court's reasoning, see Christopher Janney, Recent Developments, *Obtaining Jurisdiction over Foreign Sovereigns: The Alien Tort Statute Meets the Foreign Sovereign Immunities Act*—Argentine Republic v. Amerada Hess Shipping Corporation, *109 S. Ct. 683 (1989)*, 31 HARV. INT'L L.J. 368 (1989).

25. Janney, *supra* note 24, at 374.

26. Section 1603(a) of the FSIA defines "foreign state" as including a political subdivision of a foreign state or an agency or instrumentality of a foreign state; § 1603(b) then elaborates on the meaning of "agency or instrumentality of a foreign state." 28 U.S.C. § 1603.

27. The FSIA is structured so that section 1604 provides foreign sovereigns general immunity from the jurisdiction of U.S. courts unless an exception, as provided by sections 1605-07, applies. Sections 1605-07, then, proceeds to enumerate situations, mostly involving the foreign sovereign as a private commercial actor, in which the sovereign is not immune from suit. Section 1330(a) authorizes the district courts to hear actions against foreign sovereigns where one of the exceptions applies. *See* 28 U.S.C. §§ 1330, 1604-07. Describing the operation of the FSIA, the Supreme Court said that:

> Sections 1604 and 1330(a) work in tandem: § 1604 bars federal and state courts from exercising jurisdiction when a foreign state is entitled to immunity, and § 1330(a) confers jurisdiction on district courts to hear suits brought by United States citizens and by aliens when a foreign state is *not* entitled to immunity.

Amerada Hess, 488 U.S. at 434.

Even after *Amerada Hess*, if one of the exceptions apply and the foreign sovereign is not entitled to immunity from suit in U.S. courts, the sovereign is subject to suit in the federal courts under the ATS if all the elements of the ATS are satisfied. An example of such an occurrence is Von Dardel v. Union of Soviet Socialist Republics, 623 F. Supp. 246 (D.D.C. 1985). In *Von Dardel*, the court determined that the U.S.S.R., inarguably a foreign sovereign, was not entitled to immunity under the FSIA. *Id.* at 252-56. Moreover, the court stated that subject-matter jurisdiction would also be proper under the ATS. *Id.* at 259.

28. 630 F.2d 876 (2d Cir. 1980).

son, Joelito Filartiga.[29] The plaintiffs alleged that in 1976, Pena-Irala, the then Inspector General of Police of Asunciòn, kidnapped Joelito and tortured him to death in retaliation for his father's political activities and long-standing opposition to the ruling government.[30] All relevant acts took place in Paraguay.[31] After a fruitless criminal action in the Paraguayan courts against Pena-Irala,[32] the Filartigas, having attained residence in the United States, brought a civil suit against Pena-Irala in the Eastern District of New York while Pena-Irala was in the country on a visitor's visa.[33] The district court, ruling that the "violation of the law of nations" element of the ATS was not satisfied, dismissed the case for lack of subject-matter jurisdiction.[34] The Second Circuit reversed and held that the ATS did confer jurisdiction over the claim.[35]

In deciding that the federal courts had jurisdiction over the matter, the Second Circuit made several crucial rulings. First, the court ruled that "an act of torture committed by a state official against one held in detention violates established norms of the international law of human rights, and hence the law of nations."[36] To reach this conclusion, the Second Circuit had to ascertain the established norms of international law[37] "by consulting the works of jurists, . . . the general usage and practice of nations[, and] judicial decisions recognizing and enforcing that law."[38] Among the sources consulted were the United Nations Charter,[39] General Assembly resolutions,[40] several international treaties and accords,[41] documents expressing U.S. policy on the matter,[42] and a judicial opinion.[43]

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29. *Id.* at 878.
30. *Id.*
31. *Id.*
32. *Id.* at 878, 880.
33. *Id.* at 878-79.
34. *Id.* at 880.
35. *Id.* at 878.
36. *Id.* at 880.
37. The court held that to determine whether the "violations of international law" element of the ATS is satisfied, the court must determine the state of international law at the time of the action. "[C]ourts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today." *Id.* at 881 (citing The Paquete Habana, 175 U.S. 677 (1900) and Ware v. Hylton, 3 U.S. (3 Dall.) 198 (1796)).
38. *Filartiga*, 630 F.2d at 880 (quoting United States v. Smith, 18 U.S. (5 Wheat.) 153, 160-61 (1820)).
39. *Filartiga*, 630 F.2d at 881.
40. *Id.* at 882. Among the General Assembly resolutions considered were the Universal Declaration of Human Rights, G.A. Res. 217A(III), U.N. GAOR, 3d Sess., Supp. No. 16, U.N. Doc. A/810 (1948), which states "no one shall be subjected to torture" and the Protection of All Persons from Being Subjected to Torture, G.A. Res. 3452, U.N. GAOR, 13th Sess., Supp. No. 34, at 91, U.N. Doc. A/1034 (1975).
41. *Filartiga*, 630 F.2d at 883-84.
42. *Id.* at 884. Documents evidencing U.S. policy included the Department of State's *Country Reports on Human Rights for 1979.* HOUSE COMM. ON FOREIGN AFFAIRS & SENATE COMM. ON FOREIGN RELATIONS, 96TH CONG., 2D SESS., COUNTRY REPORTS ON HUMAN RIGHTS FOR 1979 Introduction at 1 (Joint Comm. Print 1980); Memorandum for the United States as *Amicus Curiae*, Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980) [hereinafter *Filartiga* Memo], *reprinted in* David Cole, Jules Lobel, and Harold

After perusal of these sources, the Second Circuit determined that "international law confers fundamental rights upon all people vis-a-vis their own governments," including the right to be free from torture.[44]

Secondly, the court ruled that, although all relevant acts occurred in Paraguay and all the parties were Paraguayan citizens, U.S. federal courts still have jurisdiction under the ATS.[45] The Second Circuit justified jurisdiction over the matter by the theory of transitory torts.[46] This theory, long established by English common law,[47] provides that liability for certain tortious acts follow the tortfeasor, such that he could be subject to suit for that act in any forum. The court held that the claims for torture and wrongful death were transitory torts, and thus, adjudicable in the United States regardless of the place of occurrence.[48]

In addition to these two explicit rulings, the Second Circuit, in dicta, indicated that a state official acting under color of government authority is a proper defendant of an ATS action. Jurisdiction over such a defendant is valid even if his actions were not authorized by his government but, in fact, contrary to the laws and policies of his government.[49]

Finally, contrary to some interpretations of *Filartiga*,[50] the Second Circuit did not decide the issue of whether the ATS provides a private right of action.[51] The *Filartiga* court held only that the ATS conferred upon federal courts the subject-matter jurisdiction to hear the case.[52] The Second

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Hongju Koh, *Interpreting the Alien Tort Statute: Amicus Curiae Memorandum of International Law Scholars and Practitioners in* Trajano v. Marcos, 12 HASTINGS INT'L & COMP. L. REV. 1, 34-47 (1988).

43. *Filartiga*, 630 F.2d at 884 n.16. The judicial opinion was from the European Court of Human Rights.

44. *Id.* at 885. The list of fundamental rights afforded by international law was later extended in Forti v. Suarez-Mason, 672 F. Supp. 1531 (N.D. Cal. 1987). In addition to torture, the District Court of Northern California held that the following two violations were also prohibited by international law: prolonged, arbitrary detention without trial and cruel, inhuman, and degrading treatment. *Forti*, 672 F. Supp. at 1541-43. For a more detailed discussion of *Forti v. Suarez-Mason* and its potential ramifications in human rights cases, see Allison J. Flom, Note, *Human Rights Litigation Under the Alien Tort Statute: Is the* Forti v. Suarez-Mason *Decision the Last of Its Kind?*, B.C. THIRD WORLD L.J. 321 (1990).

45. *Filartiga*, 630 F.2d at 885.

46. *Id.*

47. The case establishing the doctrine of transitory torts is Mostyn v. Fabrigas, 1 Cowp. 161 (1774) (Lord Mansfield, J.). The U.S. Supreme Court, quoting *Mostyn*, adopted the doctrine of transitory torts in McKenna v. Fisk, 42 U.S. (1 How.) 241, 248 (1843).

48. *Filartiga*, 630 F.2d at 885.

49. *Id.* at 889-90.

50. Several commentators and courts interpret *Filartiga* to have ruled that the ATS does provide a private cause of action. *See, e.g.*, *Tel-Oren*, 726 F.2d 774, 777-82 (Edwards, J., concurring); *Filartiga* Memo, *supra* note 42, at 21 ("As Judge Edwards in *Tel-Oren* and Judge Jensen in *Forti* made clear, *Filartiga* has established that 'section 1350 *itself* provides a right to sue for alleged violations of the law of nations.'") (footnote omitted) (quoting *Tel-Oren*, 726 F.2d 774, 780 (Edwards, J., concurring) (emphasis added)).

51. Clyde H. Crockett, *The Role of Federal Common Law in Alien Tort Statute Cases*, 14 B.C. INT'L & COMP. L. REV. 29, 37 (1991) ("[T]he *Filartiga* opinion did not hold that the Alien Tort Statute creates a cause of action.").

52. *Filartiga*, 630 F.2d at 878.

Circuit distinguished between the law of nations that confers jurisdiction under the ATS and the substantive law that creates a cause of action and is applied in deciding the merits of the case.[53] In fact, the court noted that "it is sufficient here to construe the Alien Tort Statute, not as granting new rights to aliens, but simply as opening the federal courts for adjudication of the rights already recognized by international law."[54] This language suggests that the ATS does not provide a private cause of action.[55] On remand, the district court awarded damages for wrongful death, court costs, and attorney's fees under Paraguayan law.[56] Additional punitive damages were awarded on the basis of international law.[57] The basis of the award in *Filartiga* suggests that the ATS does not create a cause of action, but rather that the plaintiff must have a cause of action independent of the ATS. The court's resort to Paraguayan law to determine damages suggests that the actual cause of action was created by the domestic law of Paraguay.

2. Tel-Oren v. Libyan Arab Republic[58]

On March 8, 1978, members of the Palestine Liberation Organization (PLO) entered Israel, seized a civilian bus, and took its passengers hostage.[59] Wounded civilian victims and survivors of those killed sued in the United States District Court for the District of Columbia[60] and named as defendants the Libyan Arab Republic, the PLO, the Palestine Information Office, and the National Association of Arab Americans.[61] The plaintiffs asserted jurisdiction under the "federal question" statute[62] and the ATS.

The district court dismissed for lack of subject-matter jurisdiction.[63] On appeal, the D.C. Circuit affirmed.[64] Each of the three judges hearing the case, however, issued a separate concurring opinion with vastly divergent rationales justifying their unanimous decision. This section discusses the construction of the ATS provided by Judges Edwards and Bork.[65]

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53. *Id.* at 889.
54. *Id.* at 887.
55. *See* Crockett, *supra* note 51, at 37 ("Rather, the court['s] language suggests that the Alien Tort Statute is purely a jurisdictional statute.").
56. Filartiga v. Pena-Irala, 577 F. Supp. 860, 864-65 (E.D.N.Y. 1984).
57. *Id.* Although international law was the supposed basis of the punitive damages, there is not a generally accepted practice of awarding punitive damages in international law. Most of the cases relied on to award punitive damages were U.S. cases applying U.S. domestic law. *See* Casto, *supra* note 11, at 478 n.57 and accompanying text.
58. Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984).
59. *Id.* at 799.
60. *Id.*
61. *Id.* at 798.
62. 28 U.S.C. § 1331; *Tel-Oren*, 726 F.2d at 799.
63. Hanoch Tel-Oren v. Libyan Arab Republic, 517 F. Supp. 542 (D.D.C. 1981).
64. *Tel-Oren*, 726 F.2d at 775.
65. This section does not include Judge Robb's concurrence in *Tel-Oren*. Although his opinion addresses the proper application of the ATS by the courts, it does not propose a construction of the ATS. Rather, resorting to the political question doctrine, Judge Robb believes that many cases coming under the ATS contain problems that the other two branches, and not the courts, are better able to handle. Judge Robb's opin-

a. Judge Bork: ATS does not expressly create a cause of action and separation of powers principles counsel against implying one

Judge Bork relied on the constitutional principle of separation of powers to argue that the plaintiffs did not have an independent cause of action to support ATS jurisdiction.[66] First, he presumed that plaintiffs must have a cause of action for the courts to have subject-matter jurisdiction over the controversy. Second, Judge Bork found that no law expressly provides the plaintiffs with a cause of action and that principles of separation of powers counsels against the courts inferring a cause of action. Therefore, Judge Bork concluded that the plaintiffs have no cause of action and that the suit must be dismissed.[67]

Throughout his opinion, Judge Bork claimed that his guiding principle was the separation of powers; he believed that the "political" branches of our government, the Executive and Legislative, should conduct U.S. foreign relations.[68] In applying this principle, the courts should not hinder the Executive branch in foreign policy[69] and should refrain from adjudicating matters that may embarrass the Executive branch in the international community.[70] Judge Bork counsels hesitation in matters that may infringe upon the rightful duties of the Executive and Legislative branches of government.[71]

Judge Bork proposed that the courts, in following the principle of separation of powers, should not recognize a cause of action and should refuse jurisdiction under the ATS.[72] Although the primary defendant, the PLO, was not a foreign sovereign, Judge Bork noted that the status of U.S. foreign relations was still at stake[73] because terrorism is a very sensitive subject with very little international consensus.[74] Accordingly, the court should have found no cause of action for this suit absent "a very clear showing that [some body] of law grant[s the] appellants a cause of action. . . ."[75] Judge Bork noted that insufficient evidence of such a grant existed.[76]

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ion, though persuasive, is beyond the scope of this Note. *Id.* at 823 (Robb, J., concurring).

For a discussion on Judge Robb's approach in *Tel-Oren*, see E. Hardy Smith, Note, *Federal Jurisdiction Under the Alien Tort Claims Act: Can This Antiquated Statute Fulfill Its Modern Role?*, 27 ARIZ. L. REV. 437, 446 (1985).

66. *Tel-Oren*, 726 F.2d at 799.

67. *Id.* at 801.

68. *Id.* (quoting Oetjen v. Central Leather Co., 246 U.S. 197, 302 (1918)).

69. *Tel-Oren*, 726 F.2d at 802 (quoting Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1292 (3d Cir. 1979)).

70. *Tel-Oren*, 726 F.2d at 802 (quoting Alfred Dunhill of London, Inc. v. Cuba, 425 U.S. 682, 697 (1976)).

71. *Tel-Oren*, 726 F.2d at 801.

72. *Id.* at 804.

73. *Id.* at 805.

74. *Id.* at 805-06.

75. *Id.* at 808.

76. *Id.*

Judge Bork considered several bodies of law and found that none of them granted the plaintiffs a cause of action. First, he considered treaties entered into by the United States. According to Judge Bork, however, treaties "do not generally create rights that are privately enforceable in courts"[77] unless they are self-executing[78] or there is legislation implementing the treaty as domestic law.[79] After examining the treaties cited by the plaintiffs to support their claim, Judge Bork found that all of them were non-self-executing and lacked authorizing legislation.[80]

Second, Judge Bork considered and rejected U.S. federal common law as a source of a cause of action.[81] Judge Bork explained that "common law" had two meanings. First, common law meant the body of court-made common law handed down from England and granting causes of action.[82] Second, common law meant the body of general law "not based on a statute or constitution and not granting a cause of action."[83] According to Judge Bork, to say that international law is a part of "federal common law"[84] refers to federal common law of the latter kind and does not provide a cause of action.[85] Therefore, a violation of international law, which is a part of federal common law, does not grant a cause of action under the ATS.[86]

Third, Judge Bork considered federal statutes, specifically the "federal question" statute and the ATS, but found that these provisions were purely jurisdictional and that neither granted a cause of action.[87] Judge Bork argued that to interpret the ATS as providing a cause of action would "make all United States treaties effectively self-executing."[88] Moreover, Judge Bork argued that appellants' interpretation was "too sweeping" and would allow tort suits for infringement of "any international legal right."[89]

Finally, Judge Bork considered whether general international law, standing alone, might create a cause of action. Traditionally, only states are subjects of international law, not individuals; individuals have interna-

77. *Id.* (citing Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829)).

78. A self-executing treaty is one that has effect as domestic law without further legislation. Whether a treaty is self-executing depends on the intent of the United States, i.e., the President when he ratifies it and the Congress when it gives its consent. A self-executing treaty must be given the force of law in U.S. courts. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 (1987).

79. *Tel-Oren*, 726 F.2d at 808.

80. *Id.* at 808-09.

81. *Id.* at 810.

82. *Id.* at 811. Examples of such common law would be the right to sue for tort or contract.

83. *Id.*

84. The Paquete Habana, 175 U.S. 677 (1900), stated that international law is a part of the federal common law. Based on this statement, the appellants argued that a violation of international law would, not only provide jurisdiction under the ATS, but also provide them with a cause of action. *Tel-Oren*, 726 F.2d at 810.

85. *Tel-Oren*, 726 F.2d at 811.

86. *Id.*

87. *Id.*

88. *Id.* at 812.

89. *Id.*

tional rights only to the extent that they derive them from the rights of their respective countries.[90] In addition, "as a general rule, international law does not provide a private right of action [unless] demonstrated by clear evidence that civilized nations had generally given their assent. . . ."[91] As Judge Bork could find no such evidence,[92] he concluded that appellants had no cause of action.[93]

b. Judge Edwards: ATS does not extend to private actors

In *Tel-Oren*, Judge Edwards claimed to "adhere to the legal principles established in *Filartiga*."[94] Judge Edwards' formulation of the ATS parallels the propositions established by the *Filartiga* opinion as he interpreted them. First, "the 'law of nations' is not stagnant and should be construed as it exists today among the nations of the world."[95] Second, "one source of that law is the customs and usages of civilized nations, as articulated by jurists and commentators."[96] Third, "international law today places limits on a state's power to torture persons held in custody, and confers 'fundamental rights upon all people' to be free from torture."[97] And finally, "[the ATS] opens the federal courts for adjudication of the rights already recognized by international law."[98]

Judge Edwards first considered the plaintiff's "right to sue."[99] Contrary to Judge Bork, Judge Edwards asserted that a plaintiff need not state a separate cause of action to invoke ATS jurisdiction, but rather, in accordance with the explicit language of the ATS, he need only show a violation of international law.[100] Furthermore, the ATS itself grants the plaintiff a right to sue for violations of fundamental rights which international law has endowed upon him.[101] These violations include genocide, slavery, murder or causing the disappearance of individuals, torture or other cruel punishment, prolonged arbitrary detention, systematic racial discrimina-

90. *Id.* at 817.
91. *Id.*
92. *Id.* at 817-19.
93. *Id.* at 819. In dismissing the action for lack of cause of action, Judge Bork did not consider other issues surrounding the ATS, such as whether ATS jurisdiction could be had over the PLO, an individual group not affiliated with a government, and whether U.S. courts had jurisdiction over the extraterritorial tort.
94. *Id.* at 776.
95. *Id.* at 777 (citing *Filartiga*, 630 F.2d at 881).
96. *Id.* (citing *Filartiga*, 630 F.2d at 884).
97. *Id.* (citing *Filartiga*, 630 F.2d at 885).
98. *Id.* (citing *Filartiga* 630 F.2d at 887).
99. *Id.* The "right to sue," used by Judge Edwards, is synonymous to "cause of action" as used by Judge Bork.
100. Judge Edwards states, "The language of the statute is explicit on this issue: by its express terms, nothing more than a *violation* of the law of nations is required to invoke section 1350." *Id.* at 779 (emphasis supplied).
101. *Id.* at 780. Judge Edwards derives this principle from *Filartiga*. He states:
> The Second Circuit reads § 1350 "not as granting new rights to aliens, but simply as opening the federal courts for adjudication of the rights already recognized by international law." *Filartiga*, 630 F.2d at 887. I construe this phrase to mean that aliens granted substantive rights under international law may assert them under § 1350.

tion, and consistent patterns of gross violations of internationally recognized human rights.[102] A violation of any of these rights automatically provides the victim with a statutory right under the ATS to sue for civil damages in U.S. federal courts.

Judge Edwards then proposed an alternative formulation of the ATS[103]—that the violation of international law need not be of such monumental importance as an infringement of a fundamental right. Rather, ATS "jurisdiction might be triggered by offenses less severe than are required under the *Filartiga* formulation. . . ."[104] The international violation, however, must have some minimal connection with a tort in violation of domestic law.[105] The international violation and the domestic tort could be the same act[106] but, at a minimum, there should be a "but for" causation between the two, i.e., "but for" the international violation, the domestic tort could not have been committed.[107] Under this formulation, the substantive right to sue would be based on the domestic tort law of the United States.[108] In essence, the two elements for ATS jurisdiction under Judge Edwards' formulation are a domestic tort and an allegation of a violation of a less severe international law.[109]

Id. at n.5.

102. *Id.* at 781. To identify such fundamental international rights, Judge Edwards looked to the RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) § 702 (Tent. Draft No. 3, 1982). These fundamental rights were later adopted into the RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (1987). Traditionally, crimes punishable as international violations included violation of safe-conducts, infringement of diplomatic rights, and piracy. *Tel-Oren*, 725 F.2d at 813. Crimes such as piracy and slave trade were labeled *hostis humani generis*, an "enemy of all mankind" and were punishable by any state regardless of nationality of the criminals or location of the crime. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 (1987). *Filartiga* has attempted to add torture to this list of international crimes by creating civil liability, though not criminal, for the violator.

103. *Tel-Oren*, 726 F.2d at 782.

104. *Id.* at 787.

105. *Id.* at 788.

106. Judge Edwards contemplates that his speculation that "the facts of *Filartiga* would likely produce a finding of jurisdiction under . . . the . . . *Adra* formulation," is evidence of proper jurisdiction. *Id.* The *Adra* formulation is identical to Judge Edwards' alternative formulation. He presents the *Adra* court's rulings as a paradigm of his proposition. For the brief facts of *Adra*, see *supra* note 13.

107. *Tel-Oren*, 726 F.2d at 788. Attempting to define "the requisite nexus between the domestic and the international tort," Judge Edwards looks to the *Adra* decision which "applied, at best, a 'but for' causation test to determine whether the international and domestic torts were sufficiently related to establish jurisdiction." *Id.*

108. *Id.* at 782.

109. Judge Edwards, however, places some limitation on the use of the ATS in accordance with the alternative formulation. He realizes that authorizing jurisdiction over all matters satisfying the above two elements might "enable courts to burrow into disputes wholly involving foreign states." To prevent this from happening, Judge Edwards holds that his formulation should only cover the following situations: 1) actions by "aliens for domestic torts that occur in the territory of the United States and injure 'substantial rights' under international law," *Id.* at 788 (citing 26 Op. Att'y Gen. 250, 252-53 (1907)), 2) "for universal crimes, as under the first formulation," and 3) for extraterritorial torts that are committed by U.S. citizens. *Id.*

Although Judge Edwards found that the ATS granted the plaintiffs the right to sue, he voted to dismiss the case because the primary defendant, the PLO, was recognized neither as a state nor as acting under color of any recognized government.[110] Private individuals are generally unable to violate international law[111] unless the violation is one of a listed exceptions.[112] Judge Edwards found that terrorism could not be included within one of the listed exceptions due to the lack of general consent on the matter within the international community.[113] He stated, "While this nation unequivocally condemns all terrorists attacks, that sentiment is not universal."[114] Since terrorism is not an exception and the PLO, being composed of private individuals, cannot violate international law, Judge Edwards held that the courts do not have subject-matter jurisdiction under the ATS.[115]

II. The *Trajano* Decision

A. The Facts

On August 31, 1977, Archimedes Trajano, a student at the Mapua Institute of Technology, attended an open forum discussion at which Imee Marcos-Manotoc[116] was scheduled to speak.[117] At the discussion, Trajano ventured to question Marcos-Manotoc regarding her appointment as director of an organization.[118] The Philippine military intelligence subsequently abducted Trajano, interrogated him, and tortured him to death.[119]

The military intelligence organization acted pursuant to martial law declared by President Marcos and under the authority and orders of Marcos, Marcos-Manotoc, and Fabian Ver.[120] Marcos-Manotoc directly controlled the police officers and military intelligence personnel who abducted Trajano.[121] She was aware that they tortured Trajano, and she ultimately was the direct cause of Trajano's death.[122]

In February of 1986, a special presidential election culminated in the election of Corazon Aquino, who displaced Marcos as president of the

110. *Id.* at 791.
111. *Id.* at 794.
112. *Id.* Such exceptions include piracy and, after *Filartiga*, torture. *Id.*
113. *Id.* at 795.
114. *Id.* He goes on to say that "the nations of the world are so divisively split on the legitimacy of [terrorism] as to make it impossible to pin-point an area of . . . consensus." *Id.*
115. *Id.* at 776.
116. Marcos-Manotoc was the daughter of Ferdinand Marcos, the President of the Philippines at the time, and the National Chairman of the Kabataang Baranggay. *Trajano*, 978 F.2d at 495.
117. *Id.*
118. *Id.*
119. *Id.* at 495-96.
120. *Id.* at 496. Fabian Ver was the director of the Philippine military intelligence, the former Chief of Staff of the Philippine Armed Forces, and cousin to President Marcos. *Id.*
121. *Id.*
122. *Id.*

Philippines.[123] The situation at the presidential palace quickly deteriorated after the election and, consequently, endangered the lives of the Marcoses.[124] U.S. Air Force helicopters air-lifted Marcos and his immediate family from the palace and transported them to Hickam Air Force Base in Hawaii.[125]

B. The District Court

Archimedes Trajano's mother, Agapita Trajano, a citizen of the Philippines residing in Hawaii, filed suit against Marcos, Marcos-Manotoc, and Ver in the United States District Court for the District of Hawaii on March 20, 1986.[126] Seeking damages on behalf of the estate of Archimedes Trajano, she alleged charges of false imprisonment, kidnapping, wrongful death, and a deprivation of rights.[127] She also sought damages for herself for emotional distress.[128]

The Hawaiian district court held that subject-matter jurisdiction existed under the ATS.[129] The defendants defaulted, and judgment was entered against the defendants on May 29, 1986.[130] The district court eventually found[131] that Marcos-Manotoc caused the torture and death of Archimedes Trajano and, after a damages hearing, entered judgment for the plaintiff in the amount of $4.16 million and attorneys' fees, in accordance with Philippine law.[132]

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123. Seth Mydans, *Marcos Flees and Is Taken to Guam; U.S. Recognizes Aquino as President*, N.Y. TIMES, Feb. 26, 1986, at A1, A12.

124. *Id.*

125. Bernard Weinraub, *Reagan Welcomes Change in Manila*, N.Y. TIMES, Feb. 27, 1986, at A1, A15.

126. *Trajano*, 978 F.2d at 496.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. The district court did not reach this decision immediately. Marcos-Manotoc eventually appeared before the court and moved to dismiss the action on several grounds including the Act of State doctrine. She claimed that Trajano's death was an act of the Philippine government and, as such, the federal courts of the United States could not adjudicate the matter.

Judge Fong, presiding over the district court in Hawaii, accepted the defendant's argument and dismissed the action. On appeal, the Ninth Circuit reversed and remanded. The court held that since "[n]either the present government of the Republic of the Philippines nor the United States government objects to judicial resolution of these claims, or sees any resulting potential embarrassment to any government[, t]he issues raised . . . are within the capacity of the courts to resolve." Trajano, et al. v. Marcos, et al., 878 F.2d 1439 (Table, Text in Westlaw), Unpublished Disposition (9th Cir. July 10, 1989).

On remand, Marcos-Manotoc attempted to set aside the entry of default on the ground that service was insufficient. The district court denied the motion. *Trajano*, 978 F.2d at 496.

132. *Trajano*, 978 F.2d at 496.

C. The Ninth Circuit Rulings

Marcos-Manotoc appealed, claiming that the district court lacked authority to enter a judgment since the court lacked subject-matter jurisdiction.[133] She argued that the FSIA, not the ATS, applied to this case and that she was thus immune from suit.[134] The Ninth Circuit rejected her arguments and affirmed the judgment.[135]

1. The FSIA Does Not Provide Sovereign Immunity to Marcos-Manotoc

The first step of the Ninth Circuit's analysis, as required by *Amerada Hess*,[136] was to determine whether the FSIA applied to Marcos-Manotoc. The court noted, "The FSIA 'must be applied by the district courts in every action against a foreign sovereign. . . .'"[137] The court determined that a "foreign state," within the meaning of the FSIA, did not cover a defendant in Marcos-Manotoc's situation (an individual acting outside of her official capacity)[138] and therefore concluded that Marcos-Manotoc was not entitled to immunity under the FSIA.[139]

Clarifying the definition of a "foreign state" given by the FSIA,[140] the Ninth Circuit has previously included individuals acting within their official capacity.[141] As a corollary, the Ninth Circuit has ruled that the FSIA does not provide immunity for officials acting outside of their official capacities.[142] This includes officials acting completely outside their

133. *Id.* at 499.
134. *Id.* at 497.
135. *Id.* at 501.
136. *See* discussion *supra* part I.A.
137. *Trajano*, 978 F.2d at 496 (quoting Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 493 (1983)).
138. *Id.* at 497.
139. *Id.* at 498.
140. The FSIA, in relevant part, provides:
> For purposes of this chapter—
> (a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).
> (b) An "agency or instrumentality of a foreign state" means any entity—
> (1) which is a separate legal person, corporate or otherwise, and
> (2) which is an organ of a foreign state or political subdivision thereof . . . and
> (3) which is neither a citizen of a State of the United States . . . nor created under the laws of any third country.

FSIA § 1603(a), (b).
141. In Chuidian v. Philippine National Bank, 912 F.2d 1095 (9th Cir. 1990), the court decided to "join the majority of the courts which have similarly concluded that section 1603(b) can fairly be read to include individuals sued in their official capacity." As examples of other courts which have followed this line of reasoning, the court provided several cases from other districts including Kline v. Kaneko, 685 F. Supp. 386 (S.D.N.Y. 1988) and American Bonded Warehouse Co. v. Compagnie Nationale Air France, 653 F. Supp. 861 (N.D. Ill. 1987). *Chuidian*, 912 F.2d at 1103.
142. *Chuidian*, 912 F.2d at 1106. The Ninth Circuit stated in *Trajano* that "[i]n *Chuidian*, we held that the FSIA covers a foreign official acting in an official capacity, but that an official is not entitled to immunity for acts which are not committed in an

authorized capacities[143] and officials claiming to act as an individual and not as an official.[144]

Despite this broad definition, the Ninth Circuit concluded that Marcos-Manotoc could not be categorized within the scope of a "foreign state."[145] Although an official of the Philippine government, she admitted that she was acting on her individual authority and not on the authority of the government.[146] The court ruled, therefore, that the district court did not err in sustaining the jurisdiction over Marcos-Manotoc in her individual capacity.[147]

2. The ATS Confers Subject-Matter Jurisdiction over the Action

The Ninth Circuit determined that the ATS requires three elements to confer jurisdiction on federal courts: "a claim by an alien, a tort, and a violation of international law."[148] These requirements were fulfilled by this case: the plaintiff was an alien, torture and wrongful death are tort claims, and torture violates international law[149] as evidenced by various international declarations.[150] The court also cited judicial determinations in finding that international law prohibits torture.[151]

In challenging the court's jurisdiction, Marcos-Manotoc attacked the scope of the ATS, asserting that it does not cover every situation in which the court's three elements are fulfilled. She claimed that the ATS does

official capacity . . . and for acts beyond the scope of her authority." *Trajano*, 978 F.2d at 497.

143. Clarifying this category, the *Chuidian* court stated, "If an employee of the United States acts completely outside his governmental authority, he has no immunity. An obvious example would be . . . sale of . . . personal [property]." *Chuidian*, 912 F.2d at 1106 (quoting United States v. Yakima Tribal Court, 806 F.2d 853, 859 (9th Cir. 1986), *cert. denied*, 481 U.S. 1069 (1987)).

144. Clarifying this category, the *Chuidian* court stated, "If the officer purports to act as an individual and not as an official, a suit directed against that action is not a suit against the sovereign." *Id.* (quoting Larson v. Domestic and Foreign Commerce Corp., 337 U.S. 682, 689 (1949)).

145. *Trajano*, 978 F.2d at 498.

146. *Id.*

147. *Id.*

148. *Id.* at 499.

149. *Id.*

150. The plaintiff cited various treaties which prohibit torture as a violation of international law. These include the United Nations Charter; the Universal Declaration of Human Rights, G.A. Res. 217A(III), U.N. GAOR, 3d Sess., Supp. No. 16, U.N. Doc. A/810 (1948); the American Convention on Human Rights, Nov. 22, 1969, 36 O.A.S.T.S. 1, O.A.S. Official Records OEA/Ser. 4 v/II 23, doc. 21, rev. 2 (1975); the Declaration on the Protection of All Persons From Being Subjected to Torture, G.A. Res. 3452, U.N. GAOR, 13th Sess., Supp. No. 34, at 91, U.N. Doc. A/1034 (1975); and the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/RES/39/708 (1984), *reprinted in* 23 I.L.M. 1027 (1984).

151. The court stated, "And, as we have recently held, 'it would be unthinkable to conclude other than that acts of official torture violate customary international law.'" *Trajano*, 978 F.2d at 499 (quoting Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 717 (9th Cir. 1992)). *See also Filartiga*, 630 F.2d at 880 ("[W]e find that an act of torture committed by a state official against one held in detention violates established norms of the international law of human rights, and hence the law of nations.").

not confer jurisdiction over a tort committed by a foreign state's agents against its nationals outside of the United States and having no nexus to this country.[152] She also claimed that the violation of international law must be recognized by U.S. federal law and that a violation of international law, standing alone, is not sufficient to confer jurisdiction.[153] The Ninth Circuit rejected both arguments.[154]

Marcos-Manotoc first argued that the Senate's understanding attached to its ratification of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[155]—conditioning that a state is not required to provide a private right of action for extraterritorial torture—suggests that international law cannot provide a right of action against torture outside of the plaintiff's country.[156] The court found this inference to be incorrect, however, because the understanding does not prohibit U.S. courts from providing a forum for claims by aliens for extraterritorial torture, a transitory tort.[157]

Second, Marcos-Manotoc argued that the Justice Department's change in position, as evidenced by their amicus curiae brief, advocating jurisdiction only where violation of international law is recognized and made a part of federal law,[158] made jurisdiction here inappropriate.[159] The court stated that the Justice Department's "change of position in different cases and by different administrations is not a definitive statement by which we are bound on the limits of [the ATS]."[160] The court held that these actions by the legislative and executive branches did not change the law established by *Filartiga*[161] and that the ATS provides proper jurisdiction over official torture claims in violation of international law regardless of the "citizenship of the defendant, or the locus of the injury."[162]

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152. *Trajano*, 978 F.2d at 499.

153. *Id.* at 499-500.

154. *Id.* at 500.

155. G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/RES/39/708 (1984), *reprinted in* 23 I.L.M. 1027 (1984). According to the United States Senate, "it is the understanding of the United States that Article 14 requires a State Party to provide a private right of action for damages only for acts of torture committed in territory under the jurisdiction of that State Party." 136 CONG. REC. S17486 (daily ed. Oct. 27, 1990).

156. *Trajano*, 978 F.2d at 499-500.

157. *Id.* at 500.

158. *Id.* In its memorandum as Amicus Curiae submitted in *Trajano*, the U.S. Justice Department advocated that ATS jurisdiction should be limited only to those situations where 1) the tortfeasor was subject to U.S. jurisdiction at the time he committed the tort, 2) the United States would be held accountable for the action, 3) a federal criminal statute defines the conduct as an offense against the law of nations, and 4) the federal statute provides a private right of action. Cole et al., *supra* note 10, at 3.

159. *Trajano*, 978 F.2d at 500.

160. *Id.*

161. *See* discussion *supra* part I.B.1.

162. *Trajano*, 978 F.2d at 500.

3. Subject-Matter Jurisdiction Conferred upon District Courts by the ATS Is Not Violative of Article III

Marcos-Manotoc then asserted that jurisdiction under the ATS was constitutionally invalid because the Constitution does not authorize Congress to confer such jurisdiction on federal courts.[163] The Ninth Circuit, however, found that the "arising under" clause[164] of the Constitution gives Congress this authority.[165]

The court agreed with Marcos-Manotoc that a purely jurisdictional statute authorized by the "arising under" clause "may not alone confer jurisdiction on the federal courts, and that the rights of the parties must stand or fall on federal substantive law to pass constitutional muster."[166] The court also conceded that the rights of these parties depended on federal substantive law.[167] Nevertheless, the court found that relevant and substantive federal law was involved and thus validated jurisdiction.

The Ninth Circuit found that the reasoning of *Verlinden B. V. v. Central Bank of Nigeria*,[168] in which the Supreme Court held jurisdiction under the FSIA constitutionally valid under the "arising under" clause,[169] also applied to the ATS so that its jurisdiction was also constitutionally valid.[170] In *Verlinden*, the court found that "Congress has the undisputed power to decide, as a matter of federal law, whether and under what circumstances foreign nations should be amenable to suit in the United States."[171] Accordingly, "a suit against a foreign state . . . necessarily raises questions of substantive federal law at the very outset, and hence clearly 'arises under' federal law, as that term is used in Art. III."[172]

The Ninth Circuit extended this reasoning to validate not only jurisdiction over foreign sovereigns, but also jurisdiction over foreign government officials acting under color of law.[173] The court cited various sources from the framers of the Constitution suggesting that the "arising under" clause would validate jurisdiction over any foreign individual even if no connection between the individual and the sovereign existed.[174]

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163. *Id.* at 501.

164. The "arising under" clause of the Constitution, in relevant part, provides:

> The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; —to all Cases affecting Ambassadors, other public Ministers and Consuls; —to all Cases of admiralty and maritime Jurisdiction; . . . .

U.S. CONST. art. III, § 2.

165. *Trajano*, 978 F.2d at 501.

166. *Id.* (citing Mesa v. California, 489 U.S. 121, 136-37 (1989)).

167. *Id.*

168. Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480 (1982).

169. *Id.* at 492.

170. *Trajano*, 978 F.2d at 501.

171. *Verlinden*, 461 U.S. at 493.

172. *Id.*

173. *Trajano*, 978 F.2d at 501-02.

174. *Id.* at 502. Among the sources cited by the Ninth Circuit were THE FEDERALIST No. 80, at 536 (A. Hamilton) (J. Cooke ed., 1961) ("Arising under" clause was applicable to "all those [cases] in which [foreigners] are concerned. . . .") and Letter from James

Alternatively, the Ninth Circuit proposed that "the law of nations is a part of federal common law."[175] Under this approach, Congress may constitutionally confer jurisdiction upon federal courts over any action which could involve international law since any such case would also involve federal law. Since the ATS concerns foreign plaintiffs and international law, congressionally conferred jurisdiction is proper.[176]

4. A Separate, Independent Cause of Action Is Necessary

Finally, Marcos-Manotoc argued that even if the ATS conferred jurisdiction over the matter, jurisdiction existed only to determine whether the plaintiff had a separate, substantive cause of action.[177] In other words, Trajano must also find an independent cause of action created by a separate and substantive body of law.[178] Since no treaty or customary international law creates such a positive right to bring action, Marcos-Manotoc asserted that the action must be dismissed.[179]

The district court agreed that the ATS is merely a jurisdictional statute and creates no cause of action standing alone.[180] Nevertheless, the district court proceeded to find a cause of action, not in treaties or international law, but in the substantive law of the Philippine Civil Code, and calculated damages under Philippine law.[181]

The Ninth Circuit affirmed this interpretation of the ATS. Accordingly, the Ninth Circuit has ruled that the ATS is only a jurisdictional statute providing courts with subject-matter jurisdiction. It does not create a cause of action for the plaintiff. The court ruled that the violation of international law only "supplies the jurisdictional key to [a] federal court,"[182] i.e., it is relevant as an element of jurisdiction but irrelevant in determining the right to a remedy. The court ruled that "the cause of action comes from municipal tort law and not from the law of nations or treaties of the Untied States."[183]

Madison to Edmund Randolph (Apr. 8, 1787), *in* 9 THE PAPERS OF JAMES MADISON 368, 370 (R. Rutland & W. Rachal eds., 1975) ("Arising under" clause extends judicial powers to "all cases which concern foreigners.").

175. *Trajano*, 978 F.2d at 502 (citing The Paquete Habana, 175 U.S. 677, 700 (1900) and United States v. Smith, 18 U.S. (5 Wheat.) 153, 160-61 (1820)).

176. *Id.* at 502-03. *See also Filartiga*, 630 F.2d at 885 ("The constitutional basis for the Alien Tort Statute is the law of nations, which has always been part of the federal common law.").

177. *Trajano*, 978 F.2d at 503.

178. The Justice Department went another step and advocated that the separate cause of action must be recognized by Congress and enacted as a part of domestic federal law. Cole et al., *supra* note 10, at 3.

179. *Trajano*, 978 F.2d at 503.

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

III. Analysis

A. Cause of Action in an ATS Suit

The most controversial issue regarding the ATS is whether the statute creates a cause of action. The issue breaks down into two separate questions. First, must the plaintiff have a cause of action for the courts to properly take jurisdiction over ATS cases? Second, does the cause of action which entitles the plaintiff to a judicial remedy arise from the ATS or some other source?

1. Cause of Action Is Not Needed to Invoke ATS Jurisdiction

In *Tel-Oren*, Judge Bork held that the plaintiff needed to show an independent cause of action before the courts could take proper jurisdiction over the action.[184] Judge Bork misconstrues the statute and creates an additional requirement which is not in the statutory language or the legislative history.

Judge Edwards, concurring in *Tel-Oren* and rejecting Judge Bork's additional requirement, asserted:

> The Second Circuit [in *Filartiga*] did not require plaintiffs to point to a specific right to sue . . . in order to establish jurisdiction under [the ATS]; rather, the Second Circuit required only a showing that the defendant's actions violated the substantive law of nations. . . . Judge Bork's suggestion that [the ATS] requires plaintiffs to allege a right to sue . . . is seriously flawed.[185]

The *Filartiga* court distinguished between two stages of proceedings —one where the court finds jurisdiction to hear the case and one where the court determines if a cause of action exists.[186] When the defendant argued that there was no cause of action, much as Marcos-Manotoc did and Judge Bork would have, the *Filartiga* court explained:

> In doing so, [the defendant] confuses the question of federal jurisdiction under the Alien Tort Statute, which requires consideration of the law of nations, with the issue of the choice of law to be applied, which will be addressed at a later stage in the proceedings. *The two issues are distinct.*[187]

The *Filartiga* court explains that, in order for the court to obtain jurisdiction to hear the case, it only needs to consider whether international law was violated, not whether international or any other law provides a cause of action. This analysis is supported by the language of the ATS, which only requires a violation of international law.[188] Judge Edwards adopts this well supported position and holds that a showing of an independent

184. *Tel-Oren*, 726 F.2d at 801 (Bork, J., concurring).
185. *Id.* at 777 (Edwards, J., concurring).
186. *Filartiga*, 630 F.2d at 889.
187. *Id.* (emphasis added).
188. Judge Edwards stated:
> The language of the statute is explicit on this issue: by its express terms, nothing more than a *violation* of the law of nations is required to invoke section 1350. Judge Bork nevertheless would propose to write into section 1350 an additional restriction that is not even suggested by the statutory language.

cause of action is not required for the plaintiff to invoke the ATS and for the courts to take jurisdiction over the case.[189]

The *Trajano* court, following the *Filartiga* court and Judge Edwards' reasoning, correctly resolved this issue. While conceding that some substantive federal law was constitutionally necessary for the court to take proper jurisdiction under the ATS,[190] the Ninth Circuit did not require that the substantive law be a cause of action. Rather, the court held that a simple claim of an international law violation sufficiently implicates substantive federal law. Since only individuals acting under official authority or under color of authority can violate international law,[191] and proceedings against such persons necessarily involve sovereign immunity, an area regulated by federal law,[192] a claim of international law violation always implicates substantive federal law. Consequently, an ATS claim is always sufficient to justify jurisdiction.

2. ATS Does Not Create a Cause of Action

Although a cause of action may be unnecessary for a court to exercise jurisdiction over an ATS case, one is necessary for the court to grant the plaintiff a remedy. Whether the ATS creates a cause of action is highly disputed, with respectable judges and commentators on both sides of the dispute.[193] After examination of this issue, the *Trajano* court correctly concluded that the ATS "is simply a jurisdictional statute and creates no cause of action itself."[194]

Both Judge Edwards[195] and the Amicus Curiae Memorandum, written

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Tel-Oren, 726 F.2d at 779 (Edwards, J., concurring) (emphasis added).

189. *Id.* at 777.

190. *Trajano*, 978 F.2d at 501 (citing Mesa v. California, 489 U.S. 121, 136-37 (1989)). *See supra* notes 165-69 and accompanying text.

191. *Trajano*, 978 F.2d at 501-02.

192. *Id. See supra* notes 168-76 and accompanying text.

193. Included among those asserting that the ATS does create a cause of action are the following: Judge Edwards of the D.C. Circuit, *Tel-Oren*, 726 F.2d at 777-82 (Edwards, J., concurring); The *Forti* court, 672 F. Supp. at 1539 ("There appears to be a growing consensus that section 1350 provides a cause of action . . ."); David Cole et al., Amicus Curiae Memorandum on Behalf of International Law Scholars and Practitioners in Support of Plaintiffs in *Trajano v. Marcos*, [hereinafter Amicus Memo], *reprinted in* David Cole et al., *Interpreting the Alien Tort Statute: Amicus Curiae Memorandum of International Law Scholars and Practitioners in* Trajano v. Marcos, 12 HASTINGS INT'L & COMP. L. REV. 1, 20-33 (1988); and Kenneth C. Randall, *Further Inquiries into the Alien Tort Statute and a Recommendation*, 18 N.Y.U. J. INT'L L. & POL. 473, 480 (1986) (Professor Randall, however, does not unconditionally claim that the ATS creates a cause of action. Rather, he states that "the Alien Tort Statute therefore suggests the existence of a cause of action—or permission to invoke the district court's power—where a plaintiff simply establishes that defendant *committed a municipal tort* and a *violation* of the law of nations or a treaty.") (first emphasis added).

In contrast, the following judges and commentators hold otherwise: Casto, *supra* note 11, at 479; Crockett, *supra* note 51, at 33-42; Judge Bork of the D.C. Circuit, *Tel-Oren*, 726 F.2d at 798; and, after *Trajano*, the Ninth Circuit.

194. *Trajano*, 978 F.2d at 503.

195. *Tel-Oren*, 726 F.2d at 775.

by international law scholars and practitioners for the *Trajano* case,[196] (Amicus Memo), advocated the theory that the ATS creates a cause of action. These arguments, however, are based on misinterpretations and unsupported assertions. In support of his position, Judge Edwards first pointed to the *Filartiga* decision.[197] As discussed above,[198] however, the *Filartiga* court did not hold that the ATS creates a cause of action. Judge Edwards also looked[199] to a 1907 opinion of U.S. Attorney General Bonaparte,[200] who stated that the ATS "provide[s] a right of action and a forum."[201] But this 1907 opinion does not provide any analysis nor does it cite any authority for its bold, but unsupported statement. As one commentator stated, "The 1907 Opinion is purely conclusory."[202]

Alternatively, the Amicus Memo looked to legislative history and determined that Congressional understanding was "that transitory torts were indeed actionable, and were directly actionable in federal court . . . ."[203] But Professor William Casto, by looking at the language of the statute, provides a different interpretation of Congressional intent:

> The statute is purely jurisdictional, and the first Congress undoubtedly understood this to be the case. The Alien Tort Claim Act . . . simply gave the district courts "cognizance" . . . . Eighteenth century lawyers understood this term of art as referring to a court's power to try a case. When the first Congress desired to create statutory civil actions, entirely different language was used.[204]

Professor Casto's language based argument effectively renders a claim that the ATS creates a private cause of action as "simply frivolous."[205]

3. Alternative Sources of Cause of Action

Since the ATS does not create a private cause of action, an independent source is necessary for the courts to provide the plaintiff a remedy. Courts and commentators have looked to two sources of law for the necessary cause of action: international law and local municipal law. The *Trajano* court rejected the first source and looked to the second.

a. International law as a source of a cause of action

In *Trajano,* the Ninth Circuit affirmed the district court's decision to find the necessary cause of action in municipal tort law and not the law of

196. Amicus Memo, *supra* note 193, at 20-33.
197. *Tel-Oren,* 726 F.2d at 780.
198. *See supra* notes 50-57 and accompanying text.
199. *Tel-Oren,* 726 F.2d at 780.
200. 26 Op. Att'y Gen. 250, 253 (1907).
201. *Id.* at 252.
202. Crockett, *supra* note 51, at 37. Professor Casto, agreeing with this position and summarily dismissing the Attorney General's opinion, states, "Notwithstanding a *carelessly* written attorney general's opinion, section 1350 *clearly does not create* a statutory cause of action. The statute is purely jurisdictional . . . ." Casto, *supra* note 11, at 478-79 (emphasis added) (footnotes omitted).
203. Amicus Memo, *supra* note 193, at 25.
204. Casto, *supra* note 11, at 479 (footnotes omitted).
205. *Id.* at 480.

nations or treaties of the United States.[206] This ruling is supported by traditional international law, which holds that states, not individuals, are the proper subjects of international law.[207] International law is concerned with "the rights and obligations of nation-states *inter se*, rather than with the rights of private individuals."[208] Accordingly, individuals do not have "legal personality" in international law and "as a general rule, international law does not provide a private right of action . . . ."[209]

This view is shared by several commentators who suggest, "There is serious doubt . . . whether international law, unassisted by domestic law, creates a tort remedy that may be invoked in domestic courts by private individuals."[210] The lack of a body of international law or precedent allowing for such an international private cause of action does not, in itself, prove that international law cannot create a cause of action. New situations, however, such as a suit for torture, would lead to judicial creation of purported "international law" by analogy to domestic law.[211] With the ATS, the newly created law would not be international law, but a rendition of American law: "Such a cause of action would be an international remedy in name only."[212] Similarly, treaties do not generally create a private cause of action unless there is specific language to that effect.[213] In general, international law is a very tenuous source from which to derive a cause of action.

b. Local law as a source of a cause of action—Rules of decision approach

In *Trajano*, the district court determined damages in accordance with Philippine law.[214] The *Trajano* court's action was preceded by the *Filartiga* court which assessed damages, in part, according to the laws of Paraguay. Although courts have not recognized their action for what it actually is, the utilized basis of recovery in these precedent cases exemplify the rules of decision approach to a cause of action.

Filartiga first hinted at this approach by distinguishing two phases in the proceedings: finding jurisdiction and deciding the rules of decision to be applied.[215] Under the rules of decision approach, finding a private cause of action is governed by a choice of law analysis, i.e., determining which laws will govern the substantive issues of the case and using those laws to determine the existence of a cause of action and appropriate rem-

206. *Trajano*, 978 F.2d at 503.
207. *See generally Tel-Oren*, 726 F.2d at 816-20 (Bork, J., concurring).
208. Crockett, *supra* note 51, at 41.
209. *Tel-Oren*, 726 F.2d at 817 (Bork, J., concurring).
210. Casto, *supra* note 11, at 475. Professor Crockett agrees: "It is doubtful, however, that customary international law would provide a private cause of action in Alien Tort Statute cases." Crockett, *supra* note 51, at 40.
211. Casto, *supra* note 11, at 476-77.
212. *Id.* at 477.
213. Crockett, *supra* note 51, at 41-42.
214. *Trajano*, 978 F.2d at 503.
215. *Filartiga*, 630 F.2d at 889.

edy.[216] Federal courts should use federal common law to determine which substantive law will apply to the different issues in the case. Whether the plaintiff has a cause of action and possible remedy will depend on the result of the choice of rule analysis. In cases like *Filartiga* and *Trajano,* the United States has little interest in having its own laws applied and all the relevant contacts are with the foreign state. Consequently, the proper law to determine the rights of the parties is the foreign local law. For special issues, such as punitive damages, the courts can again use federal common law to determine which law will determine whether punitive damages are appropriate. For example, the *Filartiga* court, on finding that Paraguayan law did not award punitive damages, held that such damages would still be appropriate under both U.S. and international arbitration decisions.[217]

B. The Scope of ATS Jurisdiction

The *Trajano* court held that if the three ATS elements are satisfied, federal courts have subject-matter jurisdiction over the case.[218] The court imposed no limits on the scope of the ATS but left open-ended, and potentially unlimited, the proper extent of ATS jurisdiction. The language of the ATS provides no clear solution to this problem. On the contrary, the "plain language of the Alien Tort Statute authorizes jurisdiction over 'any' alien's action for a tort in violation of international law, whoever the tortfeasor may be and wherever the tort may have occurred . . . ."[219]

Notwithstanding the apparent lack of constraints, ATS jurisdiction must be limited. To construe the ATS as "without limits would vest U.S. courts with a free-roving commission to intermeddle in foreign domestic activities throughout the world."[220] Even if such an extension of jurisdiction could be enforced,[221] this unlimited exercise of U.S. authority would violate both the Constitution[222] and internationally recognized principles of jurisdiction.[223] This section considers the proper scope and limitations of ATS jurisdiction.

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216. *See generally,* Crockett, *supra* note 51, at 46-50; Casto, *supra* note 11, at 473-88; Blum & Steinhardt, *supra* note 1, at 97-103.

217. *Filartiga,* 577 F. Supp. at 865.

218. *Trajano,* 978 F.2d at 499.

219. Amicus Memo, *supra* note 193, at 17.

220. Casto, *supra* note 11, at 472 n.33. Even the authors of the Amicus Memo, who advocate the broadest reading of the ATS concede that some limitation on ATS jurisdiction is necessary. "This does not mean, of course, that every tort somehow connected to an international law violation would proceed to judgment in a federal court. There are substantial procedural limitations on such suits . . . ." Amicus Memo, *supra* note 193, at 17 n.55.

221. Casto, *supra* note 11, at 472 n.33. "This arrogation of authority would be futile to the extent that the United States lacks power to enforce such judgments." Professor Casto continues, "Uncontrolled litigation could also impede the conduct of foreign relations, including the implementation of human rights." *Id.*

222. *See* discussion *infra* part III.B.2.c.

223. *See infra* notes 258-63 and accompanying text.

1. Proper Defendants of the ATS Actions

Determining who is liable for suit under the ATS is very controversial.[224] Private plaintiffs have invoked the ATS to bring suits against a variety of defendants,[225] but the precise boundaries of proper defendants under the ATS are still in dispute.

Amerada Hess held that the ATS cannot serve as the sole basis of jurisdiction over a foreign sovereign.[226] The next analytical step asks to what extent and in what circumstances are private individuals subject to suit under the ATS.

a. Individuals acting under color of law

In *Trajano*, the Ninth Circuit reaffirmed *Filartiga* by holding that a private individual acting under the color of law is subject to jurisdiction under the ATS.[227] But this simple answer does not consider an inherent problem—that most individuals acting under the color of law are also considered a "foreign state" for the purposes of the FSIA[228] and, consequently, are generally immune from suit. Since FSIA immunity must be determined before the question of proper ATS jurisdiction, if an individual acting under color of law is immune under the FSIA, the question of proper jurisdiction under the ATS will never even arise. Since the FSIA would exclude most potential defendants before ATS jurisdiction is even considered, to simply state that persons acting under the color of law are proper defendants under the ATS would leave the ATS applicable to practically no defendants at all and render the ATS obsolete. The Ninth Circuit's *Trajano* decision suggests a solution to this FSIA hurdle.

In finding that Marcos-Manotoc was not a "foreign state" under the FSIA but was sufficiently associated with the government to have violated

224. Many commentators and judges have considered this very question. Randall, *supra* note 193, at 495; Janney, *supra* note 24, at 368; *Tel-Oren*, 726 F.2d at 791-95 (Edwards, J., concurring); Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428 (1989).

225. *Amerada Hess*, 488 U.S. 428 (suit brought against a foreign sovereign); *Tel-Oren*, 726 F.2d 774 (suit brought against the Arabian government and the P.L.O., a private organization); Nguyen Da Yen v. Kissinger, 528 F.2d 1194 (9th Cir. 1975) (suit brought against the Immigration and Naturalization Service and private corporations incorporated in America); Lopez v. Reederei Richard Schroeder, 225 F. Supp. 292 (E.D. Pa. 1963) and *Adra*, 195 F. Supp. 857 (suits brought against private individuals).

226. *See supra* part I.A. Also, Randall, *supra* note 193, at 507-11 ("The Alien Tort Statute does not provide an exception to the law of sovereign immunity." "[T]he Alien Tort Statute . . . provides at most a concurrent basis of jurisdiction.").

227. *Trajano*, 978 F.2d at 498.

228. Many courts have included an official acting within his official capacity within the definition of "foreign state." Chuidian v. Philippine National Bank 912 F.2d 1095, 1099-1103 (9th Cir. 1990); Week v. Cayman Islands, No. 91-2965, 1992 WL 372241, at 3 (7th Cir. Dec. 16, 1992) (unpublished disposition) ("The individual defendants in this action are sued in their official capacities. As instrumentalities of the foreign sovereign they are the same as the sovereign for purposes of immunity."); Fickling v. Commonwealth of Australia, 775 F. Supp. 66 (E.D.N.Y. 1991) ("Plaintiffs . . . bring the above-referenced action against defendants . . . Tony Lyons, in his official capacity . . . . Lyons is an "agency or instrumentality" of Australia under the [FSIA]."); Rios v. Marshall, 530 F. Supp. 351 (S.D.N.Y. 1981).

the prohibition against official torture, the Ninth Circuit drew a fine line between the FSIA and the ATS. To reach this conclusion, the court looked to an earlier decision, *Chuidian v. Philippine National Bank*,[229] which held that the FSIA does not immunize government officials for acts not committed in an official capacity or for acts beyond the scope of the official's authority.[230] By creating a new and non-enumerated "exception" to sovereign immunity, *Chuidian* provided the key to extending ATS jurisdiction to government officials.

To overcome sovereign immunity, a plaintiff need only show that the official's action, although purportedly taken in performance of her duties, was actually beyond the scope of her power. If the act is torture, an act which no government will publicly condone, the plaintiff's burden is minimal.[231] With this court-created exception, the Ninth Circuit has construed the FSIA to allow room for the ATS to take jurisdiction over government officials. This construction allows a plaintiff to bring suit against an official who committed a tort in violation of international law and who, otherwise, would be immune from suit.

b. Private individuals

Although *Trajano* did not directly address whether private individuals could be proper defendants in ATS cases, the inquiry is relevant since it may be the next issue for the courts to resolve. Including individuals as defendants in ATS actions is problematic since, traditionally, individuals cannot violate international law[232] as required by the ATS. If individuals cannot violate international law, they can never be subject to ATS jurisdiction.

Professor Kenneth Randall suggests that in "certain circumstances, however, 'actions based on international law violations may also be brought against individuals who in one capacity or another had committed acts prohibited by international law.'"[233] Such circumstances include cases where Congress provides for criminal or civil statutory liability and cases of genocide, which are always enforceable against private or official entities.[234] Professor Randall proposes that, despite traditional ideas of international law, individuals sometimes have obligations and duties under international law and should be liable for violations of international norms. Whether a private individual has responsibilities under an international norm is dependent on whether the norm is "intended to provide a

229. Chuidian v. Philippine National Bank, 912 F.2d 1095 (9th Cir. 1990).

230. *Id.* at 1106.

231. *See* Blum & Steinhardt, *supra* note 1, at 106 ("[I]ndividual defendants in cases like *Filartiga*, where states may have an interest in denying that the actors were acting as agents of their government, would almost certainly not be covered by the FSIA.").

232. Randall, *supra* note 193, at 497 ("[I]ndividuals and other non-state actors purportedly do not have rights under international law neither do they have duties; hence, they cannot violate international law.").

233. *Id.* at 497 (citing O. SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 238-39 (1985)).

234. *Id.* at 497-99.

basis for claims against individual actors."[235] Hence, individuals should be held liable for a violation of the prohibition against genocide, a norm which contemplates "holding individuals responsible when acting in either a private *or* an official capacity."[236]

Although Professor Randall distinguishes private individuals from private corporations and non-state organizations, such as the P.L.O.,[237] this author would generalize this approach and apply it to every category of potential defendants, from private individuals to sovereign states. Predicating an entity's ability to violate an international norm upon the definition of that norm, is a clear and universally applicable approach. For example, only states could violate an international norm prohibiting war, but both states and individuals acting under color of law could violate a norm prohibiting official torture. Assuming arguendo that terrorism was generally accepted as contrary to international law, then non-state organizations such as the P.L.O. could violate the norm. Individuals could also violate such international norms as an offense against ambassadors[238] or falsifying a passport.[239] Using this approach, the courts would have a clear and easily applicable rule to determine whether an ATS defendant could conceivably violate the alleged international law and whether ATS jurisdiction is proper in that situation.

2. *Jurisdiction over Extraterritorial Activities*

Another important ATS controversy is its jurisdiction over extraterritorial activities. This problem has increased since the most recent ATS cases, including *Trajano*, have involved almost no nexus with the United States. The majority of the suits have been between two aliens[240] for activities occurring outside of U.S. borders.[241]

a. Classical international principles counseling against extension of ATS jurisdiction over extraterritorial torts

Several principles of classical international law dictate that U.S. courts should abstain from hearing ATS cases with minimal nexus to the United States. One of the oldest and well established principles of international law is a state's inviolable right to territorial sovereignty, which provides that all events occurring within the territory of a state are a matter of domestic jurisdiction and the sole concern of that state, and no other state

235. *Id.* at 499.
236. *Id.*
237. *Id.* at 497-507.
238. One example is the "Marbois incident" which, with several other concerns, originally inspired the ATS. *See* Randall, *supra* note 4, at 24-26.
239. *See* Adra v. Clift, 195 F. Supp. 857 (D. Md. 1961).
240. Casto, *supra* note 11, at 511 n.244 and accompanying text.
241. *See* Randall, *supra* note 4, at 59 n.289 and accompanying text. Extraterritorial application of the ATS is especially problematic in light of the extreme likeliness that the drafters of the statute did not intend or contemplate its invocation for extraterritorial events, except in a limited number of situations. *Id.* at 60-62.

shall have an interest or a right to interfere.[242] Under strict compliance with territorial sovereignty, U.S. courts should not be allowed to adjudicate events that took place within the territory of another state between nationals of that state.

The international community, however, has not adhered strictly to the principle of territorial sovereignty. The recognition of human rights, developed since World War II, has provided states with a legitimate reason to intervene in matters occurring wholly within a foreign state's territory.[243] The deterioration of strict territorial sovereignty[244] may provide U.S. courts with authority to adjudicate extraterritorial torts that rise to the level of violations of fundamental human rights.[245]

Comity is a second international principle that advises against adjudication of extraterritorial torts. Under comity principles, one state may comply with or defer to the laws of another state out of courtesy and good will.[246] Comity may also require that forum courts refrain from adjudicating matters occurring in foreign states, thus allowing that state's justice system to resolve these situations.[247]

International comity, however, should not apply to ATS cases for three reasons. First, comity has never required that forum courts completely refrain from adjudicating cases with no direct contact with the forum state.[248] Second, comity is generally applied to criminal cases and not civil cases.[249] Third, the general rule of comity has deteriorated in light of the increasing persuasive influence of human rights norms.[250] For these reasons, comity does not oppose the U.S. courts' exercise of ATS jurisdiction.

b. Principles justifying extraterritorial exercise of ATS jurisdiction

Several principles justify exercising jurisdiction over extraterritorial events. One of the oldest and well established of these principles is the common law doctrine of transitory torts. The *Trajano* court, as did the *Filartiga* court, looked to the transitory tort doctrine to obtain jurisdiction over an extraterritorial event.[251]

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242. *See* U.N. CHARTER art. 2, ¶ 7 (guarantees its members territorial sovereignty stating, "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state . . . .").

243. Blum & Steinhardt, *supra* note 1, at 77.

244. Commentators have asserted that the international community adheres to territorial sovereignty only to the extent that there is a general consensus. The community's conception of matters within domestic jurisdiction may change with time. *Id.* ("The issue of domestic versus international concern depends ultimately on how the international community chooses to define the matter.")

245. *Filartiga*, 630 F.2d at 884-85.

246. BLACK'S LAW DICTIONARY 267 (6th ed. 1990).

247. Blum & Steinhardt, *supra* note 1, at 83-84.

248. *Id.* at 84.

249. *Id.*

250. *Id.*

251. *Trajano*, 978 F.2d at 503; *Filartiga*, 630 F.2d at 885.

The transitory tort doctrine provides that "the tortfeasor's wrongful acts create an obligation which follows him across national boundaries."[252] The plaintiff may bring suit for the tort wherever he may find the tortfeasor[253] as long as the suit is not strongly contrary to the public policy of the forum state.[254] U.S. federal courts, invoking the transitory tort doctrine, may properly take jurisdiction of extraterritorial torts as long as Congress confers original jurisdiction. Since the ATS confers such jurisdiction, federal courts may properly take jurisdiction over wrongful death suits or other transitory torts.

Providing the federal courts as an alternative forum for aliens to bring suit[255] effectuates the purposes of the ATS, i.e., to promote unbiased judgments[256] and avoid friction in international relations.[257] The transitory torts doctrine not only justifies ATS jurisdiction, but almost necessitates it to ensure that federal courts, not state courts, hear cases that could affect U.S. foreign relations.

In addition to the transitory tort doctrine, internationally accepted bases of jurisdiction to prescribe laws[258] may authorize jurisdiction to adjudicate extraterritorial activities.[259] Of the five[260] bases of jurisdiction

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252. Blum & Steinhardt, *supra* note 1, at 63.

253. Amicus Memo, *supra* note 193, at 14.

254. Blum & Steinhardt, *supra* note 1, at 63.

255. *Tel-Oren*, 726 F.2d at 782 ("There is evidence . . . that the intent of this section was to assure aliens access to federal courts to vindicate any incident which, if mishandled by a state court, might blossom into an international crisis.").

256. Burley, *supra* note 14, at 465 ("The Federalists thought this danger [of the denial of justice to an alien party] to be particularly great in state courts."); *Tel-Oren*, 726 F.2d at 782 (The ATS was a result of "[c]oncern that state courts might deny justice to aliens . . . .").

257. *Tel-Oren*, 726 F.2d at 782; Casto, *supra* note 11, at 489-98; Burley, *supra* note 14, at 465 (The ATS is a result of "the Framer's desire to avoid embroiling the nation in conflicts with foreign states arising from U.S. mistreatment of foreign citizens.").

258. International law has developed five bases which give a state jurisdiction to prescribe. For a summary of the five, see J.G. STARKE, INTRODUCTION TO INTERNATIONAL LAW 202-35, (10th ed. 1989). These principles authorize a state to create and possibly enforce laws regulating certain situations, persons, or activities. They provide mechanisms by which power is distributed among the members of the international community. Although not every state recognizes the validity of all five principles, the U.S. accepts all of them and has a history of practicing them to its extremes. *E.g.*, The Sherman Act, 15 U.S.C. §§ 1, 2 (1988) (declaring illegal and imposing criminal liability for contracts that restrains "trade or commerce among the several States, or with foreign nations" without limitation on where the contract is executed); Compagnie Européenne des Petroles S.A. v. Sensor Nederland B.V., 22 I.L.M. 66 (1983) (the District Court in the Hague Judgment, in the Netherlands, invalidating the United States' attempt to regulate international trade of technology based on origin or "nationality" of the technology).

259. If a state has a proper basis of jurisdiction to prescribe laws, it may have jurisdiction to adjudicate or enforce its laws if the enforcement measures are reasonably related to the laws and the punishment is reasonably proportional to the act. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 431 (1987). Most commentators recognize two categories of jurisdiction: jurisdiction to prescribe and jurisdiction to enforce. In contrast, the Third Restatement of Foreign Relations recognize three categories, the two above and a third, jurisdiction to adjudicate. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 401

to prescribe, the protective and universal principles may justify ATS jurisdiction.

In accordance with the protective principle, a state has jurisdiction to prescribe law regarding conduct against state security or against other limited and vital state interests, including the integrity of government functions and the state's vital economic interests.[261] The protective principle justifies extension of ATS jurisdiction because its invocation always implicates U.S. foreign relations.[262] The United States' authority to exercise power under the protective principle must include "the nation's ability to make and implement foreign policy in an effective manner."[263]

The *Filartiga* court relied on the principle of universal jurisdiction to prescribe in stating that "the torturer has become—like the pirate and slave trader before him—*hostis humani generis,* an enemy of all mankind."[264] Universal jurisdiction allows a state to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern. Such offenses are considered contrary to the interests of the international community—"a heinous threat to the common safety."[265] As a matter of customary law, any and all states may claim jurisdiction over such acts, regardless of where or by whom the act was committed. This doctrine was formerly applied principally to piracy,[266] but could also apply to other offenses such as slave trade[267] and genocide.[268]

(1987). Under the two category system, the jurisdiction to adjudicate would be included in jurisdiction to enforce. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES Part IV Introductory Note (1987).

260. The five bases of jurisdiction are: 1) territorial jurisdiction, which gives a state authority to prescribe laws over acts within its own territory (this includes the effects doctrine, which states that any act that has any effect in the forum state has jurisdiction to prescribe laws over such activities); 2) nationality principle, which allows jurisdiction over actions of a state's citizens; 3) protective principle, which allows states to exercise jurisdiction over crimes against its security, integrity of governmental function, or its vital economic interests; 4) passive personality principle, which allows states jurisdiction over actions where its victims are nationals of that state; 5) universal jurisdiction, which allows any state to prescribe punishment for certain specific crimes which are recognized by the community of nations as of universal concern and contrary to the interest of the international community as a whole. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402, 404 (1987).

261. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(3) (1987). For more detail about protective jurisdiction, see generally George D. Brown, *Beyond Pennhurst— Protective Jurisdiction, the Eleventh Amendment, and the Power of Congress to Enlarge Federal Jurisdiction in Response to the Burger Court,* 71 VA. L. REV. 343 (1985).

262. Casto, *supra* note 11, at 513.

263. *Id.*

264. *Filartiga,* 630 F.2d at 890.

265. Blum & Steinhardt, *supra* note 1, at 60.

266. *Id.* (citing United States v. Klintock, 18 U.S. (5 Wheat.) 144 (1820); United States v. Pirates, 18 U.S. (5 Wheat.) 184 (1820)).

267. La Jeune Eugenie, 26 F. Cas. 832 (D. Mass. 1821) (No. 13,819).

268. The Nuremberg trials. *See* Judgment of the International Military Tribunal, 22 *Trial of the Major War Criminals Before the International Military Tribunal, Proceedings* 411, (1948), *reprinted in* 41 AM. J. INT'L L. 172 (1947).

Under universal jurisdiction, U.S. courts may take jurisdiction over instances of official torture if it is generally recognized as a violation of international law significant enough to threaten the interests "of civilization everywhere."[269] The *Filartiga* court suggested that official torture cases were of such significance that U.S. courts could take jurisdiction under the ATS through the universal jurisdiction principle.[270] In *Tel-Oren*, Judge Edwards also suggested the potential use of universal jurisdiction to support jurisdiction.[271] By adopting this suggestion,[272] the *Trajano* court supported their holding that the ATS, as a manifestation of the doctrine of *hostis humani generis*, properly confers jurisdiction over extraterritorial acts of official torture.

c. Possible constitutional limitations—Due Process Nexus

Although the doctrine of transitory torts and the protective and universal principles justify ATS jurisdiction, the ability of these principles to extend ATS jurisdiction over extraterritorial torts is limited by the Constitution. Although the transitory tort doctrine allows the plaintiff to bring suit in any country where the defendant is found, a suit brought in the United States must meet the reasonableness requirement afforded by the right to Due Process under the Constitution.[273] The Supreme Court has held that, in order for a court to obtain jurisdiction over a defendant in accordance with Due Process, the defendant must "have certain minimum contacts with [the territory of the forum] such that the maintenance of the suit not offend 'traditional notions of fair play and substantial justice.'"[274]

A defendant being sued for a transitory tort in the United States must, at a minimum, have some contact more than mere physical presence in the state to make the jurisdiction over him reasonable. To satisfy traditional notions of fair play,

> [at least one] of the following minimum contacts [must] exist: defendant is a citizen or resident of the United States; defendant is an alien present, not just transitorily, in the United States; defendant, if a corporation, is a U.S. corporation or foreign corporation with "continuous and systematic" contacts in this country; defendant committed an extraterritorial tort which had a direct or foreseeable effect in the United States; and (perhaps) defendant has property in the United States.[275]

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269. Blum & Steinhardt, *supra* note 1, at 60-61. ("The common denominator of *hostis humani generis* seems to have been the magnitude of the threat posed by the acts, coupled with the universality of condemnation of the acts.").

270. *Filartiga*, 630 F.2d at 890.

271. *Tel-Oren*, 726 F.2d at 788 (Edwards, J., concurring).

272. *Trajano*, 978 F.2d at 500.

273. Randall, *supra* note 4, at 69.

274. International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940) (citations omitted)).

275. Randall, *supra* note 4, at 65 (footnotes omitted). Professor Randall continues, "The specific types of minimum contacts listed are generally based on . . . case law." *Id.* n.316. The prominent cases in this area includes Calder v. Jones, 465 U.S. 783 (1984); Keeton v. Hustler Magazine, Inc., 465 U.S. 770 (1984); World-Wide Volkswagen Corp. v.

The requirement that one of these minimum contacts must exist limits the doctrine of transitory torts' ability to authorize ATS jurisdiction over extraterritorial torts.

The facts of the *Trajano* case satisfied the Due Process reasonableness requirement. The defendants in this case had come to the United States with the intention to remain in the States permanently. As permanent residents of the United States, the defendants had sufficient contacts with the forum state to establish the reasonableness of suit for Due Process purposes.[276]

Conclusion

The Ninth Circuit in *Trajano* has ruled on and provided answers to many of the controversies surrounding the ATS. It ruled that the ATS does not create a cause of action but is purely a jurisdictional statute.[277] This conforms with the Second Circuit's construction in *Filartiga* and is supported by the language and the historical context of the statute.[278] Also consistent with *Filartiga*, the Ninth Circuit affirmed the district court's finding of an independent cause of action in the local laws of the states involved.[279] This approach, though not expressly acknowledged by the courts, correlates to the rules of decision approach advocated by several commentators.[280] This rules of decision approach avoids the problems of trying to create a cause of action from international law, a body of law that traditionally does not provide a cause of action,[281] and provides a simple and intuitive approach to torts falling under the ATS.

The Ninth Circuit also considered the scope of the ATS. The court's reliance on *Chuidian* to explicate ATS liability for those acting under the color of law clarifies the problem initiated by *Amerada Hess* of defining proper ATS defendants. Determining liability from the nature of the violation also provides a workable approach to define the liability of private individuals not associated with a state government.[282] The Ninth Circuit also considered the applicability of the ATS to extraterritorial torts and held that jurisdiction is proper if the three ATS elements are satisfied.[283] Although the court did not consider limits to the ATS's applicability to extraterritorial torts, some limitations are necessary. As Judge Bork and

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Woodson, 444 U.S. 286 (1980); Shaffer v. Heitner, 433 U.S. 186 (1977); and International Shoe Co. v. Washington, 326 U.S. 310 (1945).

276. *See* Randall, *supra* note 4, at 66-67 (applying Due Process reasonableness to *Filartiga* and *Tel-Oren* determining that minimum contacts requirement were satisfied).

277. *Id.* at 503.

278. *See supra* notes 50-57, 193-205 and accompanying text.

279. *Trajano*, 978 F.2d at 503.

280. *See generally* Crockett, *supra* note 51, at 46-50; Casto, *supra* note 11, at 473-88; Blum & Steinhardt, *supra* note 1, at 97-103.

281. *Tel-Oren*, 726 F.2d at 820 (Bork, J., concurring).

282. *See supra* notes 239-41 and accompanying text.

283. *Trajano*, 978 F.2d at 499.

Judge Robb noted in their *Tel-Oren* concurrences,[284] principles of separation of powers and political sensitivity of the controversies should be considered when the judiciary hears and rules on them. If considered in light of such limiting principles,[285] the courts should be able to strike a functional balance in ATS cases, a balance which allows the courts to work justice by compensating victims who are injured and deserve appropriate remedy while avoiding infringement upon the powers of the political branches and upon the sovereignty of foreign states.

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284. *See generally Tel-Oren*, 726 F.2d at 798-823 (Bork, J., concurring); *Id.* at 823-27 (Robb, J., concurring).

285. These limiting principles include constitutional limitations on jurisdiction, *see supra* part III.B.2.c.; traditional concepts in international law, *see supra* part III.B.2.a.; and the Act of State doctrine, *see* Blum & Steinhardt, *supra* note 1, at 107-12.